REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

MARCH, 1912, to OCTOBER, 1912.

H. A. LIBBY
REPORTER

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FOR THE STATE OF NORTH DAKOTA.

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HON. CHARLES J. FISK, Judge.
HON. EDWARD T. BURKE, Judge.
HON. EVAN B. GOSS, Judge.
HON. ANDREW A. BRUCE, Judge.

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

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CONSTITUTION OF NORTH DAKOTA.

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

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

COUNTY COURTS.

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

Constitutional Provisions.

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

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

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

Statutory Provisions.

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

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

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

CASES REPORTED IN THIS VOLUME.

A

PAGE

Albrecht v. Zimmerly 337
American Surety Co., Long v. 492
Amundson, State ex rel. v. 238
Aultman & Taylor Mach. Co. v. Runck 579

B

Bancroft, State v. 442
Bartron, Johnson v. 629
Beddow, Heiszler v. 34
Bismarck, Bismarck Water Supply Co. v. 352
Bismarck Water Supply Co. v. Bismarck 352
Blessett v. Turcotte 417
Blew, Tharp v. 3
Board of Comrs., Pederson v. 547
Burcell v. Goldstein 257
Burleigh County v. Rhud 362

C

Cass County, Edwards v. 555
Citizens' Ins. Co., Stotlar v. 352
Coghlan, Johannes v. 588
Corbett v. Great Northern R. Co. .. 1
Courant Co., Smith v. 297

D

Dallier, Nichols & Shepard Co. v... 532
Davies, State ex rel. Atty. Gen. v... 334
Dawson, Howard v. 165
Dodson, State v. 305

E

Edwards v. Cass County 555
Elliott, Hackney v. 373
Ely, State ex rel. v. 619
Enderlin, Gaustad v. 526

F

PAGE

Fargo-Moorhead Street R. Co., Lathrop v. 246
Farley v. Lawton School Dist. No. 41 565
Farmers & M. State Bank, Ugland v. 536
Fawcett v. Ryder 20
Ferguson, State ex rel. v. 153
Finlayson, State ex rel. v. 181
First Nat. Bank v. German American Ins. Co. 130
First Nat. Bank v. Mahoney 177
First State Bank v. Krenelka 568
Flaherty, State ex rel. v. 313
Forum Printing Co., Goolsby v. .. 30

G

Gaustad v. Enderlin 526
Geiszler, Nitschka v. 412
German Alliance Ins. Co., Stotlar v. 346
German American Ins. Co. v. First Nat. Bank v. 130
Goetz v. Merchants' Bank 643
Goldstein, Burcell v. 257
Goolsby v. Forum Printing Co. ... 30
Great Northern R. Co., Corbett v. .. 1
Great Northern R. Co., Schumacher v. 231
Great Northern R. Co., Whalen v. 607
Greuneich v. Greuneich 368
Grover v. Muralt 576
Grow v. Taylor 469

H

Hackney v. Elliott 373
Haigh, Stockwell v. 54
Haney, North Dakota Lumber Co. v. 504
Hanson v. Hanson Hardware Co. .. 169
Hanson, Murdoch v. 280
Hanson Hardware Co., Hanson v. .. 169

PAGE

Harmon, State ex rel. v. 513
Harris v. Jones 488
Hartzell, Riebold v. 264
Heiszler v. Beddow 34
Hoff, Smith v. 37
Hoge, Olesen v. 648
Howard v. Dawson 165

J

Johannes v. Coghlan 588
John Leslie Paper Co. v. Wheeler .. 477
Johnson v. Bartron 629
Johns, Schafer v. 593
Jones, Harris v. 488
Jones, Wright v. 191

K

Knight, Landis v. 450
Kolb, Ugland v. 158
Krenelka, First State Bank v. 568

L

Landis v. Knight 450
Lathrop v. Fargo-Moorhead Street R. Co. 246
Lawton School Dist. No. 41, Farley v. 565
Lidgerwood Rural Teleph. Co., Ruehl v. 6
Long v. American Surety Co. 492

M

McIntosh, Noble v. 59
Mahoney, First Nat. Bank v. 177
Mann v. Redmon 508
Merchants' Bank, Goetz v. 643
Minneapolis, St. P. & S. Ste. M. R. Co., Reinke v. 182
Minot Flour Mill Co. v. Swords ... 571
Movius v. Propper 452
Muffle, Satham v. 63
Muralt, Grover v. 576
Murdock v. Hanson 280

N

Nichols & Shepard Co. v. Dallier .. 532
Nitschka v. Geiszler 412
Niven v. Peoples 202
Noble v. McIntosh 59
Noble, Tee v. 225
North Dakota Lumber Co. v. Haney 504

O

Olesen v. Hoge 648

P

PAGE

Paulson v. Ward County 601
Pederson v. Board of Comrs. 547
Peoples, Niven v. 202
Propper, Movius v. 452

R

Redmon, Mann v. 508
Reinke v. Minneapolis, St. P. & S. Ste. M. R. Co. 182
Rhud, Burleigh County v. 362
Rhud, Slattery v. 274
Riebold v. Hartzell 264
Robbins, Wipperman Mercantile Co. v. 208
Ruehl v. Lidgerwood Rural Teleph. Co. 6
Runck, Aultman & Taylor Mach. Co. v. 579
Ryan, Union Nat. Bank v. 482
Ryder, Fawcett v. 20

S

Satham v. Muffle 63
Schafer v. Johns 593
Schumacher v. Great Northern R. Co. 231
Slattery v. Rhud 274
Smith v. Courant Co. 297
Smith v. Hoff 37
Sorrenson, Summerville v. 460
State v. Bancroft 442
State v. Dodson 305
State v. Stockwell 70
State v. Tolley 284
State ex rel. v. Amundson 238
State ex rel. v. Davies 334
State ex rel. v. Ely 619
State ex rel. v. Ferguson 153
State ex rel. v. Finlayson 181
State ex rel. v. Flaherty 313
State ex rel. v. Harmon 513
Stockwell v. Haigh 54
Stockwell, State v. 70
Stotlar v. Citizens' Ins. Co. 352
Stotlar v. German Alliance Ins. Co. 346
Summerville v. Sorrenson 460
Swords, Minot Flour Mill Co. v. .. 571

T

Taylor, Grow v. 469
Tee v. Noble 225
Tharp v. Blew 3
Tolley, State v. 284
Turcotte, Blessett v. 417

U

PAGE

Ugland v. Farmers & M. State Bank 536
Ugland v. Kolb 158
Union Nat. Bank v. Ryan 482

V

Vance, Wannemacher v. 634

W

Wannemacher v. Vance 634
Ward County, Paulson v. 601
Whalen v. Great Northern R. Co. 607
Wheeler, John Leslie Paper Co. v. 477
Wipperman Mercantile Co. v. Robbins 208
Wright v. Jones 191

Z

Zimmerly, Albrecht v. 337

DAKOTA CASES CITED IN OPINIONS.

		PAGE
Beach v. Beach	6 Dak. 371	271

TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

A

		PAGE
Acton v. Fargo & M. Street R. Co.	20 N. D. 434	254
Adams & F. Co. v. Kenoyer	17 N. D. 302	487
Ætna Indemnity Co. v. Schroeder	12 N. D. 110	146
Alstad v. Sim	15 N. D. 629	381, 389, 394, 403 406, 559, 561
Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co.	18 N. D. 462	189
Anderson Mercantile Co. v. Anderson	22 N. D. 441	646

B

Bazal v. St. Stanislaus Church	21 N. D. 602	593
Beggs v. Paine	9 N. D. 538	411
Beggs v. Paine	15 N. D. 436	195, 396, 407, 408
Bessie v. Northern P. R. Co.	18 N. D. 507	3
Betts v. Signor	7 N. D. 399	195
Bismarck Grocery Co. v. Yeager	21 N. D. 547	571
Blessett v. Turcotte	20 N. D. 151	420, 433
Burleigh County v. Kidder County	20 N. D. 27	242

C

Cline v. Duffy	20 N. D. 525	593
Coleman v. Fargo	8 N. D. 69	529
Coler v. Dwight School Twp.	3 N. D. 249	157, 567
Corbett v. Great Northern R. Co.	19 N. D. 450	185, 187
Cughan v. Larson	13 N. D. 373	175, 176

D

Dever v. Cornwell	10 N. D. 123	408
Douglas v. Fargo	13 N. D. 467	395, 403, 404

E

Eaton v. Bennett	10 N. D. 346	395, 403, 404
Elvick v. Groves	17 N. D. 561	626, 627, 629
Erickson v. Cass County	11 N. D. 494	402, 559, 561, 562 564

F

Fargusson v. Talcott	7 N. D. 183	176
Farrington v. New England Invest. Co.	1 N. D. 102	403
Fenton v. Minnesota Title Ins. & T. Co.	15 N. D. 365	404, 405, 411
Fergusson v. Talcott	7 N. D. 190	164
Finlayson v. Peterson	11 N. D. 45	427, 432
Fitzmaurice v. Willis	20 N. D. 372	331, 520
F. Mayer Boot & Shoe Co. v. Ferguson	19 N. D. 496	263

G

		PAGE
Gjerstadengen v. Hartzell	9 N. D. 268	459

H

Hackney v. Elliott	— N. D. —	559
Hagler v. Kelly	14 N. D. 218	457
Hodgins v. Minneapolis, St. P. & S. Ste. M. R. Co.	3 N. D. 382	187
Hosmer v. Sheldon School Dist.	4 N. D. 197	599
Houghton Implement Co. v. Vavrosky	15 N. D. 308	501
Howser v. Pepper	8 N. D. 484	519

I

Iowa & D. Land Co. v. Barnes County	6 N. D. 601	195

J

Jasper v. Hazen	4 N. D. 1	43
J. B. Streeter, Jr. Co. v. Frederickson	11 N. D. 300	195
Jewett Bros. v. Huffman	14 N. D. 110	263, 264
Johnson v. Fargo	15 N. D. 525	529
Johnson v. Grand Forks County	.. N. D. ...	328
Johnson v. Grand Forks County	16 N. D. 363	327, 328
Johnson v. Soliday	19 N. D. 463	507

K

Kerr v. Anderson	16 N. D. 36	501
Klemmens v. First Nat. Bank	22 N. D. 304	482
Knudtson v. Robinson	18 N. D. 13	162

L

Lee v. Crawford	10 N. D. 482	408
Leisen v. St. Paul F. & M. Ins. Co.	20 N. D. 316	145, 147, 350
Lorin v. Seitz	8 N. D. 404	519
Lowe v. Jensen	22 N. D. 148	5
Luick v. Arends	21 N. D. 614	26, 372

M

McCormack Harvesting Mach. Co. v. Rae	9 N. D. 482	504
McCue v. Blaisdell	18 N. D. 31	321
McCue v. Blaisdell	18 N. D. 55	322
McDonald v. Holmes	16 N. D. 457	514
McTavish v. Great Northern R. Co.	8 N. D. 333	457
Mahon v. Fansett	17 N. D. 104	262
Martin v. Tyler	4 N. D. 278	382
May v. Cummings	21 N. D. 281	507
Meehan v. Great Northern R. Co.	13 N. D. 432	501
Merchants' Nat. Bank v. Braithwaite	7 N. D. 358	367, 486, 653
Miller v. Schallern	8 N. D. 395	329, 519
Morrison v. Lee	13 N. D. 591	257

N

Nash v. Northwest Land Co.	15 N. D. 566	425–427, 431
Nind v. Myers	15 N. D. 400	195, 408
Noble v. McIntosh	23 N. D. 59	228, 405

O

		PAGE
O'Neil v. Tyler	3 N. D. 47	404
Osborne v. Lindstrom	9 N. D. 1	367, 487

P

Perry v. Hackney	11 N. D. 148	329
Power v. Bowdle	3 N. D. 107	195, 396
Power v. Kitching	10 N. D. 254	195
Power v. Larabee	2 N. D. 141	404
Powers v. First Nat. Bank	15 N. D. 466	61, 63, 228, 229 404, 405
Powers Dry Goods Co. v. Nelson	10 N. D. 580	263, 480
Pyke v. Jamestown	15 N. D. 157	529

R

Racine-Sattley Mfg. Co. v. Pavlicek	21 N. D. 222	273, 593
Raymond v. Edelbrock	15 N. D. 231	18
Redmon v. Chacey	7 N. D. 231	383
Richmire v. Andrews & G. Elevator Co.	11 N. D. 453	501
Russell v. Meyer	7 N. D. 335	257

S

Salzer Lumber Co. v. Claflin	16 N. D. 601	507
Sim v. Rosholt	16 N. D. 77	559
Smith v. Jensen	16 N. D. 408	43
Soliah v. Cormack	17 N. D. 393	397
Stanford v. McGill	6 N. D. 536	504
State v. Empting	21 N. D. 128	181
State v. Hakon	21 N. D. 133	291
State v. Hazlett	14 N. D. 491	291
State v. Kerr	3 N. D. 523	290
State v. Malmberg	14 N. D. 523	291
State v. Reilly	22 N. D. 353	310
State v. Rhoades	17 N. D. 580	445
State v. Winchester	18 N. D. 534	58
State v. Wisnewski	13 N. D. 649	312
State ex rel. Montgomery v. Anderson	18 N. D. 149	316
State ex rel. Hagendorf v. Blaisdell	20 N. D. 622	316
State ex rel. McCue v. Blaisdell	18 N. D. 55	316, 317
State ex rel. Erickson v. Burr	16 N. D. 581	336
State ex rel. Tompton v. Denoyer	6 N. D. 586	329
State ex rel. Dorgan v. Fisk	15 N. D. 219	559, 564
State ex rel. Moore v. Furstenau	20 N. D. 540	410
State ex rel. Laird v. Gang	10 N. D. 331	156, 157, 567
State ex rel. Sunderall v. McKenzie	10 N. D. 132	551
State ex rel. Shaw v. Thompson	21 N. D. 426	317
State ex rel. Davis v. Willis	19 N. D. 209	625
State Finance Co. v. Beck	15 N. D. 374	195, 229, 404, 410 411
State Finance Co. v. Mather	15 N. D. 386	395, 404
State Finance Co. v. Mulberger	16 N. D. 214	195
State Finance Co. v. Trimble	16 N. D. 199	195, 406
Stiles v. Granger	17 N. D. 502	195
Stockwell v. Crawford	21 N. D. 261	57
Sweigle v. Gates	9 N. D. 538	408

T

		PAGE
Tee v. Noble	23 N. D. 225	406
Timmins v. Russell	13 N. D. 487	175, 176
Turnquist v. Cass County	11 N. D. 514	403, 559, 564

W

Wadge v. Kittleson	12 N. D. 452	507
Wagar v. Prindeville	21 N. D. 245	329
Walcott Twp. v. Skauge	6 N. D. 383	364, 366
Webster v. McLaren	19 N. D. 751	606
Weisbecker v. Cahn	14 N. D. 390	487
Welch v. Northern P. R. Co.	14 N. D. 25	501
Wells v. Geyer	12 N. D. 316	47
Wells v. Lisbon	21 N. D. 36	529
Wheeler v. Castor	11 N. D. 347	510
Woodward v. McCollum	16 N. D. 42	507
Wright v. Minneapolis, St. P. & S. Ste. M. R. Co.	12 N. D. 159	187

Y

Yorke v. Yorke	3 N. D. 343	271
Youker v. Hobart	17 N. D. 296	61

TABLE OF SOUTH DAKOTA CASES CITED IN OPINIONS.

		PAGE
Borneman v. Chicago, St. P. M. & O. R. Co.	19 S. D. 459	188
Burnett v. Costello	15 S. D. 89	200
Dielmann v. Citizens' Nat. Bank	8 S. D. 263	511
Gordon v. Lawrence County	1 S. D. 31	105, 119, 137
Houts v. Hoyne	14 S. D. 176	431
Jones v. Pettigrew	25 S. D. 432	546
Keator v. Ferguson	20 S. D. 473	176
Lawver v. Globe Ins. Co.	25 S. D. 549	145
Morrow v. Wipf	22 S. D. 146	325
Pier v. Lee	14 S. D. 600	176
Searle v. Lead	10 S. D. 312	360
Spackman v. Gross	25 S. D. 244	464
State v. Bennett	21 S. D. 396	311, 313
State v. Bradley	15 S. D. 148	290
State v. Garrington	11 S. D. 178	311, 313
State v. Williams	11 S. D. 64	311
State ex rel. Hayes v. Board of Equalization	16 S. D. 219	84
State ex rel. Howells v. Metcalf	18 S. D. 393	326
Whittaker v. Deadwood	12 S. D. 608	360
Wilson v. McWilliams	16 S. D. 96	43, 45, 51

TABLE OF ALL CASES CITED IN OPINIONS.

A

PAGE

Abell v. Penn. Mut. L. Ins. Co. 18 W. Va. 400 19
Acton v. Fargo & M. Street R. Co. 20 N. D. 434 254
Adams v. Crittenden, 4 Woods, 618, 17 Fed. 42 263
Adams v. Kellogg, 63 Mich. 105, 29 N. W. 679 216
Adams v. Lansdon, 18 Idaho, 483, 110 Pac. 280 ..... 520, 522
Adams & F. Co. v. Kenoyer, 17 N. D. 302 487
Ætna Indemnity Co. v. Schroeder, 12 N. D. 110 146
Alden v. Yeoman, 29 Ill. App. 53 262
Alexander v. Bradley, 3 Bush, 667 19
Allen v. United States, 164 U. S. 492, 41 L. ed. 528, 17 Sup. Ct. Rep. 154 252
Alstad v. Sim, 15 N. D. 629 ..... 381, 389, 394, 403, 406, 559, 561
American Surety Co. v. Woods, 45 C. C. A. 282, 105 Fed. 741 500
Amis v. Cooper, 25 Ark. 14 262
A. M. Todd Co. v. Farmers' Mut. F. Ins. Co. 137 Mich. 188, 100 N. W. 442 ... 145
Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 462 189
Anderson v. Moore, 108 Ill. App. 106 15
Anderson Mercantile Co. v. Anderson, 22 N. D. 441, 134 N. W. 36 646
Andrews v. United States, 2 Story, 202, Fed. Cas. No. 381 86
Ankeny v. Henningsen, 54 Iowa, 29, 6 N. W. 65 409
Anne Arundel County v. Duvall, 54 Md. 350, 39 Am. Rep. 393 119
Arkansas Midland R. Co. v. Griffith, 63 Ark. 491, 39 S. W. 550 19
Astor v. Merritt, 111 U. S. 202, 28 L. ed. 401, 4 Sup. Ct. Rep. 413 84
Atwell v. Barnes, 109 Mich. 10, 66 N. W. 583 398
Auditor General v. Bolt, 147 Mich. 283, 111 N. W. 74 385
Augusta v. Dunbar, 50 Ga. 387 409

B

Bach v. Parmely, 35 Wis. 238 255
Backus v. Archer, 109 Mich. 666, 67 N. W. 913 504
Backus v. Burke, 93 Minn. 272, 65 N. W. 459 ..... 426, 428
Bacon v. Mitchell, note in 4 L.R.A.(N.S.) 244 272
Baker v. State Canvassers, 111 Mich. 378, 69 N. W. 656 625
Baker v. Wentworth, 155 Mass. 338, 29 N. E. 589, 8 Ann. Cas. 1046, note 26
Baldwin v. Biersdorfer, Wilson, Super. Ct. (Ind.) 1 69
Bank of Tarboro v. Fidelity & D. Co. 126 N. C. 320, 83 Am. St. Rep. 682, 35 S. E. 588, 128 N. C. 366, 83 Am. St. Rep. 682, 38 S. E. 908 504
Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. ed. 552 626
Barlow v. McKinley, 24 Iowa, 69 475
Barnes v. Shreveport City R. Co. 47 La. Ann. 1218, 49 Am. St. Rep. 400, 17 So. 782 18
Bates v. St. Louis, 153 Mo. 18, 77 Am. St. Rep. 701, 54 S. W. 439 95
Bazal v. St. Stanislaus Church, 21 N. D. 602 593

PAGE
Beach v. Beach, 6 Dak. 371 271
Beals, Re, 116 Fed. 530 263
Beam v. Jennings, 96 N. C. 82, 2 S. E. 245 120
Beggs v. Paine, 9 N. D. 538 411
Beggs v. Paine, 15 N. D. 436 ..... 195, 396, 407, 408
Belcher v. Treat, 61 Me. 577 626
Bell v. State, 73 Ga. 572 310
Benham v. Farmers' Mut. F. Ins. Co. 165 Mich. 406, — L.R.A.(N.S.) —, 131 N. W. 87, Ann. Cas. 1912 C. 983 148
Bennett v. Orange, 69 N. J. L. 675, 56 Atl. 1131 ..... 86, 95
Bennett v. Orange, 69 N. J. L. 176, 54 Atl. 249 86
Bentley v. Fidelity & D. Co. 75 N. J. L. 828, 69 Atl. 202, 15 Ann. Cas. 1178, 127 Am. St. Rep. 837 273
Bergsma v. Dewey, 46 Minn. 357, 49 N. W. 57 633
Besore v. Dosh, 43 Iowa, 211 63
Bessie v. Northern P. R. Co. 18 N. D. 507 3
Betts v. Signor, 7 N. D. 399 195
Bigler v. Jack, 114 Iowa, 667, 87 N. W. 700 53
Bismarck Grocery Co. v. Yeager, 21 N. D. 547 571
Blessett v. Turcotte, 20 N. D. 151 ..... 420, 433
Blumberg, Re, 94 Fed. 476 263
Boettger v. Scherpe & K. Architectural Iron Co. 136 Mo. 531, 38 S. W. 298 ... 19
Bohart v. Anderson, 24 Okla. 82, 103 Pac. 742, 20 Ann. Cas. 742 86
Boone v. Templeman, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947 175
Boreman v. Chicago, St. P. M. & O. R. Co. 19 S. D. 459 188
Bower v. Peate, L. R. 1 Q. B. Div. 321, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321 16
Bowman v. Ogden City, 85 N. W. 439 605
Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473 511
Brady v. Hayward, 114 Mich. 326, 72 N. W. 233 385
Bragg v. Shain, 49 Cal. 131 504
Bramlage v. Com. 113 Ky. 332, 68 S. W. 406 95
Breckenridge v. Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 84 546
Brick v. Plymouth County, 63 Iowa, 462, 19 N. W. 304 604
Brinckerhoff v. Bostwick, 99 N. Y. 185, 1 N. E. 663 237
Brink v. Purnell, 162 Mich. 147, 127 N. W. 322, Ann. Cas. 1912 A. 829 69
Briscoe v. Clark County, 95 Ill. 309 126
Brittain v. Lankford, 110 Ky. 484, 61 S. W. 1000 486
Broaddus v. Pawnee County, 16 Okla. 473, 88 Pac. 250 86
Bromfield v. McKinley, 53 Colo. 279, 125 Pac. 493 579
Brooks v. Lowenstein, 95 Tenn. 262, 35 S. W. 89 217
Brooks v. Metropolitan L. Ins. Co. 70 N. J. L. 36, 56 Atl. 168 511
Brown v. Brown, 124 N. C. 19, 70 Am. St. Rep. 574, 32 S. E. 320 372
Brown v. Dooley, 95 Minn. 146, 103 N. W. 894 486
Brown v. La Societe Francaise, 138 Cal. 475, 71 Pac. 516 26
Brown v. McCord, 20 Ind. 270 388
Brown v. Salt Lake City, 33 Utah, 222, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 570, 14 Ann. Cas. 1004 530
Bruce v. Dodge County, 20 Minn. 388, Gil. 339 ..... 105, 119
Bucknall v. Story, 36 Cal. 67 409
Bump v. Jepson, 106 Mich. 641, 64 N. W. 509 409
Burgert v. Borchert, 59 Mo. 80 216
Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731 475
Burleigh County v. Kidder County, 20 N. D. 27 242
Burnett v. Costello, 15 S. D. 89 200
Burnham v. Aiken, 6 N. H. 306 99
Burr v. Clement, 9 Colo. 1, 9 Pac. 633 223
Busenbark v. Busenbark, 150 Iowa, 7, 129 N. W. 332 372

C

PAGE
Cadman v. Peter, 118 U. S. 73, 30 L. ed. 78, 6 Sup. Ct. Rep. 957 43
Callaway County v. Henderson, 119 Mo. 39, 24 S. W. 437 107
Carman v. Ross, 64 Cal. 249, 29 Pac. 510 255
Carr v. Luscher, 35 Neb. 318, 53 N. W. 144 262
Cash v. Meisenheimer, 53 Wash. 576, 102 Pac. 429 175
Cavanaugh v. Fenley, 94 Minn. 505, 110 Am. St. Rep. 382, 103 N. W. 711 263
Chapin v. Kingsbury, 135 Mass. 580 464
Chesbrough v. Putnam & Paulding Counties, 37 Ohio St. 508 393
Chicago & A. R. Co. v. Becker, 84 Ill. 483 ..... 16, 20
Chicago & E. R. Co. v. Branyan, 10 Ind. App. 570, 37 N. E. 190 19
Chicago & S. Traction Co. v. Flaherty, 22 Ill. 67, 78 N. E. 29 273
Chicago, R. I. & P. R. Co. v. People, 217 Ill. 164, 75 N. E. 368 409
Cincinnati College v. State, 19 Ohio, 110 84
Citizens' Nat. Bank v. Burch, 145 N. C. 316, 59 S. E. 71 491
Clambey v. Copeland, 52 Wash. 580, 100 Pac. 1031 47
Clark v. Fisher, 54 Kan. 403, 38 Pac. 493 475
Clark v. Zeigler, 79 Ala. 346 475
Clayton v. Dinwoodey, 33 Utah, 251, 93 Pac. 723, 14 Ann. Cas. 926 511
Cleveland County v. Seawell, 3 Okla. 281, 41 Pac. 592 ..... 604, 606
Cline v. Duffy, 20 N. D. 525 593
Cohn & G. Lumber Co. v. Robbins, 159 Ala. 289, 48 So. 853 217
Cole v. White County, 32 Ark. 45 95
Coleman v. Fargo, 8 N. D. 69 529
Coler v. Dwight School Twp. 3 N. D. 249 ..... 157, 567
Collier v. Ervin, 2 Mont. 335 179
Columbia Sav. & L. Asso. v. Clause, 13 Wyo. 166, 78 Pac. 708 511
Columbus Gaslight & Coke Co. v. Columbus, 50 Ohio St. 65, 19 L.R.A. 510, 40 Am. St. Rep. 648, 33 N. E. 292 361
Com. v. Fry, 183 Pa. 32, 38 Atl. 417 ..... 106, 122, 136
Com. v. McManus, 143 Pa. 64, 14 L.R.A. 89, 21 Atl. 1018, 22 Atl. 761 296
Com. v. Mann, 168 Pa. 290, 31 Atl. 1003 109
Com. v. Tuey, 8 Cush. 1 252
Corbett v. Great Northern R. Co. 19 N. D. 450 ..... 185, 187
Corcoran v. White, 117 Ill. 118, 57 Am. Rep. 858, 7 N. E. 525 476
Cornelius v. Wash, note in 12 Am. Dec. 145 272
Cosby v. Buchanan, 81 Ala. 574, 1 So. 898 43
Cowdery v. Hahn, 105 Wis. 455, 76 Am. St. Rep. 921, 81 N. W. 882 504
Coyle v. Davis, 116 U. S. 108, 29 L. ed. 583, 6 Sup. Ct. Rep. 314 43
Crawford v. Bradford, 23 Fla. 404, 2 So. 782 107
Craythorne v. Swinburne, 14 Ves. Jr. 160, 9 Revised Rep. 264, 21 Eng. Rul. Cas. 636 490
Cughan v. Larson, 13 N. D. 373 ..... 175, 176
Cutler v. Howard, 9 Wis. 309 100

D

Davidson v. Van Pelt, 15 Wis. 341 475
Davie v. Briggs, 97 U. S. 628, 24 L. ed. 1086 200
Davie v. Levy, 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395 17
Davis v. Seymour, 16 Minn. 210, Gil. 184 464
Davis v. Standish, 26 Hun, 608 19
Day v. Webb, 28 Conn. 140 255
Deisenrieter v. Kraus-Merkel Malting Co. 97 Wis. 279, 72 N. W. 735 255
Deisner v. Simpson, 72 Ind. 435 388
Delmonica Hotel Co. v. Smith, 112 Iowa, 659, 84 N. W. 906 253
Dever v. Cornwell, 10 N. D. 123 408
Dielmann v. Citizens' Nat. Bank, 8 S. D. 263 511
Dillon v. Whatcom County, 12 Wash. 391, 41 Pac. 174 95

PAGE
Ditch v. Edwards, 2 Ill. 127, 26 Am. Dec. 414 462
Doherty v. Real Estate Title Ins. & T. Co. 85 Minn. 518, 89 N. W. 853 407
Donley v. Glens Falls Ins. Co. 184 N. Y. 107, 76 N. E. 914, 6 Ann. Cas. 81 148
Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283 446
Donovan v. Oakland & B. Rapid Transit Co. 102 Cal. 245, 36 Pac. 516 16
Dooley v. Jackson, 104 Mo. App. 21, 78 S. W. 333 325
Douglas v. Fargo, 13 N. D. 467 ..... 395, 403, 404
Duerden v. Solomon, 33 Utah, 468, 94 Pac. 978 43
Duffield v. Hue, 129 Pa. 94, 18 Atl. 566, 17 Mor. Min. Rep. 253 176
Duffy, Re, 58 Misc. 1, 110 N. Y. Supp. 54, 125 App. Div. 406, 109 N. Y. Supp. 979 332
Durham, Re, 104 Fed. 231 263
Dutton v. Warschauer, 21 Cal. 625, 82 Am. Dec. 765 426

E

Eachus v. Los Angeles, 130 Cal. 492, 80 Am. St. Rep. 147, 62 Pac. 829 360
Eachus v. Los Angeles Consol. Electric R. Co. 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750 360
Eakin v. Nez Perces County, 4 Idaho, 131, 36 Pac. 702 ..... 604, 606
Eaton v. Bennett, 10 N. D. 346 ..... 395, 403, 404
Edwards, Re, 156 Fed. 794 264
Edwards v. Clark, 83 Mich. 246, 10 L.R.A. 659, 47 N. W. 112 475
Eginoire v. Union County, 112 Iowa, 558, 84 N. W. 758 19
Ehrmann v. Nassau Electric R. Co. 23 App. Div. 21, 48 N. Y. Supp. 379 17
Elvick v. Groves, 17 N. D. 561 ..... 626, 627, 629
Emblem v. Bicksler, 34 Colo. 496, 83 Pac. 636 273
Erickson v. Cass County, 11 N. D. 494 ..... 402, 559, 561, 562, 564
Evans v. Mohn, 55 Iowa, 302, 7 N. W. 593 571
Evans v. Trenton, 24 N. J. L. 764 86
Everest v. Ferris, 16 Minn. 26, Gil. 14 429
Everett v. Beebe, 37 Iowa, 452 63
Exchange Bank v. Nebraska Underwriters Ins. Co. 84 Neb. 110, 133 Am. St. Rep. 614, 120 N. W. 1010 146
Exchange Bank v. Underwriters' Ins. Co. 84 Neb. 110, 133 Am. St. Rep. 614, 120 N. W. 1010 304

F

Fargusson v. Talcott, 7 N. D. 183 ..... 164, 176
Farmers' & M. Bank v. Evans, 4 Barb. 487 503
Farmers' & M. Ins. Co. v. Jensen, 56 Neb. 285, 44 L.R.A. 861, 76 N. W. 577, 78 N. W. 1054 147
Farr v. Detroit, 136 Mich. 200, 99 N. W. 19 398
Farrington v. New England Invest. Co. 1 N. D. 102 403
Feeney v. Howard, 79 Cal. 525, 4 L.R.A. 826, 12 Am. St. Rep. 162, 21 Pac. 984 546
Feland v. Berry, 130 Ky. 328, 113 S. W. 425 499
Fenton v. Minnesota Title Ins. & T. Co. 15 N. D. 365 ..... 404, 405, 411
Finlayson v. Peterson, 11 N. D. 45 ..... 427, 432
Finley v. Territory, 12 Okla. 621, 73 Pac. 273 107
First Nat. Bank v. Blair State Bank, 80 Neb. 400, 127 Am. St. Rep. 752, 114 N. W. 409 545
First Nat. Bank v. Fidelity & D. Co. 145 Ala. 335, 5 L.R.A.(N.S.) 418, 117 Am. St. Rep. 45, 40 So. 415, 8 Ann. Cas. 241 503
Fitzgerald v. First Nat. Bank, 64 Iowa, 260, 89 N. W. 813 511
Fitzmaurice v. Willis, 20 N. D. 372 ..... 331, 520
Flack v. Green Island, 122 N. Y. 107, 25 N. E. 267 476
Flagg v. Marion County, 31 Or. 18, 48 Pac. 693 605
F. Mayer Boot & Shoe Co. v. Ferguson, 19 N. D. 496 263

PAGE
Foster v. National Steel Co. 216 Pa. 279, 65 Atl. 618 15
Franke v. St. Louis, 110 Mo. 516, 19 S. W. 938 19
Freedom v. Weed, 40 Me. 383, 63 Am. Dec. 670 244
Fritz v. Pusey, 31 Minn. 368, 18 N. W. 94 475
Frost v. Leatherman, 55 Mich. 33, 20 N. W. 705 383
Fulcher v. State, 28 Tex. App. 465, 13 S. W. 750 313

G

Gaines v. Grunewald, 102 Minn. 245, 113 N. W. 450 486
Galesburg Sanitarium v. Jacobson, 103 Ill. App. 26 26
Gallia County v. Holcomb, 7 Ohio, pt. 1, p. 232 244
Galloway v. Kerr, — Tex. Civ. App. —, 63 S. W. 185 431
Garner v. Trumbull, 36 C. C. A. 361, 94 Fed. 321 17
Gassert v. Bogk, 7 Mont. 585, 1 L.R.A. 240, 19 Pac. 281 45
Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739 475
Gaughen v. Kerr, 99 Iowa, 214, 68 N. W. 694 176
George A. Hormel & Co. v. American Bonding Co. 112 Minn. 288, 33 L.R.A. (N.S.) 513, 128 N. W. 12 ..... 502, 503
Gerken v. Sibley County, 39 Minn. 433, 40 N. W. 508 86
German-American Ins. Co. v. Brown, 75 Ark. 251, 87 S. W. 135 152
Gibson v. Nelson, note in 31 L.R.A.(N.S.) 523 272
Gilbert v. Marshall County Justices, 18 B. Mon. 427 95
Gillett v. McLaughlin, 69 Mich. 547, 37 N. W. 551 ..... 383, 384
Gillilland v. Brantner, 145 Iowa, 275, 121 N. W. 1047 273
Gitzhoffen v. Holy Cross Hospital Asso. 32 Utah, 46, 8 L.R.A.(N.S.) 1161, 88 Pac. 691 26
Giuricevic v. Tacoma, note in 28 L.R.A.(N.S.) 523 530
Gjerstadengen v. Hartzell, 9 N. D. 268 459
Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675 26
Goldstein v. Peter Fox Sons Co. — N. D. —, 40 L.R.A.(N.S.) 566, 135 N. W. 180 344
Gordon v. Lawrence County, 1 S. D. 31, 34 ..... 105, 119, 137
Gray v. Minnesota Tribune Co. 81 Minn. 333, 84 N. W. 113 33
Gray v. Nelson, 77 Iowa, 63, 41 N. W. 566 476
Green v. Lancaster County, 61 Neb. 473 605
Griffin v. Maxwell, 23 Ill. App. 405 262
Groeltz v. Cole, 128 Iowa, 340, 103 N. W. 977 431

H

Haas v. Chicago & N. W. R. Co. 41 Wis. 51 255
Hackney v. Elliott, — N. D. — 559
Haddock v. Haddock, 192 N. Y. 499, 85 N. E. 682, 19 L.R.A.(N.S.) 126 491
Hagler v. Kelly, 14 N. D. 218 457
Hall v. Slaybaugh, 69 Mich. 484, 37 N. W. 545 383
Halstead Lumber Co. v. Sutton, 46 Kan. 192, 26 Pac. 444 499
Hansen v. Berthelsen, 19 Neb. 433, 27 N. W. 423 545
Harbaugh v. Martin, 30 Mich. 234 383
Harris v. Fall, 177 Fed. 79, 100 C. C. A. 497, 27 L.R.A.(N.S.) 1174 26
Harton v. Lyons, 97 Tenn. 180, 36 S. W. 851 217
Hawes v. Williams, 92 Me. 483, 43 Atl. 101 52
Hawkes v. Pike, 105 Mass. 560, 7 Am. Rep. 554 476
Haynie v. Robertson, 58 Ala. 37 44
Hazlett v. Holt County, 51 Neb. 716, 71 N. W. 717 107
Heaston v. Randolph County, 20 Ind. 398 84
Helena Nat. Bank v. Rocky Mountain Teleph. Co. 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829 303
Hemenway v. Wood, 53 Iowa, 21, 3 N. W. 794 633

PAGE
Henderson v. State, 96 Ind. 437 ..... 105, 123
Henderson Bridge Co. v. Com. 120 Ky. 690, 87 S. W. 1088 409
Hennepin County v. Dickey, 86 Minn. 331, 90 N. W. 775 ..... 106, 131
Herman v. Martineau, 1 Wis. 151, 60 Am. Dec. 368 304
Hewitt v. Taunton Street R. Co. 167 Mass. 483, 46 N. E. 106 17
Hightower v. State, 72 Ga. 482 84
Hill v. Edwards, 11 Minn. 22, Gil. 5 429
Hodgins v. Minneapolis, St. P. & S. Ste. M. R. Co. 3 N. D. 382 187
Holman v. Clark, 148 Ala. 286, 41 So. 765 217
Holmes v. Tennessee Coal, I. & R. Co. 49 La. Ann. 1465, 22 So. 403 15
Holton v. Bowman, 32 Minn. 191, 19 N. W. 734 429
Homan v. Stanley, 66 Pa. 464, 5 Am. Rep. 389 16
Home F. Ins. Co. v. Collins, 61 Neb. 198, 85 N. W. 54 147
Hoon v. Beaver Valley Traction Co. 204 Pa. 369, 54 Atl. 270 20
Hopper v. Stack, 69 N. J. L. 562, 56 Atl. 1 325
Horn v. Butler, 39 Minn. 515, 40 N. W. 833 475
Horton v. Maffitt, 14 Minn. 289, Gil. 216, 100 Am. Dec. 222 464
Hosmer v. Hunt Drainage Dist. 134 Ill. 317, 25 N. E. 747 409
Hosmer v. Sheldon School Dist. 4 N. D. 197 599
Hotchkiss v. Oliphant, 2 Hill, 510 33
Hotz v. School Dist. 1 Colo. App. 40, 27 Pac. 15 600
Houghton Implement Co. v. Vavrosky, 15 N. D. 308 501
Houts v. Hoyne, 14 S. D. 176 431
Howell v. Rochester R. Co. 24 App. Div. 502, 49 N. Y. Supp. 17 17
Howser v. Pepper, 8 N. D. 484 519
Hubbell v. Sibley, 50 N. Y. 468 ..... 427, 431
Hudson v. Duke, 21 Ga. 403 176
Hughes v. Insurance Co. of N. A. 40 Neb. 626, 59 N. W. 112 145
Hughes v. Percival, L. R. 8 App. Cas. 443, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772 16
Hunt v. Oregon P. R. Co. 1 L.R.A. 842, 36 Fed. 481 500

I

Illinois C. R. Co. v. Com. 30 Ky. L. Rep. 190, 98 S. W. 1008 409
Illinois C. R. Co. v. Southern Seating & Cabinet Co. 104 Tenn. 568, 50 L.R.A. 729, 79 Am. St. Rep. 933, 58 S. W. 303 499
Indianapolis v. Marold, 25 Ind. App. 428, 58 N. E. 512 19
International Cement Co. v. Beifield, 173 Ill. 179, 50 N. E. 716 503
Iowa & D. Land Co. v. Barnes County, 6 N. D. 601 195

J

Jasper v. Hazen, 4 N. D. 1 43
J. B. Streeter, Jr. Co. v. Frederickson, 11 N. D. 300 195
Jeffries v. Bartlett, 20 Fed. 496 263
Jellison v. Halloran, 44 Minn. 199, 46 N. W. 332 429
Jenkins v. Fahey, 73 N. Y. 355 475
Jerome v. Bigelow, 66 Ill. 452, 16 Am. Rep. 597 272
Jewett Bros. v. Huffman, 14 N. D. 110 ..... 263, 264
Johnson v. Chicago & N. W. R. Co. 64 Wis. 425, 25 N. W. 223 ..... 16, 20
Johnson v. Fargo, 15 N. D. 525 529
Johnson v. Grand Forks County, 16 N. D. 363 ..... 327, 328
Johnson v. Grand Forks County, — N. D. — 328
Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889 429
Johnson v. Soliday, 19 N. D. 463 507
Jones v. Brooklyn Heights R. Co. 10 Misc. 543, 31 N. Y. Supp. 445 17
Jones v. Chenault, note in 82 Am. St. Rep. 211 216
Jones v. Hess, — Tex. Civ. App. —, 48 S. W. 46 217

PAGE
Jones v. Pettigrew, 25 S. D. 432 546
Jones v. Powning, 25 Nev. 399, 60 Pac. 833 511
Jordan v. Otis, 37 Barb. 50 476

K

Kansas City, M. & B. R. Co. v. Phillips, 98 Ala. 159, 13 So. 65 19
Kansas Lumber Co. v. Horrigan, 36 Kan. 387, 13 Pac. 564 176
Kansas P. R. Co. v. Cutter, 19 Kan. 91 ..... 16, 20
Karahuta v. Schuylkill Traction Co. 6 Pa. Super. Ct. 319 18
Karr v. Putnam County, 170 Ind. 571, 85 N. E. 1 245
Keator v. Ferguson, 20 S. D. 473 176
Keefe v. Fairfield, 184 Mass. 334, 68 N. E. 342 175
Keithley v. Wood, 151 Ill. 566, 42 Am. St. Rep. 265, 38 N. E. 149 43
Kelley v. Leachman, 3 Idaho, 392, 29 Pac. 849 52
Kerr v. Anderson, 16 N. D. 36 501
Ketcham v. Newman, 141 N. Y. 205, 24 L.R.A. 102, 36 N. E. 197 278
Kinnie v. Bare, 68 Mich. 625, 36 N. W. 672 ..... 383, 389
Kirkwood v. Soto, 87 Cal. 394, 25 Pac. 488 126
Kitchell v. Brooklyn Heights R. Co. 6 App. Div. 99, 39 N. Y. Supp. 743 17
Klemmens v. First Nat. Bank, 22 N. D. 304 482
Knudtson v. Robinson, 18 N. D. 13 162
Koshland v. Spring, 116 Cal. 689, 48 Pac. 58 475
Kroop v. Forman, 31 Mich. 144 383

L

Ladd v. Holmes, 40 Or. 167, 91 Am. St. Rep. 457, 66 Pac. 714 327
Lagomarcino v. Quattrochi, 89 Iowa, 197, 56 N. W. 435 224
Lamberton v. Grant, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127 486
Landes v. Walls, 160 Ind. 216, 66 N. E. 679 336
Lankford v. Gebhart, 130 Mo. 621, 51 Am. St. Rep. 585, 32 S. W. 1127 519
La Plata County v. Durnell, 17 Colo. App. 85, 66 Pac. 1073 604
La Plata County v. Morgan, 28 Colo. 322, 65 Pac. 41 604
Lawrence v. Springer, note in 31 Am. St. Rep. 702 633
Lawver v. Globe Ins. Co. 25 S. D. 549 145
Ledgerwood v. Bushnell, 128 Ill. App. 555 499
Lee v. Crawford, 10 N. D. 482 408
Leeds v. Dunn, 10 N. Y. 469 503
Legler v. Paine, 147 Ind. 181, 45 N. E. 604 95
Lehmann v. Chapel, note in 68 Am. St. Rep. 553 216
Leiper v. Denver, 36 Colo. 110, 7 L.R.A.(N.S.) 108, 118 Am. Rep. 101, 85 Pac. 849, 10 Ann. Cas. 847 360
Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316 ..... 145, 147, 350
Lent v. Burlington & M. R. Co. 11 Neb. 201, 8 N. W. 431 175
Leonard v. Com. 112 Pa. 607, 4 Atl. 220 328
Less v. Butte, 28 Mont. 27, 61 L.R.A. 601, 98 Am. St. Rep. 545, 72 Pac. 140 360
Light v. West, 42 Iowa, 138 63
Lindley v. Miller, 67 Ill. 244 262
Line v. Election Canvassers, 154 Mich. 329, 18 L.R.A.(N.S.) 412, 117 N. W. 730, 16 Ann. Cas. 248 325
Line v. Wait, 154 Mich. 329, 18 L.R.A.(N.S.) 412, 117 N. W. 730, 16 Ann. Cas. 248 325
Little, Re, 110 Fed. 621 263
Little v. Tingle, 26 Ind. 168 69
Littler v. Lincoln, 106 Ill. 353 476
Locke v. Central, 4 Colo. 65, 34 Am. Rep. 66 86
Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. ed. 1061, 23 Sup. Ct. Rep. 751 264

PAGE
Loeschigk v. Addison, 19 Abb. Pr. 169 180
Lorin v. Seitz, 8 N. D. 404 519
Louisville & N. R. Co. v. Connor, 9 Heisk. 20 ..... 16, 20
Louisville & N. R. Co. v. Mothershead, 97 Ala. 261, 12 So. 714 19
Louisville, N. A. & C. R. Co. v. Miller, 141 Ind. 533, 37 N. E. 343 19
Lowe v. Jensen, 22 N. D. 148 5
Luick v. Arends, 21 N. D. 614 ..... 26, 372

M

McBrian v. Nation, 78 Kan. 665, 97 Pac. 798 ..... 89, 131
McBride v. Union P. R. Co. 3 Wyo. 247, 21 Pac. 687 255
McCabe v. New York, 77 App. Div. 637, 79 N. Y. Supp. 176 88
McCabe v. New York, 176 N. Y. 587, 68 N. E. 1119 88
McCormack Harvesting Mach. Co. v. Rae, 9 N. D. 482 504
McCue v. Blaisdell, 18 N. D. 55 322
McCue v. Blaisdell, 18 N. D. 31 321
McDonald v. Bayha, 93 Minn. 139, 100 N. W. 679 217
McDonald v. Holmes, 16 N. D. 457 514
McDonnell v. Alabama Gold L. Ins. Co. 85 Ala. 401, 5 So. 120 19
McGovern v. New York C. & H. R. R. Co. 67 N. Y. 417 20
McIntee v. Middletown, 80 App. Div. 434, 81 N. Y. Supp. 124 530
McKinstry v. United States, 40 Fed. 813 95
McLaughlin, Re, 4 Wash. 570, 16 L.R.A. 699, 30 Pac. 651 235
McNeill v. Norsworthy, 39 Ala. 156 43
McPherson v. Hayward, 81 Me. 329, 17 Atl. 164 ..... 425, 426
McTavish v. Great Northern R. Co. 8 N. D. 333 457
Mahon v. Fansett, 17 N. D. 104 262
Main Water Co. v. Waterville, 93 Me. 586, 49 L.R.A. 294, 45 Atl. 830 362
Marks v. Fell, 1 Johns. Ch. 594 430
Marquis v. Santa Ana, 103 Cal. 661, 37 Pac. 650 86
Martin v. Tyler, 4 N. D. 278 382
Marx v. Trussell, 50 Miss. 498 262
Mathias v. Carson, 49 Mich. 465, 13 N. W. 818 388
Mathis v. Carpenter, 95 Ala. 156, 36 Am. St. Rep. 187, 10 So. 341 224
Mauch v. Hartford, 112 Wis. 40, 87 N. W. 816 257
May v. Cummings, 21 N. D. 281 507
Maylone v. St. Paul, 40 Minn. 406, 42 N. W. 88 530
Meehan v. Great Northern R. Co. 13 N. D. 432 501
Mellen v. Old Colony Street R. Co. 184 Mass. 399, 68 N. E. 679 17
Memphis & L. R. Co. v. Kerr, 52 Ark. 162, 5 L.R.A. 429, 20 Am. St. Rep. 159, 12 S. W. 329 188
Mercantile Bank v. Busby, 120 Tenn. 652, 113 S. W. 390 491
Merchants' Nat. Bank v. Braithwaite, 7 N. D. 358 ..... 367, 486, 653
Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686 176
Messmore v. Cunningham, 78 Mich. 623, 44 N. W. 145 545
Midgette v. Branning Mfg. Co. 150 N. C. 333, 64 S. E. 5 15
Miller v. Schallern, 8 N. D. 395 ..... 329, 519
Miller v. Sovereign Camp, W. O. W. 140 Wis. 505, 28 L.R.A.(N.S.) 178, 133 Am. St. Rep. 1095, 122 N. W. 1126 200
Miller v. Stewart, 9 Wheat. 681, 6 L. ed. 190 503
Miner v. Aylesworth, 18 Fed. 199 511
Miner v. Beekman, 50 N. Y. 337 427
Minnesota Thresher Co. v. Holz, 10 N. D. 16, 84 N. W. 581 642
Mitchell v. Wellman, 80 Ala. 16 43
Modern Steel Structural Co. v. English Constr. Co. 129 Wis. 31, 108 N. W. 70 .. 499
Monson v. Bragdon, 159 Ill. 66, 42 N. E. 383 ..... 175, 176
Montant v. Moore, 135 App. Div. 334, 120 N. Y. Supp. 556 176
Montgomery v. Chelf, 118 Ky. 760, 82 S. W. 388 325

PAGE
Moore v. Jones, 63 Cal. 12 ... 216
Moran v. St. Paul, 54 Minn. 279, 56 N. W. 80 ... 530
Morgan v. New York, 105 App. Div. 425, 94 N. Y. Supp. 175 ... 88
Morgan v. Roberts, 38 Ill. 65 ... 272
Morgan County v. Branham, 57 Fed. 179 ... 503
Morrill v. Palmer, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829 ... 236
Morris v. Metropolitan Street R. Co. 170 N. Y. 592, 63 N. E. 1119 ... 20
Morris v. Ocean Twp. 61 N. J. L. 12, 38 Atl. 760 ... 95
Morrison v. Lee, 13 N. D. 591 ... 257
Morrison v. Smith, 90 Md. 76, 44 Atl. 1031 ... 176
Morrow v. Wipf, 22 S. D. 146 ... 325
Morse v. Omaha, 67 Neb. 426, 93 N. W. 734 ... 388
Muller v. Brooklyn Heights R. Co. 18 App. Div. 177, 45 N. Y. Supp. 954 ... 17
Multer v. Knibbs, 193 Mass. 556, 9 L.R.A.(N.S.) 322, 79 N. E. 762, 9 Ann. Cas. 958 ... 372
Munroe v. Barton, 98 Me. 250, 56 Atl. 844 ... 426
Murdock v. Jones, 3 App. Div. 221, 38 N. Y. Supp. 461 ... 499
Murphy v. People, 120 Ill. 234, 11 N. E. 202 ... 409
Murray v. Abbott, 61 Wis. 198, 20 N. W. 910 ... 255
Myers v. San Francisco, 42 Cal. 215 ... 19

N

Nash v. Northwest Land Co. 15 N. D. 566 ... 425-427, 431
Natick Gaslight Co. v. Natick, 175 Mass. 246, 56 N. E. 292 ... 361
National Surety Co. v. Long, 79 Ark. 523, 96 S. W. 745, 107 S. W. 384 ... 504
Nearing v. Coop, 6 N. D. 345, 70 N. W. 1044 ... 507
Nelson v. Branford Lighting & Water Co. 75 Conn. 548, 54 Atl. 303 ... 19
Newburgh & C. Turnp. Road v. Miller, 5 Johns. Ch. 101, 9 Am. Dec. 274 ... 100
Newlove v. Pennock, 123 Mich. 260, 82 N. W. 54 ... 486
Nichols v. Russell, 141 Mo. App. 140, 123 S. W. 1032 ... 62
Nind v. Myers, 15 N. D. 400 ... 195, 408
Noble v. McIntosh, 23 N. D. 59 ... 228, 405
Noble v. Olympia Brewing Co. note in 36 L.R.A.(N.S.) 467 ... 535
Noblitt v. Durbin, 41 Or. 555, 69 Pac. 685 ... 217
Nofire v. United States, 164 U. S. 657, 41 L. ed. 588, 17 Sup. Ct. Rep. 626 ... 212
Norman v. Norman, 121 Cal. 620, 42 L.R.A. 343, 66 Am. St. Rep. 74, 54 Pac. 143 ... 234
Null v. Zierle, 52 Mich. 540, 18 N. W. 348 ... 383, 388

O

Oakman v. Belden, 94 Me. 280, 80 Am. St. Rep. 396, 47 Atl. 553 ... 372
O. H. Perry Tie & Lumber Co. v. Reynolds, 100 Va. 264, 40 S. E. 919 ... 499
O'Keefe v. Foster, 5 Wyo. 343, 40 Pac. 527 ... 511
Oldfield v. New York & H. R. Co. 3 E. D. Smith, 103 ... 16, 20
Omaha v. Bowman, 63 Neb. 333, 88 N. W. 521 ... 20
O'Neil v. Tyler, 3 N. D. 47 ... 404
O'Neill v. Capelle, 62 Mo. 202 ... 43
Osborne v. Lindstrom, 9 N. D. 1 ... 367, 487
Owen v. Brown, 57 C. C. A. 180, 120 Fed. 812 ... 480

P

Pace v. Chadderdon, 4 Minn. 499, Gil. 390 ... 429
Palmer v. Mahin, 57 C. C. A. 41, 120 Fed. 737 ... 33
Pamperin v. Scanlan, 28 Minn. 345, 9 N. W. 868 ... 464
Parker v. Porter, 11 Ill. App. 602 ... 475
Parmelee v. Simpson, 5 Wall. 81, 18 L. ed. 542 ... 476

PAGE
Patterson v. Thompson (C. C.) 90 Fed. 647 511
Paxton v. Scott, 66 Neb. 385, 92 N. W. 611, 10 Am. Bankr. Rep. 80 480
Peck v. Brighton Co. 69 Ill. 200 176
People v. Barnnovich, 16 Cal. App. 427, 117 Pac. 572 290
People v. Fitzgerald, 51 Colo. 175, 117 Pac. 135 290
People v. Gosset, 93 Cal. 641, 29 Pac. 246 290
People v. Hamilton, 103 Cal. 488, 37 Pac. 627 107
People v. Mayhew, 150 N. Y. 346, 44 N. E. 971 310
People v. Seeley, 139 Cal. 118, 72 Pac. 834 297
People v. Snyder, 75 Cal. 325, 17 Pac. 208 445
People v. Vann, 129 Cal. 119, 61 Pac. 776 445
People ex rel. Wood v. Assessors & Collector of Taxes, 137 N. Y. 201 625
People ex rel. Morrison v. Board, 56 Hun, 459, 10 N. Y. Supp. 88 605
People ex rel. Stetson v. Calhoun County, 36 Mich. 10 86
People ex rel. O'Mara v. Cayuga County, 43 N. Y. S. R. 77, 17 N. Y. Supp. 314 ..... 604, 605
People ex rel. Coffey v. Democratic General Committee, 164 N. Y. 335, 51 L.R.A. 674, 58 N. E. 124 326
People ex rel. Breckon v. Election Comrs. 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562 328
People ex rel. Ahrens v. English, 139 Ill. 622, 15 L.R.A. 131, 29 N. E. 678 328
People ex rel. Van Keuren v. Esopus, 74 N. Y. 310 244
People ex rel. Phœnix v. New York, 1 Hill, 362 86
Perry v. Cheboygan, 55 Mich. 250, 21 N. W. 333 ..... 604, 605
Perry v. Ford, 17 Mo. App. 213 15
Perry v. Hackney, 11 N. D. 148 329
Phelps v. Illinois C. R. Co. 63 Ill. 470 175
Phœnix Ins. Co. v. Flemming, 65 Ark. 54, 39 L.R.A. 789, 67 Am. St. Rep. 900, 44 S. W. 464 146
Phœnix Ins. Co. v. Mills, 77 Ill. App. 546 152
Pier v. Lee, 14 S. D. 600 176
Potter v. Kimball, 186 Mass. 120, 71 N. E. 308 431
Potter v. Potter, 45 Wash. 401, 88 Pac. 625 236
Power v. Bowdle, 3 N. D. 107 ..... 195, 396
Power v. Kitching, 10 N. D. 254 195
Power v. Larabee, 2 N. D. 141 404
Powers v. First Nat. Bank, 15 N. D. 466 ..... 61, 63, 228, 229, 404, 405
Powers v. Hitchcock, 129 Cal. 325, 61 Pac. 1076 626
Powers Dry Goods Co. v. Nelson, 10 N. D. 580 ..... 263, 480
Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246 475
Pueblo Electric Street R. Co. v. Sherman, 25 Colo. 114, 71 Am. St. Rep. 116, 53 Pac. 322 18
Pulliam v. Pulliam, 10 Fed. 53 511
Pye v. Mankato, 38 Minn. 536, 38 N. W. 621 530
Pyke v. Jamestown, 15 N. D. 157 529

Q.

Queen Ins. Co. v. May, — Tex. Civ. App. —, 35 S. W. 829 146

R.

Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222 ..... 273, 593
Ramaley v. Ramaley, 69 Minn. 491, 72 N. W. 694 180
Rath v. Rath, 2 Neb. (Unof.) 600, 89 N. W. 612 372
Rawlins v. Jungquist, 16 Wyo. 403, 94 Pac. 464 ..... 604, 607
Rawlins v. Jungquist, 16 Wyo. 426, 96 Pac. 144 604
Ray v. St. Paul, 44 Minn. 340, 46 N. W. 676 530
Raymond v. Edelbrock, 15 N. D. 231 18

PAGE
Raymond v. Madison County, 5 Mont. 103, 2 Pac. 306 86
Redmon v. Chacey, 7 N. D. 231 383
Reed v. Reed, 6 Ind. App. 317, 51 Am. St. Rep. 310, 33 N. E. 638 372
Rhodes v. Brightwood, 145 Ind. 21, 43 N. E. 942 476
Rice v. Coffey County, 50 Kan. 149, 32 Pac. 134 625
Rice v. Crescent City R. Co. 51 La. Ann. 108, 24 So. 791 18
Richmire v. Andrews & G. Elevator Co. 11 N. D. 453 501
Rickards v. Cunningham, 10 Neb. 420, 6 N. W. 475 546
Ricker v. Kelly, note in 10 Am. Dec. 38 633
Ridgley v. Abbott Quicksilver Min. Co. — Cal. —, 79 Pac. 833 180
Rio Grande County v. Hobkirk, 13 Colo. App. 180, 56 Pac. 993 605
Riter v. Douglass, 32 Nev. 400, 109 Pac. 444 325
Roanoke Gas Co. v. Roanoke, 88 Va. 810, 14 S. E. 665 361
Roberts v. Bassett, 105 Mass. 409 475
Roberts v. McFadden, 32 Tex. Civ. App. 47, 74 S. W. 105 475
Robinson v. Fife, 3 Ohio St. 551 427
Robinson v. Wilson, 15 Kan. 595, 22 Am. Rep. 272 263
Rockland Water Co. v. Rockland, 83 Me. 267, 22 Atl. 166 361
Rockport v. Walden, 54 N. H. 167, 20 Am. Rep. 131 511
Rockwell v. Humphrey, 57 Wis. 412, 15 N. W. 394 43
Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765 .... 427, 430
Root v. Sturdivant, 70 Iowa, 56, 29 N. W. 802 69
Rose v. Gandy, 137 Ala. 329, 34 So. 239 43
Rosenberg v. Burnstein, 60 Minn. 18, 61 N. W. 684 217
Rouse v. Thompson, 228 Ill. 522, 81 N. E. 1109 325
Russell v. Finn, 110 Iowa, 301, 81 N. W. 589 53
Russell v. Meyer, 7 N. D. 335 257
Russell v. Southard, 12 How. 145, 13 L. ed. 929 43

S.

St. Landry Wholesale Mercantile Co. v. New Hampshire F. Ins. Co. 114 La. 146, 38 So. 87, 3 Ann. Cas. 821 148
St. Louis v. Meintz, 107 Mo. 611, 18 S. W. 30 107
Salzer Lumber Co. v. Claflin, 16 N. D. 601 507
Samson v. Thornton, 3 Met. 275, 37 Am. Dec. 135 476
San Antonio Brewing Asso. v. Magoffin, — Tex. Civ. App. —, 99 S. W. 187 .. 217
Sanborn v. Murphy, 86 Tex. 437, 25 S. W. 613 545
Sargent v. Tuttle, 67 Conn. 162, 32 L.R.A. 822, 34 Atl. 1028 409
Sawdey v. Spokane Falls & N. R. Co. 30 Wash. 349, 94 Am. St. Rep. 880, 70 Pac. 972 26
Scheffler v. Minneapolis & St. L. R. Co. 32 Minn. 518, 21 N. W. 711 19
Schrunk v. St. Joseph, 120 Wis. 223, 97 N. W. 946 257
Scott v. Berkshire County Sav. Bank, 140 Mass. 157, 2 N. E. 925 476
Scranton Gas & Water Co. v. Scranton City, 214 Pa. 586, 6 L.R.A.(N.S.) 1033, 64 Atl. 84, 6 Ann. Cas. 388 361
Searle v. Lead, 10 S. D. 312 360
Seymour v. Deming, 9 Cush. 527 486
Sharp v. State, 15 Tex. App. 171 449
Sheldon v. Barlow, 108 Mich. 375, 66 N. W. 338 486
Shelton v. American Surety Co. 66 C. C. A. 94, 131 Fed. 210 504
Shelton v. Thompson, 96 Mo. App. 327, 70 S. W. 256 945
Shover v. Myrick, 4 Ind. App. 7, 30 N. E. 207 19
Shrieve v. Stokes, 8 B. Mon. 453, 48 Am. Dec. 401 278
Shriver v. Shriver, 86 N. Y. 575 476
Shurter v. Butler, 43 Tex. Civ. App. 353, 93 S. W. 1084 499
Sidway v. South Park, 120 Ill. 496, 11 N. E. 852 86
Sim v. Rosholt, 16 N. D. 77 559
Simonson v. Grant, 36 Minn. 439, 31 N. E. 861 503

PAGE
Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175 15
Slater v. Emerson, 19 How. 224, 15 L. ed. 626 476
Smalley v. Bowling, 64 Kan. 819, 68 Pac. 630 486
Smith v. Day, 39 Or. 531, 64 Pac. 812, 65 Pac. 1055 511
Smith v. Dunn, 68 Cal. 54, 8 Pac. 625 106
Smith v. Jensen, 16 N. D. 408 43
Smith v. Smith, 80 Cal. 325, 21 Pac. 4, 22 Pac. 186 53
Smith v. Taylor, 82 Cal. 534, 23 Pac. 217 475
Snavely v. Pickle, 29 Gratt. 27 43
Soliah v. Cormack, 17 N. D. 393 397
Soliah v. Cormack, 222 U. S. 522, 56 L. ed. 294, 32 Sup. Ct. Rep. 103 398
Southern Queen Mfg. Co. v. Morris, 105 Tenn. 654, 58 S. W. 651 ..... 16, 20
Spackman v. Gross, 25 S. D. 244 464
Speet v. Speet, 88 Cal. 437, 14 L.R.A. 137, 22 Am. St. Rep. 314, 26 Pac. 203 426
Spier v. Baker, 120 Cal. 370, 41 L.R.A. 196, 52 Pac. 659 328
Spurr v. Andrew, 6 Allen, 420 475
Stambaugh v. Smith, 23 Ohio St. 584, 15 Mor. Min. Rep. 82 475
Standard Brewing Co. v. Anderson, 121 La. 935, 46 So. 926, 15 Ann. Cas. 251 176
Standard Implement Co. v. Parlin & O. Co. 51 Kan. 566, 33 Pac. 363 ..... 216, 224
Stanford v. McGill, 6 N. D. 536 504
Stanley v. Schumpert, 117 La. 255, 41 So. 565, 6 L.R.A.(N.S.) 306, note in 116 Am. St. Rep. 202, 8 Ann. Cas. 1044 26
State v. Allen, — Tenn. —, 46 S. W. 303 95
State v. Bennett, 21 S. D. 396 ..... 311, 313
State v. Blake, 86 Minn. 37, 90 N. W. 5 394
State v. Bradbury, 40 Me. 154 476
State v. Bradley, 15 S. D. 148 290
State v. Burpee, 65 Vt. 1, 19 L.R.A. 145, 36 Am. St. Rep. 775, 25 Atl. 964, 9 Am. Crim. Rep. 536 296
State v. Corwin, 151 Iowa, 420, 131 N. W. 659 290
State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90 296
State v. Davis, 9 Houst. (Del.) 558, 33 Atl. 439 84
State v. Empting, 21 N. D. 128 181
State v. Garrington, 11 S. D. 178 ..... 311, 313
State v. Hakon, 21 N. D. 133 291
State v. Hazlett, 14 N. D. 491 291
State v. Kerr, 3 N. D. 523 290
State v. Landry, 85 Me. 95, 26 Atl. 998 313
State v. Malmberg, 14 N. D. 523 291
State v. Reilly, 22 N. D. 353 310
State v. Rhoades, 17 N. D. 580 445
State v. Smith, 49 Conn. 376 252
State v. Trask, 6 Vt. 355, 27 Am. Dec. 563 476
State v. Vorey, 41 Minn. 134, 43 N. W. 324 445
State v. Weems, 96 Iowa, 448, 65 N. W. 387 313
State v. Williams, 11 S. D. 64 311
State v. Winchester, 18 N. D. 534 58
State v. Wisnewski, 13 N. D. 649 312
State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S. W. 655 95
State ex rel. Buffalo County v. Allen, 23 Neb. 451, 36 N. W. 756 107
State ex rel. Montgomery v. Anderson, 18 N. D. 149 316
State ex rel. Runge v. Anderson, 100 Wis. 533, 42 L.R.A. 239, 76 N. W. 482 326
State ex rel. Smith v. Askew, 48 Ark. 82, 2 S. W. 349 336
State ex rel. Hagendorf v. Blaisdell, 20 N. D. 622 316
State ex rel. McCue v. Blaisdell, 18 N. D. 55 ..... 316, 317
State ex rel. Hayes v. Board of Equalization, 16 S. D. 219 84
State ex rel. Troll v. Brown, 146 Mo. 401, 47 S. W. 504 95
State ex rel. Erickson v. Burr, 16 N. D. 581 336
State ex rel. Buttz v. Comptroller General, 9 S. C. 259 95

PAGE
State ex rel. Raymer v. Cunningham, 82 Wis. 39, 51 N. W. 1133 135
State ex rel. Tompton v. Denoyer, 6 N. D. 586 329
State ex rel. Smith v. Drake, 83 Wis. 257, 53 N. W. 496 625
State ex rel. Adair v. Drexel, 74 Neb. 776, 105 N. W. 174 ..... 325, 328
State ex rel. Watson v. Eskew, 64 Neb. 600, 90 N. W. 629 86
State ex rel. Webber v. Felton, 77 Ohio St. 554, 84 N. E. 85, 12 Ann. Cas. 65 325
State ex rel. Dorgan v. Fisk, 15 N. D. 219 ..... 559, 564
State ex rel. Lull v. Frizzell, 31 Minn. 460, 18 N. W. 316 ..... 87, 95
State ex rel. Moore v. Furstenau, 20 N. D. 540 410
State ex rel. Laird v. Gang, 10 N. D. 331 ..... 156, 157, 567
State ex rel. Duryee v. Howell, 59 Wash. 634, 110 Pac. 543 ..... 518, 521
State ex rel. Gulden v. Johnson, 87 Minn. 221, 91 N. W. 604 325
State ex rel. Frontier County v. Kelly, 30 Neb. 574, 46 N. W. 714 107
State ex rel. Anderton v. Kempf, 69 Wis. 470, 2 Am. St. Rep. 753, 34 N. W. 226 626
State ex rel. Sunderall v. McKenzie, 10 N. D. 132 551
State ex rel. Brown v. McMillan, 108 Mo. 153, 18 S. W. 784 336
State ex rel. Vereen v. Marion County, 27 Fla. 438 625
State ex rel. Axen v. Meserve, 58 Neb. 451, 78 N. W. 721 95
State ex rel. Howells v. Metcalf, 18 S. D. 393 326
State ex rel. Labauve v. Michel, 121 La. 374, 46 So. 430 ..... 325, 326
State ex rel. McCarthy v. Moore, 87 Minn. 308, 59 L.R.A. 447, 97 Am. St. Rep. 702, 92 N. W. 4 326
State ex rel. Zent v. Nichols, 50 Wash. 508, 97 Pac. 728 ..... 325, 522
State ex rel. McGrael v. Phelps, 144 Wis. 1, 35 L.R.A.(N.S.) 353, 128 N. W. 1041 325
State ex rel. Utick v. Polk County, note in 60 L.R.A. 161 329
State ex rel. Holman v. Roach, 123 Ind. 167, 24 N. E. 106 95
State ex rel. Wayne County v. Russell, 51 Neb. 778, 71 N. W. 785 107
State ex rel. Lancaster County v. Silver, 9 Neb. 88, 2 N. W. 215 107
State ex rel. Miller v. Sovereign, 17 Neb. 173, 22 N. W. 353 107
State ex rel. Newnham v. State Bd. of Education, 18 Nev. 173, 1 Pac. 844 .. 99
State ex rel. Mitchell v. Stevens, 23 Kan. 456, 33 Am. Rep. 175 625
State ex rel. Shaw v. Thompson, 21 N. D. 426 317
State ex rel. Hathorn v. United States Exp. Co. 95 Minn. 442, 104 N. W. 556 625
State ex rel. Davis v. Willis, 19 N. D. 209 625
State, Dewitt, Prosecutor, v. Rutherford, 57 N. J. L. 619, 31 Atl. 228 565
State Finance Co. v. Beck, 15 N. D. 374 ..... 195, 229, 404, 410, 411
State Finance Co. v. Mather, 15 N. D. 386 ..... 395, 404
State Finance Co. v. Mulberger, 16 N. D. 214 195
State Finance Co. v. Trimble, 16 N. D. 199 ..... 195, 406
Steele v. Branch, 40 Cal. 13 176
Stiles v. Granger, 17 N. D. 502 195
Stillwater Water Co. v. Stillwater, 50 Minn. 498, 52 N. W. 893 361
Stinson v. Dousman, 20 How. 461, 15 L. ed. 966 476
Stockwell v. Crawford, 21 N. D. 261 57
Stone v. Bird, 16 Kan. 488 216
Stoner v. Keith County, 48 Neb. 279, 67 N. W. 311 107
Stow v. Russell, 36 Ill. 18 175
Stringer v. Franklin County, — Tex. Civ. App. —, 123 S. W. 1168 86
Sun Fire Office v. Clark, 53 Ohio St. 414, 38 L.R.A. 563, 42 N. E. 248 145
Supper v. Stauss, 39 Pa. Super. Ct. 388 327
Sutton v. Wanamaker, 95 N. Y. Supp. 525 499
Sweigle v. Gates, 9 N. D. 538 408

T.

Taylor v. Jeter, 23 Mo. 244 504
Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504 475

PAGE
Tee v. Noble, 23 N. D. 225 406
Terre Haute & I. R. Co. v. Mason, 148 Ind. 578, 46 N. E. 332 255
Thole v. Watson, 6 Mo. App. 591 263
Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306 580
Thornton v. Security Co. 117 Fed. 773 152
Timmins v. Russell, 13 N. D. 487 ..... 175, 176
Tinkcom v. Lewis, 21 Minn. 132 463
Tobler v. Nevitt, 45 Colo. 231, 23 L.R.A.(N.S.) 702, 100 Pac. 416, 16 Ann. Cas. 925, 132 Am. St. Rep. 142 272
Torbert v. Hale County, 131 Ala. 143, 30 So. 453 95
Traders' Ins. Co. v. Letcher, 143 Ala. 400, 39 So. 271 146
Traver v. Purdy, 30 Abb. N. C. 443, 25 N. Y. Supp. 452 546
Traylor v. Hollis, 46 Ind. App. 680, 91 N. E. 567 217
Trucks v. Lindsey, 18 Iowa, 504 ..... 43, 53
Trumbull v. Trumbull, 71 Neb. 186, 98 N. W. 683, 8 Ann. Cas. 812 372
Turner v. Reynolds, 81 Cal. 214, 22 Pac. 546 475
Turner v. Wilkinson, 72 Ala. 361 ..... 43, 51
Turnquist v. Cass County, 11 N. D. 514 ..... 403, 559, 564
Tyrrell v. New York, 159 N. Y. 239, 53 N. E. 1111 ..... 86, 95

U.

Union P. R. Co. v. Artist, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365 26
Union P. R. Co. v. Dunden, 37 Kan. 1, 14 Pac. 501 19
Union Sav. Bank v. Barrett, 132 Cal. 453, 64 Pac. 713 511
United States v. Adams, 7 Wall. 463, 19 L. ed. 249 605
United States v. Adams, 33 Utah, 196, 93 Pac. 561 605
United States v. Clough, 5 C. C. A. 140, 6 U. S. App. 377, 55 Fed. 373 95
United States v. Clough, 47 Fed. 791 95
United States v. Hill, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510 107
United States v. King, 147 U. S. 676, 37 L. ed. 328, 13 Sup. Ct. Rep. 439 .. 86
United States v. Mosby, 133 U. S. 273, 33 L. ed. 625, 10 Sup. Ct. Rep. 327 .. 128
United States v. Mowry, 154 U. S. 564, 19 L. ed. 256, 14 Sup. Ct. Rep. 1213 605
United States use of Heise, B. & Co. v. American Bonding & T. Co. 32 C. C. A. 420, 61 U. S. App. 584, 89 Fed. 925 503
United States Fidelity & G. Co. v. Thaggard, 130 Ga. 701, 61 S. E. 726 504
University of Louisville v. Hammock, 127 Ky. 564, 14 L.R.A.(N.S.) 784, 128 Am. St. Rep. 355, 106 S. W. 219 26

V.

Vail v. Amenia, 4 N. D. 239, 59 N. W. 1092 244
Vicksburg, S. & P. R. Co. v. Traylor, 104 La. 284, 29 So. 141 409
Vilas v. Butler, note in 9 L.R.A. 844 272
Vorwerk v. Nolte, — Cal. —, 24 Pac. 840 476
Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470 511

W.

Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748 .. 361
Wadge v. Kittleson, 12 N. D. 452 507
Wagar v. Prindeville, 21 N. D. 245 329
Walcott Twp. v. Skauge, 6 N. D. 383 ..... 364, 366
Wallace Bros. v. Robeson, 100 N. C. 206, 6 S. E. 650 223
Wapello County v. Sinnaman, 1 G. Greene, 413 ..... 604, 605
Ward v. St. Vincent's Hospital, 23 Misc. 91, 50 N. Y. Supp. 466 25
Ward v. St. Vincent's Hospital, 39 App. Div. 624, 57 N. Y. Supp. 784 25
Warner v. Miller, 17 Abb. N. C. 221 372

PAGE
Washburn College v. Shawnee County, 8 Kan. 344 84
Waters v. Pioneer Fuel Co. 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52 .. 15
Wear v. Sanger, 91 Mo. 348, 2 S. W. 307 223
Webster v. McLaren, 19 N. D. 751 606
Weisbecker v. Cahn, 14 N. D. 390 487
Welch v. Hubschmitt Bldg. & Woodworking Co. 61 N. J. L. 57, 38 Atl. 824.... 504
Welch v. Northern P. R. Co. 14 N. D. 25 501
Welch v. Sackett, 12 Wis. 253 476
Wells v. Geyer, 12 N. D. 316 47
Wells v. Lisbon, 21 N. D. 36 529
Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397 372
Westmoreland & C. Natural Gas Co. v. DeWitt, 130 Pa. 235, 5 L.R.A. 731, 18 Atl. 724 176
Wheeler v. Castor, 11 N. D. 347 510
Whelan v. Kinsley, 26 Ohio St. 131 431
Whitcomb v. Chase, 83 Neb. 360, 119 N. W. 673, 17 Ann. Cas. 1088 629
Whiteford Twp. v. Phinney, 53 Mich. 130, 18 N. W. 593 ..... 383, 388
Whittaker v. Deadwood, 12 S. D. 608 360
Wilcox v. Continental Ins. Co. 85 Wis. 193, 55 N. W. 188 145
Wilcoxson v. Miller, 49 Cal. 193 463
Williams v. Johnson, note in 21 L.R.A. 848 272
Williams v. State, 1 Tex. App. 90, 28 Am. Rep. 399 445
Williams v. Williams, 20 Colo. 51, 37 Pac. 614 372
Wilson v. Hayes, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467 464
Wilson v. Hendee, 74 N. J. L. 640, 66 Atl. 413 491
Wilson v. Hill, 17 Nev. 401, 30 Pac. 1076 224
Wilson v. McWilliams, 16 S. D. 96 ..... 43,45, 51
Wilson v. Russell, 4 Dak. 376, 31 N. W. 645 ..... 462, 467
Wolters v. Western Assur. Co. 95 Wis. 265, 70 N. W. 62 152
Wood v. Madison County, 125 Ind. 270, 25 N. E. 188 95
Woods v. Klein, 223 Pa. 256, 72 Atl. 523 480
Woodward v. McCollum, 16 N. D. 42 507
Wright v. Minneapolis, St. P. & S. Ste. M. R. Co. 12 N. D. 159 187

Y.

Yavapai County v. O'Neill, 3 Ariz. 363, 29 Pac. 430 ..... 604, 605, 607
Yorke v. Yorke, 3 N. D. 343 271
Youker v. Hobart, 17 N. D. 296 63
Young v. Atlantic Ave. R. Co. 10 Misc. 541, 31 N. Y. Supp. 441 18

Z.

Zent v. Nichols, 50 Wash. 527, 97 Pac. 728 524
Zirker v. Hughes, 77 Cal. 235, 19 Pac. 423 604

REVISED RULES OF THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

ADOPTED July 1, 1913.
TO TAKE EFFECT Sept. 1, 1913.

1.

CLERK.

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

2.

FEES.

At or before the filing of a record on appeal, or upon the filing of papers in proceedings originating in this court, the appellant or petitioner filing papers shall deposit with the clerk $8.00 to apply on fees; provided that no fees shall be exacted in habeas corpus proceedings.

3.

TERMS.

There shall be four general terms of the supreme court held each year at the seat of government at Bismarck, to be known as the March, June, September and December terms, each of said terms convening on the first Tuesday of each of said respective months; provided that special terms may be held at such times and places as the court may deem necessary and after ten days' notice thereof given by publication as provided by law.

4.

CASES TO BE PLACED ON CALENDAR.

At each general term of the supreme court all cases in which the record on appeal has been filed in said court not less than twenty days prior to the first day of the term shall be placed upon the calendar of said court for final disposition. Attorneys will not be allowed to stipulate cases upon the calendar where the record on appeal has not been filed with the clerk of this court twenty (20) days before the term.

5.

CALENDAR.

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

6.

CLERK TO MAIL PRINTED CALENDAR.

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

7.

ADVANCEMENT OF CASES.

Cases may be advanced for cause shown, but only upon written application supported by affidavit presenting reasons therefor; which application shall be filed on or before the first day of the term. A party shall

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

8.

PROCEEDINGS UPON OPENING OF TERM.

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

9.

SHORT CAUSE CALENDAR.

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

10.

ARGUMENTS HAD—WHEN.

Commencing on the first and third Tuesdays in each month, excepting July and August, unless otherwise provided by order or direction of the Chief Justice, the court will hear such causes as shall have been assigned

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

11.

ORAL ARGUMENT LIMITED.

Counsel on argument shall be limited to thirty minutes on each side. In cases of much importance, where more time for argument is necessary, counsel may at the opening of argument be granted such additional time as may be deemed necessary, not exceeding one hour on each side. Counsel will be limited on arguments on motions to fifteen minutes on each side, the moving party to take ten minutes in opening and five minutes in closing. And oral arguments will not be permitted in cases involving less than $100, exclusive of costs, but such cases will be placed upon the short cause calendar.

12.

DISMISSAL FOR NOT FILING BRIEFS.

Any appeal in which the appellant shall not have served and filed his brief by the time the cause is reached for assignment for argument shall be summarily dismissed or the decision appealed from affirmed, according as justice may require; and for failure of an appellant to serve and file his brief in time, or when the appellant shall not have served and filed his brief more than twenty days preceding the opening of the term, and such delay shall have inconvenienced opposing counsel or needlessly

delayed them in the preparation of the respondent's brief, this court will, on a showing and application therefor, after notice, by respondent, place the cause at the foot of the calendar or impose such terms as may be just, or both. Delay by appellant in serving and filing briefs, until after the first day of the term, places the control of the cause on the calendar with the respondent. The respondent must serve and file his brief within thirty (30) days after the service upon him of appellant's brief, and in any event at least ten (10) days prior to the argument of the case.

13.

NOTICE THAT NO BRIEF OF APPELLANT IS FILED.

On compiling the calendar the clerk shall at once mail notice to counsel for both appellant and respondent of the failure of an appellant to have his brief on file in any cause appearing upon said calendar; and the same shall constitute notice to appellant to forthwith transmit his brief on appeal or suffer respondent to control the place of the cause upon the calendar, or suffer dismissal of the appeal or affirmance of the judgment under the conditions provided elsewhere in these rules.

14.

MOTIONS TO DISMISS.

All motions to dismiss appeals for want of prosecution shall be brought on for hearing on the first day of each term, or within fifteen days thereafter, and shall be upon not less than five days' notice, served personally or by mail, to the opposing counsel.

15.

WHEN APPEALS WILL BE DISMISSED FOR NONPROSECUTION.

In all civil and criminal actions neglect or unreasonable delay on the part of an appellant in ordering or procuring a transcript of the testimony for appeal purposes, or inexcusable delay in thereafter causing a statement of the case to be settled, where the obtaining of a transcript or a statement of the case is necessary, or unnecessary delay in taking any step preliminary to or concerning an appeal, including unnecessary delay or negligence in causing the clerk of the lower court to transmit

the judgment roll or record on appeal to the clerk of this court, shall constitute sufficient ground for dismissal of the appeal so taken; and in the absence of a showing of sufficient cause excusing such delay, a motion to dismiss upon such grounds will be granted. Provided, however, that on showing made, where the benefit of not more than one term of this court has been lost to respondent by such delay, dismissal will not be ordered unless the delay be aggravated and inexcusable. Where needless delay has lost to respondent more than one term of this court the appeal will be dismissed upon his motion. It is the intent of this rule to exact of all appellants a reasonable degree of diligence in prosecuting appeals.

16.

JOINDER OF ISSUE AND TIME FOR ARGUMENT ON ORDERS TO SHOW CAUSE.

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

ficient. Seven copies of all papers used under this rule shall be filed with the clerk, and be of the same style as provided for typewritten briefs.

17.

MOTIONS—NOTICED FOR FIRST DAY OF TERM.

All motions for continuance of causes over the term, or for dismissal, or affecting the place of causes upon the calendar, shall be returnable the first day of the term, or within fifteen days thereafter, and where possible will be heard and disposed of previous to assigning causes for argument.

18.

STIPULATIONS.

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

19.

PETITIONS FOR REHEARING.

Unless otherwise ordered, a petition for rehearing may be filed as of course in any case wherein an opinion is written, if served on the opposing counsel and filed with proof of such service within fifteen days after notice of the decision has been mailed by the clerk. Thereafter ten days will be allowed counsel for the prevailing party to serve and file any citation of authorities or additional reasons in support of the opinion or reply to the petition for rehearing. No petition for rehearing which has not been served on the opposing counsel will be considered or will operate to stay remittitur. The petition must be confined to a citation of authorities or any statute or precedent, or any controlling principle, overlooked by the court or not discussed or passed upon in the opinion. Duplication of argument in original brief will not be permitted. Five copies of petition and reply must be filed. No petition containing scurrilous or discourteous remarks will be filed. The court in its discretion will, on consideration of such petition and reply, change its opinion or decision without granting a rehearing.

20.

OPINIONS.

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

21.

TAXATION OF COSTS.

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

22.

EXECUTION FOR COSTS.

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

23.

PROCESS—WHEN RETURNABLE.

All writs and process issued from and out of this court shall be signed by the clerk, sealed with the seal of the court, and attested of the day when the same issues. When no necessity appears for an earlier return to be made, and except when otherwise ordered, all process shall be made returnable on the first day of the term next succeeding its issue. In the

absence of an order otherwise fixing the time it shall be deemed returnable on the first day of the term next succeeding its issue.

24.

CORRECTION OF RECORDS ON APPEAL.

The court will grant either party, on application, permission to cure any defect or omission in any return required by law or by these rules to be filed with the clerk; and in a proper case, on application, after notice to opposing counsel, a record may be returned for the use of the district court when that court desires to amend the record of the proceedings had below. Any application to amend should be made on or before the first day of the term and in any event without delay after discovering the defect or omission.

25.

PAPERS TO BE TRANSMITTED—CLERK'S CERTIFICATE APPENDED.

When an appeal is taken (except in cases where by order of the district court copies are transmitted in lieu of original papers) the clerk shall transmit the original judgment roll, or in case of an order, the original order and original papers used by each party on the application for the order, as required by sec. 7206, R. C. 1905, with his certificate attached thereto as herein provided. In framing appealable orders the attention of trial courts and of counsel is directed to sec. 7325, R. C. 1905.

26.

RECORD TO BE TRANSMITTED ON APPEALS.

(A) From Orders:

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

(B) From Judgments:

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

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

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

27.

RESPONDENT MAY REQUIRE RETURN TO BE TRANSMITTED OR HAVE APPEAL DISMISSED.

An appeal is deemed perfected, in civil cases, upon both the service and filing of a notice of appeal with undertaking on appeal, and in criminal cases upon the service and filing of a notice of appeal. The appellant shall cause the proper return to be made and filed with the clerk of the supreme court within 60 days after the appeal is so perfected, unless he shall, upon showing for cause made, upon five days' notice to respondent, procure from the trial court an order that the record shall remain in the district court for such time as shall be necessary to enable the appellant to properly prepare and have the same certified, which order shall definitely specify such extension of time. No ex parte extension of time for such purposes shall be so granted except upon written stipulation filed. If after the expiration of said 60-day period for transmission of the record, or upon the expiration of the time as extended by the trial judge, the return on appeal has not been filed with the clerk of this court, the respondent may, by notice in writing, require such return to be filed within 20 days after the service of such notice; and if the return is not filed in pursuance of such notice the appellant shall be deemed to have abandoned the appeal, and, on an affidavit proving when the appeal was perfected, accompanied with a copy of the original notice of

appeal, and that no extension of time has been granted by the trial judge and that the case is not within the exceptions mentioned in rules 30 and 31, and proof of the service of such notice to transmit the record, and a certificate of the clerk of this court that no return has been filed, the respondent may on eight days' notice in writing to the appellant, apply to any judge of this court for an order dismissing the appeal for want of prosecution with costs, which if so dismissed will authorize the court below to thereupon proceed as though there had been no appeal. Provided, however, that this rule shall have no application to cases where the respondent has elected to himself cause the record to be transmitted to the supreme court as regulated by the proviso contained in sec. 7206, R. C. 1905. The district court or judge thereof shall not grant any extension of time to appellant to file said return on appeal with the clerk of this court, without the consent of respondent, if respondent has served the eight days' notice in writing of his application for an order of dismissal for want of prosecution.

28.

STATEMENT—SIZE AND REQUIREMENTS.

The statement of the case and copies thereof to be filed shall be carefully prepared, bound on the side, clearly legible, and upon paper of not less than 16 pounds per ream of folio in weight, ($8\frac{1}{2}$ x 11 inches) not over 500 pages per bound volume, carefully and fully indexed to examination of witnesses and exhibits, arranged in the order of their reception in evidence, with margins of not less than one and one-half inches on each side, on plain white or yellow paper, yellow preferred, and made with black carbon or ribbon, and of a kind that will not quickly fade. Said statement shall also be folioed and paged and bound in flexible covers. Illegible statements of the case or those not complying with this rule will not be received for filing.

29.

PRINTED STATEMENTS OF THE CASE PERMITTED.

In all cases, civil and criminal, the appellant may present printed copies of the original statement of the case to the number of nine, to be filed with the clerk, cost of the printing of which may be taxed as other

disbursements are taxed, should the party printing the same prevail, provided the cost of such printing shall not be taxed at more than sixty cents per page; and the fact that typewritten copies of the original statement could have been filed shall not defeat the right to tax the cost of the statement so printed as a part of the disbursements of the party prevailing. Where the statement of the case is of great length and a review of all or the greater part thereof is necessary, the court will be saved much labor and inconvenience if printed statements are furnished. Furnishing printed statements is not obligatory, however, but remains at the option of the appellant. Where the statement is printed the brief may be much more abbreviated or condensed, avoiding double printing where possible, and the rules governing printed briefs will be considered as modified accordingly as to contents.

30.

SETTLEMENT OF STATEMENT OF THE CASE.

(a) General Provisions.

The statement of the case in all civil actions and proceedings must be prepared and settled in conformity with chapter 131, Laws of 1913. In case of the death or removal of the district judge his successor, if not disqualified, shall, in all cases civil and criminal, settle and sign the statement of the case, but during a vacancy in such office the statement may be settled by a judge of an adjoining district. In the absence of the trial judge from the state the judge of any adjoining district may, upon written request of such judge, settle the statement and enlarge the time for so doing. If the judge authorized to settle a statement of the case shall refuse to allow an exception in accordance with the facts, in any case civil or criminal, the party desiring the statement settled, or the exception included, may apply by petition to the supreme court to prove the same, in accordance with the provisions of section 7060, or section 10075, R. C. of 1905, according as the case be civil or criminal.

(b) Statement in Civil Cases—Contents.

It shall not be necessary in civil cases to reduce testimony to narrative form, but instead the transcript of the evidence, after the same has been duly certified by the official court reporter taking and transcribing the

same, as a true and correct transcript of the original shorthand notes of testimony taken by him on the trial, shall be served by the party desiring its settlement upon the opposing party, who shall, within the statutory time, serve any amendments desired, and thereafter the trial judge shall, after making the transcript conform to the facts, settle and certify the same as correct. Provided, however, that nothing herein contained shall prevent the settlement of a statement of the case upon stipulation of counsel; but the trial judge may in any case disregard a stipulated statement of fact presented to him to be settled as a statement of the case and require in lieu thereof, or for the purpose of verifying said stipulated statement presented, a transcript of the evidence duly certified as correct by the official court stenographer.

(c) Statement in Criminal Cases.

In criminal cases the statement of the case must still be settled as required by sections 10074 to 10078, inclusive, R. C. of 1905.

31.

PREPARATION OF JUDGMENT ROLL. JURY CASES—CIVIL ACTIONS.

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

If the adverse party questions the correctness of the transcript he shall, five days before the date set for the certification of such record, or within such further time as the court may allow, serve upon the party

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

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

a review is sought of an order enlarging or denying time in which to do any act preparatory to appeal, the judgment roll shall contain the application therefor and all affidavits used and the order made thereon, which order shall recite the papers and proceedings upon which it is based.

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

32.

PREPARATION OF JUDGMENT ROLL IN CRIMINAL CASES.

The judgment roll on appeal in criminal cases shall consist of the original notice of appeal with proof of service, and a copy of the information or indictment and of any demurrer or motion filed and of the clerk's minutes of the trial, including his minutes of the plea entered and the court's rulings on any demurrer or motions; a copy of the verdict and clerk's minutes thereof (see sec. 10106, R. C. 1905) and all instructions to the jury given, requested and refused and exceptions taken or filed; and if oral instructions were given, a certified transcript thereof, with all exceptions thereto taken and filed, and a copy of all papers filed in the action; and any papers used on motion for a new trial or in arrest of judgment, and order made thereon. Where a statement of the case is settled it (together with the order settling it) shall also be incorporated into the judgment roll. The judgment roll must be authenticated by the clerk of the district court, as required by sec. 10147, R. C. 1905. While the statute does not require the clerk of the district court to submit the judgment roll as certified by the clerk to the trial judge for inspection before its transmission to this court, nevertheless it should be done where possible to avoid the possibility of errors or omissions therein.

33.

PREPARATION OF JUDGMENT ROLL IN CASES TRIABLE DE NOVO.

In all actions tried under the provisions of sec. 7229, R. C. 1905, the proceedings to procure a settlement of the statement of the case shall be taken as in other civil actions as provided in these rules, and as required by chap. 131, Laws of 1913. *In all cases where a trial de novo*

of all issues is desired the appellant must specify in his statement of the case that he desires a review of the entire case in the supreme court, and the judge's certificate settling the statement must state that such statement contains all the evidence and proceedings had on the trial. But if the appellant desires a review of only particular facts *the specification must state the particular facts of which a review is desired,* in which event the specifications may be in the following form: "Appellant specifies the following questions of fact which he desires the supreme court to review, to wit: (One ———, Two ———, Three ———, etc.,— stating each fact to be reviewed separately and concisely). When such particular review is specified the statement shall contain only such evidence as relates to the questions of fact to be reviewed. *The specification demanding a review of the entire case or of certain specified facts must be incorporated in and settled as a part of the statement of the case. This is imperative under section* 7229, R. C. 1905, not amended by chap. 131, Laws of 1913.

34.

CORRECTION OF THE STATEMENT OF THE CASE.

A trial court may, at any time before the record on appeal has been transmitted to the supreme court, upon request of either party, upon notice to the other, or upon its own initiative, after notice to counsel, correct any statement of the case which may be found not to conform to the facts, to the end that the same may conform to the proceedings actually had upon the trial.

35.

ABSTRACTS NOT REQUIRED— TYPEWRITTEN STATEMENTS FILED IN LIEU THEREOF.

Abstracts are no longer required either in civil or criminal cases, but instead the original judgment roll (in criminal cases a certified copy thereof), including the original statement of the case as settled by the trial judge, together with two duplicate first impression carbon copies of said statement, shall be filed with the clerk of this court in lieu of abstracts formerly required. See chap. 131, Laws of 1913.

36.

BRIEFS ON APPEAL—WHEN PRINTED.

In all civil cases in which the amount in controversy, exclusive of costs, does not exceed $300, and in all criminal cases wherein the defendant shall have been adjudged to be in indigent circumstances and unable to employ counsel on trial, typewritten briefs may be filed in this court on appeal. In all other cases, civil and criminal, briefs shall be printed and must conform to the requirements prescribed in rule 37.

37.

PRINTED BRIEFS—ARRANGEMENT AND CONTENTS, IN JURY TRIALS.

The brief of the appellant shall contain in the front thereof that portion of the pleadings of both parties necessary to an understanding of the nature of the case and the issues. The appellant shall then print his specifications of errors of law and fact and state whether the appeal is from an order denying or granting a new trial, and if so, whether the specifications were served with the notice of appeal. Then shall follow a concise statement of the facts of the case, presenting succinctly the questions involved and the manner in which they are raised, to be followed with the findings and conclusions and order for judgment, verdict, and, if entered and material, the judgment. Where the sufficiency of the evidence to sustain the findings or verdict is challenged, the evidence in the particulars wherein the same is alleged to be insufficient shall be set forth fully. Where a consideration of the findings, conclusions and order for judgment is unnecessary to a decision of the error assigned, the brief shall so state and the same need not be printed. Where rulings on testimony constitute the errors complained of, sufficient explanatory facts or evidence shall be recited. Errors may be assigned by groups where the same argument applies to them as classified; otherwise the error should be assigned in connection with the argument thereof made in the brief. In general, the brief shall contain at the front thereof so much of the pleadings and testimony as shall be necessary to a general understanding of all issues presented for determination, obviating the necessity of consulting the three typewritten statements of the case, for the reason that the law exempts appellant

from the necessity of filing a sufficient number of statements that each member of the court may be furnished with one. Appellant must recite in his brief so much of the evidence or the record as contained in the original judgment roll as will fully illustrate the points made in his brief and upon which he urges a modification or reversal of the judgment appealed from. And the brief of the respondent shall likewise contain a summary of the evidence constituting his defense or explanation of any points raised by appellant's brief. The briefs must state fully and fairly all the facts necessary to the decision of the matters presented therein under penalty for noncompliance of having the briefs stricken from the files, and, where the appellant is in fault, the appeal summarily disposed of; or where the respondent disregards this rule, terms will be imposed or upon his recovery he will be denied the right to tax costs for defective briefs. In citing cases the name of the case and the report shall be given, the same to constitute a separate line, properly indented. All cases cited from this court, when published, should be cited by reference to the official state reports. Reference in the briefs to testimony may refer by page to the statement of the case. Each assignment of error in the brief must refer to the specification of errors served, and upon which it is predicated. The brief of the respondent shall correspond to that of the appellant, except that no assignment of errors is required and no statement of facts need be made except as the facts presented in the brief of the appellant are controverted, when the facts as controverted shall be stated. In answering the appellant's points, respondent shall discuss them in the same order adopted by the appellant. Assignments of error not within the scope of the specification of errors served will not be considered, nor will questions of law or of fact not raised by the specifications and discussed in the briefs.

38.

PRINTED BRIEFS—ARRANGEMENT AND CONTENTS, IN TRIALS DE NOVO.

In appeals in actions triable de novo the appellant shall specify, at the front of the brief, as he is required to specify in his statement of the case, a demand for a review of the entire case or the part particularly specified to be reviewed. Such portion of the testimony as shall be necessary to illustrate the point shall be printed, and appellant shall

designate those findings claimed to be unsupported by the evidence, and concisely state the facts claimed to be established by the evidence, and quote such parts of the evidence as tend to sustain his contention. Where the evidence is conflicting he may argue the facts in connection with his contention as to what facts are or should be found. Where particular questions of fact are specified for review, the same will be tried in connection with the evidence bearing thereon, and other matters not at issue or not within the specifications will be deemed properly decided by the trial court, as provided in sec. 7229, R. C. 1905. The testimony may be printed in the brief in narrative form when desired, and when so printed by appellant such narrative will be taken as true except when challenged.

39.

PRINTED BRIEFS—ARRANGEMENT AND CONTENTS, IN BRIEFS ON APPEAL FROM ORDERS AND IN SPECIAL PROCEEDINGS.

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

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

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

40.

SIZE OF PRINTED BRIEFS AND TYPE TO BE USED.

When printed briefs are required nine (9) shall be filed. All briefs shall be printed upon white, unglazed book paper, of reasonable thickness, in size ten and one-quarter ($10\frac{1}{4}$) inches long by six and three-quarters ($6\frac{3}{4}$) inches wide, and paged and folioed from the commencement to the end. The printed page shall be seven (7) inches long by three and one half ($3\frac{1}{2}$) inches wide, with an outer margin of one and

one half ($1\frac{1}{2}$) inches upon which shall appear the folio numbers. The finished book shall be trimmed to ten and one fourth ($10\frac{1}{4}$) inches in length and six and three quarters ($6\frac{3}{4}$) inches in width. Small pica solid is the smallest letter and most compact form of composition allowed. On the cover shall appear the title of the cause, the court and county in which and the name of the judge before whom it was tried, and the names of counsel and their addresses. The covers shall be of light color to plainly show filing marks. No charge for printing briefs shall be allowed as a disbursement unless the requirements of this rule have been substantially complied with. Where parties are awarded costs and disbursements they may tax for briefs printed in compliance with the rules of this court the sum actually paid, not to exceed, however, sixty cents ($.60) per page of printed matter.

41.

INDEXING BRIEFS AND STATEMENTS.

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

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

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

42.

TYPEWRITTEN BRIEFS.

In cases where typewritten briefs are allowed, they shall conform to the requirements of the rule of this court governing the preparation of statements of the case, under rule 28. Seven copies shall be filed.

43.

APPLICATION FOR WRIT OF HABEAS CORPUS.

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

44.

WHEN STATE IS A PARTY—ATTORNEY GENERAL SERVED.

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

45.

ATTORNEYS—ADMISSION TO PRACTICE.

Applications for admission to the bar of this state, when made upon a certificate issued by a court of any other state, may be made at any regular or special term of this court. Such application shall be upon written motion made by a member of the bar of this court and filed with the clerk; and with such motion shall be filed the applicant's certificate of admission to practise in the foreign state and his affidavit, which shall disclose the place or places where he has practised law in such foreign state or states, the length of time he has practised and shall show that he has been actively and continuously engaged in the practice of law at the places designated in the foreign state or states for a period of more than three years in the aggregate. He shall also give the name and postoffice address of one or more of the district or circuit judges, who have presided during said time in the court before which he has practised, and, where possible, present the certificate of such judge show-

ing the above facts in support of his application. The affidavit of the applicant shall also disclose whether any proceedings in disbarment or suspension of his license to practise are pending against him or were pending at the time of his removal from the foreign jurisdiction, and that he is still an attorney at law in good standing in such foreign state.

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

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

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

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

46.

DISBARMENT.

All petitions for disbarment, presenting facts sworn to upon positive knowledge, or upon information and belief and corroborated by facts proven, and upon charges made in apparent good faith, or where the court in its discretion deems it necessary that such action be taken, may be referred to the proper committee of the state bar association with instructions to fully investigate, as provided by chap. 11, Laws of 1913, and to make a report of the facts or evidence taken and the conclusions of the committee. If therefrom it shall appear that reasonable grounds exist for further investigation or for the prosecution of charges of disbarment, the same will be ordered and said committee or other person appointed by this court will be directed to prepare and file formal written accusations and prosecute the matter to final determination. The expenses thereof to be paid by the state, as provided by law.

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

CLERK'S CERTIFICATE.

Supreme Court, }
State of North Dakota. } ss.

I, R. D. Hoskins, Clerk of the Supreme Court of North Dakota, do hereby certify that the above and foregoing Revised Rules of Practice of the Supreme Court of North Dakota are true and correct copies of such rules as adopted by the court at a regular session thereof, held at the Capitol July 1, 1913.

Witness my hand and the seal of said Court this 1st day of July, 1913.

R. D. Hoskins,
Clerk.

(Seal)

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

CORBETT v. GREAT NORTHERN RAILWAY COMPANY.

(135 N. W. 665.)

Appeal — remanding case for further proceedings — time limit for — discretion of lower court as to.

1. Section 7228, Rev. Codes 1905, provides that when a case has been remanded by the supreme court for further proceedings in the trial court, proceedings must be had therein within one year from the date of the order of the supreme court remanding it, or in default thereof the action shall be dismissed, unless, upon good cause shown, the court shall otherwise order. *Held*, that the district court in such cases is permitted to exercise its sound discretion, and that its decision will only be reversed when that discretion is clearly abused.

Appeal — review of discretion.

2. The facts and circumstances in the case at bar examined and it is *held*, that the trial court having refused to dismiss the action, this court cannot say that it is clear that that court abused its discretion in so doing.

Opinion filed March 13, 1912.

Appeal by defendant from an order of the District Court for Williams County, *Fisk*, J., denying its motion to dismiss an action for failure to prosecute it to trial within a year after the order of reversal.

Affirmed.

Murphy & Duggan, for appellant.
H. B. Doughty, for respondent.

SPALDING, Ch. J. This is an appeal from an order denying appellant's motion to dismiss the above-entitled action, for failure of the plaintiff to prosecute it to trial within one year after the decision of the supreme court, reversing a former judgment entered therein by the district court. The remittitur on the judgment of the supreme court was transmitted to the clerk of the district court about the 15th of April, 1910. The case appears to have been placed upon the calendar of the district court of Williams county at the next term, and to have remained there three terms, until an order was made, March 15, 1911, striking it from the calendar; but, as shown, it was placed upon the calendar by the clerk without authority and without any notice of trial having been served.

The respondent excuses his neglect by showing that it had at all times been his purpose to bring the case to trial as speedily as possible, and that it was not noticed for trial by reason of a misunderstanding occasioned by the employment of two attorneys on the part of the respondent. The principal counsel, seeing it upon the calendar, was thereby led to believe that the other counsel had noticed it. He also showed that it could not have been tried had it been properly on the calendar. The facts were fully presented to the trial court, who was also aware of the condition of the calendar in that county, and knew of his own knowledge whether the case could have been reached for trial at any time, had it been properly noticed. It is clear that the respondent relied upon the mistaken information given him by his counsel that the case would be tried at the first term at which civil cases were tried, as it is shown that he was present on several occasions, with his witnesses, prepared to go to trial.

Section 7228, Rev. Codes 1905, provides that in every case on appeal in which the supreme court shall order a new trial or further proceedings in the court below, the record shall be transmitted to such court and proceedings had therein within one year from the date of such order in the supreme court, or in default thereof that the action shall be dismissed, unless upon good cause shown the court shall otherwise order. The district court, in matters of this nature, is per-

mitted to exercise its sound discretion, and its decision should only be reversed when that discretion is clearly abused. Bessie v. Northern P. R. Co. 18 N. D. 507, 121 N. W. 618. And, in view of the facts and circumstances surrounding this proceeding, we do not feel justified in saying that the court abused its discretion in refusing to dismiss the action. It is true that more than one year had elapsed without active proceedings having been taken, but the respondent was innocent in the matter, and his principal attorney was laboring under a most natural belief, and his failure to act was but the natural result of seeing the action upon the calendar; and we think it would be too harsh to hold, in this case, that the respondent must lose his right of action, in view of these facts and circumstances, when no harm has been done by the delay.

Each case of this kind must, in a large measure, stand upon its own facts, and the facts in relation to this motion distinguish it quite clearly from those in the Bessie Case, supra. In that case Bessie was his own attorney.

The order is affirmed.

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

THARP v. BLEW.

(135 N. W. 659.)

Pleading — in action on contract of employment — variance.

Plaintiff's complaint alleged that between certain dates he "performed work and labor for defendant of the value amounting to $130, which amount the defendant agreed to pay; that there has been paid plaintiff on account of the labor and services so performed the sum of $23, and no more," together with a demand for judgment. The answer was a general denial. The proof made established an employment by the month for an agreed monthly wage, and nonpayment. The court directed a verdict of dismissal on the ground that the complaint stated "a cause of action on a *quantum meruit*, whereas the uncontradicted evidence showed any services performed were under and by virtue of an express contract." *Held* error in that there was no variance between the complaint and the proof. The complaint was not a *quantum meruit* count.

Opinion filed March 13, 1912.

Appeal by plaintiff from a judgment of the District Court for Sargent County, *Allen,* J., dismissing an action brought to recover on a contract of employment.

Reversed.

J. G. Forbes and *O. S. Sem,* for appellant.

Wolfe & Schneller, attorneys on this appeal, and *J. E. Bishop* and *T. E. Curtis,* attorneys on the trial, counsel for respondent.

Goss, J. Plaintiff's complaint in brief alleges that between specified dates he "performed work, labor, and services for the defendant of the value amounting to $130.95, which amount the defendant agreed to pay; that there has been paid plaintiff on account of the labor and services so performed the sum of $23.66, and no more," together with a demand for judgment for the balance of $107.29. The answer consists of a general denial, with a detailed plea of payment, pleading an express contract of employment of plaintiff for one year; and based thereon a counterclaim for damage from plaintiff, quitting without cause such employment during the term, to which counterclaim plaintiff rejoined by denial.

During the trial (as evidenced by the rulings on objections made and sustained, unduly curtailing plaintiff's proof, and again at the close of the case) the court assumed that the complaint charged only a cause of action on a *quantum meruit* count. Plaintiff's proof, elicited on cross-examination, when plaintiff rested, disclosed an employment at $30 per month for no definite term except from month to month at the pleasure of the parties, a termination of such employment by mutual consent, and an amount agreed upon as due plaintiff therefor and its nonpayment. Defendant then moved the court "to direct the jury to return a verdict for the defendant on the ground that the complaint states a cause of action on a *quantum meruit,* whereas the uncontradicted evidence shows that any services performed by the plaintiff for the defendant were under and by virtue of an express contract." Plaintiff's counsel thereupon concluding that the court's ruling would be (as it had previously been during the trial) that the complaint stated but a cause of action on a *quantum meruit,* asked leave to reopen his case and amend his complaint to conform to the proof. In so doing he explicitly stated the amendment he desired to make, showing thereby that

the amendment desired was not only in conformity with the proof, but was contrary to the testimony of the plaintiff. Counsel was evidently laboring under a misapprehension of fact and law as to the terms and legality of the employment, and because thereof desired the erroneous and unnecessary amendment offered. The court agreed with counsel in the necessity for an amendment to the complaint, concluding that a fatal variance existed between the complaint and the proof, but denied plaintiff the right to reopen his case and amend as desired, probably for the reason that to have allowed the request would have been but the useless exercise of discretion in permitting an amendment after which a supposed fatal variance would still have existed between the complaint as amended and the proof as made.

The fundamental error was in the mistaken assumption that the complaint stated a cause of action founded only on a *quantum meruit,* and because of which false premise the equally erroneous deduction followed that a fatal variance existed between the written complaint and the proof as it then stood. The court evidently assumed a pleading of reasonable value, instead of agreed value, and wholly ignored the pleading of an agreement to pay an amount certain for the work, as evidenced by the words, "which amount the defendant agreed to pay." The complaint did not plead a contract of employment to be reimbursed by payment to the reasonable value of service performed, but instead, alleged the value of the service performed, with an expressed or implied agreement by defendant to pay an amount stated therefor. The complaint is not on a *quantum meruit,* but, strictly speaking with reference to common-law pleading, pleads a count on indebitatus assumpsit. No variance existed between the pleading and the proof. The court should not have granted the motion for a directed verdict. See 2 Ency. Pl. & Pr. 1010; 1 Chitty, Pl. 352; Lowe v. Jensen, 22 N. D. 148; 3 Century Dig. col. 20; Decen. Dig. Assumpsit, § 6.

The judgment appealed from is reversed and a new trial ordered; appellant to recover costs on this appeal.

RUEHL v. LIDGERWOOD RURAL TELEPHONE COMPANY.

(— L.R.A.(N.S.) —, 135 N. W. 793.)

Independent contractors — master's responsibility as to necessary precaution.

1. Where, in the making of an improvement, it is manifest that injury is likely to result unless due precautions are taken, a duty rests upon him who causes the work to be done to see that such necessary precautions are taken.

Independent contractors — master's duty to see that excavation is guarded.

2. Where a telephone company contracts with a laborer to dig holes in the dooryard of a house, under a contract to furnish a telephone to the occupant of such house, and into which hole someone else is to place the telephone pole, when the proper time comes, it is a legal duty of such company to properly safeguard such hole, and it is immaterial whether the laborer who digs the same is a servant or an independent contractor.

Independent contractors — master's liability.

3. There is a distinction between the liability for injuries resulting from the work which is intrusted to be done, and the liability for injuries occasioned by wrongful and careless acts done in connection with some collateral work or matter.

Contributory negligence in failing to anticipate negligence of other party.

4. There is a natural presumption that everyone will act with due care, and it cannot, therefore, be imputed to a plaintiff as contributory negligence that he did not anticipate culpable negligence on the part of the defendant.

Note. — The liability of an employer for injuries caused by the performance of work by an independent contractor, which is dangerous unless certain precautions are observed, is the subject of an elaborate note in 65 L.R.A. 833, wherein the general doctrine is stated to be that when a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and that he does not escape from liability for the discharge of the duty by employing the contractor if the latter does not take these precautions.

As to contributory negligence of parent as bar to action by parent or administrator for death of child *non sui juris*, see note in 18 L.R.A.(N.S.) 328, and supplemental note in 38 L.R.A.(N.S.) 754.

As to contributory negligence of child, see notes in 55 Am. Dec. 676, and 57 Am. Rep. 478.

As to doctrine of "attractive nuisance," see notes in 19 L.R.A.(N.S.) 1094, and 20 L.R.A.(N.S.) 903.

Injury to child — contributory negligence of parent.

5. It is not contributory negligence as a matter of law, for a mother to allow her children to play in the dooryard while a telephone is being put in the house and the necessary poles are being erected for the purpose. At the most the question is one for the jury, and not for the court.

Negligent killing of child — damages — necessity of consulting mortality tables.

6. In a suit under the statute for damages to the parents occasioned by the death by wrongful act of a child of three and one-half years of age, where there is proof that the child, at the time of the accident, was in good health, it is not necessary to a recovery of damages that mortality tables shall be introduced in evidence in order to prove the life expectancy of the deceased. Such tables are admissible both at the common law, and under § 7303, Rev. Code, 1905, but their introduction is not indispensable. The courts also may take judicial notice of such tables and may instruct the jury accordingly.

Infants — negligence toward, in leaving excavation unguarded.

7. The question as to whether it was negligence for a telephone company to leave unguarded a telephone pole hole 4½ feet in depth, and 20 inches square, in the dooryard of a farmhouse in which its servant knew that children were playing, is a proper matter for determination by the jury, under all the circumstances of the case.

Contributory negligence of small child.

8. A child three and one-half years of age cannot, itself, be charged with contributory negligence.

Opinion filed March 15, 1912.

Appeal from the District Court of Richland county; *Allen, J.*

Action under the statute to recover damages caused by death by wrongful act. Verdict directed in favor of defendant. Plaintiff appeals.

Reversed.

This is an action brought under the statute by Louis Ruehl, the father of, and administrator of the estate of, Louis Ruehl, Jr., deceased, for and on behalf of the father and mother and sisters of the deceased, to recover damages for the death of the said Louis Ruehl, Jr., alleged to have been occasioned by the defendant by carelessly and negligently leaving a telephone post hole "without placing any guards over or above the same, and without taking any precaution of any kind to

avoid" the accident. The evidence is to the effect that on or about the 1st day of April, 1910, one L. J. Christenson was president and manager of the defendant telephone company; that about such time the company arranged to extend its line past the house of the plaintiff and to put a telephone therein; that the dwelling house of the plaintiff stood about 4 rods from the east end of the section line, on which was laid out a traveled highway; that before the holes in which the telephone poles were to be set were dug, defendant telephone company had caused the necessary poles to be hauled and placed along the route of the proposed extension, at about the places where the same were to be set, and had caused the places where it was proposed to have the holes dug marked or designated by sticks or broken lath; that on or about the 1st day of April, 1910, Christenson, on behalf of the telephone company, employed one Frank Zimmerman to dig a line of post holes along the said extension, and agreed to pay him 12½ cents for each hole; that Christenson told said Zimmerman what to do, and supplied him with the tools, and told him how to do the work; that the post holes were to be 4½ feet deep, and that this depth was directed by Christenson; that the spade used by Zimmerman was given to him by Shulke, the employee of the company who marked the holes; that the arrangement was that Zimmerman should dig a line of holes from Lidgerwood out about 2 miles, and the line of poles ran down alongside the highway for about a mile; that he commenced digging at the city limits and worked due east a mile, and in the evening had to go home, so took his tools over to Ruehl's house and went, horseback, to town, and started at Ruehl's place and worked towards town. Then, after finishing up that mile, he commenced next morning at Ruehl's house and worked back and met the holes dug before; that the whole job was about 2½ miles long; that his arrangement with Christenson was that he should dig that line of holes, and should be paid therefor at the rate of 12½ cents per hole, to be paid when the job was finished and accepted by the company; that at the time of the accident, plaintiff's family consisted of himself, his wife, and five children, the oldest child being at the time ten years of age, and the youngest about one year; that the deceased child was aged three years and five months; that on the day of the accident the weather was warm, and plaintiff's children were playing about the house and in the dooryard; that on the said day Frank Zimmerman dug a hole in which

to insert one of the telephone poles about 4 rods directly east from the plaintiff's house, and on or near the west edge of the said public highway; that the hole was partly in the highway and partly to the west, on plaintiff's land; that it was about 4½ feet deep and 20 inches across; that when completed this hole was left uncovered and unguarded; that Zimmerman finished this hole about a quarter after eight in the morning; that he saw the children about ten minutes before he completed it; that when he had completed the hole he proceeded to dig another one about 10 rods from the first one; that they were with him when he dug the third hole, the second one from the one in question; that after he finished, they walked with him a ways; that he did not put anything over the holes, or guard them in any way; that about ten or fifteen minutes before the child was found in the hole, the children were with Zimmerman, and about three-quarters of an hour from the time that he finished digging the first hole; that the plaintiff talked to Zimmerman two or three minutes while he was digging the first hole, and left when he had the hole about half done; that he then went into the field to work; that when he left, Zimmerman was still digging at the first hole; that when he left for the fields, the children were all at home; that he thought they were in the house; that he did not see them in the yard; that Zimmerman did not say anything about covering the hole; that he (Ruehl) did not think or say anything about covering the hole; that the child was a bright, good and healthy boy, and was his only son, and had never been sick. Mrs. Ruehl was working in the house. She saw Zimmerman digging the hole. She knew that the telephone company was about to extend its line to the house. She did not know how deep the hole was going to be dug; nobody had told her anything about it. She did not miss her children at any time. She could hear them talking in the yard, and supposed they were all right. About an hour after the first hole had been dug, the deceased, Louis Ruehl, Jr., fell into the first hole head first, and was either drowned or smothered in the mud.

After the close of plaintiff's testimony, the defendant moved for a directed verdict on the grounds: (1) That there was no actionable negligence on the part of the defendant; (2) contributory negligence on the part of the parents of the deceased child; (3) that the hole in which the child lost its life was not dug by a servant of the defendant,

but by an independent contractor. This motion was granted, and from the judgment dismissing the action this appeal is taken.

W. S. Lander, for appellant.

Zimmerman was simply the servant of defendant, and nothing more; there was no question even to go to the jury as to his being an independent contractor. Wood, Mast. & S. § 1, p. 2; 26 Cyc. pp. 699, 1546; Waggener v. Haskell, 89 Tex. 435, 35 S. W. 1; Jensen v. Barbour, 15 Mont. 582, 39 Pac. 906; Holmes v. Tennessee Coal, Iron & R. Co. 49 La. Ann. 1465, 22 So. 403; Waters v. Pioneer Fuel Co. 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52; O'Neill v. Blase, 94 Mo. App. 648, 68 S. W. 764; Fink v. Missouri Furnace Co. 10 Mo. App. 61; Sadler v. Henlock, 3 C. L. R. 760, 4 El. & Bl. 570, 24 L. J. Q. B. N. S. 138, 1 Jur. N. S. 677, 3 Week. Rep. 181; Turner v. Great Eastern R. Co. 33 L. T. N. S. 431; Texas & P. R. Co. v. Juneman, 18 C. C. A. 394, 30 U. S. App. 541, 71 Fed. 936; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; Stone v. Codman, 15 Pick. 297; State, Redstrake, Prosecutor, v. Swayze, 52 N. J. L. 129, 18 Atl. 697; Lancaster Ave. Improv. Co. v. Rhoads, 116 Pa. 377, 2 Am. St. Rep. 608, 9 Atl. 852; Lewis v. Detroit Vitrified Brick Co. 164 Mich. 489, 129 N. W. 726; Larson v. Home Teleph. Co. 164 Mich. 295, 129 N. W. 894; Barg v. Bousfield, 65 Minn. 355, 68 N. W. 45, 16 Am. Neg. Cas. 188; Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408, 2 Mor. Min. Rep. 194; Brackett v. Lubke, 4 Allen, 138, 81 Am. Dec. 694; Atlantic Transport Co. v. Coneys, 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed 177; Campbell v. Lunsford, 83 Ala. 512, 3 So. 522, 13 Am. Neg. Cas. 164; Giacomini v. Pacific Lumber Co. 5 Cal. App. 218, 89 Pac. 1059; Linnehan v. Rollins, 137 Mass. 123, 50 Am. Rep. 287; DePalma v. Weinman, 15 N. M. 68, 24 L.R.A.(N.S.) 423, 103 Pac. 782; Goldman v. Mason, 18 N. Y. S. R. 376, 2 N. Y. Supp. 337; Pickens v. Diecker, 21 Ohio St. 212, 8 Am. Rep. 55; Smith v. Humphreyville, 47 Tex. Civ. App. 140, 104 S. W. 495; Shearm. & Redf. Neg. §§ 76–79; Southern Cotton Oil Co. v. Wallace, — Tex. Civ. App. —, 54 S. W. 738; Indiana Iron Co. v. Cray, 19 Ind. App. 565, 48 N. E. 803; Brophy v. Bartlett, 1 Silv. Ct. App. 575; Barclay v. Puget Sound Lumber Co. 48 Wash. 241, 16 L.R.A. (N.S.) 140, 93 Pac. 430; Nyback v. Champagne Lumber Co. 48 C. C.

A. 632, 109 Fed. 732; St. Clair Nail Co. v. Smith, 43 Ill. App. 105; Drennen v. Smith, 115 Ala. 396, 22 So. 442; Scott v. Springfield, 81 Mo. App. 312; Speed v. Atlantic & P. R. Co. 71 Mo. 303; Stevens v. Gourley, 14 Moore P. C. C. 92; Steger v. Barrett, — Tex. Civ. App. —, 124 S. W. 174; Mullich v. Brocker, 119 Mo. App. 332, 97 S. W. 549; Andrews Bros. Co. v. Burns, 22 Ohio C. C. 437, 12 Ohio C. D. 305; Anderson v. Moore, 108 Ill. App. 106; Rait v. New England Furniture & Carpet Co. 66 Minn. 76, 68 N. W. 799; Ballard & B. Co. v. Lee, 131 Ky. 412, 115 S. W. 732; Isnard v. Edgar Zinc Co. 81 Kan. 765, 106 Pac. 1003; Missouri, K. & T. R. Co. v. Romans, — Tex. Civ. App. —, 114 S. W. 157; Pearson v. M. M. Potter Co. 10 Cal. App. 245, 101 Pac. 681; Neimeyer v. Weyerhaueser, 95 Iowa, 497, 64 N. W. 416.

Where, in the making of an improvement of any kind, it is manifest that injury is likely to result unless due precautions are taken, duty rests upon the employer to see to it that all necessary precautions are taken. A neglect of this duty will render the employer liable. 26 Cyc. 1560 and note 95, and cases cited; Thompson v. Lowell, L. & H. Street R. Co. 170 Mass. 577, 40 L.R.A. 345, 64 Am. St. Rep. 323, 49 N. E. 913; Davis v. Summerfield, 133 N. C. 325, 63 L.R.A. 492, 45 S. E. 654; Wolf v. Third Ave. R. Co. 67 App. Div. 605, 74 N. Y. Supp. 336; Denison, B. & N. O. R. Co. v. Barry, — Tex. Civ. App. —, 80 S. W. 634, 98 Tex. 248, 83 S. W. 5; Wetherbee v. Partridge, 175 Mass. 185, 78 Am. St. Rep. 486, 55 N. E. 894; Thomas v. Harrington, 72 N. H. 75, 65 L.R.A. 742, 54 Atl. 285; Mullins v. Siegel-Cooper Co. 183 N. Y. 129, 75 N. E. 1112; Downey v. Low, 22 App. Div. 460, 48 N. Y. Supp. 207; Wile v. Los Angeles Ice & Cold Storage Co. 2 Cal. App. 190, 83 Pac. 271; Keyes v. Second Baptist Church, 99 Me. 308, 59 Atl. 446; Wiggin v. St. Louis, 135 Mo. 558, 37 S. W. 528; Murphy v. Perlstein, 73 App. Div. 256, 76 N. Y. Supp. 657; Ann v. Herter, 79 App. Div. 6, 79 N. Y. Supp. 825; Loth v. Columbia Theater Co. 197 Mo. 328, 94 S. W. 847; Southern Ohio R. Co. v. Morey, 47 Ohio St. 207, 7 L.R.A. 701, 24 N. E. 269; Palmer v. Lincoln, 5 Neb. 136, 25 Am. Rep. 470; Robbins v. Chicago, 4 Wall. 679, 18 L. ed. 432; Omaha v. Jensen, 35 Neb. 68, 37 Am. St. Rep. 432, 52 N. W. 833; McCarrier v. Hollister, 15 S. D. 366, 91 Am. St. Rep. 695, 89 N. W. 862; Donovan v. Oakland & B. Rapid Transfer Co. 102 Cal. 245, 36 Pac.

516; Savannah v. Waldner, 49 Ga. 316; Joliet v. Harwood, 86 Ill. 110, 29 Am. Rep. 17; Dooley v. Sullivan, 112 Ind. 451, 2 Am. St. Rep. 209, 14 N. E. 566; Bonaparte v. Wiseman, 86 Md. 12, 44 L.R.A. 482, 42 Atl. 918; Stewart v. Putnam, 127 Mass. 403; Pye v. Faxon, 156 Mass. 471, 31 N. E. 640; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; Woodman v. Metropolitan R. Co. 149 Mass. 340, 4 L.R.A. 213, 14 Am. St. Rep. 427, 21 N. E. 482, 12 Am. Neg. Cas. 80; Dillon v. Hunt, 105 Mo. 154, 24 Am. St. Rep. 374, 16 S. W. 516; Johnston v. Phœnix Bridge Co. 44 App. Div. 581, 60 N. Y. Supp. 947; Covington & C. Bridge Co. v. Steinbrock, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375, and elaborate note; Houston v. Isaacks, 68 Tex. 116, 3 S. W. 693; Wilber v. Follansbee, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559; Chicago Economic Fuel Gas Co. v. Myers, 168 Ill. 139, 48 N. E. 66; Bower v. Peate, L. R. 1 Q. B. Div. 321, 45 L. J. Q. B. 446, 35 L. T. N. S. 321; Adams Exp. Co. v. Schofield, 111 Ky. 832, 64 S. W. 93; Reuben v. Swigart, 15 Ohio C. C. 565, 7 Ohio C. D. 638; Cameron Mill & Elevator Co. v. Anderson, 98 Tex. 156, 1 L.R.A.(N.S.) 198, 81 S. W. 282.

The question as to whether, under the evidence, as matter of law, the parents of the deceased child were guilty of such contributory negligence as precluded a recovery was a question for the jury, and nothing more. Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367, and cases cited at page 377, 121 N. W. 830; Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390; Herbert v. Northern P. R. Co. 3 Dak. 38, 13 N. W. 349; Mares v. Northern P. R. Co. 3 Dak. 336, 21 N. W. 5; Elliot v. Chicago, M. & St. P. R. Co. 5 Dak. 523, 3 L.R.A. 363, 41 N. W. 758.

Purcell & Divet, George W. Freerks, and *P. L. Keating,* for respondent.

Zimmerman was an independent contractor, and the relation of master and servant did not exist between him and the defendant. Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91; Gay v. Roanoke R. & Lumber Co. 148 N. C. 336, 62 S. E. 436; Patton-Worsham Drug Co. v. Drennon, — Tex. Civ. App. —, 123 S. W. 705; McCarthy v. Portland, 71 Me. 318, 36 Am. Rep. 320; Keyes v. Second Baptist Church, 99 Me. 308, 59 Atl. 446; Kampman v. Rothwell, — Tex. Civ. App. —, 107 S. W. 120; 2 Thomp.

Neg. § 22, p. 809; Atlantic Transport Co. v. Coneys, 51 U. S. App. 570, 82 Fed. 177, and instructive note at the end of this case in 28 C. C. A. pp. 392–399; Giacomini v. Pacific Lumber Co. 5 Cal. App. 218, 89 Pac. 1059; Linnehan v. Rollins, 137 Mass. 123, 50 Am. Rep. 287; Goldman v. Mason, 18 N. Y. S. R. 376, 2 N. Y. Supp. 337; Pickens v. Diecker, 21 Ohio St. 212, 8 Am. Rep. 55; Kniceley v. West Virginia Midland R. Co. 64 W. Va. 278, 17 L.R.A.(N.S.) 370, 61 S. E. 811; Penny v. Wimbledon Urban Dist. Council [1898] 2 Q. B. 212, 67 L. J. Q. B. N. S. 754, 62 J. P. 582, 78 L. T. N. S. 748, 14 Times L. R. 477; St. Louis & S. F. R. Co. v. Madden, 77 Kan. 80, 17 L.R.A.(N.S.) 788, 93 Pac. 586; Arasmith v. Temple, 11 Ill. App. 39; Eldred v. Mackie, 178 Mass. 1, 59 N. E. 673; Houghton v. Loma Prieta Lumber Co. 152 Cal. 574, 93 Pac. 377; Louisville & N. R. Co. v. Hughes, 134 Ga. 75, 67 S. E. 542; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; Casement v. Brown, 148 U. S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672; Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58; McColligan v. Pennsylvania R. Co. 214 Pa. 229, 6 L.R.A.(N.S.) 544, 112 Am. St. Rep. 739, 63 Atl. 792; MacDonald v. O'Reilly, 45 Or. 589, 78 Pac. 753; Midgette v. Branning Mfg. Co. 150 N. C. 333, 64 S. E. 5; Finkelstein v. Balkin, 103 N. Y. Supp. 99; Omaha Bridge, & Terminal R. Co. v. Hargadine, 5 Neb. (Unof.) 418, 98 N. W. 1071, 76 Neb. 729, 107 N. W. 864; Hawver v. Whalen, 49 Ohio St. 69, 14 L.R.A. 828, 29 N. E. 1049; Poor v. Madison River Power Co. 38 Mont. 341, 99 Pac. 947; McGrath v. St. Louis & H. Constr. Co. 215 Mo. 191, 114 S. W. 611; Brackett v. Lubke, 4 Allen, 138, 81 Am. Dec. 694; Smith v. Benick, 87 Md. 610, 42 L.R.A. 277, 41 Atl. 277.

Contributory negligence of the plaintiff, administrator, or other beneficiaries is a good defense. Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000.

Bruce, J. (after stating the facts as above). The first question to be determined is whether the defendant at the time of the accident was acting through a servant, or by means of an independent contractor. On this point John L. Matthews, the vice president of the company, testifies that Mr. Christenson was the vice president and had charge of and was a general manager of the construction work; that the company

employed Shulke to mark the places where the holes were to be dug; that no one was employed by the company to dig them. Frank Zimmerman, on the other hand, testifies that "Christenson employed me to dig that hole. I spoke for the job, and he offered me so much a hole, and I did that. Christenson offered me so much a hole, and I accepted the proposition on certain terms. He paid me 12½ cents for each hole. I worked for the telephone company off and on all summer. My directions were that the holes should be 4½ feet. I asked Christenson, and that is what he told me the depth was. I put no guard around the first hole I dug. I made arrangements with Christenson. The arrangement was that I should dig the line of holes from Lidgerwood out to the place, about 2 miles, and that line of holes ran down along the side of the railway for about a mile. My arrangement with Christenson was that I should dig that line of holes and should be paid at the rate of 12½ cents per hole, to be paid for when the job was finished and accepted by the company, and under that arrangement I went ahead and did the work. Q. The tools used in digging the hole belonged to the telephone company? By the court: Do you know that they belonged to the telephone company, or do you merely mean that they were given you by Christenson? A. Why, they were not just exactly given me by Christenson. The tools were given me by Shulke. I don't know who owned them. I had a talk with Christenson at the time I made the arrangement to dig these holes, at the time Christenson supplied me with these tools. I had nothing to do with the marking the place where these holes were to be dug. I was told to dig the holes where I found the stakes. Christenson told me that he would send Shulke out and mark the holes, and to dig them where the stakes were."

The defendant cannot, under these facts, escape liability on the theory that Zimmerman was an independent contractor. There is much confusion in the authorities as to what is and what is not an independent contract. Some hold that the service must be rendered in the course of an independent occupation, and that the work done must be done by one whose independent business it is to do it. Judge Cooley, for instance, defines the term "independent contracts" as follows: "Persons following a regular, independent employment, in the course of which they offer their services to the public to accept orders and execute commissions for all who may employ them, in a certain line of duty,

using their own means for the purpose and being accountable only for final performance." Cooley, Torts, p. 549. Other authorities make the distinction depend solely upon whether, in the transaction of the business, the workman is subject to the orders of his patron, both as to the manner of doing and the result of his work. Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175. Nearly all of the writers, however, agree that where a person or corporation undertakes to do work upon the premises of the owner or of him who is in possession, and such first person intrusts the performance of the work to a contractor or workman, but does not, and is not authorized by the one in possession to, give the control of the premises to the workman or contractor, such workman or contractor will be looked upon as a servant of the first party, and not as an independent contractor. In other words, the courts are inclined to hold, and we hold in this case, that when the telephone company undertook to put the telephone in the house of Louis Ruehl, it impliedly agreed to put it in in a safe and proper manner, and not in a manner which would endanger the lives of the plaintiff and of his family. Anderson v. Moore, 108 Ill. App. 106; Perry v. Ford, 17 Mo. App. 213; Waters v. Pioneer Fuel Co. 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52. There is much in this case which would lead us to hold that in no sense could the witness Zimmerman be held to be an independent contractor, and the general rule is that the burden of proof in such matters is upon him who alleges the fact. Midgette v. Branning Mfg. Co. 150 N. C. 333, 64 S. E. 5. Zimmerman testifies that he was in the employ of the defendant all summer, and that he did not furnish his own tools. A person is not an independent contractor merely because he is paid by the piece or by the job. Foster v. National Steel Co. 216 Pa. 279, 65 Atl. 618; Waters v. Pioneer Fuel Co. 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52; Holmes v. Tennessee Coal, I. & R. Co. 49 La. Ann. 1465, 22 So. 403. Nor does the fact that Zimmerman was not to be paid until the job was satisfactorily completed alter the case. This would merely be evidence of the fact that the method of work was subject to the approval of the company. It is a provision which is implied in all contracts of employment. No laborer can recover his daily wage unless he can show that he has earned it. Even if Zimmerman could be considered as an independent contractor in relation to the

digging of the hole, he was not an independent contractor in relation to the whole of the work, which was the digging of the holes and the placing of the posts therein. His work was but a part of a series of work. The posts were on the ground to be put in by some one else. All that we learn of his contract was that he should dig the post holes. If the contract presupposed this and this alone, it would presuppose the construction of dangerous pitfalls, and the principal would be liable for them the same as if he had authorized an independent contractor to construct a wall or a building according to specifications which were inherently dangerous, and which resulted in the falling of such wall. The rule seems to be well established that where, in the making of an improvement of any kind, it is manifest that injury is likely to result unless due precautions are taken, a duty rests upon him who causes the work to be done to see that all necessary precautions are taken. See 26 Cyc. p. 1560, and numerous cases there cited. According to the evidence the contract was merely to dig the holes into which someone else was to place the posts when the proper time came. It is really immaterial, in this view of the case, whether Zimmerman was an independent contractor or not. It was the legal duty of the defendant to properly safeguard the holes. There is no evidence that the defendant transferred this duty to another. We are in serious doubt as to whether it could. Bower v. Peate, L. R. 1 Q. B. Div. 321, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321; Hughes v. Percival, L. R. 8 App. Cas. 443, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772. We consider the reasoning of the case of Donovan v. Oakland & B. Rapid Transit Co. 102 Cal. 245, 36 Pac. 516, as entirely applicable in the case at bar, and we adopt it as our own. See also Homan v. Stanley, 66 Pa. 464, 5 Am. Rep. 389. There is a distinction between injuries resulting from the work itself and where the wrongful or careless act is in connection with some collateral work or matter. A distinction is made, indeed, between a contract whereby the independent contractor is required to dig a deep pit or well, and a third person is injured by falling into that well, and a case where a contractor is authorized to build a house, which in itself is not dangerous, but while building it he drops a plank upon the head of a passer-by. In one case the injury is occasioned by the subject of the contract itself, or the thing constructed under the contract. In the other it is occasioned

by an act collateral to the construction. Davie v. Levy, 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395.

We are unable to find, as a matter of law, that the father was guilty of contributory negligence in this case. It is true that before going to work in the fields he talked with Zimmerman, who was digging the first hole, and that he testifies that at the time "he did not think anything about covering the hole," and that respondent's counsel not only seeks to argue contributory negligence therefrom, but a lack of negligence on the part of the defendant. "Why, then" he asks, "should Zimmerman think of it?" The conclusion he contends for, however, by no means follows. Plaintiff had the right to assume that in digging the holes in question Zimmerman would proceed with due care, and at the time he left for the fields Zimmerman was in complete control, and the hole was not even fully dug. "As there is a natural presumption that everyone will act with due care, it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence on the part of the defendant." 1 Shearm. & Redf. Neg. 4th ed. § 92 and cases cited. The duty to properly guard the holes was upon the defendant, and not upon the plaintiff.

Nor do we believe that it was contributory negligence, as a matter of law, on the part of the mother to allow the child to play in the yard. In considering such matters, by far the greater number of the courts have borne in mind the fact that "men must work;" that seed must be sown and housework done; that the hard-working mother of a family has many duties, and that the provider of bread must give a more or less uninterrupted attention to his labors; that it is only the few who have the means to employ a retinue of servants. At the most, and according to the great weight of authority, the question of contributory negligence was one for the jury, and not for the court. Garner v. Trumbull, 36 C. C. A. 361, 94 Fed. 321; Mellen v. Old Colony Street R. Co. 184 Mass. 399, 68 N. E. 679; Hewitt v. Taunton Street R. Co. 167 Mass. 483, 46 N. E. 106; Howell v. Rochester R. Co. 24 App. Div. 502, 49 N. Y. Supp. 17; Ehrmann v. Nassau Electric R. Co. 23 App. Div. 21, 48 N. Y. Supp. 379; Muller v. Brooklyn Heights R. Co. 18 App. Div. 177, 45 N. Y. Supp. 954; Kitchell v. Brooklyn Heights R. Co. 6 App. Div. 99, 39 N. Y. Supp. 743; Jones v. Brooklyn Heights

R. Co. 10 Misc. 543, 31 N. Y. Supp. 445; Karahuta v. Schuylkill Traction Co. 6 Pa. Super. Ct. 319.

It is, of course, well established that a child of three and a half years of age cannot itself be made chargeable with contributory negligence. Rice v. Crescent City R. Co. 51 La. Ann. 108, 24 So. 791; Barnes v. Shreveport City R. Co. 47 La. Ann. 1218, 49 Am. St. Rep. 400, 17 So. 782; Pueblo Electric Street R. Co. v. Sherman, 25 Colo. 114, 71 Am. St. Rep. 116, 53 Pac. 322. Even the most rigid rule would make the question one for the jury. Young v. Atlantic Ave. R. Co. 10 Misc. 541, 31 N. Y. Supp. 441.

But respondent's counsel contends that the judgment should be affirmed because the plaintiff failed to introduce any mortality tables in evidence, or in any way to prove the life expectancy of the deceased child. He claims that on this account the jury could only have found a verdict for nominal damages, and that where only nominal damages could be recovered the doctrine of *de minimis non curat lex* applies, and appellate courts will not reverse judgments for the defendant when a new trial would only result in nominal damages for the plaintiff. Appellant answers this contention chiefly by stating that the matter was not brought to the attention of the court below, and the failure to prove damages was not urged as a reason for the motion for a directed verdict. Both counsel are partially mistaken. The fact as to whether the matter was brought to the attention of the trial court at the time of the motion for a directed verdict is of no moment, and the rule is well established that except in the case of what may be called "hard actions," and actions which involve title to land, or other than merely money rights, the appellate court will not reverse a judgment for the defendant when a new trial would merely result in the awarding of nominal damages. Raymond v. Edelbrock, 15 N. D. 231, 107 N. W. 194. The respondent, on the other hand, is mistaken in his assumption that it was necessary for the plaintiff to introduce mortality tables in evidence, and that the plaintiff failed to introduce evidence from which the value of the loss of the services and earnings of the deceased might be inferred. He proved the age of the child, and that the child was in good health. There was also evidence enough in the record for the jury to form a fair estimate of the business and occupation, and the circumstances of the father. On these facts the jury could base their

conclusions. After a very exhaustive examination of the cases and authorities, we fail to find a single authority which makes the introduction of such tables a prerequisite to a recovery of damages. Such tables, it is true, are admissible in evidence, and our statute, § 7303, Rev. Codes 1905, makes the so-called "Carlisle Tables" admissible. But nowhere do we find authority for the proposition that their introduction is absolutely necessary. In fact, the overwhelming weight of authority is to the effect that the court will take judicial notice of the standard tables, and if called upon, or even if not called upon, may instruct the jury in relation thereto. It would have been perfectly competent, in the case at bar, for the court to have instructed the jury as to the fact of the contents of such mortality tables; and the request for this instruction, of course, was not required to be made prior to or at the time of the motion for the directed verdict. Kansas City, M. & B. R. Co. v. Phillips, 98 Ala. 159, 13 So. 65; Louisville & N. R. Co. v. Mothershead, 97 Ala. 261, 12 So. 714; McDonnell v. Alabama Gold L. Ins. Co. 85 Ala. 401, 5 So. 120; Arkansas Midland R. Co. v. Griffith, 63 Ark. 491, 39 S. W. 550; Nelson v. Branford Lighting & Water Co. 75 Conn. 548, 54 Atl. 303; 1 Greenl. Ev. 16th ed. § 6e; 17 Am. & Eng. Enc. Law, 2d ed. 900; Indianapolis v. Marold, 25 Ind. App. 428, 58 N. E. 512; Louisville, N. A. & C. R. Co. v. Miller, 141 Ind. 533, 37 N. E. 343; Shover v. Myrick, 4 Ind. App. 7, 30 N. E. 207; Alexander v. Bradley, 3 Bush, 667; Boettger v. Scherpe & K. Architectural Iron Co. 136 Mo. 531, 38 S. W. 298; Davis v. Standish, 26 Hun, 608; Abell v. Penn Mut. L. Ins. Co. 18 W. Va. 400; Abbott, Trial Ev. p. 729, note 4; Scheffler v. Minneapolis & St. L. R. Co. 32 Minn. 518, 21 N. W. 711. Anything that the court may take judicial notice of must be something which, from its nature, is or should be known to all men of ordinary understanding and intelligence, and such men the jury must be deemed to have been.

In the following cases damages running all the way from $1,000 to $7,500 were awarded by the juries, and sustained by the courts, even though there was an entire absence of mortality tables, or even of an instruction upon the subject. Myers v. San Francisco, 42 Cal. 215; Chicago & E. R. Co. v. Branyan, 10 Ind. App. 570, 37 N. E. 190; Eginoire v. Union County, 112 Iowa, 558, 84 N. W. 758; Union P. R. Co. v. Dunden, 37 Kan. 1, 14 Pac. 501; Franke v. St. Louis, 110

Mo. 516, 19 S. W. 938; Omaha v. Bowman, 63 Neb. 333, 88 N. W. 521; Morris v. Metropolitan Street R. Co. 170 N. Y. 592, 63 N. E. 1119; Hoon v. Beaver Valley Traction Co. 204 Pa. 369, 54 Atl. 270; Southern Queen Mfg. Co. v. Morris, 105 Tenn. 654, 58 S. W. 651; Johnson v. Chicago & N. W. R. Co. 64 Wis. 425, 25 N. W. 223; Kansas P. R. Co. v. Cutter, 19 Kan. 91; Chicago & A. R. Co. v. Becker, 84 Ill. 483; Louisville & N. R. Co. v. Connor, 9 Heisk. 20; Oldfield v. New York & H. R. Co. 3 E. D. Smith, 103; McGovern v. New York C. & H. R. R. Co. 67 N. Y. 417.

On the main question as to whether the jury could infer negligence from the leaving of the post holes unprotected, we hold that it could. The first hole was completed at least three quarters of an hour before the time of the accident. Zimmerman knew that children were playing or liable to play in the yard. This they had a perfect right to do. The question, in the main, is one for the jury, and not one for the court.

The judgment of the District Court is reversed, a new trial granted, and the cause remanded for further proceedings according to law.

FAWCETT v. RYDER.

(135 N. W. 800.)

In an action for negligently placing plaintiff, a patient of the defendant physician, upon or subject to contact with a hot-water bottle, causing injury to plaintiff by burning, and while plaintiff was unconscious after an operation upon him for appendicitis, it is *held:*

Note. — Where liability for negligence cannot be avoided upon the ground that the hospital or sanitarium in question is a purely charitable institution (in which case it is generally held that it is not liable, as shown by authorities reviewed in notes in 23 L.R.A. 200; 7 L.R.A.(N.S.) 481; 10 L.R.A.(N.S.) 74; 22 L.R.A.(N.S.) 486), the liability of the proprietor of such hospital or sanitarium for the negligence of nurses or attendants rests upon the general doctrine that the master is responsible for the torts of his servant in the scope of his employment. See Galesburg Sanitarium v. Jacobson, 103 Ill. App. 26; Stanley v. Schumpert, 117 La. 255, 6 L.R.A.(N.S.) 306, 116 Am. St. Rep. 202, 41 So. 565, 8 Ann. Cas. 1044. So, too, the liability of the proprietor of a private institution of this character for the negligence of physicians employed has been upheld. Brown v. La Societe Francaise,

Hospitals — negligence — question for jury.

1. The question of negligence was for the jury to determine under all the evidence.

Hospitals — negligence of nurse — liability.

2. The negligent acts of the nurses, defendant's employees in a private hospital run for profit in connection with the practice of medicine and surgery, by a physician and surgeon as owner and proprietor thereof, renders the physician hospital owner liable as a master for acts of servant nurses resulting in injury to a patient who has for hire intrusted himself to defendant for professional treatment and hospital nursing.

Evidence — sufficiency to support verdict.

3. Evidence is sufficient to sustain the jury's finding that plaintiff was injured by coming in contact with a hot-water bag through the negligence of defendant.

Trial — instructions — duty to give in order requested.

4. Section 7021, Rev. Codes 1905, providing that written requested instructions shall be indorsed by the court as given or refused, and then so given or refused without modification except by consent of counsel, does not require the court to give a long series of requested instructions in the order as requested; nor does the statute prevent the court from instructing upon the theory of the opponent's case in connection with each separate requested instruction, as to the subject-matter of each request, that both sides of the case may be covered without repetition, when all matter embraced in requests is covered by instructions formulated by the court, or when the requested instructions are given in terms as requested.

Trial — instructions — refusal.

5. Certain requested instructions were properly refused.

Appeal — failure to except to instructions.

6. Certain assignments on instructions not considered, because not based on any exceptions taken and filed to the oral charge given and within the statutory twenty-day period therefor.

Trial — motion for directed verdict — conflict in evidence.

7. Motion for directed verdict for defendant made at the close of the case was properly denied, as substantial conflict existed in the evidence carrying the issues to the jury for determination.

Opinion filed March 15, 1912.

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138 Cal. 475, 71 Pac. 516; Sawdey v. Spokane Falls & N. R. Co. 30 Wash. 349, 94 Am. St. Rep. 880, 70 Pac. 972.

But the fact that a public charitable hospital receives pay from a patient for lodging and care does not affect its character as a "charitable institution" nor its rights or liabilities as such in relation to a patient. Taylor v. Protestant Hospital Asso. 85 Ohio St. 90, 39 L.R.A.(N.S.) 427, 96 N. E. 1089.

Appeal by defendant from a judgment of the District Court for Dickey County, *Allen*, J., in plaintiff's favor in an action brought to recover damages for personal injuries.

Affirmed.

Ball, Watons, Young, & Lawrence, and *E. T. Conmy*, for appellant.

W. S. Lauder and *Jas. M. Austin*, for respondent.

Goss, J. This action is brought to recover damages for personal injuries received by plaintiff while in defendant's hospital. The complaint charges negligence in four particulars: (1) That plaintiff was by defendant placed in a bed wherein a bottle of hot water was negligently, carelessly, and wrongfully left by defendant, resulting in plaintiff's injury. (2) That plaintiff was by defendant laid upon said bottle of hot water so that the same came in close contact with plaintiff to plaintiff's injury described. (3) That plaintiff's back was burned by reason of the carelessness and negligence of the defendant in not removing or causing to be removed from the bed said bottle of hot water before placing plaintiff therein. (4) That plaintiff's back was burned by reason of the carelessness and negligence of the defendant in not placing said bottle of hot water in such position in said bed that the same would not come in contact with the body of the plaintiff, and that by coming in contact therewith plaintiff was burned. The negligence charged then is summarized in brief into (a) the placing plaintiff in bed with the hot-water bottle; (b) laying plaintiff on said bottle; (c) (the equivalent of the first) in leaving the water bottle in the bed with plaintiff; and (d) failure to so place the bottle in the bed that it could not come in contact with plaintiff to his injury. The sufficiency of the proof to sustain the verdict under the complaint is questioned, and was challenged by a motion for directed verdict at the close of plaintiff's case, and renewed at the close of the trial. An examination of the proof raised by this assignment makes it necessary to recite the evidence bearing upon the negligence charged.

When plaintiff rested his case the testimony disclosed the following uncontroverted facts: Defendant was a physician and surgeon at Oakes, North Dakota, operating a hospital for profit in connection with his practice, with one trained nurse and two assistant nurses in his employ. Plaintiff engaged defendant in a professional capacity to treat,

operate upon him, and have him cared for until he regained health, all for hire. Plaintiff had been removed by defendant to the operating room of the hospital, wherein defendant successfully operated upon him for appendicitis. He was then taken from the operating table directly to the bed in question, and placed therein by the defendant and assistants while plaintiff was helpless under anæsthetics. He was lifted from the operating table and placed in bed. This bed had been prepared for plaintiff's reception under the direction of a trained nurse, to whom defendant had given general instructions as to such preparation. It was customary in all hospitals to so prepare the bed by heating that the shock from the operation might be reduced and the patient be otherwise benefited. The operation was begun by administering of anesthetics at about half-past five o'clock in the evening, and it was from three quarters of an hour to an hour and one quarter thereafter until, at the completion of the operation, plaintiff was placed in the bed so prepared. At 10 or 11 o'clock, and after the patient recovered consciousness, and some hours after defendant had left, plaintiff complained that his back was burning, and thereupon the nurse immediately took from under him a hot-water sack, or rubber hot-water bottle, partially filled with hot water. As to this we quote the following from the testimony of plaintiff's father: "Mrs. Foster [nurse] came into the room, threw the sheet back from him and took a sack out from under him, the hot-water sack. It was a big rubber sack filled with hot water, an ordinary hot-water bottle. The bag when taken out from under him was leaking. Mrs. Foster threw it upon the floor. I went over and picked it up, and it was so hot I could not hold it in my hands, and there was a stream of water flowing out of it." The witness further testifies that he and Mrs. Foster then examined plaintiff's back and found it burned over a large area covering "the whole back from shoulders clear to his hips, and in a minute or two the blister raised up all over his back just the same as any other blister." Testimony was received as to the healing of the wound, and the pain and suffering occasioned. The complaint asked judgment for damages in the sum of $25,000, and the jury awarded plaintiff a verdict for $1,800, also returning the following special findings:

"(1) Was the injury to plaintiff caused by his being placed on or in contact with the hot-water bag referred to in the testimony? A. In-

jury was caused by plaintiff coming in contact with the hot-water bag through negligence of defendant.

"(2) Was the injury to the plaintiff caused by the breaking of the hot-water bag and the hot water therein burning the plaintiff? A. No.

"(3) Was the injury caused by both the contact with the hot-water bag and the breaking of same, and the consequent burning of plaintiff by the hot water escaping from the bag? A. No."

These are important findings as limiting the cause of injury to that pleaded in the complaint; *viz.*, that the injury was caused by plaintiff coming in contact with the hot-water bag. This eliminates from consideration any question of variance between the complaint and the proof, in that the jury expressly found that the injury did not result because of the leak in the water bag or from the breaking of said bottle, resulting in plaintiff being scalded by escaping water. The jury having specifically found, then, that plaintiff's injury was occasioned by his coming in contact with the hot-water bag through negligence of the defendant, defendant's assignment of error that the evidence is insufficient to warrant the verdict raises the question: "Does the evidence sustain such finding of fact? On this question it must be remembered plaintiff was unconscious when placed in the bed after the operation. As the result of his complaint of pain on his first coming to consciousness, the injury and its cause were simultaneously discovered. The size of the burn and its location are significant. The jury might in reason have concluded from the location of the injury in the middle of the back that plaintiff had been placed in contact with the bottle carelessly left in the bed. Beyond all question the burn came from the bottle or its contents. Defendant does not contend otherwise or suggest any other possible explanation. As the testimony stood at the close of plaintiff's case, reasonable men might conclude the water bottle to have been dangerous to contact with the body, and that it was negligence to leave the same in such a position in the bed that it could come in contact with the insensible patient to his injury. And as defendant personally placed plaintiff in bed, the jury has evidence upon which to have found the negligence to have been defendant's, in not removing the bottle or in suffering it to remain where contact could be had by plaintiff therewith. If it needs adjudicated precedent to warrant a conclusion that under these facts defendant was negligent, see a

case of burning by a hot-water bag under identical circumstances, reported in Ward v. St. Vincent's Hospital, 23 Misc. 91, 50 N. Y. Supp. 466–469, wherein the court's opinion states: "It seems from the nature of the act here complained of that the veriest tyro in nursing would have known better than to have been so grossly negligent as was the nurse in charge of the plaintiff" patient, and the hospital was absolved from liability, because the act so grossly negligent did not evince any want of training or knowledge, but instead, was a single act of thoughtlessness not covered by the hospital's duty to furnish competent nurses. In other words, the act was so grossly negligent as to excuse liability, which theory was disaffirmed by the reversal of the case in Ward v. St. Vincent's Hospital, 39 App. Div. 624, 57 N. Y. Supp. 784, on appeal, where it was held a matter for the jury to determine whether a single act of negligence of a nurse established her incompetency, and rendered the hospital liable as for employing incompetent servants in nursing. Had the act of negligence in the case at bar been that of Mrs. Foster, instead of defendant, under this holding defendant could be held liable. On the other hand, from the doctor's viewpoint, with the successful termination on his mind of a dangerous operation, a matter of life or death to this patient, in the mere trusting others with such minor details, matters of secondary importance only, all things, considered, reasonable men might conclude no proof of negligence was made out. But as to whether defendant's acts constituted negligence, the law would compel the submission of the question of negligence under the facts in evidence to the jury for its determination. There is no question, under the pleadings or the proof, but what plaintiff was a patient for hire in this hospital of the defendant. The hospital was defendant's private institution, operated for his benefit in connection with his practice. It was not a charitable institution.

If defendant personally placed plaintiff in contact with the hot-water bottle, or in such near proximity thereto that plaintiff came in contact therewith to the injury complained of, no question of master and servant is involved, and defendant is responsible for his own negligent act, if such act be negligence, and the jury has found that it was. If, on the other hand, the negligence was that of the nurse who prepared the bed, the authorities then hold defendant liable. We quote from 21 Cyc. 1111: "A private hospital which is in its nature a charitable

institution is not liable in damages to patients for the negligence or misconduct of its officers or employees, but the rule is otherwise where the hospital is not a charitable institution." Citing Brown v. La Societe Francaise, 138 Cal. 475, 71 Pac. 516; Galesburg Sanitarium v. Jacobson, 103 Ill. App. 26. See also Sawdey v. Spokane Falls & N. R. Co. 30 Wash. 349, 94 Am. St. Rep. 880, 70 Pac. 972; Stanley v. Schumpert, 117 La. 255, 41 So. 565, 6 L.R.A.(N.S.) 306, and case note, 116 Am. St. Rep. 202, 8 Ann. Cas. 1044; Gitzhoffen v. Holy Cross Hospital Asso. 32 Utah, 46, 8 L.R.A.(N.S.) 1161, 88 Pac. 691; University of Louisville v. Hammock, 127 Ky. 564, 14 L.R.A.(N.S.) 784, 128 Am. St. Rep. 355, 106 S. W. 219; Harris v. Fall, 177 Fed. 79, 100 C. C. A. 497, 27 L.R.A.(N.S.) 1174, and briefs of counsel and authorities cited, including the valuable footnote. See also Baker v. Wentworth, 155 Mass. 338, 29 N. E. 589, and numerous cases cited in note to 8 Ann. Cas. 1046, including Union P. R. Co. v. Artist, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365, and Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675.

The assignment of insufficiency of the evidence to warrant a recovery is not well taken. A liability existing under the evidence, we will now consider questions arising on the trial touching the validity of the verdict.

Plaintiff called the defendant physician for cross-examination under the statute, and then dismissed such witness. Defendant's counsel sought to explain by immediate examination of the witness the testimony elicited under such cross-examination. The court properly excluded such attempted redirect examination. Plaintiff had the right to such testimony from the defendant as he desired to elicit for his main case, and the right to exclude, by his objection, further examination into the matters brought out, to the end that the two sides of the case, plaintiff's main case and defendant's defense thereto, might be kept separate. While the matter is one largely in the discretion of the court, as are usually all questions as to order of proof, the court properly excluded the examination after the cross-examination under the statute. See Luick v. Arends, 21 N. D. 614, 132 N. W. 353–363.

Defendant presented thirteen requested instructions, eight of which were marked given by the court, and in the appropriate places in the charge these eight were given, no part of them being omitted. But with

each requested instruction so given was coupled a converse instruction on the matter contained in the requested instruction, that the court might instruct the jury fully as to the rights of both parties, and, without repetition, cover fully each subject instructed upon. Defendant urges this as error, and contends that he was entitled to have them given as requested in whole, without explanation or addition thereto, under § 7021, Rev. Codes 1905, providing that counsel may in writing request instructions to the jury, and that the court shall write on the margin of such requested instruction the word "given" or "refused," and that "all instructions asked for by the counsel shall be given or refused by the court without modification or change, unless modified or changed by consent of counsel asking the same." We do not construe this provision as binding the court to give without modification or change, except by consent of counsel, all instructions requested, in the order as requested, or coupled with no other instructions on matters covered by such requests. To so construe the statute would place the order and arrangement of the instructions of the trial court largely at the caprice of counsel. It is a matter of the court's discretion as to arrangement and substance of instructions, except counsel has the advantage gained by the requests, in compelling the court, under penalty of reversal, to fully cover the case, or to at least properly instruct upon those subjects embraced in the requests. Thus counsel may under this statute direct the court's attention to and require it to instruct in its language, or in its discretion when the requested instruction is correct, in the language as requested, upon each and all matters of law necessarily embraced within the issues under the pleadings and upon which proof has been presented. But the instructions are the court's and not counsel's and the court in its discretion may indorse proper requested instructions, either as given or refused, and then give instructions on such subjects in its own language under such arrangement as its discretion may dictate, so long as the instructions given are proper, fully cover the case, and omit nothing that should be instructed upon regarding which instructions were requested. The purpose of the statute is to aid counsel in protecting his client's rights by preventing the giving of abridged or indefinite instructions in lieu of those requested, and at the same time compel the subject to be instructed upon. And the statute so construed allows counsel, while so safeguarding his client's rights,

to be of assistance to the court in the suggestions necessarily contained in the requests.

Again, exception is taken to the court's refusal to instruct "that physicians are not liable for the negligence of hospital nurses or attendants, of which they are not personally cognizant." The authorities heretofore given in determining whether a cause of action was established under the evidence and within the scope of the pleadings effectually settle this assignment against appellant's contention. The employment being for hire, and covering nursing and care after the operation, the requested instruction misstated the law.

Defendant assigns error in the court's refusal to give the following requested instruction: "You are instructed that in order for the plaintiff to recover you must find the accident and injury occurred by the placing of the plaintiff on a hot-water bag or bottle, for that is the act of negligence alleged in the complaint and the theory upon which the plaintiff rested his case; and you cannot base a verdict upon any claimed act of negligence not in the complaint; and if you find that the injury occurred only through the falling upon and breaking of a hot-water bag not placed under the plaintiff you must find for the defendant, as the plaintiff can recover only on the negligence charged in the complaint." This instruction was properly refused. To have given it would have charged explicitly that the jury could find for the plaintiff only one of the several acts of negligence pleaded, and would have excluded recovery for injuries occasioned by contact with the bottle negligently permitted to remain where contact was possible, and therefore eliminate from consideration half of plaintiff's case under both pleadings and proof. To have so instructed would have prevented the jury answering as it did the first finding of fact and its only finding of negligence.

The jury by the last two findings has found in defendant's favor as to the evidence of injury by breaking of the bag and the scalding by water escaping therefrom, and by its special findings has told us its general verdict, is as to negligence, based solely and only upon "plaintiff coming in contact with the hot-water bag through negligence of defendant." Had the court given the instruction complained of appellant could have urged that the jury answered the special finding with reference to its legal effect, and that the force of the finding was to that

extent minimized; but in the entire absence of the instruction we must give the finding full force as a finding of fact. The requested instruction was too narrow, and the jury having found the facts in defendant's favor, the assignment is untenable.

Then again, defendant urges error in the court's refusal to give the following instruction: "If you find that after the injury occurred the plaintiff refused to have the same properly treated, or neglected to have same properly attended to, then you must find for the defendant, even if the injury occurred through his negligence, as it cannot be determined what part of the full injury was due to defendant's alleged negligence and what part to plaintiff's refusal to have proper care and attention given to the injury. And if you find such to be the fact in this case, you will find a verdict for the defendant." To have given this instruction would have required the jury to have found for defendant if plaintiff neglected to treat or if he improperly treated the injury, even though the jury found the injury was caused by and through the actionable negligence of defendant. Such is not the law.

This cause of action arose in plaintiff's favor as soon as his injuries were received, and his right of recovery is not defeated by any subsequent neglect to cure himself of the injury suffered. This proposed instruction was properly refused.

This disposes of all assignments properly taken to instructions given and refused. Many others are urged, but we agree with counsel for respondent that the exceptions to instructions are all confined to the refusal of the court to charge as requested, and to the act of the court in giving with the requested instructions the law applicable to plaintiff's theory of the case; and that in fact no exception has otherwise been taken to any instructions actually given by the court. And, therefore, no question arises on this appeal as to the correctness of the court's instructions as given. The court charged orally, and such instructions are unchallenged except by assignments of error urged in the brief, with no exceptions, other than as above stated, taken and filed within the twenty-day period from the giving of the instructions. There is no proper basis for such other assignments of error on the charge. The statute defines the rights of an appellant in this respect, and requires the filing of exceptions as a prerequisite to the assigning of error on ap-

peal, and to disregard this requirement would be to ignore respondent's statutory rights in the matter.

Defendant at the close of the testimony renewed the motion for a directed verdict upon the grounds "that there is an entire failure of plaintiff to establish the acts of negligence set out in the complaint; secondly, there is no proof whatever of any negligence upon the part of the defendant; thirdly, the whole testimony of the plaintiff, so far as any claim of purported negligence is concerned, is based upon inference, and no fact of negligence has been introduced in court." We have heretofore held that on the proof at the close of plaintiff's case the motion was properly denied, as the evidence was sufficient to sustain the findings and verdict. The facts shown in evidence in defendant's case but raised a conflict in testimony. The determination of the ultimate facts rested with the jury. Certain other assignments of error, not having been argued in the body of the brief, have been deemed abandoned under supreme court rule number 14.

The judgment appealed from is ordered affirmed.

GOOLSBY v. FORUM PRINTING CO.

(135 N. W. 661.)

Libel — damages — effect of retraction — sufficiency.

1. Defendant published a libel of and concerning plaintiff, and in an action to recover resulting damages, defendant, among other defenses, relied upon an alleged retraction published pursuant to § 8889, Rev. Codes 1905. The libelous article was published in good faith, without malice, and at plaintiff's request the jury was restricted to actual damages resulting to plaintiff's reputation by the publication complained of.

Held, that defendant is not entitled to rely on § 8889, for the reason that its alleged retraction was not a full and fair retraction of the libelous article.

Appeal — instructions — admission of testimony — misconduct of counsel.

2. Certain assignments of error based on alleged erroneous instructions to the jury and on alleged errors in the admission of testimony and also on alleged misconduct of counsel in argument, examined and held without substantial merit.

Opinion filed March 22, 1912.

Appeal by defendant from a judgment of the District Court for Richland County, *Frank P. Allen,* J., and from an order denying a new trial in an action to recover damages for an alleged liability.

Affirmed.

Engerud, Holt, & Frame, for appellant.

The retraction was full and fair, and, independently of the statute, entitled to consideration in mitigation of damages. White v. Sun Pub. Co. 164 Ind. 426, 73 N. E. 890; Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392.

Wolfe & Schneller, for respondent.

The retraction published was not full and fair. Palmer v. Mahin, 57 C. C. A. 41, 120 Fed. 737; Gray v. Minnesota Tribune Co. 81 Minn. 333, 84 N. W. 113; Hotchkiss v. Oliphant, 2 Hill, 510.

Per Curiam. Action to recover damages for libel, the complaint alleging that defendant libeled plaintiff by publishing a defamatory article concerning him in its newspaper. The answer admits that it published the article as alleged and that the same was false, but alleges that it made a full and fair retraction within three days after its falsity was discovered and that there was no malice in its publication. A verdict was directed for plaintiff, leaving the assessment of damages to the jury, which damages were assessed at $500. Judgment was entered on the verdict and from such judgment and from an order denying defendant's motion for a new trial, defendant appeals.

Appellant urges several grounds for reversal, which will be briefly noticed.

It is first insisted that the court erred in granting plaintiff's motion for a directed verdict. At the request or suggestion of plaintiff's counsel the court eliminated from the consideration all damages except compensatory damages for alleged injury to the reputation of the plaintiff by the publication complained of. It is appellant's contention that no damages were recoverable because of the retraction. On the contrary respondent contends, among other things, that the alleged retraction was not a full and fair retraction, such as the statute, § 8889, Rev. Codes 1905, required. Said statute is as follows:

"Before any suit for libel can be brought against a newspaper, other than a libel of or concerning a female, the party aggrieved must, at

least three days before filing his complaint, serve notice on the publisher of such newspaper at the principal office of its publication, specifying the statement alleged to be false and defamatory, and then if on the trial it appears that the article was published in good faith, and its falsity was due to a misapprehension in regard to the facts, and a full and fair retraction of the erroneous statement was published in the next issue of the paper, or in the case of a daily paper within three days after the mistake was brought to the attention of the publisher, in as conspicuous a place and type as the original article, the plaintiff will be entitled to recover only such damage as he can show he has sustained to his property, business, trade, profession, or occupation. But if the libel is against a candidate for office, the retraction must also be made editorially, and, in the case of a daily paper, at least three days, and in the case of a weekly paper, at least ten days, before the election."

The libelous article as published was as follows:

"Blind Pigger's Frightful Crime. Ran Amuck at Geneseo and Killed One Man.

"Milnor, N. D., July 11. Martin Polaski, a blacksmith, who lived at Geneseo, was killed by George Goolsby, a ruffian who was running a blind pig at the Fourth of July celebration at Hamlin.

"Goolsby ran amuck, injuring several persons and fairly trampling the life out of Polaski. The injured man was removed to his home, and died yesterday from concussion of the brain. He leaves a wife and large family almost penniless, as he had only been in the United States two months.

"Goolsby is in jail at Forman, the county seat. Mob violence is threatened."

The alleged retraction was as follows:

"There was no Hamlin Crime.

"Sensational story from Milnor about an alleged killing at Hamlin was unfounded—Goolsby's hands not red with gore. In the Forum July 11, there was an article under a Milnor date line, to the effect that Martin Polaski, a blacksmith, had been killed at a Fourth of July celebration at Hamlin, Sargent county, by George Goolsby. It was further claimed that Goolsby was running a blind pig at Hamlin that day.

"It is now asserted that there was no murder, that Polaski is not dead, nor did he leave a wife and children penniless, that Goolsby was not a ruffian, did not run a blind pig, and never was in jail at Forman.

"The only foundation for the story appears to be that Goolsby did have a fight with a man at Hamlin, was arrested at his home in Lidgerwood, taken to Forman for trial, and fined $20. The Lidgerwood Broadaxe, has the following:

" 'Goolsby attacked and beat up a man at the Fourth of July celebration at Hamlin. Last Friday Sheriff Jackman arrested Goolsby here; on Saturday he was tried at Forman and fined $20 for assault. The man he beat up is reported to be able to be at work again in his shop. There must be a yellow journalist in the woods around Milnor.'

"The sensational story put Mr. Goolsby in the limelight in a manner that he does not desire, and the Forum regrets that it, in any way, assisted in giving wider publicity to the unfounded rumor."

We fully agree with respondent's counsel that the so-called retraction fell far short of a compliance with the statute above quoted. Such retraction was made after plaintiff, through his counsel, wrote defendant, calling attention to the libel as published and asserting its falsity and that there was no foundation for any single fact stated in it, and demanding an immediate retraction as provided by law, which letter, among other things, stated: "The article is absolutely false in every particular. It is libelous on the very face of it. There is no foundation in truth for any single fact stated in it. . . . Mr. Goolsby is not a "blind pigger." He did not run amuck. No one was killed. Polaski was alive and well yesterday. Goolsby is not a ruffian. He did not run a blind pig at the Fourth of July celebration at Hamlin. He never was in jail at Forman. No mob violence was threatened him."

Under the facts it is entirely clear that such retraction was wholly insufficient under the statute. Palmer v. Mahin, 57 C. C. A. 41, 120 Fed. 737; Gray v. Minnesota Tribune Co. 81 Minn. 333, 84 N. W. 113; Hotchkiss v. Oliphant, 2 Hill, 510. It was not error, therefore, to direct the verdict.

We have examined the instructions complained of and find no error therein. The charge as a whole stated the law correctly. Certain other

assignments of error are predicated upon the alleged improper admission of certain evidence and upon alleged improper remarks made in argument by plaintiff's counsel. We have considered these assignments and deem them devoid of merit. The record discloses no prejudicial error, and the judgment and order appealed from are accordingly affirmed.

HEISZLER v. BEDDOW.

(135 N. W. 660.)

Evidence — admissibility under general denial in action for conversion of money.

1. Under a general denial in an action for the conversion of money alleged to have been given to the defendant to be applied in payment of a debt to a third party, defendant may put the plaintiff to proof of the allegations of his complaint, and may himself show that the money was really received in payment of a debt due to him from the plaintiff. Such evidence, however, may not be introduced merely for the purpose of proving a counterclaim or obtaining an affirmative judgment.

Appeal — absence of statement of case — effect.

2. Where there is, in the record, no settled statement of the case from a perusal of which the court can be advised as to the nature of the evidence, and under what conditions it was admitted and introduced, the supreme court will not reverse a judgment because, upon a certain state of facts not disclosed by the record, the instruction might be incorrect.

Opinion filed March 25, 1912.

Appeal from the District Court of La Moure county; *Goss*, J.

Action for the wrongful conversion of money. Verdict and judgment for the plaintiff. Defendant appeals.

Affirmed.

Davis & Warren, for appellant.

Defendant could show under his general denial that plaintiff never had a cause of action. Hogen v. Klabo, 13 N. D. 319, 100 N. W. 847; Phœnix Mut. L. Ins. Co. v. Walrath, 53 Wis. 669, 10 N. W. 151; Bliss, Code Pl. § 327; 1 Enc. Pl. & Pr. 817, 819; Sodini v. Gaber, 101 Minn. 155, 111 N. W. 962; 31 Cyc. 680, 681.

The court, whether requested or not, should correctly and fully charge the jury on every point material to the decision of the case on which there is evidence. 11 Enc. Pl. & Pr. 159; Judson v. Winsted, 80 Conn. 384, 15 L.R.A.(N.S.) 91, 68 Atl. 999; Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1; Ferris v. Marshall, 1 Neb. (Unof.) 377, 96 N. W. 602.

M. C. Lasell, for respondent.

The judgment roll is the only matter before the court. First Nat. Bank v. McGuire, 12 S. D. 226, 47 L.R.A. 413, 76 Am. St. Rep. 598, 80 N. W. 1074; 23 Cyc. 622.

Bruce, J. This action, when stripped of all confusing details, is an action for the conversion of the sum of $1,025, alleged by the plaintiff, Nettie Heiszler, to have been paid by her to one W. E. Beddow, deceased (the administratrix of whose estate is made a party defendant herein), for the purpose of being applied towards the payment of a certain mortgage note. The answer is in effect a general denial. The court instructed the jury that "the only issue to be decided is as to whether the plaintiff, when she paid the said sum of $1,025 to the deceased, directed that it should be applied to the payment of said note," and that "the verdict of the jury must be for the full amount sued for, or for nothing." He also instructed the jury that "all evidence in this case relative to whether or not there was a lease between the plaintiff and her then husband, and this defendant, and all the evidence of financial transactions by the plaintiff with other persons, has been received solely for the purpose of aiding you in determining the relationship of the parties in a business way to each other, the credibility of the parties, and as bearing upon whether the plaintiff, at the time of the payment of said money, directed the application thereof to be made by the defendant upon the note and mortgage aforesaid." A verdict and judgment was returned and entered for the plaintiff for the full amount, and defendant appeals.

In appellant's abstract, and in the form of an exception to one of the instructions of the court, there is a claim by defendant's counsel "that at least the sum of $140 has been paid on the note, inasmuch as certain testimony is in the case relative to the authorization by the defendant of the payment of that amount by the bank of Caledonia," and in an-

other exception is found the statement that "there was a contract of hiring between the plaintiff and her then husband and the defendant in the spring of 1905, whereby the plaintiff and her husband farmed certain land of the defendant, and for their services were to receive a portion of the crop produced upon said land, which portion should be delivered to the defendant in an elevator at Berlin, but the plaintiff and her husband should care for and preserve said crops until divided and delivered, and until such time title, ownership, and right to possession of the whole should remain in the defendant; that such crops were never divided, nor delivered to the defendant, and that plaintiff, without the knowledge and consent of the defendant, sold and otherwise disposed of said crops and converted the proceeds to her own possession, and that said payment of $1,025 to the defendant by the plaintiff was part of the proceeds as received from said crops." It is also alleged in the abstract and brief of defendant that there was proof of these facts. There is to be found in the record, however, no statement of the case, and no abstract or review of the testimony, the appeal being taken upon the judgment roll alone.

There can be no question that under the plea of a general denial, the plaintiff may be put to strict proof of the allegations of his complaint, and that under such plea the defendant may show that the contract sued upon did not exist, or that the money in controversy was paid and received under a different contract. Anderson Mercantile Co. v. Anderson, 22 N. D. 441. If, therefore, competent evidence was offered tending to show that the $1,025 paid to the deceased was not paid to him to apply upon said note, but was merely a payment of money derived as his share of crops raised upon the lands leased by him, such evidence would have been admissible. It would have been admissible, however, not for the purpose of establishing a counterclaim, but for the purpose of showing that the contract sued upon did not, in fact, exist, or that the money claimed to have been converted was not paid to the defendant for the purpose claimed. Anderson Mercantile Co. v. Anderson, 22 N. D. 441. Under a general denial, however, a counterclaim cannot be proved. The court, therefore, did not err in instructing the jury that the only issue before them was as to whether the $1,025 was directed to be paid upon the note, and that their verdict must be for the full amount sued upon or for nothing. Defendants asked for no specific instructions. They

seem to have been satisfied with excepting to those that were given. Even if the making of the lease was proved and the $1,025 was proved to have been paid out of the crops, the question would still have remained as to whether the money received by the deceased was received by him to be applied upon the notes, or received by him for some other purpose. The court so instructed, and the issue was squarely presented to the jury. Neither in the printed abstract nor in the record itself is there to be found any statement of the case or record or summary of the evidence. Without such matter before us, we are totally unable to determine whether the instructions were based upon the evidence and the proof or not. We are also unable to determine whether the evidence offered as to the lease and the proceeds of the crops, and as to the $140 alleged to have been paid by the bank of Caledonia, was offered in such a way as to have been admissible for any other purpose than that outlined in the instruction of the court, or, if admissible, whether it was in any way conclusive or worthy of credence. Strictly speaking, also, the instructions and the exceptions thereto are not before us for review. We have therefore no choice but to affirm the judgment of the court below.

Goss, J., having presided at the trial in the court below, did not participate.

SMITH v. HOFF.

(135 N. W. 772.)

When deed with contract to reconvey will be deemed a mortgage.

1. Where a conveyance of land is accompanied by an instrument of defeasance providing for the reconveyance of the property on the payment of a debt or performance of some other act intended to be secured thereby, the two instruments may in case of doubt be taken together and held to constitute a mortgage.

Note.—As to when a deed with a contract to reconvey will be deemed a mortgage, see note in 3 L. ed. (U. S.) 321.

When and how an absolute deed may be proved to be a mortgage generally, see notes in 17 Am. Dec. 300, 4 Am. St. Rep. 707.

As to whether a deed absolute on its face, but intended as a mortgage, conveys the legal title, see note in 11 L.R.A.(N.S.) 209.

Parol evidence to show that deed was intended as mortgage.

2. For the purpose of reducing a deed, absolute and unconditional in its terms, to the character of a mortgage, it is not always immaterial whether the contract which constitutes the defeasance be incorporated in the same instrument; and if a deed absolute is given, and at the same time a separate defeasance is executed, parol evidence is admissible to connect the two writings and to show that they were parts of the same transaction, and that the whole amounted to and was intended to be a mortgage.

Deed with contract to reconvey as mortgage.

3. When the grantor in a deed absolute at the same time takes back from the grantee a written contract giving the former a certain length of time in which to redeem the premises by paying the amount of the debt or consideration for the debt, and binding the latter to reconvey on such redemption, the two papers will generally be held to constitute a mortgage, and the effect of the transaction is not altered by the fact that the contract specifically limits the time for redemption and makes time an essential element in the right to redeem. But if the contract leaves it entirely optional with the grantor to redeem or not, and does not bind him to effect a redemption according to the agreement, it is rather to be held a conditional sale than a mortgage.

Parol evidence to show that deed is intended as mortgage — weight and sufficiency of.

4. Where a conveyance is made in fee with a covenant of warranty, and there is no defeasance either in the conveyance or in a collateral paper, the parol evidence by which it is attempted to show that the deed was intended to secure a debt and operate only as a mortgage must be clear, unequivocal, and convincing, or the presumption that the instrument is what it purports to be must prevail. Where, however, there is a conveyance by deed and a defeasance in a collateral paper, or a contract for resale, and the evidence leaves it in doubt whether the transaction was intended as a conditional sale or as a mortgage, no such rule of strict proof applies, and the transaction will generally be treated as a mortgage.

Transaction as mortgage or sale with right to repurchase.

5. When it is admitted or shown by separate written instrument that the transaction is not an unconditional sale as the deed imports, but either a mortgage or a sale with right to repurchase, the court, in the interest of complete justice, is inclined to construe the transaction as a mortgage; and on the question whether, in such case a mortgage or conditional sale was intended, any substantial doubt as to the intention will be resolved in favor of the construction that the conveyance is a security for a debt.

Foreclosure sale — assignment of sheriff's certificate — agreement by assignee to reconvey to original debtor.

6. These considerations apply in cases where a third party, at the solicitation

of a debtor, takes an assignment of the sheriff's certificates given upon a foreclosure sale, and as a part of the same transaction gives back to the original debtor an agreement to resell and reconvey for the amount of money paid for such certificates, and obligating the said debtor to purchase the land and pay the said amount therefor.

Opinion filed March 25, 1912.

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

Action to determine adverse claims to land and quiet title thereto. Judgment for defendant. Plaintiff appeals.

Affirmed.

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

Evidence was wholly insufficient to sustain the claim that the transaction between plaintiff and defendant was that of a loan of money, with the sheriff's certificates and the contracts, Exhibit "1," as security therefor. 27 Cyc. 1025, and note; Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; Forester v. Van Auken, 12 N. D. 175, 96 N. W. 301; Little v. Braun, 11 N. D. 410, 92 N. W. 800; McGuin v. Lee, 10 N. D. 160, 86 N. W. 714.

Time being expressly declared of the essence of the contract, default, followed by notice of cancelation, extinguished all rights of the defendant. Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207; Martinson v. Regan, 18 N. D. 467, 123 N. W. 285.

Defendant, having failed to redeem, was barred of all rights in the property after March 9, 1908. Southard v. Pope, 9 B. Mon. 261; Turpie v. Lowe, 158 Ind. 314, 92 Am. St. Rep. 310, 62 N. E. 484; Bigler v. Jack, 114 Iowa, 667, 87 N. W. 700; Russell v. Finn, 110 Iowa, 301, 81 N. W. 589.

Scott Rex, for respondent.

When it is doubtful whether the transaction is a mortgage or a conditional sale, it will generally be treated as a mortgage. Jones, Mortg. § 279, note 205; Kelley v. Leachman, 3 Idaho, 392, 29 Pac. 849; Jeffery v. Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7; Heaton v. Darling, 66 Minn. 262, 68 N. W. 1087; 27 Cyc. 979, 998, cases cited, notes 10–12; Wilson v. McWilliams, 16 S. D. 96, 91 N. W. 453; Duerden v. Solomon, 33 Utah, 468, 94 Pac. 978; Jones v. Gillett, 142 Iowa, 506, 118 N. W. 314, 121 N. W. 5; Raski v. Wise, 56 Or.

72, 107 Pac. 984; Keithley v. Wood, 151 Ill. 566, 42 Am. St. Rep. 265, 38 N. E. 149; Halbert v. Turner, 233 Ill. 531, 84 N. E. 704; Hull v. Burr, 58 Fla. 432, 50 So. 754; Smith v. Jensen, 16 N. D. 408, 114 N. W. 306; Niggeler v. Maurin, 34 Minn. 118, 24 N. W. 369; King v. McCarthy, 50 Minn. 222, 52 N. W. 648; Clark v. Landon, 90 Mich. 83, 51 N. W. 357.

BRUCE, J. This is an action to determine adverse claims to certain tracts of land in the city of Minot and the village of Palermo, and to quiet the title thereto. It appears from the evidence that on June 5, 1903, the defendant, John C. Hoff, was the owner of the real estate in controversy, and on that date mortgaged the said property to the Minot National Bank for the sum of $1,000. On July 15, 1905, the mortgage having been foreclosed, the premises were sold by the sheriff to the bank for the aggregate sum of $1,465.62. Later, and on December 1, 1905, one Swords, as receiver, and for and on behalf of said bank, purchased a sheriff's certificate issued upon a judgment sale of a portion of the premises for the sum of $487.51. On March 9, 1907, Swords, as such receiver, sold and assigned both of these certificates to the plaintiff and appellant, James L. Smith, for the sum of $2,500, and on March 22, 1907, sheriff's deeds were issued to Smith. On March 9, 1907, and a short time before the issuance of the sheriff's deeds, but on the same day and immediately after the assignment to him of the certificates the plaintiff entered into a contract with the defendant, Hoff, in words and figures as follows: "For and in consideration of the sum of $2,500 to be paid as hereinafter agreed, and on the faithful performance of the covenants, conditions, and agreements hereinafter expressed on the part of the party of the second part to be performed, kept, and fulfilled (the performance of each and every of said covenants, agreements, and conditions, as well as the payment of said money, being hereby expressly declared a condition precedent and of the essence of this contract) the party of the first part (the plaintiff) agrees to sell to the party of the second part the land in question. And the party of the second part hereby covenants and agrees to purchase of the party of the first part, the above-described land and premises, and to pay therefor the sum of $2,500. . . . And the party of the second part, for himself and his heirs, executors, administrators, and assigns, cove-

nants and agrees with the party of the first part, his heirs, and assigns, that should default be made in the payment or in any of the payments of the principal or interest, aforesaid, at the time or any other times above specified for the payment thereof, or in case the party of the second part fail to pay the taxes, etc., this agreement at the option of the party of the first part shall be null and void, and all payments that shall have been made under this agreement, and the land and all the buildings and improvements thereof, shall be and forever remain the absolute property of the party of the first part; . . . it being expressly understood and agreed that time is of the essence of this contract, . . . and it is mutually covenanted and agreed that in case default shall be made on the part of the party of the first part in any of the covenants and agreements herein contained to be performed by him, and the party of the first part shall see fit to declare this contract null and void by reason thereof, such declaration may be made by notice from the party of the first part served upon the party of the second part as provided by law," etc. This contract was signed by the plaintiff, Smith, and by the defendant, Hoff. It is also fairly well established by the evidence, though there is a conflict upon this point, that at about the same time Hoff paid to Swords the difference between the $2,500 and the amount due to the bank on the sheriff's certificates. No notes, however, or other evidence of indebtedness, were given to Smith in this transaction, and defendant has never paid anything to the plaintiff on the contract and never paid any taxes on the real property, and was wholly in default on the 16th day of March, 1908. On that date the plaintiff served on defendant a notice of cancelation of the contract under the statute, and this notice fixed the 18th day of April, 1908, as the day on which the contract would terminate. On April 18, 1908, defendant caused a notice to be served upon the plaintiff to the effect that he had deposited in the Farmers & Merchants' State Bank at Palermo the sum of $2,451.27 to meet the payments due, and had instructed the said bank to pay over the said money upon the receipt of a good and sufficient warranty deed. The evidence, however, shows that no such money was ever actually paid to the bank, nor is there any proof of any further effort towards performance of the contract on the part of the defendant, nor any other assertion of title to the property until the commencement of the action at bar, which was on April 28,

1908. The defendant, however, was in the possession of the land both on March 9, 1907, and at the time of the trial.

In his answer to this action defendant asked to have it decreed "that the plaintiff had no right, title, or interest or estate in the premises involved, save and excepting a mortgage therein; that such mortgage can only be foreclosed in the manner prescribed by law, and that the defendant be adjudged entitled to redeem from such foreclosure at any time within one year from the day of such foreclosure sale. The claim of plaintiff in the action, in short, was that he bought the certificate of sale outright from the receiver, Swords; that he gave the defendant a contract of sale, to reconvey upon the latter performing the conditions of the contract on or before March 9, 1908; that the defendant defaulted in these conditions; that plaintiff gave due notice of the termination of the agreement, and that such notice and such default operated to extinguish all interest or right of the defendant in the property. The defendant claimed, on the other hand, that the assigning of the sheriff's certificates from the receiver of the bank to the plaintiff, Smith, and the subsequent issuance of the sheriff's deeds thereunder to the plaintiff, and the execution of the contract between the plaintiff and the defendant, constituted one transaction between plaintiff and defendant, in the nature of a loan of money, with the legal title under the sheriff's deeds and the said certificates held by plaintiff as security only for the repayment of the $2,500 loan. The trial court found and decreed that plaintiff had no right, title, estate, or interest except that of an equitable mortgagee in the sum of $3,267.50, and from this judgment plaintiff appeals.

The question for determination is whether at the time the appellant purchased the certificates from the receiver of the bank he did so as the agent of the respondent, Hoff, loaning to him, at the time, the $2,500 necessary to pay the original mortgage and judgment debts, and to take up the certificates of sale and taking the certificates and sheriff's deeds in his own name as security for such advances. In other words, whether the certificates of sale which were assigned to Smith, and the sheriff's deeds, which were afterwards obtained, constituted an equitable mortgage.

It seems to be well established that if a conveyance is made in fee with a covenant of warranty, and there is no defeasance either in the

conveyance or in a collateral paper, the parol evidence by which it is attempted to show that the deed was intended to secure a debt and operate only as a mortgage must be clear, unequivocal, and convincing, or the presumption that the instrument is what it purports to be must prevail. Coyle v. Davis, 116 U. S. 108, 29 L. ed. 583, 6 Sup. Ct. Rep. 314; Cadman v. Peter, 118 U. S. 73, 30 L. ed. 78, 6 Sup. Ct. Rep. 957; Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; Smith v. Jensen, 16 N. D. 408, 114 N. W. 306. The rule, however, appears to be different where there is a conveyance by deed and a defeasance in a collateral paper or a contract for resale, and the evidence leaves it in doubt whether the transaction was intended as a conditional sale or as a mortgage. In such case the transaction will, as a general rule, be treated as a mortgage. "The character of the deed," says the supreme court of Alabama in Cosby v. Buchanan, 81 Ala. 574, 1 So. 898, "must be determined by the intention of the parties clearly and satisfactorily proved. When it is absolute, and only parol evidence is relied on, the party affirming that the conveyance was intended as a security for a debt must show that such was the intention by clear and convincing evidence. But when it is admitted or shown by separate written instruments that the transaction is not an unconditional sale as the deed imports, but either a mortgage or a sale with right to repurchase, the court, in the interest of complete justice, is inclined to construe the transaction as a mortgage, and on the question whether in such case a mortgage or conditional sale was intended, the same degree of proof is not requisite. Any doubt as to the intention will be resolved in favor of the construction that the conveyance is a security for a debt." This rule and exception seems to be abundantly borne out by the authorities. See Mitchell v. Wellman, 80 Ala. 16; Turner v. Wilkinson, 72 Ala. 361; McNeill v. Norsworthy, 39 Ala. 156; Russell v. Southard, 12 How. 145, 13 L. ed. 929; O'Neill v. Capelle, 62 Mo. 202; Keithley v. Wood, 151 Ill. 566, 42 Am. St. Rep. 265, 38 N. E. 149; Rose v. Gandy, 137 Ala. 329, 34 So. 239; Smith v. Jensen, 16 N. D. 408, 114 N. W. 306; Duerden v. Solomon, 33 Utah, 468, 94 Pac. 978, 980; Wilson v. McWilliams, 16 S. D. 96, 91 N. W. 453; Jones, Mortg. § 279; Trucks v. Lindsey, 18 Iowa, 504; Rockwell v. Humphrey, 57 Wis. 412, 15 N. W. 394; Snavely v. Pickle, 29 Gratt. 27. Much, of course, depends upon the nature of the con-

tract to reconvey, and as to whether it expressed a conditional sale, a purchase which is optional with the grantee, or whether it is obligatory upon such grantee. See 27 Cyc. p. 999; Haynie v. Robertson, 58 Ala. 37.

In the case at bar the contract of sale was clearly not what might be termed a contract for a conditional sale. In it Hoff agreed to purchase, and if the land had decreased in value, could have been compelled to purchase. Nor is it necessary that in order to constitute a mortgage the transaction should be contained in one and the same document. "Where a deed of land absolute and unconditional on its face," says Mr. Henry Black, in 27 Cyc. 994, "is accompanied by an instrument of defeasance providing for the reconveyance of the property to the grantor or the revesting of title in him on his paying a debt or performing some other act intended to be secured thereby, the two instruments will be taken together and held to constitute a mortgage. At the same time an instrument of defeasance executed by the grantee in an absolute deed contemporaneously with the latter for reconveyance to the grantor on his paying a sum of money does not always make the transaction a mortgage. Its character depends on the inquiry whether the contract is a security for the repayment of money. If so it is a mortgage; otherwise it may be a conditional sale. . . . For the purpose of reducing a deed, absolute and unconditional in its terms, to the character of a mortgage, it is entirely immaterial whether the contract which constitutes the defeasance be incorporated in the same instrument or in a separate instrument contemporaneously executed. And when a deed absolute is given, and at the same time a separate defeasance is executed, parol evidence is admissible to connect the two writings, and to show that they were parts of the same transaction, and that the whole amounted to and was intended to be a mortgage. . . . When the grantor in an absolute deed, at the same time takes back from the grantee a written contract giving the former a certain length of time in which to redeem the premises by paying the amount of the debt or consideration for the deed, and binding the latter to reconvey on such redemption, the two papers constitute a mortgage. And the effect of the transaction is not altered by the fact that the contract specifically limits the time for redemption, and makes the time an essential element in the right to redeem. But if the contract leaves it entirely optional

with the grantor to redeem or not, and does not bind him to effect a redemption according to the agreement, it is rather to be held a conditional sale than a mortgage." The courts indeed seem to make a radical distinction between the cases in which a deed which is absolute upon its face is sought to be shown to be a mortgage by oral proof merely, and those cases in which there is a contract to reconvey as well as the original deed. Where there is a deed and a contract to reconvey, and oral evidence has been introduced tending to show that the transaction was one of security, and leaving upon the mind a well-founded doubt as to the nature of the transaction, then courts of equity incline to construe the transaction as a mortgage. Gassert v. Bogk, 7 Mont. 585, 1 L.R.A. 240, 19 Pac. 281; Wilson v. McWilliams, 16 S. D. 96, 91 N. W. 453, and cases therein and before cited.

We are not prepared to say, with counsel for the respondent, that the evidence clearly shows that the transaction was in the nature of a loan. We do hold, however, that there is evidence strongly tending towards this conclusion, and, as we have before stated, we understand the law to be that where a contract of sale is given back which obligates the purchaser to buy and which is not conditional in its nature, the presumption is not merely that such a transaction constitutes a mortgage, but that the courts of equity will incline strongly to that view. There is no material dispute in the evidence except that furnished by the bankruptcy proceedings, that the property sold or mortgaged was worth two or three times the amount of the debt. The witness William Olson states that the value of the land at Palermo was $3,000, while that of the witness Lewis is to the effect that the land at Minot was worth from $3,500 to $4,500. A. A. Robinson testifies that the Minot property was worth from $3,500 to $4,000, and John Ehr places the value from $3,500 to $3,800. While mere discrepancy in the consideration is conclusive, it is a matter which will be considered by the courts. It seems strange indeed, that if the transaction was originally intended to be anything else but a loan, that the appellant Smith should have agreed on the same day that he purchased it, to resell it for the identical amount paid, and this in a contract which was not in its form a conditional sale, but one which obligated the defendant to buy. Appellant admits that he never saw the Palermo property; that he had no idea of its value, and that he had no use

for any of the property, and the witness Johnson states that he told Smith that "he did not need to be scared of taking that investment, loan, or whatever I called it, because if Hoff did not pay him I considered the property good enough for the money." He also stated that Smith asked him if he thought that "if Hoff did not pay him he could get his money out of the property." There can be no doubt from the testimony that Swords extended the original loan and refrained from taking the sheriff's deeds in order that Hoff might have a chance to redeem, and that Swords was anxious that Hoff should have such opportunity. It is also undisputed that the land contract called for the same amount of interest as the original mortgage and the sheriff's certificate. It is true that both Smith and Swords testify that Smith stated that he would not lend the money to Hoff to take up the loan, but it is also true that on cross-examination Smith testified that the contract was made "through the consideration, I suppose, of Mr. Swords to Mr. Hoff, to give him a chance if he wanted the property at the end of a year, . . . for the purpose of accommodating Mr. Hoff and give him a chance to get the property back on payment of the amount of money." We believe, in short, that if the transaction had been comprised in a deed from Hoff to Smith alone, and it had been sought to declare that deed a mortgage, that the evidence would hardly justify such action, as in that case under the authorities, the proof required would have to be clear, consistent, unequivocal, satisfactory, and convincing; but that, the transaction being in the nature and form of a deed to the appellant, or an assignment of the certificates, which amounts to the same thing, and a contract from the appellant to reconvey, which contract bound the respondent to pay and was not conditional or optional in its nature, that under the authorities the evidence is sufficiently confusing and conflicting to put in operation the equitable rule which applies in such cases, that "where there is a deed and a contract to reconvey, and oral evidence has been introduced tending to show that the transaction was one of security, and leaving upon the mind a well-founded doubt as to the nature of the transaction, courts of equity will incline to construe the transaction as a mortgage." Nor do we think that the fact that Mr. Schull, respondent's attorney, seems to have labored at one time under the impression that the transaction constituted a sale, and gave notice of a deposit of the money under the pro-

visions of art. 3, chap. 30, of the Code of Civil Procedure, and in response to a notice from the appellant requiring such payment under the contract, in any way changed the nature of the transaction. The doctrine that "once a mortgage always a mortgage" would still apply. A transaction which was originally a mortgage cannot be converted into a sale by reason alone of a mutual mistake of the parties. See Jones, Mortg. 6th ed. § 340; Clambey v. Copeland, 52 Wash. 580, 100 Pac. 1031; Wells v. Geyer, 12 N. D. 316, 96 N. W. 289.

It is undisputed that the mortgages to the bank having been foreclosed, the premises were sold by the sheriff to said bank on July 15, 1905, and that later, and on December 1, 1905, the receiver of the bank purchased a sheriff's certificate of sale on another judgment for the sum of $87.51, so that on March 9, 1907, there was owing to the bank about the sum of $2,586.69. The witness Swords testifies that he did not immediately get a sheriff's deed, because he did not want the property. His business was to collect money, not to get property; that he had been working with Hoff for some time prior to March 9, 1907, to collect his money; that he was instrumental in bringing about the transaction between Hoff and Smith on the 9th day of March, 1907; that Mr. Hoff said he could not pay any of it, or words to that effect, "and he wanted me to borrow some money, try and get him some money, and I did try, and I don't know how I learned that Louis Smith had money, but I wanted to get the money of Louis, and he said he had a deal or two with Hoff, and he would not have anything to do with him, and he would not loan him money; and I said, 'I will sell it to you. I don't want the stuff; I want the bank's money,' and he said he would take it; that the amount paid the bank was $2,586.69." I was trying to get the bank's money, and I was having a good deal of trouble to get it. I tried to borrow the money of Mr. Smith, and he would not loan it to Mr. Hoff, and I said, 'Louis, I will assign you my rights, all I want is my money.' I think I had given him the records properly, so I had no desire to hurt anybody. I said, 'Give him a contract to repurchase within a year,' and he said he would, and the contract was then executed. I do remember telling Mr. Hoff: 'You are not dealing with me. You have a year in which to purchase this property. Now hustle around and get the money.' I remember that I did not want any advantage of anybody. I was extending a

favor to Mr. Hoff by so doing. I desired to be strictly honest in the transaction, and tried to do what was right. The bank got the money at the time this contract was made, at the time of the assignment of the sheriff's certificates."

Mr. Smith testifies: "I never had any talk with Mr. Hoff prior to the execution of this contract of sale in regard to this property at all. I paid Mr. Swords the amount he demanded for the assignment of the certificates. In the purchase of this property I did not have any negotiations with Hoff himself at any time, but with Mr. Swords. My understanding was that Mr. Swords was to give me the title he had, the sheriff's deeds, and give Mr. Hoff a contract to purchase at the end of a year, provided he paid the interest and taxes and principal on or before March 9th. I was to give him a contract for deed for $2,500 on these conditions. Nothing was said to me that this was to be a mortgage, and not a complete title. I never talked with Mr. Hoff about it. I paid Mr. Swords $2,500 for the assignment of these certificates. I might have been negotiating with Mr. Swords for two weeks. I remember I refused to loan any money on the property at that time. It was along, as I said before it might be along, about two weeks before I finally bought the property from Mr. Swords. I believe Mr. Swords was in possession of both properties, I don't know. I mean Mr. Hoff was in possession of the Minot property, and I don't think the Palermo property was in the possession of anybody. I was afraid to make the loan, because I was afraid possibly the property was not worth it. Q. You were willing to buy it? A. When you loan money, property must be worth more. Q. And you were willing to sell it back? A. When you loan money shouldn't the property be worth more than the amount you loan, in case you loan money? Q. Yet you were willing to sell it right back at the price you paid for it? A. Well, according to the contract, I was willing to go by the contract. Q. How did you happen to make that contract, Mr. Smith? A. It was through Mr. Swords, through the consideration, I suppose, of Mr. Swords to Mr. Hoff to give him a chance if he wanted the property at the end of the year. It seems to me it was for the purpose of accommodating Mr. Hoff and give him a chance to get the property back on payment of the amount of money." Smith also admits that he had no particular use for the property at the time.

Mr. Hoff testifies: "He (Swords) wanted to know where I could get the money, and I couldn't say, and he gave me a little time on it. Finally he says: "I got to have it, but he was satisfied when I took it up and fixed it up all right. He figured it up, and I told him I will try to get that money. I was told by George Swords that he knew a fellow that had the money. It was about fourteen days before we made out the papers. Mr. Smith was to let me have about $2,500, pretty close to $2,700 was due to Swords. I was in Swords' office on the 9th day of March, 1907. I found there Swords and his typewriter, and someone else, I don't remember. I signed the mortgage for the money, for $2,500. My wife also signed the instrument. It was understood that it was a mortgage deed the same as was signed to the other bank that time that we got the money at that bank. Mr. Swords said it was a mortgage. He said the paper was to secure the $2,500." His testimony clearly points to a mortgage transaction. He says that he paid to the receiver of the bank the balance between the amount due under the former mortgage and the $2,500 paid by Smith. There can be no question that after the foreclosure sale the period of redemption was deemed to be extended. Hoff testifies that about fourteen days or three weeks before the papers were made out he had a conversation with Smith, and Smith said that "it would be all right to let me have that money for that security, including the property here and the other 8 acres at Palermo, and I could have my chance to buy it back at any time I wanted to, simply over a year, because he did not want to let me have it then for 12 per cent and 12 per cent I thought was steep, and he said I could pay it back sooner, but I asked him if it was all right, and so he said." He testified that the matter was always talked of as a loan. He says he did not sign a note, "nothing but the mortgage deed as security." Much of the confusion in the testimony is probably due to an effort on the part of the counsel for respondent to prove a stronger case than he really had, and the mere fact that the witnesses refused to conform their testimony to his theory casts no discredit upon their veracity. It is true, in fact, that there was an attempt on the part of attorneys for the respondent to prove that at the time of the transaction in question Hoff and his wife actually gave to Smith a deed of the premises, and that after the receipt of such deed, Smith and Hoff executed the land contract in controversy, and

that the giving of this separate deed is hardly supported by the evidence, and that the evidence is conflicting in regard thereto. It seems to us quite clear, however, that counsel had in their mind the giving of this deed, and that Hoff did not have any recollection of it, and, as a matter of fact, the giving of the deed was immaterial, as the sheriff's certificate and the subsequently acquired sheriff's deed were sufficient. It seems quite plain to us that when asked about this deed Hoff had in mind the land contract which he signed, and this is quite easily explainable by the fact that in such cases usually two copies are made out, one of which is retained by each party. Hoff certainly signed the copy that was retained by Smith. It is quite easy to understand how he testified that he gave Smith a deed or mortgage at the time the land contract was handed to him.

He testifies:

Q. What took place when you got to Mr. Swords' office?

A. Well, Swords handed us the paper we should sign for that money I borrowed for to pay up the papers as was against the property up to the bank, and to Kulass, which have been talked about.

Q. At that time, Mr. Hoff, did you sign Exhibit 1, being the contract?

A. Yes, sir.

Q. What other papers did you sign at that time?

A. Well, I signed the mortgage for the money.

Q. You signed a mortgage at that time?

A. Yes, sir.

Q. For how much money?

A. $2,500.

Q. Now, Mr. Hoff, I will ask if you did not sign a deed or mortgage upon the land involved in this action to James L. Smith upon the 9th day of March, 1907, at the time you signed the contract, Exhibit 1?

A. Yes, sir; yes, I did, sure.

Q. Was that deed or mortgage given by you at the time to secure the payment of the $2,500?

A. Yes, that was the only reason I got the $2,500.

Q. In your direct examination I asked you about a certain mort-

gage or deed which you and Mrs. Hoff signed in favor of James L. Smith on the 9th day of March, 1907. I will ask you now if you are able to state whether or not that was an instrument commonly known as a deed or mortgage?

A. If I knew it was a deed or mortgage?

Q. I don't want you to tell what it was meant for, or anything of that kind. I want to know what kind of a paper it was, a deed or mortgage. State if you know?

A. No, sir.

Q. You don't know what it was called, now?

A. A mortgage deed it was called to me

Q. What called it that?

A. Swords.

Q. Now, Mr. Hoff, during your negotiations with Mr. Swords and Smith which culminated on March 9, 1907, was anything ever said at any time in regard to selling the property to Smith?

A. No, sir.

The case, indeed, seems to come within the rule which is laid down in Wilson v. McWilliams, 16 S. D. 96, 91 N. W. 453, and where, under a very similar state of facts, the court held that where money was advanced at the request of the mortgagor to bid in the property at a sheriff's sale, and the title thereto was taken in the name of the person advancing the money for the benefit of such owner, with the understanding that he would convey the same back to the said owner on the payment of the money, the transaction in equity constituted a mortgage. "While it is undoubtedly true," the court said, "that to show that a deed in effect an absolute conveyance is intended as a mortgage to secure the debt, the evidence must be clear, satisfactory, and convincing, yet if, from all the evidence, a doubt arises as to whether the transaction was a mortgage or a conditional sale, such doubt must be resolved in favor of holding the instrument a mortgage."

The case of Turner v. Wilkinson, 72 Ala. 361, is also very much in point. In it the transaction was held to constitute an equitable mortgage, and in it the court laid down a criterion as applicable in the case before it, and which would be equally applicable in the case before us. "Although," says the court, "it is difficult to establish fixed rules by

which to determine whether a particular transaction is a mortgage or a conditional sale, there are some facts which are regarded as of controlling importance in determining the question. Did the relation of debtor and creditor exist, before and at the time of the transaction? or, if not, did the transaction commence in a negotiation for a loan of money? Was there great disparity between the value of the property and the consideration passing for it? Is there a debt continuing, for the payment of which the vendor is liable? If any one of these facts is found to exist, in a doubtful case, it will go far to show a mortgage was intended. If all of them are found concurring, the transaction will be regarded as a mortgage, rather than a conditional sale, unless the purchaser, by clear and convincing evidence, removes the presumptions arising from them."

In the case of Hawes v. Williams, 92 Me. 483, 43 Atl. 101, the court said: "It appears that Page was owing $1,500 secured on the land; that he applied to Williams for a loan of that amount on a mortgage, but that Williams said 'he was not in the habit of taking mortgages on property at all; he would rather not if he could fix it some other way.' Thereupon he advanced the money, took a warranty deed of the property, and gave back the writing before mentioned. 'A legal mortgage was avoided; an equitable mortgage was made.'" Whenever the transaction resolved itself in the security whatever may be its forms, and whatever the name the parties may choose to give it, it is in equity a mortgage.

In the case of Kelley v. Leachman, 3 Idaho, 392, 29 Pac. 849, the court said: "The proof shows that the plaintiff was never in actual possession of the land; that the deed was given to plaintiff for the amount of money named therein, which was furnished by the plaintiff to pay off certain indebtedness of the defendant to other parties. The agreement of defeasance, or for reconveyance, was given to afford defendant an opportunity to repay the money with interest, and thus procure a reconveyance of the land. The questions for the determination of this court are, Was this an absolute conveyance of the title to the land in question, or must the deed and agreement to reconvey be held a mortgage, and will ejectment lie to gain possession of the land? The agreement to reconvey was executed on the same day as the deed. It was given by the grantee in the deed to the grantor, recites the giving

of the deed, and contracts to reconvey the land described, upon the payment of the sum mentioned as the consideration in the deed, with interest thereon at a specified rate, all taxes and assessments, etc., made upon the land. These two writings, taken together, constitute a mortgage. 1 Jones, Mortg. § 20. It would have constituted a mortgage if there had been simply a parol agreement made between the parties to reconvey upon the payment of a stipulated sum. Jones, Mortg. § 248. It might have been in that case more difficult to prove the contract. This being an agreement in writing, there is no difficulty about the proof. In Smith v. Smith, 80 Cal. 325, 21 Pac. 4, 22 Pac. 186, 549, the court say: 'It is the settled rule in that state that if a deed, absolute in form, was made merely to secure an indebtedness to the grantee, it is a mere mortgage, and does not pass the title.' . . . When, at the time of the execution of an absolute conveyance, a separate defeasance or agreement to reconvey is also executed, the transaction at law will constitute a mortgage. Where the deed and defeasance have been executed and delivered at the same time, and form parts of one transaction, as in this case, the courts have universally considered them as constituting a legal mortgage."

We are not unmindful of the cases of Russell v. Finn, 110 Iowa, 301, 81 N. W. 589, and Bigler v. Jack, 114 Iowa, 667, 87 N. W. 700, which are cited by counsel for appellant; and the former of which, at any rate, seems, to a greater or less degree, to sustain his propositions. In the latter of these cases, however, lack of proof of inadequacy of consideration seems to have been the controlling element, and both of the cases must be considered in the light of the former case of Trucks v. Lindsey, 18 Iowa, 504, in which it was said: "This rule of equity which attaches the right of redemption to every grant made as a security does not in the least interfere with the right or power of persons to make a conditional sale. It is, therefore, competent for parties to make a purchase and sale of lands with a reservation to the vendor of a right to repurchase the same land within a given time at an agreed price. A resort, however, to a formal conditional sale as a device to defeat the equity of redemption, will, of course, when shown, be unavailing for that purpose. And the possibility of such resort, together with other considerations, has driven courts of equity to adopt

as a rule that when it is doubtful whether the transaction is a conditional sale or a mortgage, it will be held to be the latter."

The judgment of the District Court is affirmed.

Goss, J., having presided on the trial in the court below, being disqualified, did not participate.

STOCKWELL v. HAIGH.

(135 N. W. 764.)

Change of venue — order to show cause against — jurisdiction to hear application.

1. On the return of an order requiring plaintiff to show cause why a change of venue should not be ordered from Billings county on the ground that an impartial trial could not be had therein, an objection was interposed to the jurisdiction to hear such application, for the alleged reason that, prior to the issuance of such order to show cause, an affidavit of prejudice had been filed against the judge who issued the same.

Held, that such objection was properly overruled for the reasons, first, that there was no proof that such alleged affidavit or prejudice was filed; and, second, plaintiff made a general appearance on the return of such order to show cause, and opposed the application on the merits before another district judge, who had been requested to hear and determine such application.

Change of venue — sufficiency of proof to justify.

2. The motion for a change of venue was supported by the affidavits of defendant and one F., corroborated by about thirty other residents of the county, and the plaintiff produced at the hearing the affidavits of seventeen persons. The latter affidavits were not printed in the abstract. The trial judge granted the application.

Held, that defendant's showing was amply sufficient to justify the order complained of.

Appeal — discretion as to change of venue.

3. District judges are vested with a sound judicial discretion in the matter of granting or refusing applications for a change of the place of trial, and their decision will not be disturbed except where there has been a clear abuse of such discretion.

Opinion filed March 26, 1912.

Appeal from District Court, Billings county; *Nuchols*, Special Judge.

From an order granting defendant's motion for a change of the place of trial, plaintiff appeals.

Affirmed.

M. A. Hildreth, for appellant.

Judge Crawford was disqualified to act, and the making of the order was without authority of law, and gave Judge Nuchols no right to hear the application. Orcutt v. Conrad, 10 N. D. 431, 87 N. W. 982; Tiffany v. Lord, 65 N. Y. 310; Wheeler v. Lampman, 4 Johns. 481; Malcolm v. Rogers, 1 Cow. 1; Brett v. Brown, 13 Abb. Pr. N. S. 295; Von Hesse v. Mackaye, 8 N. Y. Supp. 894.

If the court considers the application on its merits, the affidavits were wholly insufficient upon which to predicate a right for a change of the place of trial, and it was an abuse of discretion for the court to grant the motion. People v. Bodine, 7 Hill, 147; People v. McCauley, 1 Cal. 379; Sloan v. Smith, 3 Cal. 410; People v. McGarvey, 56 Cal. 327; People v. Williams, 24 Cal. 31; People v. Shuler, 28 Cal. 490; Sloan v. Smith, 3 Cal. 412; People v. Fisher, 6 Cal. 154; Schafer v. Shaw, 87 Wis. 185, 58 N. W. 240; Erickson v. Shaw, 87 Wis. 187, note, 58 N. W. 241; People v. Sammis, 3 Hun, 560; see Territory v. Egan, 3 Dak. 119, 13 N. W. 569; Frank v. Avery, 21 Wis. 168; People v. Bodine, 7 Hill, 147; People v. Wright, 5 How. Pr. 23; People v. Williams, 3 N. Y. Crim. Rep. 75; Budge v. Northam, 20 How. Pr. 248; Messenger v. Holmes, 12 Wend. 203; Patchin v. Sands, 10 Wend. 570; Cook v. Pendergast, 61 Cal. 72; 2 Wait, Pr. 620.

F. M. Murtha and *W. F. Burnett*, for respondents.

Application for change of venue on the ground of local prejudice is addressed to the sound discretion of the trial court, and will not be disturbed unless there is a great abuse of discretion. Cyra v. Stewart, 79 Wis. 72, 48 N. W. 50; Gandy v. Bissell, 81 Neb. 102, 115 N. W. 571, 117 N. W. 349; Jacob v. Oyster Bay, 119 App. Div. 503, 104 N. Y. Supp. 275.

Fisk, J. On June 10, 1911, Judge Crawford, of the tenth judicial district, issued an order in this action, requiring plaintiff to show cause on July 19, 1911, at 9 o'clock A. M., why a change of the place

of trial of such cause should not be ordered. The order to show cause was supported by a large number of affidavits by residents of Billings county, wherein such action was at the time pending, tending to show that an impartial trial could not be had therein. Such order was made returnable before any other district judge then presiding at the term of the district court in Billings county in case of the absence of Judge Crawford. On the return date Judge Nuchols was the presiding judge at said term, sitting at the request of Judge Crawford, and plaintiff, through his counsel, made what he styles a special appearance, and filed the following objections:

"1. That the Honorable W. C. Crawford, who made said order on the 10th day of June, A. D. 1911, had no jurisdiction whatsoever to make the same, for the reason that an affidavit of prejudice had been filed by the defendant, Haigh, against the said Judge Crawford long prior to the regular June, 1911, term of said court, and said affidavit of prejudice and demand for change of judges had been acted upon by his Honor, W. C. Crawford, and said judge was absolutely divested of any jurisdiction whatsoever in said cause to make said order, which purports to have been made on the 10th day of June, A. D. 1911.

"2. The affidavit of Mr. Haigh is insufficient to predicate a change of venue on the grounds of prejudice or otherwise.

"3. The affidavit of Mr. Foley is made upon information and belief, and the affidavit of J. A. Haigh and others who have signed the same states no facts of any kind or character of probative weight upon which to predicate a change of venue. And on the further grounds that the order to show cause herein referred to was served on the attorney for the plaintiff while he was engaged in a trial of a cause in the Federal court in the city of Fargo on the 16th day of June, 1911, between the hours of 10 and 12 o'clock of said day, and therefore said service was insufficient in point of time upon which to predicate an application for a change of venue in said cause."

Appellant's assignments of error present but two questions for determination: First, Did the court have jurisdiction to make the order? If so, then, second, was defendant's showing on the merits sufficient to justify such order?

The first question must receive an affirmative answer for two reasons. There is no showing that prior to the time Judge Crawford

issued the order to show cause a sufficient affidavit of prejudice had been filed to oust him of jurisdiction. In fact, the record is silent as to the filing of any such affidavit, but appellant directs our attention to the opinion of this court in Stockwell v. Crawford, 21 N. D. 261, 130 N. W. 225, presumably as proof that such an affidavit was filed. This is no proof of such fact, and furthermore it was expressly held in the Crawford Case that the affidavit was not filed within the statutory time, and did not for such reason oust Judge Crawford of jurisdiction in the action. But in any event, appellant made a general appearance before Judge Nuchols on the return of the order to show cause, by challenging, on the merits, the sufficiency of defendant's affidavits, and consequently he must be held to have waived any objection which he might have had to the jurisdiction of Judge Crawford to issue such order.

This brings us to a consideration of appellant's second contention, which challenges on the merits the sufficiency of defendant's showing to authorize a change of the place of trial. Such showing consisted principally of the affidavits of defendant and one James W. Foley, corroborated by about thirty other residents of Billings county, the material portions of such affidavits being as follows: "That he now is and for many years last past has been a resident of Billings county, North Dakota, and that he is well acquainted in said county and in practically every part thereof, and well acquainted with the persons in said county who are liable to be called for jury service; affiant further states that for nearly two years last past the facts at issue and the questions involved in the trial of the above entitled action have been widely discussed by the people of Billings county, and great publicity has been given to the case by the newspapers of said county and adjoining county; that the case has provoked a great deal of bitter feeling in the city of Beach and the country tributary thereto and among the people thereof; that the people generally have taken sides in said case; that by reason of the great publicity and notoriety given to the case the people of the county, in affiant's opinion, have quite generally formed and expressed opinions concerning the merits of the case; that a criminal action (was tried therein) growing out of the same state of facts between the party plaintiff and defendant in this action, the said plaintiff in this case being the prosecuting witness in the criminal case;

that all the matters pertaining to the purported facts in said case with respect to the party plaintiff as well as the defendant herein have been a subject of universal comment in Billings county; affiant believes and states on his information and belief, that a great number of jurors called upon the jury at the present term of court have heard this case discussed as to its merits, and affiant is informed and believes that by reason of said facts many of them are not impartial as between the plaintiff and the defendant, and affiant believes that the ends of justice would best be subserved by the place of trial in said action being changed from Billings county to some other county."

In opposition thereto appellant produced the affidavits of seventeen persons, but such affidavits are not printed in the abstract and hence cannot be considered.

Appellant argues that defendant's affidavits state no facts, but contain merely expressions of belief that an impartial trial could not be had, and that such affidavits are merely on information and belief. We are unable to concur in this view. Indeed, we cannot very well see how a much stronger showing could have been made. In the nature of things such a showing must, to some extent, be based upon information and belief, instead of positive knowledge. Of course mere statements of conclusions without any facts on which they are based would not suffice. The proof must show facts from which the court is able to judicially determine that an impartial trial cannot be had in the county from which a change of venue is asked. Where such a showing is made, but there is a counter showing by the other party, it is a matter for the trial judge to decide within the exercise of a sound judicial discretion, and his decision will not be disturbed unless it appears that he has clearly abused such discretion. State v. Winchester, 18 N. D. 534, 122 N. W. 1111, 21 Ann. Cas. 1196.

After duly considering appellant's contentions, as well as the authorities cited in his brief, we are agreed that under the record on this appeal the trial judge was fully justified in making the order complained of. Such order is accordingly affirmed.

NOBLE et al. v. McINTOSH et al.

(135 N. W. 663.)

Suit to cancel tax certificates and enjoin issue of deeds — tender to certificate holder of amount of taxes.

1. In an action brought by a landowner against the holder of tax certificates and the county auditor for the purpose of canceling such certificates and enjoining the issuance of tax deeds, the complaint is vulnerable to attack by demurrer where it fails to allege an offer or tender to the certificate holder of the amount of the taxes, interest, and penalty due to the county at the date of the tax sales, even though such complaint alleges the invalidity of such sales by reason of an unlawful combination or agreement between the bidders thereat to stifle competitive bidding.

Suit to cancel tax certificates and enjoin issue of deeds — tender to certificate holder of amount of taxes.

2. Under such facts the landowner who seeks the aid of equity for the purpose of setting aside the sales and canceling the tax certificates must do equity by paying or offering to pay to the certificate holder the amount due the county at the date of the sales, but he will not be required to pay or tender any subsequent interest or penalty.

Opinion filed February 14, 1912. Rehearing denied March 26, 1912.

Appeal by plaintiff from a judgment of the District Court for Bottineau County; *A. G. Burr,* J., in defendants' favor in a suit for the cancelation of tax certificates and to enjoin issue of deeds.

Affirmed.

Noble, Blood, & Adamson, of Bottineau, for appellants.

Weeks, Murphy, & Moum, of Bottineau, for respondents.

Fisk, J. This is an appeal from an order of the district court of Bottineau county sustaining a demurrer to the complaint upon the ground that such complaint fails to allege facts sufficient to constitute a cause of action.

Omitting formal parts the complaint is as follows:

(1) That the plaintiff herein V. B. Noble is the duly appointed, qualified, and acting administrator of the estate of D. McBrayen, deceased, and that the plaintiff Lizzie McBrayen is the only heir and

person entitled to inherit the whole of the real estate of D. McBrayen, deceased, involved in this action.

(2) That the defendant J. P. Simon is the duly elected, qualified, and acting auditor of the county of Bottineau and state of North Dakota.

(3) That at the time of the death of the said D. McBrayen, in the year 1905, he left as part of his estate the following-described property, to-wit: Lot 6, lot 23, and lot 24, all in block 16 of South Bottineau (now city of Bottineau), in said Bottineau county.

(4) That on the 3d day of December, 1907, said real property described in paragraph 3 hereof was sold at a certain tax sale held in Bottineau county, to the above-named defendant W. H. McIntosh, for the unpaid tax levied and assessed for the year 1906, which said tax, interest, and penalty at the time of said sale amounted to $21.96 for the said lot 6 hereinbefore described, and the sum of $193.76 for the said lots 23 and 24 hereinbefore described, and tax certificates were issued thereon to the said defendant W. H. McIntosh for said above-named sums.

(5) That the plaintiffs are informed and believe, and from such information and belief allege the fact to be, that the defendant W. H. McIntosh is now the owner and holder of said tax-sale certificates.

(6) That at said 1907 tax sale in said Bottineau county the said lots were not fairly and in good faith offered for sale and sold at public vendue, for the reason that at said sale the persons then and there present as purchasers refrained from bidding against one another under an understanding that the bids for the city and village property to be sold at such sale should be for the full rate of 24 per cent, together with a 5 per cent penalty, and that whenever any person present at said sale should enter a bid for the full legal rate of interest, 24 per cent, that no person should bid against him, thereby eliminating all competitive bidding at such tax sale, and as a result of such arrangement the premises hereinbefore described were sold to the defendant W. H. McIntosh for the full obtainable rate of 24 per cent, together with 5 per cent penalty; that the defendant McIntosh is a professional tax purchaser in Bottineau county, and for years has been a regular purchaser at the annual tax sales held therein, purchasing large numbers of tracts under an express or tacit understanding that all the property

sold should be bid in for the highest rate of interest obtainable, and the plaintiff herein V. B. Noble, upon his information and belief alleges the fact to be that never at any time in Bottineau county at any tax sale, including the said sale of 1907, has the city or village property in said county ever been sold under competitive bidding.

(7) That the defendant J. P. Simon is threatening to give notice of the expiration of the period of redemption from said tax sales to said property, and the defendant W. H. McIntosh is threatening to demand from the said J. P. Simon a tax deed to said real property above described.

(8) That unless restrained and enjoined by an order of this court the defendant J. P. Simon, as auditor, will give notice of the expiration of the period of redemption from said tax sales, and the said defendant W. H. McIntosh will demand and receive from the said J. P. Simon a tax deed to the said real property above described, and the plaintiffs will be irreparably damaged thereby, and for such damage plaintiffs have no plain, speedy, or adequate remedy at law.

Wherefore, plaintiffs pray judgment as follows:

(1) That an order issue from this court, enjoining and restraining the said J. P. Simon and his successors in office from giving notice of the expiration of the period of redemption from said tax sales, and from issuing any deed based on such tax-sale certificates, and from doing any act whatsoever with reference to said tax-sale certificates, and that the defendant, W. H. McIntosh, his agents, servants, and attorneys and each of them be enjoined and restrained from demanding of the said J. P. Simon and his successors in office that he give notice of the expiration of the period of redemption of said tax-sale certificates, or from demanding any deed therefor.

(2) That the said tax certificates for said property be declared illegal and void, and canceled of record as a cloud on plaintiff's title.

(3) For costs and disbursements of suit and for such other and further relief as to the court may seem just and agreeable to equity.

At the outset it will be observed that the action is not the statutory action to determine adverse claims, but on the contrary is analogous to the case of Powers v. First Nat. Bank, 15 N. D. 466, 109 N. W. 361, the object being to have certain tax certificates adjudged null and void and canceled of record, and perpetually enjoining the issu-

ance of tax deeds thereunder. In other words, it is strictly an equitable action to be determined on equitable principles. It is nowhere alleged in the complaint that the taxes represented in the tax certificates were not justly and legally levied, nor that any portion thereof have ever been paid or tendered, nor does the plaintiff in his complaint offer to do equity by paying or tendering to defendant McIntosh the amount of such taxes with legal interest, or at all. He is in a court of equity asking affirmative equitable relief without offering to do equity. His position in brief is that, because of an alleged illegal agreement between the bidders at the tax sale to stifle competitive bidding, that a court of equity should lend its aid to enable him to escape the payment of a concededly just and legal tax. To the extent of any injury suffered by him through such unlawful combination, a court of equity will of course afford him relief, and no doubt it will cancel the tax certificates; but to do so without requiring him to do equity by first paying or tendering the amount of the taxes, interest, and penalty justly due from him to the county at the date of sale, would be manifestly inequitable. We see no reason why the maxim, "he who seeks equity must do equity," should not apply. The unlawful agreement to stifle competitive bidding had for its sole object the obtaining of an excessive rate of interest and penalty, and could in no manner injure the plaintiff in so far as the amount actually due the county at the date of the sale is concerned. Of course defendant should not be permitted to profit in the least through his wrongful act. Hence he should not be permitted to recover any interest whatever on his investment. He has, however, discharged an obligation to the county which plaintiff was under a legal duty to discharge; and it seems to us that, both in equity and good morals, plaintiff, who comes into a court asking equitable relief against such tax certificates, ought to be required to pay or tender to defendant what in equity and good conscience he ought to have paid to the county at the date of sale. It is the plaintiff, not the defendant, who is invoking the aid of equity in this case, and the above maxim has no application to the latter.

We have not overlooked the case of Nichols v. Russell, decided by the Kansas City court of appeals, reported in 141 Mo. App. 140, 123 S. W. 1032, and relied on by appellants' counsel in support of their contention. We have carefully examined this case, and are unable to con-

cur in the criticism therein of the decisions of the supreme court of Iowa in Besore v. Dosh, 43 Iowa, 211. Light v. West, 42 Iowa, 138, and Everett v. Beebe, 37 Iowa, 452. We do not adopt the Iowa rule. however, *in toto,* as we deem it more consistent with a wise public policy, as well as more equitable, to require the plaintiff to pay or tender to the defendant merely the amount paid by him at the sale, without any interest from such date. This justly deprives the defendant of any profit out of the transaction, but at the same time compels the landowner to pay, as a condition to equitable relief, what he should have paid to the county as his share of the public burdens. There is nothing in Youker v. Hobart, 17 N. D. 296, 115 N. W. 839, inconsistent with the above views. In that case the defendant, the landowner, deposited with the clerk of court and offered to pay to plaintiff the full amount of taxes, with interest and penalty, which offer was refused. Our views herein are in harmony with the settled rule in this state. Powers v. First Nat. Bank, 15 N. D. 466, 109 N. W. 361.

The order appealed from is affirmed.

SATHAM v. MUFFLE et al.

(135 N. W. 797.)

Assault and battery — civil liability — admissibility of plea of guilty in criminal action.

1. Plaintiff sued the defendants for damages alleged to have been inflicted upon him by them through an assault and battery. At the trial plaintiff introduced in evidence the record of a justice of the peace, showing that two of the defendants had pleaded guilty to the same assault and battery in a criminal action. Defendants objected to the reception of the said record, because it did not show that the defendants had been fully informed of their rights by the justice, and because the complaint in said justice court was not specific enough to constitute the plea thereto an admission of assault and battery. *Held,* that the plea was an admission against interest, and that upon all of the facts shown was an admission that they had assaulted and battered plaintiff, and, as such, was admissible in evidence to go to the jury for what it was worth.

Assault — civil action for — proof of plea of guilty in criminal action.

2. After the reception of the plea of guilty above mentioned, the defendants

offered to prove that they had been advised by friends to plead guilty in the criminal case, as it would be cheaper to so do than to allow their breaking outfit to stand idle and to hire attorneys. *Held*, that while the plea of guilty was not conclusive and could be explained by competent evidence, yet statements made to the defendants by other parties, unless relied upon, are inadmissible in evidence.

Assault — evidence of former altercations — malice.

3. Evidence of former altercations with one of the defendants held admissible as showing the question of malice.

Assault — proof that defendant carried weapon and had threatened to use it.

4. Evidence that one of the defendants was in the habit of carrying a pocket knife, and that he had made threats to use it, admissible under the facts in this case, as plaintiff had during the course of the altercation armed himself with an iron bolt, and claimed to have done so in self-defense.

Assault — incitement to, by one not actively participating.

5. The elder defendant, who was the father of the other two defendants, did not actually touch the plaintiff, but he stood by and encouraged the sons to do so, using such expressions as, "soak him," "kill him," and telling the sons about the plaintiff having a bolt to assault their father. *Held*, that the father by such conduct became an active participant in the fight, and a motion made at the close of the case to instruct a verdict for him was properly denied. Likewise such a motion for the other defendants was properly denied.

Appeal — error in instructions.

6. Errors assigned upon the instructions to the jury examined and found without prejudicial error; the case being one peculiarly for the jury, and wherein the instructions, even if faulty, would not be likely to mislead.

Opinion filed March 28, 1912.

Appeal by defendants from a judgment of the District Court for Sargent County, *Allen*, J., in plaintiff's favor in an action brought to recover damages for an assault and battery.

Affirmed.

Wolfe & Schneller, of Wahpeton, and *E. W. Bowen*, of Forman, for appellants.

Purcell & Divet, of Wahpeton, for respondent.

BURKE, J. While there are the customary minor disputes, a fair preponderance of the evidence shows the following facts: Plaintiff was an unmarried man, thirty-six years of age, in good health, weighed

about 145 pounds, and was a grain buyer at the little station of Straubville, North Dakota. The defendant, Jacob Muffle, Sr., was a farmer, sixty-nine years of age, who lived adjacent to the village. He was very eccentric, and it would appear that some of the citizens, who should have known better, amused themselves by teasing him. The younger Muffles were his sons, also farmers, aged about thirty and thirty-six respectively, and who had left the father's home. It also appears that plaintiff had boarded with the older Muffle for a time, and had left the home with some little bad feelings between them. Upon the 19th day of May, 1909, the elder Muffle met the east-bound train, preparatory to going to the county seat to serve as a juror at a regular term of the district court. Plaintiff met the same train upon some of his elevator business. When he reached the station one Schultze was teasing Muffle, Sr., regarding his qualifications as a juror, and Muffle was striking at and swearing at Schultze. It was just dusk, but when plaintiff came up close enough to be recognized, Muffle turned upon him and called him a foul name. For this plaintiff gave him a push that sent him back about a dozen feet. The old man recovered and rushed at plaintiff just as the train pulled into the station. Plaintiff avoided him by rushing across the railway tracks ahead of the engine, and allowing the train to stop between them. Muffle then boarded the train from the station side, and plaintiff tried to board it from the opposite side, as he says, for the purpose of crossing to the station side to talk to the train crew. He had picked up an iron bolt about 20 inches long and held it in his hand. There were but two coaches in the train, so Muffle and plaintiff met as each tried to ascend the coach steps. Muffle, being first up, tried to prevent plaintiff's ascent by kicking at his face. Incidentally he used some loud and vulgar language, and reproached plaintiff for arming himself with the bolt. Plaintiff thereupon threw away said weapon, but continued the altercation. The disturbance was heard all over the town, and the two younger Muffle boys, who had been at a store across the street, recognized their father's voice and rushed to his assistance, and jointly and severally chastised plaintiff until he hollered enough, when they ceased. Plaintiff appears to have received a broken nose, black eye, broken tooth, and some minor injuries. During the fight the elder Muffle remained upon the car steps, and took no part further than to encour-

age the boys by telling of the iron bolt and other grievances, and advising the boys to "kill him," "soak him," and similar expressions. When the train pulled out, he went upon it. The following day the two boys were arrested upon the charge of assault and battery upon the complaint of Satham. They pleaded guilty and paid a small fine.

The case at bar is a civil action against the father and the two sons for damages alleged to have been inflicted upon plaintiff. In the complaint it is alleged that the defendants, "Jointly, wrongfully, and unlawfully conspired together . . . to assault, beat, bruise, and injure plaintiff," and that as a result of the conspiracy the two sons did assault and batter said plaintiff, and that the father did counsel, advise, incite, and encourage the said sons in their said assault, wherefore the plaintiff prays judgment against all of the defendants in the sum of $2,515.00, for actual and punitive damages. The answer filed by the father is a general denial. The sons add the further defense of justification, alleging that what they did was in defense of their father's person. They also add to their answer the following statement: "That thereafter and on or about the 20th day of May, 1909, the plaintiff made a complaint before W. W. Bradley, Esq., a justice of the peace in and for Sargent county, in which these two defendants were charged with the commission of assault and battery upon the person of the plaintiff, such charge being based upon the acts aforesaid; that being advised thereto by friends and relatives who were not lawyers, and being entirely unadvised as to their legal rights in the premises, these defendants, mistakenly believing themselves technically guilty of assault and battery upon the person of the plaintiff, went before said justice of the peace and entered a plea of guilty to said charge . . .; that in truth and in fact these defendants were not guilty of said offense, and made and entered said plea under a mistaken apprehension both of the facts and of the law."

(1) At the trial below, plaintiff offered in evidence the record of the justice of the peace to show the plea of guilty entered by the two younger Muffles, as an admission against their interests in the present case. Appellant concedes that this procedure is proper as a general rule of law, but insists that in this praticular case the record offered was insufficient in several particulars; for instance, that the complaint in the justice court did not in fact charge any offense. Also that the record

offered does not show affirmatively that the prisoners had been informed of their statutory rights, or that the complaint had been read to them. In passing upon this objection, we must bear in mind the fact that the plaintiff was merely trying to prove an admission made by the two boys that they had committed an assault, and the assault in issue, upon plaintiff. This admission could have been proved by any person hearing it made, or by the record of the justice of the peace. If the proof is by record only, such record should show the complaint and the record of the plea of the defendants thereto. The complaint need not be formal or technical, but need only state the jurisdictional facts, and fairly apprise the defendants of the nature of the charge laid against them. An examination of the record offered in the case at bar shows the complaint in full. It charges that "on the 19th day of May, A. D. 1909, at Straubville, Jackson township, in said county, the above-named defendants did the crime of assault and battery, committed as follows, to wit, that at the same time and place the said Jake Muffle, Sr., Aaron Muffle, and Louis Muffle, with cause or provocation, did wilfully, maliciously, and unlawfully strike, kick, and beat the said Peter Satham, he being then and there against the peace and dignity of the state of North Dakota. Wherefore, complainant prays that defendants may be arrested and dealt with according to law." The record shows that the defendant Jake Muffle, Sr., pleads not guilty and the defendants Aaron Muffle and Louis Muffle plead guilty. We are not unmindful of the assaults upon the English language contained in the above complaint, but courts of justice must deal with the poorly educated people as well as with those more fortunate, and we believe that the defendants were fully and fairly informed of the charge against them by the said complaint, and that they pleaded guilty with a full knowledge of what it was all about. When we further consider that these defendants had pleaded in their answer that they had been arrested and had pleaded guilty to the charge, we must hold that proof of the record offered was admissible. They try to avoid the effect of their own answer in argument before this court by saying that their answer meant that the complaint in the justice court was based upon the facts disclosed, and that those facts showed that they were not guilty; but a careful reading of the said answer, set forth above, will show defendants allege a plea of guilty to a charge of assault and battery, and an attempt to explain

away such admission by showing that they pleaded guilty to avoid the expense of a trial. Having pleaded these facts themselves, it would be a strange rule that allowed them to complain that such facts were not proven by their adversary. This applies to the matter of reading the complaint to the defendants and similar objections. This is not an argument upon a demurrer, it is merely a discussion as to what admissions of the defendants were made in a former trial.

(2) We now come to a more serious question. After the trial court had admitted the record of the justice of the peace showing the plea of guilty, the defendants made the following order: "Defendants offer to prove by this witness and the witness Louis Muffle and by the witness Knute Knipstrap and George Sullivan, that this witness and the other defendant, Louis Muffle, were on the morning of the 20th of May, 1909, advised by Knipstad and Sullivan to come to Forman and enter a plea of guilty to assault and battery, for the reason that it would be better and cheaper than to employ an attorney and let their breaking rig stand idle during the time of the trial, and whether guilty or innocent made no difference." This offer was rejected by the court, and error is assigned upon the ruling. The appellant cites to us cases holding that a plea of guilty entered in a criminal case is not conclusive against the defendant in case the same facts are made the basis of a civil suit, and that the defendant may show why he comes to make the plea of guilty. There is no attempt upon the part of the plaintiff to dispute this doctrine, either here or below. In fact the defendants were allowed to go all over the details of the combat and give their version of the facts. They were not held to their plea of guilty. They were allowed to show fully just how the fight started, progressed, and ended. They were also allowed to show that they were running a breaking outfit the next day when arrested, and that they advised with friends. When, however, they attempted to show what those friends had advised them, the evidence was excluded. The statements made to defendants by other persons would at most be material if they were relied upon and acted upon by defendants; and the offer made does not include this fact. Dozens of their friends may have advised them to plead guilty, but unless they were influenced thereby to make such a plea the advice of their friends would be immaterial in this suit. After all the matter in issue was not what they were advised, or what they did

in justice court, but what did they do in the fight at Straubville? The advice of friends and the plea of guilty are only straws. As the trial court allowed them to show all the facts of the assault, the jury could determine the fact in issue, and defendants are not prejudiced in any manner by the exclusion of statements made by friends not under oath. See Root v. Sturdivant, 70 Iowa, 56, 29 N. W. 802.

(3) During the course of the trial, plaintiff offered evidence to the effect that plaintiff and the elder Muffle had an altercation some time before the assault in issue. This evidence was admitted over the objection of the defendants. We think the evidence proper. It showed the condition of the elder Muffle's mind toward plaintiff, and went to the question of punitive damages at least.

(4) Another error alleged by appellant is the admission of evidence as to the elder Muffle carrying a knife, and threats made by him to use it. As the evidence showed that plaintiff had armed himself with an iron bolt after the first meeting with the elder Muffle, we think it proper to show the above facts as a reason why plaintiff so armed himself.

(5) At the close of the taking of evidence, the defendants moved for a directed verdict upon the grounds of failure of proof. It is especially urged that the elder Muffle was entitled to the same as he had not touched plaintiff and no conspiracy was proven. The ruling of the trial court was right. The elder Muffle had stood by and encouraged the boys in the assault; he had related to them the facts of the bolt in plaintiff's hands. He had done everything he could to incite the anger of his sons. Such conduct made him an active participant in the assault, and equally liable with his sons for any damage done. Little v. Tingle, 26 Ind. 168; Baldwin v. Biersdorfer, Wilson, Super. Ct. (Ind.) 1; Brink v. Purnell, 162 Mich. 147, 127 N. W. 322, Ann. Cas. 1912A, 829. In the last-named case the language was very similar to that used by Muffle, Sr. We think the motions were properly denied.

(6) Certain errors are predicated upon the instructions to the jury. Most of them relating to the matters already covered by this opinion, and are in harmony therewith. They will therefore not be further noticed.

Many other exceptions are taken to the charge of the jury and have been carefully considered by us. Many of the extracts quoted by appellants, taken alone, are subject to criticism, and emphasize the neces-

sity that judges prepare their charges with care. However, taken as a whole we do not believe there is anything in the charge that can be said to prejudice either of the defendants. The case is one peculiarly for the jury, and one in which the charge of the judge is not likely to mislead.

Finding no prejudicial error, the judgment is affirmed.

STATE v. STOCKWELL et al.

(134 N. W. 767.)

Chapter 85 of the Session Laws of 1901 (§§ 868 to 876, Code 1905) provided for the payment of $2 fee for each applicant for teacher's certificate, and that one dollar thereof should be transmitted to the superintendent of public instruction "to be used by him for such clerical assistance as he may deem necessary and competent for the reading of teachers' answer papers and work connected therewith," and that to do said work the state superintendent "may appoint such clerical assistants as he may deem necessary, but the expenditures therefor shall not exceed in the aggregate the sum annually collected from applicants for county certificates for this purpose." During defendant's incumbency of said office there was collected from this course $17,714, of which $11,816 was disbursed, leaving unexpended $5,598. This balance is retained by defendant under his claim of ownership founded upon his claims, *viz.*: (a) That the fund was intended as a private fund and that any balance thereof remaining belonged to him individually; (b) that the right to use necessarily carried with it the ownership of the fund, the statute not requiring the same to be covered into the state treasury nor an accounting therefor from the officer; (c) that the statute creating the fund prescribed new and additional duties for the office and that the legislative intent should be that the balance remaining of the fund should belong to the officer as compensation for such added duties of office; (d) that under the facts that the balance remains unexpended because the defendant personally performed the duties during times when not otherwise necessarily engaged in the performance of his official duty, the defendant was entitled to the reimbursement that otherwise would have been

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Note.—A question similar to the one involved in this case is treated in a note in 30 L.R.A.(N.S.) 810, on the right of a clerk on a salary basis to retain fee for naturalization. The authorities there reviewed show that it is generally held that a clerk on a fixed salary is not entitled to retain as his own the fees received in naturalization cases by virtue of his office.

paid to clerical assistants; and that because the fund was saved by his own personal exertions, instead of expended for clerical assistants, defendant is entitled to said balance remaining of the fund; (e) that the practical construction of the statute in question by such officer, and his predecessor, and the various executive state officers, has always been that such balance of the fund belonged to the officer, and such construction is urged as controlling; (f) that the allowance of such additional compensation does not contravene the terms of § 84 of the state Constitution against the increasing or decreasing of official salaries during the period for which the officer shall have been elected.

Under the above it is *held:*

Superintendent of public instruction — ownership of funds in hands of — accounting.

(1) That the fund created by said $1 payments at all times since collection is and has remained a public fund and the balance unexpended is a balance of one of the public funds of the state for which the defendant is accountable to the state.

Superintendent of public instruction — ownership of funds in hands of — accounting.

(2) That the legislature, in providing this fund and authorizing its use for declared purposes and constituting the incumbent of the office of state superintendent of public instruction, the paymaster authorized to disburse from the fund for certain duties for which he was allowed to employ clerical assistants did not thereby constitute the officer the owner of the fund. The right of use conferred was the right to disburse in payment for such service germane to the duties of the office.

Ownership of funds in hands of public officer — legislative intent.

(3) That the legislative intent must be clear and the statute must evidence a plain intent to grant public funds to a public officer occupying a salaried office, otherwise the fund remains the property of the state, conceding without deciding the authority of the legislature to give to the officer the ownership of such funds.

Ownership of fund in hands of public officer — burden of proof.

(4) That the collection of the moneys by the defendant under color of office being admitted, the burden of establishing title thereto in the individual is upon such public officer claiming to own the fund, and not upon the state to establish want of ownership on the part of the state officer.

Public officers — compensation — extra work.

(5) A public officer cannot increase his salary by performance of official duty under claim of its performance after regular office hours, nor by himself performing office duty in lieu of employing office assistants authorized by statute. And the officer can make no claim to public moneys a necessity for the expenditure of which is avoided by his own performance of official duty.

Public officers — right to fees — practical construction of statute.

(6) There being no plain statutory intent that the fees in question should belong to the officer as emoluments of office, any practical construction of such statute by the previous incumbent of the office and of other state executive officers is immaterial, as such construction cannot be permitted to contradict, overrule, or supplement the plain terms of the statute.

Public officers — compensation — increased duties.

(7) That the salary attached to a public office is but an incident of the office, and an increase in official duty does not necessarily imply or exact an increase of salary.

Public officers — fees — duty to account for.

(8) That under the statutes of this state, §§ 420 and 421, Revised Codes 1905, formerly existing as § 358, Revised Codes 1895, §§ 98, 101, and 103 of the Codes of 1905, in force throughout defendant's incumbency of this office, it was the duty of the defendant at a no later date than the expiration of each term of office, to account to the state and cover into the state treasury any balance remaining of the fees collected from this source during such two-year term of office.

Public officers — fees — duty to account for.

(9) Under the above holding that the state is the owner of the moneys in suit, and that the defendant must account and is liable therefor to the state on his official bond, the constitutional question that would be involved by a contrary construction of the statute is without the case, and is not passed upon.

Public officers — fees — duty to account for.

(10) This balance in suit are fees and profits arising from said office mentioned in, covered by, and within the meaning of § 84 of the state Constitution, requiring the same to be paid into the state treasury.

Opinion filed October 12, 1911. On petition for rehearing February 14, 1912.

Appeal by defendant Stockwell from a judgment of the District Court for Grand Forks County, *Templeton,* J., in plaintiff's favor in an action brought to recover certain unexpended balances retained by defendant under claim of ownership after expiration of his term of office.

Affirmed.

Gray & Myers, for appellant.

That portion of § 84 of the Constitution, "and all fees and profits arising from any of said offices shall be covered into the state treasury,"

is not self-executing. Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331; Rowland v. Forest Park Creamery Co. 79 Kan. 134, 99 Pac. 212; Griffin v. Rhoton, 85 Ark. 89, 107 S. W. 380; State ex rel. Ohlquist v. Swan, 1 N. D. 5, 44 N. W. 492; Roesler v. Taylor, 3 N. D. 546, 58 N. W. 342; Engstad v. Grand Forks County, 10 N. D. 54, 84 N. W. 577; Lewis v. Lackawanna County, 200 Pa. 590, 50 Atl. 162; Re Cahill, 110 Pa. 167, 20 Atl. 414; State ex rel. Barron v. Cole, 81 Miss. 174, 32 So. 314; French v. Teschemaker, 24 Cal. 518; Chittenden v. Wurster, 152 N. Y. 345, 37 L.R.A. 809, 46 N. E. 857.

Concluding clause of § 84 of the Constitution does not, directly or otherwise, impose a limitation upon the right of the legislative authority to thereafter compensate those officers thereby affected, by means of specific fees, for the performance of such new duties as might be legislatively required of them. State ex rel. Edgerly v. Currie, 3 N. D. 317, 55 N. W. 858.

Fund created by §§ 869 and 876 of Code not necessarily composed of "fees" and "profits." State ex rel. McGrath v. Walker, 97 Mo. 162, 10 S. W. 473.

Andrew Miller, Attorney General, *Alfred Zuger*, and *C. L. Young*, Assistant Attorneys General, for the State.

Provision of § 84 of the Constitution, with reference to covering all fees and profits arising from any of the state offices into the state treasury, is self-executing. Cooley, Const. Lim. pp. 119–123; Willis v. St. Paul Sanitation Co. 48 Minn. 140, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110, 53 Minn. 370, 55 N. W. 550; State ex rel. Roberts v. Weston, 4 Neb. 216; Thomas v. Owens, 4 Md. 189; Reynolds v. Taylor, 43 Ala. 420; Miller v. Marx, 55 Ala. 322; People v. Hoge, 55 Cal. 612; Swift & Co. v. Newport News, 105 Va. 108, 3 L.R.A. (N.S.) 404, 52 S. E. 821; Davis v. Burke, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210; State ex rel. Lincoln v. Babcock, 19 Neb. 230, 27 N. W. 94; Ex parte Snyder, 64 Mo. 58; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Parker County v. Jackson, 5 Tex. Civ. App. 36, 23 S. W. 924; State v. Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; San Francisco & N. P. R. Co. v. State Bd. of Equalization, 60 Cal. 12; Day v. Day, 12 Idaho, 566, 86 Pac. 531, 10 Ann. Cas. 260; State ex rel. Murray v. Voorheis, 50 La. Ann. 985, 24 So. 132; Winchester v. Howard, 136 Cal. 432, 89 Am. St. Rep. 193,

64 Pac. 692, 69 Pac. 77; Mallon v. Hyde, 76 Fed. 388; Nickerson v. Crawford, 74 Minn. 366, 73 Am. St. Rep. 354, 77 N. W. 292; Farmers' Loan & T. Co. v. Funk, 49 Neb. 353, 68 N. W. 520.

No claim for additional compensation can be made in the absence of an express legislative grant of such compensation. Mechem, Pub. Off. § 862; Throop, Pub. Off. 478–479; 1 Dill. Mun. Corp. § 233, 4th ed.; Evans v. Trenton, 24 N. J. L. 764; People v. New York, 1 Hill, 362; United States v. King, 147 U. S. 676, 37 L. ed. 328, 13 Sup. Ct. Rep. 439. See also Broaddus v. Pawnee County, 16 Okla. 473, 88 Pac. 250.

Person who accepts office to which no compensation is attached is presumed to undertake to serve gratuitously, and cannot recover anything upon the ground of implied contract to pay what the services are worth. Johnson v. Black, 103 Va. 477, 68 L.R.A. 264, 106 Am. St. Rep. 901, 49 S. E. 633; Jones v. Lucas County, 57 Ohio St. 189, 63 Am. St. Rep. 710, 48 N. E. 882; United States v. Saunders, 120 U. S. 126, 30 L. ed. 594, 7 Sup. Ct. Rep. 467; Throop, Pub. Off. 443.

General usage cannot be resorted to, to escape liability, and therefore the defendant is liable. Whittemore v. People, 227 Ill. 453, 81 N. E. 427, 10 Ann. Cas. 44. See also Throop, Pub. Off. § 445, and Lewis, Stat. Constr. § 473; Ogden v. Maxwell, 3 Blatchf. 319, Fed. Cas. No. 10,458; Albright v. Bedford County, 106 Pa. 582.

Goss, J. There is no conflict as to the facts in this case. It stands admitted that during the three terms defendant and appellant served in public office as the superintendent of public instruction in this state there came regularly into his possession by virtue of his office the sum of $17,714, as the proceeds of that number of $1 payments contributed by that number of teachers under the provisions of § 876 of the Revised Codes of 1905, or chap. 85 of the Session Laws of 1901. Under this statute each applicant for teacher's certificate on examination therefor paid a fee of $2 to the county superintendent of schools of such county wherein the examination was held, $1 of which $2 fee the county superintendent was obliged by law to pay into the county teachers' institute fund, and the other $1 thereof to forward to the superintendent of public instruction. It is admitted that of such total collection by the

defendant as state superintendent he disbursed $11,815, leaving unexpended $5,898 as a balance retained by him personally after the expiration of his term of office, under his claim in good faith that he is entitled to retain same as owner thereof; and that acting thereon to determine the law involved this action has been brought. The lower court awarded judgment in favor of the state, and defendant appeals.

This matter is primarily one of statutory construction. The sections to be construed are §§ 876 and 869, providing for the collection and creation of the fund and for its expenditure. The statute creating the fund does not expressly or explicitly command an accounting by the officer to the state for the fund, or direct disposition of any balance that may remain unexpended therein, while the statute itself in terms provides the official may disburse it, designating, however, the purposes for which it may be so expended.

This legislation originates with chap. 62 of the Session Laws of 1890, the important features of which defines the duties of the office of superintendent of public instruction; providing in § 5 of the law that it shall be the duty of such officer to prepare all questions used in the examination of applicants for teacher's certificates, prescribe the rules and regulations for conducting all such examinations, and issue or revoke state certificates when provided by law. His duty in such respect remained unaltered as § 626 of the Code of 1895, and § 736 of the Code of 1899; and until 1901 this duty and the work involved rested upon the various county superintendents. By chap. 85 of the Session Laws of 1901 this duty was placed with the state superintendent. And in addition to the fee of $1 formerly required to be paid by the applicant to the county superintendent, used by the county superintendent in support of teachers' institutes in the county or in the support of teachers' training schools (see § 743, Code of 1899) a $1 addition to the fee was required, making the fee paid by the applicant for certificate $2. The section of statute requiring the fee as enacted in chap. 85 of the Session Laws of 1901 is as follows: "Sec. 743. Fee for Certificate. Each applicant for a county certificate shall pay $2 to the county superintendent, $1 of which shall be paid into the county teachers' institute fund, to be used in support of teachers' institutes or the teachers' training schools in the county, as otherwise provided, and $1 of said fee shall be used by the superintendent of public instruction for such clerical assistance as he

may deem necessary and competent for the reading of teachers' answer papers and work connected therewith. It shall be the duty of the county superintendent immediately after each examination to forward $1 for each applicant for teachers' certificate to the superintendent of public instruction, such sums to be used by him as hereinbefore provided."

Under another and preceding section of the same law a fee of $1 was required to be paid into the institute fund of the county in cases of removal or validation of certificates by indorsement by the county superintendent as by law provided.

The question before us for determination is: Do the provisions of §§ 869 and 876 authorize the claim of the defendant in this case that the balance of the unexpended fee provided in those sections belongs to him under a reasonable construction of the two sections referred to? One basic fact must be considered as having an important bearing in this matter. We are dealing with one of the state funds. This surplus is but a balance remaining of a fund collected by virtue of official employment in the exercise of official duty by a county officer in a matter germane to the duties of such officer, and is, in its collection and transmission to a state officer charged by law with the duty to receive it, a state fund,—public money. The mode of collection impresses it with these characteristics. Indeed, an equal amount, the other one half the fee collected from the same source, goes into a designated public fund created by the same statute, named the "teachers' institute fund" of the county wherein it is collected. It would be strange reasoning, indeed, that would conclude that $1 of every collection belonged to some person individually, holding public office, while the entire collection is made as a collection of public moneys for public use by a public officer discharging his prescribed statutory official duty in so doing, unless there be some plain mandate of the law providing that such portion of this public money shall become private property. It is likewise plain that the legislature never intended the county superintendent should extract $2 for every applicant for teachers' certificate, that one half thereof should be public money and one half a private fund for the already salaried official at the head of the educational department of the state, upon whom already rested the duty of performance of all the duties of his office the legislature might declare belonged to it. Again, in case of default by the county superintendent of schools in making collection of

the applicants, would there be any doubt as to his liability on his bond for such failure of performance of plain duty, and who but the state would then be able to collect thereon? Or, again, in case of the collection of the $2 required and the embezzlement by the county superintendent of one half of such fund so collected, after the other one half had been paid into the county institute fund, would there be any question of the ability of the state to recover for its use the defalcation, or prosecute the delinquent officer criminally therefor? It is noticeable that the statute designates the total payment as a fee in the direction "and $1 of said fee shall be used by the superintendent of public instruction for such clerical assistance as he may deem necessary and competent." The fee of $2, then, is by statute designated as an entire payment, one fee, and, so regarded, it must be either wholly private or wholly public, unless the statute itself expressly declares one part public and the other private. One half the fee reaching by statute a public county fund, it thereby impressed the whole fund as belonging to the public, even though there be no provision made for the other one half, except that it be paid into the hands of the public official for public use. Hence, the conclusion urged by defendant that the omission to declare that portion of the payment transmitted to the state superintendent to be a public fund, while the other portion remaining in the county is declared a county fund, shows a legislative intent that the part transmitted to the state superintendent should be private funds, is without force. The only reasonable conclusion to arrive at is exactly the contrary; namely, that the legislature, having designated the portion remaining shall be turned into a particular fund, evidences an intent that the entire collection is for public purposes unless the contrary is specifically provided for, and it is not. This is strengthened by the presumption that every fee exacted by a public officer in the performance of his duty requiring it is a collection of public moneys excepting where the statute plainly provides that the officer shall be paid by the fee or that such fee collected shall belong to the officer. Otherwise it attaches as a public fee or profit of the office and belongs to the public. Defendant's assumption, then, that the statute authorizes the collection of these fees by these public officers, the various county superintendents, for the benefit of the state superintendent individually, is begging the question and assuming as a fact an unusual situation,

as nowhere and at no place is a similar provision found relative to a state or county officer. And such an assumption would ignore the proposition of law that the burden in this case is upon the defendant to justify his title to these funds retained by him, and not upon the state, after the collection has once been established or admitted, to prove the ownership of moneys collected by force of statute by public officers, transmitted to the incumbent of this state office.

Then, again, the statute providing for the payment of fees by private parties to public officers necessarily evidences a legislative intent that such fees shall belong to the public, unless expressly declared as fees to the officer individually; and most certainly is this true where the officer to whom the fees are paid is a salaried officer. Defendant, challenging the conclusion that the fees are a public fund, argues that the various county superintendents are the agents of the state superintendent to collect from each applicant for a teacher's certificate the $1 item on behalf of the state official; and urge that he is an agent or trustee in such collection and the transaction of the same to the state superintendent, urging this agency or trusteeship as a reason why the funds should be held to be the private property of the superintendent from the time of their collection. But though the county officer may act as agent or trustee of the incumbent of the office of state superintendent of public instruction in the performance of this duty, it does not follow that such is any reason to characterize the fund so acted upon as a private fund, when one remembers that every public officer is an agent for the state and likewise a trustee for the state in the performance of his duty. Turn to § 3, Throop on Public Officers, and find the following definition of a public officer: "A public office is an agency for the state, and the person whose duty it is to perform this agency is a public officer." Turn again to Mechem on Public Officers, § 803, and read: "From the very nature of the case it is evident that the public—the government, be it national, state, or lesser municipal—can deal with third persons and enter into contracts with them only through the instrumentality of its public officers or agents, duly authorized by law and acting within the scope of the authority conferred upon them." See also §§ 839 and 840 of the same authority. And constantly throughout the text-books and decisions on public officers we find parallels drawn, comparing public officers with agents and trus-

tees, and the word "officer" is often used, coupled with agent or trustee, in illustrating the relation between the office and the public. A public officer is in a sense an agent or trustee of every other public officer or person to whom a responsibility is owing by the public officer. And whether the fees in question be the property of the state or the property of the defendant, the county superintendent in the collection of the fund in either case acts as an agent or trustee for such purposes.

Again, it is urged in support of the contention that these funds are private funds of the officer that the state has in no sense obligated itself to pay any clerical assistants he may employ, but on the contrary, that the superintendent is alone responsible for their pay; and that he has the fund and is required to procure the work done on his own private responsibility. We submit this proposition will not stand the light of reason. Here is a state officer explicitly authorized by the statute, § 869, in the closing part thereof, to employ such clerical assistants as he may deem necessary and competent. For whom is the employment but the state? Who pays the employees but the state? And from what is it paid but the fund mentioned in § 876, which fund is by statute limited to the disbursement for payment of such clerical assistants as must be necessary as well as competent to do the work? If a private fund, why such limitation on its disbursement? Are private funds subject to statutory limitation? Does not, on the contrary, reason dictate that such statutory restriction evidences a legislative intent that the fund was a public one? The importance of this question of ownership of the fund is seen when we realize that, to sustain defendant's contention, we must hold that the fund, from collection to final disbursement, at all times remains private property of an incumbent of public office; and to so hold it would follow as the night the day that at no time has the state been responsible for the payment of the employees doing its work under the statute authorizing the state superintendent to employ clerical assistance. We cannot subscribe to such a doctrine contrary to all precedent and as inconsistent as it is unreasonable. The statute, by authorizing the officer to employ clerical assistants in his office to perform and assist in the performance of the duties of the officer, never contemplated that when so employed they should be regarded as private servants looking to a private individual for their compensation. While the clerks are not officers, not

having subscribed to any oath of office, or given a bond, or being responsible as public officers, yet they are public employees when legally employed by the officer authorized by law to engage their service, in the absence of some provision of law or some express provision of their contract of employment rendering the public officer personally liable to them for their pay, and accordingly the state is their paymaster and legally obligated as such to pay them. In the absence of any statutory or contract provision as to who shall pay such clerical assistants, the presumption is that the officer when authorized to make the employment at all bound the state, and not himself, to pay the employee. See chap. 7, Mechem on Public Officers, and particularly § 805 thereof, reading: "A well-defined distinction is made by the law between contracts entered into by the agent of a private principal and those of the agents of the public. It is constantly presumed that the latter do not intend personally to assume the public burdens, and that persons dealing with them do not rely upon their individual responsibility. 'On the contrary,' says Judge Story, 'the natural presumption in such cases is that the contract was made upon the credit and responsibility of the government itself, as possessing an entire ability to fulfil all its just contracts far beyond that of any private man, and that it is ready to fulfil them not only with good faith, but with punctilious promptitude and in a spirit of liberal courtesy.' " Then, again, § 806, same authority, reads: "Hence it is well settled as a general rule that public officers and agents will not be held personally liable upon contracts entered into by them in the public behalf, except in those cases where the intent is clearly apparent so to bind them. And as is said by Chief Justice Marshall, 'the intent of the officer to bind himself personally must be very apparent indeed to induce such a construction of the contract.' " Then, again, we quote the following from Throop on Public Officers, § 551: "A contract entered into in behalf of the state by public officers empowered by statute, either expressly or by implication, to make the same, binds the state as a contract by an individual made through his authorized agent binds him."

Nor are works on public officers the only text-books supporting this proposition. See chap. 37 of second edition, Bishop on Contracts. We quote from § 996 of this authority the following summary of the chapter: "The government, whether of the United States or of a

state, has within its sphere the same power of contract as an individual within his sphere. And like an individual it can enforce the contract in its courts. It is bound the same on its part and the presumption is the same that it will perform. . . . Since it can act only through its officers and other agents its contracts must be ostensibly made by them, for which and other reasons the presumption is always strong that it, and not the agent, is the party to a bargain in its interest."

Under these authorities, but a digest of the cases cited in them, it is plain that the state, and not the defendant, is the employer and paymaster of any clerical assistants contemplated to be employed by the superintendent of public instruction under §§ 869 and 876 of the statute. It is equally plain that the fund from which such help shall be paid is, as declared by § 869, the accumulation from the portion of these fees in the hands of the superintendent. The state being the employer and the party responsible to the employees for wages, the fund from which the wages are designated to come must be a public fund. There can be no other conclusion in reason. And if the fund is a public fund at the time of its prescribed statutory disbursement, it is such in its collection and transmission to the official and in his custodianship of it; all of which everlastingly negatives the theory advanced by the defendant that the fund is his, and not a public fund.

We have established, then, that the undeniable, indisputable, basic fact confronts us in this inquiry, that we are dealing with public moneys in the hands of public officers accountable to the state for the proper care and keeping as well as the appropriate disbursement of public money collected for the state's use. With this in mind should we not have a plain direction in law before we should hold public moneys could be legally diverted as an increase in salary? And should not the claimant be able, before establishing title to the fund, to place before us legislative sanction for such appropriation? With the ownership of the fund established to be in the state, let us analyze the statute in question under which defendant makes his claim thereto. The statute reads: "It shall be the duty of the county superintendent immediately after each examination to forward $1 for each applicant for teacher's certificate to the superintendent of public instruction, such sums to be used by him as hereinbefore provided." This is the law covering the payment of the fund into his hands, "to be used by him as

hereinbefore provided," which is in the manner prescribed in the following language: "And $1 of said fee shall be used by the superintendent of public instruction for such clerical assistance as he may deem necessary and competent for the reading of teachers' answer papers and work connected therewith." No other authority whatever is granted him to disburse from this fund, except it be contained in the last part of § 869, reading: "He may appoint such clerical assistants as he may deem necessary, but the expenditures therefor shall not exceed in the aggregate the sum annually collected from applicants for county certificates for this purpose." It is true this particular state does not expressly require the superintendent to account for the fund in question, nor does it say what disposition he shall make of any balance of the fund remaining unexpended; but that does not alter the fact that whatever balance exists remains as a balance of a public fund. Nor can the fund be disbursed by the superintendent of public instruction except for certain specified purposes. The statute defines the purpose of the fund's collection to be to pay clerical assistants in the office of the state superintendent of public instruction, and defray expenses of assistance in examination, marking and filing of teachers' answer papers, authorizing the superintendent to use said fund not for general clerical assistance, but "for such clerical assistance as he may deem necessary and competent for the reading of teachers' answer papers and work connected therewith." With the examination papers being examined by the various county superintendents, no such fund was contemplated or provided for, but immediately on this work being thrown into the department of public instruction with the bill placing the work there, we find this fund created, to use the words of the statute, "for this purpose" of defraying the expenses necessarily to be incurred "for such clerical assistance as he may deem necessary and competent for the reading of teachers' answer papers and work connected therewith." And, again, immediately following in the provision for payment by the county superintendent to the state superintendent, we find the command; "To forward $1 for each applicant for teachers' certificate to the superintendent of public instruction, such sums to be used by him as hereinbefore provided," again limiting its disbursement to the particular use to which it is ordered applied. But defendant contends it was intended by the legislature that he should

own the fund, subject, however, to the duty of payment therefrom of such clerical assistance as should be necessary to properly perform the duties of the office in this respect. Such is not the letter nor the intent of the act. So to do would be contrary to all precedent in the payment by the state of its officers. Was not the clerical force "necessary and competent for the reading of teachers' answer papers and the work connected therewith" in the state's employ? When has the state ever provided a fund to pay its employees, and transferred title to the same to one of its officers under the command that he individually be responsible for and pay such clerical help of the state? History affords no example of such a manner of dealing by this state. Why should the state exercise the foresight to collect the adequate fund to more than meet all expenses, and then place it in the hands of the officer under whose supervision the work is to be done as a gift to him individually, instead of acting as reason would demand, that of placing the fund in the officer's hands and authorizing him to disburse it as the state paymaster to the employees of his office working for the state. Most assuredly it would seem that before such an unreasonable, unprecedented procedure is declared to be that intended, the statute should be so plain as not only to imperatively demand such construction, but negative any other reasonable one.

The statute grants no more than the right to use, meaning the right to disburse, expend, and pay out the money for the declared purpose for which it was provided. Surely if a construction is adopted interpreting legislative permission to use under such circumstances as an appropriation and a grant of ownership to the officer, careful, indeed, must future legislatures be; and to prevent state officers from claiming funds coming to them by virtue of office, future legislation, to properly safeguard the interests of the state in authorizing official disbursements, should always conclude with a statement "that under no circumstances shall the officer be held to own the public funds hereby intrusted to him by virtue of his office for the state's use." The idea of the necessity for such a provision shows the absurd extreme to which a holding with appellant would naturally lead. Rather, instead, the contrary construction should prevail, that the public official who retains possession of public funds under claim of ownership thereof should be able to base his claim on plain and unambiguous statutory authority therefor; upon

such a definite, unequivocal appropriation to him of the fund as evidences a plain legislative intent to make him the donee of public property. The legislature by granting the use granted no more than that, and the right to such use was granted, not to the individual, but to the office as an incident of the office. We have searched without success for precedent favoring defendant's contention. None is cited by his careful, painstaking, and eminent counsel. On the contrary we find the words "use" and "to be used" must be construed with the context. As an instance, such terms in insurance law mean occupancy; in real estate transfers and the interpretation of wills and devises, the word "use" often is interpreted as a trust; while in ordinary language to "use" is to employ, to derive service from; to "use" moneys is to pay out or disburse them. In Hightower v. State, 72 Ga. 482, the term is exemplified as "one may 'use' a thing that is employed in his service or business." Again, in Heaston v. Randolph County, 20 Ind. 398, at page 403, we read: "The word 'use' may be held as synonymous with benefit." Again, under statutes regulating United States customs duties on personal property imported, in Astor v. Merritt, 111 U. S. 202, 28 L. ed. 401, 4 Sup. Ct. Rep. 413, we find: "In 'use' is defined to be in employment." "Out of 'use' is defined as 'not in employment.'" "To make use of is defined as 'to put in use,' 'to employ,' 'to derive benefit from.'" Again, in State v. Davis, 9 Houst. (Del.) 558, 33 Atl. 439, at page 440, the opinion used the following language: "The word 'use' means to make use of, to convert to one's own service, to avail one's self of, to employ, to put to a purpose." Again, in State ex rel. Hayes v. Board of Equalization, 16 S. D. 219, 92 N. W. 16, we read from the opinion that "use and ownership are not synonymous." Courts are often called upon in taxation matters to determine whether the use or the ownership determines exemption or nonexemption on property for taxation purposes. In Washburn College v. Shawnee County, 8 Kan. 344, we read: "It is strictly the use of the property which determines whether the property is exempt or not." Again, in Cincinnati College v. State, 19 Ohio, 110, in the discussion of taxation matters, we find the following: Property used exclusively for educational purposes is exempt whoever may own it or whoever may use it. Property not used exclusively for educational purposes, if otherwise taxable, is not exempt whoever may own it or whoever may use it. And

generally in taxation matters the use instead of the ownership determines the right to tax, so far as the exemption from taxation of property used for charitable purposes is concerned. We find the right to use to be but an incident of ownership, but not necessarily implying ownership. In no sense are the terms "use" and "ownership" synonymous, nor to be construed as identical in meaning. If the statute in question had authorized the "use" by him for educational purposes of certain real estate belonging to the state no one would contend that more than the bare power to use was conferred. Why under the same phraseology should the privilege of use of public moneys for a specified purpose carry with it the ownership of the fund? The power to employ, to disburse, to pay out, to put to a purpose, or to derive benefit from the money—terms held synonymous with use,—must be construed in connection with the fact that such employment, use, and benefit derived is for the state in whose behalf such funds are to be used, disbursed, and employed.

Appellants urge for our consideration an assumption that the legislature never intended that any balance should exist in this fund. It matters not whether it did or not. Assume the legislature may have supposed that the entire fund would be consumed for the purposes specified and to which the fund is required to be devoted,—to the payment of clerical help. The supposition of the legislature in this respect in no wise evidences an intent that the superintendent of public instruction personally should derive any benefit, but rather the contrary, if the supposition be true, it evidences a want of intent on the part of the legislature to transfer ownership of the fund to the superintendent. It certainly is irrational to first suppose an intent that no balance shall exist, and in the next supposition suppose therefrom such evidences an intent that a balance shall exist and that it shall be the private emolument of office of the officer. Unless the legislature assumed the fund to be entirely devoted to and consumed as well in paying state office employees in clerical work, why the provision that the expenditures for the purposes to which the fund is to be devoted shall not exceed the aggregate sum annually collected from applicants for county certificates for this purpose? The intent may have been that the state clerical help would perhaps consume entirely the state's fund provided to pay the same. If so, this very idea negatives the thought

of its appropriation by the state superintendent, to alleviate whose work and make possible payment of clerical assistants without calling on the general funds of the state, this special fund was created. Grant, again, that a fair inference from the provisions of § 869 is that the fund was to be used to pay clerical assistants so far as it would go, and that the state superintendent and his deputy should, in case of work remaining unfinished in "the reading of teachers' answer papers and work connected therewith," complete the same as a duty of his office. Inasmuch as no specific provision is made for such added work, if any was thrown upon the office, no added salary was to be paid defendant therefor; the rule in such case being that if the statute increases the duties of an official by the addition of other duties germane to his office, he must perform them without extra compensation. "An officer who accepts an office to which a fixed salary or compensation is attached is deemed to undertake to perform its duties for the salary or compensation fixed, though it may be inadequate, and if the proper authorities increase its duties by the addition of others germane to the office the officer must perform them without extra compensation. Neither can he recover extra compensation for incidental or collateral services which properly belong to and form a part of the main office." Mechem, Pub. Off. § 862; Throop, Pub. Off. 478, 479; 1 Dill Mun. Corp. 4th ed. § 233; Evans v. Trenton, 24 N. J. L. 764; People ex rel. Phœnix v. New York, 1 Hill, 362; Andrews v. United States, 2 Story, 202, Fed. Cas. No. 381; United States v. King, 147 U. S. 676, 37 L. ed. 328, 13 Sup. Ct. Rep. 439; Broaddus v. Pawnee County, 16 Okla. 473, 88 Pac. 250. "A change in the duties of an office during the term of the incumbent does not affect the compensation of the officer." 29 Cyc. 1424, citing: Bennett v. Orange, 69 N. J. L. 176, 54 Atl. 249, affirmed in 69 N. J. L. 675, 56 Atl. 1131; Tyrrell v. New York, 159 N. Y. 239, 53 N. E. 1111; Marquis v. Santa Ana, 103 Cal. 661, 37 Pac. 650; State ex rel. Watson v. Eskew, 64 Neb. 600, 90 N. W. 629; Sidway v. South Park, 120 Ill. 496, 11 N. E. 852; Locke v. Central, 4 Colo. 65, 34 Am. Rep. 66; People ex rel. Stetson v. Calhoun County, 36 Mich. 10; Gerken v. Sibley County, 39 Minn. 433, 40 N. W. 508; Raymond v. Madison County, 5 Mont. 103, 2 Pac. 306. See also Stringer v. Franklin County, — Tex. Civ. App. —, 123 S. W. 1168, and Bohart v. Anderson, 24 Okla. 82, 103 Pac. 742, 20 Ann. Cas. 742.

"Public officers have no proprietory interest in their offices or any right of property in the prospective compensation attached thereto." State ex rel. Lull v. Frizzell, 31 Minn. 460, 18 N. W. 316–319; Cooley, Const. Lim. 7th ed. 388.

But on the question of the assumption by the legislature that no unexpended balance in this fund would ever arise, it is doubtful if such assumption is warranted. The findings show that a balance has been accumulated steadily during the entire incumbency of defendant in said office. At the expiration of the first two years in office a balance of $1,857 remained unexpended of this fund, which was increased by the next two-year term to a balance of $3,800 over all disbursements, and at the expiration of defendant's third term it has further increased to the amount in suit, $4,898. The legislature are presumed to have acted intelligently in this as in all legislation. They foresaw the necessity of creating the fund to care for the expense of clerical assistance. It is but reasonable to suppose investigation was made in advance of the legislation as to whether the fund would be ample to care for the expense for which it was created, and the fact that it was more than sufficient, as the existence of this suit establishes, should but strengthen the belief in the care with which this legislation was enacted. Can we not conclude then that the legislature intended just what has happened? That a balance should remain, but if perchance the fund should not be sufficient there should be no drain upon the state treasury or its accumulation from other sources? Such a construction is more reasonable than the contrary one that, because of the provision against expending more than the amount collected by this fund in clerical help, the entire fund itself was to be donated to the incumbent of the office to the detriment of the state financially, the construction urged by the defendant in this action.

Much stress is laid by defendant upon the fact found by the trial court to exist, that this balance in suit remains unexpended largely because he as an officer performed himself the duties and work resulting from examining, marking, and filing teachers' answer papers and other work connected therewith, instead of employing clerical assistance in the performance of the work and expending the fund in payment therefor. Any economic action of the officer in such respect is commendable, but the declaration of the statute still remains that this money is to be

used by him only for clerical assistance necessary in the performance of these certain duties; and also that the duties were not imposed upon the defendant individually but upon the office. His work in the performance of his official duty is that of the incumbent of the office. It is not clerical assistance, and cannot be so construed. His time and the result of his energies belonged to the state, so far at least as the state's necessity required. And as such officer he was obliged to so properly fulfil the duties of the office, and for these he is paid his yearly salary. While economic administration in office is to be commended, yet it is but a duty to be expected, and not something to furnish a pretext for the appropriation of clerical hire graciously provided by the state to lighten the work of the office. The very claim of the defendant establishes the fact of his ability to do the work himself and save the fund, and the want of necessity for its disbursement, leaving the fund belonging to the state unexpended; certainly the want of the necessity for its use so established can in no wise change the character of the fund from state moneys to private emoluments in office. "Since a public officer with fixed compensation is bound to perform his duties for the compensation provided by law, compensation in addition to salary must be expressly provided for." 12 Current Law, p. 1160, and cases cited. Again, "Public officers must perform the duties of their offices, however onerous they may be, for the compensation fixed by law, and will not be allowed compensation for extra services unless expressly authorized by statute." 4 Current Law, 865, and cases cited.

As to the claim of the defendant regarding which findings were made in the trial court as to some of the work being done out of regular office hours by himself individually, and that because of such efforts he is entitled to the amount so saved from the fund as his personal compensation, plenty of precedent exists against the validity of such a claim and none for it. See Morgan v. New York, 105 App. Div. 425, 94 N. Y. Supp. 175, the syllabus of the case summarizing the holding to be: "The fact that affidavits taken by a chief messenger in the department of buildings of the city of New York in the performance of his duties as such messenger, as charged on him by specific direction, were taken in the morning before business hours, did not entitle him to extra compensation," citing McCabe v. New York, 77 App. Div. 637, 79 N. Y. Supp. 176, affirmed by court of appeals in 176 N. Y. 587, 68 N. E.

1119; in which case it is held that an employee of the city is not entitled to extra compensation for services performed out of regular office hours.

As further illustrating and supporting this proposition, see McBrian v. Nation, 78 Kan. 665, 97 Pac. 798, where a chaplain of the penitentiary, required by statute to devote his entire time to the performance of his official duties as such, and paid $1,000 per year therefor, superintended a night prison school after employment by the board of directors of the penitentiary so to do, and was refused a reasonable compensation of $30 per month for such additional service. In disposing of the case the court says: "The case here presented is an extreme one. The services as superintendent of the night school are performed when the chaplain would probably not be engaged in any official duty. No material injury is suffered by the state. Moreover the chaplain would seem to be an eminently proper person for a superintendent of the school, and his services are less expensive than if a specially qualified person were employed to perform them. Strictly speaking, however, the time so devoted by the chaplain belongs to the state and is paid for by his salary, and this is a sufficient reason why the state should not be called upon for further payment." And payment was denied. Granting the case on trial to be an extreme one so far as personal effort of the defendant expended for the benefit of the state in saving the fund is concerned, it is not as extreme an instance as the Kansas case quoted. Defendant is paid a more adequate salary, every personal expense provided for connected with the office, and he was under no employment by anyone pretending to exercise authority to induce him to do the work, granting that it was all done after hours, as was the case in McBrian v. Nation.

Another ground for defendant's claim of ownership of this fund is that the statute creating it does not require the superintendent to account to the state for the proceeds hereof, and that in the absence of such an accounting the right to use conferred carried with it by necessary implication the ownership of the fund itself. Further, that he is not chargeable with an accounting, and that the omission of express statutory requirement that he shall account evidences an intent that he shall not and that the money shall belong to him. To this we cannot agree. The public officer is an agent or a trustee of the public, and he must ac-

count for all money coming into his hands by virtue of his official relation to the public, and this *without the necessity of a statute requiring him to account.* His bond to the state as its officer, required by the provisions of §§ 401, 403, and 404 of the Code of 1905, existing by virtue of legislative enactment prior to the taking office of this incumbent, requiring his bond in the penal sum of $5,000, conditioned that such officer "render a true account of all moneys and property of every kind that shall come into his hands as such officer, to pay over and deliver the same according to law," is in itself a contract with the state that on his bond he will account for these moneys. But defendant may answer and say that the bond only calls for the payment to the state of the money required to be paid to it by law. The requirement of § 401 Code of 1905, formerly contained in Revised Codes of 1899 at § 340, is that the requirement of the bond shall be that he "shall account according to law," and the law makes it his duty to account as a trustee to the public at the termination of his term of office for all moneys and property received by him in his capacity as public officer. For authority for this holding, see § 909, Mechem on Public Officers, reading: "It is the duty of the public officer, like any other agent or trustee, although not declared by express statute, to faithfully account for and pay over to the proper authorities all moneys which may come into his hands upon the public account, and the performance of this duty may be enforced by proper actions against the officer himself or against those who have become sureties for the faithful discharge of his duties." Then, again, quoting from the same authority, § 912: "It is made the duty of the officer either by the terms of the statute prescribing his duties, the performance of which the bond in general terms is given to secure, or by the very language of the bond itself, to safely keep the public funds which come into his hands and to pay them over according to law," and "the officer's liability is, according to the great majority of the decisions, held to be fixed by the terms of the statutes, or the language of the bond," to the terms of which bond he has given the state he is held. As to the time at which the defendant was called to account, § 910, Mechem on Public Officers, announced the following rule: "Where by the law creating the office or otherwise the time for accounting is expressly fixed that provision would of course govern. Where, however, no such time has been fixed it would be the duty of

the officer ordinarily in analogy with that of a private agent to account upon lawful demand, and at all events, within a reasonable time." Sec. 916, Mechem on Public Officers, in part reads: "It is frequently the case that public officers, by virtue of their position, come into the possession of property, both real and personal, belonging to the public. Certain of this property, such as real estate occupied for public purposes, and the public books, records, and furnishings, form permanent appurtenances of the office designed by law to be transmitted to his successor, and it is the officer's duty therefore upon the expiration of his term to duly deliver them over to the public authority lawfully entitled to receive them."

In this case the fund in question came to defendant as an incident of his office, as much so as an appurtenance of the office, and, in the absence of statute, the law implies the plain duty that he shall deliver them to his successor at the end of his term, and in so doing there necessarily exists the obligation to account for such money and for the accuracy of his books regarding the same, as well as the requirement of its safe-keeping. It matters not that the legislature omits to specifically require an accounting. His bond required by law is that he shall so account; and the law requiring his custody of this public fund, the terms of his bond, and the law authorizing it, compel an accounting thereof. Appellant's contention in such respect is as untenable as would be that, because the statute defining his duties does not specifically require him to perform them to the best of his ability, or does not in terms require him to be faithful and honest toward the public, that indifferent official action or unfaithfulness or dishonesty toward the public would be excused as not mentioned in the statute or "not so nominated in the bond." We use this illustration with no reference to appellant personally, his efficiency in office being unquestioned, and realizing that his claims in suit are made by him in the utmost of good faith.

But in the contention of defendant that nowhere in the statute is he obliged to account, defendant overlooks the plain mandate of the statute requiring him to account on demand of the state auditor, imposed upon the state auditor as the duty necessarily a part of the duties of that office, of formulating an account with the office of superintendent of public instruction, and, if necessary,

compelling an accounting. See § 103, Revised Codes of 1905. formerly existing as § 100 of the Revised Codes of 1895, reading: "Whenever any person has received moneys or has moneys or other personal property which belongs to the state by escheat or otherwise, or has been intrusted with the collection, management, or disbursement of any moneys, bonds, or interest accruing therefrom belonging to or held in trust by the state, and fails to render an account thereof to and make settlement with the state auditor within the time prescribed by law, or when no particular time is specified, fails to render such account and make such settlement, or who fails to pay into the state treasury any money belonging to the state upon being required so to do by the state auditor within twenty days after such request, the state auditor must state an account with such person charging interest at the rate of 12 per cent per annum from the time of the failure." Also by § 101 of the Codes of 1905, in existence prior to the time of taking office of the defendant as § 98, Revised Codes of 1905, we find the duties of the state auditor defined and itemized, and therein we find: "It is the duty of the state auditor: . . . 11. To examine and settle the accounts of all persons indebted to the state and certify the amount to the treasurer, and, upon presentation and filing of the treasurer's receipts therefor, to give such person a release, and charge the treasurer with such amount. . . . 13. To require all persons who have received any moneys belonging to the state and who have not accounted therefor to settle their accounts. . . . 15. To require at such times and in such forms as he may designate all persons who have received money or securities, or who have had the disposition or management of any property of the state of which an account is kept in his office, to render statements thereof to him, and all such persons must render such statements when so required by said auditor. 16. To direct and superintend the collection of all moneys due the state, and institute suits in the name of the state for all official delinquencies in relation to the assessment, collection, and payment of the revenue, and against persons who by any means have become possessed of public moneys or property and who fail or neglect to pay for or deliver the same and against all persons indebted to the state." Surely these duties of the auditor plainly provide he shall require an accounting of this state fund in the hands of this state officer. Then again, § 421 of the Codes

of 1905, existing since the Revised Codes of 1899 as § 358 thereof, prior to the taking of office of appellant, must also apply as a specific legislative provision requiring him to account. Sec. 421 reads: "Every officer elected or appointed under the laws of this state shall, on going out of office, deliver to his successor in office all public moneys, books, records, accounts, papers, documents, and property in his possession belonging or appertaining to such office." For fear that this section should not be construed to cover officers re-elected to the same office, careful legislative provision is made in § 420, Codes of 1905, formerly existing as § 358, Revised Codes of 1899, reading: "When the incumbent of any office is re-elected he shall qualify as above required, but his bond shall not be approved until he has produced and fully accounted for all public funds and property in his control under color of his office during the expiring term, to the person or authority to whom he should account, and the fact and date of such satisfactory exhibit shall be indorsed upon the new bond before its approval." Certainly this provision, construed with the provisions above quoted as to the duties of the state auditor, make it plain that before defendant properly qualified at the commencement of his second term of office, in law it was his duty to account for the $1,857 remaining unexpended of this fund, and before his last qualification the law imposed the duty to likewise account for $3,800, and this, regardless of the provisions of § 103, making it the duty of the state auditor to see that he did so account.

These statutes are general ones, applying where no specific, express contrary provision is made. The legislature placed this fund as it did "for his use" to be expended "for clerical assistance necessary and competent" to do the work specifically required; and the reason why such statute did not in terms provide an accounting, or require the money to be turned into the state treasury at the end of each of his terms in office, was because the fund was created and placed in his custody under this general statute requiring such accounting, rendering unnecessary any specific legislation on the subject. Assuredly when the legislative power places a fund in the hands of a state officer as a trustee of the fund, with such plain statutory requirements existing as to the officer's duty to account, the obligation arising from the general statute applies as certainly as though an accounting has been especially

provided in the legislation creating the fund. Notice, also, that the provisions of these sections are so general as to cover every emergency and all public funds and property in the officer's possession or control under color of his office. It surely was the legislative design to cover every dollar reaching a public officer from any source whatever not otherwise excepted, or for which no other certain specific provision was provided. This general language itself heads off any claim that defendant became the owner of this fund in question, as it certainly came to the office of which he was the incumbent as an incident to such office, and he himself secured possession thereof under color of that office. The term "color of office," in this connection, cannot be distorted when read with the context, to mean a fund not legally belonging to the office, but obtained by the official wrongfully under color of office.

But we find that the legislature of 1901, creating this fund, defined in its creation its use to be that of paying for clerical assistance, the act itself providing by express terms its creation for that purpose. Not only did they declare the purpose to which it should be applied, but they did at the same session, under chap. 51, Session Laws 1901, and prior to the going into effect of the law creating the fund, provide it to be a misdemeanor for the officer to divert to his own use and benefit any allowance made for clerk hire in his office, by the following provision: "Any state or county officer who shall, either directly or indirectly, receive and appropriate to his own use and benefit any part of the allowance made for clerk hire in his said office shall be guilty of a misdemeanor." That legislature clearly understood there was a distinction between use of a fund for the public and use of it for the individual in office. In the face of this statute, how can it be maintained that, in granting the right to use this fund in question in such manner for such declared purpose, for clerk hire only, the legislative intent was to permit the appropriation of the fund or any part or balance thereof, the very thing guarded against by chap. 51, of the act quoted, enacted by the same legislature? Chap. 51, Session Laws of 1901, is still in force as § 8645, Codes of 1905.

Then, again, we must not lose sight of the common-law requirement in connection with salaries, that the statute must be plain and explicitly cover the salary or increase of salary claimed; for in the absence of statutory provision for compensation the officer is presumed to perform

the work gratuitously as a matter of honor. Mechem on Public Officers, §§ 855, 856; Throop on Public Officers, § 446, reading: "The general law is that the rendition of the services of a public officer is deemed to be gratuitous unless a compensation therefor is fixed by statute." "A strict construction of the statute under which the salary is claimed, against the person asserting the claim, must be followed." See 15 Decen. Dig. p. 732, and cases there cited, including Wood v. Madison County, 125 Ind. 270, 25 N. E. 188; Legler v. Paine, 147 Ind. 181, 45 N. E. 604; Torbert v. Hale County, 131 Ala. 143, 30 So. 453; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S. W. 504; State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S. W. 655; Bates v. St. Louis, 153 Mo. 18, 77 Am. St. Rep. 701, 54 S. W. 439; State ex rel. Axen v. Meserve, 58 Neb. 451, 78 N. W. 721; Bennett v. Orange, 69 N. J. L. 675, 56 Atl. 1131; State v. Allen, — Tenn. —, 46 S. W. 303; Dillon v. Whatcom County, 12 Wash. 391, 41 Pac. 174; State ex rel. Holman v. Roach, 123 Ind. 167, 24 N. E. 106. "Where the provision of law fixing the compensation is not clear it should be given the construction most favorable to the government." 29 Cyc. 1426, citing the following decisions fully sustaining the text: Tyrrell v. New York, 159 N. Y. 239, 53 N. E. 1111; United States v. Clough, 5 C. C. A. 140, 6 U. S. App. 377, 55 Fed. 373, an opinion by Circuit Judge Taft reversing 47 Fed. 791, and expressly disapproving the contrary doctrine laid down in McKinstry v. United States, 40 Fed. 813. See also State ex rel. Lull v. Frizzell, 31 Minn. 460, 18 N. W. 316; Bramlage v. Com. 113 Ky. 332, 68 S. W. 406; Gilbert v. Marshall County Justices, 18 B. Mon. 427; Morris v. Ocean Twp. 61 N. J. L. 12, 38 Atl. 760; State ex rel. Buttz v. Comptroller General, 9 S. C. 259; Cole v. White County, 32 Ark. 45. If this statute be of doubtful construction, then under the above authorities the doubt must be resolved in favor of the state and against the defendant. To hold with appellant would necessitate ignoring this rule in addition to giving an unusual and strained construction of the statute.

Another argument is advanced by defendant in support of his construction of the statute. He claims that the executive officers of the state, and legislatures as well, have acquiesced in such construction from the passage of the act in 1901 to the commencement of this action in 1910, and that this fact is entitled to weight in construing this state

that he declares is ambiguous. Let us consider this proposition. Every incumbent of the office had before him the state and all the statutes of the state bearing on the question, including § 8645, against the appropriation of clerk hire by the officer. As to legislative sanction there is nothing showing that this particular matter has ever been called to the attention of the legislature. Instead we find practically every legislature increasing the expense allowed to the office and in doing so particularly designating how it shall be paid and for what it is payment. As an instance, the legislature in 1903, in chap. 192 of the Session Laws of that year, made an allowance of actual and necessary traveling expenses to the incumbent of this office, the same not to exceed $1,000, adding thereto its reasons in an emergency clause to the effect that the fund then allowed for such purposes was insufficient, hence the increase. Then the legislature in 1905 increased the clerk hire to $4,000 per annum, and made provision for the payment of a deputy out of the increase. The following legislature, in 1907, allowed the incumbent of the office an increase of $500 per annum for personal expenses as is shown by chap. 30 of the Session Laws of 1907, and this was increased by the next legislature by chap. 216, Session Laws of 1909, to $750 per annum for such purposes, the salary in the meantime having been increased to $3,000 per year, and the last legislature in chap. 266, Session Laws of 1911, fixed the traveling expenses at $1,200 per annum.

On the question of the practical construction adopted by the office and executive officers of the state favoring appellant's contention: The rule is that, before resort can be had to such a rule of construction, the statute must be ambiguous and of doubtful import as to its true meaning. "If the meaning of a statute is clear and unambiguous, a practical construction inconsistent with that meaning will have no weight, and will not be followed." 2 Lewis's Sutherland, Stat. Constr. § 474, p. 891. Under ordinary interpretation of the language used in the statute, we agree with the state's contention that there is no ambiguity in the statute, and there can be no resort to usage to aid in its construction. Under the same authority at § 476 we find a further want of evidence of the legislative intent that this statute be construed as a grant of the fund, instead of the use thereof. "The contemporary and subsequent action of the legislature in reference to the

subject-matter has been accepted as controlling evidence of the intention of a particular act. Legislative construction of old laws has no judicial force, whether right or wrong the courts must determine the proper interpretation from the statutes themselves." We submit that the contemporary act of the same legislature in making it a crime for state officers to appropriate any part of the clerk hire allowed by the legislature to said office, may be "accepted as controlling evidence of the intention of the particular act" under construction. Again, referring to the acts of subsequent legislatures: Nearly every two years provision has been made defraying the personal expenses of the officer in traveling when performing his duties. His personal office hire allowance has constantly increased. Five hundred dollars per year has been granted him for personal expenses without his filing a statement thereof, and subsequently increased to $750 per annum. His salary has been increased $1,000, and he granted, as at present, the right to employ to an unlimited extent clerk hire in office. But running throughout all these provisions we find expressed in exact terms the purpose for which all money is given or to which it is required to be applied, and at no place in twenty years of legislation touching this office do we find any grant of fees to this office as a prerequisite of the office. Appellant urges that the duties of the office have steadily increased. Reference to the statutes shows the salary and clerk hire have accordingly kept pace with the increased duties. Well, indeed, has the legislature provided for this office. All of which is indicative that the legislative intent in providing this fund was, as expressed in §§ 869 and 876 of the Codes of 1905, to provide a fund to pay the clerical help rendered necessary by the new duties imposed, and intrust the disbursing of the fund in the state's behalf to this particular officer, instead of directing payment in the usual manner. The statute, having defined the purposes, we must take that as controlling the action of the general assembly at the time of its passage. Accordingly the rule of statutory construction announced in Lewis's Sutherland, Stat. Constr. § 490, applies, it being: "In construing an act of the general assembly such a construction will be placed upon it as will tend to advance the beneficial purposes manifestly within the contemplation of the general assembly at the time of its passage." Was the beneficial purpose of the legislature in enacting this legislation to increase the

superintendent's annual income, or was it, as declared by the act, a provision for clerical assistance and to prescribe its payment out of the fund created therefor? Again at § 916, Lewis's Sutherland, Statutory Construction, we find: "An act should be so construed as to bring it, if possible, within the legislative authority; to limit its general words to the subject-matter or object of the act." Thus is the wording of the act limited to and to be read in the light of the subject-matter and the object of the act. The object of this legislation being manifestly to create a public fund for a particular purpose and regulate its use, limiting it to such purpose, far-fetched indeed must be the course of reasoning whereby, contrary to all precedent and dealing with public officers, a construction be given as contended for by defendant. Such an intent never could have been the controlling idea of the legislature.

One further contention demands consideration. Were these fees received and to be disbursed by the state superintendent in the course of his required official duty? The statute effectually answers in the affirmative. Sec. 869 declares his duty with reference to teachers' answer papers that "he shall examine, mark, and file or cause to be examined, marked, and filed all answer papers submitted" by applicants for county teacher's certificates. Sec. 873 makes the county superintendents the officials conducting the examinations for teachers' certificates, and provides that they shall forward all answer papers "immediately after the close of the examination to the superintendent of public instruction for examination, marking, filing, and recording. The superintendent of public instruction shall transmit, within thirty days from the date of said examination, a record of the standings of each applicant to the county superintendent, who shall then grant to the applicant a certificate of qualification," if the applicant is entitled thereto from said examination. The questions used in the examination, § 751 declares it to be the duty of the state superintendent "to prepare or cause to be prepared." Though the statute permits the superintendent to either do the work himself or cause it to be done, it still remains his duty to superintend such work and such duty is discharged either by doing it himself or causing the performance of the work. The duty is to do one or the other, or both, that the work may be done within the thirty-day period prescribed for its completion. In this

connection the case of State ex rel. Newnham v. State Bd. of Education, 18 Nev. 173, 1 Pac. 844, is parallel. We quote from the court's opinion on page 180: "The board's duty is to prescribe and cause to be adopted a uniform series of text-books. The statute makes the last duty as imperative as the first. The complaint made in this case is that the board fails to cause the adoption of text-books by it prescribed. By prescribing a text-book simply the board's duties are only half done. It must also see that the prescribed book is adopted and thereafter for four years it cannot be changed. This is the sensible view of the statute. The law declares no means by which the board shall cause the adoption of text-books, but, the duty being enjoined, a power is given to use such reasonable means as are necessary for its proper performance. By a judicious exercise of this power the board need not experience much difficulty in performing their entire duty." The fact that in the statute the disjunctive, instead of the conjunctive, is used, makes no difference with the application of the law quoted. The duty is prescribed by statute, the power to employ and the power to pay for the performance of the duty is granted, and the remark regarding the exercise of the power by the board here applies.

The phrase "or cause to be examined," wherein the officer is enjoined to examine or cause to be examined the teachers' answer papers, is as regards official action the equivalent of the individual performance of it by the officer. See 2 Words & Phrases, p. 1012, and Burnham v. Aiken, 6 N. H. 306, on page 328, where the court says: "What is caused to be done is done."

Nor can it be contended that because in § 869 the words "he may appoint such clerical assistants as he may deem necessary" are framed in the permissive, that such officer does not owe a duty to the public in the performance of the work for which the money was received and disbursed. Or in other words, that it was his duty, or it was not, as he saw fit to elect as to the performance of this work. If this theory needs answer it is effectually met by the authorities. We quote from § 593, Mechem on Public Officers, as follows: "Authority to perform acts of public concern is often conferred in language which in form seems to be permissive only, leaving it to the option of the officer whether he will act or not, and the question arises whether the imposition of the authority creates an implied duty to exercise it." In

disposing of this matter the authority given cites Chancellor Kent's decision in Newburgh & C. Turnp. Road v. Miller, 5 Johns. Ch. 101. 9 Am. Dec. 274, and continues as follows: "The inference deducible from the various cases on this subject seems to be that where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, though the phraseology of the statute be permissive merely, and not peremptory." See also Cutler v. Howard, 9 Wis. 309, from page 312 of which we quote: "The cases fully establish the doctrine that when public corporations or officers are authorized to perform an act for others which benefits them, that then the corporations or officers are bound to perform the act. The power is given to them not for their own but for the benefit of those in whose behalf they are called upon to act, and such is presumed to be the legislative intent." The same rule is approved in § 460, Sutherland Statutory Construction, and in § 548, Throop on Public Officers. The interest of the public in the prescribed duties referred to of this state officer cannot be disputed. His duties affect the public in this as in the performance of all his duties prescribed by statute and owing to the public. Hence the above authority is directly applicable.

Appellant calls attention to the fact that a previous legislature, that of the year 1899, defeated a bill providing in part for the fund in question and for its payment into the state treasury and a particular scheme for its disbursement. He contends that the defeat of this measure, and the fact that two years thereafter a succeeding legislature passed the statute under construction, is entitled to consideration as evidence that the bill, as passed, was not intended to be as the one defeated; and accordingly that the one passed must be taken as a grant of the fund to the individual. This is peculiar reasoning to say the least. How the reason governing the legislature of 1899 in defeating the measure in question is to be arrived at is difficult to conceive. Again, how its reasons if ascertainable, could have influenced subsequent legislation is equally hard to determine. Again, the intent of the legislature is to be determined from the act itself. If defendant's position in this respect be law, careful indeed should the state be to preserve all its old defeated proposed bills, hundreds in

number every session, that mayhap they may at some future time be considered as a reason, perhaps controlling, for some legislation that does run the legislative gauntlet and come into existence as law. This proposition is well in line with the strange and strained construction necessary to permit defendant to prevail in this action.

This action came to this court on appeal and was of the files of this court on and prior to October, 1910, from a judgment entered in district court March 29, 1910. Since a decision hereof has been pending in this court, the last legislature has enacted chapter 266 of the Session Laws of 1911, which took effect last July 1st, expressly repealing the sections of the statute construed in this opinion, re-enacting them in substance, however, but expressly providing that all fees similar to these in controversy shall be paid into the state treasury. In this connection it is a well-known principle of law that a legislature is presumed to do no idle act, and that where a law is amended the former law when ambiguous should be construed in such a manner as to give force to the amendment, rather than that such amendment be held unnecessary. But this rule of construction cannot here apply. The sections of the Code of 1895 under construction are not amended but repealed by the 1911 Session Laws, which fact in itself renders the rule relative to amendments inapplicable. Besides, new offices are created, a board of examiners to do this work and new machinery accordingly provided, so that in no sense can the present law be considered an amendment merely of the 1893 statutes under discussion. And the rights of defendant under review in this court on appeal are as they were fixed in 1909 by virtue of the judgment appealed from; and legislative action since judgment entered can neither add to nor detract from the verity of the judgment questioned by appeal. Hence, whatever the purpose for the enactment of chapter 266 of the Session Laws of 1911, the same must be wholly immaterial and a matter with which we have no concern.

Heretofore in this opinion we have not mentioned § 84 of the Constitution. We consider that the balance in suit, consisting as it does of a sum remaining undisbursed after full application to the purposes provided by statute of a total collection from sources provided by statute to be covered by § 84 of the Constitution, and accordingly as fees or

profits of an office therein named, must be under the mandate of such provision in accordance with its terms "covered into the state treasury."

"We conclude therefore that the moneys in question are and always have been since their collection public moneys of the state, for which the defendant is obliged to account to the state; that the statutes under which defendant came into possession of and became charged with the custody of these funds gave him no personal interest in or to them; that the right to use conferred was only the right to disburse for the state's benefit in the payment of its employees who performed such service for the state under the supervision of the defendant as a state official; that the additional duties imposed upon such office does not imply or evidence a legislative intent that the compensation of the officer should be proportionately or at all increased, the salary being but an incident resulting from the holding of office and bearing no relation whatever to the amount of official duties devolving under the law upon the officer; that where the provisions of law fixing the compensation of the officer is not clear, it must be given the construction most favorable to the state; that the burden is upon the defendant to prove his title to the moneys in question, their collection by him while in office under color of office being admitted; and to establish title to such funds in the individual, he must establish an appropriation thereof to him by plain statute where the office is a salaried as distinguished from a fee office; that the construction given by heads of departments and executive officers of government cannot control in the interpretation of a statute contrary to its terms, nor change the rule of construction that the statute when ambiguous is to be construed in favor of, and not against, the government; that all of the time, as well as all of the services capable of being rendered performed by defendant while superintendent of public instruction, was compensated for by the annual salary paid him, and defendant is entitled to no extra allowance therefor and can make no claims in the nature of offset or counterclaim for the reasonable value of extra service performed by him under official duty of office as a defense to plaintiff's recovery in this action. That as regards official duty every statutory direction to the officer creates a duty on his part to comply therewith, and in contemplation of law no duty prescribed can be disregarded and the fund in question remained as a balance of a collection made of moneys in

the performance of statutory duties. Nor can the enforcement by the state by appropriate action to collect its money from its delinquent former official properly be held to be inequitable or unconscionable. The officer, when doubt exists as to his right to fees, gains no advantage as against the state by the conversion or appropriation to himself of fees or profits in office.

The judgment of the trial court is affirmed.

FISK and SPALDING, JJ., dissenting. MORGAN, Ch. J., concurs, and BURKE, J., concurs specially.

BURKE, J. (concurring). The majority opinion is, as far as it goes, entirely satisfactory to me. The reasons hereinafter set forth are to be additional ones only. The majority opinion has construed chapter 85 of the Session Laws of the year 1901, and holds that the said act did not give to the defendant any right to the funds in suit. They base their construction upon the language of the act, and show conclusively that it was not the legislative intent to give said funds to the defendant. With that result I agree; it seems absurd to say that the legislature intended the defendant to have the surplus funds when they did not expect there would be a surplus. They certainly did not intend to extort money from the teachers of the state to enrich the defendant or the state. The legislature did not realize the fact that $1 from each teacher applying for examination would amount to such large sums.

But the additional reason I have to offer why the said act of 1901 should receive the majority construction is this: *any other construction would render said act of 1901 repugnant to § 84 of the Constitution of North Dakota.* It being the duty of courts to give to a statute a construction that will render it constitutional, rather than a construction that will render the act unconstitutional, it appears to me as one of the strongest possible reasons in support of the majority opinion that the construction contended for by the defendant is clearly in defiance of our Constitution.

Section 84 of the Constitution of this state reads as follows:

"Until otherwise provided by law, the governor shall receive an annual salary of $3,000; the lieutenant governor shall receive an annual salary of $1,000; the secretary of state, auditor, treasurer, super-

intendent of public instruction, commissioner of insurance, commissioners of railroads, and attorney general shall each receive an annual salary of $2,000; the salary of the commissioner of agriculture and labor shall be as prescribed by law, but the salaries of any of the said officers shall not be increased or diminished during the period for which they shall have been elected, and all fees and profits arising from any of the said officers shall be covered into the state treasury."

The act of 1901, as stated in the majority opinion, transferred the duty of superintending the teachers' examination papers from the county to the state superintendent of schools. In part it reads: "The superintendent of public instruction shall prepare, or cause to be prepared, all questions for the examination of applicants for teachers' certificates, both county and state, and shall prescribe rules for the conduct of all examinations. He shall examine, mark, and file, or cause to be examined, marked, and filed, all answer papers submitted by candidates for first, second, and third grade county certificates." [Rev. Codes 1905, § 869.] The act further provides that an *additional* dollar per head should be collected from the teachers and forwarded to the state superintendent, to be "used by the superintendent of public instruction for such clerical assistance as he may deem necessary and competent for the reading of teachers' answer papers and work connected therewith."

The defendant was an occupant of the said office, and collected under the act of 1901 the sum of $17,714 from the teachers of the state. He claims to have expended the sum of $11,815 for necessary and competent clerical assistance. The balance remaining in his hands he claims as a private fund. The state claims it is such "fees and profits" as are contemplated by § 84 of the Constitution, and that it should be covered into the state treasury. The defendant's claim is that this surplus was given to him *by implication* in the said act of 1901. He does not claim there are any direct words in said act giving him the funds. In fact the quotation above is all of the act that pertains to the use of the said funds. It must also be kept in mind that the state is not asking for all of the moneys collected by the defendant. He has been allowed to disburse, without question, $11,815, possibly to members of his immediate family, without any auditing upon the part

of the state. He is asked to account only for the balance remaining in his hands.

Turning again to § 84 of our Constitution, we find the phrase "all fees and profits arising from any of the said offices shall be covered into the state treasury." Are the funds in suit "fees and profits of office" within the meaning of this language? It seems absolutely clear to me that they are. Looking into the decisions of our sister states for holdings under similar facts, we find them unanimous in holding that funds collected under very similar circumstances are *fees,* and must be covered into the treasury. To understand those holdings, it is necessary to remember certain facts, relative to our legislative and judicial history. When this country was new and the duties of officials were light, it was customary to allow to them fees, upon the theory, no doubt, that they should be thereby paid for the work actually done. Unexpected increases in the work often gave to an official a small fortune in fees. Sometimes the state or the county would bring suit against the official to recover some of the fees upon some excuse or other. The courts uniformly held that, *in the absence of statutes* requiring the official to turn over the fees of his office, he was entitled thereto as a personal compensation. The legislatures promptly took the hint, and laws were passed in most of the states placing all officials upon a salary basis and providing that all of the fees collected by the official should be turned into the treasurer. The cases mentioned above would of course be no longer authority, because the statutes now provide for the payment of all fees into the treasury; but oddly enough those cases are now cited to us as authority, and cited, I am informed, in one of the dissenting opinions. I refer to Henderson v. State, 96 Ind. 437; Gordon v. Lawrence County, 1 S. D. 31, 44 N. W. 1025; Bruce v. Dodge County, 20 Minn. 388, Gil. 339. However, no state having a statute of the import of § 84 of our Constitution has held otherwise than that the fees belonged to the county or state, under circumstances similar to the case at bar. For instance, Minnesota had held prior to the passage of such a statute that the fees belonged to the official (Bruce v. Dodge County, supra), but after the passage of a statute covering fees into the treasury, she held directly to the contrary. A clerk of court had furnished to subscribers a certain bulletin showing the title to actions commenced, judgments entered, and other

information gathered from his office and useful to banks, attorneys, and commercial agencies. The subscribers paid to the clerk a certain sum monthly agreed upon by themselves. The county claimed the said subscriptions were "fees" of the office, and should be turned into the treasury. The clerk claimed the money as a private fund. In fact the contention of the defendant in the Minnesota case was almost exactly like the claim of the defendant in the case at bar. Judge Lovely wrote the opinion of the court, holding squarely that the subscriptions were *fees,* and should be accounted for; he says: "The general intent of the act of 1891 [requiring fees to be covered into the treasury] is not obscure or in dispute here. . . . These fees were to be collected and paid into the county treasury. From this source the county derived a revenue taken from the clerk, but in lieu thereof he was to be paid a fixed salary. His perquisites from fees for official duties were ended; these belonged to the county. His salary took their place, and with this he had to be content." Hennepin County v. Dickey, 86 Minn. 331, 90 N. W. 775.

Pennsylvania had a statute similar to § 84 of our Constitution, requiring certain "fees" to be covered into the state treasury. The legislature later on passed a law providing that applicants for liquor licenses should pay a certain amount to the clerk of court to be used as "expenses" in connection therewith. The clerk refused to pay this money into the treasury, claiming, like the defendant in this case, that the funds were not "fees" of his office. The supreme court of Pennsylvania held against him, and say that the term "fees" is broad enough to cover any money received by him by virtue of his office. Com. v. Fry, 183 Pa. 32, 38 Atl. 417.

California passed an act providing, like our Constitution, that certain officials should cover all fees of office into the treasury. Later an act was passed providing that the county treasurer should be allowed a commission for collecting taxes for villages. A county treasurer refused to treat those *commissions* as fees, but like the defendant in our case claimed they were allowed to him as a private fund. Their supreme court held with the county, and said that the term "fees" was broad enough to include "commissions." Smith v. Dunn, 68 Cal. 54, 8 Pac. 625.

Missouri passed a statute similar to § 84 of our Constitution, and

under it the supreme court of that state held that where the legislature allowed him certain sums as "compensation" for extra work done by him, he must account for the same to the treasury. They say: "From this section it is plain the clerk must report all fees for all services rendered in his official character. . . . It is true that § 3207 speaks of compensation . . . while § 5009 speaks of fees, but the word 'fees,' as here used, includes the compensation mentioned in the other section." [Callaway County v. Henderson, 119 Mo. 39, 24 S. W. 437.]

Oklahoma likewise had a statute that, like our Constitution, required "fees" to be accounted for. Under its provisions a certain county judge was required by their supreme court to turn in an allowance made to him for acting as a town-site appraiser. Finley v. Territory, 12 Okla. 621, 73 Pac. 273.

Nebraska also had such a statute. The board of county commissioners of one of the counties hired the clerk of court to act as clerk for their board, and paid him for his services. The county insisted that those moneys were such fees as were intended to be turned into the county treasury, and the supreme court of that state so held. State ex rel. Wayne County v. Russell, 51 Neb. 778, 71 N. W. 785.

California has also held that it did not matter whether such moneys collected were illegally so collected, yet the officer must account to the treasury, and the rightful owner could then sue the state. People v. Hamilton, 103 Cal. 488, 37 Pac. 627. Similar holdings will be found in the following cases: State ex rel. Frontier County v. Kelly, 30 Neb. 574, 46 N. W. 714; Hazlett v. Holt County, 51 Neb. 716, 71 N. W. 717; State ex rel. Buffalo County v. Allen, 23 Neb. 451, 36 N. W. 756; State ex rel. Miller v. Sovereign, 17 Neb. 173, 22 N. W. 353; Stoner v. Keith County, 48 Neb. 279, 67 N. W. 311; State ex rel. Lancaster County v. Silver, 9 Neb. 88, 2 N. W. 215; Crawford v. Bradford, 23 Fla. 404, 2 So. 782; St. Louis v. Meintz, 107 Mo. 611, 18 S. W. 30; United States v. Hill, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510; 3 Words & Phrases, title Fees, p. 2712.

In view of the above decisions, and considering also that in all of the above states the statutes only required the official to turn over "fees," while our Constitution requires that fees and profits be covered into the treasury, I think it clear that such part of the funds as

remained in the defendant's hands after he had paid all necessary and competent clerical assistance were fees and profits arising from his office and as such come under the terms of said § 84 of the Constitution. In passing we might say that there are a few cases that might be mentioned wherein certain moneys were received by the official by virtue of some *other office* he held at the same time, and those the state could not take. For example, if the defendant herein had been a notary public, and had received fees as such, those fees would not have arisen from his office as school superintendent. The same would be true had he been holding the office as city alderman, or as a director of a district or city school and had collected fees for his services. However, as to all fees collected by virtue of his occupancy of the office of superintendent of public instruction he must account.

Having decided that the funds in litigation are fees and profits within the purview of § 84, aforesaid, we next consider whether or not the legislature had the right, if they so desired, to give these fees to the defendant. Turning again to the constitutional provision, we find the phrase, "until otherwise provided by law," as the opening of the section. Defendant claims that this phrase applies to and modifies all of the section, and that the entire section is in force only until otherwise provided by law. That the legislature may at any time wipe out § 84. This view is not correct. It cannot, for instance, be contended that the legislature may increase or diminish the salary of the said named officials during the term for which they have been elected, yet such a reading as defendant contends for would mean that; namely, "until otherwise provided by law . . . the salary of the said officials shall not be increased or diminished during their term of office." The very act that raised or lowered their salary would "otherwise provide by law." Neither could it be seriously contended that the Constitution reads, "The salary of the commissioner of agriculture and labor shall be as prescribed by law, until otherwise provided by law." To our notion the constitutional convention, composed as it was of a strong mixture of able lawyers and sound-minded laymen, knew of the abuses of the fee system and desired to prohibit it. They first drew said section reading that the officers named should be paid a stated salary which should not be changed during their term of office, and that all fees and profits should be turned into the state

treasury. Their attention being called to the fact that the state would probably be admitted early in November, 1889, and the legislature would not meet for some sixty days, they desired to provide for the said officials in the two months intervening. Thus the section was amended to read that until otherwise provided by law the said official should receive the sum stated. The omission of the commissioner of agriculture and labor from the list of those whose salaries were provided is accounted for by the fact that the office was one newly created by Constitution, and there was no one to draw the salary if one were provided. If the constitutional convention had intended to give the legislature the power to change all of said section, they were wasting their time in having it submitted to a vote of the people, as a legislature, having full power to change its every import, would meet within sixty days after the adoption of the Constitution. On the contrary, I believe that the said section of the Constitution should be read with the phrase "until otherwise provided by law," modifying only the amounts of salaries named therein. Thus it will be seen that the legislature is prohibited from making any other disposition of the fees and profits of the officers named, than to have said sums paid into the treasury.

We feel that the language used is not susceptible of any other construction. Further, we are strengthened in such belief by all of those things of which we can take judicial cognizance. The constitutional convention of this state was not held until 1889, after many other states had tried the fee system and had discarded it for the salary system. Said convention numbered among its members two men who have since represented the state in the United States Senate; two in Congress; two governors; one supreme court judge, several district judges, and one who is now a judge of the United States circuit court. To say that such a body proposed a section of the Constitution providing that it might be changed *in toto* within sixty days is utterly absurd. Our constitutional convention may have felt in sympathy with the supreme court of Pennsylvania, which, about that time, said in the case of Com. v. Mann, 168 Pa. 290, 31 Atl. 1003:

"It may be presumed the legislature knew the old law, the mischiefs or abuses under it. . . . The large compensation of officers paid by fees in large counties for years before was felt to be a wrong on the public; though the grievance was not so sore as farming out the taxes

in France before the French Revolution, it was getting to be of the same character; the compensation of the officer . . . [was] only limited by the amount of fees the officer could wring from unfortunate litigants. He had every temptation to pile up fees. . . . It is difficult for those who have come to the bar since to realize the abuses of the fee system. . . . In that spirit was framed the act of 1876. The legislative intention was to sweep away . . . a pernicious system, by removing as far as possible all motive for illegal exactions."

In the case at bar the temptation would be for the superintendent to do the work himself, thus delaying the publishing of the result, or in hiring members of his own family and thus appropriating indirectly the fees. If the official could not possibly obtain any of the fees, and was obliged to turn the same into the state treasury, this temptation would be removed. In my opinion the constitutional convention intended to guard against this very evil.

This court is authorized by § 7319, Revised Codes of 1905, paragraphs 20, 57, and 60, to take judicial notice of the official acts of public officials and of the journals of each house of the legislature. We avail ourselves of this source of information to note pages 1320 to 1336 of the senate journal of the year 1909. It so happened that the Honorable W. E. Purcell, a member of our constitutional convention, was afterwards a member of the state senate and a member of the investigating committee that found the facts upon which this suit is based. Mr. Purcell is a lawyer of distinction who has served his state in the United States Senate. He certainly ought to know the intent of the constitutional convention of which he had been a member. He was one of a committee of three who passed upon the merits of this very case, and we quote from the report of that committee, signed by him: "*In this case* we do not believe it to be the policy of the law that state officers should receive any fees in connection with the duties of their office over and above the salary which the Constitution and law provides."

This language of a distinguished member of our constitutional convention is merely given as a side light in aiding in determining the intent of said convention.

It is interesting to note, while examining the senate journal above mentioned, that the defendant at that time prepared a written state-

ment, which is reproduced at said pages, in which the following language is used by him: "This work has been handled through this office by the force doing a large amount of extra work." (Page 1336, line 4, 5, and 6 from top.) I mention this in view of the claim now made that the defendant personally did the work after hours, etc.

In brief, my conclusion is that the sums in suit are "fees and profits" of the office held by defendant; that as such they should be covered into the state treasury. That had the legislature of 1901 tried to give them to the defendant, their act would have been unconstitutional and void, but as the said legislature did not attempt to give the fees in this manner the question of the constitutionality of said act is only useful in determining the construction to be given the act of 1901.

FISK, J. (dissenting). I am unable to concur in the views of the majority of the members of the court as above expressed. With due deference to the judgment of my associates I feel that they wholly fail to grasp the controlling legal principles involved in this case. This is quite manifest to my mind from a careful perusal of the majority opinion.

I will here set forth my views as briefly as possible:

It is expressly conceded by the attorney general that the legislature had the unquestioned power, if it so desired, to allow the appellant the moneys thus received from the county superintendents or any balance remaining of such moneys after paying for the necessary clerical assistance in doing the work; but his contention is that the legislature has not *expressly* thus ordained, and that in the absence of such *express* legislative declaration, such unexpended balance should be covered into the state treasury as the property of the state, under § 84 of the Constitution, or, in any event, that such funds should have been turned over by defendant Stockwell to his successor in office. The attorney general, as well as the majority of the court, seem to labor under the idea that in order to confer title to such funds in the officer as an emolument of the office, the legislature must have used *express* and unequivocal language evincing, beyond any doubt, such intent. Such is not my understanding of the law. The rule is elementary that the legislative will may be implied in certain cases where the statute fails to use express language to evidence such will. As well stated in 26

Am. & Eng. Enc. Law, 2d ed. 613: "When the intention of the legislature, as gathered from all legitimate sources, is taken into consideration, terms and provisions, not expressly declared, may be introduced into a statute by necessary or plain implication from what is directly or expressly declared. By 'necessary implication' is not meant an implication that points to a result so as to leave no possible escape and to exclude every other imaginable conclusion, but one that leads to such a conclusion as, under the circumstances, a reasonable view compels the court to take, the contrary of which would be improbable or absurd. . . . When the intention is clear, what is implied in a statute is as much a part of it as what is expressed." In 36 Cyc. 1112, it is stated thus: "The rule is that whatever is necessarily or plainly implied in a statute is as much a part of it as that which is expressed."

In the light of the above rule, as well as other well-settled rules of statutory construction, I entertain no doubt that the construction placed on said statutory provisions by appellants' counsel is correct. Taking into consideration and applying all legitimate tests for determining the legislative will, I feel impelled to the conclusion that it was unmistakably the legislative intent to authorize the superintendent of public instruction to retain such fees as a flat allowance for the extra duties imposed by said statute, upon the condition, however, that out of such moneys he should defray the expense of the additional clerical assistance required to perform such work. In other words, it was the intent that such fund was to be used *in toto* by such officer for the payment of whomsoever might perform the additional duties called for in such law.

Some of my reasons for this conclusion are the following: In the first place, such added duties are most onerous, and at the time of the passage of the act they were most unusual and contrary to the universal rule of practice in this country, and while I concede that they are germane to the office, it is but natural and highly probable that the legislature should, although not legally required so to do, make some provision to reasonably recompense such officer for the discharge of such added duties. Concededly, this was done to the extent of allowing for the additional clerical assistance required. In the second place, it is evident that the legislature never contemplated that any substantial balance would arise in such fund, or if a balance should

arise, that the same should be turned over to the state, else why did it not provide for its disposition in this manner?

Third, it is contrary to all precedent, and I cannot believe it the legislative intent to enrich its treasury by, to any extent, imposing a tax upon the teaching profession in the state. In the case of fees exacted from applicants for admission to the other professions, the legislature has in no instance, to my knowledge, required any portion thereof to be covered into the treasury for the enrichment of the funds of the state.

Another circumstance of more or less significance is the fact that at the 1899 session of the legislature the bill which was finally enacted into chapter 85, Laws of 1901, was introduced and passed its first and second readings, and later the committee to which it was referred reported a substitute bill, the express provisions of which required the superintendent of public instruction to pay such moneys into the state treasury on the first day of each month or within three days thereafter, and also providing that the same should be kept in a separate fund to be known as "teachers' certificate fund," to be used in paying for such additional clerical work as may be necessary in the office of such superintendent by reason of the provisions of such act, and further providing how such payments should be made. Thus the committee aforesaid recommended a scheme which, had the same been adopted by the legislature, would have, in express and explicit terms, accomplished just what it is now contended was accomplished by the passage of the act in question; but such substitute bill was indefinitely postponed, and at the following session the original bill was reintroduced and passed unchanged as chapter 85, Laws of 1901. It is fair to assume, therefore, that the legislature enacted such statute only after due consideration of the very question here presented. Not only this, but all subsequent legislatures have seemingly acquiesced in the construction placed on such statute by defendant Stockwell and his predecessor in office, in harmony with the contention here made by appellants. Such fact is entitled to some weight, especially where the language of the statute is ambiguous, as is this statute. It is stated on good authority that "if the legislature, by its inaction, has long sanctioned a certain construction, language apparently *unambiguous* may receive from the courts that construction, especially if the usage has been

public and authoritative." 26 Am. & Eng. Enc. Law, 2d ed. 634, and cases cited.

These are a few general side lights which aid in some degree, at least, to disclose the legislative intent, which is the real object sought to be accomplished by all rules of statutory construction. While I am free to admit that the act under consideration is so unfortunately worded as to greatly obscure, rather than to clearly reveal, the legislative purpose, I think such purpose is fairly and reasonably disclosed by a careful reading of the whole act, especially when considered in the light of other cognate legislative declarations. Taking said statute by its four corners and holding it up to the light of reason and common sense, it seems reasonably certain that the legislative purpose was to authorize the state superintendent to retain all of such dollar payments as a flat or gross allowance to compensate him and such clerical help as he might deem necessary and competent for the performance of such additional work; and it was contemplated, no doubt, that the entire fund would be thus used; for the expressions "shall be used" and "to be used" as employed in said statute with reference to the disposition of such fund by the superintendent, must be given the same meaning as like expressions therein with reference to the disposition of other funds of like nature; and it certainly will not be contended that such expressions, as employed in other portions of said act, do not contemplate a complete devolution upon the state superintendent of the funds therein referred to. When such officer has performed, or caused to be performed, the extra duties entailed by said act, and to this end has expended such sums as are necessary for clerical assistance, he has "used" the fund within the legislative contemplation. The Century Dictionary warrants such construction. The verb "use" is therein defined as meaning, "to employ for the attainment of some purpose or end; avail one's self of;" also, (a) Such employment in a narrower and more restricted sense may be merely transitory and without result or effect upon the thing employed, as "to use a plow;" or (b), in a more comprehensive sense, the employment may imply a complete appropriation, expenditure, or consumption of the thing employed, as, to use water for irrigation or flour for bread. See also Webster's New International Dictionary wherein such verb is defined, among other things, as follows: "To

make use of; to convert to one's service; to avail one's self of; to employ; *to consume or exhaust by using; to leave nothing of;* as, to use up the supplies." See also 29 Am. & Eng. Enc. Law, 439, and 8 Words & Phrases, 7228.

The above construction of the statute in question is not only permissible, but I believe entirely reasonable. The statute does not contemplate that all such extra duties shall necessarily be performed by the clerical assistants therein authorized. On the contrary, such statute provides that the superintendent "shall examine, mark, and file . . . all answer papers," etc., but this mandate is qualified by the later provision that "he may appoint such clerical assistants *as he may deem necessary.*" Thus it is apparent by the language employed, that the legislature contemplated that he should or might perform portions of the work without the aid of assistants, for otherwise the words above italicized would have no meaning or proper place in the statute. The words, "or cause to be examined, marked, and filed," as therein employed, must be construed in connection with the words last above quoted. To uphold respondent's contention, therefore, we are driven to the unreasonable and highly improbable conclusion that the legislature did not intend to compensate such officer in the least for the extraordinary duites by it imposed on him. If such had been the legislative intent, I again ask, why did not the legislature make express provision for the disposition of any surplus of the fund which might accrue? Did it conclude that the necessary clerical assistants would always exhaust such fund? Again, if the fund was inadequate to pay for such necessary clerical assistants, was it the legislative purpose to require the superintendent to pay such deficiency and at the same time withhold from him any surplus, should it arise? It seems to me that the more rational conclusion is as I have above indicated. It is a very significant fact that such officer is nowhere, either expressly or impliedly, required to keep any account of the moneys expended by him for such "necessary clerical assistants," or to report such expenditure to any person, and the whole import of the statute is inconsistent with a purpose on the part of the legislature of requiring such accounting. Surely it would seem that this would have been expressly provided for in this statute as is the universal custom in other similar statutes, if respondent's contention be correct.

But the attorney general assumes, and the majority of the court seems to have held, that it was not the intent that any portion of such funds should go to compensate the superintendent for any additional work thus imposed on him, because, as argued, it is not thus provided in express language; and by a course of reasoning the conclusion is reached that, because no provision is made in the statute for the disposition of any surplus arising in the fund, that it must be treated, under § 84 of the Constitution, as "fees and profits" arising from said office and coverable into the state treasury accordingly. Such argument will not stand the test of analysis, as I shall attempt to demonstrate. The same legislature which enacted the statute in question also enacted chapter 95 of the Session Laws of 1901, providing, among other things, that "every state officer . . . required by § 84 of the Constitution of this state, or by any provision of the laws of this state, to cover into the state treasury all fees and profits arising from such office . . . shall report to the state treasurer monthly the amount of fees or profits received, verified by oath, *and at the same time pay the amount* of such fees or profits *to the treasurer* . . . ." This statute is very broad and explicit, covering *"all* fees and profits" required by § 84 of the Constitution or by any law, to be covered into the state treasury. Is it not, therefore, too plain for argument that the legislature in enacting the law in question did not intend that there should be any balance in this fund which should be treated as fees or profits? The provisions of said act are wholly foreign to and utterly incompatible with any such intent. The statute provides, "And $1 of said fee shall be used by the superintendent of public instruction for such clerical assistants as he shall deem necessary and competent for the reading of teachers' answer papers and the work connected therewith" and "the expenditures therefor shall not exceed, in the aggregate, the sum annually collected from applicants for this purpose." By this language it was no doubt contemplated that the aggregate of all such unexpended receipts should be available at any time during each year, if not during the entire term of the incumbent, for the payment of such clerical assistants; and how, I ask, could this be true, if, at monthly periods, it must be covered into the state treasury? The conclusion is irresistible, therefore, that § 84 of the Constitution has no application, and that there is no law requiring any

balance which may accumulate in such funds to be covered into the state treasury. It was not the intention of the legislature that any balance should ever arise to be thus disposed of. On the contrary, as before stated, it was intended that these funds should be consumed *in toto* by such officer, as compensation for the performance of such newly created duties. It seems to me that the whole fallacy of the state's contention and of the reasoning of the majority lies in the unwarranted assumption that these fees are *state funds,* and that an express appropriation was consequently necessary to transfer title thereto to appellant. There is nothing in the statute affording any basis for such contention. Does a statute providing for the payment of fees by private parties to a public officer necessarily evince a legislative intent that such fees shall belong to the public? Clearly not. On the contrary, the fact that as to one half of such fee the legislature has expressly provided that it should be turned into a fund to be kept by the county treasurer, and no similar legislative provision is made for the other one half, is quite persuasive in favor of appellant's contention.

The county superintendent is by this statute, in effect, made the agent or trustee of the state superintendent, to collect from each applicant for teacher's certificate the $1 item, and to transmit same to him. In case of a failure or refusal to carry out such agency or trust, ample remedy can be found to authorize the person thus beneficially interested, to wit: The state superintendent to enforce such trust. The statute should be construed the same as if it provided that each applicant for a teacher's certificate should pay the sum of $1 directly to the state superintendent, to be used by him as aforesaid. It is begging the whole question to say that these payments constitute a *state fund,* and hence that the state is the sole person having a remedy against a defaulting county superintendent. It is likewise begging the question to assert that these dollar collections constitute *public moneys collected for the state.* Whether they are public funds or private emoluments of this officer is the sole and vital question involved. The state in no sense obligates itself to pay the clerical assistants. They are employed by the superintendent and are his servants, and he alone is responsible for their pay. The statute clearly leaves the matter of the employment of such assistants and their

compensation wholly to the judgment and discretion of the state superintendent. The statute merely requires him to do the work or to cause the same to be done, and it, in effect, says: "We care not how much assistance you see fit to employ, you are restricted as to the expense thereof, so far as the state is concerned, to the fees thus collected and transmitted to you for this work." It therefore seems plain that such clerical assistants are not in the employ of the state at all, and such is the express holding in our sister state of South Dakota in a case in all respects identical on principle with the case at bar. There the legislature made an allowance to the probate judge of a certain sum for *"clerk hire,"* and the supreme court held that he was entitled to such allowance whether he in fact employed a clerk or did the clerical work himself. I quote therefrom as follows:

"The probate judge may not desire to appoint, nor may the public service demand the appointment of, a clerk of the probate court with such full and extended powers. Therefore, the legislature wisely left it optional with the judge. The act of March 7, 1889, simply provides that, in counties having 20,000 inhabitants or more, compensation shall be allowed the judges of the probate court for clerk hire; the legislature, no doubt, presuming that in counties having that much population the business of the probate courts would be of such a magnitude that the judge could not reasonably be able to do all the judicial, ministerial, and clerical business coming before it. The enactment is plain and free from all ambiguity. It says: 'There shall be allowed and paid to the judges of the probate courts, . . . for clerk hire,' etc. This clerk may or may not be the clerk of the probate court, as provided in the act of March 8. He need not receive the formality of an appointment. It need not be an officer of the court. It may be any person capable of transcribing or recording papers. It may be a male or female; a minor or a legal voter; a foreigner or a naturalized citizen. There may be no permanency to his employment. It may be for a day or more, *and the liability only extending to the employer,* and he is clothed with no official responsibility. Nor need it be either of these, independent of the judge of the court; for if he performs the duties himself, and does it well and efficiently, the public or county cannot complain, for it can make no difference to it whether the money provided by the act goes into the pocket of the

judge, as his own, or into the pocket of someone else, for doing the work. The legislature evidently intended that this money should be appropriated in these counties, to be used at the discretion of the probate judge, for the good of the public." Gordon v. Lawrence County, 1 S. D. 31, 44 N. W. 1025. There the legislature made a flat allowance for "clerk hire." Here the legislature made a flat allowance for "clerical assistants." Wherein is there any distinction on principle in these cases? See also to the same effect, Bruce v. Dodge County, 20 Minn. 388, Gil. 339, from which I quote: "The words 'The county auditor shall be allowed for clerk hire,' evidently mean that he shall be entitled to receive the percentage allowed for clerk hire in all counties where the valuation amounts to or exceeds $800,000, without reference to whether he in fact employs a clerk or not. In other words, he is entitled to receive the percentage, though he performs in person the labor for which such percentage is intended as a compensation. And even when he employs a clerk or clerks, he is under no legal obligation to pay him or them the full amount of the percentage allowed for clerk hire. He can pay his clerks whatever price is agreed upon, retaining any surplus of the percentage for his own use. In other words, the percentage allowed for clerk hire would seem to be part of the *compensation* allowed the auditor as pay for the discharge of the duties of his office, and a portion of his *salary,* just as is the percentage allowed him in the earlier provisions of the section." If, as no doubt is true, these clerical assistants were the mere private employees and servants of Stockwell, and not of the state (see Anne Arundel County v. Duvall, 54 Md. 350, 39 Am. Rep. 393), is it consistent to hold that the fund out of which they were paid was a *public fund?* Although engaged in assisting him in the discharge of his official duties, they, nevertheless, were working for him, not the state, and they were obliged to look to him alone for their compensation. While it is true that he was supplied with a gross allowance for such purpose by the statutory provision requiring each applicant for teacher's certificate to pay $1 to him for this purpose, such funds, when paid to him, became, as I contend, his private emoluments, burdened, it is true, with a liability on his part to pay the necessary expense of such clerical assistance.

Chapter 51, Laws of 1901, making it a misdemeanor for an officer

to divert to his own use and benefit any allowance made for clerk hire in his office, is cited and relied on in the majority opinion, but in my judgment it does not have the least application. "Clerical assistance," within the meaning of the act in question, is not the same as "clerks" within the meaning of chapter 51, supra. A good case defining the words "clerical assistance," is Beam v. Jennings, 96 N. C. 82, 2 S. E. 245, from which I quote as follows: "The secretary of state is a high and respectable executive officer of state, charged with a variety of important—many of them delicate—duties, that require his personal attention, supervision, and scrutiny. His office is created by the Constitution, and his duties are prescribed by statute.

"It seems to be the purpose of the legislature that he shall personally and alone exercise official authority in the exercise of the functions of his office. There is no statutory provision that he shall have an assistant, deputy, or clerk, so designated, required to take an oath of office, and exercise any official authority. *He is simply allowed $2,000 per annum 'for clerical assistance* . . . in the discharge of his office.' This does not imply *official* assistance,—that the secretary shall appoint a deputy or a clerk, one or more, who are to take an oath of office, and hold office for a definite period of time. Plainly he may employ such 'clerical assistance' as he may need, from time to time, sometimes more, at others less, as occasion and his convenience may require, and such assistance he can change or dispense with at his convenience and pleasure, having in view the public need.

"By 'clerical assistance' is meant, not official assistance, but such as aid in the exercise of official authority by the secretary himself, such as writing letters, making entries of record, copying grants, and the like service. The word 'clerical,' as employed in the statute to designate a kind of help, has no very definite meaning; is not a very apt word for the purpose intended, but it is obvious the legislature did not intend to extend its meaning so as to imply official aid; if so, it would have designated the person to render such aid, as deputy, assistant, clerk, or by some such designation, with a term of office, and required the incumbent to take an oath of office. . . . It would certainly be a very latitudinous and unwarranted interpretation of the words, 'clerical assistance,' to hold that they imply that every person whom the secretary of state may find it necessary to employ to

aid him in the discharge of the 'clerical' duties of his office, as above indicated, shall take an oath of office and represent him in the exercise of official authority. He might, sometimes no doubt would, require half a dozen or more clerks, copyists, and letter writers. Shall they all be sworn as officers? Shall they all represent and act for the secretary officially in the authentication of copies of records, grants, and other papers? If not, which of them shall be sworn? Which of them shall represent him by virtue of the statute, officially, and as to what matters and things?"

The idea that the superintendent must account for any surplus, should it arise, is wholly foreign to the statute. No such accounting is required, and, furthermore, the undisputed facts as found by the trial court effectually refute the idea that a surplus was ever contemplated. Under the findings it was not possible for a single dollar of such surplus to accrue, except by reason of the extra work of the superintendent performed out of office hours; and it is fair to assume that the legislature, before enacting said statute, made an intelligent investigation, which, if made, necessarily disclosed that such would be the result under the practical operation of the law. Certainly it could not have been contemplated that the superintendent would burn midnight oil, and by so doing create a surplus solely for the enrichment of the general fund of the state. His time outside of office hours did not belong to the state. Concededly the superintendent could have and, but for the extra work done by him, would have exhausted every dollar of such fees. Is it logical or sensible to say that while the legislature was perfectly willing to, and did in fact, authorize every dollar of such fees to be devoted to compensating *clerical assistants,* if employed, it, on the other hand, most strenuously objected to any portion thereof being used to compensate for such work, if, perchance it should be performed by the superintendent himself, even though wholly out of office hours? Where is the provision of this law, when the whole act is construed together which evinces any such absurd legislative purpose? It may readily be conceded in accordance with the general rule that a public officer cannot claim extra compensation for official work performed out of office hours, in the absence of a statute to that effect; but this is wholly beside the question. Appellant is not here asserting any such right. He is not asking the state to compensate him for such

work, nor is he seeking to establish an offset or counterclaim therefor, as stated in the majority opinion. His contention is that in legal effect the legislature, by the act in question, has already compensated him by directing these moneys to be paid to him. In addition to the South Dakota and Minnesota cases, supra, I call attention to the recent case of Com. v. Fry, 183 Pa. 32, 38 Atl. 417, wherein that eminent tribunal was called upon to determine a similar question. Under certain statutes of Pennsylvania all applicants for liquor licenses were required to pay to the clerk *"for expenses* connected therewith" the sum of $5; and the court was required to decide whether such fund constituted "fees" of his office within the law of that state, taxing such fees. The court, without a dissenting vote, said: "As to the question whether the sum paid to the clerk of the sessions in liquor license cases is to be regarded as 'fees' within the meaning of the acts which tax fees, we think there is no doubt. While the Acts of 1887 and 1891 both designate the payment as being made for *'expenses,' it is a payment to the clerk which he is at liberty to keep, taking credit against it for* actual expenses paid, and the balance *is therefore an emolument of the office, and under the taxing laws must be regarded as a part of the income of the office."*

Surely if the above is sound, and of this I entertain no doubt, it would seem that appellant's contention in the case at bar is likewise sound, for the two cases are not distinguishable on principle. Manifestly, if such expense moneys, or the unexpended balance thereof, constitute an emolument of the office, as held by the Pennsylvania court, the whole reasoning in the majority opinion based on the assumption that such fees are state funds and should be accounted for, must fail. If the rule announced by the Pennsylvania court be correct, it would be absurd to contend that an accounting of such moneys to the state or to defendant's successor in office is required by any statutory or constitutional provisions. Is it possible that it could have been intended by § 84 of the Constitution to deprive the legislature of the power, on adding new duties to an office, to provide for reimbursing such officer for the expense of such additional clerical assistance as may be made necessary on account of such newly added duties? This, as I read the law, is just what the legislature sought to do by the act in question.

In providing for such expenses, did not the legislature have the right to do as it has done in many other instances, make a flat allowance thereof without the necessity of such officer rendering any itemized account? The statute in question, in legal effect, makes such flat allowance when it requires payment by each applicant to such officer of $1 to be used to cover such additional expenses. In what manner then, and by force of what rule or principle, does such expense money, or any portion thereof, become transposed into either fees or profits within the meaning of the Constitution?

It seems too plain for serious debate that such constitutional provision in no manner restricts the power of the legislature in the matter of allowing not only such expenses, but also additional *remuneration* to the officer for such newly added duties, if it so desires.

It is but fair to the attorney general and his able assistants to state that they make no contention to the contrary in their printed brief in this case.

Another case involving a somewhat analogous principle arose in Indiana in the case of Henderson v. State, 96 Ind. 437. Henderson, who was state auditor, made claim to a surplus of $14,412 collected by him from foreign insurance companies doing business in Indiana pursuant to a certain statute of that state, and the question for decision was: To whom did the fees thus collected belong? Appellant, Henderson, insisted that they were a part of the emoluments of his office, and that he retained them because the law gave them to him in part compensation for his services as such auditor. The attorney general urged that the law required such fees to be collected for the state. The statute authorizing the collection of such fees took effect in 1877. Such act was not amendatory of any existing statute, but was an original enactment imposing new duties on the auditor with relation to foreign insurance companies. Prior thereto, and in 1875, an act was passed requiring the auditor to charge and collect, *for the state* from foreign insurance companies, the same fees as he was previously authorized to charge and collect under a prior statute, to wit: An examination fee of $5 and $2 for each certificate of authority to do business in that state, which amendatory statute further required such auditor at state intervals to make sworn statements of such fees, and pay same

to the treasurer, to be covered in the general fund of the state, with the exception that he was permitted to retain for his services 25 per cent thereof.

Among other things the court said: *"Whenever the general assembly authorizes by new legislation the imposition and collection by a public officer of new and additional fees for the discharge of new and additional duties, we are of opinion that such fees, ex vi termini, when imposed and collected, belong to and are the property of such public officer, unless the law-making power has clearly indicated, in such legislation, that such fees shall be applied in a different way, or to a different purpose. That is, in such a case, no prior legislation would affect or control the appropriation of such fees by such public officer to his own use and purpose. In the case in hand, we do not doubt that the new and additional fees, imposed and collected by the appellant as auditor of state, under the provisions of* § 3773, *and in controversy herein, belonged to him of right, and were his sole and separate property."*

It is no answer to appellant's contention to cite the various instances wherein the legislature has seen fit to increase the salary or expenses of this officer. Similar increases were made all along the line of state officials in apparent recognition of two well-known facts, *viz.:* increased work in the offices by reason of the increase in population, and the increased cost of living, rendering the old salaries and allowances for expenses wholly inadequate to changed conditions. None of such increases can be legitimately accounted for by reason of *newly added* duties. Hence they furnish no light whatever on the question here involved. Another apparent fallacy in the majority opinion is the unwarranted assumption that an express legislative appropriation, or any appropriation, was necessary to confer these fees on this officer. Starting, first, with the erroneous assumption that these fees are state funds, it is very easy to fall into the second error of concluding that an appropriation is requisite. These fees, as before stated, were never state funds, consequently it is entirely a misuse of the term "appropriation" to use it in such connection. It is of course only state property which may be appropriated by the legislature. The word is defined in 3 Cyc. 565, as follows: "An authority from the legislature, given at the proper time and in legal form, to the proper officers, to apply sums of money out of

that which may be in the treasury, in a given year, to specified objects or demands against the state."

What I have above stated sufficiently answers respondent's other contention, which, in effect, is that in any event such fund belongs to Stockwell's successor in office. Such contention necessarily leads to the conclusion that it was the legislative purpose to create a perpetually augmenting fund in the hands of such officer to be transferred from each retiring incumbent to his successor in office. This is a less plausible argument than the first, and I cannot believe the legislature contemplated any such thing.

The judgment appealed from should, in my opinion, be reversed and the action dismissed.

SPALDING, J. (dissenting). No case before this court since I became a member thereof has received more earnest consideration than the one at bar. Neither has any case developed greater diversity of view or furnished the subject for more conflicting opinions, depending largely upon the point of view or state of mind at different times.

The conclusion arrived at by Judge Burke, regarding the applicability of § 84 of the Constitution, is a very easy conclusion to reach, and is one that on a somewhat superficial view, as I now regard it, when first presented, was very attractive to me.

After further and more careful examination I am satisfied that the conclusion of Judge Fisk is correct, *viz.*, that the fund in question does not constitute fees and profits within the meaning of that section of the Constitution, and that if the legislative intent is material it was intended to make a flat allowance to the state superintendent to cover the expenses thought necessary to be incurred by changing the examination of teachers' papers from the thirty-nine different county superintendents, to a clerical force to be selected by the state superintendent. I do not find it necessary to enlarge greatly on the reasons advanced by Judge Fisk, in support of my conclusions; and offer only a few supplemental suggestions, which seem pertinent. I, however, do not attach more weight to the fact that the work performed by the defendant was done outside regular office hours.

The fallacies on which the conclusions of the majority of this court rest are the assumptions that the money in question is public money,

and that the act of examining the papers is an official duty of the state superintendent. In the opinion written by Judge Goss, attention is constantly misdirected to the acts of the state superintendent, which are unquestionably performed as public duties, but the mind must be applied to the act which we are considering, for a determination of this question. That act does not consist in the superintendence of the examination of papers or in reporting the result to the county superintendent, but the act which we are required to consider is at all times the mental and clerical work of examining and marking the papers. I deem it but just to the defendant to also call attention to the fact that many of the points discussed and attempted to be settled in the majority opinion were never presented or discussed by the defendant or his counsel. They are simply men of straw.

In my opinion, the questions presented are purely political or legislative, and the facts do not disclose a cause of action on behalf of the state. It is practically immaterial whether the legislative intent was to furnish the state superintendent emolument in addition to the prescribed salary.

Constitutional provisions regarding the salary of state officers do not limit the legislature in making provision for the payment of their expenses or for the expenses of running their offices. See Briscoe v. Clark County, 95 Ill. 309; Kirkwood v. Soto, 87 Cal. 394, 25 Pac. 488.

No question of bad faith, either on the part of the legislature or of the defendant, arises in this case. The legislature, when the law in question was enacted, simply had under consideration a change in the system of marking the examination papers of applicants for teachers' certificates. Theretofore they had been examined and marked by thirty-nine different county superintendents, who did not always interpret the same question the same way, and did not always give equal credit for the same answers. The purpose of the legislature was to change the system and place the work under the supervision of one official, thereby securing substantial uniformity in interpreting the papers, and impartiality in fixing the grades of certificates. It must have been apparent to the legislature that the superintendent of public instruction could not possibly do the work himself. It therefore gave him the oversight, and provided that he might secure clerical assistance to perform

it. Some means had to be provided for paying the expenditure made necessary by this change. It may not have been thought wise to increase the burden of taxation. One dollar had theretofore been collected of applicants for teachers' certificates, for the creation of a teachers' institute fund, and it was thought that the addition of a dollar to the amount so collected from applicants, for the creation of a fund out of which to pay for the examination of the papers, would not be unreasonable. It was therefore provided that the county superintendent should collect $1 from each individual applicant, which dollar he was required to give to the state superintendent for use in payment for the examination of the papers. No burden was cast upon the state. This was specifically guarded against by the provision that such expenditures should not exceed the aggregate sum annually collected for that purpose.

The state superintendent was made the sole judge of the necessity for the expenditure, and was clothed with absolute authority to select the beneficiaries and fix the rate of pay. It may or may not have been contemplated that he would do a portion of the work himself and thereby add to his income. If by reason of superior thrift, hard work, or laboring at unusual hours, he avoided making some of the expenditure contemplated, it does not occur to me that, in the absence of any provision of law regarding it, an implied duty devolved on him to pay a portion of the allowance received into the state treasury. The action in question makes no provision for any of it being paid into the treasury. If it should, accidentally or otherwise, be turned into that office, it could not be withdrawn or made available for the purpose contemplated, as no provision for its withdrawal is found.

The terms of this act, when read in connection with other provisions of law previously enacted, create a conflict which it is our duty to reconcile, if possible. I see no method of doing so except by adopting the construction that the state superintendent was allowed this fund absolutely, for the purpose named. To illustrate some of these conflicts, the examination of teachers are held four times per year, under the statute. Three of the days for holding them are the last Fridays, and, if necessary, Saturdays, of certain months. The law is mandatory, and requires the county superintendent to immediately forward to the state superintendent $1 for each applicant examined. If the law quoted in some of the opinions relating to the transfer of funds by officers into the

state treasury on the first of each month has any application, it takes but little consideration to disclose the fact that the state superintendent would thereby be deprived of the power to use most of this fund for the purpose for which it was intended, or at all. It would go into the state treasury before he could possibly dispose of it, and without any means for its withdrawal to pay for the clerical services required for the examinations. This is not of great weight except as it sheds some light upon the intent of the legislature to turn over the fund to the state official absolutely.

But to return somewhat, the legislature is the sole judge of the necessity for paying a part or all of the expenses of state officials. It can pay and provide for them in either of many different ways. For instance, by allowance, for mileage, for actual disbursements, in lump sums from the state treasury, or by providing for collections from the persons for whom services are rendered.

The legislature exercises its judgment in the selection of a method, and in fixing the amount of the allowance, as well as in determining whether the state or private individuals shall pay it. In the case at bar, it determined that the pay for certain work should be met by the persons for whom the work was performed. It exercised its judgment and discretion in fixing the amount to be collected and allowed for that purpose, and it saw fit to require the payment of $1 from each individual applicant. If it was mistaken in its judgment and $1 is too much, the remedy lies with the legislature, rather than with the courts.

The determining factor is the nature of the work done, in examining papers, by the superintendent. If it is his official duty to perform that work, his salary pays him. But the terms of the law disclose that *the duty of examining the papers is nowhere cast by it upon him. Hence such examination does not become an official duty on his part.* See United States v. Mosby, 133 U. S. 273, 33 L. ed. 625, 10 Sup. Ct. Rep. 327.

It is unquestionably the duty of a state official to devote his entire time, as far as becomes necessary, to the duties of his office. If he fails to do so and engages in private enterprises, this does not afford the state a remedy through the courts for his malfeasance or nonfeasance in office, or neglect of duties. The remedy lies with the electors or with the legislature, or both. In the instant case the defendant saw fit to devote

time out of office hours to the performance of labor which was not imposed upon him by the law, and for which other provision had been expressly made. Had he neglected his official duties and devoted a portion of the time during office hours to the performance of this work, for the reasons theretofore suggested, the state would have no remedy against him in an action at law, any more than it would have had he devoted a portion of his office hours to teaching singing school, or farm labor, for compensation. If the state possesses no legal remedy in cases when the unofficial work conflicts with official duties, it certainly can possess none when no conflict is shown. This is said on the assumption that the legislature has said nothing on the subject; but on the contrary it has said something and has disposed of this proposition. By the terms of the law he was given permission to do this work, but the test is that *he was not required to do it.* Had he been required to do it, it, of course, would have become an official duty. See Ibid.

We are not without instances of parallel legislation, many of which may be said to illustrate the case at bar and furnish the legislative construction, which is entitled to weight in the interpretation of ambiguous language. For instance, the governor was allowed a flat sum for expenses. Vouchers were not required for its expenditure. If he found it necessary to expend less than the allowance, he was the beneficiary. No contention has been noted to the contrary. Similar allowances were made to some other state officials, all of whom, including the governor, are within the terms of § 84 of the Constitution. No one knows whether the allowance made to them exceeded their necessary disbursements while on official duty, or not. It is immaterial, because the legislature exercised its discretion and judgment and fixed the allowance, and did so in good faith.

In the case of the other officials, the allowance was paid to them from the state treasury, while the one we are considering never goes into the state treasury. This makes it much more readily apparent that an accounting is unnecessary. If it was a fund primarily belonging to the state or paid out of the state treasury, the case of the state would be stronger. All state moneys must go into the treasury and be disbursed only on appropriation and through regular channels. No appropriation can be made of funds to which the state has no title. The

title to this fund after it went into his hands, and until disbursed, was at all times in the defendant.

A similar method of paying expenses of different officials is employed in all parts of the country and in every county of this state. An instance of this is found in the mileage which the law permits sheriffs to collect from litigants for whom they render services. The rate allowed is a flat rate per mile. The object of requiring its payment is to reimburse sheriffs for expenditures incurred in traveling when officially engaged. We know that the mileage fixed is considerably in excess of the necessary expenditures in many instances and undoubtedly so as a whole, but neither the state nor the county is interested in the excess of the allowance over actual disbursements. If the legislature has exercised bad judgment in fixing the rate and made it unreasonable or oppressive, the remedy lies with that body.

It is argued that the burden rests with the defendant to establish clearly that he has a legal right to the fund in controversy. This seems to establish a new doctrine,—that the defendant is presumed guilty until he proves himself innocent; and that the burden of proof is no longer on the plaintiff. I deem it beyond controversy that the burden is on the state to establish its title to the fund; and on its failing to do so the defendant is entitled to a favorable judgment, regardless of his ability to establish title in himself. It is the state which must put its finger, as is said, on the law, bringing this fund within the terms of the constitutional provision. Until it does so it has not made out a case.

The fees and profits referred to in § 84 are those derived from the performance of official duties. It is apparent to me that the fund under consideration is not made up of fees of the office of the state superintendent, neither is it profits in the ordinary sense, for the reasons which I have briefly stated; and possibly also because he did not hire papers examined for a less sum than the allowance. It is not claimed that he could have done so. All the money transferred to him went for the accomplishment of the purpose for which it was provided. It all paid for work, at the rate fixed by the law in question, and, as I have attempted to indicate, if the examination of the papers was unofficial work, that is, work not mandatorily required of his office, some of it, when done by him, was work for which he had a right to retain

pay. The public is in no manner interested in the *personnel* of the examiners of teachers' examination papers. Its interest lies in the direction of having the work correctly, promptly, and impartially done, and to that end that the direction and control be committed to one person. Neither the state nor the public has in any manner suffered. On the contrary, the interests of the public have been served by the acts of the defendant. The claim of the state at best is of the most technical character, devoid of equity, and unconscionable.

I think I have shown that the beneficial purpose of the change in the law which we are considering was to secure uniformity in the markings of examination papers, but if the majority of this court is correct in its suggestion that the beneficial purpose of the legislature was either to increase the superintendent's annual income or to make provision for clerical assistance and to prescribe its payment out of a fund created thereunder, the whole provision is unquestionably rendered invalid. It never was intended as a revenue measure. The revenue feature of it is but an incident to the main purpose.

Many authorities cited in the majority opinions I deem wholly irrelevant. A considerable number simply hold that an official cannot recover from a state or municipality for services to pay for which no provision has been made. An analysis of most of the other authorities cited in those opinions might be of interest, but it would serve no purpose other than to gratify the vanity of the writer and the curiosity of the reader. It will, therefore, not be included in this opinion. However, one or two illustrations will not unduly lengthen it.

Hennepin County v. Dickey, 86 Minn. 331, 90 N. W. 775, is relied upon, but a consideration of the entire opinion would disclose the fact that the services performed by the defendant in that case and for which he retained the fees for which suit was brought were required of him by the statute, and were therefore official duties.

McBrian v. Nation, 78 Kan. 665, 97 Pac. 798, relating to pay for the services of the chaplain of the penitentiary, rendered by him as a school teacher, has no bearing upon this case. The Kansas statute expressly required the chaplain to devote his entire time to the duties of that office. The penitentiary board employed him to perform the other duties, and the court held, in view of the express statute on the subject, he could not devote any of his time to any occupation outside that

of the chaplaincy. Some distinction will be found in the Oklahoma case and in nearly, if not all, the other authorities cited, relating to duties of officials.

In the light of the foregoing considerations briefly expressed, and of most of the reasons advanced by my associate, I am satisfied that no part of the fund in question comes from fees or profits of the office of the state superintendent, within the meaning of § 84 of the Constitution; and that the body of the law on the subject, when construed together, warrants the conclusion that I have reached; namely, that the fund went to the defendant, subject only to the condition that he provide for and secure the performance of the work referred to.

Chief Justice MORGAN having resigned before the petition for a rehearing was filed in the above entitled case, Mr. Justice BRUCE participated in his place and filed the following opinion on February 14, 1912:

On Petition for Rehearing.

BRUCE, J. This appeal was first presented to and decided by a court of which I was not then a member. It now comes before us on a motion for rehearing, which, under the rules in order to be considered, must show "either that some question, decisive of the case and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision, to which the attention of the court was not called either in the brief or oral argument, or which has been overlooked by the court." (Rule No. 32, 10 N. D. LVI.) Neither of these facts is presented or claimed in the petition. The only new point raised is that a somewhat similar practice as that adopted by the superintendent of public instruction, prevails among the district judges of this state, and that a constitutional question was argued in the opinion of Mr. Justice Burke, which, it is claimed, was waived by the attorney general in his brief and oral argument.

It is a question of somewhat doubtful propriety whether a new member of the bench should, after a full hearing and consideration, and on such a petition, seek to review an adjudication which was rendered by a court of which he was then not a member; but waiving this question,

and all other doubtful questions of propriety, I am of the opinion that no new points have been raised on the motion for a rehearing which would, in any way, affect the majority decision, and I personally believe that the language of the statute is too plain to leave any doubt as to its meaning. The majority opinion filed by Mr. Justice Goss was in no way based upon the constitutional argument, and this opinion was concurred in its entirety by both Chief Justice Morgan and Mr. Justice Burke. Mr. Justice Burke, it is true, argued the constitutional question, but merely as an *additional argument,* and not as the main and only ground of his concurrence.

It is not necessary to a recovery by the state in this case that the fund in controversy should be looked upon either as a fee or as a profit of the state superintendent's office. It certainly was not a perquisite or emolument of the officer. It was a trust fund which was paid to the superintendent of public instruction for one purpose, and for one purpose alone, and that was for the *employment of assistants.* The language of the act appears to me to be very plain. The money collected from the examination fees paid by the respective teachers is required by the act *"to be used* in the support of teachers' institutes or the teachers' training schools in the county as otherwise provided, and $1 of said fee *shall be used* by the superintendent of public instruction for such *clerical assistance* as he may deem necessary and competent for the reading of teachers' answer papers and work connected therewith. Section 876 provides that "each applicant for a county certificate shall pay $2 to the county superintendent, $1 of which shall be paid into the county teachers' institute fund, . . . and $1 of said fee shall be used by the superintendent of public instruction for such *clerical assistance* as he may deem necessary and competent for the reading of teachers' answer papers and *work connected therewith."* "It shall be the duty of the county superintendent," the section continues, "immediately after each examination, to forward $1 for each applicant for teacher's certificate to the superintendent of public instruction, such sums *to be used* by him as *hereinbefore provided."* The only use provided for in this section and in the act is the use *in the employment* of *clerical assistance or clerical assistants;* for that the words "clerical assistants" are synonymous with the words "clerical assistance" is clear from § 869 of the Code of 1905, and of the same act, which provides that "he [the state

superintendent] may appoint such *clerical assistants* as he may deem necessary, but the expenditures therefor shall not exceed, in the aggregate, the sum annually collected from applicants for county certificates *for this purpose.*" It is also to be noted that the act nowhere permits the money to be used for *expenses* incident to the examination of such papers, but merely "for such *clerical assistance* as he may deem necessary and competent for the reading of teachers' answer papers and *work connected therewith.*" This can only mean the work of the *assistants,* and not of the superintendent, in connection with the marking of the papers. The meaning of the act is made still more clear when we consider that that portion of § 869 which relates to the duties of the state superintendent in regard to supervision and filing and examination is separated from the portion or sentence which relates to the use of the money, by a period. It needs no argument to prove that a man cannot be an *assistant* to himself, or *employ* himself.

In no case did the title to the money in controversy become vested in the defendant Stockwell. It was a trust fund which was intrusted for a specific purpose; namely, *the employment of assistants.* Even if it did not come to him in connection with the prescribed duties of his office—and this we do not concede—it came to him, nevertheless as an *agent of the state.* The statute, that is to say, the state, authorized the county superintendents to collect certain fees from the teachers, and of the funds thus collected to transmit a portion to the state superintendent *to be used* by him for a *specific purpose.* It cannot be claimed that in the collection and transmission of the fund, the county superintendents acted in any other capacity than as agents of the state. Except as agents of the state, indeed, they could have been given no power to hold the examinations, nor to collect the money or fees. Any other construction of the law would render it unconstitutional, and there is nothing in its terms which would justify any other construction.

There is no force in the analogy drawn in the motion for a rehearing, between the practice under those statutes which allow a flat sum for expenses to district judges, and the statute in question. We are not here called upon to pass upon those statutes, and we disclaim any intention of doing so. We merely call attention to the fact that in those statutes the sum is a flat sum, granted for a specific purpose, and that purpose is the *personal use* of the judge, and his own comfort and convenience.

The money is provided to *aid the judge,* and not for the purpose of having someone else perform that which otherwise might be considered an implied and absolute duty of the judge himself. In the case at bar the sum is required *to be used* for the employment of *clerical assistants,* and the statute prescribes that the state superintendent shall examine *or cause to be examined.* There is no provision made for him in case he examines, himself. It was probably anticipated that he would but rarely so examine. There is a provision made in cases where *he causes to be examined.* The legislature plainly intended to make it clear that, though the personal examination of papers might be considered by some to be an absolute duty of the officer, it was not their intention that it should be, or that the superintendent should be unduly burdened, but that he could employ assistants for this purpose, and for those *assistants* a trust fund was provided. The intention of the legislature to me appears to be plain. It may be that some individuals have understood, and still understand, the act otherwise; but it is the intention of the legislature, and not even of the authors of the bill, that we must seek to ascertain. In the case of the expenses of the district judge, the provision is made for personal use, and for personal comfort. The money is not required to be used for the *employment* and compensation of others. At any rate, these judicial expenses statutes are not before us, nor have they been adjudicated by this court. This case must stand upon its own foundation, and it is the intention of the legislature in this special instance that we must endeavor to ascertain. To use the language of Mr. Justice Cassoday, in the case of State ex rel. Raymer v. Cunningham, 82 Wis. 39, 50, 51 N. W. 1133, "While such an argument may have weight in construing a doubtful or ambiguous provision, yet it has no force as against the plain language of the clause in question."

The history of the statute is well known. Formerly, and under § 740, Code of 1899, the county superintendents examined the papers. Even then, however, the examinations were held, and the questions marked under the rules and regulations of the state superintendent. Sec. 736, Rev. Codes 1899. The only new duties imposed by § 869 of the Code of 1905 are the duties "to examine, mark, and file, or *cause to be examined, marked, and filed,* all answer papers submitted." There is no doubt of the power of the legislature to impose upon the state

superintendent these new duties, especially since he is expressly allowed to delegate them, and is allowed a fund with which to compensate his *assistants*. The burden upon the respective county superintendents became onerous, and there came a cry for uniformity and greater accuracy in the markings. It was therefore thought that all of the work of the examination of answers should be done in the state superintendent's office, and it was already the duty of that office to prepare the questions. In order to have such extra work done and not unduly burden the state superintendent, a fund was furnished for the *employment of clerical assistants*. No new duty was imposed upon the state superintendent as to general superintendence, and although the examination of the papers might have been held to be a new duty, he was provided with a fund to be used for the employment of assistants, and could delegate the duty. The statute requires such money to be used *for the employment of clerical assistants*. In speaking of the fund it expressly provides a use, and that is in *employing* "clerical assistance necessary and competent for the reading of teachers' answer papers, and work connected therewith." It provides that the state superintendent may appoint such clerical assistants as he may deem necessary, but the expenditures therefor shall not exceed, in the aggregate, the sum annually collected for county certificates *for this purpose*. One cannot be an assistant to himself, or even, technically speaking, of assistance to one's self, nor can he "employ" himself. The law recognizes no doubles.

I do not agree with Judges Goss, Morgan, and Burke that the case of Com. v. Fry, 183 Pa. 32, 38 Atl. 417, is an authority for the state, but I do hold that in the case at bar the facts are materially different, and that the case is hardly an authority for the defendant. If it were an authority, I believe that it states bad law, and a bad public policy. In that case a flat sum of $500 was required to be paid to the clerk of the court by applicants for liquor licenses, "for expenses connected therewith." The terms are general. The fund was for the payment of *expenses*. The amount saved or made out of the fund by the clerk of the court, if any, did not necessarily detract from the compensation or efficiency of others to whom *discretionary* powers had been authorized to be delegated. No others were specifically mentioned. Neither do I believe that the South Dakota case cited in the opinion of Mr. Justice

Fisk is an authority for the defendant. It, in any case, lays down a rule of public policy with which I am utterly unable to agree, and which chapter 51 of the Laws of 1901 (Rev. Codes 8645), which makes it a misdemeanor for a public official to appropriate clerk hire to their own use, absolutely repudiates. It announces both a bad and a dangerous doctrine. In that case, as is pointed out in the opinion of Mr. Justice Fisk, the legislature made an allowance to the probate judges of a certain sum "for clerk hire," and the supreme court held that the judges were entitled to such allowance whether they in fact employed a clerk or did the clerical work themselves. "The probate court," the supreme court of South Dakota said, "may not desire to appoint, nor may the public service demand the appointment of, a clerk of the probate court with such full and extended powers. Therefore the legislature wisely left it optional with the judge. The act . . . provides that in counties having 20,000 inhabitants or more, compensation shall be allowed the judges of the probate court for clerk hire; the legislature, no doubt, presuming that in counties having that much population the business of the probate courts would be of such a magnitude that the judge could not reasonably be able to do all the judicial, ministerial, and clerical business coming before it. . . . The legislature evidently intended that this money should be appropriated in these counties to be used at the discretion of the probate judge for the good of the public" [Gordon v. Lawrence County, 1 S. D. 34, 44 N. W. 1025], and even when he employs a clerk or clerks he is under no legal obligation to pay him or them the full amount or percentages allowed for clerk hire. He can pay his clerk whatever price is agreed upon, retaining any surplus or percentage for his own use. But the public needs good service, and though it should demand that its officers and servants should work hard, it is not to its interest that they should be burdened or overworked. A burdened man renders but inefficient service. A county judge or superintendent of public instruction whose time is taken up with the details of his office, and with clerical work, can render but inefficient judicial and administrative and supervisory service. To say that such an officer may appropriate to himself money which is expressly given to him "for the employment of assistants," and employ no assistants at all, would be to defeat the very purpose of the statute, and promote a general public inefficiency, rather than efficiency. Public officials are merely public

servants, and public statutes cannot be construed differently than the private contracts and obligations of individuals. Would anyone say that if a railway company came to the conclusion that a station agent was overworked and was liable to neglect the general business of the company, and so gave to such station agent $500 to be used "for the employment of station assistance," such agent could dispense with such assistants and keep the money himself? It may be, as Justice Spalding says, that the state superintendent need not have accepted these added duties at all, or agreed to become a trustee of the fund at all, but when he accepted the fund he accepted it impressed as it was with a trust, and for a specific purpose, and he could not use it for any other.

This is a civil, and not a criminal, action, and there is no reason or necessity, in this case, for imputing dishonesty to the defendant. I personally believe that he acted with an honest belief, and without guile. An honest belief, however, does not give legal right, nor does it change the meaning of the clerk provisions of statutory law. To hold that the fund could be appropriated to the personal use of the superintendent would evince an unwisdom on the part of the legislature of which it would be hard to believe they were guilty. The purpose of the act was to promote the cause of education, and educational efficiency, and not to hamper it. It was to promote a thoroughness and competency in the examinations, and not to lower the standard. It was to insure correct and satisfactory markings, and not to lessen the amount of care and thought expended upon the papers. If the state superintendent could have all that he could make out of the fund, or that he could save after paying expenses, there would be a constant temptation to employ cheap and inefficient assistants, and to assume to himself more work than he could reasonably perform. The more work he would expend upon the examinations, the less he could expend in the general discharge of his duties; but the more work and time he thus spent, the more money he would make. The case is very different when a judge is allowed a flat sum for his traveling and other expenses. There parsimony and a strict economy does not result in a public injury, but in the judge's own personal discomfort. The question before us is, as I have suggested, not a question of honesty or of dishonesty, but a mere, naked question of legal right. I have no doubt of the honesty of the defendant. I am equally clear that he has no legal right to the fund in question.

I am of the opinion that the motion for rehearing should be denied.

FIRST NATIONAL BANK OF NOME v. GERMAN AMERICAN INSURANCE COMPANY.

(38 L.R.A.(N.S.) 213, 134 N. W. 873.)

Fire insurance — stipulation against other insurance — agent acting for both parties.

1. Action on two fire insurance policies issued by defendant company covering plaintiff's banking building and its contents. Such policies were issued by one T., who was both plaintiff's cashier, and defendant's local agent. These policies are in the standard form, containing, among other things, the usual stipulations to the effect that the policies shall be void if additional insurance is effected on the property, without consent thereto being indorsed on the policy, or "if the hazard be increased by any means within the control or knowledge of the insured."

Concededly, T., as plaintiff's cashier, effected other and additional insurance on the bank building in another insurance company, and no indorsement of consent thereto was ever made on the policies in suit, and defendant had no actual knowledge thereof until after the property was consumed by fire.

Held, that such stipulations are valid, and hence such other insurance rendered the policies void, in the absence of a waiver thereof by defendant, or in the absence of facts estopping it from urging such defense.

Imputing notice of insurance agent to company — where agent also acts for insured.

2. The knowledge of T. of facts avoiding such policies will not, for reasons stated in the opinion, be imputed to his principal, the defendant. Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837, distinguished.

Imputing agent's notice to principal — where interests are conflicting.

3. Where an agent's duty to his principal is opposed to or conflicts with his own interest or that of another person for whom he acts, the law will not impute his knowledge gained in such transaction to such principal.

Note.—The question of the effect of the knowledge of an insurance agent acting in two capacities to charge the company with notice is treated in a note in 3 L.R.A. (N.S.) 444, appended to the case of Foreman v. German Alliance Ins. Co. 104 Va. 694, 113 Am. St. Rep. 1071, 52 S. E. 337, holding that to bind an insurance company to a waiver because of knowledge of a particular state of facts received by its agent while acting as agent of a building association, such knowledge must be shown to have been present in his mind when performing the act which is alleged to have constituted the waiver. And this seems to be the general rule that is applied in determining whether knowledge of an agent acting in two capacities, or acquired outside the scope of his duties as agent, can be imputed to the principal.

Fire insurance — stipulation against other insurance — waiver.

4. Knowledge of such additional insurance acquired by defendant's adjuster after the fire did not operate as a waiver of defendant's right to urge the invalidity of such policies.

Fire insurance — diligence in saving property.

5. *Held,* that no recovery on said policies for the personal property loss can be had for the further reason that the evidence discloses that no proper diligence on plaintiff's part was exercised to save the same.

Opinion filed December 11, 1911. On rehearing February 23, 1912.

Appeal by defendant from a judgment of the District Court for Barnes County, *E. T. Burke,* J., denying his motion for judgment *non obstante veredicto,* or for new trial, in an action to recover on two fire insurance policies.

Reversed.

Barnett & Richardson, for appellant.

Defendant not liable when property of plaintiff destroyed by order of civil authority. Lycoming F. Ins. Co. v. Schwenck, 95 Pa. 89, 40 Am. Rep. 629; Barton v. Home Ins. Co. 42 Mo. 156, 97 Am. Dec. 329; Dupin v. Mutual Ins. Co. 5 La. Ann. 482; Strauss v. Imperial F. Ins. Co. 16 Mo. App. 555; Germania F. Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868; Boon v. Ætna F. Ins. Co. 95 U. S. 117, 24 L. ed. 395; Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 20 L.R.A.(N.S.) 277, 116 S. W. 234; see also note to 20 L.R.A.(N.S.) 277; New York v. Lord, 17 Wend. 258; Taylor v. Plymouth, 8 Met. 462; Keller v. Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613; Hale v. Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190; Struve v. Droge, 62 How. Pr. 233; Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; 28 Cyc. 769; Chicago League Ball Club v. Chicago, 77 Ill. App. 124; McKibbin v. Ft. Smith, 35 Ark. 352; Keller v. Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613; Fields v. Stokley, 99 Pa. 306, 44 Am. Rep. 109; City F. Ins. Co. v. Corlies, 21 Wend. 367, 34 Am. Dec. 258.

Insured cannot recover for a loss occasioned by his own wrongful act, or by any agent for whose conduct he is responsible. Williams v. New England Ins. Co. Fed. Cas. No. 17,731; Cyc. Names v. Dwell-

ing-House Ins. Co. 95 Iowa, 642, 64 N. W. 628; Fleisch v. Insurance Co. of N. A. 58 Mo. App. 596; Emerado Farmers' Elevator Co. v. Farmers' Bank, 20 N. D. 270, 29 L.R.A.(N.S.) 567, 127 N. W. 522; Cobb v. Simon, 119 Wis. 597, 97 N. W. 276; Robinson v. Superior Rapid Transit R. Co. 94 Wis. 345, 34 L.R.A. 205, 59 Am. St. Rep. 896, 68 N. W. 961. See note to 62 Am. Dec. 387.

Defendant cannot be held to have either consented to or waived the indorsement in writing upon the policies, of the agreement permitting additional insurance. Couch v. City F. Ins. Co. 38 Conn. 181, 9 Am. Rep. 375; Hughes v. Insurance Co. of N. A. 40 Neb. 626, 59 N. W. 112.

Knowledge of an agent of additional insurance procured by him upon his own property, or property in which he had an interest, cannot be imputed to the defendant company. Traders' Ins. Co. v. Letcher, 143 Ala. 400, 39 So. 271; Queen Ins. Co. v. May, — Tex. App. —, 35 S. W. 829; Phœnix Ins. Co. v. Fleming, 65 Ark. 54, 39 L.R.A. 789; Gregg v. Baldwin, 9 N. D. 515; Union Nat. Bank v. German Ins. Co. 18 C. C. A. 203, 34 U. S. App. 397, 71 Fed. 473; 31 Cyc. 1587, 1588; United Firemen's Ins. Co. v. Thomas, 47 L.R.A. 450, 27 C. C. A. 42, 53 U. S. App. 517, 82 Fed. 406, 34 C. C. A. 240, 92 Fed. 127; Ætna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436.

Page & Englert, for respondent.

In the absence of fraud or design on the part of the insured in destroying the property a fire insurance company is not relieved from liability. Karow v. Continental Ins. Co. 57 Wis. 56, 46 Am. Rep. 17, 15 N. W. 27; Pool v. Milwaukee Mechanics' Ins. Co. 91 Wis. 530, 65 N. W. 54; Anger v. Western Assur. Co. 10 S. D. 82, 71 N. W. 761; Bowers v. State, 24 Tex. App. 542, 7 S. W. 247; Ferguson v. State, 36 Tex. Crim. Rep. 60, 35 S. W. 369; Huff v. Chicago, I. & L. R. Co. 24 Ind. App. 492, 79 Am. St. Rep. 274, 56 N. E. 932; Horton v. Equitable Life Assur. Soc. 35 Misc. 495, 71 N. Y. Supp. 1060.

Defendant is not in a position to urge a forfeiture of the policies. Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837; Lawyer v. Globe Mut. Ins. Co. 25 S. D. 549, 127 N. W. 615.

FISK, J. Plaintiff seeks to recover on two insurance policies issued by defendant company in the fall of 1908. Both policies covered plaintiff's banking building in the village of Nome, this state, and one of such policies also covered the furniture and fixtures while contained in such bank building. The first policy is for $1,000 on the building, and the other is for $500 on the building and $800 on furniture and fixtures. Both of these policies were carried on this property for several years, being renewed from year to year. One Torbenson, during all the times mentioned, was cashier of plaintiff bank and also the local agent at Nome for defendant company, and in the latter capacity he issued the policies in suit. Each of such policies are in the standard form insuring plaintiff against all direct loss or damage by fire in the amounts mentioned, and containing, among other things, the following stipulations and conditions: "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. . . . 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; or in case of any fraud or false swearing by the insured, touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered, in whole or in part, by this policy; or if the hazard be increased by any means within the control or knowledge of the insured.

"This company shall not be liable for loss caused directly or indirectly by . . . order of any civil authority . . . or by neglect of the

insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises."

Sometime prior to the fire hereinafter mentioned, the exact date being immaterial, Torbenson, as cashier of plaintiff, applied for and procured to be issued to it by the Home Insurance Company a policy for $500, covering said building, which policy was in force at the date of the fire. It is conceded that consent to such additional insurance was not indorsed on either of the policies issued by defendant, and no notice was given to the defendant company of such other insurance, unless the notice and knowledge thereof on Torbenson's part can be imputed to it, which we will presently notice.

On the night of June 5, 1909, a fire was discovered in the rear of a general merchandise store about six lots east of the bank building and on the same side of the block. The bank building stood in the southwest corner of the block, and between it and the place where such fire originated there were several buildings, all of which were consumed by such fire. Nome, being a small village, was not equipped with modern fire apparatus, and, shortly after the fire started, a consultation was had between Torbenson, the sole representative of the bank present at the time, and the president of the board of village trustees and two of such trustees, together with several other citizens, and it was finally agreed that in order to prevent the fire from reaching what is known as the Hanson store, which was a large establishment, heavily insured, and situated east and just across the street from the bank building, in the corner of the next block, they concluded it necessary or advisable to destroy the bank building by burning the same, which they proceeded to do by saturating the same with kerosene oil and lighting it. While the record discloses that there was plenty of time before burning such building to remove the furniture contained therein, no effort appears to have been put forth to this end, and practically all of it was burned with the building.

At the conclusion of plaintiff's testimony and also at the conclusion of all of the evidence, defendant's counsel moved for a directed verdict upon the grounds:

"First. That it appears affirmatively that there was other insurance on this building, notice thereof not being given to the defendant.

"Second. That it appears affirmatively that this building was destroyed in the presence of and with the tacit consent of the cashier of the plaintiff, who was then present.

"Third. That it appears affirmatively from the evidence herein that there was no effort made on behalf of the plaintiff, or its officers, to protect the property at the time of the fire or thereafter. It further appears from the testimony of the plaintiff that there was no effort made to save the personal property therein.

"Fourth. It affirmatively appears that there was false swearing in the matter of making final proof of this loss."

Such motion was denied and the cause submitted to the jury, who returned a verdict in plaintiff's favor of $2,099.40. Thereafter defendant moved in the alternative for judgment notwithstanding the verdict or for a new trial, which motion was denied and judgment entered on the verdict, and this appeal is from the order and judgment aforesaid.

In this court appellant assigns numerous errors, but we find it unnecessary to set them out in full or to notice more than two of appellant's contentions, which are, that the policies were void at the time of the fire on account of such additional insurance procured by plaintiff without defendant's knowledge or consent, either express or implied, and that plaintiff, through its cashier, neglected to use reasonable means to save and preserve the personal property.

We are agreed that these contentions must be upheld and the trial court directed to reverse its judgment and enter a judgment in appellant's favor. Our reasons for reaching this conclusion are briefly as follows: Such additional insurance was in direct contravention of the stipulations in the policies in suit which, in effect, provide that consent thereto must be indorsed on such policies, and also "if the hazard be increased by any means within the control or knowledge of the insured" the entire policy shall be void. The uncontroverted showing is that with such additional insurance the bank building was overinsured and the hazard was thus increased by means within the control and knowledge of the insured in direct contravention of the provisions of the policies, and unless defendant company has waived the benefit of such stipulations or has done something creating an estoppel on its part to urge such defenses, the recovery cannot be sustained, and this, regardless of Torbenson's alleged good faith in procuring such additional insurance.

We take it to be the universal holding that such conditions or stipulations are valid and binding on the insured, unless waived by the insurer or unless the latter, by its conduct, becomes estopped to urge a breach there as a defense to a recovery under the policy. Wilcox v. Continental Ins. Co. 85 Wis. 193, 55 N. W. 188; A. M. Todd Co. v. Farmers' Mut. F. Ins. Co. 137 Mich. 188, 100 N. W. 442; Sun Fire Office v. Clark, 53 Ohio St. 414, 38 L.R.A. 563, 42 N. E. 248, and cases cited. Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837, and cases cited. Lawver v. Globe Ins. Co. 25 S. D. 549, 127 N. W. 615; Hughes v. Insurance Co. of N. A. 40 Neb. 626, 59 N. W. 112.

The fact that defendant's adjuster acquired knowledge after the fire of such additional insurance, and made no complaint by reason thereof, does not, under the provisions of the policy, operate as a waiver of defendant's right to urge such defense. The fact that the jury found that defendant company had knowledge of such additional insurance is of no force whatever, as there is not a scintilla of evidence in the record upon which such finding can be based.

Respondent's counsel rely upon the cases of Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837, and Lawver v. Globe Ins. Co. 25 S. D. 549, 127 N. W. 615, in support of their contention that defendant is not in a position to urge a forfeiture of the policies, but we do not deem these cases in point. In the Leisen Case we held, following the weight of authority, that where a fire insurance company, with full knowledge of facts which, under the stipulations contained in the application or policy, render 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 that 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. That case, however, may be clearly differentiated from the case at bar. There, the agent of the insurance company was in no way connected with the insured and had no direct or indirect interest in the property insured. Hence, the well-settled rule that the knowledge of the agent

of facts invalidating the policy at its inception will be imputed to his principal, the insurance company, has no application. In the case at bar the agent Torbenson was also cashier of plaintiff bank and owned about one quarter of its capital stock. In effecting such insurance he acted in a dual capacity, and although defendant, as plaintiff contends, may, from the evidence, be presumed to have had knowledge of this fact, and cannot, therefore, take advantage thereof, it by no means follows that Torbenson's knowledge as to such additional insurance taken out in another company, should, in law, be imputed to this defendant. We are clear that it should not, for there can be no presumption that Torbenson would convey information to defendant which would be prejudicial or detrimental to the interests of the bank. This is well settled by the authorities.

Ætna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436, and authorities cited. Traders' Ins. Co. v. Letcher, 143 Ala. 400, 39 So. 271; Queen Ins. Co. v. May, — Tex. Civ. App. —, 35 S. W. 829; Phœnix Ins. Co. v. Flemming, 65 Ark. 54, 39 L.R.A. 789, 67 Am. St. Rep. 900, 44 S. W. 464; 31 Cyc. 1587–1595, Mechem, Agency, § 721; Exchange Bank v. Nebraska Underwriters Ins. Co. 84 Neb. 110, 133 Am. St. Rep. 614, 120 N. W. 1010.

In the last case cited the facts are very similar to those in the case at bar, and we quote therefrom as follows:

"It is conceded that the defendant company had no actual notice of the bill of sale made by Hall & Hartley to the bank until after the fire, and the principal dispute arises upon the effect that should be given to the knowledge of Lamborn, the agent of the defendant company, and who, at the same time, was the assistant cashier of the bank. The plaintiff asserts that knowledge of the agent, who, it is conceded, was present when the bill of sale was made, and had knowledge of all the facts, is notice to the defendant company; while the defendant asserts with equal vigor that knowledge of Lamborn cannot be imputed to the company, as his interest as an employee and officer of the bank was adverse to the interest of the defendant company."

After quoting certain authorities as to the general rule, the court says: "Like most other legal rules, this one has its exceptions, and one of the exceptions is that a corporation is not chargeable with the knowledge, nor bound by the acts of one of its officers in a matter in which

he acts in behalf of his own interest, and deals with the corporation as a private individual, and in no way representing it in the transaction. . . . We think it may be regarded as well established that where an agent's duty to his principal is opposed to, or even remotely conflicts with, his own interest, or the interest of another party for whom he acts, the law will not permit him to act, nor will it hold his acts or his knowledge gained in such transaction obligatory upon his principal. That the execution of the bill of sale rendered void policies conditioned as are those in question was held in Farmers' & M. Ins. Co. v. Jensen, 56 Neb. 285, 44 L.R.A. 861, 76 N. W. 577, 78 N. W. 1054, and in Home F. Ins. Co. v. Collins, 61 Neb. 198, 85 N. W. 54. . . . The bank must be charged with knowledge of the conditions of the policies prohibiting a transfer of title of the property insured. It knew that in accepting the bill of sale the policies were made void, unless the company was notified and consented thereto. It was the duty of the bank to inform the company that it was about to take this security and to obtain its assent. . . . A like duty was cast upon Lamborn, the agent of the company; but it appears that the adverse interest cast upon him as an officer of the bank kept him silent, and that same adverse interest creates an exception in the application of the general rule of law imputing knowledge and notice of the agent to his principal."

There being no contention that the defendant had actual notice of such additional insurance and there being nothing to impute such notice or knowledge to it, it necessarily follows that it is not estopped to urge such defense under the rule announced in Leisen v. St. Paul F. & M. Ins. Co. and Lawver v. Globe Ins. Co. supra.

As to the personal property destroyed we think it clearly appears from the uncontroverted evidence that no effort was made to save the same, and that there was ample time and opportunity to do so. It would be useless to review the testimony bearing upon this point. Sufficient to say that after reading the record we are forced to the conclusion that no indemnity could be had for the loss of such personal property, even though the policies were not rendered void by reason of such additional insurance. The finding of the jury in plaintiff's favor on this issue is entitled to no weight in the light of the undisputed facts disclosed by the record.

The trial court should have granted defendant's motion and directed

a verdict in its favor. For its failure to do so the judgment must be reversed and that court directed to enter a judgment dismissing the action, and it is so ordered.

Mr. Justice BURKE, being disqualified, did not participate. Honorable S. L. NUCHOLS, of the twelfth judicial district, sitting in his place by request.

(Filed February 23, 1912.)

FISK, J. After the above opinion was filed a rehearing was granted upon the question of plaintiff's right to recover for the personal property loss. In their petition for rehearing as well as in their brief on such rehearing, counsel for plaintiff vigorously challenge the correctness of that portion of the opinion which denies the plaintiff's right to recover for the loss on the personal property. We have carefully reconsidered this phase of the appeal, and are agreed that the conclusion arrived at in the first opinion is sound and must be accordingly adhered to. We deem it advisable, however, to treat this question a little more elaborately than was done in the first opinion. The writer, in preparing such opinion, labored under the belief that the policy, Exhibit D. covering as it does both the bank building and the furniture and fixtures while contained therein, for a lump consideration as premium, although the amount of insurance on each class was separately stated, was an indivisible contract. Hence, under its provisions, anything which rendered the policy void as to the building would also render it void in its entirety. In the absence of the special statute in this state, which we discovered since filing the former opinion, and which we will presently notice, this conclusion is, we think, correct and in harmony with the weight of modern authority, which, as we understand it, is to the effect that such a policy is indivisible, although the cases on this question are in hopeless conflict.

See 19 Cyc. 711, 674 & 707, and cases cited; also 2 Cooley, Briefs on Insurance, pp. 1894–1926, where the authorities are collated and exhaustively discussed; Benham v. Farmers' Mut. F. Ins. Co. 165 Mich. 406, — L.R.A.(N.S.) —, 131 N. W. 87, Ann. Cas. 1912 C, 983; St. Landry Wholesale Mercantile Co. v. New Hampshire F. Ins. Co. 114 La. 146, 38 So. 87, 3 Ann. Cas. 821; Donley v. Glens Falls Ins. Co.

184 N. Y. 107, 76 N. E. 914, 6 Ann. Cas. 81. Further citation of authorities is useless, however, as we have a special statute which we deem controlling and which apparently adopts the rule of the New York and other courts that such a policy is devisable. This statute is § 5909, Rev. Codes 1905, and reads:

"The procurement of any other contract of insurance upon or the encumbrance of one or more of the several distinct things insured by one policy does not render void any insurance upon the things not covered by such other contract of insurance or encumbrance; but in case of loss or damage such an amount shall be deducted from the insurance as the value of the property so encumbered or doubly insured bears to the value of all the property covered by the policy. Any agreement made to waive the provisions of this or the preceding section is void."

We are unable to concur in the construction of this section contended for by appellant's counsel. The language therein employed must be given its ordinary meaning, and not a technical meaning known only to insurance experts. As thus construed the policy must be treated as two separate and distinct policies, one on the building and the other on the personal property and fixtures; and a breach of conditions subsequent which renders the insurance void as to one does not affect the other.

There is, however, as we view the record, an unsurmountable obstacle in the way of plaintiff's recovery for the personal property loss. The record discloses the following undisputed facts: One Torbenson, the cashier of the plaintiff bank, was the only director or representative of the bank who was present at the time of the fire. A fire broke out in the building on lot 8 of block 2, and plaintiff's bank building was on lot 1 in such block, about 175 feet away. The fire which started on lot 8 is not the same fire that burned the bank, although Torbenson, in effect, so stated in his own proof of loss. The bank building was set on fire, with the consent of Torbenson, some thirty to forty-five minutes after the discovery or alarm of fire was given, for the purpose of checking the first fire and preventing it from spreading west and across the street to the Hanson store. After the fire was started in the bank building, Torbenson interfered with a person who was in the act of putting it out. With the question of the wisdom or propriety of setting the bank building afire for the purpose aforesaid, we are not

concerned further than the legal bearing it may have on the right to recover for the personal property therein destroyed. The evidence discloses that the bank building was set on fire and entirely consumed prior to the time the other fire reached the implement building, 28 feet east of such bank. For the purpose of burning the bank several persons carried pails of kerosene oil from the Hanson store and saturated the interior of the building therewith. Numerous persons were present, including Torbenson, for considerable time before this took place, but no effort apparently was made to save any of the personal property, except as hereinafter stated. Under the undisputed facts it is unbelievable that, with the exercise of but little diligence, the entire contents of the building could not have been saved. When asked on the trial what, of the contents, he removed from the bank, Torbenson testified: "Well, there wasn't much stuff taken out, but there was some put in the vault."

Q. What, if any, property did you take from the bank building out in the street or to a place of safety?

A. I think there was a check sorter, . . .

Q. What else did you take out?

A. Just as I got out it was getting pretty smoky, and right around the corner of the door I took the telephone.

Q. That is all you took out of the bank?

A. Yes, sir, that is all.

Q. I think you told the jury that you had a roll-top desk and bank counter, and lamps and cuspidors, supplies, and books in that bank?

A. Yes, sir.

Q. Those you didn't take out?

A. No, sir.

Q. Now you were possessed at the time of the fire in the bank of a typewriter?

A. Yes, sir.

Q. How many?

A. Two.

Q. One you placed in the vault, you say?

A. Yes, sir.

Q. Did you get the other one out?

A. No, sir.

Q. Left that in—the bank owned them both?

A. No, Mr. Gilland owned one of them.

Q. Which one did he own?

A. The one in the vault. The typewriter belonging to the bank was not removed from the banking room; the adding machine was in the vault when we closed that night.

Q. I wish you would tell the jury, Mr. Torbenson, just what stuff you put into the vault after you discovered the fire in the block.

A. Well, there was that check protector and insurance blanks and some legal blanks and other small things I could throw in easily.

Q. Then you opened the vault door to put these legal blanks in?

A. I didn't put many legal blanks in, because it was getting smoky and I didn't have much time. I opened the vault door to put the legal blanks in. I didn't go into the bank and open the vault door until they started to set the bank on fire.

Q. Now, you have told the jury, have you Mr. Torbenson, all of the personal property that you removed from that banking room that night, either by placing it in the vault or by taking it out on the street?

A. I couldn't say as to that.

Q. Well, all that you recall?

A. Well, I recall there was a pistol in there that was taken out.

Q. . . . . What else did you take out?

A. There was a draft holder; I put that in the vault; that was a sort of box to keep the drafts in; it was a piece of tin; I cannot recall anything else.

This witness enumerated the property which was destroyed as a typewriter, roll-top desk, bedroom set, insurance cabinet, stand, desk, typewriter desk, stamps, check counter, six chairs, 2 office chairs, cuspidors, waste baskets, 2 stoves, check desk, 2 oil lamps, gasolene lamp, supplies, stamps, envelopes, and books, rubber stamp and holders, inkstand, legal blanks, carpet, maps, lawn mower, flat-top desk, and some small things not enumerated. When we consider that the fire did not break out in the bank building, but in a building about 175 feet therefrom, and that there were four buildings and a vacant lot between the bank and the place where the fire started, and when we also consider that the bank building was deliberately set on fire as the result of a consultation be-

tween Torbenson and several other citizens, we cannot help but feel that we were justified in our conclusion in the first opinion that no effort was made to save this personal property, and that there was ample time and opportunity to do so. The case at bar in this respect widely differs from Wolters v. Western Assur. Co. 95 Wis. 265, 70 N. W. 62, relied on by respondent's counsel. There the fire started in the building where the personal property was contained, and, furthermore, the opinion discloses that there was a sharp conflict in the testimony as to the efforts made to save the personal property, at least such a conflict as required the submission of the question to the jury, while in the case at bar no such conflict exists. In German-American Ins. Co. v. Brown, 75 Ark. 251, 87 S. W. 135, also cited by respondent's counsel, the court said: "There was a conflict in the testimony as to whether or not some of the property could not have been saved by the bystanders, but none that either of the insured could have done so. The testimony introduced by appellants showed affirmatively that Brown did not reach the scene of fire until too late to have saved any of the property; and that McKibben was suffocated and in a helpless condition, and unable for that reason to save any of the property." The case cannot be said to be in any respect in point under the facts in the case at bar.

The policy contains a stipulation that the "company shall not be liable for loss caused directly or indirectly . . . by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises." If it be conceded (which we do not decide) that the company may be held liable for the loss of a building where it is intentionally burned for the protection of other property, still it would seem plain that at least reasonable care should be exacted in order to minimize the loss as much as conditions will fairly permit of. As said in Thornton v. Security Co. 117 Fed. 773: "Every policy holder is bound to do all that he reasonably can, in case of a fire, to preserve and protect the property insured, and cannot therefore hold the company liable for loss which is traceable to a disregard of that duty." To the same effect is Phœnix Ins. Co. v. Mills, 77 Ill. App. 546. The contention of respondent's counsel that by the terms of the above stipulation the company is exonerated from liability only to the extent of loss caused by the failure of the insured to use all reasonable means to save the

property is no doubt correct, but, as before stated, the proof conclusively shows that all the personal property might have been saved by the use of even slight diligence on Torbenson's part. His conduct evinces a most flagrant and reckless disregard of the rights of the company, amounting to bad faith, if not actual fraud; and if the plaintiff bank is responsible for his acts in failing to exercise diligence to save his property, then clearly no liability on defendant's part exists. That plaintiff is thus responsible for Torbenson's conduct, we entertain no doubt. He was the sole representative of the bank present, and in effect he was the bank to all intents and purposes. If respondent's contention be sound on this phase of the case, such stipulation in a policy issued to a corporation would be utterly useless. Nor does § 5973, Rev. Codes, support respondent's contention on this point. That section, as we construe it, has reference to the original cause of the fire, and distinguishes between loss resulting from a wilful setting of the fire and one resulting from a fire caused through mere negligence of the insured or his agents or others. If the section applies here, then manifestly the grossest negligence of the insured, when a natural person, in failing to preserve the property at or after a fire, would not exonerate the company from liability, and such stipulations in our standard policies would therefore be nugatory. Clearly, such could not have been the legislative intent.

Judgment reversed, and the district court is directed to dismiss the action.

STATE EX REL. NICHOLSON v. FERGUSON et al. as Board of County Commissioners.

(134 N. W. 872.)

In 1883 congressional township 146 north of range 56 west in Foster county was organized into a common-school district. In 1900 the city of Carrington was incorporated, embracing all of section 19 in said township. In 1902 pursuant to a petition, notice, etc., an election was held in such school district for the purpose of organizing the same into a special school district, which proposition carried by practically a unanimous vote, and ever since the date of such election the inhabitants of such township have recognized such special

school district corporation, and such corporation has regularly elected its officers, levied taxes, issued bonds, and expended large sums for educational purposes. In 1906 such congressional township, with the exception of section 19, was organized as a civil township. Thereafter, and in September, 1907, the resident electors and taxpayers of such civil township petitioned the board of county commissioners and the superintendent of schools to segregate the territory embraced in such civil township from the school district aforesaid, and to organize therein a distinct school district. Such petition was denied, and relators seek by mandamus to compel compliance therewith by the officers aforesaid. *Held:*—

Mandamus — inquiry into due organization of school district.

1. That such special school district is at least a *de facto* school corporation, and its due organization will not be inquired into in a mandamus proceeding.

Petition for organization of school district.

2. That the territory which relators seek to have segregated and organized into a distinct school district being embraced within such special school district, § 949, Rev. Codes, 1905, is controlling. This section provides "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."

The relators were therefore not entitled to the relief prayed for, and the district court properly quashed the writ.

Opinion filed January 29, 1912. Rehearing denied February 27, 1912.

Appeal from District Court, Foster county; *J. A. Coffey*, J.

From a judgment quashing an alternative writ of mandamus, plaintiffs appeal.

Affirmed.

S. E. Ellsworth, for appellants.

Edward P. Kelly and *C. B. Craven*, for respondents.

No provision in law providing for the relief prayed for by relators. State ex rel. Laird v. Gang, 10 N. D. 331, 87 N. W. 5.

Existence of a *de facto* corporation cannot be collaterally assailed. Coler & Co. v. Dwight School Twp. 3 N. D. 249, 28 L.R.A. 649, 55 N. W. 587; State ex rel. Laird v. Gang, 10 N. D. 331, 87 N. W. 5.

Mandamus not a proper proceeding to compel exercise or discharge of an act or duty which is either judicial or discretionary in its character. 19 Am. & Eng. Enc. Law, 805.

FISK, J. This is an appeal from a judgment of the district court of Foster county, refusing the issuance of a peremptory writ of mandamus as prayed for by relators, and dismissing relators' alternative writ, with costs to respondents.

The facts are not in dispute and are in substance as follows:

At the time the alternative writ was issued, the respondents Ferguson, Ballard, and Zink were the duly elected, qualified, and acting county commissioners of such county, and respondent Cain was the duly elected, qualified, and acting county superintendent of schools therein. That relators are resident citizens, electors, and taxpayers of the civil township of Carrington, which embraces all of the territory within congressional township 146, north of range 66 west in said county, with the exception of section 19 in such township, which embraces the municipality known as the city of Carrington. In October, 1883, the entire congressional township aforesaid was duly organized as a general school district, and it thus remained until June 3, 1902. In November, 1900, section 19 in said township was duly and regularly organized and incorporated as the municipality of the city of Carrington, ever since which time it has existed as such municipal corporation. On June 3, 1902, pursuant to a prior petition therefor and notice thereof, an election was held in school district No. 10, the purpose and object of which was to organize a special school district out of the entire territory embracing such district No. 10, at which election 110 votes were cast in favor of the organization of such special district, and but 3 votes were cast against such organization, whereupon the proposition to create such special school district was declared carried, and thereafter and in the month of June of said year an election was held for the purpose of electing five directors of such special district pursuant to law. Such directors were elected and thereafter duly qualified, and from such date to the present time such special school-district organization has transacted business as such, and has at all times been recognized accordingly by the inhabitants therein.

In October, 1906, the territory embraced in such congressional township, with the exception of section 19, which was embraced within the limits of the city of Carrington, was duly and legally organized into a civil township and designated as township of Carrington. Thereafter and in September, 1907, a petition numerously signed by resi-

dents and taxpayers of school district No. 10, outside of the city of Carrington, was presented to the county commissioners and county superintendent of schools of Foster county, and filed with the county auditor, praying that such commissioners and superintendent of schools take the necessary action to set apart and organize a distinct school district comprising the territory embraced in such civil township, being the entire territory in such congressional township, with the exception of section 19, which is embraced within the limits of the city of Carrington as aforesaid. Such petition was considered by said county board and superintendent of schools, and the prayer thereof denied; the grounds for such denial need not be stated, as we deem them immaterial.

The object of the writ in this proceeding is to compel the said board of county commissioners and superintendent of schools to comply with the prayer of such petition, and to take action looking to the segregation of the territory in said congressional township, outside of section 19, from the school district aforesaid, and to organize a new common-school district therein.

The relators and appellants assert that the inhabitants of the civil township of Carrington have the absolute legal right to have the territory embraced in such civil township set apart as a distinct school corporation, and their counsel argue with much ability that the public policy of the state as exemplified in its school laws is not only consistent with the assertion of such strict legal right, but is repugnant to any other theory or construction. The argument of appellants' counsel is evidently based upon the assumption that the territory in said congressional district was not organized into a special school district, and that consequently section 785, Rev. Codes 1905, and succeeding sections, are applicable. But even if this were true appellants could not succeed, for the obvious reason that Carrington school district No. 10 was organized as a general school district prior to the enactment of section 785, and consisted of territory not organized into a civil township, and consequently under the proviso in said section the organization of such civil township in 1906 did not have the effect of altering the boundary lines of such school townships, and such lines could not be changed except upon petition as therein required. State ex rel. Laird v. Gang, 10 N. D. 331, 87 N. W. 5. As was held by this court in the

above case, the mere organization as a civil township does not *ipso facto* constitute it such district school corporation, but it remains a part of the existing school district, and must so remain until a petition such as is defined in section 786 is presented to and acted upon by the board of county commissioners, with the advice and consent of the county superintendent.

It is idle, however, to consider what rights appellants might have had if, at the date such civil township was organized or such petition filed, Carrington school district No. 10 was still in existence; for, as we have seen, in the year 1902 a special school district was created out of the territory embracing such former school district, and the statutes relating to the segregation of territory from special school districts are therefore controlling. Appellants urge that such special school districts were not legally organized, but this is wholly immaterial in this proceeding. The record discloses that an election was called and held for the purpose of organizing such special district, and that at such election 110 votes were cast in favor of, and but 3 against, such proposed organization, and that thereafter five directors were elected pursuant to law, and that such district has at all times since been recognized and treated as a special school district. Taxes have been levied, bonds issued, and large sums of money expended by it for educational purposes, and it must be considered at least as a *de facto* special school district. This being true, it is well settled that the due and legal organization thereof cannot be inquired into in this proceeding. Coler v. Dwight School Twp. 3 N. D. 249, 28 L.R.A. 649, 55 N. W. 587; State ex rel. Laird v. Gang, supra.

The territory which relators seek to have segregated and organized into a district by itself being a part of such special school district, we must look to article 19, chapter 9, of our Political Code to determine relators' rights in this proceeding. Section 949 embraced in said article is very explicit and leaves no room for doubt. Among other things it provides: That any part of adjacent territory which is at a greater distance than 3 miles from the central school in such special district shall be detached by the county commissioners therefrom, and attached 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. The relators are not asking for any such

relief, and it is perfectly apparent from the foregoing that they are entitled to none other. We refrain from noticing the arguments of counsel as to the alleged equities of the case, for the reason, as we view it, the case is controlled not by the equities, but by the plain legislative mandates. If relators, in equity and good conscience, are entitled to the relief which they seek, they should apply to the legislature for a remedy. The courts are powerless to grant such relief under the statutes as they now exist.

Judgment affirmed.

BURKE, J., being disqualified, took no part in the decision.

UGLAND v. KOLB.

(134 N. W. 879.)

Contracts — mutuality — specific performance.

1. Plaintiff has acquired two quarter sections of land from the government, which land he contracted to sell to one Kuchenbecker upon what is known as a contract for deed. Kuchenbecker, assuming to act as owner of the land, though without paying the full purchase price and receiving himself a deed therefor, made a similar contract to sell the said land to Kolb for some $850 more money than he was paying to Ugland. Kuchenbecker paid about one fifth of the purchase price and defaulted. Kolb paid about the same amount upon his contract. After two years Ugland brings this action to quiet his title, proving that he had served notice of cancelation upon Kuchenbecker. Kolb defends the action and shows that he had offered to Ugland all of the money, excepting $150, which he wished to keep back to clear the title,—due upon Kuchenbecker contract. Ugland showed that at the time of the offer the contract between himself and Kuchenbecker had been assigned to one Brennan as security for a loan, and had never been redeemed. He also showed that the objections to his title were frivolous. It also appeared that Kuchenbecker had made a deed of the premises to Kolb, but said deed was made after the assignment of his contract to Brennan, and had never been delivered to Kolb, but was made at a time when Kolb expected to borrow enough money upon the land to pay Ugland in full; *held:*

That there was no mutuality of contract between Ugland and Kolb, and as Kolb could not have been compelled to specifically perform to Ugland, neither should Ugland be compelled to perform to Kolb. Also that the contract could

not be specifically performed until redeemed from Brennan. Kolb having no interest in the contract or land, the trial court properly quieted the title as against him.

Brennan and Ugland, having made no appeal, are also precluded by the judgment.

Opinion filed January 30, 1912. Rehearing denied February 27, 1912.

Appeal by defendant Kolb from a judgment of the District Court for Ramsey County, *Cowan,* J., in plaintiff's favor in an action brought to quiet title to certain land.

Affirmed.

Middaugh & Cuthbert, for appellant.

Appellant is entitled to a decree for the specific performance of the contract of sale. Brown v. Haff, 5 Paige, 235, 28 Am. Dec. 425; Brown v. Newman, 15 N. D. 1, 105 N. W. 941; Kicks v. State Bank, 12 N. D. 576, 98 N. W. 408.

John J. Sampson and *C. J. Sampson,* for respondent.

Appellant must show performance on his part before he can seek equitable relief of specific performance. 3 Pom. Eq. Jur. §§ 455, 1407; Hubbell v. Von Schoening, 49 N. Y. 326; Leaird v. Smith, 44 N. Y. 618; Crabtree v. Levings, 53 Ill. 526; Morse v. Seibold, 147 Ill. 318, 35 N. E. 369; Kimball v. Tooke, 70 Ill. 553. See also Carter v. Phillips, 144 Mass. 100, 10 N. E. 500.

Burke, J. During all of the times hereinafter mentioned the plaintiff Ugland was a farmer living upon a half section of land in Ramsey county, North Dakota, which land he had acquired under the homestead and pre-emption laws of this country. In April, 1902, he made a contract to deed said premises to one Kuchenbecker. Said contract was in the usual form of contract for deed, and provided that if Kuchenbecker should first pay to Ugland the sums of $200 cash; $500 July 1, 1902; and $2,630 September 1, 1902, and further assume a mortgage against the land of some $1,200 and interest, then Ugland would deed the land to said Kuchenbecker. The contract also contained the provision that in case the purchaser failed to make the payments, the contract should become forfeited and determined at the option of the seller, and that all payments made thereon prior to its

forfeiture shall be retained by the seller as damages by him sustained, and time was made of the essence of the contract. Kuchenbecker made the first two payments amounting to $700. It also appears that very shortly after the purchase of the land upon contract with Ugland, Kuchenbecker, acting as owner of the land, made a contract for deed with one Kolb, a farmer of Iowa. This contract was very much like the one between himself and Ugland, but the price of the land in the second contract was some $850 higher. The payments of the second contract were so timed as to take care of those due upon the first, but Kolb evidently was somewhat slow with the $500 payment which should take up the payment due Ugland July 1, 1902, and Kuchenbecker, to avoid a default, went to the defendant Brennan, a lawyer of Devils Lake, and borrowed $600 wherewith to make the payment to Ugland. To secure Brennan, he (Kuchenbecker) made an assignment in writing of his contract with Ugland, which assignment was duly acknowledged July 9, 1902, and duly recorded in the office of the register of deeds of the proper county. At the trial below, Brennan testified that he had never been fully repaid and had never reassigned the contract to Kuchenbecker, but was still the owner thereof.

September 3, 1902, Kuchenbecker notified Ugland that he was ready to make final payment and receive his deed, and requested Ugland to come into town with his wife. Ugland complied, and a deed was prepared by Kuchenbecker, running to himself as grantee, and this deed was duly signed and acknowledged by Ugland and wife, but such deed was never delivered. Ugland, his wife, Kolb, and Kuchenbecker then went to a bank of which one Baird was an officer, when it appeared that the bank was to advance the money for final payment upon receiving a first mortgage upon the land. Kuchenbecker and his wife executed a deed to the premises, to Kolb, and Kolb, in his turn, executed a mortgage for some $2,600 to the bank. It was in this manner that the money due Ugland was to be raised. Kolb, it appears, brought from Iowa, enough money to pay up the $1,200 mortgage already against the land. When all of the parties were gathered in the bank, Baird asked Ugland for the deed so he might take it to the courthouse. Ugland declined to make delivery until he had received his money. Thereupon the parties withdrew from the room, leaving Ugland and his wife alone for about twenty minutes.

When they returned they told Ugland that his title was not perfect and that they were going to keep $150 of the purchase price for the purpose of having it perfected. Ugland declined to receive the balance, and Baird then offered him $2,480 in currency for his deed. This was $150 less than the amount due, and it was declined by Ugland. Baird then offered him the full amount if he would give perfect title, and Ugland insisted that his title was perfect, but Baird would not give him the full amount while the title was in the condition mentioned. Kuchenbecker then signed and served upon Ugland a notice that he had failed to perform the conditions of the contract for deed, and demanding performance.

There was no money deposited to Ugland's credit in Baird's bank or elsewhere, but Kolb left with Baird about $1,400, being the money brought by him from Iowa, for a period of about one year, when that was withdrawn. Ugland retained possession of his farm and is still in possession. December 8, 1902, he served upon Kuchenbecker a notice of cancelation of the contract between them upon the ground that the $2,600 due September 1, 1902, had not been paid. Neither Kuchenbecker nor Kolb ever did anything thereafter towards curing the default, and some two years later this action was begun by Ugland to quiet title to the land, Kuchenbecker, Kolb, and Brennan being the defendants named and served. Kuchenbecker made no appearance, and judgment by default was entered against him. Kolb and Brennan answered separately, each setting up the facts, and asking to be allowed to pay the balance due upon the Kuchenbecker contract, and that thereupon Ugland be compelled to deed the premises to him. Kolb further asks that in case Ugland cannot be made to specifically perform, that the $700 payment made to him be returned to Kolb. In the trial below it was ordered that the contract had been canceled, and that Ugland should retain the $700 as damages, excepting that he should make good to Brennan the amount still due to him. Brennan accepted the judgment and has not appealed. Kolb alone appeals, and it is with his rights alone we must deal.

The evidence is practically undisputed, and it appears that the only title or interest that Kolb can have in the land is that acquired from Kuchenbecker. He has no assignment of the contract between Ugland and Kuchenbecker. What he had was a separate and distinct

contract with Kuchenbecker. Ugland had no dealings with Kolb whatever. Even at the last day when the deed from Ugland was signed and acknowledged, it was made to Kuchenbecker, and not to Kolb; and Kolb himself testifies that he knew of the fact and was satisfied with it. The payments were made by Kuchenbecker to Ugland. While there is testimony to the effect that Ugland knew that Kuchenbecker had sold the land to Kolb, there is nothing to show that Ugland knew that Kolb would call upon him for a deed. In fact Ugland could not have forced Kolb to pay to him one cent of the purchase price. As Kolb could not be forced to specifically perform the contract between Kuchenbecker and Ugland, he cannot force Ugland to perform. See Knudtson v. Robinson, 18 N. D. 13, 118 N. W. 1051; Rev. Codes 1905, § 6610.

Kolb, not being entitled to specific performance, has no standing in this suit. Not being the assignee of the first contract, he is not the successor in interest to Kuchenbecker thereunder. It is true that Kuchenbecker executed a deed in favor of Kolb at the time when it was necessary to complete Kolb's title to get the $2,600 loan upon the land, but there is no evidence of the absolute delivery of said deed, and there is positive evidence that Kolb only paid to Kuchenbecker $800 of the $5,500 purchase price. Had Kolb paid to Ugland every cent due upon the first contract, still Kuchenbecker would have had some $850 coming from Kolb, and this has never been paid. Besides all this, it also appears that at the time Kuchenbecker gave such deed to Kolb, he had already assigned his contract to Brennan, and had never redeemed it. We are unable to see where Kolb has the slightest right to compel specific performance or recover any part of the money paid to Ugland by Kuchenbecker. And still further, an examination of the title to the land shows that Ugland's title was all right. He had received patents from the government and had given an old mortgage upon the land. While the satisfaction of this mortgage was not entirely regular, yet Ugland had the original notes and mortgage in his possession, and a satisfaction obtained at the request of Baird and his attorneys, the same men who objected to the title at the meeting at the bank. It also appears that Baird had made one loan upon the same title not two years before, and the title had been passed upon at that time by the same attorney. The matter is not

material, but the fact remains that the objection to the title was frivolous.

But one other matter needs attention. The trial court found that the contract had been legally canceled as to Kuchenbecker and Kolb, but ordered that Brennan be paid the amount due upon his assignment of the contract, and Brennan has not appealed. The judgment below inadvertently says that Ugland shall retain the balance of the $700 payment made to him by Kuchenbecker for the purpose of paying his attorneys. This should be changed so as not to interfere with Ugland's right to make his own contract with his attorneys.

As the trial court has ordered that Ugland pay to Brennan a certain sum of money in satisfaction of his claim, and as neither Brennan nor Ugland has appealed, we cannot see how we could disturb this part of the judgment upon an appeal by Kolb, who, as we have seen, has no interest in the land.

The judgment is affirmed.

BRUCE, J. I concur generally in the result; I am not inclined to believe, however, that the title offered by Ugland was a merchantable one.

FISK, J. (dissenting).

I cannot concur in all that is said in the majority opinion. Briefly stated my views are as follows:

First. Plaintiff who seeks the equitable relief of having defendant's rights cut off and declared forfeited by the judgment is himself in default, and therefore stands in an unfavorable light in a court of equity. The title which he tendered pursuant to the contract, while perhaps good as a matter of fact, was not a merchantable title as a matter of record, for the reason that the record disclosed a mortgage on the land which was not properly satisfied. At the time he tendered the deed he had in his possession the canceled notes secured by such mortgage, and although he knew that the vendee and those claiming under him objected to the title because of such defect appearing of record, he made no mention of the fact that he had such notes in his pocket. This alone would warrant the court in denying him any relief.

Second. Conceding, for the sake of argument, that plaintiff had an unquestioned merchantable title of record, and that the vendee, Kuchenbecker, was in default in making the payment due on September 1, 1902, still plaintiff waived such default by not proceeding at once to take advantage thereof as stipulated in the contract. The contract contains the usual stipulation that "in case of failure of the said party of the second part to make either of the payments, or to perform any of the covenants on his part hereby made and entered into, this contract shall, at the option of the parties of the first part, be forfeited and determined, *time being the essence of this agreement.*" It is well settled that the provision that time shall be of the essence of the contract applies to the vendor as well as to the vendee. As said by this court in Fergusson v. Talcott, 7 N. D. at page 190, 73 N. W. 207, "Time being of the essence of the entire contract, it was as much incumbent on the plaintiff to act promptly in giving his notice of cancelation as it was incumbent on the defendants to deliver the wheat on the day specified in the agreement." Plaintiff waited over three months after the alleged default occurred before serving notice of his election to declare the contract forfeited. Three months was held an unreasonable delay in the Fergusson case, supra, and operated as a waiver of the default. I see no reason why a similar holding should not be made in the case at bar. Having waived such default by waiting an unreasonable time, the vendor could not, as he attempted to do, cut the vendee off short by serving a notice such as was served in this case. He was in duty bound to give the vendee a reasonable time in which to make the default good. As I view it, therefore, the contract was not legally forfeited, but was still in force at the time the action was commenced. This being true, how should the rights of the respective parties be adjusted? The vendee, Kuchenbecker, made no appearance in the action and apparently claims no interest under the contract. Defendants Kolb and Brennan appeared, claiming as successors in interest of Kuchenbecker, Brennan as pledgee of the contract as security, and Kolb as the vendee of Kuchenbecker, and therefore his successor in interest, Brennan, has not appealed. The uncontradicted testimony discloses that Kuchenbecker entered into a contract with Kolb, agreeing for a valuable consideration to sell and convey such land to the latter, and subsequently executed and delivered to him a

deed thereof, and that Kolb paid under such contract to Kuchenbecker the sum of $800 toward the purchase price. It is also undisputed that plaintiff received, under his contract with Kuchenbecker, the sum of $700 to apply on the purchase price, which sum he still retains, although he has parted with nothing and has at all times retained possession and had the use of the land. It is admitted by the plaintiff that he knew all about Kolb's purchase from Kuchenbecker, and that Kolb claimed to be his successor in interest. Plaintiff, in effect, repeatedly recognized Kolb as such successor to Kuchenbecker; and, in his notice declaring the contract forfeited, he in fact expressly referred to Kolb as the assignee of Kuchenbecker. He was therefore, in my opinion, both equitably and morally bound to serve Kolb with a proper notice of his election to forfeit the contract. This was not done, and in my opinion, this is an additional reason why plaintiff does not stand in an equitable light, and ought not to enjoy a very favorable position in a court of equity. Notwithstanding all the above facts, I am disposed to agree with my associates that specific performance should not be compelled against plaintiff. After such a long lapse of time and changed conditions as to land values, it would not be consistent with the real equities of the case to thus adjudge specific performance. But I am convinced that if plaintiff is to be awarded equitable relief in this action, it should be only on condition that he do equity by refunding the money received by him on the purchase price. To the extent of such sum, defendants Kolb and Brennan should at least be deemed in equity the successors in interest or equitable assignees of Kuchenbecker, and such money should be divided between them as their respective rights appear.

HOWARD v. DAWSON.

(135 N. W. 783.)

Justices of the peace — process — jurisdiction.

1. A summons in justice court directed the defendant "to appear at my office, in the city, in said county, on the 22d day of July, A. D. 1910, at 10 o'clock, A. M.," omitting to state where in such county the office of the justice

was located. The defendant appeared, on the return day, specially, and objected to the jurisdiction of the justice on the ground that the summons did not state facts sufficient to constitute a cause of action, and moved to dismiss the same. *Held*, that such objection and motion did not go to the jurisdiction of the justice by reason of the omission to state, in the summons, the location of of his office, and that on appeal defendant will be deemed to have waived such defect.

Justices of the peace — procedure — summons.

2. The action was brought by Carl E. Howard, and the summons states that he claims to recover for services rendered by himself and wife between certain dates. *Held*, that whatever the facts may be as to the cause of action being in part for services of the wife, the statement in the summons was sufficient, and not subject to objection on jurisdictional grounds. *Held*, further, that if the wife was a necessary party plaintiff, an objection to the jurisdiction was not the proper objection to raise the question.

Justices of the peace — reversal — review.

3. The justice dismissed the action and taxed costs against the plaintiff. On appeal, on questions of law alone, to the county court having increased jurisdiction, the judgment of the justice court was reversed. *Held*, that such judgment was thereby canceled as to the costs taxed against plaintiff.

Justices of the peace — abuse of discretion — review of decision.

4. On the reversal of the judgment of the justice court by the county court, upon an appeal on questions of law alone, defendant was not entitled of right to time in which to answer. The judge gave him four days. *Held*, that there was no abuse of discretion.

Opinion filed March 27, 1912.

Appeal from an order of the County Court for LaMoure County, *Lynch*, J., overruling a judgment of the justice dismissing an action brought to recover a balance alleged to be due for services rendered by plaintiff and his wife to defendant.

Affirmed.

M. C. Lasell, for appellant.

Davis & Warren, for respondent.

SPALDING, Ch. J. Plaintiff brought an action in justice court. The summons directed the defendant "to appear at my office, in the city, in said county, on the 22d day of July, A. D. 1910, at 10 o'clock A. M., to answer the complaint of the above-named plaintiff, Carl E. Howard,

who claims to recover of you the sum of $168 and no cents, for services rendered you by plaintiff and his wife from the 18th day of March, 1910, to the 18th day of July, 1910, at the agreed wages of $60 per month, which said sum of $168 is the balance due for services rendered as aforesaid, and which said sum, or any part thereof, has not been paid by you to plaintiff."

On the return day of the summons, defendant appeared before the justice, stating that he "appears especially, and objects to judgment (jurisdiction) of the court on the ground that summons does not state facts sufficient for cause of action," and moved to dismiss. This motion was granted and the action dismissed without prejudice, and judgment entered in favor of defendant for attorneys' fees. Whereupon plaintiff appealed to the county court, having increased jurisdiction, upon questions of law alone. These questions need not be here stated.

The plaintiff submitted a motion in county court that the court consider and determine the questions of law raised on the appeal, and such motion came on regularly to be heard on the 3d day of January, 1911. Whereupon an order was entered in that court overruling the decision and judgment of the justice, and it was further ordered that the action stand for trial at the January, 1911, term of said county court, and that the defendant file therein his answer to the complaint on or before the 7th day of January, 1911. From this order this appeal is taken.

It is very doubtful whether this is an appealable order, but as respondent has not suggested or briefed this we shall not take the trouble to determine it. The complaint filed in justice court alleged a contract for services by the plaintiff to the defendant as a farm foreman and laborer, and the rendition of services amounting to $240 on the contract, and the payment thereon of $72. It will be noted that the only objection made to the jurisdiction was in the form of a general demurrer to the summons. It is, however, now contended for the first time that the justice acquired no jurisdiction, because the summons omitted to state the location of the office of the justice. It gave no township, village, or city. Not having included this defect in his grounds for this motion to dismiss, he must be deemed to have waived it.

The next complaint made is that the summons was defective in one or two things; that it either omitted necessary parties plaintiff or that the facts were insufficient to apprize the defendant of the nature of the

cause of action. It is contended that the statement that it is to recover for wages of the plaintiff and plaintiff's wife goes to show that the plaintiff's wife should have been made a party, or that there should have been some allegation to show that the wages earned by plaintiff's wife had been assigned to plaintiff.

We are unable to discover any merit in this contention. It is not necessary that the summons in justice court should contain a complete statement of the grounds of action or sufficient allegations to serve as a complaint. The complaint is a separate and distinct and more complete statement of the cause of action. It is only necessary that the summons contain sufficient of the cause of action to apprize the defendant of the nature thereof. Rev. Codes 1905, § 8360; 24 Cyc. 318. It in no manner follows, because plaintiff alleged that his claim was for his own and his wife's services, that his wife must be made a party plaintiff, nor was it necessary that he should allege an assignment of any claim by his wife to him. The details as to these matters would be set out in the complaint. However, if the wife was a necessary party, appellant did not take the proper course to take advantage of her omission. If she had no interest in the cause of action, including her name in the statement would be merely surplusage. Defendant was sufficiently informed as to the claim of the plaintiff so he could prepare his defense. The summons contained a general statement of the cause of action. If the plaintiff should, on trial, be unable to sustain any claim for services of his wife, he would fail in his suit to that extent. An examination of the complaint discloses that the allegation complained of in the summons is an appropriate one, in view of the cause of action which the complaint states.

The next complaint is that the county court vacated the judgment for costs in justice court. We know of no law or reason warranting or requiring the payment of costs taxed to the plaintiff in favor of the defendant when an action in justice court is held, on appeal, to have been wrongfully dismissed. The judgment, being reversed, is canceled.

The defendant was not as a matter of right entitled to time in which to answer. Whether he should be given time to do so rested in the sound discretion of the trial court, and we cannot say that the discretion vested in the County Court was abused. The order is affirmed.

HANSON v. HANSON HARDWARE COMPANY. HANSON, Intervener.

(135 N. W. 766.)

Landlord and tenant — nonpayment of rent.

1. Where a lessor, without objection, had for a long time been receiving payments of rent from the lessee after the time stipulated in the lease for such payments to be made, he will be deemed to have impliedly waived a provision in such lease requiring prompt payments at certain dates, and if he desires in the future to exact strict compliance with the terms of the lease in such respect, he must give the lessee notice to that effect, and not having done so he cannot declare a forfeiture of the lease for similar defaults subsequently occurring.

Landlord and tenant — evidence.

2. Evidence of the lessor's continued acquiescence, by his silence and failure to object, in such prior defaults, is admissible for the purpose of proving a waiver by him of a strict performance of the lease as to future instalments of rent.

Opinion filed April 1, 1912.

Appeal by plaintiff from a judgment of the District Court for Sargent County, *Frank P. Allen,* J., in defendant's favor in an action of forcible detainer to recover possession of certain premises.

Affirmed.

George W. Freerks and *Purcell & Divet,* for appellant.

Parol evidence not admissible to vary the written lease. Culver v. Wilkinson, 145 U. S. 205, 36 L. ed. 676, 12 Sup. Ct. Rep. 832; Hazelton Tripod-Boiler Co. v. Citizens' Street R. Co. 72 Fed. 325; Kramer v. Gardner, 104 Minn. 370, 22 L.R.A.(N.S.) 492, 116 N. W. 927; National Gas-light & Fuel Co. v. Bixby, 48 Minn. 323, 51 N. W. 217; Wigmore, Ev. 2433; Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943; Trice v. Yoeman,

Note.—The cases seem to be agreed that the acceptance of rent accruing after a cause for forfeiture, with knowledge of such cause, nothing else being shown, constitutes a waiver, as shown by annotation in 11 L.R.A.(N.S.) 831. See also note in 47 Am. St. Rep. 198.

The authorities on the question of the delay of a landlord in enforcing forfeiture as waiver of breach are reviewed in a note in 24 L.R.A.(N.S.) 1063.

60 Kan. 742, 57 Pac. 955; 17 Cyc. 622; Merchants' State Bank v. Ruettell, 12 N. D. 519, 97 N. W. 853; Hume Bros. v. Taylor, 63 Ill. 43; Chapman v. McGrew, 20 Ill. 101; Loach v. Farnum, 90 Ill. 368; Collamer v. Farington, 15 N. Y. Supp. 452; Delamater v. Bush, 63 Barb. 168; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903; Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 729; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924; Grand Forks Lumber Co. v. Tourtelot, 7 N. D. 587, 75 N. W. 901.

There can be no waiver unless at the time of its exercise the right or privilege waived was in existence. San Barnadino Invest. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487; United Fireman's Ins. Co. v. Thomas, 47 L.R.A. 450, 27 C. C. A. 42, 53 U. S. App. 517, 82 Fed. 406; Kennedy v. Roberts, 105 Iowa, 521, 75 N. W. 363; Pabst Brewing Co. v. Milwaukee, 126 Wis. 110, 105 N. W. 563; Schillinger Bros. v. Bosch-Ryan Grain Co. — Iowa, —, 116 N. W. 133.

Where lease is terminated by force of its own provisions for default in the payment of rent, and a three days' notice to quit is given, notice need not give the lessee notice to pay up the rent in arrear in the three days, and a subsequent tender of rent could not operate to cure the default, or to reinstate the lease. 9 Enc. Pl. & Pr. 67; Roussel v. Kelly, 41 Cal. 360; Silva v. Campbell, 84 Cal. 420, 24 Pac. 316; Jackson v. Allen, 3 Cow. 220; Martin v. Morgan, 87 Cal. 203, 22 Am. St. Rep. 242, 25 Pac. 350; Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207; Boyum v. Johnson, 8 N. D. 306, 79 N. W. 149; Pier v. Lee, 14 S. D. 600, 86 N. W. 642; Page v. Ross, 11 N. D. 458, 92 N. W. 822; Bucholz v. Leadbetter, 11 N. D. 473, 92 N. W. 833; Kicks v. State Bank, 12 N. D. 576, 98 N. W. 408; Timmins v. Russell, 13 N. D. 487, 99 N. W. 48; and Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088; Keator v. Ferguson, 20 S. D. 473, 129 Am. St. Rep. 947, 107 N. W. 678; West Shore R. Co. v. Wenner, 70 N. J. L. 233, 103 Am. St. Rep. 801, 57 Atl. 408, 1 Ann. Cas. 790; 7 Am. & Eng. Enc. Law, 2d ed. 118; Burlington & M. River R. Co. v. Boestler, 15 Iowa, 555; Gray v. Blanchard, 8 Pick. 284; First Nat. Bank v. Maxwell, 123 Cal. 360, 69 Am. St. Rep. 64, 55 Pac. 980; Balfour v. Parkinson, 84 Fed. 855; Armstrong v. Agricultural Ins. Co. 130 N. Y. 560, 29 N. E. 991; Ripley v. Etna Ins. Co. 30 N. Y. 138, 86 Am. Dec. 362; Decker v. Sexton, 19 Misc. 59, 43 N. Y. Supp. 167.

O. S. Sem and *Jos. G. Forbes,* for respondents.

Oral evidence admissible to show the relation of the parties to the lease. Mechem, Agency 442; Thompson v. Goble, 15 Or. 631, 16 Pac. 713; Duffield v. Hue, 129 Pa. 94, 18 Atl. 566, 17 Mor. Min. Rep. 253; United States Fidelity & G. Co. v. Siegmann, 87 Minn. 175, 91 N. W. 473; Curran v. Holland, 141 Cal. 437, 75 Pac. 46; Southern P. Co. v. Van Schmidt Dredge Co. 118 Cal. 368, 50 Pac. 650; Keidan v. Winegar, 95 Mich. 430, 54 N. W. 901; Williams v. Macatte, 86 Va. 681, 10 S. E. 1061; Carraher v. Mulligan, 4 Silv. Sup. Ct. 550, 8 N. Y. Supp. 42; Kaufman v. Barbour, 98 Minn. 158, 107 N. W. 1128; Small v. Elliot, 12 S. D. 570, 76 Am. St. Rep. 630, 82 N. W. 92.

Appellant is estopped to insist upon the harsh rule of forfeiture, because he waived his right to do so by his own conduct and express agreement. 18 Am. & Eng. Enc. Law, 371; Reiger v. Turley, 151 Iowa, 491, 131 N. W. 866; Westmoreland & C. Natural Gas Co. v. DeWitt, 130 Pa. 235, 5 L.R.A. 731, 18 Atl. 724; Duffield v. Hue, 129 Pa. 94, 18 Atl. 566, 17 Mor. Min. Rep. 253; Morrison v. Smith, 90 Md. 76, 44 Atl. 1031; 29 Am. & Eng. Enc. Law, 1103, 1104; 1 Pom. Eq. Jur. § 452; 24 Cyc. 1335; Lucas v. Brooks, 18 Wall. 436, 21 L. ed. 779; Prindle v. Anderson, 19 Wend. 391; Kenny v. Seu Si Lun, 101 Minn. 253, 11 L.R.A.(N.S.) 831, 112 N. W. 220; Johnson v. Electric Park Amusement Co. 150 Iowa, 717, 130 N. W. 807; M. Levy & Son v. Steigaman, — Iowa, —, 104 N. W. 372; Barton v. Koon, 7 S. D. 7, 104 N. W. 521; Shaw v. Chicago, B. & Q. R. Co. — Iowa, —, 105 N. W. 120; Wm. Barie Dry Goods Co. v. Casler, 138 Mich. 172, 101 N. W. 215; New England Mort. Secur. Co. v. Great Western Elevator Co. 6 N. D. 407, 71 N. W. 130; Stanford v. McGill, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938; First M. E. Church v. Fadden, 8 N. D. 162, 77 N. W. 615; Band of Park River v. Norton, 12 N. D. 497, 97 N. W. 860; Dakota Hot Springs v. Young, 9 S. D. 577, 70 N. W. 842; Cole v. Johnson, 120 Iowa, 667, 94 N. W. 1113; Cannon v. Wilber, 30 Neb. 777, 47 N. W. 85; Hill v. Carter, 101 Mich. 158, 59 N. W. 413; 18 Am. & Eng. Enc. Law, 379, 381; Wasser v. Western Land Securities Co. 97 Minn. 460, 107 N. W. 160; Wood, C. & Co. v. Seurich, 5 Cal. App. 252, 90 Pac. 51; American Copying Co. v. Lehmann, 6 Cal. App. 1, 91 Pac. 414; Barnes v. Clement, 12 S. D. 270, 81 N. W. 301; Little Rock Granite Co. v. Shall, 59 Ark. 405, 27 S. W. 562; 2 Story

Eq. Jur. §§ 1321, 1322; 24 Cyc. 1364; 18 Am. & Eng. Enc. Law, 389.

FISK, J. On February 17, 1909, plaintiff and appellant, the owner of the premises in controversy, entered into a written contract with defendant and respondent, Hanson Hardware Company, whereby he leased to the latter such premises for the term of two years at the agreed rental of $65 per month, payable on the first day of each month in advance. Such written lease contained the following stipulations material to this controversy:

"And it is hereby expressly understood, declared, and agreed, by and between the parties hereto, that this lease is made, and the continuance of the term hereby demised is dependent upon the following conditions, viz.: That the rent hereby reserved shall be paid by or on the day when the same shall become due by the terms thereof; . . . that time is deemed and taken to be as the very essence of this lease and of all and each of the covenants and conditions herein, and all courts shall so construe the same, and that unless all and each of the terms, covenants, and conditions herein shall in all respects be complied with by the party of the second part, at the respective times and in the manner herein specified and declared, the term herein demised, at the option of the said party of the first part, shall cease and terminate; and the party of the first part, his heirs, executors, or assigns shall have the full right to re-enter upon and occupy the premises hereby leased, and the party of the second part shall lose and be debarred from all right, remedies, or action, either in law or in equity, upon and under this instrument; and no waiver of time or performance shall be implied or alleged to excuse a failure, unless such waiver shall be in writing, signed by the party of the first part, or his attorney, lawfully authorized. And if at any time said term shall end at the election of said party of the first part, . . . the said party of the second part hereby covenants, promises, and agrees to surrender and deliver up said premises and property peaceably to said party of the first part . . . immediately upon such termination of said term aforesaid . . . ; and if he shall remain in possession of the same after the termination of this lease, in any of the ways above named, he shall be deemed guilty of a forcible detainer of said premises, under the statute; and in order to enforce a forfeiture of his lease for nonpayment

of rent when due, no demand for rent when due, nor notice to quit the premises, shall be required, any demand therefor being expressly waived; nor shall the acceptance of any rent renew this lease for any time or purpose whatsoever."

Respondent entered into possession under such lease, and was in possession at the time this action for forcible detainer was instituted on May 26, 1910, paying the stipulated rental to plaintiff, but not at the time stipulated in the lease, the undisputed proof showing that such instalments of rent were paid on the dates and in the amounts as follows:

March 8	$ 65	to April	1st
April 23	65	to May	1st
May 20	65	to June	1st
June 15	65	to July	1st
July 21	65	to Aug.	1st
Oct. 1 to Sept. 15	130	to Oct.	1st
Dec. 13 from Oct. 1	196	to Jan.	1st
January, 1910	65	to Feb.	1st
April 7	130	to Apr.	1st

Plaintiff at no time objected to such delays, but by his silence presumably acquiesced therein.

The rent for the months of April and May, 1910, not having been paid on May 20th of that year, plaintiff caused the following notice to be served on respondent:

Hanson Hardware Co.
Milnor, N. Dak.

You will take notice that I hereby require you to remove from and vacate the premises being lots (7, 8, 9, 25, and 26) block twenty-eight (28) in the town of Milnor, Sargent county, North Dakota, including the buildings and structures thereon except the stable, and not including vacant parts of lots 25 and 26, said removal and vacation of premises to be made by you on or before the 24th day of May, 1910; and as grounds for such vacation and removal as herein demanded, I call your attention to the fact that you have wholly failed to comply with the

terms and conditions as made and existing in a certain lease thereof, and of said premises, bearing date the 17th day of February, 1909, between the said Hanson Hardware Company and myself, in this,—that you have failed to pay for the use of said premises the monthly rent of $65, to be paid on the 1st day of April, 1910, and have further failed to pay for the use of said premises the further and other sum of $65 to be paid on the 1st day of May, 1910, as provided in said lease. And you are further notified that I have and do hereby exercise the option granted me under said lease, and do hereby declare said lease terminated, and that your rights thereunder have ceased, and that I have the full right to re-enter upon and occupy the premises above described, under the terms of said lease. And you are further notified that you have failed to pay said instalments of rent, or any part thereof, for three days after the same became due. Ole Hanson.

Dated May 19, A. D. 1910.

On May 23d respondent tendered the amount of such rent, $130, and $1 additional, to plaintiff, which tender was refused and such sum deposited by defendant for plaintiff in the First National Bank of Milnor, and notice of such deposit was given to plaintiff by the bank.

Plaintiff, by this action of forcible detainer, seeks to recover possession of the premises, claiming a forfeiture of such lease pursuant to the terms thereof. Defendant had judgment in the court below and plaintiff seeks to procure a reversal of such judgment on this appeal.

In disposing of this appeal we shall assume the correctness of appellant's contention that the respondent, Hanson Hardware Company, is the sole lessee under such lease. This assumption obviates the necessity of considering certain of the specifications under the first assignment of error. But under such assignment, appellant challenges the correctness of certain rulings in the admission of testimony relative to an alleged custom of paying and receiving instalments of rent after the time they become due under the lease. Appellant insists that, especially in view of the stipulations in the lease above quoted, such testimony was inadmissible; his contention being that indulgence on plaintiff's part as to the payment of prior instalments of rent in no manner affects his right to enforce a forfeiture, for a failure to pay strictly according to the lease, of instalments of rent subsequently falling due. Plaintiff is here

seeking to enforce a forfeiture. In Timmins v. Russell, 13 N. D. 487, 99 N. W. 48, this court said: "Contracts permitting forfeitures are harsh, and courts are careful not to enforce such forfeitures, unless the plaintiff appears without fault, *and the defendant's default is not at all attributable to plaintiff's conduct or acquiescence.*" We think plaintiff's continued acquiescence, by his silence, in defendant's faults in failing to pay the rent each month in advance, constituted an implied waiver by him of the provisions of the lease that time was of the essence of the contract. His conduct in thus acquiescing amounted to an assurance to defendant that he would act in the future as he had acted in the past, and not invoke such harsh remedy without first notifying it that thereafter he should exact a strict compliance with the contract. Plaintiff is therefore estopped from urging such forfeiture under the facts. For this conclusion we find abundant support in the authorities. See Boone v. Templeman, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947, and cases cited; Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088; Monson v. Bragdon, 159 Ill. 61, 42 N. E. 383.

We quote from Boone v. Templeman, as follows: "The controlling question in the case, therefore, is whether or not the conduct of Templeman, as averred in the complaint, constituted a waiver of the condition that time was of the essence of the contract, as applied to the payments falling due after April 24, 1903, when the last sum paid was accepted. The decisions are not entirely harmonious on this point. We find none that goes so far as to hold that the mere acceptance of one payment after its maturity will waive the right to declare a forfeiture if default occurs in subsequent instalments. In Lent v. Burlington & M. R. Co. 11 Neb. 201, 8 N. W. 431, the court on this point says: 'The simple act of receiving a payment after the date when the payee was bound to accept it, without more, is no excuse for laches as to future payments. The effect of the acceptance is exhausted upon the payment made, and as to those following, the provisions of the contract are left to operate with unimpaired force.' To the same effect are Phelps v. Illinois C. R. Co. 63 Ill. 470; Stow v. Russell, 36 Ill. 18; Keefe v. Fairfield, 184 Mass. 334–337, 68 N. E. 342; and Cash v. Meisenheimer, 53 Wash. 576, 102 Pac. 429. But in the present case we have much more than this. Boone was in the possession and in actual use of the land during the whole period. A payment of $50 was due on the price

on the fifth day of every month after November, 1901. Not one of these payments had been made on the day they were due, nor, except the first, until months afterward. Fourteen payments in succession had been accepted after maturity and without objection or protest of any kind. Interest fell due each month, but nothing was paid as interest, and none was demanded, nor were any objections raised on that score. After the acceptance of the last sum paid, twenty-four additional payments of principal and interest fell due and were not paid, Boone remaining in possession and Templeman apparently acquiescing in the continuance of the contract, giving no notice to the contrary, nor doing anything inconsistent therewith for still another period of fourteen months. We think from these facts a court might infer a waiver of the conditions regarding forfeiture and time, and that they supported the general allegation of the complaint that Templeman had waived those conditions. The authorities, with practical unanimity, so hold. In Monson v. Bragdon, 159 Ill. 66, 42 N. E. 383, the court, upon similar facts, says: 'While not necessarily an absolute permanent waiver, yet in a court of equity there was at least such a temporary suspension of the right (of forfeiture) as could only be restored by his giving a definite and specific notice of an intention to that effect.' Similar rulings were made in Steele v. Branch, 40 Cal. 13; Hudson v. Duke, 21 Ga. 403; Kansas Lumber Co. v. Horrigan, 36 Kan. 387, 13 Pac. 564; Pier v. Lee, 14 S. D. 600, 86 N. W. 642; Timmins v. Russell, 13 N. D. 487, 99 N. W. 48; Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686; Gaughen v. Kerr, 99 Iowa, 214, 68 N. W. 694; Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088; Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207; Keator v. Ferguson, 20 S. D. 473, 129 Am. St. Rep. 947, 107 N. W. 678; Peck v. Brighton Co. 69 Ill. 200." In addition to the foregoing, we cite the following as fully supporting our views herein: Standard Brewing Co. v. Anderson, 121 La. 935, 46 So. 926, 15 Ann. Cas. 251; Montant v. Moore, 135 App. Div. 334, 120 N. Y. Supp. 556; Westmoreland & C. Natural Gas Co. v. DeWitt, 130 Pa. 235, 5 L.R.A. 731, 18 Atl. 724; Duffield v. Hue, 129 Pa. 94, 18 Atl. 566, 17 Mor. Min. Rep. 253; Morrison v. Smith, 90 Md. 76, 44 Atl. 1031; 12 Current Law, 557, and cases cited; 14 Current Law, 498, and cases cited.

The provisions in the contract that "no waiver of time or perform-

ance shall be implied or alleged to excuse a failure, unless such waiver shall be in writing," etc., is for plaintiff's benefit, and there is no doubt that he could and did, by his conduct and acquiescence, waive the benefit of the same.

It follows that the admission of the testimony complained of was proper. Having waived a strict performance of the lease as to the time of the payment of rent, it necessarily follows that plaintiff also waived his right to declare a forfeiture of the lease on account of the failure of defendant to make such prompt payments. This disposes of the appeal in respondent's favor, without the necessity of noticing the other assignments.

The judgment is accordingly affirmed.

FIRST NATIONAL BANK OF NOME v. MAHONEY.

(135 N. W. 771.)

Chattel mortgages — actions — findings.

1. A finding, in an action to foreclose a chattel mortgage, that the mortgagor has disposed of part of such mortgaged property and has failed to take proper care thereof and that the same is running down and deteriorating, is a finding of ultimate facts, and proper as far as it goes.

Chattel mortgages — foreclosure — findings.

2. In an action to foreclose more than one chattel mortgage the court must find the amount due on the debt secured by each mortgage separately.

Chattel mortgages — foreclosure — findings — actions.

3. In an action to foreclose more than one chattel mortgage, when the disposal or injury to the property, or its deteriorating in value, is relied upon as a ground for foreclosure, before the note secured is due, as to part only of the mortgages being foreclosed, separate findings should be made on these subjects regarding the security of each mortgage, and whether the debt secured by each separate mortgage is insecure.

Trial — findings.

4. A finding of the amount due on a note or notes is a conclusion of law.

Chattel mortgages — foreclosure — judgment — actions.

5. In an action to foreclose a chattel mortgage, or mortgages, the clerk has no power to enter a personal judgment against the defendant unless the amount

due on the indebtedness is found and a personal judgment ordered therefor or for a deficiency.

Chattel mortgages — foreclosure — judgment — actions.

6. Sec. 7516, Rev. Codes 1905, prescribes certain essential elements of a valid judgment foreclosing a lien on personal property, and its terms should be followed; and a judgment which fails to conform to the requirements of that section in material respects cannot be sustained.

Opinion filed April 6, 1912.

Appeal by defendant from a judgment of the District Court for Ransom County, *Allen,* J., foreclosing chattel mortgages.

Reversed.

Rourke & Kvello, for appellant.

Judgment entered is not supported by the findings, conclusions, or order for judgment. Ramaley v. Ramaley, 69 Minn. 491, 72 N. W. 694; Loeschigk v. Addison, 19 Abb. Pr. 169; Clendenning v. Mathews, 1 Tex. App. Civ. Cas. (White & W.) 904; 4 Wait, Pr. § 6, p. 708; 9 Enc. Pl. & Pr. 423, 424, § 3; Collier v. Irvin, 2 Mont. 335; 8 Enc. Pl. & Pr. 942; Maynard v. Locomotive Engineers' Mut. L. & Acci. Ins. Asso. 14 Utah, 458, 47 Pac. 1030; Walley v. Deseret Nat. Bank, 14 Utah, 305, 47 Pac. 147; Karren v. Karren, 25 Utah, 87, 60 L.R.A. 294, 95 Am. St. Rep. 817, 69 Pac. 465; Ridgley v. Abbott Quicksilver Min. Co. — Cal. —, 79 Pac. 833.

Curtis & Curtis, for respondent.

Findings should contain a concise statement of the several facts found by the court from the evidence, and not the evidence from which they are found. Jones v. Block, 30 Cal. 227; Minnich v. Darling, 8 Ind. App. 539, 36 N. E. 173; Van Riper v. Baker, 44 Iowa, 450; Oliphant v. Atchison County, 18 Kan. 386; Conlan v. Grace, 36 Minn. 276, 30 N. W. 880.

Reasons for the court's decisions should not be set out in the finding. Bernal v. Wade, 46 Cal. 663; Conlan v. Grace, 36 Minn. 276, 30 N. W. 880.

Foreclosure decree should contain a finding as to the exact amount due the mortgagee. Wernwag v. Brown, 3 Blackf. 457, 26 Am. Dec. 433; Tompkins v. Wiltberger, 56 Ill. 385; Collier v. Ervin, 2 Mont. 335; Rollins v. Forbes, 10 Cal. 299.

SPALDING, Ch. J. This is an appeal from what purports to be a judgment foreclosing three chattel mortgages. The case is before us on the judgment roll alone. Error is assigned with reference to most of the findings made by the court. We shall consider such only as we deem material.

1. It is urged that there is no finding of fact from which the legal conclusion can be drawn that the defendant had disposed of any part of the mortgaged property, or that the same was running down and deteriorating; and that there is no finding that the defendant disposed of any part of the property covered by any particular mortgage or mortgages. We think the finding made to the effect that the mortgagor had removed and disposed of part of the mortgaged property, and had failed to take proper care of such property; and that the same was running down and deteriorating,—is a statement of the ultimate facts on that subject, and would be sufficient were there only one mortgage. It is insufficient, however, because it does not disclose whether it applies to the property covered by all the mortgages, or part of them. There should have been a finding on these facts with reference to the property covered by each mortgage, and whether the debt secured by each separate mortgage was insecure.

2. Error is assigned because there is no finding of fact, conclusion of law, or order of the court, conferring power or authority on the clerk to enter a personal judgment against this defendant. This assignment is well taken. There is no finding of any fact as to the amount unpaid on the notes. There is what purports to be a finding of fact of the amount due on the combined notes. This, however, is but a mere conclusion of law. It might properly be included in the conclusion of law, but has no place in the findings of facts.

3. Error is also assigned because there is no finding of the amount due upon each note under each mortgage. This assignment must be sustained. It is necessary to find the amount unpaid on the debt secured by each mortgage, and also that there is ground for deeming the debt secured by any mortgage insecure. So far as the findings and conclusions contained in this record disclose, more than one mortgage may have been foreclosed by reason of the insecurity of the debt secured by one or both other mortgages. It is apparent that this is erroneous. Collier v. Ervin, 2 Mont. 335.

4. The conclusions of law are simply to the effect that the plaintiff is entitled to the foreclosure of each of said mortgages, Exhibits A, B, and C, in satisfaction of its debt, and for its costs and disbursements in this action; and judgment was ordered accordingly. The clerk is without authority to include anything in the judgment which is not authorized by the conclusions and order. The facts found not including the amount unpaid on each note, and the order not directing the entry of personal judgment, do not sustain the judgment entered. Ramaley v. Ramaley, 69 Minn. 491, 72 N. W. 694; Loeschigk v. Addison, 19 Abb. Pr. 169; Ridgley v. Abbott Quicksilver Min. Co. — Cal. —, 79 Pac. 833.

5. Section 7516, Rev. Codes 1905, relating to judgments in actions to foreclose liens on personal property, is as follows: "In such action judgment in favor of the plaintiff must specify the amount due on the lien, and direct a sale of the property to satisfy the same and the costs, by a person appointed thereby or by an officer designated therein, in the manner provided for the sale of personal property under execution; and the application by him of the proceeds of the sale, less his fees and expenses, to the payment of the judgment and costs. It may also provide for the payment of the surplus to the owner of the chattel and for the safekeeping of the surplus, if necessary, until it is claimed by him. If the defendant upon whom the summons is personally served is liable for the amount of the lien, or for any part thereof, judgment may be entered against him accordingly."

The judgment in the case at bar does not fix the amount due upon each of the several liens. It does not designate any officer or person to make the sale, the application of the proceeds of sale, and in other respects fails to comply with the requirements of the above section. A judgment of foreclosure which does not conform in material respects to the above section cannot be sustained.

The findings and judgment are vacated, and the District Court is directed to make new findings of fact, and to enter a new judgment appropriate to the facts found and the law relating to foreclosure of personal property liens by action.

STATE EX REL. SMITH, State's Attorney of Burleigh County, v. FINLAYSON.

(135 N. W. 1123.)

Opinion filed April 6, 1912.

Appeal by defendant from a judgment of the District Court for Burleigh County, *Winchester*, J., adjudging him guilty of contempt of court.

Affirmed.

F. H. Register, for appellant.

W. L. Smith, State's Attorney, and *F. E. McCurdy*, Assistant State's Attorney, for respondent.

PER CURIAM. The appellant was charged with the violation of an order of the district court of Burleigh county, enjoining him from maintaining a common nuisance upon certain premises in the city of Bismarck, such nuisance being alleged to consist in the maintenance of a place for the sale of intoxicating liquors, in violation of the prohibition law. On the 19th day of April, 1911, the court adjudged the defendant guilty of contempt of court as charged, and imposed sentence upon him. Judgment was duly entered, from which this appeal is taken.

Only two questions are involved. The first relates to the admissibility of a question as to whether a witness knew where Finlayson's place of business was. This identical question was recently passed upon in State v. Empting, 21 N. D. 128, 128 N. W. 1119, and the court there held that it was nonprejudicial. In the present case it is less so than in a jury case. It also appears that the witness answered the question before objection was made, and his answer shows clearly that it was nonprejudicial.

The second assignment is that the evidence is insufficient to sustain the judgment. We have carefully examined the record and find ample evidence to sustain the judgment of the trial court. That court stated that he thought the evidence overwhelming against the defendant. We think it very clear that the judgment of the court was warranted, and it is affirmed.

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

(135 N. W. 779.)

Railroads — evidence — question for jury.

1. Evidence examined, and although unsatisfactory and entitled to but slight weight, it was sufficient to go to the jury for a finding as to the running of certain trains which might have killed the stock of plaintiff.

Rulings on evidence examined.

2. Rulings on certain evidence examined and passed upon.

Railroads — injuries to animals — presumptions.

3. Section 4297, Rev. Codes 1905, makes the killing or damaging of horses or other stock by cars or locomotives along the railway prima facie evidence of carelessness and negligence on the part of the railway company. *Held*, that when the ownership and killing are proven, a presumption of law is raised that such killing was caused by defendant's carelessness or negligence; but that this presumption, when relied upon by plaintiff without other evidence of negligence, requires evidence of less weight to rebut it than would be necessary if plaintiff made proof of actual negligence.

Railroads — injuries to animals — operation.

4. In this state, as has been repeatedly held, railway companies are not required to keep a lookout from their locomotives for stock trespassing upon their right of way, outside of public crossings, depot grounds, and similar places.

Railroads — injuries to animals.

5. The negligence for injury to stock trespassing upon a railway track or right of way, outside of crossings, depot grounds, etc., is the negligence of the railway after the discovery of the stock in a place of danger.

Railroads — injuries to animals — evidence.

6. Evidence examined relating to certain trains of defendant company passing over the track where plaintiff's stock was killed, and *held* to rebut plaintiff's case made only by proof of ownership and killing, and to have entitled the defendant to a directed verdict, so far as the case related to such trains only.

Note.—The question of the duty of railroad employees to keep a lookout for live stock on the track is treated in notes in 24 L.R.A.(N.S.) 858, and in 25 L.R.A. 291.

As to the power of the legislature to make the killing of stock prima facie evidence of negligence, see note in 32 L.R.A.(N.S.) 227. See also note in 25 L.R.A. 162. And for presumption of negligence from injury to live stock from railway train, see notes in 15 L.R.A. 39, and 58 Am. Rep. 703.

Railroads — injuries to animals — operation — instructions.

7. When the plaintiff, in an action against a railway company for injury to stock trespassing upon its track, relies solely upon the statutory presumption of negligence, and does not submit direct proof as to which of several trains inflicted the injury, the trial court should instruct the jury as to the law applicable to each train which it is shown might have killed the stock, and with relation to the evidence relating to each such train.

Railroads — injuries to animals — operation — instructions.

8. Certain instructions examined and *held* erroneous because they permit the jury to find, as it undoubtedly did, that one of certain trains as to which the presumption of law referred to had been overcome, killed the stock belonging to plaintiff.

Opinion filed April 6, 1912.

Appeal by defendant from a judgment of the District Court for Richland County, *Allen,* J., in plaintiff's favor in an action brought to recover for injuries to plaintiff's horses, alleged to have been caused by defendant's negligence.

Reversed.

J. A. Dwyer and *Wolfe & Schneller* (*John L. Erdall* of counsel), for appellant.

Railway owes no duty to the animal or its owner to keep a lookout. Bostwick v. Minneapolis & P. R. Co. 2 N. D. 440, 51 N. W. 781; Hodgins v. Minneapolis, St. P. & S. Ste. M. R. Co. 3 N. D. 382, 56 N. W. 139; Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054.

Dan R. Jones and *Purcell & Divet,* for respondent.

Instructions as to care only being requisite after discovery of the stock, unnecessary. Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 462, 123 N. W. 281.

Records similar to the self-serving record made by the defendant are to be taken by the jury for what they appear to be worth. Kitman v. Chicago, B. & Q. R. Co. 113 Minn. 350, 129 N. W. 844.

SPALDING, Ch. J. This action was brought to recover for two horses alleged to have been killed, and for harnesses injured, by the negligent management and running of a locomotive and cars belonging to the appellant, on or about the 12th day of January, 1907, while on section 34, in township 13 North, of range 50 West, in Richland county, 3 or 4

miles northwest of the village of Hankinson. There is no dispute about the killing. The record shows that the horses must have been killed between 10 or 11 o'clock in the evening of January 11th, and about 2 o'clock in the afternoon of January 12th. They were not killed on a public crossing. The plaintiff recovered a verdict and judgment for the value of the horses and injury to their harnesses. Numerous errors are assigned on the admission and rejection of evidence, and on instructions to the jury.

For a proper understanding of the legal questions involved, we may say that the record discloses that the weather on the night of January 11, 1907, was cold; a strong wind was blowing, and it was snowing some or all of that night; and that trains running on defendant's line were constantly striking snowdrifts; that frost gathered on the windows of the engine cab, so the engineer could not see the track through the window any of the time; and that if he caught sight of the track at all it was by opening and leaning out of the cab window, and that at such times snow from the snowplow and steam from the locomotive filled the air and the engineer's eyes, and interfered seriously, if it did not wholly prevent his obtaining a view of the track ahead.

The engineers of two trains passing over the road, between midnight and 5 A. M. January 12th, testified. One of them, Welliver, testified as to the conditions, and that he did not know whether he struck any horses in that vicinity or not, but did not think he did so, and that he saw none on the track; and that he could not distinguish between striking horses and snowdrifts when he could not see. The second engineer, Freeborn by name, did not testify positively that he saw no horses, as he seems not to have been inquired of on that subject, but he likewise testifies as to the conditions and that it was impossible to get, during much of the time, a view of the track ahead, and that he did not know of striking any horses, but did remember striking snowbanks, and that he kept as good a lookout as could be kept under the conditions, which he fully described.

In addition to what we have said, he testified that the windows got icy and snowed up, and it was too stormy to hold his head out of the cab window; that snow would blow in his eyes and that the snow was mixed with steam from the engine, and altogether they prevented him keeping a watch ahead.

Some testimony was received tending to show the passage of two or three other trains over the track where the horses were killed, during the time in question, but none was offered concerning their operation. It is strenuously contended by appellant that there was no evidence warranting submitting the case to a jury. As to the trains on which Welliver and Freeborn were the engineers, we agree with the appellant for reasons hereafter stated. The evidence was very slight and unsatisfactory and entitled to but slight weight regarding other trains. We think there was sufficient, as it stood at the close of the trial, to justify the submission of the case as to such other train, if any, to the jury, under proper instructions. We cannot say how this might have been, had evidence, to which we shall refer later, not been excluded.

A train register, which was kept at Hankinson, a junction point, and testimony explaining it and the custom regarding the registry of trains arriving at, starting from, or going through Hankinson, were received in evidence. It appears to indicate that a train, known as No. 20, arrived from the west at 7 o'clock A. M., on the 12th. Another train appears, from such register, to have arrived from the west at 11:45 A. M., on the 12th.

The plaintiff relied solely on the statutory presumption of negligence, no proof being offered of actual negligence in the running of the train which killed plaintiff's horses, nor was it proved which of the trains mentioned did so. Section 4297, Rev. Code 1905, makes the killing or damaging of any horses or other stock by cars or locomotive along the railway prima facie evidence of carelessness and negligence on the part of the corporation. The purpose of this provision is explained in Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054; and it is there held that when the plaintiff relies solely upon the prima facie case, made under the statute, less is required to rebut the prima facie case than would be necessary to rebut his evidence if the plaintiff relied upon actual proof of negligence.

We will now consider the proof regarding each of the trains shown to have passed over the track between the hours named, and those which may have passed over it. As to train No. 20, from the condition of the record relating thereto, as it stands, we think the jury might have inferred that such a train arrived in Hankinson at 7 o'clock on the morning of the 12th. The witness who testified in explanation of the entries

on the register explained that the record "evidently meant that train No. 20 was made up at Hankinson, and did not go further west." On motion his answer was stricken out on the ground that "it is not responsive to the question, and a conclusion of the witness from the entries before him; not the best evidence." The witness was used to explain the entries on the train register, and this was his interpretation of such entry after a foundation had been laid. His whole testimony was composed of opinions as to the meaning of the entries on the register. The explanation of No. 20 may have been entitled to little weight in the minds of the jury, but we think they were entitled to consider it for what it was worth, and the court erred in striking out such explanation, and but for this error further explanation might have followed.

As to the train registered as arriving from the west at 11:45 A. M., on the 12th, the testimony of the witness, Loomis, who explained the register, amounted to proof that the conductor and engineer of that train ran on another line of defendant's road, out of Hankinson, regularly during January, 1907, and that if they were running on the line northwest from Hankinson on the day in question, they were outside their regular employment. He knew this because he was employed on the other line during that month and met them on it. We think, under the circumstances, that this evidence, had it been received, was sufficient to cast the burden upon the plaintiff, if he contended that the 11:45 train occasioned his loss, to submit further proof of that fact; and that the striking out of the testimony of Loomis on this question was error.

One Fisher testified that at the time of the accident he was in the employ of the defendant company, and on a certain day—he could not give the day of the week or month—he went from Hankinson to Enderlin to dig out a train, and that he returned in the nighttime, on the passenger train, and, as near as he could remember, arrived at Hankinson about 11:30 that night; and that he saw the dead horses by the side of the track the next day. His testimony in chief was in answer to a question as to what time he got into Hankinson. "As near as I can recollect, about half-past 11, but I cannot tell exactly. When I got back to Hankinson, I went from the train to my home. It was about half-past 11 when I got home." In answer to another question as to when he saw the horses he replied, in part: "I got back from Enderlin at 7 o'clock in the morning." He also testified that when

he saw the dead horses there were what appeared to be horse tracks in the snow along the railroad track, between a crossing and where they were found; that these tracks went northwest, while the train he rode on ran southeast. This witness was testifying three years after the occurrence of the accident; and the uncertain character of his testimony as to the time renders it of very little value, and entitled to but slight weight, as proof of the passenger train concerning which he testified passing over the place of the accident at a materially different time from that shown by the register and other evidence, and it would be entitled to no greater weight if used to show the passage of a train not registered at all. But we think it entitled to some weight, and we cannot say that the court erred in letting it go to the jury.

The proof relating to the train of which Welliver was the engineer was sufficient to rebut the prima facie case made under the statute, under the rule laid down in Corbett v. Great Northern R. Co. supra, and Hodgins v. Minneapolis, St. P. & S. Ste. M. R. Co. 3 N. D. 382, 56 N. W. 139, and others cited in the opinions in those cases.

The evidence regarding the train of which Freeborn was the engineer, we think, taken in connection with the further explanation made of the conditions of the road, the weather, and the effect of the drifts and storm upon the ability of the engineer to keep a lookout, was sufficient to rebut the statutory presumption as to that train. Had it been shown definitely that these two trains were the only trains passing over the road between the hours in question, the motion of the defendant for a directed verdict, at the conclusion of the trial, should have been granted; but in view of the evidence, slight though it may be, of other trains, we must consider the case with reference to the rights of the parties, on the assumption that it was not shown that the two trains were the only ones passing over the road, but that there was some evidence of other trains, regarding which no explanation has been made on the part of the defendant, either as to negligence or as to killing or not killing the animals. The case appears to have been tried on the theory that it was the duty of the railway to keep a lookout for animals upon the track. Herein counsel and the court were in error. As held in the cases cited above, the only duty of the railway with reference to the plaintiff's stock was to use ordinary care after discovering it. It was not required to keep a lookout. See also Wright v. Minneap-

olis, St. P. & S. Ste. M. R. Co. 12 N. D. 159, 96 N. W. 324; Borneman v. Chicago, St. P. M. & O. R. Co. 19 S. D. 459, 104 N. W. 208; Memphis & L. R. Co. v. Kerr, 52 Ark. 162, 5 L.R.A. 429, 20 Am. St. Rep. 159, 12 S. W. 329. The instructions of the court to the jury should have been given in the light of the holdings of this court on this subject, and at the same time with reference to the testimony given by the two engineers. As the record stands, the jury may have found that the horses were killed by either one of the trains as to which we have held the prima facie case had been rebutted. Indeed, it is far more probable that the jury found that the killing was done by one of those trains than by either of the other trains as to which the evidence is so slight. It was the duty of the court to instruct the jury with reference to the law as applicable to any condition, as shown by the evidence; that is to say, he should have instructed them properly as to their duties regarding the trains referred to, which would have been, as we have held, that they could not find the defendant liable if they found either of those trains killed the horses. Had he done this and had the jury found in favor of the plaintiff, it would then appear that they had found the killing was done by a train as to which the statutory presumption had not been rebutted, and, in the absence of other prejudicial error, the judgment would be affirmed.

The first error assigned in the charge is in ¶ 3. Paragraphs 1 and 2 are unimportant, but ¶ 3 is as follows: "I instruct you further in this connection that proof of ownership, value, and killing by a train is sufficient to create a presumption of negligence; but I instruct you further in this connection that this is a rebuttable presumption and such a presumption as may be overcome by proof, that, as a matter of fact, the corporation in question, the Soo road, in this case, was in no wise guilty of either carelessness or negligence." It is apparent that this imposes upon the appellant a degree of care not required by law to overcome the prima facie case made by the statute. The care or negligence with which the plaintiff is concerned in such cases is only the care or negligence defendant exercises after the discovery of the stock in a place of danger, and the care required after such discovery is not such care as shows that the defendant was in *no wise guilty of either carelessness or negligence,* but is ordinary care; and ordinary care is defined by statute as such care as "persons of ordinary prudence usually

exercise about their own affairs of ordinary importance." Rev. Codes 1905, § 6694.

Paragraph 5 of the charge is also subject to criticism because it charged in effect that if the defendant did not exercise ordinary care in running its trains over the portions of the road in question at the time in question, *irrespective of the question of seeing the horses in a place of danger,* it would be sufficient to render the defendant liable. Paragraph 4 is open to the same criticism, and is erroneous for the same reason, though stating the converse of the proposition contained in ¶ 5.

Paragraph 7 states the law to be that if the animals were trespassing upon the tracks, the defendant is not absolved from preventing injury to them, if by the exercise of ordinary care it could have been avoided. This fails to limit the exercise of ordinary care as to plaintiff's horses to the time subsequent to discovery.

Paragraph 14 reiterated the statements to which we have made reference, and omitted to indicate that the care required of the railroad was after the discovery of the horses, and left the jury to infer that the question of their being seen was not involved.

But it is claimed by respondent that it was unnecessary to instruct as to care only being requisite after the discovery of the stock, because it is said in their brief that "there is no possible theory upon which that clause could be inserted. There is absolutely no testimony in that case that the stock was ever discovered." And it is then argued that such an instruction would have been in effect an instruction to the jury to return a verdict for the defendant. We are unable to understand how this changes the law. Counsel indicates that the principle is analogous to that discussed in Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 462, 123 N. W. 281. There is, however, a very marked distinction between that case and the case at bar. In the Anderson Case the main issue related to the fact of the killing. That was the contested question. The trainmen saw the horse near the track at the place of the injury. The injuries were such as might have been, and probably were, inflicted by a locomotive; and the circumstances as to the train, regarding which the testimony was given, were such as to warrant the jury in finding that that train inflicted the injury, and furthermore, other trains passed over the road after the

injury might have been inflicted, concerning the running of which no testimony was submitted, and it was held that as to such other trains the statutory case had not been rebutted. There would be some similarity had the court, in the case at bar, peremptorily instructed the jury that they could not find that either of the two trains of which Welliver and Freeborn were the engineers had injured the horses of respondent.

But it may be contended, and we think is, that the 6th paragraph of the charge corrects the errors to which we have made reference. That paragraph reads: "The jury are further instructed that the defendant railroad company has the right to use its tracks for the legitimate purpose of railway operation, and it is not bound in law to anticipate the presence upon its tracks, either of trespassing persons or animals, but it has the right to assume that no such trespassing persons or animals will be upon its tracks." This undoubtedly states the law correctly as far as it goes, but in its relation to the other parts of the charge and the circumstances of this case it is inadequate to inform the jury that the only care devolving upon the railroad in such case is after the discovery of the stock or that it need not keep a lookout. Standing alone with nothing further on that subject, it may be an obscure statement of the law; but in view of the paragraphs which we have quoted, and of the further fact that nowhere in the charge did the court define ordinary care or when the rule of ordinary care as to stock upon the track goes into operation, it was insufficient.

While engineer Freeborn was testifying he was questioned regarding his train being on time, and replied that it was not on time when it came through Hankinson, and that he got "particular orders outside of the regular line of orders at Hankinson that morning;" that all orders were delivered to him; that he did not have a copy of such order but that he supposed he destroyed it, and that he had no means of producing a copy. Whereupon the court excluded the testimony intended to show its contents from memory, for the reason that it would be hearsay and calling for a self-serving declaration. In this the court was in error.

Other errors are assigned, but those which we have called attention to are sufficient to guide the court on a new trial, and are all that are discussed and material. It is true that there was no evidence of any stock being seen, but when the court let the jury take into consideration

the trains run by the two engineers named, his attention was called to the law applicable in such case. The fatal vice of the charge lies in the fact that it left the jury free to find, as it undoubtedly did, that one of the trains, as to which the prima facie case had been met, and as to which there was no proof of actual negligence, had inflicted the injury.

The judgment is reversed and a new trial granted.

WRIGHT v. JONES et al.

(135 N. W. 1120.)

Taxation — assessment roll — tax deed.

1. The case of Power v. Bowdle, 3 N. D. 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404, having been followed for twenty-one years by this court, has established a rule of property in this state. Following said case, it is *held* that a description in the assessment roll as follows:

Name.	Sec.	Twp.	Range.	Acres.
Margaret J. McGibbney, N. W. ¼	35	149	56	160

cannot support a tax levy, and a tax deed based thereon is void.

Adverse possession — evidence.

2. Defendants claim title under § 4928, Rev. Codes 1905, it being their contention that they have been in open, adverse, and undisputed possession of the land under color of title for more than ten years, paying all taxes thereon during said time. Evidence examined and found not to support said claim.

Inheritance — presumption from absence — evidence.

3. Plaintiff received one-third interest in the land by grant from the government, and is entitled to have his title thereto quieted, but the remaining two-thirds interest he claims by inheritance from his father, who he asserts is dead. Having no positive proof of such death, he relies upon the presumption arising

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Note.—The authorities on the question as to absence from what places gives rise to presumption of death are reviewed in a note in 104 Am. St. Rep. 200. See also note in 46 Am. Rep. 761.

The question of the necessity of inquiry to raise presumption of death from seven years' absence is the subject of notes in 2 L.R.A.(N.S.) 809, and 28 L.R.A.(N.S.) 178.

As to time of death of one presumed to be dead after seven years' absence, unheard of, see note in 26 L.R.A.(N.S.) 294.

from the unexplained absence of his father for seven years under § 7302, Rev. Codes 1905. An examination of the evidence, however, shows that this presumption did not arise. Such presumption only arises upon an unexplained absence from his last known home. Evidence herein not sufficient to show facts upon which to base this presumption.

Evidence — sufficiency of — finding of trial court sustained.

4. The evidence regarding an accounting examined and found to fully sustain the finding of the trial court, and is adopted by this court.

Opinion filed April 18, 1912.

Appeal by plaintiff from a judgment of the District Court for Grand Forks County, *Templeton,* J., in defendant's favor in an action brought to recover possession of certain land and for an accounting of rents and profits.

Affirmed.

Scott Rex, for appellant.

Presumption of death arises when it is proven that person has not, for seven years or more, been heard from at the place he left, by those who might reasonably be expected to hear from him. Greenl. Ev. § 41; Wigmore, Ev. §§ 2531, 2532; Jones, Ev. § 57; Lawson, Presumptive Ev. rule 44, p. 264; Miller v. Sovereign Camp, W. W. 140 Wis. 505, 28 L.R.A.(N.S.) 178, 133 Am. St. Rep. 1095, 122 N. W. 1126; Holdrege v. Livingston, 79 Neb. 238, 112 N. W. 341; Renard v. Bennett, 76 Kan. 848, 93 Pac. 261, 14 Ann. Cas. 240; Davie v. Briggs, 97 U. S. 628, 24 L. ed. 1086; Winship v. Connor, 42 N. H. 341; Johnson v. Johnson, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; Freeman's Estate, 227 Pa. 154, 75 Atl. 1063; Kennedy v. Modern Woodmen, 243 Ill. 560, 28 L.R.A.(N.S.) 181, 90 N. E. 1084; Burnett v. Costello, 15 S. D. 89, 87 N. W. 575; Bardin v. Bardin, 4 S. D. 305, 56 N. W. 1069; Smith v. Smith, 5 N. J. Eq. 484; Osborn v. Allen, 26 N. J. L. 388; Hoyt v. Newbold, 45 N. J. L. 219, 46 Am. Rep. 757; Wheelock v. Overshiner, 110 Mo. 100, 19 S. W. 640; Gilroy v. Brady, 195 Mo. 205, 93 S. W. 279; Winter v. Supreme Lodge, K. P. 96 Mo. App. 1, 69 S. W. 662.

Defendants have no title to or interest in the land in suit. State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984; State Finance Co. v. Mulberger, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986;

State Finance Co. v. Bowdle, 16 N. D. 193, 112 N. W. 76; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737; 26 Am. & Eng. Enc. Law, 959; 21 Cyc. 101; Dohms v. Mann, 76 Iowa, 723, 39 N. W. 823.

Bangs & Robbins, for respondent.

Presumption of death did not arise. Burnett v. Costello, 15 S. D. 89, 87 N. W. 575; Davie v. Briggs, 97 U. S. 628, 24 L. ed. 1086; Modern Woodmen v. Gerdom, 72 Kan. 391, 2 L.R.A.(N.S.) 809, 82 Pac. 1100, 7 Ann. Cas. 570 and note; Renard v. Bennett, 76 Kan. 848, 93 Pac. 261, 14 Ann. Cas. 240; Gall v. Gall, 114 N. Y. 109, 21 N. E. 106; Vought v. Williams, 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195; Re Board of Education, 173 N. Y. 321, 66 N. E. 11; Shriver v. State, 65 Md. 278, 4 Atl. 679; Schaub v. Griffin, 84 Md. 557, 36 Atl. 443; Spahr v. Mutual L. Ins. Co. 98 Minn. 471, 108 N. W. 4; Manley v. Pattison, 73 Miss. 417, 55 Am. St. Rep. 543, 19 So. 236; Smith v. Combs, 49 N. J. Eq. 420, 24 Atl. 9; Francis v. Francis, 180 Pa. 644, 57 Am. St. Rep. 668, 37 Atl. 120; Whiting v. Nicholl, 46 Ill. 230, 92 Am. Dec. 248; Reedy v. Millizen, 155 Ill. 636, 40 N. E. 1028; Hitz v. Ahlgren, 170 Ill. 60, 48 N. E. 1068; Kennedy v. Modern Woodmen, 243 Ill. 560, 28 L.R.A.(N.S.) 181, 90 N. E. 1084; Iberia Cypress Co. v. Thorgeson, 116 La. 218, 40 So. 682; Seeds v. Grand Lodge, A. O. U. W. 93 Iowa, 175, 61 N. W. 411; Wheelock v. Overshiner, 110 Mo. 113, 19 S. W. 640; Flood v. Growney, 126 Mo. 262, 28 S. W. 860; Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924; Hyde Park v. Canton, 130 Mass. 505; Latham v. Tombs, 32 Tex. Civ. App. 270, 73 S. W. 1060; Hess v. Webb, — Tex. Civ. App. —, 113 S. W. 618; Re Richards, 133 Cal. 524, 65 Pac. 1034; Miller v. Sovereign Camp, W. W. 140 Wis. 505, 28 L.R.A. (N.S.) 178, 133 Am. St. Rep. 1095, 122 N. W. 1126.

BURKE, J. About the year 1882 one Margaret J. McGibbney, then unmarried, made homestead entry for a quarter section of land in Grand Forks county, North Dakota, and took up her residence thereon. Shortly thereafter she married one John Wright, by whom she bore two sons, Arthur W., plaintiff herein, and a younger son, whose first name we do not know. Arthur was born in 1884, and the younger son in February, 1887, at which time the mother died. The infant

child was given away by its father to a mother who had lost her own child, a stranger to him, and so far as we can learn this child has never been heard of since. The husband continued to reside upon his dead wife's homestead, and two years thereafter a patent was issued to the heirs of Margaret J. McGibbney, deceased.

After a short time, Wright placed the son Arthur with the family of the defendants, the Jones, neighbors of his family. Wright was to pay $6 per month in cash and furnish the material for the boy's clothes. While this arrangement was in effect, and in the fall of the year 1890, Wright suddenly disappeared from that neighborhood, leaving many debts. He did not notify the defendants, or anyone, of his intended departure. The defendants continued to care for the boy Arthur, and finally legally adopted him as their own son, about the year 1898.

The elder Wright was soon heard from at Fairhaven, Washington state, where he had gone apparently in quest of a widow who had removed from the Dakota neighborhood to the Pacific coast. Whatever induced his change of residence, he never returned to Dakota, but continued to reside upon the coast. His Dakota creditors took what little property was left by him, excepting his interest in the homestead of his late wife. This land belonging to the father and the two sons in undivided one thirds, under the grant from the government, but not in any manner inherited from Mrs. Wright. However, the said land was soon sold for taxes and a tax deed issued to one Lindwell, a banker in a near-by town. This tax deed caused some talk in the neighborhood, and some of those interested decided to have a guardian appointed for the boy, who would redeem from the tax sale and keep the land for the boy. One Christian was proposed as guardian, but he consulted the Jones before he would consent to act, and shortly thereafter the Jones adopted the boy, and Mrs. Jones obtained a quitclaim deed from Lindwell, for which she paid $126.54, the exact amount due to Lindwell for taxes upon the land. Three years later, when the boy Arthur was seventeen years of age, he ran away and did not return until he had reached his majority and came back to claim the land.

1. The first question arising is the validity of the title which the Jones now assert to the land. They claim under the tax deed to Lindwell, his quitclaim deed to Mrs. Jones, and ten years' adverse pos-

session. We will examine the tax deed first. It is based upon the taxes for the year 1889, and the assessment roll shows that the land was listed as follows:

Name	Sec.	Twp.	Range	Acres.
Margaret J. McGibbney, N. W. ¼	35	149	56	160

An examination of the sixth line of the Ex. 4 at page 113 of the case of Power v. Bowdle, 3 N. D. 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404, will show that the description in said case is almost exactly like this one, and such case will be controlling here, unless overruled. We are now asked to overrule the earlier case. We are well aware of the severe criticism accorded the Power-Bowdle Case, but we feel that after twenty-one years it would be a mistake to change the rule which has long since become a rule of property in this state. This court has followed the said case too often to repudiate it now. See Iowa & D. Land Co. v. Barnes County, 6 N. D. 601, 72 N. W. 1019; Betts v. Signor, 7 N. D. 399, 75 N. W. 781; State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984; 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; Nind v. Myers, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335; Beggs v. Paine, 15 N. D. 436, 109 N. W. 322. In the last-mentioned case this court announced that it would not extend the rule, but say "those decisions have established a rule of property in this state from which we cannot now depart." That, being true then, is even more effective now. We must hold the tax deed absolutely void.

2. It therefore follows that neither Lindwell nor his grantee has any interest in the land unless acquired under § 4928, Rev. Code 1005, designated by appellant as the short statute of limitations. This section has been construed by this court several times, J. B. Streeter, Jr. Co. v. Fredrickson, 11 N. D. 300, 91 N. W. 692; Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737; Stiles v. Granger, 17 N. D. 502, 117 N. W. 777. Under these decisions these defendants, to recover, must show that for the full period of ten years they were in the open, adverse, and undisputed actual possession of the land under color of title, and had paid thereon all taxes

and assessments. In this order of proof it will be necessary to consider whether the Jones took the land from Lindwell, "openly adverse" to Arthur Wright, and whether for a period of ten years such possession was undisputed by Arthur. We will preface our answer to the said questions with some of the testimony from the record. Walter Christian was the neighbor mentioned by the neighbors as a guardian for the boy.

We quote from his testimony:

Q. For what purpose were you to be appointed?

A. Why, it was for Arthur.

Q. And was this question of this land discussed in that connection?

A. Yes, sir.

Q. And what about it?

A. I believe it had been sold for taxes then, and it was to see to the boy and to the property— . . . it was to get the taxes cleared up and keep it clear for the boy.

Q. . . . Just what conversation did you have with the Jones on this subject . . . ?

A. I told them that the neighbors were going to have a guardian appointed and that they wanted me appointed, but I wouldn't accept unless they were willing, and he said if anyone was going to be appointed, he would just as soon have me as anyone else, and Mrs. Jones said the same, and then they called Arthur and he agreed to it.

When Mrs. Jones was on the stand to explain the matter she said: "After a number of years we found that this quarter of land that was his mother's had been sold for taxes. . . . It came into my mind that perhaps I might in some way raise the money *to pay the taxes* on this place, and we could keep it to help support the boy and to pay us back a little bit; . . . so I went to Mr. Lindwell and asked him if he would turn the land over to me, and he did."

Again, she was asked:

Q. Did you ever agree with him (Arthur) to deed the land to him or convey it to him or anything of that kind?

A. I may have said that if he was a good, good boy until he was

twenty-one years and helped us to get along so we would have a home of our own, that we would turn the quarter over to him.

Q. Did you ever say anything to him that you had acquired this title for his benefit?

A. Nothing more than that we might keep him and support him, instead of sending him away.

Again, she says:

Q. Now, did you ever say to him, absolutely or otherwise, that if he was a good boy when he became of age you might give him the land?

A. I presume likely that I did.

And again:

Q. Well, he had given you to understand when he came back after he was of age, that he claimed the land?

A. Yes.

Q. And gave him to understand at that time that you would settle by conveying one-third interest in the land, didn't you?

A. No, sir, not one third.

Again:

Q. In discussing the matter of the Lindwell deed with him, as you say it was discussed when he was a chunk of a boy ten or twelve years old, you didn't disclose any such intention (to keep the land) on your part?

A. No, sir.

Q. And you say it was first disclosed to him by you after he had run away, as you put it?

A. Yes, sir.

Q. When was the first time that you saw him or communicated with him after he ran away?

A. It was in February after he was twenty-one years old.

Q. February, 1906.

A. Yes, sir.

Q. And did you give him to understand at that time that you intended to assert title to it yourself?

A. I told him at that time when he asked me what I was going to do, that if he had any right to the land his brother had also, and that I should wait two years until his brother was of age before I did anything towards settlement of the land.

Q. Then he was back again in 1908?

A. Yes, sir.

Q. Did you at that time give him to understand in any way that you intended to claim and keep this land?

A. There wasn't very much said at that time.

Q. What did you mean in March, 1906, when you stated to him in substance that you wouldn't make settlement until the youngest brother came of age . . . ?

A. Why, I considered what little I knew about law, I didn't know much—I knew that in a good many instances the children had to be of age before estates could be settled.

Mrs. Jones also admitted writing a letter to Arthur in October, 1908, wherein she stated: "No, we haven't done anything yet about the land; I haven't got time, but must this fall, if possible." There is much more of this kind of testimony, the plaintiff stating positively that Mrs. Jones had made to him the statements partially admitted by her. We are satisfied that the extracts given will satisfy most minds that Mrs. Jones did not assert any hostile title as against Arthur until after he had run away, if she ever so asserted it. In fact it seems clearly established that this good woman, either through love of the boy or through pride toward her neighbors, had assumed a voluntary trust towards this boy and advanced the money from her meager means to keep the land for him. After he had so ungratefully run away, she may have decided to keep the land herself, and she probably has maintained an adverse claim against the elder Wright and the younger son, but as against the one-third interest of Arthur, we cannot see that she has established any such claim. While she was under no obligation to assume such trust, nevertheless, having so assumed it, she must account to her trustee. Rev. Codes 1905, chap. 60; 26 Am. & Eng. Enc. Law, 959; 21 Cyc. 101, and cases cited. It is our conclusion, then, that as against this plaintiff's one-third interest in the land, defendants have

no right, title, or interest, and the trial court was right in quieting such interest in plaintiff.

3. We have next to consider the claim of plaintiff to the other two-thirds interest in the land. As already stated he did not inherit the one third from his mother. The government gave him such interest direct. At the same time the father was given one-third interest therein, as also was the brother. If the brother is dead his interest would go to the father. If the father is dead his share should go to Arthur. If the father is not dead, Arthur can in no way inherit any of the land. The estate of the father has not been probated, but the plaintiff relies upon the presumption of death by unexplained absence, under § 7302, Rev. Code, 1905. We have therefore to determine whether the evidence offered is sufficient to raise the presumption of death of the father. Again we will have to quote from the evidence offered at the trial. Plaintiff himself testifies that he heard that his father was out west at Fairhaven, Washington, and that he never wrote to him even one letter. Mrs. Jones testified that he had gone to the Pacific coast. Most of the neighbors testified to the same effect.

Mrs. Thomas, a neighbor, stated,

Q. Now to get this thing straight,—he left here in 1890?

A. Yes, sir.

Q. And you know now that he went to where your sister was, at Fairhaven?

A. Yes, sir.

Q. In 1892 your sister came back and said he was out there?

A. Very likely she did.

Q. Then a couple of years after that, in 1893 or 1894, you wrote out and she replied that he had gone temporarily to some island to cut wood?

A. Yes, sir.

Q. Then some time after that, between 1893 and 1898, you wrote out and ascertained that he either was going or had gone to the Klondike?

A. No, sir, I never wrote but the one letter.

Q. But from some other letters that came to your brother's wife you learned that he had gone to the Klondike?

A. I think I learned that from Mrs. Jones.

Q. When was it that Mrs. Jones told you that Wright had gone to the Klondike?

A. It seems to me it was along about the time of the adoption.

It seems to be abundantly proven, then, that John Wright about the year 1890 removed from North Dakota and took up his residence upon the Pacific coast at or near Fairhaven, Washington, and that his home was no longer in Dakota, but in Washington; and to raise a presumption of death it must be shown that he has been absent and unheard of from that country for the full period of seven years, and not merely so absent from his Dakota home. See the case of Burnett v. Costello, 15 S. D. 89, 87 N. W. 575, where § 7302 of our Code was under consideration. The presumption is founded upon human experience and reason. A man disappears from his home, family, and friends. For seven years he does not write to those nearest and dearest to him. Those most interested in him are unable to locate him. The law in its wisdom says, surely the man is dead. On the other hand, after his disappearance it is shown that he has located in a new country and intended to desert his family. The presumption is immediately overcome. To create a new presumption of death it must appear that he has disappeared from his new and last home. Davie v. Briggs, 97 U. S. 628, 24 L. ed. 1086; Miller v. Sovereign Camp, W. O. W. 140 Wis. 505, 28 L.R.A.(N.S.) 178, 133 Am. St. Rep. 1095, 122 N. W. 1126, where the cases are collected.

The testimony at the trial below was principally to show that John Wright had disappeared from Dakota. The attorneys for the plaintiff wrote about a dozen letters to people upon the coast, but with no result. One answer they received says: "There is a lady by the name of Julia Brown, who, I am sure, knows the whereabouts of Mr. Jack Wright. Her postoffice address is Seattle, Washington, 2105 Sixth Ave. East, Flat A., also her ex-husband, George Brown of Olalla, Washington, possibly knows his whereabouts."

Mr. Shirley, attorney for plaintiff, testified upon cross-examination:

Q. There has been nothing done excepting what has been detailed?

A. I think not.

Q. Been no directories consulted in that country, Fairhaven, Seattle, and Bellingham?

A. No, sir.

Q. No chief of police or sheriff written to?

A. Not that I know of.

Q. No postmasters?

A. Not by me.

Q. Nobody been sent to see Mrs. Dyer to ascertain whether she would say more than she wrote?

A. No.

Q. You have relied entirely on this correspondence?

A. Yes, sir.

Q. Did you insert any advertisement in the newspapers in Fairhaven, Seattle, or Bellingham?

A. No place in that country.

Q. The four or five letters that have been written by Mr. Rex and the two or three or four written by you is the full amount of inquiry made to elicit the whereabouts of Mr. Wright?

A. I presume so.

When we consider that Mrs. Dyer wrote in 1909, just before this suit was brought, that she was sure that Mrs. Brown knew of Wright's whereabouts, and that Wright was a sober, healthy, cautious man when last seen we agree fully with the trial court that no presumption can arise upon the evidence that he is now dead. We therefore hold that plaintiff has no interest in the remaining two thirds of the land.

4. Nothing now remains to be determined excepting the accounting between the plaintiff and defendant. The evidence thereupon is long and of importance to this suit alone. We will therefore not set it forth, but will content ourselves with saying that, upon a careful examination of the evidence and computations resulting, we are of the opinion that the findings of the trial court in this particular are also correct, and the judgment is in all things affirmed.

NIVEN et al. v. PEOPLES et al.

(136 N. W. 73.)

Action — corporation — joinder of causes.

An action to set aside a transfer of stock alleged to have been made to an officer of a corporation, as a result of fraudulent representations on his part, cannot be properly joined with an action brought under § 7366 of the Revised Codes of 1905, to compel such officer to account for alleged official misconduct while directing the affairs of the corporation.

Opinion filed April 19, 1912.

Appeal from the District Court of Eddy county; *Coffey, J.*

Action to set aside a transfer of stock, and for an accounting. Defendants demurred to the complaint, and from an order overruling such demurrers, defendants appeal.

Reversed.

This is an appeal from an order overruling four demurrers to a complaint. The complaint set out and joined four or five causes of action, and was filed by four stockholders of the Bank of New Rockford against H. Peoples, a former director and president of said bank, E. S. Severtson, a former director and cashier of said bank, W. C. Tubbs, a director of said bank, the Bank of New Rockford itself, and the Tallman Investment Company, a banking corporation. It alleged, among other things, that the defendant Peoples, and the defendant Severtson, from the year 1898 to the 1st day of June, 1910, had full control of the affairs of the defendant bank, and that none of the other directors had any voice or management in it; that although the plaintiff Niven was a director during such time, said Peoples and Severtson failed to give him any information concerning the affairs of the bank; that the said Peoples and Severtson had been grossly negligent in the performance of their duties, and had knowingly allowed large sums of money to be loaned to irresponsible parties, and had been so negligent as to cause the assets of said bank to be dissipated; that the said Peoples and Severtson had used the assets of said bank

for their own benefit and use, and not for the use of said bank or its stockholders; that they had rendered no account of their acts and transactions; that the bank had not paid any dividends whatsoever; that $63,000 or more had been dissipated and lost through the negligence and mismanagement of said Peoples and Severtson; that said defendants had listed and carried as assets of said bank, fraudulent and worthless notes and securities, and had converted the assets and funds of said bank to their own benefit, and had failed to account to said bank therefor; that on or about the 10th day of April, 1910, the state bank examiner found among the assets of said bank worthless notes and securities to the amount of $63,000, and informed the defendants, Peoples and Severtson, that unless said worthless securities were replaced with approved securities, he would have a receiver appointed; that at said time the defendant Peoples told the examiner that the defendant Severtson was to blame, but that the defendant Peoples would guarantee said bank and its creditors against loss, and at that time gave to said examiner a bond to that effect, taking at the same time a transfer and assignment from the defendant Severtson of $30,000 or more; that on or about the 28th day of April, 1910, the said Peoples entered into an agreement with the defendant Tallman Investment Company, to turn over to said company 230 shares of the capital stock of the defendant bank and guarantee the value of all securities in said bank, which he did on the 6th day of May, 1910, the said Tallman Investment Company paying into said bank the sum of $47,000; that on the 1st day of June the said Investment Company took possession and control of said bank; that on or about the 28th day of April, 1910, and before the turning over to the Tallman Investment Company of the said shares of stock, "defendant Peoples represented to the plaintiffs that if they would surrender to said Peoples their stock in defendant bank without consideration, that the said Peoples could make an arrangement with defendant, the Tallman Investment Company, to take over said bank and its assets, and that the plaintiffs would not be liable for an assessment on said stock as provided by law; and that if they did not turn over said stock to said Peoples, that they would assess the full value of their stock to make good the loss of the bank; that the defendant Peoples represented to the plaintiffs that the defendant Severtson had dissipated the funds and assets of said bank,

and that the said Peoples had taken an assignment and transfer from said Severtson *to said bank* of said Severtson's property, including his shares of stock in said bank, to so far as possible make good the losses caused by the actions of the defendant Severtson; that these representations made by Peoples were false and fraudulent, and made with intent to defraud and deceive the plaintiffs, and to induce plaintiffs to surrender their stock in said bank without consideration; that in fact said Peoples has had full control and charge of said bank since 1898, and has so fraudulently and negligently managed the affairs of said bank as to cause the loss of said bank's assets in the sum of $63,000 or more; that in fact said Peoples took from said Severtson an assignment of more than $30,000 worth of property to himself, the said Peoples, personally, and refuses to transfer said property to said bank; that plaintiffs were induced to surrender, and did surrender, their stock without consideration by reason of the fraudulent representations of said Peoples; that they have demanded of said Peoples that he return to them said shares of stock, but said Peoples has refused and still refuses to return or account for said stock; that the stock of the plaintiffs Lawrence Buck and Margaret Buck, who were minors at the time, was transferred without the knowledge, consent, or authority of the judge of the county court." The prayer asks that the defendants, Peoples and Severtson, account for their official conduct in the mismanagement of the funds and property of the defendant Bank of New Rockford during all the period of their mismanagement; that the Tallman Investment Company account for the transfer of the stock of the Bank of New Rockford and for all their doings in connection therewith; that Peoples and Severtson be compelled to pay to the Bank of New Rockford or its creditors any money and the value of any property which they have acquired to themselves or transferred to others, or lost, or wasted by violation of their duties, and to transfer any such property held by them or either of them to said bank; that the defendant Peoples return to the plaintiffs the shares of stock of said bank delivered to him by them, or in lieu, pay to said plaintiffs the full value thereof. It also asks for such further relief as may be just and equitable. The defendant E. S. Severtson defaulted. Each of the other defendants interposed a separate demurrer. Each demurrer, however, was to the same effect, and as grounds for demurrer

alleged: 1st. That the plaintiffs have no legal capacity to sue; 2d, that there is a defect of parties plaintiff; 3d, that there is a defect of parties defendant; 4th, that several causes of action have been improperly united; 5th, that the complaint fails to state facts sufficient to constitute a cause of action. Each of these demurrers was overruled, and from the order overruling the same, this appeal is taken.

Maddux & Rinker, for appellants.

Equitable actions and law actions joined are fatal on demurrer. Jasper v. Hazen, 2 N. D. 401, 51 N. W. 583; Mares v. Wormington, 8 N. D. 329, 79 N. W. 441; Disbrow v. Creamery Package Mfg. Co. 104 Minn. 17, 115 N. W. 751; Davis v. Novotney, 15 S. D. 118, 87 N. W. 582; Pietsch v. Krause, 116 Wis. 344, 93 N. W. 9; Grant v. McCarty, 38 Iowa, 468.

Complaint fails to state a cause of action. Stutsman County v. Mansfield, 5 Dak. 78, 37 N. W. 304; VanDyke v. Doherty, 6 N. D. 263, 69 N. W. 200.

C. S. Buck, for respondents.

Plaintiffs are entitled to the relief demanded. Gore v. Day, 99 Wis. 276, 74 N. W. 788; Commercial Bank v. Chatfield, 121 Mich. 641, 80 N. W. 712; Sigwald v. City Bank, 74 S. C. 473, 55 S. E. 109; Clews v. Bardon, 36 Fed. 617; Wheeler v. Aiken County Loan & Sav. Bank, 75 Fed. 781; Elliott v. Farmers' Bank, 61 W. Va. 641, 57 S. E. 242; Gibbons v. Anderson, 80 Fed. 345; Prather v. Kean, 29 Fed. 498, 1 Am. Neg. Cas. 593; South Bend Chilled Plow Co. v. George C. Cribb Co. 97 Wis. 230, 72 N. W. 749.

Bruce, J. (after stating the case as above). In the complaint there seem to be set forth four or five separate causes of action. One is against the defendant H. Peoples, to compel a return to the plaintiffs or an accounting for the value of the stock alleged to have been given to him, on account of his alleged fraudulent representations. Another is against the defendants Peoples and Severtson, to account for their official conduct in the mismanagement of the funds of the Bank of New Rockford, and is brought by the plaintiffs as stockholders. Still another is against the Tallman Investment Company, asking it to account to the plaintiffs for the transfer of the stock of the Bank of New

Rockford, and for all other doings in connection therewith; and yet a fourth is against the defendants Peoples and Severtson, to compel them to pay to the Bank of New Rockford any money and the value of any property which they have acquired to themselves or transferred to others, or lost or wasted by reason of the violation of their duties. The plaintiffs sue both in the capacity of persons who have been defrauded of stock formerly belonging to them, and in the capacity of stockholders of a corporation who have been injured by the mismanagement of that corporation. The latter cause of action is based upon § 7366 of the Revised Codes of 1905, which, in effect, provides that an action may be maintained against one or more trustees, directors, managers, or other officers of a corporation to procure a judgment, (1) compelling the defendants to account for their official conduct; (2) compelling them to pay to the corporation or to its creditors any money and the value of any property which they have acquired to themselves or transferred to others, or lost, or wasted by violation of their duties, or to transfer any such property held by them to the corporation; (3) setting aside an alienation of property made by one or more trustees, directors, managers, or other officers of a corporation, contrary to a provision of law, or for a purpose foreign to the lawful business and objects of the corporation, when the alienee knew or had notice of the purpose of the alienation. It will be noticed, however, that § 7367 provides that this action can only be brought by a stockholder upon the neglect or refusal of a trustee, director, manager, or other officer of the corporation so to do at the request of such stockholder. It is also to be noticed that the action to set aside an alienation of property must be based upon proof that the alienee knew, or had notice, of the purpose of the alienation.

It is perfectly plain to us that even if there are not any other defects in the complaint, the cause of action for the return to plaintiffs of their stock or for the value thereof cannot be joined with a cause of action brought under § 7366 of the Code by a stockholder against a director or an officer, not as a mere individual who has obtained the property of the individual plaintiff, unlawfully, but as an officer who has misappropriated the property of the corporation, and who has mismanaged its business. The one can, as a matter of course, and of right, be brought by the individual stockholder in his own name. The other

cannot be brought in his own name without a showing that a preliminary demand has been made upon the proper officers of the corporation to bring the suit, and there has been a refusal on their part, or, at any rate, that such demand would have been futile. When he sues he sues for the corporation. We do not agree with the counsel for the respondent that legal and equitable actions are improperly joined, because we believe that all of the causes of action set forth in this complaint are equitable in their nature. We believe, however, that they are improperly joined, because they do not arise out of the same transaction or transactions, connected with the same subject of action (§ 6877, Rev. Codes 1905); and because they do not necessarily involve the same parties. The complaint is also open to the criticism that the causes of action are not separately stated as required by the Code.

In the action for an accounting against Peoples and Severtson, and a return to the bank of any property they may have wrongfully taken from it during their administrations, the proper party plaintiff is primarily the bank itself. Even under § 7366 no action can be maintained by an individual stockholder without allegation and proof of a demand on the bank to bring such an action, and of a refusal on its part so to do, or that such demand would have been unavailing. There is not such allegation in the complaint in the case at bar. It is true that it is alleged that Peoples and Severtson were officers and directors of the bank, but there is no allegation as to the number of directors, or that Severtson and Peoples constituted a majority. In a directors' meeting, men vote as individuals, and not on the basis of the stock that they own. The bank, as far as we know, might have maintained the action even without the consent of Peoples and Severtson.

It is also clear to us that no cause of action is stated against the defendant Tubbs. All that is stated in regard to him is that he lives in Minneapolis and is a director. He is not a proper party plaintiff, even under §§ 7366, 6816, and 6818 of the Codes. Even if a proper party, he should have been given an opportunity to join as plaintiff before being made a defendant, unless, indeed, some complaint is made of his actions, of which there is nothing in the pleadings. The fundamental question is, Are the plaintiffs entitled to a return of their stock? If this is decided in the affirmative, they can, perhaps, proceed under

§ 7366 of the Codes. If it is decided in the negative, they cannot so proceed, for they would not be stockholders. The issues should be separated. Whether they can ultimately proceed under § 7366 of the Codes cannot well be decided here, and must be left for future adjudication. As far as the present appeal is concerned, it is sufficient to say that the mismanagement of the affairs of the corporation is not the same transaction, nor does it grow out of the same subject of action as the alleged fraudulent obtaining and conversion of the stock of the plaintiffs by the defendant Peoples.

The orders appealed from are reversed, and the cause is remanded to the District Court for further proceedings according to law.

WIPPERMAN MERCANTILE COMPANY v. ROBBINS, as Sheriff, et al.

(135 N. W. 785.)

Evidence — title and possession — levy.

1. The acts of and statements made by a defendant in attachment proceedings, when in possession of personal property levied upon, when relevant and material to the title and ownership of said property at the time of levy, are admissible to prove possession and the interest of the attachment defendant in such property. Such statements are not objectionable as hearsay.

Evidence — title and possession — action for damages — sheriffs.

2. Certain acts occurring after the levy, tending to establish the surreptitious removal by the defendant in attachment with the knowledge and consent of plaintiff herein, of a part of the personal property levied upon, which part so removed consisted of wild game about to be shipped without the state, *held* properly received in evidence as upon a sufficient foundation laid therefor, and being material to the title and possession of the personal property in litigation. and as bearing upon the good faith of plaintiff's claim of ownership in suit.

Sheriffs — burden of proof — action for damages.

3. The court, by its instructions to the jury, properly placed the burden of proof upon the plaintiff to establish before recovery title and right of possession to have been in him at the time of the levy, where both title and possession at said time are in dispute under conflicting testimony thereon.

Rulings on evidence and instructions reviewed.

4. Other rulings on evidence and instructions to the jury are reviewed and held proper.

Opinion filed March 4, 1912. Rehearing denied April 24, 1912.

Appeal by plaintiff from a judgment of the District Court for Richland County, *Allen*, J., in defendant's favor in an action brought to recover for the conversion of certain property.

Affirmed.

Purcell & Divet and *C. W. Freerks*, for appellant.

Evidence admitted was hearsay and incompetent. Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; 1 Greenl. Ev. p. 99, 1 Philipp's, Ev. 169; Mima Queen v. Hepburn, 7 Cranch, 290, 3 L. ed. 348, 6 Enc. Ev. p. 443; Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943; Regan v. Whittaker, 14 S. D. 373, 85 N. W. 863; Stevens v. William Deering & Co. 6 S. D. 200, 60 N. W. 739; Anderson v. Jordan, 15 S. D. 395, 89 N. W. 1015; Catlett v. Stokes, 15 S. D. 635, 91 N. W. 310.

Refusal to instruct the jury that burden of proof was on defendants to show delivery of property was prejudicial. Perot v. Cooper, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391; Sargent v. Linden Min. Co. 55 Cal. 204, 3 Mor. Min. Rep. 207; Union P. R. Co. v. Fray, 31 Kan. 739, 3 Pac. 550; Comstock v. Norton, 36 Mich. 277; Williams v. Southern P. R. Co. 110 Cal. 457, 42 Pac. 974; Meyer v. Midland P. R. Co. 2 Neb. 319; Moline Plow Co. v. Anderson, 24 Ill. App. 364; Stevens v. Brown, 14 Ill. App. 173; Michigan Ins. Bank v. Eldred, 9 Wall. 544, 19 L. ed. 763; St. Louis, I. M. & S. R. Co. v. Spencer, 18 C. C. A. 114, 36 U. S. App. 229, 71 Fed. 93; Plummer v. Johnson, 70 Wis. 131, 35 N. W. 334; Welter v. Jacobson, 7 N. D. 32, 66 Am. St. Rep. 632, 73 N. W. 65; Gibbons v. Robinson, 63 Mich. 146, 29 N. W. 533; Gilman v. Gilby Twp. 8 N. D. 627, 73 Am. St. Rep. 791, 80 N. W. 889; Williams & Mobley v. Littlefield, 12 Wend. 362; Ticknor v. McClelland, 84 Ill. 471; Parmele v. McLaughlin, 9 La. 436; Nichols & S. Co. v. Paulson, 6 N. D. 400, 71 N. W. 136; Nichols & S. Co. v. First Nat. Bank, 6 N. D. 404, 71 N. W. 135; Amos v. Livingston, 26 Kan. 106; Bradford v. Stevens, 10 Gray, 379; Hayes v. Fitch, 47 Ind. 21; Thayer v. Wiles, 23 Vt. 494; Caldwell v. New Jersey S. B. Co. 47 N. Y. 282; Meikel v. State Sav. Inst. 36 Ind. 355.

Goss, J. The plaintiff corporation herein seeks to recover the value of certain property, claimed to be owned by it, but levied upon under attachment and sold on judgment rendered in an action between Goldstein and Kuhlberg, as judgment creditors, against the Peter Fox Sons Company, as judgment debtors. This action arises out of such alleged wrongful levy on the property of the plaintiff, and turns on the issue of ownership and right of possession of the property as attached. If title had been vested by the Wipperman Mercantile Company, prior to the attachment in the Peter Fox Sons Company, and thereunder possession of the property had been delivered to said company, so it became the owner with right of possession and disposition thereof in it, the attachment was levied upon its property, and this plaintiff must fail in this action. On the contrary, if title to such property or its possession, or right of disposition at the time of the levy, remained in this plaintiff with no delivery had, the defendant officer must respond in damages, as the levy would then be wrongful.

The complaint sounds in conversion. The answer is a general denial, coupled with a justification by levy under attachment and sale pursuant to final judgment in an action between such third parties. Trial was had to a jury with a verdict for defendant, from which plaintiff appeals, assigning error falling under general classifications regarding the admission and exclusion of testimony and instructions to the jury complained of.

To an intelligent understanding of this opinion it is necessary to state the following uncontroverted facts before considering the error assigned: This case is a sequel to that recently decided by this court, wherein Abe Goldstein and I. Kuhlberg, as plaintiffs, recovered judgment against the Peter Fox Sons Company, and in which the property here concerned was attached by said plaintiffs as the property of the Peter Fox Sons Company. Plaintiff's third party claim to the property was therein ignored, and it now seeks to recover of the defendants the value of the carload of chickens so taken in the other action. When attached the property was in a car at Hankinson. It consisted of 12,000 pounds of poultry of a value of about $1,400. The property had been accumulated during a period of about two weeks and paid for by this plaintiff. The poultry was brought to the car, in which was an employee of the plaintiff, who would issue duebills to the seller, who, upon presentation of the

same to plaintiff, received payment. The purchases so made were for a resale of the poultry to the Foxes, under the following: "This agreement entered into by and between the Wipperman Mercantile Company and the Peter Fox Sons Company, whereby they agree to accept a car of mixed poultry to be taken in on November 5th, at the following prices (scheduled) f. o. b. Hankinson." The poultry was so purchased at various times from October 14th to November 7, 1908, inclusive. During that period the Foxes gave plaintiff a draft for $600 as an advancement under the transaction, and this amount was used in the purchase of the poultry. Anthony Fox was at the car during part of this time, and on November 7th was in and about the car preparatory to his accompanying it to Chicago, to which place Fox was making shipment after delivery at Hankinson under the agreement. Two employees of plaintiff, Henry Wipperman and Blonagan, on November 7th, until noon, were working in the car at purchasing poultry and loading it therein, getting the car ready for delivery to Fox that noon, that he might bill it out and accompany it to Chicago. Fox had placed in the car certain property he desired to ship in the car, consisting of his personal belongings and about 200 dead wild ducks, the latter in two barrels, and a lunch with liquid refreshments, for use *en route*. Fox had just interviewed the station agent about billing out the car, and the employees in the car had nearly finished loading it, when the sheriff appeared and levied on the contents of the car as the property of the Fox Company. Fox at the time claimed to own the property, and made various statements to that effect in the hearing of defendant's employees, who did not disaffirm such averments of ownership made by Fox. The levy was made at noon, Saturday, November 7, 1908.

During that night Fox and M. A. Wipperman, manager of the plaintiff corporation, together made a trip by automobile to Wahpeton to consult attorneys, returning after midnight. The car on which was the sheriff's levy stood some 50 feet in the rear of the Wipperman Mercantile Company building and place of business, and that night, and prior to 4 o'clock in the morning, the car was burglarized, and the wild game, the dead ducks, taken therefrom through the back doors of plaintiff's building, which doors were fastened by bars on the inside and could be opened only after entrance into the building from elsewhere. This wild game was found by the sheriff the next morning, in the second

story of plaintiff's building, in a room used as a cooling room for undertaking purposes. Certain testimony was offered and received tending to prove an admission by Fox of knowledge or participation in burglarizing the car and removing a part of the contents. It is further established that, while these parties were at Wahpeton, plaintiff gave Fox a check to repay the $600 advance by draft Fox had made to the corporation. M. A. Wipperman explains this as having been made necessary because of Fox's threat to stop payment of the $600 draft previously given and of which the $600 advancement to plaintiff consisted; and for the additional reason that Fox refused to accept the car because it was not fully loaded; and thus under plaintiff's claim the Foxes withdrew their money and all interest in the matter, leaving it to future litigation between Goldstein & Kuhlberg, attaching creditors of Fox, and the Wipperman Mercantile Company as owner of the property attached. The testimony about the loading by Fox of the wild game in the car, and the levy thereon, and the burglary of the car and its removal therefrom, as well as all statements made by Fox tending to show his ownership or control of the car, or his intent to bill the same out, together with the trip to Wahpeton and all proceeding subsequent to the levy, were each and all received over objection, upon which, and certain testimony excluded with the court's instructions to the jury, are predicated the assignments of error.

We will first consider the alleged objectionable testimony consisting of declarations by Fox of ownership and possession. These were received after the method of purchase had been shown, and after other testimony tending to and placing in dispute the fact of who had possession and ownership of the property levied upon, and as a part of the proceedings had and occurring at the time of the levy. The objection urged is that such is hearsay testimony. The specific testimony thus admitted consists in the following rehearsal of what took place at the time of the levy. The sheriff at the time of the levy, in the presence of Henry Wipperman and Fox, spoke to one Blonagan, regarding which he was asked: "Q. What did you say to Blonagan, and what did he say to you?" To which the objection of hearsay as to plaintiff was made and overruled, and the answer made: "I asked if that was his car of poultry, and he said it belonged to Fox." After which ruling the witness stated: "Just about then Fox looked up and asked me if I had any

poultry to sell. I told him, 'No;' at the same time Blonagan told him I was the city marshal, and didn't have any poultry to sell. I told him [Fox] I would like to see him. I asked if his name was Fox, and he said he was one of the Foxes; and I asked if he was Peter Fox, and he said, 'No,' he was one of the sons. I asked him if that was his car, and he said, 'Yes;' he was going to ship it out on that train. I gave him the papers that I had to serve on him. He got out of the car in the meantime. Fox told Henry Wipperman to get out of the car and lock the car. I don't think that was before there had been any talk between me and Henry Wipperman, or between me and Fox about locking the car; I spoke about if they was going to lock the car I would like to get the Key. If he [Fox] was going to lock the car I would have to have the key, and he [Fox] told Henry Wipperman to keep the key. Henry did lock the car." And in response to the question: "Then, did you have any further talk about the car of poultry at that time?" over the objection as to hearsay and divers interests of the declarant to that of the plaintiff, and that the declarations were of a self-serving character, the court permitted the following from the officer witness: "I did. He [Fox] said he wasn't going to pay for them potatoes and they would have no right to attach his car; that he was going to fight the Jews to a finish. He would show them that they couldn't attach his stuff; that he would settle for the potatoes if they would settle right, that is, the way he wants to."

Appellant urges that these statements made at the time of the levy are inadmissible. We must bear in mind in this connection at the time of the levy Fox was in the car with the plaintiff's employee Henry Wipperman and one Blonagan, a stranger. Fox had his personal belongings and other property therein. He had assumed right of control over the car just previously in making arrangements for shipping it out. His business was buying poultry, and his company concededly would soon thereafter become such owner if they had not already become such. He was on hand to accompany the car when shipped. Shortly before levy he had left the car, after making a statement to the effect that he must settle for this poultry with the plaintiff, and had returned. He had in fact advanced, as either a loan or part payment on the purchase price. $600 to plaintiff, used in the purchase of this poultry, and thereby, in any event, plaintiff's interest therein were half paid for. The

arrival of the train was momentarily expected. Besides these matters occurring before he left, other acts then and soon thereafter occurring constitute sufficient evidence of Fox's ownership to carry the question of ownership to the jury for its determination. In the presence of the officer, Fox had actual or assumed control, directed plaintiff's employee to lock the car and to keep the key even when the officer desired the same; and pursuant to such directions Fox was obeyed by plaintiff's employee, who thereby at Fox's command disobeyed the attaching officer; the latter thereupon placed his own lock upon the car attached. But there is proof that the key with which plaintiff's employee had then locked the car was thereafter that same afternoon in the possession of Fox.

On this testimony, independent of any statements, the trial court was obliged to submit to the jury the question of ownership under instructions that possession raises a presumption of ownership in the possessor. Most assuredly, then, it would have been error for the trial court to have excluded Fox's statement then made, characterizing the nature of his possession as that of ownership in him. These declarations are founded on sufficient proof of actual possession by the declarant to entitle them to admission as the claim of the party in possession explaining the nature of his holding. But appellant says, "their effect is to establish possession in the declarant." Such may be in part the effect. But the ground for their admission is that these statements explain possession already by act asserted. Such foundation for admission had been sufficiently laid by the showing made as to acts and facts establishing defendant's theory of possession had in Fox, founded upon actual ownership, or from which the presumption of ownership arose. Where so admissible, they may tend to strengthen the conclusions that Fox was in undisputed possession, as well as to permit a presumption of ownership to arise, but that is no ground for excluding such statements otherwise admissible. Were there no foundation of possession shown in Fox from which facts a presumption of ownership could arise, to be in turn a basis for the admission of the statements explanatory of the nature of the possessor declarant's holding, our conclusions would be otherwise. But that question is not before us. The declarations of Fox were those of an owner or a party ostensibly in possession of property, and made as a part of his claim of ownership while in posses-

sion; and the statements so made are explanatory of his possession already shown, and support the legal presumption of ownership, and hence are admissible on the fact of ownership.

Appellant challenges as hearsay the statement of the witness Blonagan that the property belonged to Fox, and made in response to an inquiry of the officer at the time of the levy. This statement, by way of answer, was made in Fox's presence, and was equivalent to Fox's statement to the same effect made immediately afterwards. In fact, Fox did assume the truth of it by immediately inquiring if "he [the witness] had any poultry to sell," to which the witness replied, "No;" whereupon "Blonagan told him I was the city marshal, and did not have any poultry to sell," resulting forthwith in the officer levying upon the car as containing the property of Fox.

While the statement of Blonagan is that of a third party so far as possession or relationship to the parties litigant is concerned, nevertheless, it is a part of the *res gestæ* of the levy. It is interwoven with the facts there done, and tends to explain them. The statements of Fox as the possessor of said property being admissible, these statements in his immediate presence explain his own pertinent and material inquiries and statements. The general trend of authorities would admit all of said statements. See authorities collected in an elaborate note under 95 Am. Dec. 51–76, and Century Dig. vol. 20, cols. 1551–1670 et seq. And if a distinction be drawn between the admissibility of the evidence offered under the *res gestæ* doctrine from that of the verbal act theory, then the statements offered are admissible under the theory that they are verbal acts explanatory of the acts done and dominion asserted over the property. For an elaborate discussion of this, see Wigmore on Evidence, vol. 3, §§ 1768 to 1800. From § 1799, on page 2299, we quote: "A special situation arises where the parties opposed are, on the one side, creditors, levying upon property as that of their debtor Doe, and, on the other side, a party claiming the property as belonging to him, and not to Doe [our case exactly]. Here the possessor making the offered declarations of claim may have been either the now claimant himself or the debtor Doe. . . . When the possessor declarant was the debtor Doe, his declarations of claim will, of course, favor the creditor's case as against the now claimant's, and upon the present principle ought to be admitted for the creditor. In the case where the claimant sets up a title

prior and superior to that of the debtor Doe, the situation is simple; for on no other principle than the present [verbal . . . act or *res gestæ* doctrine] could such declarations by Doe be receivable. The important thing to notice in this place is that upon the present theory of verbal acts corroborating the presumption from possession, none of the above limitations stand in the way [referring to admissibility as admissions where the party in possession has sold to the third party claimant]; by abandoning the use of these declarations as admissions, and by using them as verbal acts, we leave ourselves with only one restriction; namely, that the declarations must have been made by one in possession. Such is the important difference, in practical effect, between treating them as admissions and treating them as verbal acts to aid the presumption from possession." The authority then adopts a portion of the opinion of Burgert v. Borchert, 59 Mo. 80, citing much authority, and closing with the statement that "the rule is familiar that the declarations of a party in possession of property are verbal acts and are admitted as explanatory of the nature of that possession." See an opinion by Justice Brewer, in Stone v. Bird, 16 Kan. 488, where the admissions of a party in his own interests in a similar issue of attachment were admitted, the court saying: "It may be remarked that while, as a general rule, the declarations of a party are not admissible in his own behalf, yet, an exception to the rule exists where the declarations accompany some principal fact which they serve to qualify or explain, and are thus said to be a part of the *res gestæ*. And the exception has been held to cover cases where the possession of personal property has been a principal fact in the case." 1 Greenl. Ev. §§ 597, 598, with notes; 1 Greenl. Ev. § 108. See also 3 Elliott on Evidence, § 1751, from which we quote: "The acts or declarations of an attachment defendant, while in possession, and which explain the character of his possession, are admissible in a proper case as a part of the *res gestæ*." "So the testimony of the party in possession has been held competent to prove for whom he held possession." This in a suit under third party claim. 11 Enc. Ev. 388; 47 Century Dig. col. 213; Adams v. Kellogg, 63 Mich. 105, 29 N. W. 679; Standard Implement Co. v. Parlin & O. Co. 51 Kan. 566, 33 Pac. 363–366; Jones v. Chenault, 82 Am. St. Rep. 211, and note (124 Ala. 610, 27 So. 515); Lehmann v. Chapel, 68 Am. St. Rep. 553, with note (70 Minn. 496, 73 N. W. 402); Moore v. Jones, 63 Cal.

12; Noblitt v. Durbin, 41 Or. 555, 69 Pac. 685; Brooks v. Lowenstein, 95 Tenn. 262, 35 S. W. 89; Harton v. Lyons, 97 Tenn. 180, 36 S. W. 851; 16 Cyc. 1146 to 1155, and 1166 to 1176; Jones v. Hess, — Tex. Civ. App. —, 48 S. W. 46; Rosenberg v. Burnstein, 60 Minn. 18, 61 N. W. 684, and the following recent cases: Traylor v. Hollis, 46 Ind. App. 680, 91 N. E. 567; Holman v. Clark, 148 Ala. 286, 41 So. 765; Cohn & G. Lumber Co. v. Robbins, 159 Ala. 289, 48 So. 853; San Antonio Brewing Asso. v. Magoffin, — Tex. Civ. App. —, 99 S. W. 187; McDonald v. Bayha, 93 Minn. 139, 100 N. W. 679.

An examination of the foregoing authority will suffice to establish beyond question the admissibility of the proof received. The acts and statements of Fox testified to by the station agent, relative to his contemplated shipment of the car that noon in question, and which was prevented by the attachment just after such preparations had been made, are, under the foregoing authorities, admissible as the statements of a party in possession of the property in suit, and relevant to the issue of title and possession on trial. The testimony of the officer as to Fox remaining at the car most of the afternoon after the levy, and of his having a key to the lock that Henry Wipperman put on at his order, and Fox's entry into the car with the officer for his personal belongings, and his statement that the barrels which held the contraband ducks were feed, are all admissible under the foundation laid therefor, and are not subject to the objections urged that they are immaterial, incompetent, and irrelevant and as occurring at a time after the taking of possession by the sheriff. The acts done, as well as the statements tending to deceive the sheriff as to the property he then held under levy, are material, and especially so in the light of evidence of subsequent events, the burglarizing of the car and the finding thereafter of the contraband game in the ostensible possession of this plaintiff and in its building. When considered with the ignorance of the officer of the wild game being in the car and covered by the levy, he not discovering it until after the burglary, and it being known to plaintiff's employees, and it being clearly apparent that Fox desired the removal of this game before the officer had knowledge of it; this, together with M. A. Wipperman's testimony of his transactions with Fox that night, and repayment to Fox of the $600 advanced, were circumstances which defendant was entitled to have considered by the jury for what they were worth. If they con-

cluded the intent of Fox to have been that the contraband ducks should be gotten rid of as evidence, and that Wipperman had knowledge thereof or participated therein, and that the payment to Fox was likewise to assist him to clean up preparatory to this plaintiff asserting, as it did, its third party claim to the other contents of the car, they could reasonably doubt the good faith of such claim and weigh the other testimony relative to it accordingly. If such a scheme to suppress evidence did exist, and the evidence is certainly sufficient to make it problematical and a matter for the jury to determine, the jury had the right to consider the unsuccessful attempt at suppression or spoliation of evidence as a strong circumstance against the good faith of plaintiff in making the claim, and as against its probable validity. That the spoliation of evidence may raise the presumption that it is against the party guilty of the act of spoliation, see 107 Am. St. Rep. 765, 20 Century Dig. cols. 168 et seq.

As to the evidence of the presence of the wild game in the car at the time of the levy, to the showing of which plaintiff predicates error, it is admissible as a circumstance, as much so as was the proof that Fox, in whom possession and ownership are claimed by defendant to have then existed, had his personal belongings necessarily there for his comforts *en route* during the journey upon which he was about to enter. They all show the preparation and intent of the parties, as well as Fox's present assumption of authority to that extent at least in the matter; and we see no more reason for excluding proof of the presence of the wild game, placed there by Fox with the knowledge of plaintiff's employees and levied upon, than we do to excluding proof of the presence there of the contraband liquid refreshments or the cases of eggs he was taking along with him to Chicago, all of which were in the car when it was seized. They are facts admissible as a part of the circumstantial proof of ownership and possession.

As the contents of the car at the time of levy was a proper subject-matter of proof, and the removal therefrom of property so held and material to the question of title or right of possession was admissible, likewise must have been the statement of the party thus in possession of the property so removed and secreted; hence Wipperman's disclaimer of knowledge of how the ducks came where they were found after their removal from the car was admissible. Nor does appellant contend

the contrary. And Fox's admission, by his statement to the officer when confronted with the discovery: "I'm up against it; I might as well settle with the Jews. If I don't the other fellows will steal them from me," in response to the question of who got into the car and what the barrels were taken out for,—all received over the objection that the same was immaterial, incompetent, and hearsay,—is admissible as equivalent to a confession of his knowledge of the commission of the act; and when considered with the evidence tending to connect the plaintiff's manager, Wipperman, by his then possession of the goods so taken, the circumstances of how the goods must have been gotten into the building through the back doors of plaintiff's establishment, and then placed where they were found, and the conclusion to be drawn therefrom that someone with a key and with knowledge of plaintiff's place of business and building must have assisted in secreting them therein, coupled with the contraband character of the goods and their evidentiary value on the issues to arise in this suit, which action is shown by Wipperman's testimony to have been then in contemplation; considered with Fox's connection with the entire matter prior to and at the time of levy and thereafter, tending to characterize his possession and define his interest as that of owner and party in possession; considered together with the fact that the matter so confessed was but part of the necessary clearing of the decks for action prior to the commencement of this lawsuit,—the successful accomplishment of which would have left plaintiff in a much better position to recover then had it not been undertaken; from all these matters, and resting on them as a foundation, we have no hesitancy in saying that the statement objected to was properly admissible as a fact or circumstance in the case for the jury's consideration. Not that the statement established the truth of the matters so confessed, but rather that it, whether true or false, was an evidentiary fact material in the case. And the very words of the admission still further assert his ownership inferentially in that he must "settle with the Jews" and thereby relieve his property from the levy under which they were held.

The court excluded certain proofs offered by plaintiff, among which was an offer by M. A. Wipperman to show that, upon his discovery of this wild game on the premises of the Wipperman Mercantile Company, he notified the proper authorities of such fact, and that such game was

immediately taken possession of by the game warden. Testimony in line with the offer was excluded as immaterial, and not tending to prove or disprove any fact in issue, and the ruling was correct. What plaintiff did therewith was immaterial. It was concededly the property of Fox, and whether it was removed or allowed to remain in the embalming room was wholly immaterial; it was found there. Plaintiff was permitted to disclaim prior knowledge thereof or how it got there, and we cannot see how the question of what he did with it has any materiality. Nor do we find merit in any of the assignments made under exclusion of testimony offered by appellant. Under one of such assignments appellant was asked concerning the duty of his employee, Henry Wipperman, who received the chickens and issued orders or duebills for them: "Now, what were his duties and what was he doing with reference to the loading during the time this loading was going on?" Answer to which was excluded on the objection that the same was immaterial, not tending to prove or disprove any fact in issue, and as calling for a mere conclusion of the witness. While the ruling was largely one of discretion with the trial court, the same witness was allowed to detail at length, immediately thereof, all the matters that could have been sought to be elicited by the question to which the objection was sustained.

We now reach a consideration of the court's instructions to which error is assigned. Did the court, as contended by appellant, misplace the burden of proof? On this vital question the court gave the following instructions, a part of lengthy instructions to the jury as to the law of the case: "On the burden of proof the court instructed: (1) "That the burden of proof is always upon the party holding the affirmative, and any matter assented by one party and denied by the other can only be proved in law by a preponderance of the evidence." And, further: (2) "The Wipperman Mercantile Company claimed that they are the owner and entitled to the possession of the property. Under those circumstances it is necessary for the plaintiff to prove to the jury by a preponderance of the evidence that as a matter of fact at the time in question, the 7th day of November, 1908, the Wipperman Mercantile Company was entitled to the possession of the property in question. The plaintiff should prove its case by a preponderance of the evidence. If you find the evidence to be equally balanced as between plaintiff and defendant, your verdict should then be in favor of the defendant. If,

on the other hand, you find the evidence preponderates in favor of the plaintiff, your verdict should be in favor of the plaintiff." In outlining the issues for the jury's determination under an application of the foregoing rules as to burden of proof, the court instructed as follows: "The plaintiff claims that it was the owner and in possession of a car of poultry on a side track at Hankinson on the 7th day of November, 1908, and that the defendants have taken possession of and converted that carload of poultry to their own use. The defendants claim that this carload of poultry was the property of Peter Fox Sons Company; that Goldstein & Kuhlberg, they being defendants in this action, obtained a judgment for a certain amount against Peter Fox Sons Company, and an execution was issued on said judgment, and that the sheriff had levied execution on the carload of poultry. If you find the contention of the plaintiff to be true, *viz.*, That the Wipperman Mercantile Company was at the time in question entitled to the possession of this carload of poultry, your verdict should be in favor of the plaintiff. If, on the other hand, you conclude that the poultry was at that time the property of the Peter Fox Sons Company, and that the Peter Fox Sons Company was entitled to the possession of the poultry at that time, your verdict should be in favor of defendant." The court further instructed that the payment of a part only of the purchase price to plaintiff by the Fox Company would not give the Fox Company any title or right of possession; and that the plaintiff had the right to retain its possession until the purchase price was fully paid; and that the poultry was "originally the property of the plaintiff, and it is contended in behalf of plaintiff that it continued to be the owner and was at all times, up to and including the time of seizure and attachment on November 7, 1908. It is contended by the defendant, on the contrary, that such property was sold and delivered by the plaintiff to the Peter Fox Sons Company so completely that the plaintiff had no claim to it as against the Peter Fox Sons Company; and in that behalf I charge you that if the plaintiff sold the property in question to the Peter Fox Sons Company, and completed a delivery of the same by turning it over to that company or its representative, with the intention on the part of plaintiff that it should cease to be its property, and should be owned and taken possession of by the Peter Fox Sons Company, then it would become the property of that company." "But if, upon the other hand, it was the intention of the parties at the time

of the transaction detailed in evidence as to the placing of the property in the car, that the plaintiff should retain title and possession thereto until the Peter Fox Sons Company had paid the purchase price, then such intent of the parties would govern, and the title would remain in the plaintiff, and it would be entitled to a verdict for whatever you find the value of the property to be under the evidence that has been adduced; and before the defendants are entitled to a verdict at your hands you must be convinced that it was the intention of the parties that the property, as loaded in the car in question and the full right of control over it, free of any claims of right in the plaintiff to hold it as against the Peter Fox Sons Company, should pass to that company." Under these instructions, unquestionably correct under the issues and evidence, the jury was informed particularly as to the issues to be passed upon by them and as to plaintiff's rights thereunder; and nothing less than palpable erroneous instructions as to the burden of proof would warrant setting aside the verdict on such grounds.

On this subject, did the court properly refuse to give the following instructions requested by appellants? "The burden of proof in this case is upon the defendant to establish that the title to the poultry in question was transferred to the Peter Fox Sons Company by the plaintiff, as claimed by the defendant." The question of who has the burden of proof in an issue between attaching creditors and a third-party claimant, where the property at the time of the levy is in the possession of such third-party claimant, or, in other words, when the sheriff under the writ of attachment dispossesses a third-party claimant, is an open question in this jurisdiction. And it is not necessary here to pass upon it, as the possession of the car was in dispute under the evidence. The main issue of fact for the jury to determine was whether Fox, on behalf of his company, was in actual possession at the time of the levy. Most of the declarations made and circumstances above set forth are on the question of possession as well as ownership; and there is evidence that shortly prior to the levy, Fox had left the car for the avowed purpose of settling with plaintiff for the poultry, and, returning, was exercising control over the property and continued to do so until the levy. Plaintiff denies any settlement, and offers testimony that under its theory of the case may harmonize with its ownership and actual possession of the property, to the effect that it had not parted with possession and had no intention

of delivering the car to Fox until such settlement was had and thereunder passed title to his company. Nevertheless the jury found against defendant's claim and in so doing passed upon a direct conflict of evidence. There are holdings to the effect that where the undisputed possession of the property levied upon is in the third-party claimant, a presumption of ownership from possession arises, sufficient to make the levy prima facie wrongful as a levy upon goods other than those of the defendant in attachment. But this question is not before us, the possession being a disputed fact in evidence. And as the case stands the third-party claimant is unaided by any such presumption, and the burden is where it was placed primarily by the pleadings upon the third party claimant, the plaintiff, to establish his title and right of possession by a fair preponderance of all the evidence thereon. In view of an apparent conflict of the authorities on this question, we will state that from an examination of what we believe to be nearly all the authority available on this question, the conflict apparently arises in the first instance because of the difference in procedure, causing the third party to be regarded accordingly at times as an intervener, and as such an additional party defendant as to whom the plaintiff, the attaching creditor, still has the burden of proof because of being plaintiff in the action. And then again, under statutes requiring separate actions therefor to be brought after service of notice or third-party claim, in which instances the burden of proof as in other cases being upon the plaintiff under the pleadings, he has to assume it throughout the trial. But in nearly all of the states, even where the third party intervenes in the original attachment action, such third party has such burden of proof, except where the property is found by the sheriff in the undisputed possession of the third party, the intervener, whereupon a presumption of ownership is, in some jurisdictions, held to arise from the fact of such possession.

The court rightfully refused to give the instructions requested, and placed the burden of proof where it belonged. 2 Enc. Ev. 82–86; Shinn, Attachm. §§ 437, 438; Wallace Bros. v. Robeson, 100 N. C. 206, 6 S. E. 650, for a full discussion on a statute practically our § 6951, Rev. Codes 1905, under third-party claim; Wear v. Sanger, 91 Mo. 348, 2 S. W. 307; Burr v. Clement, 9 Colo. 1, 9 Pac. 633; 3 Elliott, on Evidence, §§ 1751, 1752, from which we quote: "Where a third party interpleads or brings an independent action, claiming a superior right to the at-

tached property, the burden in most jurisdictions is upon such party to show his better claim." And then again: "Where a petition of intervention to an attachment is filed, and the petition is based upon the fact that the property belongs to the one intervening, and claims that the intervener acquired it by purchase prior to date of attachment, the burden is upon such intervener to show that he owned it before the filing of the attachment, and to prove by what manner he acquired title to it or any other interest he may claim." "The burden of proof is usually upon the intervening claimant to prove that the property belongs to him if in the hands of the attachment defendant; and this is true even though the property is not actually in his possession but only constructively so, or if in the hands of his agent or of a carrier. The plaintiff has the burden of showing that at the time of seizure the sale was completed and title had passed." 47 Century Dig. col. 216, under title "Burden of Proof;" 4 Wigmore, Ev. chap. 86 and § 2515; Standard Implement Co. v. Parlin & O. Co. 51 Kan. 566, 33 Pac. 363; Mathis v. Carpenter, 95 Ala. 156, 36 Am. St. Rep. 187, 10 So. 341–343; Lagomarcino v. Quattrochi, 89 Iowa, 197, 56 N. W. 435; Wilson v. Hill, 17 Nev. 401, 30 Pac. 1076.

A request was made that the jury be informed that a right of stoppage *in transitu* existed in plaintiff, whereby plaintiff could reclaim the property until it was actually delivered to the Fox Company in Chicago. This request was properly refused as without the scope of the proof. Two further assignments of error are based upon the refusal of the court to give certain instructions in the identical terms as requested. As the court's charges fully and substantially covered the matters contained in the requested instructions, appellants have nothing of which to complain. This covers all errors assigned.

The judgment is ordered affirmed.

SPALDING, Ch. J. (dissenting). The decision in the case of Goldstein and Kuhlberg v. The Peter Fox Sons Company, just decided, did not meet with my concurrence, in brief, because I am satisfied that the court never acquired jurisdiction of the defendants therein, or of their property, notwithstanding the apparent array of authorities referred to in the opinion. The relevancy of the cases so referred to in the decision of this court is, in my opinion, with one or two exceptions, more ap-

parent than real. In that case it was not simply a misdescription of the defendants in the title to the action, but it was an attempt to sue a party which did not exist, and recovery was had against a party never sued and never before the court, and one over whom jurisdiction could not be obtained by an amendment made without notice. One of the plaintiffs verified the complaint, and therein it was stated that the defendant was a foreign corporation, and the right to an attachment was based, among other grounds, upon the allegation that the defendant was a foreign corporation. Similar allegations were contained in the other papers in the proceeding. The undertaking for attachment was given to a foreign corporation and never amended, and the sureties therein never incurred any liability to the defendants. A suit cannot be brought by or against a partnership in the firm name except as authorized by statute, and this state has no statute authorizing it. 30 Cyc. 560, ¶ 2, and note 19.

I am of the opinion that the decision in the companion case is vitally wrong in principle, and furnishes a most dangerous precedent; that it is a misconstruction of the statute regarding amendments and contrary to the weight of authority; and it being clear that the admissibility of evidence and the defense in general, in the instant case, are so related to and affected by the decision of the trial court in the other case that they cannot be disentangled, that there should be a reversal herein.

TEE v. NOBLE.

(135 N. W. 769.)

Dismissal — counterclaim and cross bill — voluntary dismissal.

1. A plaintiff cannot avoid meeting the issues presented by a counterclaim or cross bill, by dismissing his complaint, or so much thereof as relates to said counterclaim or cross bill. Such cross bill or counterclaim, however, must be properly pleaded.

Pleading — counterclaim.

2. A counterclaim must be able to stand by itself and be complete in itself, and must be separately stated.

Taxation — adverse claims — certificate of tax sale.

3. In order to maintain an equitable action or counterclaim to set aside a tax certificate on account of an unlawful combination to stifle and prevent competition at the sale, equity must be done by first paying or offering to pay the amount due to the county at the date of such sale. (Following Noble v. McIntosh, ante, 53, 135 N. W. 663). In this respect a distinction is made between an equitable action and an action brought in statutory form under §§ 7519 and 7222 of the Revised Codes of 1905, to determine adverse claims to real property, in which latter case the court may decree the payment as a condition of granting relief, without the necessity of a specific offer to do equity.

Principal and agent — foreclosure of mortgage — implied authority.

4. An agent who is authorized to foreclose a mortgage and collect the amount due upon the same has no implied authority to consent to the assignment of the mortgage to another person on payment of the principal and interest, especially where there is a controversy over taxes due and unpaid.

Opinion filed February 26, 1912. Rehearing denied April 24, 1912.

Appeal by defendant from a judgment of the District Court for Bottineau County, *F. E. Fisk*, J., in plaintiff's favor in an action to foreclose a mortgage.

Modified and affirmed.

This is an action to foreclose a mortgage on certain land in Bottineau county. In the original complaint an attempt was made to include with the mortgage debt the indebtedness due upon a certain tax certificate, which had been purchased by the mortgagee, and a decree of foreclosure was asked which should include both the amount due upon the mortgage and the amount due upon the tax certificate. The certificate was the same to cancel which the proceeding in the case of Noble v. McIntosh, ante, 53, 135 N. W. 663, which has been argued and decided at the October term of court, was brought; and the case mentioned and the one at bar are closely related. In his amended answer the defendant, Noble, as administrator of the estate of the mortgagor, alleged that the tax certificate was void on account of the fact that there had been no competitive bidding at the sale, and asked "that the said tax certificate be canceled as a cloud upon the defendant's title, and for such other and further relief as equity deems just." He also offered, in his pleadings, and in order to conserve said estate, to personally pay the

amount of $5,200 for an assignment to him, personally, of said mortgage, according to an alleged prior agreement, but not the amount claimed for taxes. The amended answer also failed to allege or to show any tender or offer to pay to the mortgagee or to the purchaser of the said tax certificate the amount of the taxes, which offer or tender this court, in the case of Noble v. McIntosh, before referred to, and in an equitable action against the holder of the certificate, decided was necessary in order to maintain an action for canceling or setting aside the certificate.

After the filing of the amended answer, the plaintiff moved to amend the complaint by striking out all of the paragraphs therein relating to the said tax certificate, and to amend the prayer for relief so that the judgment asked would include the amount of the mortgage debt and interest alone. This motion was granted, and although the case comes to us under the Newman law, defendant and appellant assigns the granting of this motion as error, and on the trial and against the objection of irrelevancy and incompetency and failure of inclusion within the issues, introduced evidence tending to show the tender to the mortgagee of the amount of his mortgage debt, with interest, and the fact of the collusion and conspiracy to defeat competition at the tax sale, and asked for a judgment canceling the said tax certificate and assigning the mortgage to him as such administrator. He maintains that the plaintiff should not have been allowed to strike from his complaint the allegations in regard to said tax certificate, as issue had been taken thereon in the answer, and insists that this court should decree a cancelation of the tax certificate, whereas the trial court merely recognized the mortgage. He also contends that the trial court erred in entering a deficiency judgment, as there is no evidence in the record that the plaintiff filed his claim with the administrator within the time allowed for the presentation of claims against the estate of the decedent. The correctness of the last contention, however, has been admitted by the respondent, and he consents to the entry of a judgment for the foreclosure of the mortgage merely, and waives his claim to the deficiency decree. The defendant, it will be noticed, did not ask for a satisfaction of the mortgage, but for an assignment of it to him for the reason that he was "paying $5,200 out of his own funds for the purpose of protecting the estate, and that it was his intention to hold said mortgage until such time as

the premises could be advantageously mortgaged to pay the said indebtedness, and until such time as the claim for taxes could be settled, adjusted, and adjudicated." He also alleged in his answer that prior to the foreclosure proceedings, he had made an agreement with Bowen & Adams, attorneys for the plaintiff, that said mortgage would be assigned to him for the sum of $5,200, and that no foreclosure proceedings would be instituted, and that the payment or adjustment of the taxes should not be necessary to such assignment. The trial court gave judgment of foreclosure for the sum of $5,385.70, the principal and interest upon the mortgage debt, with a deficiency decree, and from this judgment the defendant appeals.

Noble, Blood, & Adamson, attorneys for appellant.
Bowen & Adams, attorneys for respondent.

BRUCE, J. (after stating the case as above). The appellant is, no doubt, correct in his contention that after the filing of an answer containing a cross-bill or counterclaim, the plaintiff has no right to amend his complaint so as to escape taking issue thereon, provided such cross-bill or counterclaim is properly pleaded. It would be, perhaps, more correct to say that he can amend his complaint if he chooses, but that he cannot escape the issues presented by the counterclaim. We are of the opinion, however, that in this case a counterclaim was not properly pleaded. There was a prayer for the cancelation of the certificate, but nothing which would stand by itself as a counterclaim or as a cross-bill, and which did not need to be bolstered up, not merely by the remaining portions of the answer, but by the complaint in itself. (Code 1905, § 6860.) So, too, the counterclaim was lacking in defendant's failure to allege a willingness to do equity. This question has been decided in the recent case of Noble v. McIntosh, ante, 59, 135 N. W. 663, which we have before referred to, and that case is founded upon the prior decision of Powers v. First Nat. Bank, 15 N. D. 466, 109 N. W. 361. The rule, indeed, that in an equitable action a willingness to do equity must be pleaded and supported by proof, has been thoroughly established in this court; and in the recent case of Powers v. First Nat. Bank, supra, a clear distinction has been made between an equitable action technically speaking, and one which is brought under §§ 7519

and 7522 of the statute, to determine adverse claims. The case of State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357, indeed, which is cited by counsel for appellant and which might seem to announce a different doctrine and to support the appellant's contention, was an action to determine adverse claims, and in the later case of Powers v. First Nat. Bank, to which we have just referred, was clearly distinguished. "A new rule," said Chief Justice Morgan, "is announced in this case, overruling previous cases in this court so far as the application of this equitable principle in actions between private parties . . . is concerned. Upon mature consideration we conclude that no sound distinction can be drawn between such actions and those against public officers that will warrant the application of this equitable principle in the one case and withholding it in the other. . . . In this case the plaintiff did not allege in the complaint a payment or an offer of payment of the taxes justly due. If the action be considered one solely to determine adverse claims, such an allegation is not necessary, as the statute prescribes a form of complaint for such cases. In such actions if it developes on the trial that taxes are justly due, the plaintiff should offer to pay them before equitable relief will be granted. In this case that was not done. . . . Hence, there is no ground for interference by a court of equity until the plaintiff himself shows a disposition to do equity." And, again, in another place in the opinion, he says: "The relief sought is equitable, hence equitable principles must be applied in the determination of the issues. The mere fact that the action is between private parties only is not enough to take it out of the rules applicable to equity cases. . . . The owner comes into a court of equity, asking that he be relieved from tax proceedings which he claims to be illegal. Before his prayer should be granted he should do equity himself, and reimburse the tax purchaser, and save the county from the burden of having to pay out the money received as taxes on plaintiff's land, which the latter does not claim not to owe."

We now come to a consideration of the question as to whether the offer of the defendant to pay into court the sum of $5,200 due under the mortgage, but not including the amount of the taxes, would preclude the entering of the judgment of foreclosure. We think that it did not. We find nowhere in the record any clear and satisfactory evidence of an agreement on the part of the plaintiff to assign the mortgage to

the administrator, V. B. Noble, upon the payment of the sum of $5,200, and without some such agreement we can see no foundation for any duty on the part of the plaintiff to assign the mortgage to him, even though a tender was made. V. B. Noble, as an individual, was not a party to the action. He was not a proper party defendant, and we find no record of his having intervened in the action, or of any right to so intervene. The only evidence, too, upon the subject of this alleged agreement is to be found in the testimony of Mr. Blood, who says that "in the fall of 1910 I called at Bowen & Adams's office. I met Mr. Adams. I first found out that they had the mortgage for collection. In the conversation it was stated by him that he did not know whether an assignment could be made of them or not, but that he would find out. About a week later I called at the office, and Mr. Adams was not in, but Mr. Bowen was there. I put the proposition up to him that I would pay the mortgage and the coupon note—pay the amount in full—if it could be arranged to get an assignment. I thought this would be better, it being an estate mortgage, and would save the expense of going through court to get an order to mortgage, and also in regard to those taxes. Mr. Bowen said that that would be satisfactory, and that he would do it. I did not see him again until the 1st day of December, when it was due, and I went there and asked him if he was ready to assign the mortgage, and offered to pay him myself. He then stated that he could not deliver it until the full amount of the mortgage and taxes were paid. Of course that was all there was to it." We do not see in this any agreement that would bind the plaintiff Tee. It was clearly not a matter within the implied authority of the agent, and there is certainly no evidence in the record of any ratification of the agreement, if agreement it be, by the principal, or of any authority given by him for it. Authority to collect a mortgage note is not authority to sell or assign it to some third person, especially when the principal at the same time has a claim or imagined claim for taxes due and unpaid.

The judgment of the District Court will be modified so as to strike therefrom all reference to and any judgment therein contained for a deficiency, and as so modified the judgment of the District Court will be affirmed. Neither party will be allowed any costs or disbursements upon this appeal.

SCHUMACHER v. GREAT NORTHERN RAILWAY COMPANY.

(136 N. W. 85.)

Marriage — legislative power — what shall be recognized as the marriage status.

1. It is within the legitimate exercise of the legislative power of the state to declare, as to its citizens, what shall be recognized as the marriage status.

Marriage — common-law marriage.

2. Prior to the enactment of chapter 21, Laws of 1890, the common-law marriage was expressly recognized as valid in this state, but by the enactment of said chapter, which is still in force as §§ 4032 to 4042, Rev. Codes 1905, which expressly repealed the old statute *in toto*, it was unquestionably the legislative intent to abrogate such common-law marriage in this state, and such intent must accordingly be given effect.

Marriage — statutory provision.

3. The words, "the marriage relation shall be entered into . . . only as provided by law," as used in § 1, chap. 91, Laws 1890, are held to be mandatory and prohibitive.

Appeal and error — reversal — judgment.

4. Under § 7044, Rev. Codes 1905, this court is expressly authorized, in the cases enumerated therein, to direct judgment *non obstante veredicto* notwithstanding the prior entry of judgment in the trial court.

Opinion filed January 4, 1912. On rehearing April 27, 1912.

Appeal by defendants from a judgment of the District Court for Ward County, *E. T. Burke,* J., in plaintiff's favor, and from an order denying a motion for judgment notwithstanding the verdict, or for a new trial, in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate.

Reversed.

Murphy & Duggan, for appellants.

Common law marriages, so-called, cannot be entered into under the laws of this state. Norman v. Norman, 121 Cal. 620, 42 L.R.A.

Note.—The authorities on the question of the effect of statutes on common-law marriages are collated in a note in 2 L.R.A.(N.S.) 353.

As to validity of common-law marriages, generally, see note in 79 Am. St. Rep. 361.

343, 66 Am. St. Rep. 74, 54 Pac. 145; Morrill v. Palmer, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829; Milford v. Worcester, 7 Mass. 48.

Evidence insufficient to show a marriage at common law. Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164; Henry v. Taylor, 16 S. D. 424, 93 N. W. 641; Re Terry, 58 Minn. 268, 59 N. W. 1014.

F. B. Lambert, for respondent.

Sufficient evidence submitted to prove a statutory marriage. Gibson v. Gibson, 24 Neb. 394, 39 N. W. 466; Harman v. Harman, 16 Ill. 85; Miller v. White, 80 Ill. 580; 8 Enc. Ev. p. 442; p. 443, note; Botts v. Botts, 108 Ky. 414, 56 S. W. 677, 961; Senge v. Senge, 106 Ill. App. 140; 26 Cyc. p. 878, note 21; Fornshill v. Murray, 1 Bland, Ch. 479, 18 Am. Dec. 344.

Common law marriage good in North Dakota. 1 Bishop, Marr. & Div. § 691; 2 Bishop, Marr. & Div. § 423; Lewis v. Tapman, 90 Md. 294, 47 L.R.A. 385, 45 Atl. 459; Ahlberg v. Ahlberg, 24 N. Y. Supp. 919; Hulett v. Carey, 66 Minn. 327, 34 L.R.A. 384, 61 Am. St. Rep. 419, 69 N. W. 31; Rose v. Clark, 8 Paige, 580; Askew v. Dupree, 30 Ga. 173; Meister v. Moore, 96 U. S. 76, 24 L. ed. 826; State v. Zichfeld, 23 Nev. 304, 34 L.R.A. 784, 62 Am. St. Rep. 806, 46 Pac. 802; Dyer v. Bannock, 66 Mo. 391, 27 Am. Rep. 359; State v. Worthingham, 23 Minn. 528; Ex parte Romans, 78 S. C. 210, 58 S. E. 614; Pegg v. Pegg, 138 Iowa, 572, 115 N. W. 1027; Jackson v. Banister, 47 Tex. Civ. App. 317, 105 S. W. 66.

Fisk, J. On July 11, 1907, one Louis P. Schumacher, an employee in the capacity of brakeman for defendant railway company, was killed as the result of a wreck of a freight train on which he was at such time employed. Plaintiff, the father of deceased, brought this action, as administrator, to recover alleged damages resulting to one Ida Schumacher and her child by the death of Louis. The trial resulted in a verdict in plaintiff's favor for the sum of $5,500. The appeal is from the judgment entered on such verdict and also from an order denying defendants' motion in the alternative for judgment notwithstanding the verdict for a new trial. There are a large number of alleged errors assigned in appellants' brief, but we find it necessary to notice but one. It is practically conceded that the recovery cannot be sustained unless it can be held that the said Ida Schumacher and her infant

child, who were found to be the sole beneficiaries of the recovery, are the legal heirs of the deceased, and this in turn depends on whether respondent's contention that there was a common-law marriage entered into between the deceased and Ida, can be upheld. In the light of the record it cannot be successfully asserted that there is any proof of a marriage between these parties other than what is known as a common-law marriage. Now, do we understand that respondent makes any serious contention to the contrary? At the trial plaintiff sought to show such a common-law marriage, but the proof thereof was objected to by the defendants; the latter contending that under the statutes of this state such a marriage is not only not recognized, but is clearly prohibited.

So far as we are aware this is the first time this court has been called upon to pass on this question; and in view of its great importance, not only to the parties directly involved, but to our citizens generally, we have concluded to place our decision squarely on this point, conceding, for the purpose of the case, the sufficiency of the evidence to support a common-law marriage, regarding the sufficiency of which evidence we entertain some doubts.

We deem it beyond controversy that it is within the legitimate legislative power of the state to declare, as to its citizens, what shall be recognized as the marriage status, and what shall be deemed contrary to its policy. This being true, decisions of courts recognizing common-law marriages under statutes materially differing from those in this state are of no assistance to us in disposing of the question in hand. We freely admit that, in a majority of the American states, decisions may be found upholding such marriages; but we think they will, without exception, be found, on investigation, to be based on statutes radically different from our own. For a good statement of the general rule as to common-law marriages, as well as a review of the leading cases on the subject, see 1 Andrews, American Law, § 482, from which we quote as follows: "In the absence of a restrictive statute, the manner in which marriage may be entered into and proved, and likewise the manner of its dissolution, depend in no small degree upon the view taken by the court of the nature of marriage. . . . Those courts which hold that marriage is a mere contract, hold that the common law requires parties who are under no legal disability and a contract substantially in the present time—that is, at the time of beginning the

relation—that 'we take each other now,' and not that 'we take each other at a future time;' that there are two essentials to a valid marriage,—capacity and consent. They do not require a ceremonial marriage, but insist upon a contract of marriage *per verba de presenti* as the beginning of the marriage relation (not necessarily at the beginning of cohabition). The adverse view requires conduct showing the assumption of the status. 'Whatever,' says the supreme court of Illinois, 'may be the rule governing other contracts, the contract of marriage is *jure gentium*, and consent and the assumption of the marriage status are all that is required by natural or public law.' The laws of civilized countries universally provide for some public celebration of marriage, but only in a few countries is such a ceremony as is provided by law absolutely essential to marriage."

In a note the author, after referring to the general rule, says: "In California the Code originally provided that marriage could be entered into by being solemnized, etc., or *'by a mutual assumption of marital rights, duties, or obligations.'* A subsequent revision omitted these, and added that a noncompliance *'by others than the parties'* should not invalidate. It was held that there could be no more nonceremonial marriages in that state. Norman v. Norman, 121 Cal. 620, 42 L.R.A. 343, 66 Am. St. Rep. 74, 54 Pac. 143." If the decision of the California court be a sound interpretation of the California statute, and of this we entertain no doubt, it logically follows, with still more forceful reasons, as we shall presently see, that our statute should receive a like interpretation. Prior to 1890 our statute defining the marriage contract was identically the same as the former statute in California, and read as follows: "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, *or by mutual assumption of marital rights, duties or obligations.*"

The provisions of the above section, as well as subsequent sections then in force and which are embraced in article 1 of chapter 1 relating to the validity of marriage contracts (Comp. Laws 1887), clearly recognized nonceremonial marriages. But in 1890 the legislature revised the entire law relation to the subject of marriage contracts, making radical changes in the prior statute, and clearly evincing a purpose to abrogate

nonceremonial marriages. The 1890 law (chap. 91) expressly repealed the old statute *in toto,* and the first section of the law defines the marriage contract as follows: "Marriage is a personal relation, arising out of a civil contract to which the consent of the parties thereto is essential; *but the marriage relation shall be entered into, maintained, annulled, or dissolved only as provided by law.*" The words italicized are perfectly clear and susceptible of but one meaning, which is to the effect a radical change in the prior statute by abrogating the policy therein clearly evinced of recognizing nonceremonial marriages. Any other construction would be absurd, as it would ignore not only the plain words of the statute, but also the evident legislative intent to effect a change in the prior statute. The change effected by the amendment to the California statute consisted of the omission of the words "by a mutual assumption of marital rights, duties, or obligations," which omitted words expressly recognized nonceremonial marriages, and by substituting the words, "It must be followed by a solemnization authorized by this code." While, as we have seen, the change in our statute not only omitted such language, but substituted in lieu thereof an express mandate that "the marriage relation shall be entered into, . . . *only* as provided by law." The words just quoted cannot be treated as directory merely, but on the contrary they are clearly mandatory and prohibitive. Any other construction would operate to nullify the plain legislative purpose in changing the former statute.

A very instructive case reviewing the authorities at length and holding in accordance with our views is the case of Re McLaughlin, 4 Wash. 570, 16 L.R.A. 699, 30 Pac. 651. The Washington statute under consideration in that case is not nearly so clear as ours in evincing the legislative intent to abrogate common-law marriages. In holding their statute mandatory and prohibitive, and not merely directory, the following language is used: "It is true the legislature may expressly provide that all marriages not entered into in the ways pointed out by the statutes, and not within the exceptions provided for, shall be held invalid, but this affords no reason for not giving effect to the clear intention otherwise expressed in the legislation existing, because the legislature has not expressly declared all others void. Our statutes in relation thereto would, if upon any other subject, be held mandatory and prohibitive, and we see no reason why the same effect should not

be given to them here, for the law could as well say that all attempted marriages should be valid, notwithstanding the statutory requisites were not complied with."

The rule thus announced was expressly recognized as the established law in Washington in the recent case of Potter v. Pottter, 45 Wash. 401, 88 Pac. 625. See also Morrill v. Palmer, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829.

It would serve no good purpose to enter into an extended consideration of cases decided in other states under statutes differing widely from our own, and we shall not attempt to do so. Suffice it to say that notwithstanding the very able and ingenious argument of respondent's counsel, which we have carefully read and considered, together with the many cases cited and claimed by him to be in point under alleged similar statutes, we are forced to the conclusion that his contention is unsound, and that in this state the legislature has, in unmistakable language, intentionally abrogated the common-law marriage.

This conclusion necessitates a reversal of the judgment, and it only remains for us to determine whether appellants are entitled to judgment *non obstante veredicto* as prayed for by them. Respondent contends that a motion for such relief comes too late when made after the entry of judgment in the district court, and certain authorities are cited and relied on in support of such contention; but in the light of the clear and specific provisions of our Code (Rev. Codes 1905, § 7044) which, of course, are controlling and which respondent's counsel has evidently overlooked, we are compelled to overrule such contention. The statute referred to, so far as material, is as follows: "In all cases where at the close of the testimony . . . a motion is made by either party to the suit requesting the trial court to direct a verdict in favor of the party making such motion, which motion was denied, the trial court on motion made that judgment be entered notwithstanding the verdict, or on motion for a new trial, shall order judgment to be entered in favor of the party who was entitled to have a verdict directed in his or its favor; and the supreme court of the state, on appeal from an order granting or denying a motion for a new trial . . . or upon a review of such order or on appeal from the judgment, may order and direct judgment to be entered in favor of the party who was entitled to have such verdict directed. . . ."

The judgment and order appealed from are accordingly reversed, and the District Court is directed to enter a judgment in defendants' favor, dismissing the action.

BURKE, J., not participating, Honorable S. L. NUCHOLS, Judge of the Twelfth Judicial District, sitting in his place by request.

On Rehearing.

PER CURIAM. A rehearing having been granted on the question whether, under our statutes, common-law marriages have been prohibited in this state, such question has again been argued at length by counsel, and, after due consideration, we see no reason to change our former views. An added, and, to our minds, a very persuasive reason for believing that the legislature in enacting chapter 91, Laws 1890, must have intended to prohibit common-law marriages, is the fact that certain sections of the prior statute providing for declarations of marriage where no solemnization thereof was had, and requiring, for the purposes of authentication, the registration of such declarations, and prescribing that such declarations or certified copies thereof shall be presumptive evidence of the fact of the marriage, were by such act expressly repealed. This is most conclusive evidence of such legislative intent, for it is unbelievable that such salutory provisions would not have been continued in force if the common-law marriages were to continue to be thereafter recognized or permitted. See Comp. Laws 1887, §§ 2545 and 2552, being §§ 46 and 53 Civil Code 1887. Also § 18 of chap. 91, Laws 1890.

Counsel for respondent argues that the statutory language in § 1, chapter 91, aforesaid, "but the marriage relation shall be entered into, . . . only as provided by law" means as provided by either statutory or common law. This is manifestly erroneous. Such a construction would render the entire statute meaningless and absurd. That the words "as provided by law" have reference merely to the statutory, and not to the common law, is perfectly apparent. See Brinckerhoff v. Bostwick, 99 N. Y. 185, 1 N. E. 663. Also 25 Cyc. 163 and 164 and cases cited. In the Brinckerhoff Case the court of appeals of New York said: "Such expressions as 'required by law,' 'regulated by law,'

'allowed by law,' 'made by law,' 'limited by law,' 'as prescribed by law,' 'a law of the state,' are of frequent occurrence in the Codes and other legislative enactments; and they are always used as referring to statutory provisions only."

The order previously made will stand.

STATE EX REL. MOUNTRAIL COUNTY et al. v. AMUNDSON et al.

(135 N. W. 1117.)

Counties — divison of — what constitutes "public property" — adjustment of liabilities.

Mountrail county was organized out of territory formerly embraced in Ward county, and at the meeting of the county commissioners of both counties pursuant to § 2336, Rev. Codes 1905, for the purpose of effecting a settlement between the counties of the indebtedness and property therein, a disagreement arose as to the proper construction of said statute, the Mountrail county commissioners contending that the bonds given or money paid by Ward county for roads and bridges remaining within such original county should be deducted from the total indebtedness thereof, upon the ground that such roads and bridges constitute public property owned by the county within the meaning of subdivision 2 of said section. On the other hand, the commissioners of Ward county deny that they should be charged with the cost of such roads and bridges, and contend that the cost of record books purchased by the old county for use in its various county offices should not be charged to it. They also contend that in such accounting and settlement Ward county should not be charged for any public property owned by it, except on the basis of its actual value.

Held, construing said section, that neither of such contentions are correct, and that the trial court properly held that the roads and bridges do not constitute public property owned by the county within the meaning of said statute; that the cost, and not the actual value of the public property remaining in Ward county, must be accounted for without taking into consideration any depreciation or appreciation in the value of such property, and that the record books remaining in the various county offices of Ward county are public property owned by it, and the cost thereof was, therefore, properly debited to Ward county.

Opinion filed March 20, 1912. Rehearing denied April 29, 1912.

Appeal from District Court, Ward County; *Charles F. Templeton,* Special Judge.

Mandamus by the state, on the relation of Mountrail county and others against Arne Amundson and others, as members of the board of county commissioners of the county of Ward. From the judgment directing the terms of settlement between the counties, both parties appeal.

Affirmed.

R. O. Miller, H. J. Linde, George R. Robbins, and *George A. Bangs,* for Mountrail County.

If the legislature does not otherwise provide, it will be presumed that the counties are to be continued precisely as they were created by the division, the old county subject to its former liabilities and owning its property, and the new county starting out afresh, with no liabilities and owning no property save such as may be within its boundaries, and entitled to no credits from the old county. 11 Cyc. 349; 7 Enc. 908, 913; 1 Cooley, Taxn. 414; 1 Dill. Mun. Corp. 63; North Hemstead v. Hemstead, 2 Wend. 109; Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552; People v. Alameda County, 26 Cal. 642; Beals v. Amador County, 28 Cal. 449; Beals v. Amador County, 35 Cal. 624; Los Angeles County v. Orange County, 97 Cal. 329, 32 Pac. 316; Orange County v. Los Angeles County, 114 Cal. 390, 46 Pac. 173; Tulare County v. Kings County, 117 Cal. 195, 49 Pac. 8; Kings County v. Tulare County, 119 Cal. 509, 51 Pac. 866; Colusa County v. Glenn County, 124 Cal. 498, 57 Pac. 477; San Diego County v. Riverside County, 125 Cal. 495, 58 Pac. 81; Riverside County v. San Bernardino County, 134 Cal. 517, 66 Pac. 788.

Ward County should be charged with the amounts expended for roads and bridges remaining therein. 4 Am. & Eng. Enc. Law, 2d ed. 921; Elliott, Roads & Streets, §§ 52, 77; Christian County Ct. v. Rankin, 2 Duv. 502, 87 Am. Dec. 505; Lawrence County v. Chattaroi R. Co. 81 Ky. 225; Louisville & N. R. Co. v. Whitley County Ct. 95 Ky. 215, 44 Am. St. Rep. 220, 24 S. W. 604; Greenup County v. Maysville & B. S. R. Co. 88 Ky. 663, 11 S. W. 774; Leslie County v. Southern Lumber Co. 28 Ky. L. Rep. 335, 89 S. W. 242; Bidelman v. State, 110 N. Y. 232, 1 L.R.A. 258, 18 N. E. 115; Ft. Covington v. United States & C. R. Co. 8 App. Div. 223, 40 N. Y. Supp. 313, affirmed in

156 N. Y. 702, 51 N. E. 1094; Palatine v. Canajoharie Water Supply Co. 90 App. Div. 548, 86 N. Y. Supp. 412, affirmed in 184 N. Y. 582, 77 N. E. 1197; Lenox v. State, 61 Misc. 28, 114 N. Y. Supp. 746; Corwin v. Cowan, 12 Ohio St. 629; Wagner v. Cleveland & T. R. Co. 22 Ohio St. 563, 10 Am. Rep. 770; Perry County v. Newark, S. & S. R. Co. 43 Ohio St. 451, 2 N. E. 854; Chambersburg & B. Twp. R. Co. v. Franklin County, 6 Serg. & R. 229; Shirk v. Carroll County, 106 Ind. 573, 5 N. E. 705, 7 N. E. 251; Troy v. Cheshire R. Co. 23 N. H. 83, 55 Am. Dec. 177; Monmouth County v. Red Bank & H. Turnp. Co. 18 N. J. Eq. 91; Com. v. Fitzgerald, 164 Mass. 587, 42 N. E. 119; State ex rel. Neeves v. Wood County, 41 Wis. 28; Howard County v. Chicago & A. R. Co. 130 Mo. 652, 32 S. W. 651; Hookset v. Amoskeag Mfg. Co. 44 N. H. 105.

Dudley L. Nash, states attorney, and *George L. Ryerson,* Assistant, (*Scott Rex* of counsel), for Ward County.

Depreciation, deterioration, and decay are to be taken into account in making the computation under subdivision 2 of the statute. Lawrence County v. Mead County, — S. D. —, 62 N. W. 131; Vermont Loan & T. Co. v. Whithed, 2 N. D. 101, 49 N. W. 318; Gaar, S. & Co. v. Sorum, 11 N. D. 171, 90 N. W. 802; State ex rel. Flaherty v. Hansen, 16 N. D. 347, 113 N. W. 371; People v. Ballard, 134 N. Y. 303, 17 L.R.A. 737, 32 N. E. 62; Manston v. McIntosh, 58 Minn. 525, 28 L.R.A. 605, 60 N. W. 672; Church of Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Burleigh County v. Kidder County, 20 N. D. 27, 125 N. W. 1063; Re Fremont & B. H. Counties, 8 Wyo. 1, 54 Pac. 1073; Shoshone County v. Thompson, 11 Idaho, 130, 81 Pac. 73; Forest County v. Langlade County, 91 Wis. 543, 63 N. W. 760, 65 N. W. 182.

Fisk, J. The facts necessary to a correct understanding of the questions involved on these appeals are not seriously in dispute, nearly all of such facts having been stipulated. In brief they are as follows:

Mountrail county, which was formerly embraced within the territory of Ward county, was, at the general election in 1908, duly segregated therefrom and set apart as Mountrail county pursuant to law. Such new county was organized in January, 1909, and thereafter the commissioners of the two counties met pursuant to law and attempted to effect

a settlement of the property and indebtedness between the two counties. They failed to agree as to the statutory rule which they should follow in making such settlement, and for the purpose of obtaining a judicial determination of the questions in dispute, relators, both in their capacity as individual taxpayers and as members of the board of county commissioners of Mountrail county, instituted mandamus proceedings against defendants as members of the board of county commissioners of Ward county. Issue was joined, and, as before stated, the facts were nearly all stipulated, and at the conclusion of the trial the district court found that there was a balance of $6,301.95 due from Mountrail county to Ward county, and entered judgment requiring the former to deliver to the latter its bonds for such balance.

From such judgment both parties have appealed. The learned trial court found that the total outstanding indebtedness of the original county of Ward on July 1, 1909, was $349,468.06; that the amount of outstanding bonds given and money paid for public property owned by and remaining within the limits of the original county of Ward on July 1, 1909, was $140,369.49; that the public funds of Ward county on hand July 1, 1909, excluding special funds, such as fire, school, road, and other funds, was $164,891.70; that after subtracting the last two items from the total indebtedness of Ward county a balance remains of $44,206.87, and that the portion thereof which Mountrial county should pay to Ward county, according to the comparative assessed valuations of the respective counties, is the sum of $6,301.95.

The questions in dispute are: —

1st. Is Ward county entitled to credit for any depreciation in the value of the property remaining within her territorial limits, and should she be charged with any appreciation in the value of such property?

2d. In such settlement should Ward county be charged with the amount expended by her in the construction of roads and bridges remaining within its limits, Mountrail county contending that the roads and bridges therein should be considered and treated as property within the meaning of the statute which we will hereafter notice.

3d. Included within the total outstanding indebtedness of Ward county is the amount of $79,649 in the form of bonds and warrants for material and labor in the construction of roads and bridges remaining

within the limits of Ward county; and the question is, Should Ward county be charged with the amount of this item, on the theory that such roads and bridges constitute property? And,

4th. The facts disclose that Ward county had expended the sum of $17,976.80 for record books consisting of permanent records for use in the various county offices, and should Ward county be charged therewith in such accounting?

We find no difficulty in arriving at the conclusion that the first question should be answered in the negative. The controlling statute, (Rev. Codes 1905, § 2336) is not susceptible of the construction contended for in behalf of Ward county. This section requires the county boards at their joint session "to ascertain as near as may be the total outstanding indebtedness of the original county, . . . and from such total they shall make the following deductions: . . . 2. The amount of outstanding bonds given or money paid for public property owned by and remaining within the limits of the original county." The words of the statute above quoted are unambiguous and leave no room for construction. If the property for which the bonds were given or money paid is still in existence and remaining in the original county, such county must be debited with the cost thereof as shown by the bonds given or money expended therefor, irrespective of its actual value or of any depreciation or appreciation in value of such property. The legislature, in its wisdom, saw fit to adopt the cost and ignore the actual value of such property as a proper rule in effecting such settlement; and whether such rule is equitable or inequitable the courts have no concern. Burleigh County v. Kidder County, 20 N. D. 27, 125 N. W. 1065.

The second and third questions are more difficult to answer. In behalf of Mountrail county it is strenuously contended that Ward county should be charged in such settlement with the amounts expended for roads and bridges remaining therein, and such contention is challenged in behalf of Ward county with equal vigor. Are the roads and bridges, or either of them, which have been constructed by Ward county and which remain therein "public property owned by . . . the original county," within the meaning of subd. 2, § 2336, Rev. Codes, 1905, and that therefore the amount of outstanding bonds given or money paid therefor must, pursuant to said section, be deducted from the total in-

debtedness of Ward county? In order to answer such question in the affirmative, we are required to hold that such roads and bridges are the property of Ward county. In behalf of Mountrail county it is insisted that Ward county has, at least, an insurable interest in such roads and bridges, and that such insurable interest constitutes ownership within the statute. Conceding the correctness of such premise, does it necessarily follow that the conclusion is sound? It is no doubt true that a county or other governmental subdivision of the state which has constructed bridges under legislative authority has a qualified interest therein, but does such qualified interest rise to the dignity of ownership within the legislative intent as disclosed in the statute in question? In other words, did the legislature intend to charge the old county with property in which it had merely a qualified interest or ownership, and that, as a mere trustee for the general public? Section 44a of *Elliott* on Roads & Streets, cited by counsel for Mountrail county, contains the statement: "The public, and not the local governmental subdivisions, are the owners of such bridges." Counsel for Mountrail county have cited numerous cases holding that a county or other governmental subdivision of a state may maintain an action to recover for injuries to roads and bridges constructed by them, but these cases merely hold that such governmental subdivisions have a qualified interest only in such roads and bridges, and the courts in most of the cases are careful to thus restrict their holdings. It is generally held, however, in accordance with Mr. Elliott's statement as above, that the public, and not the local governmental subdivision, is the owner thereof; the latter in a sense being the trustee therefor for the general public.

It would seem plain that such a qualified interest or ownership as entitled the county to insure its bridges or to enable it to maintain actions for injuries to its roads and bridges does not constitute such ownership as is contemplated in subd. 2, § 2336, Rev. Codes, which is to serve as a basis of settlements between old and new counties where a division has taken place. If the governmental subdivision is the owner in the common and general acceptance of the term, then the courts in the many authorities cited by counsel for Mountrail county would have placed their decisions upon that ground, instead of sustaining the county's right to recover because of its *qualified* interest in such roads

and bridges. These authorities serve to show that the county is not the owner except to a qualified extent.

We are agreed that when the legislature in § 2336, supra, prescribed that from the total indebtedness of the old county there should be deducted "the amount of outstanding bonds given or money paid for public property owned by and remaining within the limits of the original county," it intended to embrace only such public property as the old county had a proprietary interest in. In other words, that property owned by the public generally, the county having a mere qualified interest therein as above stated, was not contemplated by the legislature in the enactment of said section. A very important sidelight favoring this construction is the fact that the legislature, in providing for settlements between townships where a change of township lines is made, was careful to provide that road scrapers, plows, etc., shall be taken into account in effecting a settlement between the townships; but no mention is made of the highways. Rev. Code, § 3227. If roads and bridges are to be deemed an asset of the old county in effecting a settlement between the old and the new county, it would seem strange that the legislature did not treat them as assets of the old township in prescribing a rule for effecting a settlement between the townships.

Of course it is no doubt true that before material for roads and bridges is actually appropriated to the public use, as well as after it ceases to be devoted to such use, the county would have a proprietary interest and ownership therein, but while it is devoted to such public use it belongs to the public, and not to the county, except in a qualified sense, as above stated. The decision of this court in Vail v. Amenia, 4 N. D. 239, 59 N. W. 1092, to the effect that the township exercises merely a governmental function of the state as to highways and bridges, and hence is not liable for failure to repair the same, is inconsistent with the theory of a proprietary right or ownership by the township in such highways and bridges; for if it had such proprietary interest and ownership its duty to make repairs would seem plain. In People ex rel. Van Keuren v. Esopus, 74 N. Y. 310, the court held that "highways are not the property of the town, and the use is in the public, not for the benefit of the inhabitants of the town alone, but of the whole community." See also Freedom v. Weed, 40 Me. 383, 63 Am. Dec. 670; Gallia

County v. Holcomb, 7 Ohio, pt. 1, p. 232; Karr v. Putnam County, 170 Ind. 571, 85 N. E. 1.

We are unable to agree with counsel's statement in effect that the county has no greater interest or ownership in its courthouse and public grounds than it has in its highways and bridges. It is true that each are paid for by public moneys; but as to the courthouse, grounds, and other property the county has a proprietary interest therein, and may, under certain conditions, sell and transfer title to another. Not so, however, as to roads and bridges. They may not be sold, leased, or otherwise disposed of by the county, for they belong to the general public.

Another matter shedding light upon the legislative intent is the fact that under this statute no account is to be taken of the roads and bridges in the new county, and it seems strange, indeed, that the legislature would charge the old county for moneys expended in the construction of roads and bridges remaining therein, and not charge the new county for such roads and bridges as may have been constructed within its territory. Such a construction would manifestly work injustice to the old county. It is quite possible that in some instances more money may have been expended for roads and bridges in the new county than in the old prior to such segregation, but the statute makes no provision for charging the new county with such items.

Instead of the rule prescribed by the statute, as we construe it, being inequitable, it is, to our minds, most equitable. The organization of the new county effects no change whatsoever as to the benefits to be derived in the future by the citizens of the new county from the roads and bridges in the old county. They will have the benefit thereof in the future the same as they had in the past, and consequently there is no equitable reason why they should not bear their just proportion of the cost of constructing the same.

This brings us to the only remaining point in the case, which involves the question as to whether Ward county should be charged with the item of $17,976.80, which it is stipulated that such county expended in the purchase of record books for use in its various county offices. We understand that these are permanent record books now in the various county offices of Ward county and in which valuable records are contained. Such item was included by the trial court as a portion of the

money expended by Ward county for public property remaining therein at the date of the attempted settlement. We are fully agreed that such ruling was correct. These record books are not only of great value, but they are indispensable, and they clearly constitute public property owned by Ward county within the meaning of subd. 2 of § 2336, Rev. Codes. The fact that they may not have a commercial value is not made a controlling test or any test under the above statute. If they are public property and owned and retained by the county of Ward, as they most certainly are, then their cost price must be accounted for and deducted from the total indebtedness of Ward county on such settlement; for such is the plain legislative mandate, regarding the wisdom of which mandate the courts have no concern.

The judgment appealed from is, for the foregoing reasons, in all things affirmed, neither party to recover any costs on appeal.

LATHROP v. FARGO-MOORHEAD STREET RAILWAY COMPANY.

(136 N. W. 88.)

Trial — instructions — jury — its duties.

1. After the jury in this case had been out nearly twenty-four hours, and had reported that they were unable to agree, the court, over the objection of the appellant, instructed the members of the jury as to their duties to make an effort to agree, such instruction being too long to include in this syllabus, and required them to give the case further consideration. After considering it for about two hours longer, they agreed. *Held*, that, in determining how long to hold a jury for an agreement, the trial court must exercise a wide range of discretion, depending largely upon the number of facts to be found, and whether they are simple or complicated; and that the charge of the court was proper, under the circumstances of this case.

Trial — special verdict — interrogatories to jury.

2. At the request of the respondent, a special verdict was required of the jury, but before delivering the interrogatories to the jury the court answered certain of the questions, over the objection of the appellant. *Held*, that as there was no substantial conflict in the evidence on the subjects of such interrogatories, this action of the court was proper.

Appeal and error — findings — review — evidence.

3. The evidence was in direct conflict as to whether, at the time the accident in question occurred, plaintiff was driving north or south, across defendant's railway track. Among the questions submitted were certain questions framed with reference to the negligence of the defendant, if the jury should find he was going south; and others in case it should find he was going north. Two of these questions were answered by the court, but such answers were predicated upon the possibility of the jury finding that the plaintiff was driving north, when in fact they found that the plaintiff was driving south. *Held*, that it was nonprejudicial to the plaintiff.

Street railways — operation — injuries — contributory negligence.

4. Following Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225, it is *held*, that as a general rule the question is whether the motorman did see, or could have seen, the plaintiff in a place of danger in time to have avoided the accident, by the use of ordinary or reasonable care, or a question to that effect; but that the state of the evidence and the theory on which this case was tried made it unnecessary to determine whether the motorman could have seen plaintiff in time.

Trial — verdict.

5. The answers to the interrogatories contained in a special verdict must be consistent with each other, or it will be set aside.

Trial — verdict.

6. The Code requires a special verdict to present conclusions of fact as established by the evidence, and not the evidence to prove them. Courts should so frame the interrogatories of a special verdict as to comply with this provision.

Trial — special verdict — instructions — charge to jury.

7. When a special verdict is required, courts should not charge the jury on the general law of the case further than is necessary to assist in answering each interrogatory propounded.

Opinion filed March 26, 1912. Rehearing denied May 2, 1912.

Appeal by plaintiff from an order of the District Court for Cass County, *Pollock*, J., denying his motion for judgment notwithstanding the verdict, or for a new trial in an action to recover damages for injuries received in a collision.

Reversed.

Statement of Facts.

Appellant brought this action against the Fargo-Moorhead Street Railway Company, a corporation, running a street car line in the cities of Fargo, North Dakota, and Moorhead, Minnesota, to recover for injuries received in a collision with one of respondent's cars. At the conclusion of the trial the court, at respondent's request, submitted to the jury a special verdict, consisting of twenty-two questions. For a proper understanding of the case, we abridge the facts. Front street runs east and west through the city of Fargo. The numbered streets in that city run north and south, commencing to number next the Red river, on the east edge of the city. The street car line follows Fourth street north to Front street. At the point where it strikes Front street, looking north, it turns to the west and runs along the center of Front street to Broadway, or Sixth street, 600 feet, plus the width of Fifth street,—probably about 80 feet. At Broadway it turns a sharp corner to the north. On the north side of Front street, and about 100 feet from Broadway, is a loading platform of the M. warehouse, facing south. On the day in question the plaintiff drove his horses, attached to an express wagon, up to this loading platform and hitched them thereto, with the horses facing east, some 40 or 50 feet north of the street car track. He transacted his business and unhitched his team. When he got into his wagon, facing east, he observed that no street car was in sight between there and Fourth street. He thereupon turned his team southwest,—he testifies a little more south than west—and drove across the track, as found by the jury. He was sitting in the front part of the wagon, and as he was on the track he looked over his shoulder and saw a car coming from the east, about to strike him. He was unable to clear his wagon, the car struck it, and injured him, his team, and the wagon; and this action is the result.

The questions in the special verdict and their answers, so far as material to the determination of this appeal, are as follows:

"1. At what rate of speed was defendant's car moving at the time of the accident? A. 8 miles.

"2. At what rate of speed was the plaintiff driving his team at the time of the accident? A. 2 miles.

"3. At the time of the collision, which general direction was the plaintiff's team going, north or south? A. South.

"4. After the car left Fifth street, going west, and before the accident occurred, was the bell or gong of defendant's car sounded? A. Yes.

"5. Was the motorman guilty of any want of ordinary care in the operation of his car at the time of the accident? A. Yes.

"6. If you answer the last question, yes, then was such want of ordinary care the proximate cause of the injury to the plaintiff? A. Yes.

"7. Did the plaintiff, before leaving the Magill warehouse, where his horses were tied, look to see if a car was approaching from either direction? A. Yes.

"8. Did the plaintiff look east after leaving the Magill warehouse, and before he drove southwest (if you so find) upon the street car tracks, in front of the approaching car? A. No.

"9. How far did the plaintiff drive southwest (if you so find) after leaving the Magill warehouse, before he drove upon the street railway tracks? A. 50 to 60 feet.

"10. If you have answered question No. 3 that plaintiff was going north, then did plaintiff look to see if a car was approaching, before he attempted to cross the track? A. No.

"11. At the time mentioned in question No. 10, did plaintiff listen to catch the sound of an approaching car? A. No.

"12. Could the plaintiff, in the exercise of ordinary care and prudence, have seen the approaching car in time to have avoided the accident? A. Yes.

"13. Was the plaintiff guilty of any want of ordinary care which contributed to produce the injury complained of? A. Yes.

"14. After the motorman saw the plaintiff drive on to the track, did he, in the exercise of ordinary care, have time to stop the car and avoid the accident? A. No.

"15. Did the plaintiff drive upon or near the track of the defendant street car company so far ahead of the car in question that the motorman in charge of such car, after seeing him thus exposed to danger, might have avoided injuring him by the exercise of ordinary or reasonable care? A. No.

"16. Was the car of the defendant railway running at a dangerous

rate of speed, taking into consideration all the circumstances, at the time of the accident or collision? A. Yes."

"22. What amount of damages has the plaintiff sustained by reason of the acts complained of? A. $1,000."

The jury retired at 3:30, P. M., December 22, 1910. At 3 o'clock, P. M., December 23, it sent a written statement to the court, to the effect that the jurors were absolutely unable to agree; that the several ballots taken were the same on every essential question. Whereupon the court presented to the counsel for both parties a proposed instruction to the jury, and inquired of counsel for plaintiff if he had any exceptions thereto. Thereupon plaintiff's counsel objected and excepted to such instruction being given, "because it is an invasion of the province of the jury, and in view of the situation amounts to coercion of the jury." The remainder of the objection is not insisted upon here. Counsel for defendant made no objection. Whereupon the court read to the jury the following instruction:—

"Gentlemen of the Jury: The only mode provided by our Constitution and laws for deciding questions of fact is by the verdict of the jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the opinions of his fellows, yet in order to bring twelve minds to a unanimous result you must examine the questions submitted to you with candor and a proper regard and deference to the opinions of each other. You should consider that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view it is your duty to decide the case if you can conscientiously do so.

"In order to make a decision more practicable, the law imposes the burden of proof on one party or the other in all cases. In the present case, the burden of proof is upon the plaintiff to show all the material allegations of his complaint by a fair preponderance of the evidence, and upon the defendant to show contributory negligence, if any existed.

"In conferring together you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the large number of your panel are for the plaintiff, a dissenting juror should consider whether doubts in his mind as to the correctness of their conclusions are reasonable in view of the fact that doubts which you may have make no impression upon the minds of other men equally honest, equally intelligent with yourselves, and who have heard the same evidence with the same attention, with an equal desire to arrive at the truth and under the sanction of the same oath.

"And, on the other hand, if a majority are for the defendant, the minority ought to seriously ask themselves whether they may not be reasonable and ought to doubt the correctness of their judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

At 5 o'clock, P. M., on December 23, the jury reported that they had agreed; whereupon the verdict, to which reference has been made, was returned and received, and the jury discharged. Thereupon counsel for defendant submitted a motion to the court for an order for judgment in defendant's favor upon said verdict, to which plaintiff objected upon the ground that it was inconsistent in itself. Whereupon the court granted the motion of the defendant and entered judgment in its favor. Subsequently the plaintiff submitted a motion for judgment notwithstanding the verdict, or for a new trial. From an order denying such motion, and from the judgment entered, this appeal is taken.

M. A. Hildreth, for appellant.
Stambaugh & Fowler, for respondent.

SPALDING, Ch. J. (after stating the facts). Twenty-three assignments of error are contained in appellant's brief, but from our view of the case only a few of them require consideration.

1. The giving of the additional charge quoted above is assigned as error. In the nature of things the trial court must be permitted to exercise a very wide range of discretion in determining how long a jury should be held for the purpose of securing an agreement. The jury

passes upon the facts, and it cannot be presumed that in any case wherein the facts are, to any considerable degree, complicated, twelve men will view them from the start in the same light or at once reach the same conclusions in every particular. They are permitted to retire from the court room, instead of being required to take a vote at once, in contemplation of their not being able to immediately agree on all the material issues, and for the purpose of permitting them to review the evidence and present arguments, and, if possible, convince each other. In a case involving as many facts as the one before us, twelve intelligent and independent-minded men naturally find more difficulty in agreeing than in a simple case, involving only a few facts; and the trial court would, therefore, be warranted in keeping the jury out longer than in a simple case. He would likewise be justified in more fully explaining the duties of the respective jurors in the premises than might otherwise be necessary.

The charge referred to was the charge given in Com. v. Tuey, 8 Cush. 1, only changed to adapt it to a civil case, and was approved in State v. Smith, 49 Conn. 376, and in Allen v. United States, 164 U. S. 492, 41 L. ed. 528, 17 Sup. Ct. Rep. 154; and we see no reason for disapproving it. It did not go to the extent of indicating the opinion of the court on the facts, nor can it have left the impression upon any juror that he should surrender his conscientious convictions to secure an agreement. The jurors are supposed to be men of average intelligence at least, capable of understanding the meaning of the court when he gives them instructions; and to justify reversal by reason of an explanation of their duties with reference to listening to and considering the opinions of their associates should require a much more marked indication that the minority should yield than we find in the charge complained of.

The Supreme Court of the United States, in Allen v. United States, supra, said:

"While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that the opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large

majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment; or that he should close his ears to the arguments of men who are equally honest and intelligent as himself." See also Delmonica Hotel Co. v. Smith, 112 Iowa, 659, 84 N. W. 906.

2. Error is assigned because the court wrote the answers to the 8th, 10th, and 11th interrogatories. We think the court was fully justified in doing so. As to number 8, the printed record containing the evidence in narrative form would seem to indicate that on direct examination appellant testified that he looked east after he turned his team around and before he reached the track, but on cross-examination he repeatedly, clearly, and unequivocally denies having done so. We think a fair construction of his testimony is that his statement that he looked east relates to that act at the time he started turning his horses, and, so construed, there is no conflict in the record on this quesion.

There was a direct conflict in the testimony as to whether the plaintiff was driving south or north when the accident occurred. The jury passed upon this, and found that he was driving south; but of course the questions were prepared before findings were made, and certain questions were appropriate to and dependent upon their answer to question No. 3, which required an answer as to what general direction he was going,—whether north or south.

The purpose of question No. 10 was to ascertain whether the plaintiff looked for a car coming from the east before he attempted to cross the track, in case it was found that he was going north, and on his own testimony, to which we have referred, the court was warranted in answering it, "No;" that is to say, that he did not look after turning his team, even if going north at the time of the accident. The same may be said regarding the answer to question No. 11, which related to his listening. We find no error on the part of the court in answering this question.

3. We now come to a more difficult proposition. After careful consideration, we have reached the conclusion that the answers to certain material questions are inconsistent, and present such a conflict that the judgment cannot be sustained. In answer to question No. 12, the jury found that the plaintiff, if in the exercise of ordinary care and prudence,

could have seen the approaching car in time to have avoided the accident, and it answered "Yes" to question No. 13, as to his want of ordinary care contributing to produce the injury. It also found, in answer to question No. 14, that the motorman did not have time to stop the car and avoid the accident, in the exercise of ordinary care, after he saw the plaintiff drive on to the track; and in answer to question No. 15, that the plaintiff did not drive upon or near the track so far ahead of the car that the motorman, after seeing him exposed to danger, might, by the exercise of ordinary or reasonable care, have avoided injuring him.

It is apparent that interrogatories No. 14 and No. 15 and their answers, if broad enough to cover the negligence of the defendant, if any, are in direct conflict and inconsistent with interrogatory No. 5 and its answer. In Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225, this court recently announced that the rule in this state includes the question as to whether the motorman could have seen the plaintiff in a place of danger in time to have avoided the accident, by the use of ordinary and reasonable care. As the plaintiff made no objections to the form of the interrogatories or to their substance, he would not be in position to assign error because of the insufficiency of these questions, if they were insufficient; but after a careful examination of the record we agree with respondent that, on the state of the record, at the close of the trial, they were sufficient. It had not been contended that the plaintiff was in a place of danger for any considerable time; but that his danger commenced with his suddenly turning upon the track of the defendant, and that the motorman could not have anticipated his danger, even if seeing him, until he actually turned upon the track, or came so near to it as to indicate that he was intending to cross it. The defendant had tried its case on the theory based upon the testimony of the motorman, the conductor, and several other witnesses, that the plaintiff was driving east on the south side of the track, but behind a covered wagon which totally concealed him and his rig from the view of the motorman, until he suddenly turned from behind the wagon on to the track. The plaintiff and one witness testified that he was driving, as the jury found, more south than west; and it is apparent that the court, in submitting the last of these questions, framed them with reference to the contention

of the defendant, and that we are not called upon to take into consideration the question of what the motorman might have seen.

As we understand the law applicable to this case it may be stated in logical form as follows: The first question is, Was the defendant guilty of negligence? The second, if the defendant was negligent, was the plaintiff also negligent, and did his negligence contribute to the injury inflicted on him? When the jury answers both these questions in the affirmative, if nothing further is shown, the result is in favor of the defendant; but after the negligence of both parties is shown, the further question may arise; namely, the negligence of which party was the proximate cause of the injury? And when it is found that the negligence of the defendant was the proximate cause, and that of the plaintiff the remote cause, the plaintiff is entitled to recover. But in the case at bar the jury has found by its answers to two interrogatories that the defendant was not guilty of any negligence, and by its equally specific answer to another interrogatory has found that it was guilty of negligence. These findings necessarily leave the court utterly in ignorance as to the negligence of the defendant, and powerless to enter a judgment thereon.

It is well settled that when a special verdict is submitted and returned, its different parts must be consistent and without material conflict, or it will be set aside. McBride v. Union P. R. Co. 3 Wyo. 247, 21 Pac. 687; Carman v. Ross, 64 Cal. 249, 29 Pac. 510; Murray v. Abbot, 61 Wis. 198, 20 N. W. 910; Terre Haute & I. R. Co. v. Mason, 148 Ind. 578, 46 N. E. 332; Day v. Webb, 28 Conn. 140; Haas v. Chicago & N. W. R. Co. 41 Wis. 51; Bach v. Parmely, 35 Wis. 238; Deisenrieter v. Kraus-Merkel Malting Co. 97 Wis. 279, 72 N. W. 735; Clementson, Special Verdicts, 237.

As stated in the McBride Case, supra, "to strike out one and give effect to the other would be to make a new verdict, which the court has no power to do. Neither are we at liberty to go behind the findings and resort to the evidence to sustain the verdict, for the effect would be the same."

4. It is also contended that several of the answers to interrogatories are unsupported by the evidence. It is unnecessary to enter into details on this subject, as we have examined the record and find evidence supporting each finding so complained of.

5. This court having so recently passed upon nearly all phases of the law applicable to cases of this character, we deem it unnecessary to enter upon a discussion of the errors assigned as to portions of the charge to the jury.

6. There are certain phases of this case which are not adverted to in the briefs, but in view of another trial we briefly call attention to them. The inconsistency between some of the evidence and some of the findings is important. The motorman testifies that he did not see the plaintiff until within a very few feet of him, 8 to 12, say, when he turned onto the track. The jury found that he was driving south. Now a team of horses and an express wagon must cover a space of at least 18 feet in length. If, as the jury found, the car was going four times as fast as the team, the car must have passed over a distance of about 72 feet between the time the horses reached the nearest rail of the track and the accident. According to the testimony relating to the distance in which the car could have been stopped, the motorman had more than ample time in which to stop it after he could have seen that plaintiff was crossing the track. On the other hand, while the plaintiff was driving 60 feet, from the warehouse to the track, 60 feet being the greatest distance found, the car would travel only 240 feet, at the speed found by the jury. This would have placed it less than half way to Fourth street and in plain view of the plaintiff when he started south, and if going faster than found by the jury, but at any probable rate of speed, the car must have been between the point of the accident and Fourth street. If it were running twice as fast as found by the jury, or 16 miles an hour, it would still have been some distance west of Fourth street. To have placed it outside the range of vision of the plaintiff when he started to drive south, it must have been running 20 to 25 miles an hour, without making allowance for its slowing up to get around the corner of Fourth and Front streets. It would thus appear that the plaintiff either did not look at all, or that he is wholly mistaken when he says there was no car in sight.

Section 7033, Rev. Codes, 1905, defines a special verdict as that by which a jury find the facts only, leaving the judgment to the court, and requires that it present the conclusions of fact as established by the evidence, and not the evidence to prove them; and that these conclusions of fact must be so presented that nothing shall remain to the court but

to draw from them conclusions of law. Section 7034 requires the court, at or before the close of the testimony, and before any argument to the jury is made or waived, upon request of a party, to direct the jury to find a special verdict, and gives directions concerning the preparation of the questions which are required to admit of direct answer. This statute is substantially the same as that of Wisconsin on this subject, and differs from the statutes of most of the states.

Several of the interrogatories propounded to the jury are not in conformity with the statute, but required the jury to find evidential facts rather than conclusions of fact as established by the evidence. Russell v. Meyer, 7 N. D. 335, 47 L.R.A. 637, 75 N. W. 262.

When a special verdict is required, courts should not charge on the general law of the case any further than is necessary to assist the jury in answering each interrogatory propounded. For discussion of the subject, see Morrison v. Lee, 13 N. D. 591, 102 N. W. 223; Schrunk v. St. Joseph, 120 Wis. 223, 97 N. W. 946; Mauch v. Hartford, 112 Wis. 40, 87 N. W. 816.

The judgment of the trial court is reversed, and a new trial will be had.

BURCELL v. GOLDSTEIN et al.

(136 N. W. 243.)

Justices of the peace — garnishment — exemptions — filing schedule.

1. A claim for exemptions in a garnishment proceeding in a justice court must, in order to serve as a defense and to protect such exemptions, have been preceded by the filing with such justice of a schedule of the debtor's personal property, as prescribed by § 8405, Rev. Codes 1905, as amended by chap. 131, Laws of 1909.

Justices of the peace — garnishment — exemptions — filing schedule.

2. § 7119, Rev. Codes 1905, does not apply to garnishment proceedings brought in justice court, and exemptions cannot be claimed or secured by filing a schedule with the constable under such section of the statute.

Justices of the peace — garnishment — bankruptcy — appeal — exemptions.

3. Where a schedule is not first filed with the justice within the time and

in the manner prescribed by § 8405, Rev. Codes 1905, as amended by chap. 131, Laws of 1909, and judgment by default has been rendered against the defendant in the justice's court, the property garnished may not afterwards be claimed as exempt in the district court on an appeal thereto.

Justices of the peace — bankruptcy — jurisdiction — liens — exemptions — administration of estate.

4. Where money is garnished in an action in a justice court and a claim for exemption is disallowed in such court, a subsequent adjudication in bankruptcy in the Federal courts in which such property is claimed and set aside to the debtor as and for his exemptions will not release or avoid the lien of such prior garnishment, even though such garnishment proceedings may have been instituted within four months of such adjudication in bankruptcy, and in spite of the provisions of § 67-f of the Federal bankruptcy act of 1898.

Garnishment — exemptions — lien — bankruptcy — preferences.

5. The Federal statute referred to only avoids liens upon property which passes to the trustee in bankruptcy, and over which the bankruptcy court could and has assumed jurisdiction. But setting aside the property as exempt, such court will be held to have disclaimed any intention of assuming or of having ever assumed jurisdiction over it, and it cannot be said to have passed at any time to the trustee in bankruptcy. Nor will the fact that, on account of such adjudication in bankruptcy, a personal judgment cannot be rendered against the defendant in the district court, alter the case or preclude the foreclosure of the lien, as the jurisdiction of the district court is *in rem*, and not *in personam*.

Opinion filed May 2, 1912.

Appeal by defendants from a judgment of the District Court for Grand Forks County; *Hon. Charles F. Templeton,* J., in plaintiff's favor in a garnishment action brought to recover a certain amount for goods sold and delivered by plaintiff to defendants.

Affirmed.

This is an appeal from an action brought in the justice court to recover the sum of $47.40 for goods sold and delivered, in which the Hamburg, Bremen Insurance Company, and the National Union Fire Insurance Company, were the garnishee defendants. Within three days after the service of the garnishment summons, the defendant served upon the constable who served the papers a written claim for exemptions, and a certified schedule of all of his personal property, as provided by § 7119, Rev. Codes 1905. On the trial judgment by default

was rendered against the principal defendant and the several garnishee defendants. All of the defendants appealed to the district court; and prior to such appeal, and with the notice of appeal and undertaking, filed an answer setting forth, by way of defense, that such moneys were exempt from garnishment. The answer also set forth that after the time of the rendering of the judgment in the justice court the principal defendant had been adjudged bankrupt in the United States district court for the district of North Dakota; that the claim of the plaintiff was scheduled as one of his debts, and that the plaintiff had had due notice of all of the bankruptcy proceedings. The proof also showed that in the bankruptcy court the money garnished was claimed and set aside to the principal defendant as and for his exemptions. The district judge found that by reason of the defendant's failure to file in the justice court the schedule of his personal property, as provided by § 8405, Rev. Codes 1905, as amended by chap. 131, Laws of 1909, the plaintiff had acquired a lien upon the money in the hands of the garnishees; and that the former could not defend these proceedings in the district court on the ground that the money was exempt. He then, and in accordance with such findings, entered judgment against the respective garnishee defendants, and against the principal defendant, but as to him merely, "formally, and only for the purpose of sustaining plaintiff's judgment against the garnishees in the proceedings, said judgment to be in effect a judgment *in rem,* and not *in personam.*" From these judgments all of the defendants have appealed to this court.

F. B. Feetham, attorney for plaintiff and respondent.
Skulason & Burtness, attorneys for defendants and appellants.

BRUCE, J. (after stating the facts as above). The questions to be determined upon this appeal are: (1) May a defendant against whom and whose garnishees judgment is taken in justice court by default, and who, prior to such judgment has served upon the constable a written claim for exemptions and a schedule of his personal property, as provided by § 7199, Rev. Codes 1905, but has neglected to file with the justice a schedule of his personal property as provided by § 8405, Rev. Codes 1905, as amended by chapter 131, Laws of 1909, upon a trial *de*

novo in the district court and upon an appeal by the defendant and garnishee from such judgment, interpose, in the latter court, the defense that the property sought to be garnished is exempt? (2) When, upon such appeal the judgment is reversed as to the principal defendant on account of the adjudication in bankruptcy between the time of the trial in the justice court and the trial in the district court, can the judgment against the garnishees be sustained?

This case was tried before chap. 132, Sess. Laws, 1911, became operative, reducing the exemption amount to $500; and the statutes upon the subject of exemptions which relate to the case at bar are as follows: § 7117, Codes of 1905: "In addition to the property mentioned in the preceding section, the head of the family may, by himself or his agent, select from all other of his personal property not absolutely exempt, goods, chattels, merchandise, money, or other personal property, not to exceed in the aggregate $1,000 in value, which is also exempt and must be chosen and appraised as hereinafter provided." Section 7119: "Whenever any debtor against whom an execution, warrant of attachment, or other process has been issued, desires to avail himself of the benefit of § 7117, of this Code, said debtor, his agent, or attorney shall make a schedule of all his personal property of every kind and character, including money on hand and debts due and owing to the debtor, and deliver the same to the officer having the execution, warrant of attachment, or other process, which said schedule shall be subscribed and sworn to by the debtor, his agent, or attorney, and any property owned by the debtor, and not included in said schedule, shall not be exempt as aforesaid." Section 8405 of the Codes of 1905, as amended by chapter 131, Laws of 1909, is as follows: "If a defendant desire to defend the garnishment proceedings upon the ground that the indebtedness or property involved is exempt from execution, or any other ground contemplated in § 6981, such defense may be interposed at the time fixed for the garnishee's appearance; provided, that if said defense is on the ground that such property or indebtedness is exempt from execution, said defendant *shall*, within three days after the service of the garnishment summons upon him, have filed in the justice court in which said action is pending, a schedule of his personal property made and sworn to as provided in § 7119." Section 8401: "When any creditor shall be entitled to proceed by garnishment, as prescribed by §§ 6968 and 6988, in-

clusive, such proceedings may be had in any justice's court properly having jurisdiction of the subject-matter, and the mode of procedure therein and the law applicable thereto, when not otherwise prescribed or provided, shall conform as nearly as practicable to the provisions of said sections." Section 8500: "Any party dissatisfied with a judgment rendered in a civil action in a justice's court, whether the same was rendered on default or after a trial, may appeal therefrom to the district court of the county or subdivision at any time within thirty days after the rendition of the judgment. 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 8505: "The undertaking for appeal must be served with the notice; also appellant's pleading when the judgment appealed from was taken by default." Section 8509: "The action shall be tried anew in the district court in the same manner as actions originally commenced therein." Section 6981: "And this relates to the procedure in the district court. The defendant may in all cases by answer duly verified, to be served within thirty days from the service of the garnishee summons on him, defend the proceeding against any garnishee upon the ground that the indebtedness of the garnishee, or any property held by him, is exempt from execution against such defendant, or for any other reason is not liable to garnishment; or upon any ground upon which a garnishee might defend the same; and may participate in the trial of any issue between the plaintiff and garnishee for the protection of his interests. And the garnishee may at his option defend the principal action for the defendant, if the latter does not, but shall be under no obligations so to do."

The right to exemptions is a right which is the creature of statutory law. Exemptions are favorably considered by the courts, but in order that one may come within the protection of the statutes, the statutes must be obeyed. In order that one may plead an exemption in a garnishment proceeding which is originally brought in a justice court, he must, within three days after the service of the garnishment summons upon him, file a schedule of his personal property, made and sworn to as provided in § 7119. See § 8405, Rev. Codes 1905, as amended by chap. 131, Laws of 1909. This much certainly must be done, as the

statute is clear and unequivocal upon the subject. We do not believe that filing a schedule with the constable, as prescribed by § 7119 of the Code, is sufficient. Nor do we believe that this section covers the cases of garnishment at all, but rather that the garnishment statute (§ 8405 as amended by chap. 131, Laws 1909) is complete in itself. The filing of a schedule with the constable was not only not necessary, but was of no avail.

A garnishment is in the nature of an equitable attachment, and when property is once attached or garnished, the creditor has a lien thereon. When one claims the right to an exemption he does not, in any measure, question the right to the garnishment or the attachment. He merely seeks to have his property released from the lien. If, therefore, he does not assert his claim within the time and in the manner prescribed by the law, his rights are waived and the operation of the lien continues. Lindley v. Miller, 67 Ill. 244; Griffin v. Maxwell, 23 Ill. App. 405; Alden v. Yeoman, 29 Ill. App. 53. Nor does the fact that in an original proceeding in the district court the defendant may interpose his claim of exemptions by way of answer alter the case. Although, upon an appeal from the justice court, a trial *de novo* may be had, and the complaint or answer may be amended in so far as the right and theory of action is concerned, it cannot be so amended as to defeat vested rights or liens which have already been acquired. See Mahon v. Fansett, 17 N. D. 104, 109, 115 N. W. 79. Any other rule would, under the color of protection and clemency to the debtor, allow the debtor to deceive and defraud his creditor, and obtain an advantage by a default which he could not obtain if he defended the action in the justice court, and would subject the creditor to needless expense which he would not incur if he was satisfied, and could be satisfied upon the trial, in the justice court, of the honesty of the exemption. "A defendant, by failing to appear at the trial before the justice, cannot obtain an advantage." Carr v. Luscher, 35 Neb. 318, 53 N. W. 144. If he had appeared before the justice on the trial, not having filed his schedule, he could not have claimed the exemption. He certainly should not be allowed to do so after the default before the justice and on an appeal to the district court. Amis v. Cooper, 25 Ark. 14; Marx v. Trussell, 50 Miss. 498. In construing the statutes we must try to arrive at the intention of the legislature, and we are not at liberty to set aside positive statutory en-

actments because of a possible inconsistency in some other and independent provision. It is perfectly clear to us, indeed, that § 6981 of the Codes of 1905 was intended to relate solely to garnishment actions which are commenced originally in the district court, and not to those which have had their origin before a justice of the peace.

Nor, when we come to consider the effect of the adjudication in bankruptcy, do we find the situation to be any different. The law is well established that a lien upon exempt property can, in certain cases be foreclosed, notwithstanding the discharge of the defendant in bankruptcy; and the mere fact that a personal judgment cannot be rendered against the principal defendant on the original debt after such adjudication is not always controlling. Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 58 L.R.A. 770, 88 N. W. 703; Jewett Bros. v. Huffman, 14 N. D. 110, 103 N. W. 408; F. Mayer Boot & Shoe Co. v. Ferguson, 19 N. D. 496, 126 N. W. 110; Re Blumberg, 94 Fed. 476. It is true that in the case at bar the lien was obtained prior to the filing of the petition in bankruptcy, and within four months of the same; it is also true that § 67-f of the Federal bankruptcy act of 1898 expressly provides that "all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent at the time, within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same" [30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3450]. While § 1 of the same act provides that " 'a person against whom a petition has been filed' shall include a person who has filed a voluntary petition." (See also Re Beals, 116 Fed. 530; Cavanaugh v. Fenley, 94 Minn. 505, 110 Am. St. Rep. 382, 103 N. W. 711.) These statutes, however, have been held to only apply to liens upon property which has passed to the trustee in bankruptcy, and over which the bankruptcy court could and has assumed jurisdiction. Robinson v. Wilson, 15 Kan. 595, 22 Am. Rep. 272; Thole v. Watson, 6 Mo. App. 591; Jeffries v. Bartlett, 20 Fed. 496; Re Durham, 104 Fed. 231; Adams v. Crittenden, 4 Woods, 618, 17 Fed. 42; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 58 L.R.A. 770, 88 N. W. 703; Re Little, 110 Fed. 621; Jewett Bros v. Huffman, 14 N. D. 110, 103 N. W. 408. By setting

aside the property as exempt, the bankruptcy court disclaimed the intention of assuming, or of ever having assumed, jurisdiction over it, and it cannot be said to have passed at any time to the trustee. Such being the case, the liens created by the garnishment proceedings were never avoided or nullified. Though, therefore, in subsequent proceedings, and if the liens of the present garnishments were released, a claim for exemption might be set up in the state courts against another plaintiff, or the particular plaintiff himself, defendant, by failing to file his schedule with the justice, is precluded, in the present case, from asserting the same against the present plaintiff. To state the case in another way; prior to the adjudication in bankruptcy the plaintiff had an undoubted lien upon the money garnished, and subject to no claim of exemption, since the defendant, by not filing his schedule, had waived the same; and this lien the bankruptcy court, by failing to assert any jurisdiction over the property, that is to say, by its setting it apart as exempt, has left unimpaired and as if no adjudication in bankruptcy had been had. See Jewett Bros. v. Huffman, 14 N. D. 110, 103 N. W. 408; Collier, Bankr. p. 787, § 2; Re Edwards, 156 Fed. 794; Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. ed. 1061, 23 Sup. Ct. Rep. 751. The mere fact that a personal judgment could not be rendered against the defendant Goldstein, after such adjudication, is in no way controlling. The action in the district court was, to all intents and purposes, an action *in rem,* and the district court obtained jurisdiction because of the garnishment or equitable attachment, which was prior to the adjudication in bankruptcy, and not because of its jurisdiction over the person of the defendant.

The judgment of the District Court is affirmed.

RIEBOLD v. HARTZELL.

(136 N. W. 247.)

Judgment — process — quieting title.

A judgment entered by default in plaintiff's favor in 1906, but void for want

Note.—The question of the effect of the unauthorized appearance of an attorney in an action is treated in notes in 21 L.R.A. 848, and 75 Am. Dec. 145.

of jurisdiction, was three years later on motion vacated after service of moving papers on the attorney who subscribed the original summons and complaint and thereafter brought on for trial, other attorneys appearing at the request of such former attorney of record but without employment by plaintiff, who had no knowledge of any proceedings taken after entry of the void judgment presumed by him to be valid. Plaintiff was a nonresident. Without notice to him after a purported trial on the merits in 1909, of which he was ignorant, judgment was rendered in defendant's favor quieting title against plaintiff. All attorneys under the circumstances shown in the record acted in good faith. The former attorney of record was incapacitated, by sickness, from attending personally to the matter, employing other attorneys so to do who were ignorant of plaintiff's whereabouts; plaintiff's attorney having died pending the litigation. Promptly upon notice of the rendition of the second judgment, plaintiff applied for its vacation, with leave to proceed to trial on the merits, and upon the denial thereof appeals. *Held:*—

(1) That the judgment first entered was void for want of jurisdiction of the defendant.

Action — summons and complaint — dismissal.

(2) That under § 6884 the action was in law deemed discontinued after sixty days had elapsed from the filing of the affidavit for publication without personal service of the summons, on the first publication thereof having been made.

Attorney and client — substitution of attorneys.

(3) Conceding, without deciding, that the authority by employment of the attorney to institute the action was sufficient from which his authority would be presumed to continue, and as such assuming that he remained an attorney of record, authorities under § 7337 to accept service of the application served upon him in 1909 to vacate said judgment, and conceding the application of that statute to this case deemed discontinued long prior thereto under § 6884, nevertheless said attorney of record would have no authority to employ other attorneys to act for him in his behalf, as was done in representing the plaintiff on the trial of said action; and consequently the appearances made by such unauthorized substituted attorneys, and stipulations made by them, are void, and not binding under this record upon plaintiff. The application is therefore to be treated as one to vacate a judgment rendered by default.

Judgment — record.

(4) The record conclusively establishes want of knowledge in plaintiff of any proceedings had after the entry of the void judgment, until after notice of the entry of the voidable judgment from which plaintiff applies to be relieved.

Attorney and client — presumption of continuance of employment.

(5) Soon after the entry in 1906 of the void judgment, plaintiff paid said attorney of record in full for fees and costs, discharging him and terminating his employment. This destroys any contrary presumption of the continuance of

such employment of the attorney of record, and relieves plaintiff from the later unauthorized acts of said attorney of record, being in law imputed to plaintiff.

Judgment — proof.

(6) The second judgment, while apparently regular as rendered after notice of trial served on the attorney of record and counsel appearing, on proof of want of authority in them to represent plaintiff, and his want of knowledge thereof, in the absence of any ratification of their acts and under plaintiff's repudiation thereof, is voidable, and should, on plaintiff's application, seasonably made, be vacated.

Judgment — vacation.

(7) Under the showing made on this application, plaintiff being without fault before or since the entry of said judgment against him, he should, under § 6884, be relieved from said judgment and be permitted a trial on the merits.

Opinion filed May 2, 1912.

Appeal by plaintiff from an order of the District Court for Dickey County, *Allen*, J., denying his motion for vacation of a judgment in favor of defendant Hartzell in an action brought to quiet title to certain land.

Reversed.

E. E. Cassels and *Carmody & Perkins*, for appellant.

The appellant was not in fault, as S. G. Cady had ceased to be his attorney on the entering of judgment. 4 Cyc. 940; Berthold v. Fox, 21 Minn. 51; Smith v. Cunningham, 59 Kan. 552, 53 Pac. 760; Treasurers v. M'Dowell, 1 Hill, L. 184, 26 Am. Dec. 166; Bathgate v. Haskin, 59 N. Y. 533; Sturgiss v. Dart, 23 Wash. 244, 62 Pac. 858; Freeman, Judgm. § 103; 1 Am. & Eng. Enc. Law, 953.

Appellant was diligent in making the motion to vacate the judgment. Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 385; Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581.

Charles E. Wolfe and *Rourke & Kvello*, for respondent.

Respondent's notice of motion to vacate the first so-called judgment, and his notice of trial, were properly served on S. G. Cady as the attorney of record. Beach v. Beach, 6 Dak. 371, 43 N. W. 701; Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095; 23 Cyc. 953; Phelps v. Heaton, 79 Minn. 476, 82 N. W. 991; Merritt v. Putman, 7 Minn. 493, Gil. 399; Merriam v. Gordon, 17 Neb. 325, 22 N. W. 565; McConnell v.

Brown, 40 Ind. 384; Bonnifield v. Thorp, 71 Fed. 924; Nichells v. Nichells, 5 N. D. 126, 33 L.R.A. 515, 57 Am. St. Rep. 540, 64 N. W. 73.

Goss, J. This appeal is from an order of the district court denying plaintiff's application to vacate a judgment against him entered in favor of defendant, Hartzell. The application made and its review on this appeal is based on the following record:

In the early part of 1906 plaintiff employed one, S. G. Cady, then a practising attorney at law resident at Oakes, North Dakota, to institute an action against defendant, Hartzell, and one Day, to quiet title to land described as the southeast quarter of section 2, township 130 N. of range 59 W. in Dickey county. Plaintiff was then, and at all times since has been, and now is, a resident of Minnesota. He employed Cady by mail. Cady and plaintiff were strangers and this their only business transaction. Cady began this entitled action by issuing a summons in due form, accompanied by the statutory form of complaint to quiet title, and procured a judgment to be entered on July 18, 1906, on findings of fact and conclusions of law dated June 26, 1906, quieting title in plaintiff. The summons was attempted to be served by publication. Affidavit of publication of summons and affidavit of mailing was filed, but the complaint in the action was not verified until June 27, 1906, after the date of the findings, and the verified complaint was not filed in the office of the clerk of the district court until the 18th day of July, 1906, the date of entry of judgment. Soon thereafter, upon Cady advising plaintiff that judgment was entered, plaintiff paid him the costs incurred in the proceedings, and his fees, and ended his employment. Nearly three years later, upon motion supported by affidavits and accompanied by answer, defendant, Hartzell, brought on for hearing on May 8, 1909, before the district court, an application to vacate its judgment entered in 1906, with leave to serve and file his answer, which moving papers were served upon Cady as the attorney of record in the action. No one appeared on the hearing to oppose the application, and an order was entered vacating for want of jurisdiction the former judgment, and ordering the answer and cross complaint of defendant, Hartzell, to stand "without further service of the same upon the plaintiff, and that the issues be tried and determined"

on the issue presented by the old complaint and said answer. Service of this order at Oakes, North Dakota, on May 22, 1909, was admitted by Cady as attorney for plaintiff. Notice of trial was likewise admitted by him, and pursuant thereto the action came on for trial at the June, 1909, term of said court, and was called for trial July 1, 1909. A stipulation by attorneys Cady, by Youker & Perry, and Rourke & Kvello, was then entered into, upon which, with certain testimony, defendant, Hartzell, rested his case. But a further stipulation under date of December 16, 1909, was made, signed by Cady by the firm of Youker & Perry as attorneys for plaintiff and Rourke & Kvello, attorneys for Hartzell, bringing in further testimony, whereupon the case was closed and findings of fact, conclusions of law, and order for judgment, dated January 6, 1910, were found and filed by the court, pursuant to which judgment was entered January 18, 1910, quieting title to said land in Hartzell. Notice of entry of judgment was served, with service admitted February 7, 1910, by Youker & Perry appearing for S. G. Cady.

On April 28th following, service was had upon the attorneys for defendant, Hartzell, of an application to vacate said judgment, supported by affidavits, plaintiff appearing by his present counsel. These affidavits upon which hearing to vacate was had May 11, 1910, disclose conclusively that this plaintiff has had no actual knowledge whatever of any of the proceedings concerning the vacation of the judgment rendered in 1906, and the subsequent trial of the action as between him and Hartzell. That Cady's employment was terminated in July, 1906, and that all acts done by him thereafter were wholly unauthorized and without plaintiff's knowledge. That he has always been a nonresident of this state. That he has, pending these proceedings, conveyed this land by a deed containing covenants of general warranty. That plaintiff, for the first time, learned of the proceedings had subsequent to the vacation of the judgment of 1906 on the last day of February, 1910, from his purchaser, one Brennan, who had on February 18th received information of the entry of the judgment in favor of Hartzell. That plaintiff forthwith employed counsel and took steps to learn the facts concerning said matter, and in April following noticed said application for vacation of the judgment rendered against him. Accompanying plaintiff's affidavit is that of attorney Youker, explaining the connection of his firm with the record to have been brought about under

the following recited facts: "That for more than a year prior to June 1, 1909, S. G. Cady was sick at his home in Oakes, and for several months next prior to said June, and continuously thereafter up to the time of his death in March, 1910, said Cady was entirely incapacitated from attending to his regular business; and that a few days before the opening of the June term of court, 1909, said Cady requested affiant to appear for and act for him in all cases which he had on the calendar at said term, and that the action above entitled is one of the cases so on said calendar. That at said time the said Cady told this affiant that he would have the plaintiff, Riebold, write to this affiant in relation to said estate. That affiant was not acquainted with said plaintiff, and did not then know his address or at any time since. That this affiant has never at any time received any communication from said plaintiff or any one on his behalf other than the said Cady, and in entering the appearance of his firm and in all subsequent steps taken in relation thereto he was acting solely pursuant to the directions of Cady." "That at the said time said Cady stated to affiant that he would have plaintiff take this matter up with him. From such conversation affiant got the impression that said plaintiff resided in the vicinity of Oakes, the place of said Cady's residence, and that said plaintiff would be present at the trial of said cause. That when the said cause was called for hearing all that affiant knew relative thereto was what was disclosed by the records and files in the various county offices wherein the land was situated." There is also presented a letter written from Iowa by one Morgan, purporting to having been employed to represent a subsequent transferee of the land, one Fleshman, and showing knowledge of the pendency of the litigation, and under date of December 27, 1909, inquiring concerning it, but concerning which letter and employment plaintiff, Riebold, denies all knowledge. Accompanying the affidavits is a showing that plaintiff or his grantors have paid the taxes on said premises for the years including 1892 down to and including 1905. Accompanying the application is a lengthy and technically sufficient affidavit of merit wherein plaintiff deraigns his title in him to the exclusion of any interest in the land by Hartzell, and shows plaintiff's utter want of knowledge of proceedings had subsequent to the entry in 1906 of what he assumed to be a valid judgment in his favor in this entitled action. The trial court denied the application to vacate and

plaintiff's request therein made that he be thereafter afforded a trial of his case on the merits. From this denial plaintiff appeals.

We will here state that we believe and find that all parties and attorneys in this action have acted in good faith, with no intent to defraud or to, by sharp practice, wrongfully prevail in this action. Mr. Cady evidently procured the entry of the judgment in 1906 under the honest belief of its validity; and plaintiff, relying on the judgment, in ignorance of its jurisdictional defects, believed title in him to be quieted by said judgment. Plaintiff was a nonresident of the state. The attorneys for defendant, Hartzell, served upon attorney Cady the moving papers to vacate said judgment, as they had a right to do. Attorney Youker's affidavit established the sickness of Cady and his incapacity to care for the litigation, and accounts for Youker & Perry's appearance unauthorized by plaintiff. Mr. Cady's sickness satisfactorily explains the failure of plaintiff to receive from him notice of such subsequent proceedings, and Youker's ignorance of plaintiff's whereabouts and probable reliance upon Cady to procure plaintiff to be present under the supposition that plaintiff was a resident in that vicinity, likewise exonerates his firm from criticism. Under the circumstances, although the acts and appearances made in good faith, but nevertheless unauthorized by these attorneys appearing for plaintiff, while misleading defendant and counsel, also acting in good faith, the proof is conclusive that plaintiff is in no wise at fault, has not been guilty of laches before or since the entry of this last judgment; and also that it is his property that will respond to and virtually be confiscated without trial by this judgment.

The law governing our decision is plain. Cady was employed as plaintiff's attorney to institute and presumably prosecute to a successful finish the action originally brought. It is equally certain that what he did amounted to but the issuance of a summons and complaint, and the filing of the same with the clerk of the court. The purported judgment was not merely voidable, but wholly void, for want of jurisdiction apparent from the noncompliance with statutory jurisdictional requirements. Prior to the entry of judgment therein, the action was in law deemed discontinued under § 6884, Rev. Codes 1905, as more than sixty days had then elapsed after the filing of the affidavit for publication without personal service of the summons or the first publica-

tion thereof having been legally made. In law nothing was done other than the filing of the summons, complaint, and such affidavit with the clerk. Though the action should be deemed discontinued, and still though we may presume thereafter a continuance of the employment to have existed, until defendant in 1909 served the application to vacate and thereafter join issue, yet such presumption must fail in the face of the proof, *aliunde* the record and now before us, that Cady's employment was ended in July, 1906, and thenceforth he was not in fact the attorney and as such the agent of this plaintiff. It is true, as defendant claims, no written notice of termination of such employment or substitution of attorney was filed. Equally true it is that no reason existed for plaintiff taking such action. The nature of the supposed judgment obtained was one quieting title and under which no personal claim against others for costs or otherwise could be asserted. The land, title to which was so quieted in plaintiff, could not be sold or encumbered legally by Cady. There was no satisfaction of judgment that could be entered owing to the form of the judgment. Hence, it was beyond Cady's power, had the judgment been valid, to have in any way jeopardized plaintiff's rights in the land after the entry of that judgment. Of this the defendant had notice when he served this application to vacate said judgment. But defendant asserts that the statute, § 7337, providing for service on a nonresident by service on his attorney of record, "specifically requires" the service as made upon Cady to be made upon him. Granting that the statute here applies, and Beach v. Beach, 6 Dak. 371, 43 N. W. 701; and Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095, construing it, authorized service of motion to vacate the void judgment upon Cady, they are not authority for binding plaintiff thereby in proceedings beyond the vacation of such judgment. And it follows that, in proceeding beyond that limit, the judgment obtained was at most but voidable as irregnlarly entered upon authority apparently but actually not binding upon plaintiff. But the second judgment on the face of proceedings had is valid, though voidable under the proof that the same was rendered without due process of law, and without legal trial having been either had or in law waived. Such judgments, even though rendered without actual service of process upon the defendant or the party against whom they are rendered, are often upheld when an appearance has been entered by an unauthorized attorney, as where

the party fails to take prompt action to be relieved from the judgment, or by act has ratified the unauthorized appearance or otherwise estopped himself from asserting the invalidity of such voidable judgment.

But no issue is here presented other than the effect of the unauthorized appearance of these purported attorneys for plaintiff. In this respect the case stands as though no appearance had been entered, notwithstanding the acts of Youker & Perry in attempting to represent Mr. Cady, who in turn was supposed to be plaintiff's attorney. "The relation of attorney and client is a relation of agency, and in its general features is governed by the same rules which apply to other agencies." Mechem, Agency, § 808; 4 Cyc. 932; Gibson v. Nelson, 31 L.R.A. (N. S.) 523, and note (111 Minn. 183, 137 Am. St. Rep. 549, 126 N. W. 731). "Wherever . . . a regularly admitted attorney appears for a party in a cause the presumption is that such appearance is authorized." Mechem, Agency, § 809; note to Williams v. Johnson, 21 L.R.A. 848; 2 Enc. Pl. & Pr. 679; Vilas v. Butler, 9 L.R.A. 844, and note; Bacon v. Mitchell, 4 L.R.A.(N.S.) 244, and note (14 N. D. 454, 106 N. W. 129). But "in accordance with well-settled principles of agency therefore the rule is rigidly adhered to that those powers committed to an attorney which involve the exercise on his part of judgment or discretion . . . cannot be delegated by him to another without the consent of his client." Mechem, Agency, § 814. The employment of other attorneys not being within the scope of his proper duties and powers, it does not bind his client as to their conduct unless ratified. Subdivision 2, § 502, Rev. Codes 1905. "So third persons dealing with such substitute would acquire no rights against the client inasmuch as such substitute is the agent of the attorney only, and not of his client." Mechem, Agency, § 814; 4 Cyc. 950. "As an attorney is chosen with particular reference to his fitness and capacity, the established doctrine of agency that *delegatus non potest delegare* applies to him with especial force. So, it has been held that an attorney employed to prosecute a suit cannot delegate his authority to another attorney." Cornelius v. Wash, 12 Am. Dec. 145, and note (Breese [Ill.] 63); Morgan v. Roberts, 38 Ill. 65; Jerome v. Bigelow, 66 Ill. 452, 16 Am. Rep. 597; Tobler v. Nevitt, 45 Colo. 231, 23 L.R.A.(N.S.) 702, 100 Pac. 416, 16 Ann. Cas. 925, 132 Am. St. Rep. 142, and note on page 160 collecting numerous authorities. 4 Cyc. 986, reading: "As

an attorney has no implied power under a general retainer to employ associate counsel, the client is not liable to counsel so employed." It cannot be assumed or argued that any express power to employ associate counsel was ever conferred upon Cady by plaintiff, inasmuch as no occasion to employ such associate counsel ever arose until three years after Cady's employment was by plaintiff terminated. The unauthorized acts of Youker & Perry performed in the name of Cady, who from sickness did not personally act, are void and in no wise bind plaintiff. For recent holdings supporting this conclusion and rendering it uncontrovertible, see Gillilland v. Brantner, 145 Iowa, 275, 121 N. W. 1047; Bentley v. Fidelity & D. Co. 75 N. J. L. 828, 69 Atl. 202, 15 Ann. Cas. 1178, 127 Am. St. Rep. 837, and elaborate note; Emblem v. Bicksler, 34 Colo. 496, 83 Pac. 636; Chicago & S. Traction Co. v. Flaherty, 222 Ill. 67, 78 N. E. 29, reported in Cyc. Annotations. And this instant case is an apt illustration of the reason for, and the soundness of, the undisputably established rule that an attorney at law is not allowed to delegate his duties to a third person who may be, as here, wholly unfamiliar with the details of the case, even to the extent of being ignorant of the residence of the client to be bound by his acts. The judgment being voidable because of the established want of authority of Cady to represent plaintiff, it must be vacated on such grounds on plaintiff's application made.

Again, conceding the regularity of the service of the notice to vacate upon Cady, as purported attorney of record, nevertheless the case stands before us as a judgment thereafter taken by default through no fault of plaintiff, without his knowledge of the pendency of such proceedings, with no laches or unreasonable delay on his part intervening after judgment and before his application to vacate the same, and with plaintiff showing prima facie an apparent ability to establish on trial a cause of action in his favor concerning the subject-matter by default judgment determined adversely to him. Judicial discretion exercised on an application to vacate a default judgment, where such discretion may be exercised, should tend to a reasonable degree toward permitting a trial on the merits. Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228. But under these facts no discretion existed in the trial court to do aught but comply with the statute (§ 6884), and relieve plaintiff from such judgment taken against him by default, plaintiff having

brought himself squarely within its terms, conceding, without holding, that the court had jurisdiction to enter the judgment sought to be vacated.

The order appealed from is reversed, and the judgment entered against plaintiff is directed to be vacated. Defendant having in his application appeared below and asked for trial on the issues involved in the action, jurisdiction existed thereafter of the person of defendant, under § 6850. And no trial having been had, this case is remanded for trial on the merits. Judgment for taxable costs of this appeal will be entered in favor of plaintiff and against defendant, Hartzell. Let judgment be entered accordingly.

SLATTERY v. RHUD.

(136 N. W. 237.)

Actions — trespass — instructions.

1. Action to recover damages to certain ice while stored in an ice house, alleged to have been caused by defendant in carelessly and wrongfully excavating on an adjacent lot and also on plaintiff's lot, on which such ice house was situated, and so near thereto as to cause the building to collapse and the ice to become exposed to air and sun. Plaintiff introduced evidence tending to establish the alleged trespass on plaintiff's lot, as well as the other facts pleaded in the complaint. In charging the jury, the trial court told them, in substance, that even though they should find that defendant in fact wrongfully excavated on plaintiff's lot, causing the injury, he would not be liable if he exercised reasonable care in so doing. *Held* prejudicial error.

Trespass — reasonable care.

2. A wrongful trespasser is liable for all the detriment proximately caused by such trespass, whether he acted in good faith and with reasonable care or not

Trespass — action.

3. It was proper for plaintiff to allege and prove both a trespass by defendant on his lot, and a negligent excavating on the adjacent lot, as the proximate causes of the resultant injury.

Trespass — instructions — question of measure of damages.

4. Certain instructions to the jury upon the question of the measure of damages examined, and *held* erroneous.

Opinion filed May 2, 1912.

Appeal by plaintiff from an order of the District Court for Burleigh County, *W. H. Winchester,* J., denying his motion for new trial in an action brought to recover damages for injury to ice.

Reversed.

Newton, Dullam, & Young, for appellant.

Defendant had no right to excavate any part of plaintiff's ice-house lot, or to drive his teams on or over any part of it. 28 Am. & Eng. Enc. Law, 2d ed. p. 587; Sedgwich, Damages, 6th ed. p. 660; Davison v. Shanahan, 93 Mich. 486, 53 N. W. 624; Reynolds v. Braithwaite, 131 Pa. 416, 18 Atl. 1110; Georgetown B. & L. R. Co. v. Eagles, 9 Colo. 544, 13 Pac. 696; Georgetown, B. & L. R. Co. v. Doyle, 9 Colo. 549, 13 Pac. 699; Ketcham v. Newman, 141 N. Y. 205, 24 L.R.A. 104, 36 N. E. 197.

F. H. Register, R. N. Stevens, and *Niles & Koffel,* for respondent.

Trespass cannot be joined with case, for they are actions of different natures, and the judgments are different. Courtney v. Collet, 1 Ld. Raym. 273; Chitty, Am. ed. 291–294; Cooper v. Bissell, 16 Johns. 146; Sheppard v. Furniss, 19 Ala. 760; Brown v. Dixon, 1 T. R. 277; Govett v. Radnidge, 3 East, 63, 6 Revised Rep. 539; 21 Enc. Pl. & Pr. 800; Cleveland v. Barrows, 59 Barb. 364; 21 Enc. Pl. & Pr. 783, 784, 785, & note.

The remedy is by an action of trespass on the case. 21 Enc. Pl. & Pr. 786; Bay Shore R. Co. v. Harris, 67 Ala. 6, 2 Am. Neg. Cas. 1; Wilson v. Smith, 10 Wend. 324; Chitty, 16th Am. ed. 181.

Instructions to the jury upon the subject of trespass *quare clausum* not being within the issues, the plaintiff is in no position to complain, as he was not and could not have been prejudiced thereby. Sackett, Instructions §§ 73, 313; Reuss v. Monroe, 115 Ill. App. 10; Elkins v. Metcalf, 116 Ill. App. 29; Doherty v. Arkansas & O. R. Co. 5 Ind. Terr. 537, 82 S. W. 899; Beyer v. Hermann, 173 Mo. 295, 73 S. W. 164; McKinstry v. St. Louis Transit Co. 108 Mo. App. 12, 82 S. W. 1108; Chicago Union Traction Co. v. O'Brien, 117 Ill. App. 183; Tedens v. Sanitary Dist. 149 Ill. 87, 36 N. E. 1033; Chicago & A. R. Co. v. Walters, 217 Ill. 87, 75 N. E. 441; Anderson v. Walter, 34 Mich. 113; State v. Donovan, 10 Nev. 36; Quinn v. Baldwin Star Coal Co. 19 Colo. App. 497, 76 Pac. 552; Conant v. Jones, 120 Ga. 568, 48 S. E. 234.

FISK, J. Actions to recover damages claimed to have been sustained by plaintiff because of injury to certain ice stored in an ice house on lot 22, block 53, original plat of the city of Bismarck, in the month of June, 1908, by reason of certain excavations made by defendant near such ice house, causing a portion of the wall thereof to give way, thus exposing such ice to the action of the air and sun, which, it is claimed, caused a large amount thereof to become honeycombed and rendered valueless. Defendant had judgment in the court below pursuant to a verdict of the jury, and this appeal is from an order denying plaintiff's motion for a new trial.

The facts necessary to a correct understanding of the questions involved are the following: The north wall of the ice house in question was situated about 2 feet from the north line of said lot 22. Adjoining such lot on the north is lot 23. Defendant, who is a general contractor, had a contract to excavate on lots 23 and 24 preparatory to the erection of an armory building. Plaintiff was aware of the contemplated work of excavating on lots 23 and 24, and was present at or about the time such work was commenced.

Paragraph 3 of the complaint is as follows: "That on or about the 22d day of June, 1908, the defendant, Hans C. Rhud, by himself, his agents, and servants, made a large excavation on said lot 23, which excavation extended from the front or west end of said lot 23, in an easterly direction of about 110 feet, and was about 6 feet deep, and more than 25 feet in width; that in making such excavation, the defendant, his agents, and servants encroached upon and did enter upon and dig, take out, and carry away a portion of said lot 22 along or near the north side of said lot, and along and near the north side of the ice house situated thereon, all against the will and without the knowledge or consent of this plaintiff; that the said defendant, Hans C. Rhud, his agents, and servants did said excavating carelessly, negligently, and without using ordinary care and skill, and without taking any precautions to sustain the lot hereinbefore described, to wit, lot 22, block 52, original plat of the city of Bismarck, and without giving the plaintiff any notice of his intention to make such excavations. That by reason of the excavations made by the said defendant, Hans C. Rhud, his agents, and servants, as hereinbefore stated, the aforesaid ice house in the possession of plaintiff on said lot containing plaintiff's

200 tons of ice did sag, sink, and break and become wrecked so that the sawdust and other packing used in and about the packing of said ice in said ice house slipped out and fell away from said ice and left said ice uncovered and unprotected and exposed to the sun and wind, and one hundred and fifty (150) tons of plaintiff's ice so stored in said ice house, hereinbefore mentioned, was thus destroyed and rendered unfit for sale or use, to the plaintiff's damage in the sum of $900."

At the trial evidence was introduced by the plaintiff tending to support such allegations, and the defendant introduced evidence tending to show that no excavating was done on plaintiff's lot 22. In charging the jury the trial court, among other things, instructed as follows: "Under the law of this state the defendant would not have the right in making this excavation to excavate any part of lot 22, and if you find that the defendant did excavate any part of lot 22, and if you further find that it was done in a careless and negligent manner and with a want of ordinary care and skill, and that such lack of ordinary care and skill led to any damage to the ice in question, then the defendant would be liable for such damage; bearing in mind all the way through, gentlemen, that the question of negligence, or lack of ordinary care and skill, is one of the main questions for you to determine in this case."

Also as follows: "It would not be enough for you to determine as a matter of fact from the evidence if you should find it to be the fact, that the defendant did excavate any part of the lot 22 in making the alleged excavation, unless you find that it was done in such a manner as led to the damages which it is claimed the plaintiff sustained. To put it another way in order that I may not be misunderstood. If you find as a fact from the evidence that the defendant, Mr. Rhud, in making this excavation, did carelessly and negligently excavate a portion of lot 22, then if you further find that in so doing that his acts lack ordinary care and diligence, and if you find that on account of such acts the ice in question was damaged, then Mr. Rhud, the defendant, would be liable to Mr. Slattery, the plaintiff, for such damages."

It is nowhere contended that defendant had been given any permission or license to go onto lot 22, or to do any excavating thereon, but the trial court refused plaintiff's request for an instruction to the effect that defendant had no right to excavate on lot 22.

The giving of those instructions, and the refusal to instruct as requested by plaintiff, form the basis of appellant's principal assignments of error, and we are agreed that such assignments are well taken.

Respondent's counsel, in their printed brief, place considerable emphasis upon the fact that the giving of these instructions was nonprejudicial for the reason that the action is not in trespass, but on the case, while appellant's counsel contend that it is an action in trespass. At another place in their brief, respondent's counsel urge that the complaint sets forth two causes of action which are improperly united; to wit, a cause of action on the case and a cause of action in trespass. We are not particularly concerned with the question as to what the correct form of action would be under the common-law system of pleading, for under the Code we have but one form of civil action. In passing, however, it is not improper to state that the action being one to recover merely consequential damages on account of an indirect injury to personal property, the form of the action at common law would be trespass on the case, and not trespass as contended by appellant's counsel. See 21 Enc. Pl. & Pr. 786, and cases cited, and especially Shrieve v. Stokes, 8 B. Mon. 453, 48 Am. Dec. 401, the complaint in which case was very similar to the one in the case at bar. But even though it should be held that the complaint in the case at bar alleges facts which at common law would constitute both trespass and trespass on the case, there is no objection under the Code to their being united in the same complaint. See 21 Enc. Pl. & Pr. at p. 801, and cases cited.

We are entirely clear that the trial court committed reversible error in charging the jury, as above stated, with reference to the excavation, if any, on lot 22. On this point the jury should have been instructed that if they should find that defendant made any excavation on lot 22 and that this was the proximate cause of the injury complained of, they should find for the plaintiff. If defendant, by his agents and servants, unlawfully trespassed on plaintiff's lot by excavating thereon, it is an elementary rule of law that he must respond in damages for any injury proximately caused thereby, even though he and his agents and servants acted with care in so doing. Ketcham v. Newman, 141 N. Y. 205, 24 L.R.A. 102, 36 N. E. 197.

In view of another trial we will briefly notice one other assignment

of error which we deem meritorious. Complaint is made of that portion of the instructions relative to the rule to be followed by the jury in assessing the damages. We think the instructions in this respect are faulty. In that portion wherein the jury are instructed that they "have the right to ascertain how much, if any, less ice there was in the part of the ice house in which it is claimed that the ice was damaged . . . how less in pounds or quantity there was on account of the alleged damage, and if you find there was any less and that it was on account of the lack of ordinary care on the part of Mr. Rhud, the defendant, then Mr. Rhud should respond in damages to Mr. Slattery for the difference between the quantity of the ice that would have been in the ice house in the part of the ice house that it is claimed was damaged. . . . He should respond for the difference between what was in the ice house after the damage and what was in the ice house before the damage." Plaintiff does not contend that there was any less quantity of ice in the ice house after the building had collapsed than there was before, but he merely contends that a certain portion of the ice was damaged and rendered worthless by reason of having been exposed to the air and sun, as aforesaid. The instruction was, therefore, incorrect and misleading, and should not have been given in such form. The rule of damages is prescribed in § 6582, Rev. Codes, as follows: "For the breach of an obligation not arising from contract the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." If a portion of plaintiff's ice was rendered entirely valueless as the proximate result of defendant's or his servants' acts rendering him liable, then he should respond in damages to the plaintiff for the fair market value of such ice at said time and place, with interest; but if a portion of such ice was merely damaged, but not to such an extent as to render it entirely valueless, plaintiff should be compensated by allowing him the difference between the value of such ice if it had not been injured, and its value after the injury, with interest.

The assignments not noticed above are deemed without merit.

The order is reversed and a new trial directed.

MURDOCK v. HANSON.

(136 N. W. 236.)

Suit for accounting — findings of fact.

1. This is a suit for an accounting, and to redeem from a foreclosure sale upon paying the amount found due from respondent to appellant. On a trial *de novo* in this court, the facts found are stated in the opinion.

Appeal and error — additional defendants — reversal.

2. It appearing from the pleadings and the evidence submitted by respondent that some eight months prior to the commencement of this suit appellant had conveyed, by warranty deed, the premises in controversy, to third parties, who still hold title thereto, and that a complete determination of the questions involved cannot be had unless such holders of title are made parties defendant, the record is remanded, with directions to the trial court to cause such parties to be brought in as additional defendants; and to take testimony and determine their rights in the premises, and enter judgment in accordance with this opinion and the rights of the respective parties as found from the additional evidence so taken.

Opinion filed May 4, 1912.

Appeal by defendant from a judgment of the District Court for Wells County, *Goss*, Special J., in plaintiff's favor in a suit for an accounting and to redeem from a foreclosure sale.

Judgment vacated.

H. A. Olsberg (Valley City, North Dakota), for defendant and appellant.

W. E. Hoopes and *George H. Stillman* (Carrington, North Dakota), for plaintiff and respondent.

SPALDING, Ch. J. We are not entirely clear whether this suit was intended as one for specific performance of an oral contract to convey real estate, or one to redeem from a foreclosure sale, under an alleged agreement between the parties that appellant should take an assignment of a sheriff's certificate of sale, under a mortgage foreclosure, and permit the plaintiff to redeem by paying the amount which the certificate represented and other indebtedness of the plaintiff and her husband to

him. It seems to have been tried in the district court on the latter theory and without much reference to pleadings, and we shall treat it as an action to redeem. Respondent asks an accounting, and offers to pay the amount found due appellant.

We are not altogether satisfied that the plaintiff ought to recover; that is to say, the testimony of herself and her husband is in direct conflict with that of the appellant. Plaintiff herself was a most elusive and unsatisfactory witness. She studiously and ingeniously evaded giving direct testimony on many vital questions, except as occasionally compelled to do so by the court. Her husband confessed on the stand that he had testified falsely, and we should disregard the testimony given by both, did it stand alone, or had it not been considered and passed upon by a court which had the advantage of seeing and hearing both testify, and which was probably able to sift the true from the false; and even then we should feel compelled to disregard it but for corroboration in some important particulars. While the corroboration is not very strong, taken in connection with the advantage possessed by the trial court, we do not feel justified in disregarding the testimony given by these parties.

A trial *de novo* is demanded in this court on the record made in the district court. The questions involved are almost entirely questions of fact. After careful consideration we have reached the conclusion that in the main the findings of the trial court are supported by the record. No purpose would be served by a discussion of the evidence. We briefly state our findings of fact, omitting many which we deem immaterial:

The premises in controversy are the south half of the southwest quarter of section 27, and the east half of the southeast quarter of section 28, in township 150, north of range 73 west, to which the plaintiff's husband acquired title, under the homestead laws of the United States, in the year 1900. At the time of making final proof thereto, they executed and delivered a first mortgage to the Winona Savings Bank for $500, and a second mortgage to one Mitchell for $200, which mortgages were duly recorded in the office of the register of deeds of Wells county, North Dakota, about April 7, 1900. About April 15, 1903, the $200 mortgage was foreclosed by advertisement, and certificate issued to Mitchell, the mortgagee, for $265.50. In the

meantime appellant, John Hanson, sold to respondent's husband a team of horses for which he received a note in the sum of $223.30, secured by a chattel mortgage, signed by respondent and her husband. Thereafter, on or about the 22d day of April, 1902, respondent and her husband executed and delivered to said Hanson a mortgage upon the premises in controversy, as additional security for payment of the purchase price of the team of horses, which mortgage was duly recorded. Hanson thereafter abandoned his chattel security. On or about December 23, 1903, appellant, Hanson, at the request of respondent and her husband, purchased the sheriff's certificate representing the foreclosure sale above referred to, under an indefinite and vague agreement with the respondent to carry the same as security for the amount paid and for other indebtedness to him, and to permit them to repay any indebtedness owed to or advancements made by him in their behalf, he holding such certificate, and the sheriff's deed later issued, as security therefor, with interest.

On April 21, 1904, appellant applied to and received from the sheriff of Wells county a sheriff's deed conveying to him the premises in controversy, which deed was duly recorded. On several occasions, respondent and her husband commenced negotiations with other parties to secure the money necessary to reimburse appellant for the sums advanced by him, with interest, but were prevented from doing so by the advice of appellant that he was willing to let the indebtedness to him run, on payment of interest, and thereby save them the payment of large sums of money as commissions for securing a new loan, which they would have to do if they paid the amount due him. No payment was made except $93.20, in the fall of 1908.

The amount due the appellant at the present time, as shown by the record, is as follows:

The amount represented by the purchase of sheriff's certificate of sale, $265.65; to which must be added interest at 12 per cent since April 15, 1903;

The purchase price of horses, $223.30, and interest thereon at 10 per cent since April 22, 1902;

Mortgage purchased by appellant from bank, dated June 17, 1901, $301.65; and interest thereon at 10 per cent;

Store bill secured by mortgage, paid by Hanson, $61.95; interest at 7 per cent;

Making a total of $1,754.01, as near as we are able to compute the same from the somewhat uncertain dates disclosed by the record. From this must be deducted wheat delivered to Hanson in 1908, $93.30, with interest thereon at 7 per cent, making a total of $121.73, leaving due appellant $1,632.28, on the 15th day of April, 1912.

There is some evidence of appellant having paid taxes and other expenses, but no figures are given, hence such items are excluded from our computation. The trial court fund due the appellant $759.45. We have tried in vain to ascertain how these figures were arrived at. Respondent's husband testified that the indebtedness amountd to over $1,300, January 1, 1910, with interest at 7 per cent. The sums which we have named are those testified to definitely by the husband of respondent, with interest computed on the foreclosure as provided by statute, and on the other items as testified to by appellant.

If no other questions presented themselves we could modify the judgment of the district court as to the amount found due, and when so modified, affirm it; but the record discloses other persons interested in this litigation who are not made parties thereto and whose absence precludes a complete determination or settlement of the questions involved herein. The defendant's answer alleges a transfer of the premises in question before the commencement of this action, to one Axel Pederson and one Axel Lundin, and that they are the holders of the title thereto. Thirty days after the trial was completed, the court, without notice to defendant, permitted the plaintiff to amend her complaint and thereby allege that, since the commencement of the action, said Pederson and Lundin had acquired or claim to have acquired some interest, title, or demand upon, in, to, and against said premises or some portion thereof. The first exhibit offered by the plaintiff in evidence on the trial was an abstract of title to the premises in controversy, which it was stipulated should be received in lieu of the original records, and this abstract contains two entries showing the conveyance of the premises by warranty deeds to said Pederson and Lundin, eight or nine months before this suit was commenced. The pleadings and this exhibit make it clear that said holders of the title are necessary parties to a complete determination of the questions involved. In case they are good-faith pur-

chasers, no judgment in this action could restore such premises to respondent. Rev. Codes 1905, § 6816. For this reason we are compelled to vacate the judgment and remand the action with directions that the trial court cause said Pederson and said Lundin to be made parties defendant, and after issue is joined by them, or in case of default, that court to take testimony and determine their rights in the premises and enter judgment in accordance with this opinion and the rights of the respective parties as found from the additional evidence.

The trial court should also take into consideration the original $500 mortgage, and duly ascertain whether appellant has paid the same, and if he has done so the amount paid, with interest, should be added to the sum hereinbefore found due appellant as the amount necessary to be paid to entitle respondent to redeem, provided she is entitled to redeem under the additional facts found. Appellant will recover costs.

BURKE, J., and GOSS, J., being disqualified, by stipulation of counsel the cause decided by the remaining members of the court.

STATE v. TOLLEY.

(136 N. W. 784.)

Libel and slander — indictment and information — criminal responsibility.

1. An information for criminal libel, charging that defendant did wilfully, unlawfully, feloniously, maliciously, and knowingly, and with malicious intent to injure one O., write, print, and publish, and cause to be written, printed, and published of and concerning him, the said O., a certain malicious, false, and defamatory libel, etc., examined and *held* not vulnerable to attack, either upon the ground that the act charged as an offense is not clearly and distinctly set forth in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended or what is charged, or that more than one offense is charged in such information.

Indictment and information — statutory provisions.

2. Where a statute mentions several things disjunctively as constituting one and the same offense, all punishable alike, the whole may be charged conjunctively in a single count as constituting a single offense.

Order of proof — discretion — criminal law — cross-examination — witnesses.

3. The order of proof, as well as the scope of the cross-examination of witnesses, is, and of necessity must be, largely committed to the sound discretion of the trial court.

Held, that the rulings of the court below restricting the cross-examination of the complaining witness were, in the light of the record, nonprejudicial.

Witnesses — trial court — discretion — examination.

4. Defendant's contention that the trial court abused its discretion in limiting the direct examination and permitting unlimited cross-examination of himself as a witness is *held* without substantial merit.

Rulings on evidence held correct.

5. Certain alleged rulings in the admission and exclusion of testimony examined and *held* correct.

Criminal law — cross-examination — remarks of judge.

6. During the cross-examination of defendant, he was asked to state whether as a fact a certain deposit had been made to his credit in a certain bank. He evaded the question by giving several answers which were not responsive; such as, "I have never been able to find it," "I will swear I looked faithfully and made a search for it and never found it," etc. And, again, he testified, "It has not been deposited to my knowledge to this day," and "the books don't show it." Whereupon the state's attorney stated, "I am not talking about what the books show;" whereupon the trial court made the following remark: "I think he has answered it both ways. Never mind, answer the question." *Held*, that such remark was nonprejudicial, as the court clearly thereby meant that he had answered both that no such deposit had been made and that the books did not disclose such a deposit. No criticism that the defendant had testified falsely, either in one instance or the other, was made or intended.

Libel — instructions.

7. The assignments of error predicated upon the giving of certain instructions and the refusal to give others requested by defendant, as well as those predicated upon the failure to instruct on certain essential subjects, *held* without merit. We find nothing in the instructions, when considered as a whole, prejudicial to the rights of the defendant.

Criminal law — appeal — technical errors.

8. Under the provisions of the Revised Codes, § 10,157, it is made the duty of this court on appeals in criminal cases, to give judgment without regard to technical errors which do not affect the substantial rights of the parties. From a consideration of the entire record, which is very voluminous, we are unable to discover any error affecting the substantial rights of appellant. Applying the above legislative mandate, the judgment of conviction is affirmed.

Libel and slander — evidence.

9. Evidence examined as to its sufficiency to sustain the conviction, and *held* amply sufficient.

Libel and slander — jury — verdict.

10. Section 9 of the Constitution of North Dakota, which provides that in all civil and criminal trials for libels "the jury shall have the same power of giving a general verdict as in other cases; and in all indictments or informations for libels the jury shall have the right to determine the law and the facts under the direction of the court as in other cases,"—is construed and held not to make the jurors the judges of the law. The jury must accept the law from the court and apply such law to the facts. Such constitutional mandate merely vests in the jury in such cases the right to render a general verdict. They are given the right to determine the law merely in the same manner that they do in other cases where a general verdict is returned and the judge is without power to require a special verdict in such cases. Section 9991, Rev. Codes, must receive the same construction. Section 10,042, Rev. Codes, goes a step further by depriving the jury of the power to return a special verdict in criminal libel cases.

Opinion filed May 13, 1912.

Appeal from District Court, Ward county; *K. E. Leighton*, J.

E. C. Tolley was convicted of criminal libel, and from an order denying his motion for new trial, he appeals.

Affirmed.

George A. McGee and *P. M. Clark*, for appellant.

The information was defective. State v. Hakon, 21 N. D. 133, 129 N. W. 234; State v. Marcks, 3 N. D. 532, 58 N. W. 25; State v. Smith, 2 N. D. 515, 52 N. W. 320; People v. Alibez, 49 Cal. 452, 1 Am. Crim. Rep. 345; People v. Stock, 21 Misc. 147, 47 N. Y. Supp. 94; Yost v. Com. 5 Ky. L. Rep. 935; Hawkins v. Com. 70 S. W. 640, 24 Ky. L. Rep. 1034; State v. Huffman, 136 Mo. 58, 36 S. W. 797; State v. Mattison, 13 N. D. 391, 100 N. W. 1091; State v. Ashpole, 127 Iowa, 680, 104 N. W. 281; Thweatt v. State, 49 Tex. Crim. Rep. 617, 95 S. W. 517; State v. Brown, — Miss. —, 28 So. 752; State v. Gould, 26 W. Va. 258; Com. v. Melingin, 5 Ky. L. Rep. 429; People v. Hartwell, 166 N. Y. 361, 59 N. E. 929; Breeland v. State, 79 Miss. 527, 31 So. 104; State v. Comfort, 5 Mo. 357; People v. Frazier, 36 Misc. 280, 73 N. Y. Supp. 446; Porter v. State, 48 Tex. Crim. Rep. 125,

86 S. W. 767; Meadow v. State, 136 Ala. 67, 34 So. 183; State v. Dennison, 60 Neb. 192, 82 N. W. 628.

The court abused its discretion in limiting the cross-examination of the witness Olsen. State v. Hakon, 21 N. D. 133, 129 N. W. 234; State v. Malmberg, 14 N. D. 523, 105 N. W. 615; State v. Hazlett, 14 N. D. 491, 105 N. W. 617.

Defendant should be permitted to testify as to why he did the act and what provoked him. Wrege v. Jones, 13 N. D. 267, 112 Am. St. Rep. 679, 100 N. W. 705, 3 Ann. Cas. 482; Lauder v. Jones, 13 N. D. 527, 101 N. W. 907; State v. Johnson, 17 N. D. 560, 118 N. W. 230.

The remarks of the court were prejudicial to the defendant, and an invasion by the court of the province of the jury. State v. Hazlett, 14 N. D. 497, 105 N. W. 617; Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003; State v. Barry, 11 N. D. 428, 92 N. W. 809; Wheeler v. Wallace, 53 Mich. 355, 19 N. W. 33; Sharp v. State, 14 Am. St. Rep. 27, and note (51 Ark. 147, 10 S. W. 228) South Covington & C. Street R. Co. v. Stroh, 23 Ky. L. Rep. 1807, 57 L.R.A. 882, 66 S. W. 177; State v. Peltier, 21 N. D. 188, 129 N. W. 451; Wilson v. Territory, 9 Okla. 331, 60 Pac. 112, 12 Am. Crim. Rep. 582; Thomp. Trials, § 218; McMinn v. Whelan, 27 Cal. 319; People v. Hare, 57 Mich. 505, 24 N. W. 843; State v. Murphy, 9 N. D. 175, 82 N. W. 738; State v. Stowell, 60 Iowa, 535, 15 N. W. 417; State v. Philpot, 97 Iowa, 365, 66 N. W. 730; State v. Sharp, 51 Ark. 147, 14 Am. St. Rep. 27, 10 S. W. 228; State v. Jacobs, 30 S. C. 131, 14 Am. St. Rep. 897, 8 S. E. 698; Valley Lumber Co. v. Smith, 71 Wis. 304, 5 Am. St. Rep. 216, 37 N. W. 412; State v. Harkin, 7 Nev. 377; State v. Stowell, 60 Iowa, 535, 15 N. W. 417; Russ v. The War Eagle, 9 Iowa, 374; Shakman v. Potter, 98 Iowa, 61, 66 N. W. 1046; State v. Lightfoot, 107 Iowa, 344, 78 N. W. 41, 11 Am. Crim. Rep. 588; Moore v. State, 85 Ind. 90; People v. Webster, 111 Cal. 381, 43 Pac. 1114; People v. Casey, 65 Cal. 260, 3 Pac. 874, 5 Am. Crim. Rep. 318; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Dudley L. Nash, for the State.

The information charged but one offense. State v. Bradley, 15 S. D. 148, 87 N. W. 590; People v. Barnnovitch, 16 Cal. App. 427, 117 Pac. 572; People v. Fitzgerald, 51 Colo. 175, 117 Pac. 135;

People v. Gosset, 93 Cal. 641, 29 Pac. 246; People v. Thompson, 111 Cal. 242, 43 Pac. 748; People v. Gusti, 113 Cal. 177, 45 Pac. 263; People v. Wolfrom, 15 Cal. App. 732, 115 Pac. 1088; State v. Corwin, 151 Iowa, 420, 131 N. W. 659; 1 Bishop, New Crim. Proc. § 586; Ben v. State, 22 Ala. 9, 58 Am. Dec. 234; State v. Kerr, 3 N. D. 523, 58 N. W. 27.

Words are actionable if they consist in a statement of facts which would naturally and presumably be understood by the hearers as a charge of crime. Stroebel v. Whitney, 31 Minn. 384, 18 N. W. 98; Lewis v. Hudson, 44 Ga. 568; Proctor v. Owens, 18 Ind. 21, 81 Am. Dec. 341; Morgan v. Livingston, 2 Rich. L. 573.

Courts will construe a libelous publication in its ordinary popular sense. Hotchkiss v. Olmstead, 37 Ind. 74; Com. v. Child, 30 Pick. 205; World Pub. Co. v. Mullen, 43 Neb. 126, 47 Am. St. Rep. 737, 61 N. W. 108; Simons v. Burnham, 102 Mich. 189, 60 N. W. 478; Ewing v. Ainger, 96 Mich. 587, 55 N. W. 996; Poprok Zapadu Co. v. Zizkovsky, 42 Neb. 64, 60 N. W. 358; Post Pub. Co. v. Hallem, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 530; Bradley v. Cramer, 59 Wis. 309, 48 Am. St. Rep. 511, 18 N. W. 268; Bettner v. Holt, 70 Pac. 270, 11 Pac. 713; Fisher v. Clement, 10 Bart. C. 472; Pennington v. Meeks, 46 Mo. 217; People v. Taylor, 36 Cal. 256; Townshend, Slander & Libel, § 84.

Fisk, J. Appellant was convicted in the district court of Ward county of the crime of criminal libel, and he has appealed both from the judgment of conviction and from the order denying his motion for a new trial. There are 221 assignments of error, but they are grouped and argued in appellant's brief under six heads, and they will be considered in the order thus presented.

1st. It is contended that the information is defective, and the same was challenged, both by demurrer and by motion in arrest of judgment. There are four grounds of demurrer, only two of which are argued in appellant's brief, which grounds are as follows:

"2d. That the information in the above-entitled action does not substantially conform to the requirements of the Penal Code and Code of Criminal Procedure of North Dakota, 1905, and acts amendatory thereof, in this,—that the act charged as an offense in said information

is not clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended or what is charged;" and,

"3d. That more than one offense is charged in said information."

The information, omitting formal parties, is as follows:

"Dudley L. Nash, state's attorney in and for the county of Ward, in the state of North Dakota, as informant here in open court, in the name and by the authority of the state of North Dakota, gives this court to understand and be informed:

"That heretofore, to wit, on the twenty-seventh day of May, in the year of our Lord, one thousand nine hundred and nine, at the county of Ward in the state of North Dakota, one E. C. Tolley, late of said county of Ward and state aforesaid, did commit the crime of criminal libel, committed as follows, to wit: That at said time and place, the said E. C. Tolley, defendant herein, did wilfully, unlawfully, feloniously, designedly, maliciously, and knowingly, and with malicious intent to injure one Ambrose B. Olson, write, print, and publish, and cause to be written, printed, and published, of and concerning him, the said Ambrose B. Olson, a certain malicious, false, and defamatory libel, in language tending to impeach the honesty, integrity, and reputation of him, the said Ambrose B. Olson, and thereby to expose him, the said Ambrose B. Olson, to public hatred, ridicule, and contempt, and deprive him of the benefits of public confidence and social intercourse; and the said Ambrose B. Olson, at the time of the said malicious and defamatory publication, was a resident of the county of Ward, in the state of North Dakota, and said libelous publication was then and there in the words and figures following, to wit:

"'I did refuse to put any money into the hands of Ambrose Olson last fall, for the reason that he has misappropriated hundreds of dollaws of my money, and I have no confidence in his handling any more of it, and would not feel justified in letting him carry a rat's tail to a sick kitten.'

"The said E. C. Tolley then and there, thereby meaning and tending to charge the said Ambrose B. Olson with having committed a public offense, to wit, the crime of embezzlement, he, the said E. C. Tolley, well knowing that the said defamatory matter would expose him, the said Ambrose B. Olson, to public hatred, contempt, and ridicule, and

would impeach the honesty, integrity, and reputation of him, the said Ambrose B. Olson, and deprive him, the said Ambrose B. Olson, of the benefits of public confidence, and social intercourse.

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

We do not think there is any merit in either of such contentions, and the trial court properly overruled such demurrer. Such information is sufficiently definite and specific in charging the manner of the commission of the crime, to apprise defendant of the nature of the charge against him, and to thus enable him to prepare his defense.

Section 8877, Rev. Codes 1905, defines criminal libel as follows: "A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation, or effigy tending to expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence or social intercourse, . . ." and the following section provides that "every person who makes or composes, dictates or procures the same to be done, or who wilfully publishes or circulates such libel, or in any way knowingly or wilfully aids or assists in making, publishing, or circulating the same, is guilty of a felony."

It will be seen that the gist of the crime is the malicious defamation of a person, made public in one or more of the modes prescribed, and tending to expose such person to public hatred, contempt, or ridicule, etc. It seems to be appellant's contention that, because the information fails to charge that the defendant committed the acts constituting the libel in but one of two ways, that is, in person or through an agent, that the same is indefinite and uncertain. In this we cannot concur. The information charges him in the conjunctive with committing the acts and causing them to be committed. Such an allegation charges but one offense, and does not render the information vulnerable to attack for duplicity. It is well settled that where a statute mentions several things disjunctively as constituting one and the same offense, all punishable alike, the whole may be charged conjunctively in a single count as constituting a single offense. State v. Kerr, 3 N. D. 523, 58 N. W. 27. See also State v. Bradley, 15 S. D. 148, 87 N. W. 590; People v. Fitzgerald, 51 Colo. 175, 117 Pac. 135; People v. Barnnovich. 16 Cal. App. 427, 117 Pac. 572; People v. Gosset, 93 Cal. 641, 29 Pac. 246; State v. Corwin, 151 Iowa, 420, 131 N. W. 659; 1 Bishop, New Crim.

Proc. § 586. The case of State v. Hakon, 21 N. D. 133, 129 N. W. 234, relied on by appellant's counsel, is not in point. The statute there involved was § 9317, Rev. Codes, which prescribed that "every person who wilfully administers poison to any animal, the property of another, and every person who maliciously exposes any poisonous substance, with intent that the same shall be taken by any such animal, is punishable. . . ." The information in that case merely charged the defendant with having maliciously administered poison to a certain animal, and the trial court charged the jury that maliciously exposing poison with the intent that it might be taken by animals would be administering the same under the said statute, and this was held error, the court says: "The statute provides two independent ways by which the offense of poisoning animals may be committed, and an allegation of wilfully and maliciously administering poisons will not warrant proof of poisoning by any other method." In other words, we merely there held that the state having alleged that the offense was committed in but one of two statutory modes, it was restricted thereto at the trial. We have no such situation in the case at bar, but on the contrary the defendant is charged in the conjunctive with both having committed, *and* caused to be committted, the acts charged against him.

In the second subdivision of appellant's brief, he complained of the ruling of the court below in restricting the cross-examination of the complaining witness Olson. Numerous rulings claimed to be prejudicial are called to our attention by appellant's counsel. We shall not undertake to refer to them in detail in this opinion. Suffice it to say that, after considering each of such rulings, we are agreed that none of them constitute prejudicial error. The record discloses that a very extensive cross-examination of the complaining witness was permitted. Any errors in excluding testimony on cross-examination of such witness were thereafter cured by permitting the subject-matter thereof to be fully covered. The order of proof, as well as the scope of the cross-examination, is, and of necessity must be, largely committed to the sound discretion of the trial court. We find nothing in the opinions of this court in the cases of State v. Hakon, supra; State v. Malmberg, 14 N. D. 523, 105 N. W. 614; or in State v. Hazlett, 14 N. D. 491, 105 N. W. 617, inconsistent with our conclusions as above stated.

Appellant next complains of the alleged action of the trial court in

limiting the direct examination and permitting unlimited cross-examination of himself as a witness. We find no merit in this contention. The record discloses that appellant was accorded a full opportunity of giving testimony on the direct examination, and that the trial court did not abuse its discretion in permitting the cross-examination of this witness. Defendant was permitted to testify fully as to his reasons and motives for publishing the alleged libelous matter. We discover no prejudicial error in this feature of the case.

The fourth subdivision of appellant's brief charges error in the ruling, excluding Exhibit "B2," which is an article published by one Wooledge. The defense sought to prove that the alleged libelous matter set forth in the information was published by appellant as a reply to the previously published article, Exhibit "B2," and also in reply to an article, Exhibit "B1," theretofore published by the complaining witness, Olson, for the purpose of vindicating himself in the public eye from the imputations contained in such articles. Exhibit "B2," was excluded on the ground that it was incompetent, irrelevant, and immaterial. We discover no error in such ruling. We are wholly unable to see how such exhibit was either relevant or material to the issues on trial. The statement in such exhibit, to the effect that defendant refused to contribute toward the campaign fund in the county division contest in favor of the proposed organization of the new county of Lake, would not justify the publication by defendant of the libelous article charged in the information of and concerning the complaining witness, Olson, nor would it constitute a mitigating circumstance for the commission of the crime charged. Furthermore, defendant testified fully and in detail as to the intent and motive which prompted him to publish such libel.

This brings up to the fifth point in appellant's brief, which is that the trial court make prejudicial remarks during the trial in the presence of the jury. The only remark complained of was made in connection with the examination of defendant relative to whether certain moneys collected by Olson and belonging to defendant had not been deposited to defendant's credit in a certain bank. He was asked to state whether as a fact any such deposit had been made. He evaded the question by stating: First, that "I have never been able to find it;" second, "I will swear I looked faithfully and made a search for it, and

never found it;" Third, "It has not been deposited to my knowledge to this day;" again. "The books don't show any money coming from Weber to-day that is deposited." Thereupon the state's attorney interrupted the witness, stating, "I am not asking you that now, answer my question," and he again answered, "The books don't show it." The state's attorney then stated, "I am not talking about what the books show." At this point the trial court made the remark complained of, as follows: "I think he has answered it both ways. Never mind, answer the question." It is perfectly apparent that all the court meant by such remark was that he had answered both that no such deposit had been made and that the books did not disclose such a deposit, and the jury must have so understood it. The court was not criticizing defendant for having testified both ways in answer to the same question. We are clear, therefore, that appellant's contention in this respect is devoid of any merit.

Under appellant's sixth point he challenges the correctness of the court's instructions to the jury. He first asserts that the court erroneously charge the jury as to the burden of proof; and, second, that it failed to instruct on certain essential subjects and in certain specified particulars. We will notice these contentions briefly and in the order presented in appellant's brief.

We fully concur in the views of counsel for appellant, that the burden is not on the defendant to prove his defense based upon the truth and justification of the alleged libelous matter, or that it was published with good motives, beyond a reasonable doubt or by a preponderance of evidence. On the contrary, the burden is upon the state to establish, to the satisfaction of the jury beyond a reasonable doubt, that no such defense exists. In other words, it is incumbent upon the defendant merely to engender in the minds of the jury a reasonable doubt as to his guilt, or the truth of such defensive matter; and if from the whole evidence a reasonable doubt of guilt is entertained by the jury, defendant is entitled to the benefit of such doubt and to an acquittal. But we do not understand that the trial court, in giving his charge in this case violated this rule. On the contrary, after carefully reading and considering the instructions as a whole, we are entirely convinced that such instructions are not vulnerable to attack in this respect. We quote from the instructions as follows: "The jury

are the sole and exclusive judges of all questions of fact in this case, and wherever in this charge the court has stated that any fact must be found established or proved, it means that such fact must be found established or proven to the satisfaction of the jury beyond a reasonable doubt before a conviction can be had."

"The burden of proof in this case at all times is upon the state to prove the truth of the material allegations charged in the information. That is, the state must prove that there was a publication of the matter set out in the information charged to be libelous, and that the same was libelous."

"Should the state prove, to your satisfaction beyond a reasonable doubt, the truth of all the other material allegations charged in the information, but find that the alleged libelous matter was true, then it is incumbent upon the state to prove to your satisfaction beyond a reasonable doubt that the same was not published with good motives and justifiable ends, and if the state does so prove then you should find the defendant guilty. If you have a reasonable doubt as to whether the alleged libelous matter was true or not, then it is incumbent upon the state to prove that the same was not published with good motives and for justifiable ends. If the jury find that the alleged libelous matter was true, but have a reasonable doubt as to whether it was published with good motives and for justifiable ends, then the jury should find the defendant not guilty."

In the light of these instructions we fail to see how appellant has any just cause for complaint. The instructions are clear, and they placed the burden of proof upon the state throughout, and are in harmony with the rule announced in the authorities cited by appellant's counsel.

It is, of course, elementary that the instructions must be considered as a whole, and when this is done we find nothing in the instructions given in this case prejudicial to the rights of defendant.

The contention that the court failed to instruct on certain essential features of the case is, we think, without merit also. The court defined the offense of criminal libel, and clearly stated to the jury what it was incumbent upon the state to prove in order to convict. The fact that the court did not read to the jury the sections of the Code defining the crime is not material. The law of the case was fully and

accurately covered in so far as the substantial rights of defendant are concerned. The jury was explicitly instructed that the state had the burden of proving beyond a reasonable doubt that defendant published or caused to be published the alleged libelous matter charged in the information; that the same was libelous as defined in the instructions; and that the same was false, or if not false, that it was published or caused to be published by defendant as alleged, without good motives or for justifiable ends.

The criticism of the instruction upon which assignment of error number 190 is predicated is not without merit, and were it not for the facts hereinafter stated we would feel impelled to the conclusion that the giving of such instruction was reversible error. The instruction complained of is as follows: "The information in this case charges that it was the intent of the defendant in publishing the alleged libelous matter to charge the said Ambrose Olson with the crime of embezzlement." This allegation was both immaterial and improper, and the court should not have given the above charge. The publication charged was libelous *per se,* whether it charged or did not charge Olson with the crime of embezzlement. The language is plain and there was no need of an innuendo. Defendant admitted that he published the defamatory matter as charged, and the chief issue at the trial was whether as thus published it was true or false, and if true, whether it was published with good motives and for justifiable ends. We are unable to see how, therefore, the giving of such instruction could have been prejudicial. Under the provisions of § 10157, Rev. Codes, it is made the duty of this court on appeals in criminal cases to give judgment without regard to technical errors which do not affect the substantial rights of the parties. We do not think defendant's substantial rights were affected by the error thus complained of. Had such instruction not been given, it is clear, from the record, that the result of the trial must have been the same.

What we have above said regarding assignment number 190 applies also to the next two assignments.

We have considered all of the assignments not herein specially referred to, and find no substantial merit therein. To notice them in detail would extend this opinion to an unwarranted length. The sufficiency of the evidence to sustain the conviction is also challenged,

but we are agreed that the evidence is amply sufficient. The record discloses that appellant was accorded a fair and impartial trial, and that there is no error prejudicial to his substantial rights.

But one other matter will be noticed. Section 9, art. 1, of our Constitution provides that in all civil and criminal trials for libel "the jury shall have the same power of giving a general verdict as in other cases; and in all indictments or information for libels the jury shall have the right to determine the law and the facts under the direction of the court, as in other cases." It is a much mooted question in this state as to the correct meaning of the latter portion of this section, and we are urged by counsel for the state to construe the same with a view of settling the practice in this jurisdiction. We are entirely clear that the construction contended for by the learned state's attorney of Ward county is correct, and that all that was intended by the use of the language quoted was to vest in the jury in such cases the *right* to render a general verdict. It was not the intention to make the jurors the judges of the law, but they are given the right to determine the law merely in the same manner that they do in other cases where a general verdict is returned. In other words, the court is without power in libel cases to require a special verdict to be returned, as the jury is given the right not only to determine the facts, but to apply the law thereto under the direction of the court as in other cases. Section 9991, Rev. Codes, must of course be given the same construction. Section 10042, Rev. Codes, seems to go a step further by depriving the jury of the power to return a special verdict in criminal libel cases. Our Constitution in this respect is like the Constitution of Pennsylvania, § 7, article 1. Mitchell, J., of the supreme court of that state, in a very able and exhaustive opinion in the case of Com. v. McManus, 143 Pa. 64, 14 L.R.A. 89, 21 Atl. 1018, 22 Atl. 761, construed their Constitution and reached the same conclusion as we do. See also the very exhaustive opinion of the Vermont court in State v. Burpee, 65 Vt. 1, 19 L.R.A. 145, 36 Am. St. Rep. 775, 25 Atl. 964, 9 Am. Crim. Rep. 536, overruling the prior case of State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90. The reasoning in these opinions is, to our minds, unanswerable, and it would be both time wasted and presumptuous on the writer's part to attempt to add anything to what is there said. The trial judge, in charging the jury on this point,

evidently followed the recent case of People v. Seeley, 139 Cal. 118, 72 Pac. 834, but it will be found that the California constitutional provision corresponding to § 9 of the North Dakota Constitution is not the same as ours. Theirs reads: "And the jury shall have the right to determine the law and the fact," while ours provides, "The jury shall have the right to determine the law and the facts, *under the direction of the court, as in other cases.*"

Finding no prejudicial error in the record, the judgment and order must be affirmed.

SMITH v. COURANT COMPANY et al.

(136 N. W. 781.)

Corporations — authority — admissibility of evidence — bills and notes.

1. One S. was employed to edit a newspaper and manage a printing plant belonging to defendant, for a short time. In the conduct of the business he made collections and deposited them to the credit of the defendant in a bank, and drew checks on the account to pay bills for help and supplies. On the termination of his employment the account in the bank was overdrawn, and the checks which he had drawn in payment for help were cashed by S. from money in his hands as agent of his wife, the plaintiff, with her knowledge of all the facts, and the checks indorsed to her. After his connection with the defendant ceased, such checks were dishonored by the bank for want of funds, and payment thereon was refused by defendant. This action is brought upon thirty-three such checks. The defense is a general denial. On the trial the court refused to permit defendant to introduce evidence tending to show an agreement between it and S. that he was to be limited in his expenditures for the conduct of the business to profits or receipts from the business. As such evidence would have shown want of authority on the part of S. to draw checks in excess of the profits or receipts, such ruling constituted reversible error.

Corporations — agents — adverse interests — bills and notes — authority.

2. When S. was employed by defendant a disagreement arose as to the compensation he should receive for his services, defendant refusing to agree to pay the sum demanded, and the amount to be paid him was left for future determination. No further agreement was ever reached thereon. Among the checks

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Note.—On the question how far a corporation is charged with knowledge of managing officer engaged in illegal act, see note in 2 L.R.A.(N.S.) 993.

in suit were a number drawn to S., signed by him in the name of defendant, and indorsed to plaintiff, and paid to him out of funds belonging to plaintiff, without the knowledge of defendant. *Held*, that inasmuch as he was, at the same time, acting for the defendant in his own behalf and as agent for the plaintiff, and their interests were in conflict, his acts in the premises were not the acts of the defendant.

Held, further, that he had no right, under the facts disclosed, to fix his own compensation at the sum which the defendant had refused to pay, and that for this reason the checks drawn in his favor were drawn without authority, and are not the checks of the defendant.

Bills and notes — bona fide holder.

3. *Held*, under the facts, that plaintiff was not a holder of the checks in suit in due course.

Corporations — authority — ratification.

4. On the facts recited in the opinion it is *held*, that there was no ratification of the acts of S. in issuing and honoring the checks in suit, and that, not having knowledge that he was doing so, defendant was not estopped to question his authority.

Opinion filed May 14, 1912.

Appeal by defendant Courant Company from a judgment of the District Court for Bottineau County; *Crawford*, Special Judge, in plaintiff's favor and from an order denying a new trial in an action on certain checks.

Reversed.

Noble, Blood, & Adamson, for appellant.

The business manager of a corporation does not have authority to bind the corporation as maker of commercial paper, unless authority has been specifically conferred upon him. Topeka Capital Co. v. Remington Paper Co. 61 Kan. 1, 57 Pac. 504; Edwards v. Carson Water Co. 21 Nev. 469, 34 Pac. 381; Oak Grove & S. N. Cattle Co. v. Foster, 7 N. M. 650, 41 Pac. 522; Craft v. South Boston R. Co. 150 Mass. 207, 5 L.R.A. 641, 22 N. E. 920; Sanford Cattle Co. v. Williams, 18 Colo. App. 378, 71 Pac. 889; Bank of Commerce v. Baird Min. Co. 13 N. M. 424, 85 Pac. 970; Baines v. Coos Bay Nav. Co. 45 Or. 307, 77 Pac. 400; Elwell v. Puget Sound & C. R. Co. (Wash.) 35 Pac. 376; Herman v. Martineau, 1 Wis. 151, 60 Am. Dec. 368.

Weeks, Murphy, & Moum, for respondent.

Evidence is ample to establish the authority of Ed. A. Smith to issue checks for the Courant Company. Leekins v. Nordyke, 66 Iowa, 471, 24 N. W. 1; Story, Agency, 9th ed. §§ 97, 1060.

A principal is generally bound by the contracts made for him by his agent, and acts of the agent in connection therewith, while acting in the course of his employment and within the scope of his actual or apparent authority. 31 Cyc. 1566; Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 23 L.R.A. 584, 37 Am. St. Rep. 601, 35 N. E. 932; Pochin v. Knoebel, 63 Neb. 768, 89 N. W. 264; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; 31 Cyc. 1585; Whitaker v. Kilroy, 70 Mich. 635, 38 N. W. 606.

Defendant cannot repudiate these checks after having voluntarily accepted the benefits from the transaction in which they were issued. Morris v. Ewing, 8 N. D. 99, 76 N. W. 1047; Nichols, S. & Co. v. Shaffer, 63 Mich. 599, 30 N. W. 383; Eikenberry v. Edwards, 67 Iowa, 14, 24 N. W. 570; Gardner v. Warren, 52 Mich. 309, 17 N. W. 853; Vaughn v. Sheridan, 50 Mich. 155, 15 N. W. 62; Miles v. Ogden, 54 Wis. 573, 12 N. W. 81; Strasser v. Conklin, 54 Wis. 102, 11 N. W. 254; Wright v. Vineyard Methodist Episcopal Church, 72 Minn. 78, 74 N. W. 1015; Oberne v. Burke, 50 Neb. 764, 70 N. W. 387; 1 Am. & Eng. Enc. Law, 2d ed. 1195; Hoosac Min. & Mill. Co. v. Donat, 10 Colo. 529, 16 Pac. 157.

A corporation, like a natural person, may ratify, affirm, and validate any contract made or act done in its behalf which it was capable of making or doing in the first instance. 10 Cyc. 1069, 1076; Bank of Columbia v. Patterson, 7 Cranch, 299, 3 L. ed. 351; Saline County v. Gage County, 66 Neb. 846, 92 N. W. 1050, 97 N. W. 583; Bishop v. Fuller, 78 Neb. 259, 110 N. W. 715; Moody & M. Co. v. Leek, 99 Wis. 49, 74 N. W. 572; German Nat. Bank v. First Nat. Bank, 59 Neb. 7, 80 N. W. 48; Holmes Booth & Haydens v. Willard, 125 N. Y. 75, 11 L.R.A. 170, 25 N. E. 1083; Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770.

SPALDING, Ch. J., This appeal is from an order denying a new trial and from a judgment in favor of the plaintiff, rendered by the dis-

trict court of Bottineau county. The complaint sets out thirty-three causes of action, each upon a check drawn in the name of the Courant Company, a corporation, by Ed. A. Smith, Manager. The complaint simply alleges the incorporation of the defendant, and that the defendant issued each of the several checks on the Bottineau County Bank to the parties therein named, and for the respective amounts; their indorsement by the payees, and that they came into hands of the plaintiff for value in the ordinary course of business; their presentation to the bank for payment, and refusal for lack of funds in the account of the defendant to meet them and each of them, and their presentation to the defendant for payment, and refusal.

To this complaint defendant answered, admitting its incorporation and denying each and every other allegation of the complaint. At the conclusion of the plaintiff's case, defendant moved for a directed verdict. This motion was denied, whereupon defendant asked leave to file an amended answer which, in addition to the denials contained in the original answer, stated that the checks were drawn in the name of the defendant, by one Smith; that he had no authority from the defendant to sign his name to said checks. This answer contained another allegation, but in view of our conclusion regarding certain of the checks in suit we need not determine whether the court erred in denying defendant's request to amend its answer. Aside from the last proposition, it was nothing more than an amplified statement of the defense contained in the first answer.

In view, also of our conclusion, we need not pass specifically upon the denial of the motion for a directed verdict. Most questions are answered by our general conclusions. Most of the checks in suit were given to pay employees engaged in the work incident to a printing office and the publication of a newspaper which said Smith was engaged in publishing and managing on behalf of defendant. The remainder of these checks were made payable to Smith himself. All were indorsed by the payees, respectively, to the respondent, Katie M. Smith. Ed. A. Smith, her husband, had in his possession a sum of money belonging to her. From this money he paid these checks. At the time of their issuance there was no money to the credit of defendant in the bank.

After all the evidence was submitted, each party moved for a di-

rected verdict. The court discharged the jury and made findings of fact and entered judgment for the plaintiff for the full amount. The record discloses 109 assignments of error, but nearly all of them may be classed as relating to the general subjects which we shall determine, and they need not be treated separately.

In June, 1906, Ed. A. Smith, the husband of plaintiff, was engaged by the defendant corporation to work upon its newspaper, the Bottineau Courant. The evidence tends to show that the corporate records were in Minneapolis, Minnesota, at the time of the trial, but, be that as it may, they were not produced by the defendant to show the terms of the employment of Smith. He testified that, by a resolution of the board, he was employed as manager of the printing plant. Some of the directors testified that he was employed as editor of the newspaper, but that they supposed he would hire the help, buy the stock, and pay the bills. No limitations upon his authority, in the premises, were expressly proven, if any were agreed upon. He continued in their employ until the following January. At the time of his engagement he demanded $30 per week for his services; the directors or officials thought $100 per month adequate. They failed to agree on his compensation, but decided to leave it for future determination. There is evidence tending to show that he was to receive no compensation except from profits. He drew checks payable to himself, from time to time, at the rate of $30 per week, and they were paid out of plaintiff's money. All this was done without the knowledge of defendant.

On Smith leaving defendant's employment he turned over to some of the officials of the corporation papers and accounts; among them a statement of his account with the corporation, including these checks. No action was ever taken on these statements, so far as disclosed, but the treasurer told him that he thought they would be all right, and one other officer gave him some similar intimation, a short time before defendant refused payment.

We think the court may have reasonably concluded that in the conduct of a business of this nature, employing more or less labor, making purchases from time to time, and all that, that the man who was conducting the business would, from necessity and for convenience, keep a bank account and draw checks on it, and that this principal must have known or contemplated this. If he were not to do so he would not be con-

ducting business in the manner in which it is usually conducted. Smith testified that when he first assumed the management of the plant he indorsed and deposited a check in the bank on which these checks were drawn, the indorsement being made in the name of the Courant Company, by Smith as manager; that while making such deposit the banker showed the indorsement to and inquired of one of the directors of the defendant, who was present, if that was all right, and was informed that it was. This is denied by that director. On a conflict the court may have been justified in finding that it occurred. Smith also testified that another director was in the printing plant when he was printing the checks with the signature, "The Courant Company," printed thereon, with a blank line on which was room for a signature, followed by the printed word "manager;" and that such director saw such blank checks. These facts justified the court in assuming that some of defendant's directors knew that Smith was drawing checks in the name of the defendant, though he may have had no express authority for doing so.

It is not pretended that he was conducting the plant for his own profit or benefit, or that he was to pay the bills out of his own funds. He was conducting it for and on behalf of the defendant, and it appears that the defendant and its officials and directors practically turned it over to him and gave it no oversight or attention whatever. In fact, the record shows that from June until the time Smith's connection with defendant ceased, no meeting of the directors was ever held, and it is not shown that anyone ever gave him instructions as to the conduct of the business. It is not denied that he was to pay the bills of the defendant, and the testimony of one of defendant's directors, V. B. Noble, was to the effect that there was no way definitely specified in which the help should be paid, except that he (Smith) was to settle the bills; that practically all the arrangements were made between Smith and himself on behalf of the company; that Smith "was to attend to the business of the Courant Company, pay the help and bills, and receive compensation up to the amount that we might agree on later." That they never finally agreed on any amount, but that there was a dispute as to whether it would be $100 a month or $30 a week, which was never settled.

In the course of the trial the defendant sought to show by means

of questions propounded to witnesses that the agreement with Smith had limited him to paying the help out of the profits of the business. Objection was made to the introduction of evidence to show this, and such objections were sustained. We think these rulings were erroneous. While as a general rule the officer, agent, or employee of a corporation has no power to borrow money or issue negotiable paper and set it afloat without express authority, yet, we are disposed to think, on the evidence received alone, the defendant must have contemplated that Smith should keep a bank deposit in its name, and that if he did so it would be necessary for him to issue checks in the same name by means of which he could pay help and bills for supplies, etc.

The evidence received may possibly warrant the further conclusion, by implication, that it was contemplated that he would borrow money temporarily, as, for instance, if the collections from the business for one week were inadequate to pay the help for that week that he should be permitted to raise funds for such purpose, to be repaid when the receipts of the business made it possible. Helena Nat. Bank v. Rocky Mountain Teleph. Co. 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829. It is unnecessary to decide these questions, yet, if his contract of employment with the defendant limited his expenditures to the profits or receipts derived from the business as the defendant attempted to show, such contract would be a limitation upon his authority to draw checks in the name of defendant, and such checks as he might draw in excess of the receipts would be unauthorized, and not the act of defendant. Hence the evidence excluded was material to the issue, and vitally so. Defendant made an offer to prove, by one Noble, who was the director and officer with whom most of the details of the arrangement with Smith were made, as he testified, that, under the agreement between Smith and defendant, Smith was to pay the help and the bills as they came due, out of the proceeds of the business of the defendant, and that Smith was to receive as his compensation, such an amount as might be agreed upon, in cash, but that in no event should the amount received by said Smith exceed the profits of the business; and that the business as conducted by him showed no profits, and that there never were any profits to pay the exhibits offered in evidence; namely, the checks which are the subject of the litigation. It was shown that the account of the defendant was largely overdrawn at the bank when the

checks in suit were drawn. It is clear, therefore, that the court was in error in denying the offer made by defendant, as if such agreement had been proven, all the checks in controversy must have been issued without authority.

There is an additional reason why recovery cannot be had upon a number of the checks sued upon. It is shown that they were issued to Ed. A. Smith, the husband of the plaintiff. He was acting at the same time for the corporation in his own behalf and as agent for the plaintiff, his wife. No agreement had been reached as to his compensation; in fact the record shows that there had been a disagreement, and that it was left open for further consideration and future agreement or determination. The interests which he represented were clearly in conflict, and hence his acts in the premises were not the acts of appellant, and appellant is not bound thereby. Exchange Bank v. Underwriters' Ins. Co. 84 Neb. 110, 133 Am. St. Rep. 614, 120 N. W. 1010; Herman v. Martineau, 1 Wis. 151, 60 Am. Dec. 368.

He took it upon himself to pay himself at the rate which the defendant had expressly refused to sanction when the agreement for his employment was made. Until an agreement might be reached as to his compensation, he had no right to fix it in accordance with his own ideas, and either pay himself from the funds of defendant or issue its negotiable paper therefor.

It is contended very strongly that the acts of Smith as manager had been ratified by defendant. We are unable to so find. In our statement of the evidence we have given all that we find having any tendency to show a ratification. No habit of borrowing money for the corporation was shown of which any knowledge of any of its officers is disclosed; and the mere fact that one or two of the directors saw his statement of account, after the employment ceased, or expressed opinions that they thought it would be all right, but before the corporation refused to honor the checks in controversy, is insufficient to constitute a ratification. Neither is there sufficient to estop defendant from alleging a lack of authority. It is nowhere shown that defendant had accepted the fruits of the paper with any knowledge of the facts; and had the evidence been admitted which we have heretofore referred to, as far as this court knows, an express limitation on Smith's authority

in the premises might have been shown. Plaintiff was in no sense a holder of the checks in due course.

It must not be overlooked that this action is strictly upon the checks; and in holding, as we are compelled to hold, we expressly disclaim passing upon the merits of any controversy which might arise in some other form of action. The judgment herein is not to be considered as a bar to further and appropriate proceedings. The judgment of the District Court is reversed and a new trial granted.

STATE v. PHINEAS DODSON.

(136 N. W. 789.)

Criminal law — accomplice — corroboration — testimony.

1. Under § 10,004, Rev. Codes 1905, which provides that "a conviction cannot be had upon the testimony of an accomplice unless he is corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof," it is not necessary that the corroborative evidence shall cover every material point testified to by the accomplice, or be sufficient in itself to warrant the verdict of guilty. If the accomplice is by such testimony corroborated as to some material fact or facts tending to connect the defendant with the commission of the offense, the jury may from that infer that he speaks the truth as to all.

Criminal law — indictment and information — trial — argument of counsel.

2. Under the facts of this case and under § 10,000 of the Revised Codes of 1905, which provides that "in the trial of a criminal action or proceeding before any court or magistrate of this state, whether prosecuted by information, indictment, complaint, or otherwise, the defendant shall at his own request, and not otherwise, be deemed a competent witness, but his neglect or refusal to testify shall not create or raise any presumption of guilt against him, nor shall such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the court or jury before whom the trial takes place," it was not error for the prosecuting attorney in his closing argument to ask the question, "Why hasn't he [the defendant] witnesses here to prove where he was on the night of March 9, 1911?" Nor was this made prejudicial error by his subsequent explanation after an objection made by defendant's counsel that "I am not talking about the defendant, but I am asking why he did not put other witnesses on to show where the defendant was on this night."

Criminal law — trial — argument of counsel.

3. Nor, after such remarks, was it error for the trial court to charge the jury that no prejudice or presumption of guilt should be indulged in by the jury against the defendant on account of his failure to take the stand.

Criminal law — trial — argument of counsel — trial court — prejudice.

4. Section 10,000, Rev. Codes 1905, does not prevent the court from calling attention to its provisions and to the privilege of the defendant of refusing to testify without prejudice to himself, if, in the court's opinion and discretion, it seems that the jury may be misled in regard to the matter, provided that he makes it clear that nothing prejudicial to the defendant may be assumed from his failure to appear and testify, the purpose of the rule being to prevent the state's attorney from calling attention to the matter and commenting unfavorably thereon. Especially is this the case where an unnecessary objection on the part of defendant's counsel has brought the matter to the attention of the jury.

Opinion filed May 17, 1912.

Appeal from the District Court of La Moure county; *Coffey*, J.

Defendant was convicted of the crime of grand larceny, and appeals. Affirmed.

Curtis & Curtis and *Davis & Warren*, for appellant.

Conviction cannot be had upon the testimony of an accomplice, unless he is corroborated by such other evidence as tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof. State v. Coudotte, 7 N. D. 109, 72 N. E. 913; State v. Kent, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631; State v. Hicks, 6 S. D. 325, 60 N. W. 66; State v. Phelps, 5 S. D. 480, 59 N. W. 471; State v. Levers, 12 S. D. 265, 81 N. W. 294; 12 Cyc. 453–459.

Remarks of the state's attorney as to defendant's not testifying, and the instruction of the court upon the fact that defendant did not testify, were prejudicial error. State v. Williams, 11 S. D. 64, 75 N. W. 815; State v. Garrington, 11 S. D. 178, 76 N. W. 326; State v. Bennett, 21 S. D. 396, 113 N. W. 78; 12 Cyc. 576.

George P. Jones, for respondent.

Evidence is sufficient without the testimony of Carter, to make a good case of circumstantial evidence; but with the testimony of the

accomplice Carter there can be no doubt of the defendant's guilt. State v. Rowland, 72 Iowa, 327, 33 N. W. 137.

Remarks of counsel to the jury that defendant had introduced no evidence to show where he was on the night of the crime do not violate the statute, which provides that the refusal of the defendant to testify shall not be considered by the jury as evidence against him. State v. Ward, 61 Vt. 153, 17 Atl. 483, 8 Am. Crim. Rep. 207; Sutton v. Com. 85 Va. 128, 7 S. E. 323; Halleck v. State, 65 Wis. 147, 26 N. W. 572.

BRUCE, J. The defendant was convicted of the crime of grand larceny. The information charged that he stole one bay mare, eight years old, weight about 1,400 pounds, one black mare, six years old, weight about 1,400 pounds, one black gelding, five years old, weight about 1,050 pounds, one bay colt, three years old, and one sucking colt, from one F. E. Gereau on or about the 9th day of March, A. D. 1911. A reversal is sought upon the grounds: (1) That the verdict is against the evidence; (2) that the court erred in admitting a certain check in evidence; (3) because the state's attorney, in his address to the jury, asked the question: "Why hasn't he (the defendant) witnesses here to prove where he was on the night of March 9, 1911?" The defendant himself not having taken the stand; and (4) that the court erred in, himself and of his own motion, instructing the jury as follows: "The jury is instructed that in a criminal case the defendant need not take the witness stand, and because the defendant had not taken the witness stand in this case should not be permitted by you to prejudice him in any way. The failure of the defendant to testify is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of the defendant not having testified; and the jury are further instructed not to allude to this fact in their deliberations in arriving at a verdict."

One of the principal witnesses for the state was a man of the name of Carter, who was a confessed accomplice in the transaction. It is claimed that his evidence was uncorroborated, that the evidence as a whole failed to identify the horses which were alleged to have been stolen, and that the proof did not conform to the information. We do not believe, however, that any of these contentions can be sustained, but,

on the contrary, that although the evidence is mainly circumstantial it was sufficient to justify the verdict of the jury. The appellant, indeed, wishes this court to entertain "the reasonable doubt" when that matter was for the jury, and not for us. It is for us to pass upon the question as to whether there was evidence sufficient to justify a verdict of guilty if no reasonable doubt was entertained by the jury. The witness Gereau positively testified to the fact that he found a sucking colt and a three-year-old bay and a five-year-old black horse, weight 1,050 pounds, at Garden Plains, Illinois, and that these horses belonged to him and were grazing at or near Edgeley on or about March 9, 1909. These horses were described in the information as one black gelding five years old, weight about 1,050 pounds, one sucking colt, and one bay colt three years old, and although the other horses described in the information are not, perhaps, sufficiently accounted for, these three certainly are, and if there was evidence tending to show and from which the jury might find beyond a reasonable doubt that they were stolen by the defendant, the identification was certainly sufficient. The witness Carter, who was a confessed accomplice of the defendant, testified that on or about March 9, 1909, he helped the defendant to dispose of some horses, "a mixed bunch, some colts and some horses and some mares in the bunch, not more than one of them was with foal. They were of a dark color, brown and bays. One black, maybe." He also testified that he helped to ship these horses to South St. Paul and sold some of them to one J. B. Fitzgerald, "for a man in Illinois or Iowa or somewhere." This witness, it is true, is an accomplice, and his testimony should be corroborated, but this is certainly done. He testifies that the horses were stolen from the neighborhood of the farm of the complaining witness, and testifies to his whereabouts on that night, and the fact that he accompanied the defendant on some if not all of his missions, and went with him to secure some of the horses. "I know the defendant, Dodson," he said; "I was acquainted with him on March 9th. I met him at that time at Deisem. We went off south of Deisem to look for a horse that had broken away from us,—so he said—the day before. I do not remember seeing anybody but a boy. We might have met someone on the road. I am not sure. I do not know whose boy it was. After going south we went back to Deisem, and we then went to Edgeley. A traveling man was with us. Something took place that evening.

We had a deal on for some horses, and he (Dodson) was to go out and get them and bring them in to me. Dodson got a little horse that I had there and went out. It must have been about 8 o'clock. I cannot say what time. It was not very late. Dodson left the barn at that time on a saddle horse. There was around the barn that evening a man who worked there, and I don't know of anyone else but John Plott. After defendant left I got a saddle horse and went out to Boolby's pasture, between 9 and 10 o'clock. I looked to see if there was any horses in the pasture, and went back to Edgeley. Dodson was not there. I got back to Edgeley about 9 or 9:30. I laid down in a stall in the back of the barn about 11 o'clock. I went back to the barn and waited for Dodson. He got back about 2 o'clock. He told me the horses were in Boolby's pasture, about half a mile north of town. We stayed in the barn until about 4 o'clock, and went to my house and got breakfast. It was somewhere about that time. Dodson and I then took the horses to the Fradet barn. I shipped those horses to St. Paul. I should say it was around half past 5 o'clock in the morning when we arrived at the Fradet place with the horses. It was good daylight. After we arrived at this Fradet place, Dodson went back to Edgeley and I stayed there. He (Dodson) did not stay any length of time around the Fradet place. Just put the horses in the shed and went back on horseback. These were the horses I shipped. I shipped them from Berlin to South St. Paul, and sold them there. I know G. W. Stone and J. B. Fitzgerald bought two or three of the horses for a man in Illinois or Iowa. We talked about what should be done with the horses that night or morning, going out. It was agreed that I should sell them and divide the money. He got part of it, and I got into trouble and he did not get it all. He said he got hold of some horses without the permission of the owner and could sell them cheap. I knew these horses I got from Dodson were stolen horses. He said he had gotten them without the owner's permission."

A large portion of this testimony is corroborated, and as to material facts. The witness Sibley testifies that he saw Dodson and Carter in Deisem on March 9th. The witness Overlees testifies that he saw Dodson and someone with him about half a mile south of his place, and about 2 miles from Deisem; and that they claimed they were looking for horses; that they asked him if he had seen any horses with halters on. The witness Holta testifies that he saw Carter and the defendant on

the morning of March 9th, standing together, and again in the afternoon. The witness Plott testifies to seeing them at the livery barn with a saddle pony. The witness John Coop testifies that on the morning of March 10, 1911, Dodson came in early in the morning on horseback, and that his horse was sweaty and pretty tired. The witness Fortin testifies to practically the same facts. The witness Gilbertson testifies to seeing Carter standing in the barn door and seeing someone ride north at about 5 or 6 o'clock on the morning of the 10th. The witness Wilson testifies to seeing Dodson at the hotel on March 10th, but that he did not occupy his room in the hotel on that night. All this testimony is corroborative. It tends to show that both the defendant and the accomplice were in the vicinity of the place where the crime was committed at or about the time complained of, and concerning which the accomplice testified; that the defendant was seen by witnesses saddling a pony the evening before and again seen the next morning coming into the back of the livery barn with the pony very wet and sweaty; that he did not stay at his usual hotel on the night in question; that his conduct was suspicious; that he was a long way from home with no other ostensible business; that he was out looking at horses on the prairie the day before. All this evidence was corroborative on the main facts in issue and of the testimony of the accomplice.

It is not necessary that the corroborative evidence should cover every material point testified to by the accomplice, nor be sufficient in itself to warrant the verdict of guilty. If the accomplice is, by such testimony, corroborated as to some material fact or facts tending to connect the defendant with the commission of the offense, the jury may from that infer that he speaks the truth as to all. See State v. Reilly, 22 N. D. 353, 133 N. W. 914; 13 Cyc. 455; Bell v. State, 73 Ga. 572; People v. Mayhew, 150 N. Y. 346, 44 N. E. 971.

Nor do we believe that the introduction of the check in evidence was error. It was testified to by Carter as having been given as part of the purchase price of the horses. It is true that it was not given to him by the man with whom he placed all the horses for shipment to Illinois or Iowa, but it was a payment for part of the horses shipped to St. Paul. It was thoroughly explained in the evidence. It tended to prove the fact that Carter went to St. Paul and there sold the bunch of horses which he and Dodson had obtained in North Dakota. Its intro-

duction could certainly do the defendant no harm, as it was not pretended that it was given for any particular horses, but was "a part of the payment for horses Mr. Dodson delivered to Carter in Boolby's pasture, though some of his own horses were in it."

It is quite clear to us, also, that neither the remarks of the state's attorney as to the failure of proof of the whereabouts of the defendant on the night of March 9, 1911, nor the instructions given by the court in relation to the failure of the defendant to take the stand, constituted reversible error. We are aware of the fact that § 10,000, Rev. Codes 1905, provides that "in the trial of a criminal action or proceeding before any court or magistrate of this state, whether prosecuted by information, indictment, complaint, or otherwise, the defendant shall, at his own request and not otherwise, be deemed a competent witness, but his neglect or refusal to testify shall not create or raise any presumption of guilt against him, nor shall such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the court or jury before whom the trial takes place." We are also aware of the fact that it has been held reversible error for the prosecuting attorney to refer to the fact that the defendant has not testified. State v. Williams, 11 S. D. 64, 75 N. W. 815; State v. Garrington, 11 S. D. 178, 76 N. W. 326; State v. Bennett, 21 S. D. 396, 113 N. W. 78; 12 Cyc. 576. The state's attorney, however, did not at first comment upon the fact, and any prejudice which may have arisen from his remarks can be traced to the objection of the defendant's counsel, which was improperly interposed. All that the state's attorney said, indeed, was, "Why hasn't he *witnesses* here to prove where he was on the night of March 9, 1911?" He did not ask why the defendant did not, himself, prove this fact, or why he was not upon the stand. Both his subsequent remark and the instruction of the court were made necessary by the objection, and were for the benefit of the defendant, and to secure him the protection of the rule, rather than to deprive him of it. By objecting to the remarks of counsel, defendant in effect asked either that the plaintiff's counsel be rebuked and his words be withdrawn, or that the jury be instructed to disregard them. The explanation of the state's attorney was a perfectly natural explanation. It was to the effect that "I am not talking about the defendant, but I am asking why he did not put *other witnesses* on to show where the defendant was on this

night." It is perfectly clear, indeed, that an *alibi* may be proved or disproved by other witnesses than by the defendant himself, and that the failure of such proof is a legitimate subject of comment. In calling the attention of the jury to the fact that the defendant had not accounted for his whereabouts on the night of the alleged theft, the state's attorney was not exceeding the limits of fair discussion, nor was he necessarily calling attention to the fact that the defendant had not, himself, taken the stand. We would even go further, and say that the rule should not be held to prevent the court from calling attention to the rule, and to the privilege of the defendant, if, in his opinion and discretion, it seems that the jury may be misled on the proposition; provided, however, that he makes it clear that nothing prejudicial to the defendant may be argued from his failure to appear and testify. Its purpose is to prevent the state's attorney from first calling attention to the matter or commenting unfavorably thereon. The fact would have been very different if the remarks of the counsel for the state had been improper in the first place, but they were not. There is such a thing, indeed, as refining a refinement too far, and of assuming an incompetency on the part of the jury, which, if true, should do away with the system altogether. We have a right to believe that a jury represents the ordinary intelligence of the community and the ordinary sense of fair play and obedience to the law of that community. To hold, indeed, that an instruction which is given in the spirit of the utmost consideration and fair play towards the defendant must necessarily prejudice the jury and constitute prejudicial error is, we believe, to go too far. We are sustained in this position by the language of this court which was used in the case of State v. Wisnewski, 13 N. D. 649, 102 N. W. 883, 3 Ann. Cas. 907, in which it was said: "The statute does not prohibit the court from mentioning to the jury the fact that the defendant has a right not to become a witness in the case, and it seems that no possible prejudice could follow from that fact when they were instructed that such fact should not be considered by them in their deliberations. It was an instruction favorable to the defendant. The state's attorney is prohibited to refer to it or mention it. A defendant's failure to become a witness might well be considered as a circumstance unfavorable to the defendant, and to advise them it shall not be so considered is not subject to prejudice or exception. 11 Enc. Pl.

& Pr. 352; State v. Weems, 96 Iowa, 448, 65 N. W. 387; Fulcher v. State, 28 Tex. App. 465, 13 S. W. 750; State v. Landry, 85 Me. 95, 26 Atl. 998."

We are not unmindful of the cases of State v. Carrington, 11 S. D. 178, 76 N. W. 326, and State v. Bennett, 21 S. D. 396, 113 N. W. 78, which are cited by counsel for appellant. In these cases, however, improper remarks were first made by counsel for the prosecution. They were not cases where the court instructed the jury upon the subject at issue out of solicitude for the defendant, and to avoid a misunderstanding arising out of mistaken zeal upon the part of his own counsel.

On a perusal of the whole record, we are convinced that there was sufficient evidence to sustain the verdict of the jury, and that no reversible error was committed.

The judgment of the District Court is affirmed.

STATE EX REL. MILLER, Attorney General, et al. v. FLAHERTY, County Auditor.

(41 L.R.A.(N.S.) 132, 136 N. W. 76.)

Elections — nominations — suffrage — constitutional provisions.

1. Chapter 213 of Session Laws of 1911, providing for party enrolment of electors by assessors before primary election, and prescribing the form of affidavit to be so required of each elector to entitle him to enrolment as a partisan, and to qualify him to vote at the coming primary election, construed and held:—

The legislature has the right to require nomination to be made at primary

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Note.—The authorities on the constitutionality of primary election laws are collated in a note to the above case as reported in 41 L.R.A.(N.S.) 132, which is supplementary to the note in 22 L.R.A.(N.S.) 1136, on the same subject.

As to the constitutionality of legislation affecting party representation on official ballot, see note in 35 L.R.A.(N.S.) 353.

For the question whether primary elections are elections within Constitution or statutes relating to elections generally, see note in 18 L.R.A.(N.S.) 412.

As to constitutionality of a statute prohibiting the nominating, recommending, or censuring of specified officers by certain organizations or at designated elections, including primary elections, see note in 23 L.R.A.(N.S.) 839.

The question of the constitutionality of legislation restricting candidates to one place on ballot is the subject of a note in 37 L.R.A.(N.S.) 825.

elections by the use of a ballot, and may provide that such election shall be conducted within organized political parties, and may deny the right to vote to those electors not belonging to any organized political party, and may require as a reasonable test of party fealty that the elector shall subscribe an oath stating that he belongs to an organized political party, and requiring him to designate it therein by name.

(a) The law requiring such a test and making the required oath a condition precedent to the right of an elector to participate at the party primary election is not unconstitutional as prescribing an added franchise requirement, or as restricting the right of suffrage, or as violating the secrecy of the ballot, within the meaning of §§ 121, 122, and 129 of our state Constitution.

(b) Said constitutional provisions, a part of art. 5 of the state Constitution, are applicable to the extent of limiting such primary election to constitutional electors and guarantying a secret ballot at primaries, but are limited in application by the purpose for which the election is by the legislature provided, the power to declare such purpose being reserved to it by said constitutional provisions. The constitutional rights of the elector are not paramount to such contemplated legislative purpose; and a party primary election law is not rendered unconstitutional because the right of suffrage at the primary is made dependent upon the assertion of a partisan belief by the elector, and because such election regulations forbid an elector from voting who belongs to no political party.

Elections — nominations — electors.

2. The portion of the statutory affidavit exacted upon enrolment, providing for proof of naturalization, is unconstitutional, because in operation it disfranchises from participating in any party primary election those electors naturalized by being within the terms of the act of Congress naturalizing certain foreign born residents within the limits of this state at the time of its admission into the Union. That said act is likewise void because it excludes those electors similarly naturalized by act of Congress because of having been residents of other states upon the admission of such states into the Union. Except as to such feature of the statute requiring proof of naturalization, the statute remains unaffected and in force.

Elections — nominations — electors.

3. The statute in question contemplates that both the minor reaching majority on or prior to election day, but after the return of the enrolment books to the auditor, and any male person of legal age naturalized by court decree during said period, may vote, and does not discriminate between the new voter and such naturalized elector, both of whom may participate at the primary election upon taking the oath required by the act, and similar to that provided by § 738, Rev. Codes 1905.

Opinion filed May 17, 1912.

Application for original writ to compel the county auditor of Burleigh County to conform to the provisions of chap. 213 of Session Laws 1911.

Writ granted.

Palda, Aaker, & Greene, of Minot, attorneys for relators.

Andrew Miller, Attorney General, *Alfred Zuger,* and *C. L. Young,* Assistant Attorneys General, and *John Carmody,* all of Bismarck, attorneys for respondent.

Goss, J. This is an application in the name of the attorney general and an elector as relators for an original writ against the county auditor of Burleigh county. The application charges, and it is admitted by the pleadings, that the respondent is about to ignore the provisions of an act passed by the last legislature, wherein it is the respondent's duty to furnish the assessors of Burleigh county with enrolment blanks with directions to use the same in enrolling in some political party each elector assessed, according to his political belief, and obtain from such elector an affidavit stating the party with which he affiliates, the affidavit to be used as a party enrolment list at the coming primary election. Such enrolment is designed to be a classification of the electors as to their political belief, to be binding upon them at said primaries according to the enrolment so previously made. The individual enrolled, by virtue of his own declaration as a Republican, if such, can vote none but a Republican ballot in the forthcoming primaries; the same with a Democrat so enrolled. There is no provision in the law for the enrolment of one as an independent voter, or one having no political belief; and independents are accordingly barred from voting at the primaries. To those familiar with recent occurrences and proceedings of political parties had under our primary election law it is wholly unnecessary to state the reasons for such enrolment. For the sake of the record we will state that this act is to prevent the apparent habit, often indulged on the part of some voters attending primaries, of calling for and voting the primary ballot of a party other than that to which in fact they belong, resulting in a minority party participating to a great extent in selecting the nominees of the majority party, with the result that, in the general election following, a seemingly insignificant minority party elects its nominees to the defeat of those of the

preponderating party at the primary. Previous legislatures have endeavored to remedy this defect in our primary system, by requiring first a 5 per cent and then a 30 per cent party vote to be cast to nominate. Even this failed to keep political parties within their respective party beliefs; and this court has had occasion to pass upon the constitutionality of such percentage provisions in State ex rel. Hagendorf v. Blaisdell, 20 N. D. 622, 127 N. W. 720, and again in State ex rel. Montgomery v. Anderson, 18 N. D. 149, 118 N. W. 22, overruled in State ex rel. McCue v. Blaisdell, with the result that the last word of this court (though differently constituted than at present) is to the effect that such a requirement is unconstitutional. Of the soundness of this conclusion we express no opinion, and confine ourselves to the trouble before us as reflected by the contentions herein urged.

The last legislature has, by chap. 213, required the assessors, as above stated, to make a party enumeration and enrolment, and prescribed an affidavit in the following form to be taken before the assessor:

State of North Dakota }
County of ———— } ss.

I, the undersigned, elector, do solemnly swear (or affirm) that my name and signature as signed below is my true name and signature. If I have not personally signed it, it is because ——— and it was signed at my request by the attesting officer. My age is ——— years and occupation ———; nativity ——— naturalized or declared by intention in ——— court, in ——— county, ——— state, on ——— 19—, as appears by the naturalization papers exhibited herewith. Present residence is in section ———, township ———, range ———, ——— county, North Dakota; of (if city or town) at No. ——— street, in the city of ———, post office address ———. I belong to the ——— party; that I have resided in this state for one year immediately preceding this election. In testimony whereof I sign my name two times.

(1) ———— (1) ————

(2) ————

Elector.

The legality of every innovation in suffrage usually is challenged before acceptance, and this piece of legislation is before this court in this proceeding by original writ. The grounds for assumption of jurisdiction are those asserted in State ex rel. McCue v. Blaisdell, 18 N. D. 55, 24 L.R.A.(N.S.) 465, 138 Am. St. Rep. 741, 118 N. W. 141, and State ex rel. Shaw v. Thompson, 21 N. D. 426, 131 N. W. 231, and other cases cited therein. A state wide primary is about to be held. The office of the attorney general of this state has made generally public throughout the state an opinion to the effect that chap. 213 of the Laws of 1911, applying generally to the coming primary, is void as unconstitutional; that the assessors throughout the state are about to commence their duties in several thousand assessor districts, and know not whether to follow the law as written or the attorney general's advice, and that a corresponding confusion exists as to the validity of the procedure to be used at the coming primary election. If this question remains undetermined, the result will be a want of state wide uniformity in suffrage proceedings, and consequent doubt throughout as to legality of many, if not all, nominations made at the coming primary. Hence, the electorate of the state is interested as its right of franchise is uncertain until made so by a determination of the legality of the act in question. The sovereignty of the state being thus affected, it is a proper cause for the exercise of the prerogative power by prerogative writ, and original jurisdiction is assumed to determine this matter.

The constitutional provisions involved are those contained in the second amendment to our state Constitution, defining electors, and §§ 122, 124, and 129 of our state Constitution. In brief the portions to be herein considered are § 121, as amended by art. 2 of amendments, reading: "Every male person of the age of twenty-one years or upwards belonging to either of the following classes, who shall have resided in the state one year, and in the county six months, and in the precinct ninety days, next preceding any election, shall be a qualified elector at such election." Of § 122, the following: "The legislative assembly shall be empowered to make further extensions of suffrage hereafter at its discretion to all citizens of mature age and sound mind not convicted of crime, without regard to sex; but no law extending or restricting the right of suffrage shall be in force until adopted

by a majority of the electors of the state voting at a general election." Section 124 provides: "The general elections of the state shall be biennial and shall be held on the first Tuesday after the first Monday in November." Section 129 provides: "All elections by the people shall be by secret ballot, subject to such regulations as shall be provided by law." These are all the constitutional provisions involved in this decision.

The attorney general has appeared on behalf of the respondent in this case, though for formal purposes, lending his name as a relator. Respondent takes the position that a primary election is an election within the meaning of that term as used in the Constitution, and the qualifications of electors at such primary are the same as at a general election; and that chap. 213 of the Laws of 1911, by exacting an oath of party allegiance as a condition precedent to the right to vote at the primaries, is in effect requiring an additional qualification of an elector, as a condition precedent to his right to vote, besides those mentioned in § 121, defining his qualification and guarantying every male person with those qualifications who shall have resided in the precinct for a certain time "next preceding any election shall be a qualified elector at such election." Logically the first question to determine is whether the primary election is an election within the meaning of § 121, as amended. To determine this we must consider: (1) The statutory intent under which the particular right to suffrage is created and the intended rights of the individual and political party thereunder; (2) what is contemplated under the constitutional elective franchise scheme under art. 5, with reference to elector's rights; (3) its application or not to this class of suffrage rights.

Let us first examine the scheme of the primary system. Previous to primary election reform the right of the legislature to provide all things necessary to the nomination of officials to be thereafter elected was not doubted. The legislature possessed plenary power in the matter; and legislation defining the manner and procedure under the caucus and convention system has always been held to be the exercise of legislative discretion on a purely political question, without constitutional limitation, and concerning which courts are without authority to do other than declare merely the interpretation of the statutes without regard to its reasonableness or unreasonableness in application

or practical effect. If its results be undesirable the legislature was alone responsible to the people who constitute the power to correct the abuse. Such was the law for a considerable period. Within the last generation, obedient to a demand for general election reform, an application of the Australian ballot election system to nominations for office has naturally evolved, with the result that most, if not all, the states have some form of elective system in use in choosing nominees for office, supplanting thereby the former caucus and convention system. And to-day we hear a desire expressed for a presidential primary election nation wide in operation. In our state the primary is the means of nomination of all officers, state, district, and county, as well as the method of choice by election, instead of nomination, of all party committee men and delegates belonging to the party organizations of those parties entitled to participate at the primaries. The election is held at public expense and is state wide, all nominations occurring throughout the state at the same election. In one sense the state-wide primary is a state-wide election. As to time and method used to accomplish the results it is such. But as to purpose and results achieved, as to nominations made, it is in no sense an election, unless it be a party or partisan election. Its purpose as expressed in every measure providing or defining it is declared to be "for the selection of candidates for election by popular vote and relating to their nomination, and the perpetuation of political parties." Session Laws 1907, chap. 109, and Session Laws 1905, chap. 109. In the light of the history of that which in purpose is supplanted, as well as in definite terms, the only intent deducible from the statute is that it is party nomination by popular vote of the electors of the parties entitled to use the primary election machinery provided. By affording a primary election within which partisans may participate according to their party belief, it cannot be said that any election is intended to be open to all electors, regardless of party belief or party affiliation. The mere fact that all political parties entitled to recognition under the primary laws as parties hold their party nominating election at which their respective party adherents may on the same day participate in their proper political parties, in no wise changes the construction or effect to be given thereto from what it would have been had the legislature provided instead that, on the first Tuesday in May, the Republican party of the state should hold a party primary

at which Republican electors only should be eligible to participate, to be held for the purpose of nominating the nominees of that party to be by said party presented to the state-wide electorate in the general fall election; and that on the second Tuesday in May a similar Democratic state-wide primary should be held open only to Democratic electors, whereby Democratic nominees should be chosen as nominees on the general fall election ballot; and that on the third Tuesday in May the socialist party should likewise choose its nominees for office for the general fall election. Under such regulations no one would be bold enough to assert that any elector without any party belief whatever had any constitutional right to participate in any of said primaries, because, forsooth, he may be an elector within the meaning of § 121 of our Constitution. Nor could it consistently be urged that as an elector he had a right to participate in all of them; as to so assert would be to destroy the plain purpose of party separation by permitting the destruction of all parties. Surely such an interpretation would not come within the meaning of the preamble of our legislation, declaring the object of the law to be the perpetuation of political parties. Nor would an elector be heard to assert under such conditions, with party primaries held at separate times, that no right to challenge his political belief or affiliation could legally be provided, because § 129 of our Constitution assured him of his right to keep secret his political belief, and vote as early and as often as he pleased, by its declaration that "all elections by the people shall be by secret ballot." He would straightway be told that if he would partake he must declare himself on the vital question of his political belief, the test of his right to participate by ballot. His plea would receive as short shrift as that of his plea of right to vote because of being an elector. Nor would any court in Christendom, from the statutory intent above, by any process of reasoning, be justified in holding that voter's right under those circumstances to be invaded by any of the constitutional provisions here asserted, *i. e.*, that of the right of secrecy of ballot; also that an additional qualification is unconstitutionally required of the voter as a condition precedent to his right to participate in an election within the contemplation of such constitutional provisions. And the case at bar is exactly parallel with the one above assumed. Because the primaries of the various parties are consolidated and held under the same election ma-

chinery at the same time, though separately by means of party ballots, cannot change the character of the election from that of a strictly party primary, wherein a test of party fealty by oath or declaration of principles may be required as a condition precedent, or proof of necessary partisan qualification of the elector, to participate therein with his copartisans, into a so-called general election, subject to and within the meaning of the constitutional provisions applicable to general elections. Such a conclusion is impossible by any system of logical reasoning or by any method other than flagrant disregard of the expressed legislative purpose of the primary election statute, the reason for their existence, their practical operation, the assumption that a nomination is a species of election and amounts to, by bald assertion unsupported by fact, reason or principle, the casting of a mantle of constitutional protection over something utterly foreign to the statutory intent, without grounds therefor unless it be in anticipation that some future legislature will so far forget its responsibilities to the people as to, in the exercise of its discretion upon a purely political subject-matter, undertake to place in vogue restricted voting at the primaries. It is not our province to either legislate or amend the Constitution in this way. "Sufficient unto the day is the evil thereof." And should such conditions ever arise, an intelligent electorate will doubtless be all sufficient to meet the emergency. The primary statute was enacted under the supposition that art. 5 of the Constitution does not apply.

As further evidencing the legislative intent, notice also that under our present existing primary election laws two classes of primary elections are now simultaneously held; namely, the nonpartisan judiciary primary, a complete separate election at which no test of party fealty can be exacted and is in express terms prohibited; the object of which act is to nominate in a nonpartisan manner, regardless of political affiliation, candidates to be elected in the fall at a similar nonpartisan election then held simultaneously with the general election; in addition, simultaneously there is held the partisan primary, at which the personnel of two or more separate party tickets is chosen to contend for office by election at the ensuing general election upon party platforms. That such elections, though held together, are in law separate elections, see State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360, where it was held that a change of county boundaries

amounting to county division and the formation of new counties under § 168 of the Constitution, and therein required to be submitted to the electors and adopted by them at a general election, was no part of the general election at which the question was submitted; but, instead, was a special election simultaneously held upon that one matter, at which a majority only of the votes cast thereon (or in said special election) was necessary, and county division was legally carried when a majority of the votes cast on the division proposition voted affirmatively thereon, although such affirmative votes were not in fact a majority of all votes cast at the general election simultaneously held. Then, again, in State ex rel. McCue v. Blaisdell, 18 N. D. 55, 24 L.R.A.(N.S.) 465, 138 Am. St. Rep. 741, 118 N. W. 141, this court again illustrated the point under discussion. At the 1908 June primaries no senatorial nominee received the requisite per cent of plurality of vote to entitle him to nomination, and the law provided for the resubmission of the contest between the two candidates receiving the greatest number of votes again at the general election in November. It was held "that the general election, in so far as it relates to the choice of candidates for the office of United States Senator, is a mere continuation of the primary election." And the elector was subject to the provisions of the primary election as to challenge and test oath concerning party affiliation, the same as he was at the preceding June primaries, holding squarely that such election so far as the choice for United States Senator was concerned was a separate primary election under different constitutional regulations than the general election of officers.

From the standpoint of political parties, and the legislative intent to recognize and perpetuate them as governmental agencies, relator's contention then cannot be upheld. But how about the constitutionality of the statute from the view point of the rights of the constitutional elector? Does the full enjoyment of his constitutional rights bar legislation granting partisan electors the privilege of use of the ballot as election machinery, thereby rendering primary elections within political parties unconstitutional?

Our constitutional elective franchise scheme, as contained in art. 5, is that all persons possessing certain qualifications as to citizenship, age, and residence shall be electors, and as such possess a constitutional right of franchise whenever general suffrage rights are permitted in

governmental affairs. This right of franchise of the elector cannot be extended or restricted. By extension is meant that this right cannot be granted in such governmental affairs to others than electors. By restriction of the right of suffrage is meant a denial of that right under such circumstances to any constitutional elector.

This constitutional scheme further comprehends that the exercise of suffrage shall be had at elections, and recognizes two classes of elections, general and those not general. Section 124 fixes the time for the holding of general elections, and with this the legislature has nothing to do other than provide the means and regulations necessary to its conduct, and prescribe what officers shall then be elected. Other elections are by inference contemplated as permissible, for instance, evidenced by § 129 in prescribing that "all elections by the people shall be by secret ballot, subject to such regulations as shall be provided by law." Aside from constitutional general elections, the purpose of other elections is left to the legislature as the power to judge of their necessity. Certain it is, then, that if a primary election falls within the term "any elections" so as to be a contemplated constitutional election, the purpose for which it may be held was left a matter to be fixed by the legislature, and that body was not intended to be by the Constitution limited so far as such purpose was concerned. While the purpose of an act may be wholly immaterial if the act be unconstitutional as violating some express or implied constitutional requirement or prohibition, yet the purpose here being left to legislative discretion, it is by the Constitution in a sense recognized, and these provisions are to be considered therewith, and are not to be unnecessarily held to limit the purpose by construction or unreasonable application, or by application not plainly or by necessary inference within its terms. The primary election statutes have as a principal purpose the regulation of the franchise of electors within party limits. The elections so provided concern primarily the rights of parties, and only incidentally those of the individual elector. The primary is not held to afford an elector as such merely a chance to exercise his right of suffrage, but, instead, an opportunity to participate in the proceedings and acts of a political party. This he does by exercising his right to vote, but within that party. Legislative discretion has recognized the party right as to method of nominating officers as well as promulgating its political doc-

trines and the application of them as a governmental force. The legislative purpose is that the rights of the party are paramount to the individual party member as to nominations made and other party matters transacted by means of the primary. If the party primary therefore is an election within the term "any election," it is one within the power of the legislature to authorize and confine within party limits, and its purpose must be considered as sanctioned by and within the provisions of art. 5 of the Constitution. To hold the contrary is to invalidate every primary election statute *in toto*. Deny constitutional recognition of purpose of the election, and apply the constitutional definition of elector, and hold that by virtue of being an elector he shall be "deemed a qualified elector at such election," and our whole primary election system must fall, because the right to participate depends not on the elector's constitutional rights so defined alone, but on added qualifications of partisanship. We believe the purpose of such an election should determine the limits within which the elector's constitutional right of franchise is to be measured, and so long as that purpose is not unconstitutional in itself the elector's rights should be held, as intended by the Constitution, to be subordinate to the purpose of the election, because, in fact, his right of suffrage arises not wholly from his being a constitutional elector, but instead, in part, from the law permitting him to exercise it in such particular instance for such particular purpose. If he has no party belief whatever, denial of his right to participate in a partisan election does not deny him any right, legally or morally, existing to him merely as an elector. The recognition by the legislature of the existence and rights of a political party cannot devest an elector who has no political belief of any partisan rights. As the party exists for party purposes, incidental to governmental benefit, the individual elector without the party cannot complain of being barred therefrom by his own failure to entertain a partisan belief. Political parties have existed as recognized and necessary instrumentalities of our representative government for a hundred years. They are mentioned in our constitutional debates. Our Constitution was framed and adopted with knowledge of and with reference to them. We cannot reasonably conclude these suffrage provisions were intended to so exaggerate the franchise privilege of the individual as to obliterate them or thwart any legislative purpose to perpetuate political par-

ties. While courts, as in State ex rel. McGrael v. Phelps, 144 Wis. 1, 35 L.R.A.(N.S.) 353, 128 N. W. 1041, assert that political organizations "are not the subjects of constitutional care," but that it "deals with the right to vote," still every holding is to the effect that party rights are constitutionally recognized under or as an incident arising from the guaranties of § 10 of the constitutional Bill of Rights, that the right of assembly and petition of citizens for the common good shall not be denied.

We have discussed the rights of the individual and the political party from the standpoint of each, and considered the constitutional questions as the legislature construed them, evident from the general plan of party primaries for nominating purposes, and also the same questions from the elective franchise scheme contemplated by art. 5 of the Constitution. We will now thereunder define the rights of the elector and the political party in the light of court interpretation.

Many courts lay down the broad rule that such constitutional provisions are applicable only to general elections, and therefore do not apply to primary elections. As illustrative we quote from Riter v. Douglass, 32 Nev. 400, 109 Pac. 444: "That a primary election of candidates is not an election of officers within the meaning of the constitutional test has been sustained by an overwhelming weight of authority in states with similar constitutional provisions to those contained in the Constitution of Nevada." Citing Line v. Election Canvassers (Line v. Waite) 154 Mich. 329, 18 L.R.A.(N.S.) 412, 117 N. W. 730, 16 Ann. Cas. 248; Montgomery v. Chelf, 118 Ky. 766, 82 S. W. 388; State ex rel. Gulden v. Johnson, 87 Minn. 221, 91 N. W. 604, 840; State ex rel. Webber v. Felton, 77 Ohio St. 554–578, 84 N. E. 85, 12 Ann. Cas. 65; Dooley v. Jackson, 104 Mo. App. 21, 78 S. W. 333. "Any reasonable test of party affiliation may be required by the legislature of those who desire to participate in the primary elections of the various parties." Citing State ex rel. Zent v. Nichols, 50 Wash. 508, 97 Pac. 728; State ex rel. Labauve v. Michel, 121 La. 374, 46 So. 430; State ex rel. Adair v. Drexel, 74 Neb. 776, 105 N. W. 174; Hopper v. Stack, 69 N. J. L. 562, 56 Atl. 1; Morrow v. Wipf, 22 S. D. 146, 115 N. W. 1121; Rouse v. Thompson, 228 Ill. 522, 81 N. E. 1109. The following is from the opinion in Morrow v. Wipf, 22 S. D. 146, 115 N. W. 1121: "The contention [the same

as advanced in the instant case] is not tenable. It ignores the substantial distinction between the nomination of a candidate and the election of a public officer. Regarding legislative control of party nominations, this court has said: 'It is for the party to nominate; for the people to elect. The question is not who shall be chosen to [fill] any particular public office; that is for the voters of all political parties to determine at the polls. It is simply who shall represent the organization as its nominees, and certaintly the determination of that question should be controlled by the action of the party itself. Otherwise party nominations are impossible. To what extent, if at all, the rights of organized political parties should be recognized and regulated by law is a matter of public policy, to be determined by the legislative department—a matter which does not concern this court. . . .' State ex rel. Howells v. Metcalf, 18 S. D. 393, 67 L.R.A. 331, 100 N. W. 923. . . . Undoubtedly the qualifications of an elector, as defined by the Constitution for the purposes contemplated by its provisions relating to the elective franchise, are exclusive and conclusive. . . . If an elector as such formerly did not and would not now in absence of the legislation under discussion possess a constitutional right to participate in the proceedings of an organized party of which he is not a member, it is difficult to understand how he has been injuriously affected—difficult to understand how anyone can be deprived of something he never possessed. There having been no constitutional limitations upon the power of the party with respect to the qualifications of its members, it would seem that if the legislature has power to legislate on the subject at all, its power also is without limitation so far as concerns the rights of the individual elector." In State ex rel. Labauve v. Michel, 121 La. 374, 46 So. 430, that court says: "The right of the legislature to require that nominations shall be by primary, and to prescribe additional qualifications to the voters for participating in same, has been recognized by the supreme courts of several states and denied by the supreme court of only one state." Citing State ex rel. Runge v. Anderson, 100 Wis. 533, 42 L.R.A. 239, 76 N. W. 482; State ex rel. McCarthy v. Moore, 87 Minn. 308, 59 L.R.A. 447, 97 Am. St. Rep. 702, 92 N. W. 4; People ex rel. Coffey v. Democratic General Committee, 164 N. Y. 335, 51 L.R.A. 674, 58 N. E. 124 (an opinion by Judge Parker, the one time Democratic nominee for President),

where in it is said: "These acts [primary election laws] recognize the equal importance of primary and general elections, and model the conduct of the former upon the general lines of conduct of the latter. They provide for the enrolment of the voter, and the only exaction permitted precedent to his right to enroll is that he shall express an intention to support generally at the next general state or national election the nominees of such party for state or national offices;" and holding such a test valid as against the attack made in this case on this statute. Judge Parker further expresses the idea of a primary law as one "to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders to construct it from the top downwards," and it would be strange indeed if the Constitution had made such a scheme impossible. See also Supper v. Stauss, 39 Pa. Super. Ct. 388; and Ladd v. Holmes, 40 Or. 167, 91 Am. St. Rep. 457, 66 Pac. 714.

We quote from 15 Cyc. 332, 333: "Unless it is expressly made so, a general election law is not applicable to primary elections, which are merely creations of political parties and associations, and may be held at such times and places and on such terms and conditions as may seem fit. But the legislature may recognize the existence of political parties, and within reasonable limits regulate the means by which partisan efforts shall be protected in exercising individual preferences for party candidates. And this is the general purpose of primary election laws, which are designed to secure to individual voters a free expression of their will. Among other things the primary election laws usually make provision for the enrolment of the voters of the different political parties in order to prevent all persons whatever from voting in the party primaries except such as are entitled to do so."

The court of this state has twice had occasion to pass upon the reasonableness of fees exacted of candidates at primary elections for filing of petitions, and held that such a fee to be calculated upon a percentage of one year's salary of the office aspired to was an arbitrary, unreasonable condition upon the right of an aspirant for office, and accordingly void. Although the questions here involved were not necessary to a decision of those questions, the court in the former held a primary election to be an election within the meaning of § 121 of the state Constitution. Johnson v. Grand Forks County, 16 N. D. 363,

125 Am. St. Rep. 662, 113 N. W. 1071, decided in 1907, and citing Spier v. Baker, 120 Cal. 370, 41 L.R.A. 196, 52 Pac. 659; People ex rel. Ahrens v. English, 139 Ill. 622, 15 L.R.A. 131, 29 N. E. 678; People ex rel. Breckon v. Election Comrs. 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562; Leonard v. Com. 112 Pa. 607, 4 Atl. 220; State ex rel. Adair v. Drexel, 74 Neb. 776, 105 N. W. 174. This court has later, in Johnson v. Grand Forks County, — N. D. —, 135 N. W. 179, during this present year, qualified the holding in the other case of the same title, 16 N. D. 363, 125 Am. St. Rep. 662, 113 N. W. 1071.

We do not hold that the constitutional provisions contained in art. 5 have no application to the primary election law; but we believe that inasmuch as the scheme of elective franchise therein contemplated has classified elections into two classes, general, which is defined, and other elections included within the "any election" provision of § 129, with such elections other than general unclassified and undefined, and with the right to install and put them in operation left to legislative discretion, as is the purpose for which election other than general may be authorized, the legislature is unlimited by said constitutional provisions to the extent that an election for any purpose not unconstitutional may be authorized. And the application of these constitutional provisions to such an election, the purpose of which is within the province of the legislature to determine, must be made with reference to such purpose so as not to unreasonably limit or defeat the purpose of such election when it is plain said constitutional provisions were never intended to be so used or applied if at all. In other words, the purpose must be considered with the constitutional provisions to determine their application, and such election is to be considered unlimited so far as a reasonable construction of said constitutional provisions will permit. But the term "elector," as used in the statute, carries into the statute the constitutional definition of an elector, and with it the constitutional guaranty of the right to vote if otherwise qualified under the statute authorizing the election, and which statute cannot restrict or extend suffrage so but what every elector may under equal conditions have a right to participate and enjoy equal rights with every other elector, including the right of written and secret ballot, so far only as is consistent with the purpose for which the election is held. Applied to the facts the legislature had the right to determine the necessity

for nomination by primary election and provide an election for such purpose. It had the right to provide therein that such election should be carried on within the limits of political parties and make regulations with reference to partisanship of electors entitled otherwise to participate. So long as each and every elector similarly situated was afforded the opportunity, at his option, to conform or not to the statutory requirement of partisanship, a matter dependent wholly upon his frame of mind, his belief, and party principles, no elector is conditionally debarred from participating. The requirement of a partisan belief as a basis for classification of the ballot to be voted, or a condition precedent to the right to participate with an organized political party, is not therefore an additional qualification as a condition precedent to the right to vote, within the meaning of § 121 of the Constitution. Miller v. Schallern, 8 N. D. 395–400, 79 N. W. 865; Perry v. Hackney, 11 N. D. 148–156, 90 N. W. 483; Wagar v. Prindeville, 21 N. D. 245, 130 N. W. 224.

As to respondent's contention that the right of suffrage within the meaning of § 121, forbidding the extending or restricting of the right of suffrage until after submission of the proposition to a vote of the people, here applies, we answer that it does not. Chapter 213 in no wise seeks to restrict the right of suffrage, as it is based upon the premise that every elector has the right to vote; and no class of persons other than constitutional electors are by chap. 213 attempted to be granted the right of suffrage. State ex rel. Tompton v. Denoyer, 6 N. D. 586–600, 72 N. W. 1014.

Another objection urged to § 1 of chap. 213 in question is that it is unconstitutional as discriminatory. Respondent alleges that the act discriminates between claims of naturalized citizens in that it permits the foreign born elector naturalized by court process to vote if otherwise qualified, but excludes from voting that large number of foreign born citizens who were residents of this territory, and who became naturalized by the act of Congress admitting the state into the Union; or naturalized similarly on the admission of other states of the Union while then residents thereof. No provision is made whereby persons so naturalized under act of Congress may make proof of citizenship and right to be enrolled or participate in the primaries if otherwise qualified. This invalidates that portion of the required affidavit read-

ing as follows: "Naturalized or declared his intention in ——— court in ——— county ——— state on ——— 19—, as appears by the naturalization papers exhibited herein." This eliminates the proof of naturalization. As this portion is but an incidental part of the statutory affidavit prescribed, and concerns only a detail thereof regarding which we can presume that the legislature would have enacted the law with it omitted, hence the omission of it will not be such an emasculation of the statute as to require the court to pronounce the entire statute void. With this portion omitted, the statute is as plain, workable, and complete as a piece of legislation as it would be with the naturalization portion included. The balance of the statute is not, therefore, in any particular invalidated by holding, as we do, this particular portion as to naturalization void as discriminatory in that it does not operate alike upon all electors similarly situated.

The same contention is made as to § 3 of the act read in connection with § 2 thereof, respondent urging want of uniformity in application in that the statute by express terms permits the voter becoming twenty-one years of age after the period of enrolment and on or prior to the day of primary election to vote thereat, while the person naturalized within the state by court decree during the same period is not provided for and hence is denied the right to vote. This contention is not sound for two reasons: (1) This law construed in the light of its intent, as apparent from its terms and the object sought to be accomplished, does not exclude such naturalized elector, but does permit him the same privilege as is accorded the native born elector arriving at majority during said period; and (2) under existing Federal statutes no one can be admitted to citizenship during said thirty days' period after registration and before election. As to the first proposition we call attention to the statute: "Any person who was a qualified voter in any election precinct in this state on the day of enrolment and registration provided for in this act, and who failed to have his name enrolled on that day by reason of sickness or unavoidable absence from the election precinct, and who is a qualified voter in said district at the time of the primary hereafter held therein, or who may have become twenty-one years of age after the day of enrolment, may have his name enrolled by the election board on any primary day, upon making oath as provided in the general election law in relation to registration of electors

on election days." This statute must be construed in the light of the intent and the object thereof. To construe it strictly would be impossible, or would render the legislation abortive, because inapt and indefinite language is used throughout these provisions. Frequently the term "on the day of enrolment" is used and that day is designated as the time to which this portion of the statute has reference. A careful reading of the entire statute discloses that there is no day of enrolment. Instead, there is a period during which the assessor has possession of the enrolment books, consisting of from on or about the first Monday in April to their return to the county auditor, indefinitely fixed by the law as "on or before thirty days before each primary election day." This portion of the act also mentions registration provided for in the act, using the words "registration" and "enrolment" interchangeably by providing no registration other than what should probably be termed enrolment as the term is used in connection with elections. Then, again, the act provides that such party failing to have his name enrolled by the assessor, because of absence or nonage, may have same done "upon making oath as provided in the general election law in relation to registration of electors on election days," something for which there is no provision of law whatever. Section 21 of chap. 109, Session Laws of 1907, regarding registration at primary elections, having been declared unconstitutional in Fitzmaurice v. Willis, 20 N. D. 372, 127 N. W. 95, the registration provisions meant by this reference in chap. 213, Session Laws of 1911, to "the general election law in relation to registration of electors on election days," must be §§ 732 to 746, and particularly § 738, Rev. Codes 1905, providing for registration of electors in cities and villages, and the reception of votes on election day on the affidavit to be required by the election board of the elector. We would also call attention to the provision for enrolment on primary election day of those electors not enrolled by reason of their sickness or unavoidable absence "from the *election precinct,* and who is a qualified voter in said *district* at the time of the primary hereinafter held therein," as carelessness in the use of language, to say the least. The words italicized should be transposed. The statute should read, as it evidently means "from the district and who is a qualified voter in said election precinct at the time of the primary hereafter held therein." The enrolment officer

has his assessment district to cover in enrolment matters, hence the district limit. The voter's qualification is that he be such in said election precinct when the election is held therein, *i. e.*, in the precinct,—not the district. Again, the statutory phraseology that he "may have his name enrolled by the election board on any primary day" means enrolment on primary election day. So long as we have legislatures imbued with ideas of the necessity of transplanting statutes from other states into our statute law, as was evidently done in this instance, without regard to or proper consideration of existing statutes, problems of interpretation of statutes will continue to be presented. The procedure intended must be determined by a liberal construction of the whole statute, otherwise the statute is largely unintelligible, indefinite, contradictory, and inapplicable. Accordingly we construe §§ 3 and 4 to mean that the new voter becoming such either by naturalization, if possible, or reaching the age of majority during the period intervening after the return of the enrolment books to the auditor, and on or prior to election day, may upon thus becoming a qualified elector, as may also any person not enrolled because of his sickness or unavoidable absence from the assessor district during the period when he could otherwise have been enrolled by the assessor, appear before the election board and take oath provided by § 738, Rev. Codes 1905, that he is a resident elector of such precinct, and thereupon be entitled to vote. Such a construction is the only reasonable one intended by these loosely drawn and indefinite provisions. This statute being susceptible of two interpretations, one that will nullify or endanger the whole act, and the other one that will harmonize it with the existing law, our duty is to give it the construction that will uphold the statute. For a similar interpretation of an election enrolment statute, see Re Duffy, 58 Misc. 1, 110 N. Y. Supp. 54, 125 App. Div. 406, 109 N. Y. Supp. 979.

Conceding, though we do not so construe it, that the statute must be construed as relator contends for, that is, that it does not include an elector who has become such by naturalization during the thirty-day period after the enrolment books have left the hands of the assessors and prior to primary election, we would answer that this legislation was passed presumably with reference to act of Congress of June 29, 1906, § 6, under which naturalization is granted and by the terms

of which "no person shall be naturalized, nor shall any certificate of naturalization be issued by any court within thirty days preceding the holding of any general election within its territorial jurisdiction." [34 Stat. at L. 598, chap. 3592, U. S. Comp. Stat. Supp. 1911, p. 532.] However may be the holdings of the many state courts on primary elections, as to constitutional questions, the Federal statute is by the Federal naturalization bureau interpreted to apply to elections, both general and primary. The Federal statute has reference to the preventing of election abuses in connection with naturalization. The Constitution has application to individual rights of suffrage.

We hold, then, the statute as a whole is not vulnerable to objection on the grounds of its unconstitutionality under any of the specifications strenuously urged against it. To uphold the main contention of relator, urging its unconstitutionality because of its exacting other qualifications of the elector not permitted by the Constitution, or as a restriction of the elector's right of suffrage, or as denying the elector his constitutional right of secrecy of ballot, would be equivalent to holding invalid every primary election statute on our statute books, as all are vulnerable to such attack if the one in question is. To so hold would be equivalent to saying that there can be no party primary election provided unless it be possibly one wherein either all primary ballots of each party participating in the primary be given to the elector from which he shall choose the one he desires to use, or one ballot used upon which are placed under party headings the names of all nominees with the elector having the right to mark the ballot for any political party with the necessity of voting a straight party ticket or be disfranchised by a rejection of the ballot, which latter might be urged as objectionable as a restriction upon the right of suffrage. In any event, either procedure would permit minority party to participate largely in the nominations of the majority party for the purpose of its destruction, as is said by the supreme court of Louisiana, by nominating undesirable candidates, or capturing the party machinery, or foisting upon it objectionable principles. We do not mean to exaggerate the standing to be accorded to political organizations, nor do we mean to minimize the right of suffrage of the individual at primary elections. But the matter of nominations for office has never been regarded as of the great importance to the individual or the state as has the exercise of suffrage in the general elec-

tions. The mere fact of application of the general election machinery, by the Australian ballot, to the matter of nominations, as a matter of protection and greater privilege to the individual, should not lead us to declare the rights of the individual altogether paramount to those of political parties, or so much so that the individual may destroy the party altogether. There is a proper equilibrium to be maintained between the rights of the individual and those of a political party. It was the clear intent of the legislature, by the primary election laws, to establish and maintain it. The writ compelling the auditor to comply with the statute will issue. No costs to be taxed.

STATE EX REL. ATTORNEY GENERAL v. DAVIES et al.

(136 N. W. 955.)

Counties — county commissioners — vacancies.

Where the number of county commissioners has been increased by a vote of the county as provided in § 2386, and the county has been redistricted as provided in § 2387, Rev. Codes 1905, a vacancy arises in the office of county commissioner of each of the new districts, which is properly filled under the provisions of chap. 66, Sess. Laws 1907.

Opinion filed May 24, 1912.

Appeal by plaintiff from a judgment of the District Court for Burleigh County; *Winchester,* J., in defendants' favor in an action brought to oust defendants from office.

Affirmed.

Andrew Miller, Attorney General, *Alfred Zuger,* and *C. L. Young,* Assistant Attorneys, for appellant.

A provision for the redistricting of a county or the reapportionment of election districts is wholly prospective in its operation. State ex rel. Howard v. Haverly, 63 Neb. 87, 88 N. W. 172; Brungardt v. Leiker, 42 Kan. 206, 21 Pac. 1065; Norwood v. Holden, 45 Minn. 313, 47 N. W. 971; Tuohy v. Chase, 30 Cal. 525; People v. Murray, 15 Cal. 221; People v. Allen, 6 Wend. 486; People v. Peck, 11 Wend.

604; Marchant v. Langworthy, 6 Hill, 646; Ex parte Heath, 3 Hill, 42; 2 Lewis's Sutherland, Stat. Constr. § 612.

Engerud, Holt, & Frame, for respondent.

A "vacancy occurs" in an office whenever there is no incumbent, whether the absence of an incumbent is due to the retirement of a previous incumbent of a pre-existing office, or is due to the recent creation of an office for which there never has been an incumbent. Throop, Pub. Off. § 431; Walsh v. Com. 89 Pa. 425, 33 Am. Rep. 771; State ex rel. Henderson v. County Ct. 50 Mo. 317, 11 Am. Rep. 415; Stocking v. State, 7 Ind. 326; Collins v. State, 8 Ind. 344; State v. Scott, 36 W. Va. 704, 15 S. E. 405; State ex rel. Rhodes v. Hampton, 101 N. C. 629, 8 S. E. 219; State ex rel. Smith v. Askew, 48 Ark. 82, 2 S. W. 349; State ex rel. Brown v. McMillan, 108 Mo. 153, 18 S. W. 784; State ex rel. Clark v. Irwin, 5 Nev. 111; People v. Osborne, 7 Colo. 605, 4 Pac. 1074; Landes v. Walls, 160 Ind. 216, 66 N. E. 679; State ex rel. Collett v. Gorby, 122 Ind. 17, 23 N. E. 682; Re Fourth Judicial Dist. 4 Wyo. 133, 32 Pac. 850; Gormley v. Taylor, 44 Ga. 76; State ex rel. Whitney v. Johns, 3 Or. 537.

Commissioners who were elected for the districts which formerly included the newly created fourth and fifth districts ceased to be residents of those districts when the new districts were created and segregated from the old districts of which they were formerly part. 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 v. Brite, 55 Cal. 79; Yonkey v. State, 27 Ind. 236; Re Bagley, 27 How. Pr. 151; Throop, Pub. Off. § 424.

Burke, J. At the 1910 general election one of the counties of this state voted to increase the number of its county commissioners from three to five, under § 2386, Rev. Codes 1905. Thereafter, and in accordance with § 2387, the old board met and redistricted the county into five districts, and still later, in accordance with chap. 66, Sess. Laws 1907, met with the county judge and auditor, and appointed two new commissioners for the two new districts. This action is brought by the attorney general of the state to oust the two appointees.

The attorney general concedes in his brief that the county has been divided into five districts. He also concedes that the law is fairly well

settled to the effect that if new *offices have been created,* vacancies existed and were properly filled, but he asserts the proposition that the mere fact of redistricting the county did not *create* new *offices.* It seems to be his position that the new districts were formed merely as a preparation for the next general election, and that until such election had been held, the office was in abeyance. This ingenious position is not supported by any authorities, and does not stand the test of logic.

Of course, the legislative intent is to be sought and enforced, and in determining such intent we need to quote from §§ 2386–7 but meagerly. The first mentioned section says that "the number of county *commissioners* of any county may be increased to five," etc., in the manner named. It does not provide that the number of districts shall be increased. Section 2387 provides that the old board shall meet within ten days after the votes shall have been canvassed, and "divide the county into five districts." Chapter 66, Rev. Laws 1907, passed two years after the 1905 Revised Codes, has an emergency clause, and provides for the filling of vacancies by the old board with the aid of the county judge, auditor, and if necessary, the county treasurer. It seems to be well settled that the legislature may *designate* a new district and delay the *creation* thereof until the election of an official to fill the same, as was done in the case of State ex rel. Erickson v. Burr, 16 N. D. 581, 113 N. W. 705, but in the absence of a legislative intent to delay the creation of the office, the formation of the district carries with it the formation of the office, and a vacancy exists instanter.

State ex rel. Smith v. Askew, 48 Ark. 82, 2 S. W. 349; Landes v. Walls, 160 Ind. 216, 66 N. E. 679; State ex rel. Brown v. McMillan, 108 Mo. 153, 18 S. W. 784. These three cases go fully into the merits of the controversy and are very instructive. From the last-named case we quote briefly: "We think that both authority and the spirit of our institutions favor the view that when an office is created and no restrictions for filling the vacancy are imposed, a vacancy arises *ipso facto.* . . . Nor are we impressed with the reasons that relator seems to think actuated the legislature in refusing representation to the new wards till a general election. Taxation without representation has ever been resisted in the United States. . . . We can see no sound reason why the property owners in those new wards should be denied representation in the council. Certainly in the absence of a very clear-

ly expressed intention to the contrary we will not give such a construction."

In the case at bar we think that not only is there no legislative intent to postpone the creation of the new offices, but, on the contrary, a fair reading of the various sections shows the legislature mean their immediate creation. Otherwise, why the haste of a meeting within ten days? Had the legislative intent been to merely designate the districts for a future election, such results could have been accomplished at the first regular meeting of the board as well, and would probably have been delayed until the meeting before the general election wherein election precincts are generally designated. It follows that the objections raised by the attorney general are unsound, and the defendants are entitled to occupy the offices to which they have been appointed.

The learned trial court was right in his decision, and it is affirmed.

ALBRECHT v. ZIMMERLY, District Clerk, et al.

(136 N. W. 240.)

Review — jurisdiction — appearance — proceedings.

1. On an application for writ of certiorari to review proceedings of the district court of Sheridan county, and an alleged excess of jurisdiction of said court concerning a proceeding there pending for removal of petitioner as a county commissioner of said county, it is *held*:—

The appearance by defendant in said removal proceedings at the time fixed in the notice of hearing therein, and the filing with the clerk by the defendant in said proceedings of written objections challenging the sufficiency of the accusations to constitute grounds for removal under the statute, § 9646, Rev. Codes 1905, all made under a purported special appearance, is the equivalent of a general appearance and the filing of a demurrer to said written accusations, and thereby confers jurisdiction in said proceedings even though no jurisdiction over the person existed prior thereto.

Jury — waiver of right to jury trial — demurrer.

2. Without determining whether an order continuing said proceedings and holding defendants to have waived the right to trial by jury is voidable or void, the portion of the order holding the right to trial by jury to have been waived is contrary to the fact and premature in that the time has not yet arrived when defendants may be asked to render plea to said accusations, for

the reason that a demurrer in substance is pending in said proceedings, and not ruled upon or disposed of, and at least such portion of the order should be vacated.

Counties — removal proceedings.

3. The time within which the trial provided by § 9646 should have been had on the accusations in the proceedings below having expired, pending hearing herein, therefore, on the state's application, a thirty-day extension of time within which to try and determine the issues there involved in said removal proceedings is granted, the same to be calculated from the date of the filing of the remittitur herein in the lower court.

Certiorari — when denied — jurisdiction.

4. No excess of jurisdiction appearing, the writ is denied with no costs taxed.

Opinion filed May 27, 1912.

On an application for writ of certiorari an order to show cause was issued, on petitioner's application, returnable before this court, and on hearing is quashed and the writ denied.

O. P. Jordal and *Geo. Thom, Jr.*, of Denhoff, North Dakota, attorneys for petitioner.

Thos. D. Morrow, State's Attorney, of McClusky, North Dakota, and *C. S. Buck*, of Jamestown, North Dakota, attorneys for respondents.

Goss, J. Petitioner has applied for and received an alternative writ of certiorari issued from this court, staying proceedings below pending hearing, and directing the clerk of the district court of Sheridan county and the presiding judge thereof to show cause why a writ of certiorari should not issue herefrom commanding the transmission to this court of all the files, records, and proceedings had below for final order of this court in certain office removal proceedings there pending.

The alternative writ issued upon a showing by affidavit that the presiding judge of the lower court and said court was about to act in excess of that court's jurisdiction in the premises, whereby this petitioner would as a result in effect be removed from office pending hearing of proceedings void for want of jurisdiction; and because thereof no adequate and specific legal remedy, by appeal or otherwise, was available to him. The alternative writ was issued April 23, 1912, and hearing thereon was had before this court May 8th following, all parties thereto

appearing. Respondents answer by motion attacking the validity of the application made, and assert that no grounds exist for the issuance of the writ. They further respond by answer and return. So much for the proceedings heretofore had in this court.

The return and the files herein disclose the filing with the district court of Sheridan county of an accusation in writing, charging petitioner with the collection and retention of illegal fees in office as a county commissioner of Sheridan county, and asking his removal from said office because thereof; and that thereon an order was issued, and notice thereon given petitioner, fixing April 18, 1912, as the date when he should answer said accusation. On said return day counsel for both state and the defendant in said proceedings, the petitioner herein, appeared before the clerk of the district court for Sheridan county, whereupon, there being no district judge present, the clerk, respondent, made certain entries reciting the nonappearance of defendant and counsel, and also filed a purported order signed by the judge of the adjoining district wherein said judge purports to act in said matter for and at the written request of the judge of said sixth district, wherein said Sheridan county is situated. It was entitled in said removal proceedings, and is as follows: " In the above-entitled action it is hereby ordered by the court on its own motion that the 25th day of April, 1912, at 9 o'clock in the forenoon of said day, at the courthouse in the city of McClusky, county of Sheridan, state of North Dakota, be and the same is the time and place fixed by the court for the trial of the above-entitled action, and the accused (this petitioner) having failed to request that the issues in said action be submitted to a jury, the issues therein will be tried by the court." Dated April 18, 1912. Signed "S. L. Nuchols, Judge of the Twelfth Judicial District, acting on the written request of Honorable W. H. Winchester, Judge of the Sixth Judicial District." This purported order was filed by the clerk, as was also two instruments offered by attorneys for defendants in said proceedings, and one of the petitioners herein, and reading as follows: "The defendants, John Bitz and William Albrecht, appearing specially by their attorneys O. P. Jordal and Geo. Thom, Jr., for the purpose of this motion only, first object to the words 'defendant not appearing the following order was filed,' being dictated to the clerk by C. S. Buck, attorney for plaintiff, and at the same time the defendants appearing specially

object to the jurisdiction of the court and of the Honorable S. L. Nuchols as presiding judge over defendants, for the reason that the records and files of the court do not show that Honorable S. L. Nuchols is sitting by request of the Honorable W. H. Winchester, judge of the sixth judicial district. Defendants further appearing specially and reserving their rights under the foregoing motion, objection to jurisdiction, file objections to the complaint and affidavit of plaintiff herein, said objections being in writing, and are offered for file and made a part hereof." The objections referred to are entitled in said proceedings, and read as follows: "The defendant John Bitz now appears specially herein by his attorneys O. P. Jordal and George Thom, Jr., and gives the court to know and understand that said defendant objects to the jurisdiction of this court on the grounds and for the following reasons: (1) That notice of the accusations made and filed by Thos. D. Morrow, as state's attorney herein, does not state facts to apprise the defendant of the charges against him, and fails to state facts sufficient to notify this defendant of the nature of the charges against him and the facts constituting the alleged cause of action against him. (2) That said accusations fail to state facts sufficient to constitute a cause of action against this defendant; fail to state facts showing that this defendant has been guilty of malfeasance, misconduct in office, or gross incompetency, stating only legal conclusions therein; and likewise fails to state facts sufficient to show any refusal or neglect to perform the duties pertaining to the office of county commissioner of said county. (3) That said accusations as a whole do not state facts sufficient to constitute a cause of action. Dated April 18, 1912." Both the foregoing instruments were filed by the attorneys for the respective defendants therein. The affidavits upon which the alternative writ was issued, and the return of the district judge thereto fully stating all facts, show that the foregoing purported order by said district judge was delivered to counsel for the state appearing in said proceedings, with two other similar orders, together with a direction to said counsel to use whichever order was appropriate according to whether a demand for trial by jury was made or not by defendants in said proceedings. If a demand for jury trial was had, the two different orders should be filed, continuing said cause to a date certain, and directing the summoning of a jury for appearance on

said date. In case no jury trial was demanded the order above set forth, reciting the waiver of a trial by jury and postponing the trial to a date certain as therein ordered, was to be filed with the clerk. The reason that said trial judge delivered said orders to counsel for the state, and left with him the selection of the appropriate order, was the inconvenience and loss of time that would have followed had Judge Nuchols taken the time to have traveled that distance, something over 150 miles, from Mandan to McClusky by rail, or about 70 miles in a direct route across the country by automobile or other means of conveyance. To have made the trip would have taken two or three days' time, and removed him from his duties in the twelfth district during that period. The judge in such manner and for such reasons endeavored to have issue joined in the case, so that one trip to McClusky to try the case would dispose of the entire matter; and with the intention on his part that if on April 16th a demand for a jury was made one could be summoned in the meantime, and on April 24th such trial by jury be had. The foregoing appears from the affidavits and return before this court, the facts being uncontroverted.

It further appears from the return of Judge Nuchols that, prior to the issuance of said orders and on or before April 16th, he was requested by Judge Winchester to assume jurisdiction of said proceeding and attend thereto, and sit, hear, and determine as trial judge the said cause; and acceding to said request and acting thereunder the purported orders were issued. That Judge Winchester had told respondent that he would forward to the clerk of said court for Sheridan county a formal written request for the judge of the twelfth judicial district to act in said matters. Whether said written request was so forwarded to the clerk and by him filed does not appear. But the court will take judicial notice that a delay of one day in mailing the same to said clerk would have resulted in the request reaching him too late for filing prior to the return date fixed for answer to the said accusations. The district judge of the twelfth judicial district acted in any event on the oral request of the judge of the sixth judicial district, and in good faith endeavored to comply therewith, with no intent to unwarrantedly assume jurisdiction in said matter. As both defendants in said proceedings, Albrecht, petitioner, and John Bitz, were being proceeded against jointly, the alternative writ issued out of this

court stayed proceedings as to both of said defendants until the further order of this court.

Under the foregoing record, the petitioner contends he is entitled to a final writ of review of this court that it may determine that, because of the unwarranted assumption of jurisdiction by the clerk and his entries in said proceedings, made when there was no court in session, a presiding judge being absent, and because of the clerk refusing to make certain entries and recognize the so-called special appearance by them made; and because of the recitals in the purported order filed, continuing the case, wherein it held that "the accused having failed to request that the issues in said action be submitted to a jury, the issues therein will be tried by the court;" that as no court was in session defendants could not confer jurisdiction, and no rights were waived by the filing of the motion and objections made under special appearance. And that all proceedings had, including the order, were void because no jurisdiction existed in the judge of the twelfth district to act in said matter, in the absence of a written request on file from the judge of said district so to do. That said purported orders were all void, including the one filed, as being an impossible delegation of judicial authority. That, because of the foregoing, this court should order a dismissal of such proceedings, the thirty-day period of time mentioned in § 9646, Rev. Codes 1905, from the date of presentation of said accusations against said defendants herein having expired. The foregoing are the propositions urged by petitioner.

The issuance of the writ of certiorari is controlled by § 7810, Rev. Codes 1905, providing that "a writ of certiorari may be granted by the supreme and district courts when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction and there is no appeal nor, in the judgment of the court, any other plain, speedy, and adequate remedy." Petitioner's right to the writ must be conferred by this statute. He asserts the acts in excess of jurisdiction to consist of the issuance of the order filed April 18th by the respondent clerk, and that it is an excess of jurisdiction for two reasons: (1) Because issued without any written request from the judge of the district wherein the action was pending to respondent judge to act in said proceeding, although it is established an oral request so to act was given; and (2) because the purported order filed was not in fact an order at all, but a

nullity, because it, together with one or more contradictory purported orders, was delivered to the attorney for the state under the instructions hereinbefore mentioned, in effect delegating to said attorney judicial discretion and authority to determine which of said orders should in the future be effective. Petitioner contends that therefore the purported orders were noneffective and void when issued, as they must have been in force when delivered or never of any validity. As to the remedy, petitioner claims that the right of appeal will be inadequate in that, should judgment be adverse to him, he will be deprived of his office pending the appeal. As to his right to thus presume an adverse holding of the trial court, and predicate thereon his right to this particular remedy, we do not pass, as it is unnecessary to a decision of this case; nor do we, for the same reason, decide any of the contentions above urged by petitioner.

Conceding the propriety of the remedy, petitioner must show as a ground for the writ that, at the time of the application therefor to this court and its granting of the order to show cause, that the lower court, by these respondents as officers thereof, was acting without or in excess of jurisdiction. Right here it appears that there has been pending before said court in the removal proceedings since April 18th, and still is undisposed of, the equivalent to a demurrer to the written accusations, the basis for the removal proceedings. Defendants by their attorneys have filed with the clerk in this entitled action the written objections above recited. These were filed under an attempted special appearance, but the law is elementary that the designation of proceedings as taking place under a special appearance does not change the nature of the act done; and if the jurisdiction of the court is invoked, as by demurrer to the subject-matter, the appearance must be held to be a general one; and, even though made under a special appearance, jurisdiction of the person is conferred for all purposes. Had the defendants demurred to the accusations by a written demurrer containing the same matter recited in the so-called written objections, no one would question the sufficiency of the demurrer nor that a general appearance was made. The fact that the written instrument is denominated "objections," and recites that it is made under a special appearance, does not change the situation any more than it would alter the legal effect of the objections made to the sufficiency of the written

accusations. Goldstein v. Peter Fox Sons Co. — N. D. —, 40 L.R.A. (N.S.) 566, 135 N. W. 180, and authorities cited. With said demurrer pending undisposed of, with jurisdiction thereby invoked by defendants, they have no standing in this court on an application for certiorari in which they must assert and establish as a prerequisite of their right thereto the absence or want of jurisdiction of the lower court over the same matter. They cannot at the same time in the same action invoke and establish jurisdiction and then deny its legal effect. Many interesting questions are presented by this application, among them being the validity of the purported order in connection with the circumstances under which it was issued, its validity as an order, issued upon oral but not written request of the judge of the district wherein the proceeding was pending, of the right of petitioner to attempt to review the same without having first made an application for the vacation of the order to the judge of the district wherein the proceeding is pending, pursuant to § 6766, within thirty days from the date of said order; and the propriety of the remedy in any event thereafter, had such an application been made and denied. It is unnecessary to determine any of these questions. But we deem it proper to hold that, conceding without determining the order filed to be valid, it was at least premature and erroneous in that in substance a demurrer to the sufficiency of the removal proceedings was pending undisposed of, and the time had not then and never has arrived when defendants in said proceedings are obliged to plead by answer, must less proceed to trial on issues of fact before either court or jury, should their demurrer be held to be not well taken. That portion of the so-called order, purporting to hold defendants to have waived a jury, for said reasons should be and doubtless will be set aside, as the defendants in said removal proceedings will be entitled on their demand to a jury trial should there be a joinder of issue on the matters of fact contained in the accusations.

Finding, therefore, that no grounds existed for the application for the writ, and that on April 23, 1912, jurisdiction of said removal proceedings was in the trial court of Sheridan county, and it appearing that this court should not permit these abortive certiorari proceedings to, in effect, devest the lower court of its jurisdiction to try, hear, and determine said removal proceedings on the merits, as so to do would be

permitting in effect the roundabout accomplishment of what is by this court denied petitioner, inasmuch as pending determination of these proceedings in this court the thirty-day period of time required by § 9646 within which, from the presentation of said accusations, the lower court was obliged to try all issues in said proceedings; and which period of time having elapsed without fault of the state and because of these proceedings here had and instituted by petitioner; and it appearing that this court, under §§ 6884 and 7328, Rev. Codes 1905, has authority to extend the time under these circumstances within which a trial below may be had on the merits in issue under said office removal proceedings, and that the time within which to try the same should be extended accordingly; now, therefore, it is hereby ordered that the period within which the state may bring said removal proceedings to trial is hereby extended for a period of thirty days from and after the filing of the remittitur and a copy of this opinion herein with the clerk of the district court of Sheridan county, North Dakota, that such further proceedings on that behalf may be taken in conformity with law within such thirty-day period as may be deemed necessary; that the application for writ is denied and these proceedings dismissed. That the remittitur, together with a certified copy of this opinion, be forthwith transmitted to the clerk of the district court of Sheridan county, to be by such officer, respondent, filed as an order of this court made in the proceedings pending for removal of this petitioner and his co-defendant in said proceedings; and that the order extending the time for hearing therein shall operate to extend the time as to both this petitioner and his co-defendant in said proceedings, inasmuch as proceedings were by the order of this court on April 23, 1912, stayed as to both. No costs to be taxed.

Let judgment be entered accordingly.

STOTLAR et al. v. GERMAN ALLIANCE INSURANCE COMPANY.

(136 N. W. 792.)

Insurance — knowledge of company as to property insured.

1. The local agent of the defendant insurance company was fairly and fully informed of the plaintiffs' title to the property insured, and accepted the premium and issued the policy thereafter. Held that the knowledge of the agent was the knowledge of the company, and the company is therefore estopped to set up, as a defense to a loss, facts of which they had knowledge before the issuance of the policy.

Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837, followed.

Insurance — contract — evidence.

2. Evidence examined and found that plaintiffs became the owners of the building insured, either upon a parol contract or upon a written contract of very similar terms, but whether the title was obtained either way was immaterial in this case wherein it appears that the title was in fact obtained either way and the company was fully informed of its nature before the policy was issued.

Appeal and error — insurance — review — trial court.

3. Numerous assignments of error arising on account of the refusal of the trial court to allow defendants to show that the building was obtained under the written contract are disregarded because it is immaterial how the building was obtained, the written contract showing that the title to said building passed to the plaintiffs, and gave them an insurable interest therein, they did not misrepresent their title to the insurance company.

Opinion filed May 27, 1912. Rehearing denied June 13, 1912.

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

Affirmed.

E. R. Sinkler and *J. A. Heder,* for appellants.

If the ownership of the property is other than sole and unconditional, the policy is void. Brown v. Commercial F. Ins. Co. 86 Ala. 189, 5 So. 500; Lasher v. St. Joseph F. & M. Ins. Co. 86 N. Y. 423; Roch-

Note.—For a collection of the authorities on the question of imputing to insurers knowledge possessed by their agents, see note in 107 Am. St. Rep. 106.

ester German Ins. Co. v. Schmidt, 89 C. C. A. 333, 162 Fed. 447; Cole v. Niagara F. Ins. Co. 126 Mo. App. 134, 103 S. W. 569; Hebner v. Palatine Ins. Co. 55 Ill. App. 275; Westchester F. Ins. Co. v. Weaver, 70 Md. 536, 5 L.R.A. 478, 17 Atl. 401, 18 Atl. 1034; McWilliams v. Cascade F. & M. Ins. Co. 7 Wash. 48, 34 Pac. 140; 19 Cyc. 693; Phœnix Ins. Co. v. Public Parks Amusement Co. 63 Ark. 187, 37 S. W. 959; Dumas v. Northwestern Nat. Ins. Co. 12 App. D. C. 245, 40 L.R.A. 358; 13 Am. & Eng. Enc. Law, 236; Cuthbertson v. North Carolina Home Ins. Co. 96 N. C. 480, 2 S. E. 258; Henning v. Western Assur. Co. 77 Iowa, 319, 42 N. W. 308; 4 Current Law, 518; Insurance Co. of N. A. v. Erickson, 50 Fla. 419, 2 L.R.A.(N.S.) 512, 111 Am. St. Rep. 121, 39 So. 495, 7 Ann. Cas. 495; St. Landry Wholesale Mercantile Co. v. New Hampshire F. Ins. Co. 114 La. 146, 38 So. 87, 3 Ann. Cas. 821; 6 Current Law, 95; Ostrander, Fire Ins. ¶¶ 66, 73; Brown v. Commercial F. Ins. Co. 86 Ala. 189, 5 So. 500; Mers v. Franklin Ins. Co. 68 Mo. 127; Swan v. Watertown Ins. Co. 96 Pa. 37; Adema v. Lafayette F. Ins. Co. 36 La. Ann. 660; Alabama Gold L. Ins. Co. v. Johnson, 80 Ala. 467, 60 Am. Rep. 112, 2 So. 125.

Where a fire policy provides that it shall be void if the subject of insurance is a building on land not owned by the assured in fee simple, such fact renders the policy void. Wyandotte Brewing Co. v. Hartford F. Ins. Co. 144 Mich. 440, 6 L.R.A.(N.S.) 852, 115 Am. St. Rep. 458, 108 N. W. 393; Hall v. Niagara F. Ins. Co. 93 Mich. 184, 18 L.R.A. 135, 32 Am. St. Rep. 497, 53 N. W. 727; Hoose v. Prescott Ins. Co. 84 Mich. 309, 11 L.R.A. 340, 47 N. W. 587; Waller v. Northern Assur. Co. 64 Iowa, 101, 19 N. W. 865; 19 Cyc. 699; Haider v. St. Paul F. & M. Ins. Co. 67 Minn. 514, 70 N. W. 805; Insurance Co. v. Waller, 116 Tenn. 1, 115 Am. St. Rep. 763, 95 S. W. 811, 7 Ann. Cas. 1078; Planters' Mut. Ins. Asso. v. Hamilton, 77 Ark. 27, 90 S. W. 283, 7 Ann. Cas. 55; Fox v. Queen Ins. Co. 124 Ga. 948, 53 S. E. 271; Security Ins. Co. v. Kuhn, 207 Ill. 166, 69 N. E. 822; Tyree v. Virginia Ins. Co. 55 W. Va. 63, 66 L.R.A. 657, 104 Am. St. Rep. 983, 46 S. E. 706, 2 Ann. Cas. 30; Home Ins. Co. v. Smith, — Tex. Civ. App. —, 29 S. W. 264; Dwelling House Ins. Co. v. Shaner, 52 Ill. App. 326; Hankins v. Rockford Ins. Co. 70 Wis. 1, 35 N. W. 34; O'Brien v. Home Ins. Co. 79 Wis. 399, 48 N. W. 714.

Where the policy provides that the true interest of the assured in the property shall be stated in the policy, and the true interest of the assured is not stated in the policy, and the interest is not disclosed, the policy is void. Wierengo v. American F. Ins. Co. 98 Mich. 621, 57 N. W. 833; Diffenbaugh v. Union F. Ins. Co. 150 Pa. 270, 30 Am. St. Rep. 805, 24 Atl. 745; Waller v. Northern Assur. Co. 2 McCrary, 637, 10 Fed. 232; Syndicate Ins. Co. v. Bohn, 27 L.R.A. 614, 12 C. C. A. 531, 27 U. S. App. 564, 65 Fed. 165; Columbian Ins. Co. v. Lawrence, 2 Pet. 35, 7 L. ed. 339; Carpenter v. Providence-Washington Ins. Co. 16 Pet. 495, 10 L. ed. 1044; New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; Fuller v. Springfield F. & M. Ins. Co. 61 Iowa, 350, 16 N. W. 273; Waller v. Northern Assur. Co. 64 Iowa, 101, 19 N. W. 865; Henning v. Western Assur. Co. 77 Iowa, 319, 42 N. W. 308; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; Collins v. St. Paul F. & M. Ins. Co. 44 Minn. 440, 46 N. W. 906; Pelican Ins. Co. v. Smith, 92 Ala. 428, 9 So. 327; Weed v. London & L. F. Ins. Co. 116 N. Y. 106, 22 N. E. 229; Liberty Ins. Co. v. Boulden, 96 Ala. 508, 11 So. 771; Brown v. Commercial F. Ins. Co. 86 Ala. 189, 5 So. 500; Phœnix Ins. Co. v. Public Parks Amusement Co. 63 Ark. 187, 37 S. W. 959; Dumas v. Northwestern Nat. Ins. Co. 12 App. D. C. 245, 40 L.R.A. 358; Orient Ins. Co. v. Williamson, 98 Ga. 464, 25 S. E. 560; Crikelair v. Citizens' Ins. Co. 168 Ill. 309, 61 Am. St. Rep. 119, 48 N. E. 167; Geiss v. Franklin Ins. Co. 123 Ind. 172, 18 Am. St. Rep. 324, 24 N. E. 99; Westchester F. Ins. Co. v. Weaver, 70 Md. 536, 5 L.R.A. 478, 17 Atl. 401, 18 Atl. 1034; Citizens' F. Ins. Secur. & Land Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360; McFetridge v. Phœnix Ins. Co. 84 Wis. 200, 54 N. W. 326.

P. J. McClory and *W. M. Anderson,* for respondent.

An insurance company which issues an insurance policy, without any application or representation by the insured, must inquire at the time as to the title by which the insured holds the land on which stands the building containing the insured property, if it deems it necessary or essential to know such fact. Peet v. Dakota F. & M. Ins. Co. 1 S. D. 462, 47 N. W. 532; Washington Mills Emery Mfg. Co. v. Weymouth & B. Mut. F. Ins. Co. 135 Mass. 505; McCabe Bros. v. Ætna Ins. Co. 9 N. D. 19, 47 L.R.A. 641, 81 N. W. 426.

Notice to agent is notice to principal. Phenix Ins. Co. v. Stocks, 149 Ill. 319, 36 N. E. 408; Imperial F. Ins. Co. v. Shimer, 96 Ill. 580; Home Ins. Co. v. Mendenhall, 164 Ill. 458, 36 L.R.A. 374, 45 N. E. 1078; Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837.

BURKE, J. This case grew out of the following facts: August 11, 1908, the old armory building at Devils Lake was owned by the N. W. M. Savings Company, who, upon that date, sold the lots to the city of Devils Lake, to be used for a public library site, and at the same time sold the old building to one Thompson. Thompson in turn sold the building to Stotlar & Young, these plaintiffs, for $2,000, one fifth cash, and the balance in four equal payments. Plaintiffs were to remove the building at the request of the library board, and were to keep the building insured for the benefit of Thompson's claim. It appears that the building had already been insured by the savings company, but they had dropped the insurance and requested the return to them of the unearned premium. Mooers was the local agent for the defendant insurance company, and probably solicited the plaintiffs to carry insurance with him. The plaintiff Young testified that Mooers asked him for the insurance and obtained his permission to write it. When Mooers presented him with the policy, however, it was merely an assignment of the old policy held by the savings company. Young says that "I told Mooers that we had bought the building only of Mr. Thompson, and that we didn't own the lots. . . . He said it was all right. . . . I told him the change we expected to make in the building. . . . He told me it would not interfere with the insurance, it would be all right to go ahead and do that, so I told him I wanted that understood, because I wanted insurance that would protect us."

This testimony is disputed by Mooers, but after a careful examination of all of the testimony we are inclined to believe that Mooers is mistaken in several particulars. While his testimony is undoubtedly honestly given, and is in many particulars correct, yet it must be remembered that Mooers wrote very many policies in a year, and it would be hard to remember the circumstances attending each one; while Young, on the other hand, probably had but this single policy to remember. And, again, the building of a public library in a city of 5,000

people would be well known to all of the business men of the town, and Mooers undoubtedly knew all particulars of the sale of the building, even had Young not told him. On top of this we find that upon the same day Mooers wrote a tornado policy upon the building for the plaintiffs, wherein he describes the building as a roller rink. We feel, therefore, that Mooers is mistaken, and agree with the trial court in holding that Mooers, the local agent of the insurance company, was fully and fairly informed of the plaintiffs' title to the building and the use to which it was to be put, before he delivered the policy. Under those circumstances the company will be estopped to plead the facts that it knew so well when it accepted the premium from plaintiffs. This is the doctrine of Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837, wherein the policy of insurance and the facts regarding the title to the property were very similar to the case at bar. The law is so fully stated in said case that we will not attempt to enlarge thereon herein.

2. The defendants insist that plaintiffs have not shown an insurable interest in the building, and point out a certain written contract signed by themselves and Thompson, which contract, they claim, reserves the title in Thompson until the entire purchase price has been paid. It is conceded that plaintiffs owed Thompson some $800 at the time of the fire. This contract may or may not have been the one upon which the sale was made. Plaintiffs testify it was not, and the court refused to allow any testimony to be received to the contrary. However, we do not deem the mattter important. If the written contract was not the one upon which the sale was made, still it seems to contain all the terms of the oral contract contended for by plaintiffs. The fact that plaintiffs signed it inclines to the view that it was in truth the contract, and we will set it forth as governing in this case. Here it is so far as material:

"On payment of $1,600 in four notes of $400 each, I hereby agree to give Young and Stotlar a good and sufficient bill of sale to the Armory building. They to accept same now on grounds owned by the library board and to settle rental for same, if any. Also to pay for removing the building. In short, J. M. Thompson is to be held for no liability from and after August, 1908. Said Young and Stotlar agree to keep said building insured for no less than $2,000 with loss

payable clause running to said J. M. Thompson. A receipt for $400 is hereby acknowledged as payment by R. A. Young. C. A. Stotlar to leave a land contract as collateral to the above amount agreed, by Sullivan Boughem, John Boughem, and Louise B. Weber, until said amount has been paid in full. (Signed) J. M. Thompson, R. A. Young, C. A. Stotlar."

From a careful reading of the above writing we find that it was the intention of all of the parties that the title should pass at once. Otherwise a reservation of title would have been mentioned. The fact that Thompson stipulated that the building should be insured by plaintiffs for his benefit, instead of insuring it himself, tends to the same conclusion, as also does the fact that collateral was required as additional security. To the same conclusion points the clause that Thompson is to be held for no liability for the building after August, a statement inconsistent with ownership. It is our conclusion, therefore, that plaintiffs were the owners of the building subject to Thompson's rights to look to the building for the unpaid portion of the purchase price, and consequently had an insurable interest therein. Nor can the company avail themselves of the defense that the policy provides that it should be void if the ownership of the insured is not *unconditional;* the policy also showing that loss, if any, is payable to Thompson, mortgagee, as his interests may appear. The fact, if it be a fact, that Thompson was an equitable mortgagee, was without prejudice to defendant, it having been fully and fairly apprised of the nature of plaintiffs' title before the policy was delivered, which fact is shown by the policy itself. Besides this we have the testimony of the plaintiffs, positive and repeated, that the written contract had nothing whatever to do with the purchase of the building, but that the sale was made orally some days before the writing was made. If this testimony is true the plaintiffs became the owners of the building some days before the written agreement was made. Respondents also point out the fact that there is no evidence that said written contract was ever delivered.

3. The only remaining assignments of error are directed at the action of the trial court in curtailing cross-examination of witnesses relative to whether the written contract between plaintiffs and Thompson was not in fact the contract under which the sale was made. We are agreed that, had the issue been material, the rulings of the trial court

would have been error. However, as we hold the written contract passed the title to the building sufficiently to give to plaintiffs an insurable interest, and as their interest was fully explained to defendant, it cannot be said that the errors were material to the issues. Had defendant established the written contract of sale, he could not have obtained a different judgment.

Finding no material errors in the record, the judgment is affirmed.

STOTLAR v. CITIZENS' INSURANCE COMPANY OF MISSOURI.

(136 N. W. 794.)

Opinion filed May 27, 1912. Rehearing denied June 13, 1912.

Appeal from the District Court of Ramsey county; *Cowan,* J.
Affirmed.
E. R. Sinkler and *J. A. Heder,* for appellant.
P. J. McClory and *W. M. Anderson,* for respondent.

PER CURIAM. The facts in this case are similar to those in the case of same plaintiffs against German Alliance Ins. Co. ante, 346, 136 N. W. 792, just decided by this court, and by stipulation of parties the same judgment will be entered therein. The case is therefore affirmed.

BISMARCK WATER SUPPLY COMPANY v. CITY OF BISMARCK.

(137 N. W. 34.)

Municipal corporations — water companies — franchise — change of street grades — damages caused thereby.

The city of Bismarck in May, 1886, passed an ordinance granting to the

Note.—The authorities on the duty and right of a municipality to reimburse a public-service corporation for expenses entailed by improvements in street are dis-

Bismarck Water Company, its successors, and assigns a license to lay and maintain water mains and pipes in the streets of such city for the period of twenty years, for the purpose of distributing water throughout the city for sale to such city and its inhabitants. Pursuant thereto such water company constructed and established a water system and waterworks and maintained the same until the year 1898, at which time it sold and assigned its franchise, together with its water plant, mains, pipes, etc., to the plaintiff, and the latter has maintained such plant at all times since such date.

Prior to the expiration of such franchise, and in May, 1905, defendant city passed an ordinance granting to plaintiff a new franchise for the period of twenty years, to take effect at the expiration of the old franchise, and which ordinance expressly provided that in case of a change of grade of any street the city should reimburse plaintiff for the expenses incurred by it in changing and relaying its mains and pipes necessitated by a change of such grade; and pursuant to such ordinance an express contract was entered into between said parties, embracing, among other things, an express stipulation to the like effect.

Held: 1st, That such ordinance and contract are valid and enforceable, and the city did not exceed its powers in obligating itself to reimburse plaintiff for such expenses.

Constitutional law — ordinances — contracts — retroactive operation.

2d, That such ordinance in this respect is not retroactive but prospective in its operation, although it applies to mains and pipes which were laid during the life of the old franchise.

Municipal corporations — change of grade — damage — ordinance provisions.

3d, That, under the provisions of such ordinance and contract, the city is liable to the plaintiff for such expenses, whether the change of grade is from a grade already established by ordinance or merely from a natural grade.

Municipal corporations — indebtedness in excess of constitutional debt limit.

4th, That the obligations thus assumed by the city do not create an indebtedness in excess of the constitutional debt limit. Such stipulation created no indebtedness, but merely a contingent future liability.

Opinion filed June 14, 1912.

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cussed in a note in 6 L.R.A.(N.S.) 1026. And for change of grade of highway as affecting water pipes, etc., see note in 19 L.R.A. 510.

The question of what constitutes a creation of indebtedness within the meaning of debt-limit provisions is treated in notes in 23 L.R.A. 402, and 37 L.R.A.(N.S.) 1058.

As to effect of limitation of municipal indebtedness upon the acquisition of a water supply or sewer system, see note in 59 L.R.A. 604.

Appeal by defendant from a judgment of the District Court for Burleigh County, *S. L. Nuchols,* Special Judge, in plaintiff's favor, in an action brought to recover expenses incurred in lowering its water main.

Affirmed.

F. H. Register, for appellant.

Ordinance 188 by imposing an additional burden and obligation infringed upon and impaired defendant's vested rights arising out of ordinance 83, and, to the extent of such impairment, is void. 15 Am. & Eng. Enc. Law, 2d ed. p. 1032; Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211; Freeland v. Williams, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; 15 Am. & Eng. Enc. Law, pp. 1046, 1047; Sturgis v. Custer, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; State ex rel. American Sav. Union v. Whittlesey, 17 Wash. 447, 50 Pac. 119; Sutherland v. De Leon, 1 Tex. 250, 46 Am. Dec. 100; Hamilton County v. Rosche Bros. 50 Ohio St. 103, 19 L.R.A. 584, 40 Am. St. Rep. 653, 33 N. E. 408; Evans v. Denver, 26 Colo. 193, 57 Pac. 696; Northwestern Teleph. Exch. Co. v. Anderson, 12 N. D. 585, 65 L.R.A. 771, 102 Am. St. Rep. 580, 98 N. E. 706, 1 Ann. Cas. 110; Poole v. Fleeger, 11 Pet. 185, 9 L. ed. 680.

The city is liable only when an established grade has been changed, and not for the establishment of a grade different from the natural grade. Keehn v. McGillicuddy, 15 Ind. App. 580, 44 N. E. 554; Jeffersonville v. Myers, 2 Ind. App. 532, 28 N. E. 999; and Wabash v. Alber, 88 Ind. 428.

For the original establishment of a grade line, and the reduction of the natural surface of the street for street purposes to such line, there is no legal right or natural equity in the dedicator, or his assignee, to compensation. 2 Dill. Mun. Corp. 4th ed. § 995; Columbus Gaslight & Coke Co. v. Columbus, 50 Ohio St. 65, 19 L.R.A. 510, 40 Am. St. Rep. 648, 33 N. E. 292; Dexter v. Broat, 16 Barb. 337; 1 Lewis, Em. Dom. 2d ed. p. 300, § 121c, note 74; National Waterworks Co. of New York City v. City of Kansas, 28 Fed. Rep. 921 (Mo. Case); Quincy v. Bull, 106 Ill. 337; Roanoke Gas Co. v. Roanoke, 88 Va. 810, 14 S. E. 665.

The indebtedness incurred by the city was in excess of the constitutional debt limit. Niles Waterworks v. Niles, 59 Mich. 311, 26 N.

W. 525; State, Humphreys, Prosecutor, v. Bayonne, 55 N. J. L. 241, 26 Atl. 81; Salem Water Co. v. Salem, 5 Or. 29.

Newton, Dullam, & Young, for respondent.

Contracts similar in nature to the one in question have been upheld by the following decisions: Gadsden v. Mitchell, 145 Ala. 137, 6 L.R.A.(N.S.) 784, 117 Am. St. Rep. 20, 40 So. 557; State ex rel. Norfolk v. Babcock, 22 Neb. 614, 35 N. W. 941; Maine Water Co. v. Waterville, 93 Me. 586, 49 L.R.A. 294, 45 Atl. 830; Argentine v. Atchison, T. & S. F. R. Co. 55 Kan. 730, 30 L.R.A. 255, 41 Pac. 946; Brooke v. Philadelphia, 162 Pa. 123, 24 L.R.A. 781, 29 Atl. 387; McQuillin, Mun. Ord. §§ 63 et seq.

In case the city in grading its streets should in any way cause detriment, direct or consequential, to private property without first making just compensation therefor, it would be acting unlawfully, and the parties so injured would have an action against the city for its damages so suffered. Searle v. Lead, 10 S. D. 312, 39 L.R.A. 345, 73 N. W. 101; Whittaker v. Deadwood, 12 S. D. 608, 82 N. W. 202; McElroy v. Kansas City, 21 Fed. 257; Brown v. Seattle, 5 Wash. 35, 18 L.R.A. 161, 31 Pac. 313, 32 Pac. 214; Montgomery v. Lemle, 121 Ala. 609, 25 So. 919. State ex rel. Smith v. Superior Ct. 26 Wash. 278, 66 Pac. 385; Vanderburgh v. Minneapolis, 98 Minn. 329, 6 L.R.A.(N.S.) 741, 108 N. W. 480; Lewis v. Seattle, 28 Wash. 639, 69 Pac. 393; Snyder v. Chicago, S. F. & C. R. Co. 112 Mo. 527, 20 S. W. 885; Stillwater Water Co. v. Stillwater, 52 N. W. 893.

A contract by which a city agrees to pay an annual rental during a term of years for a water supply to be furnished by a company does not create an indebtedness for the aggregate amount of such rental, so as to render it invalid as against a statutory or constitutional limitation. Cunningham v. Cleveland, 39 C. C. A. 211, 98 Fed. 657; Smith v. Dedham, 144 Mass. 177, 10 N. E. 782; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Centerville v. Fidelity Trust & G. Co. 55 C. C. A. 348, 118 Fed. 332; Lamar Water & Electric Light Co. v. Lamar, 128 Mo. 188, 32 L.R.A. 157, 26 S. W. 1025, 31 S. W. 756; Saleno v. Neosho, 127 Mo. 627, 27 L.R.A. 769, 48 Am. St. Rep. 653, 30 S. W. 190; Ludington Water-Supply Co. v. Ludington, 119 Mich. 480, 78 N. W. 558; Higgins v. San Diego, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; Fidelity Trust

& G. Co. v. Fowler Water Co. 113 Fed. 560; Creston Water Works Co. v. Creston, 101 Iowa, 687, 70 N. W. 739; Stedman v. Berlin, 97 Wis. 505, 73 N. W. 57; Cain v. Wyoming, 104 Ill. App. 538; Utica Waterworks Co. v. Utica, 31 Hun, 427; Territory ex rel. Woods v. Oklahoma, 2 Okla. 158, 37 Pac. 1094; State v. McCauley, 15 Cal. 429; McBean v. Fresno, 112 Cal. 159, 31 L.R.A. 794, 53 Am. St. Rep. 191, 44 Pac. 358.

FISK, J. Plaintiff was awarded judgment on the pleadings in the court below, and the defendant has appealed therefrom. The action is for the recovery of moneys necessarily expended by plaintiff in lowering its water main in Second street, between avenues A and B in the city of Bismarck, necessitated by reason of a change of grade of such street by defendant city.

In substance the complaint alleges and the answer admits the following facts:

1. That on May 26, 1886, the city of Bismarck duly passed an ordinance, No. 83, granting to the Bismarck Water Company, its successors, and assigns a license to lay and maintain water mains and pipes in the streets of such city for the period of twenty years, for the purpose of distributing water throughout the city, and to sell the same to all persons therein desiring to purchase the same, and that on September 15, 1886, a supplemental ordinance was passed by such city extending the time granted by the prior ordinance in which such water company might lay its mains and pipes in the streets until December 1, 1887.

2. That pursuant to such ordinances said water company constructed and established a water system and waterworks and plant in such city, and maintained and operated the same until about the year 1898, at which time it sold and assigned its said franchise, together with its water system, waterworks, plant, mains, pipes, and appliances to the plaintiff corporation.

3. On May 11, 1905, the defendant city duly passed ordinance No. 188, granting to plaintiff, its successors, and assigns, a license and franchise to lay and maintain water mains and pipes under any and all of the avenues, streets, alleys, public grounds, and thoroughfares of said city, for the purpose of distributing water throughout the city to its patrons for the period of twenty years from May 26, 1906, being the

date of the expiration of the prior license and franchise granted under the preceding ordinances, and which latter ordinance expressly conferred upon plaintiff corporation the right to maintain the system theretofore constructed by the Bismarck Water Company, and then owned by plaintiff company.

4. The franchise and privileges thus granted to plaintiff by ordinance 188 was conditioned upon plaintiff entering into a contract with the city within thirty days from the date of the passage of such ordinance, promising and agreeing to and with such city that during the term from May 26, 1906, to May 26, 1926, plaintiff should not charge the city or its inhabitants more than certain rates therein specified, and that during such terms said company will furnish a full and complete supply of water for the use of said city and its inhabitants desiring to purchase water. And by § 6 of such ordinance it was provided as follows: "And in the event of a change of grade on any street or highway where the party of the second part shall have theretofore laid pipes or mains, the party of the first part shall reimburse the party of the second part in full for any expense that said party of the second part may be put to on account of such change of grade, either by way of lowering its pipes or mains to avoid the action of frost, or raising its pipes or mains or otherwise."

5. That on May 12, 1905, the city, as party of the first part, and the plaintiff, as party of the second part, entered into a contract in writing as required by such ordinance, and, among other things, such contract contained the following stipulation: "Ninth. That said city of Bismarck agrees that in case a change of grade in the streets and avenues in said city renders it necessary to raise and lower the water mains and pipes herein specified, that it, the said city, will pay the cost of relaying said water mains and pipes." And in ¶ 10 of such contract it is further stipulated as follows: "And in the event of a change of grade on any street or highway where the party of the second part shall have theretofore laid pipes or mains, the party of the first part shall reimburse the party of the second part in full for any expense that said party of the second part may be put to on account of such change of grade, either by way of lowering its pipes or mains or otherwise;" which contract was appproved and confirmed by the city council of said city on May 12, 1905.

6. That pursuant to the license, privilege, and franchise granted to it by ordinance 188 aforesaid, plaintiff, in the year 1905, laid a water main in, along, and under Second street, in said city, between Avenues A and B, at about the depth of 8 feet below the surface and grade of said street, for the purpose of supplying water to the residents and inhabitants upon said street, and has ever since such time supplied water to such residents and inhabitants.

7. That in the year 1907 or 1908 the defendant city for the first time established a grade for such street, and caused the surface of such street to be brought to such grade, thereby lowering the natural grade theretofore used to such an extent that plaintiff's mains and pipes theretofore laid were too near the surface to be below the frost line, and it became necessary for plaintiff to lower and relay such main and pipes, which it did in July, 1910, at the necessary expense to it of the sum sued for.

8. Thereafter, and on July 23, 1910, plaintiff duly presented a statement of the said claim to the board of city commissioners of such city, and demanded payment thereof; and such board, on August 23, 1910, disallowed and refused the payment of such claim.

9. Plaintiff laid its main and pipes in such street in 1905 while ordinance No. 83 was in force and effect, and by the answer defendant city seeks to urge the defense of *ultra vires,* claiming that the city was without power or authority, either by ordinance or contract, to obligate itself to reimburse plaintiff for any expense incurred by it in relaying its mains which had been laid prior to the taking effect of ordinance No. 188 and the making of the contract pursuant thereto. It is also alleged in the answer in effect that the liabilities thus attempted to be assumed by the city under such ordinance and contract, when added to the then existing indebtedness of such city, exceeded the constitutional debt limit, and consequently such ordinance and contract to such extent were and are null and void.

Appellant's assignments of error all relate to the ruling of the court below in granting plaintiff's motion for judgment on the pleadings.

We find no error in such ruling. Appellant's first point is that ordinance No. 188 and the contract entered into pursuant thereto are invalid to the extent that they undertake to indemnify plaintiff for expenses incurred by it on account of a change of grade in lowering such water

mains and pipes as were originally laid during a time preceding the passage of such ordinance and while ordinance No. 83 was in force, which latter ordinance created no such expressed liability. In other words, it contends that ordinance No. 188 could not be made to operate retrospectively, and that such ordinance and contract to this extent interfere with vested rights and obligations created and existing between these parties by virtue of the old ordinance and franchise. Such contention is unsound and predicated upon a false premise. The new ordinance and contract do not operate retrospectively merely because they relate to mains and pipes theretofore laid. When the new ordinance took effect the old one had terminated by lapse of time, and the parties thereby entered into new contractual relations, which of necessity should cover the old mains and pipes if they were to continue in the future to be utilized as a part of plaintiff's waterworks system. The parties thus contracted with a view to future mutual benefits and burdens. That they had the right to thus contract, there is no room for doubt. The old contract having expired, it follows that, in the absence of a new one obligating the plaintiff to maintain its waterworks plant and to furnish water to the city and its inhabitants, it had the right to discontinue such enterprise. If this be true, then manifestly it possessed the right, in entering into the new contractual relation, to exact such terms and stipulations as it saw fit; and of course the city could do likewise, being limited only by constitutional or statutory regulations. We are aware of no constitutional or statutory provisions depriving the municipality of the power to obligate itself to reimburse plaintiff for the actual expenses entailed by it in connection with its plant, occasioned by the action of the city in changing its street grades in the future. We do not question the soundness of the rules announced by the numerous authorities cited in the brief of appellant's counsel, but we do not deem such rules applicable to the point under consideration. The fact that the city assumed no such contractual obligation under the prior ordinance is in no manner material or controlling.

It is next asserted that the grade of this street was not established by defendant city until 1907, and the conclusion is therefore drawn that as a consequence there was not and could not have been a change of grade within the meaning of such ordinance and contract. In other words, that no liability exists except in case of a change of an *established*

grade. The fallacy of such argument lies in the fact that the contract does not thus stipulate, but, on the contrary, it is therein expressly stipulated that "in the event of a *change of grade on any* street or highway where the party of the second part shall have *theretofore laid pipes or mains,* the party of the first part shall reimburse the party of the second part in full," etc. Such stipulation is clear and is susceptible of but one interpretation, and that, in accordance with respondent's contention, to the effect that any change of grade, whether it be a natural grade or a grade established by ordinance, was within the contemplation of the contracting parties. The contract does not mention "established grade," but reads: "The said city of Bismarck agrees that in case of change of *grade,*" etc. The court, of course, cannot make a different contract for the parties. It can only enforce the contract as made. But this is in effect what we are asked to do by reading into such contract the word "established." In Less v. Butte, 28 Mont. 27, 61 L.R.A. 601, 98 Am. St. Rep. 545, 72 Pac. 140, it was held, in accordance with the apparent weight of authority and in the absence of any contract to such effect, that the defendant city was liable for damages to an abutting property owner resulting from a change for the first time of a natural to an established grade, the court saying: "The first grade of Broadway street was that provided by nature, and the alteration made by appellant was as much a change of grade as if the change had been made from a grade previously established by the authorities." See also Searle v. Lead, 10 S. D. 312, 39 L.R.A. 345, 73 N. W. 101; Whittaker v. Deadwood, 12 S. D. 608, 82 N. W. 202; Eachus v. Los Angeles Consol. Electric R. Co. 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750, and Eachus v. Los Angeles, 130 Cal. 492, 80 Am. St. Rep. 147, 62 Pac. 829. It is true there are a few cases announcing a contrary rule, such as Leiper v. Denver, 36 Colo. 110, 7 L.R.A.(N.S.) 108, 118 Am. St. Rep. 101, 85 Pac. 849, 10 Ann. Cas. 847, and cases therein cited, but as stated in the note to the latter case the authorities are massed against such holdings.

There appears, however, to be a well-recognized distinction made by the authorities between the rights of abutting property owners and those of persons merely owning franchise for the laying and maintaining of water and other pipes, etc., in the streets of a city, relative to the recovery of damages occasioned by a change of grade. 1 Lewis, Em. Dom.

3d ed. § 192, and numerous cases cited, among which are Stillwater Water Co. v. Stillwater, 50 Minn. 498, 52 N. W. 893; Columbus Gaslight & Coke Co. v. Columbus, 50 Ohio St. 65, 19 L.R.A. 510, 40 Am. St. Rep. 648, 33 N. E. 292; Rockland Water Co. v. Rockland, 83 Me. 267, 22 Atl. 166; Natick Gaslight Co. v. Natick, 175 Mass. 246, 56 N. E. 292; Roanoke Gas Co. v. Roanoke, 88 Va. 810, 14 S. E. 665; Scranton Gas & Water Co. v. Scranton City, 214 Pa. 586, 6 L.R.A. (N.S.) 1033, 64 Atl. 84, 6 Ann. Cas. 388; Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748.

None of these cases, however, involved an express contract fixing a liability such as we have in the case at bar, and in some of such authorities it is expressly recognized that the rule may be changed by contract. Chief Justice Gilfillan in Stillwater Water Co. v. Stillwater, 50 Minn. 498, 52 N. W. 893, expressly recognized the right of the city to modify such rule by contract. We quote: "When one acquires a right to use a street or highway for purposes of his own, the right is subject and must be enjoyed in subordination to the power of the public authorities to keep it in condition for public use, *unless the express terms of the grant by which he acquires the right,* or the nature of the right acquired by him, *necessarily excludes or limits such power.* So when under this ordinance the plaintiff acquired the right to lay pipes in the streets, that right was subordinate to the power of the city to establish grades and grade the streets. There is nothing in the terms of the ordinance excluding that power, and nothing, except in the proviso to § 4, limiting it; and although the exercise of the power may at times cause plaintiff inconvenience and expense, that is nothing more than it took the risk of in accepting the grant. There is nothing in the right granted inconsistent with or which excludes the power of the city over the matters referred to; *and except where the city has assumed a liability by reason of exercising that power, none exists.*"

While the power of a city to change its street grades is a governmental power which cannot be contracted away, it does not follow from this that the city, in the exercise of its business capacity such as the city of Bismarck exercised in entering into the contract in question for the purpose of supplying water to the city and its inhabitants, cannot obligate itself to reimburse the water company for its actual expenses occasioned by a change of such grades. The contract is not unreasonable, was

entered into voluntarily without fraud and presumably for an adequate consideration to be received by the city. Main Water Co. v. Waterville, 93 Me. 586, 49 L.R.A. 294, 45 Atl. 830.

The contention of appellant, to the effect that by the contract in question, the defendant city undertook to bargain away a part of its governmental powers, is, we think, for the foregoing reasons, without merit. Nor do we deem its contention sound, to the effect that by such contract the city incurred an indebtedness in excess of the constitutional debt limit. The presumption is in favor of the validity of the acts of the defendant's officers. Furthermore, the answer sets forth no sufficient facts as a basis for this attempted defense. No indebtedness was incurred by the ordinance and contract in question in so far as expenses such as those here sued for are concerned. As to this feature of the contract the defendant city merely incurred a contingent future liability. The trial court was clearly correct in entering judgment on the pleadings, and such judgment is accordingly affirmed.

BURLEIGH COUNTY v. RHUD.

(136 N. W. 1082.)

Highways — obstruction — highways created by prescription.

Section 1 of chapter 112, Laws of 1897, being § 1346 of the Revised Codes of 1905, which provides that "all public roads and highways within this state which have been opened and in use as such, and included in a road district in the town in which the same are respectively situated, during twenty years next preceding the time when this article shall take effect, are hereby declared to be public roads or highways, and confirmed and established as such whether the same have been lawfully laid out, established, and opened, or not," can only be made to apply retractively to roads which have been laid out by the proper authorities, but in some defective manner. It cannot be construed so as to apply retroactively and create highways by prescription based upon an adverse user by the public which merely covers a period of twenty years prior to its enactment. In order that highways by prescription may be claimed by the public, the adverse use must have dated back for twenty years prior to

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Note.—On the question of the establishment of a highway by prescription, see note in 57 Am. St. Rep. 746.

January 1, 1896, when § 1050, Rev. Codes 1895, went into effect, or have continued for twenty years after March 29, 1897, when chapter 112, Laws of 1897, went into operation.

Opinion filed June 15, 1912.

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

Defendant was permanently enjoined from obstructing a certain alleged public highway, and appeals.

Reversed, and injunction dissolved.

Newton & Dullam, of Bismarck, attorneys for defendant and appellant.

Smith & McCurdy, Stevens & Berndt, all of Bismarck, attorneys for plaintiff and respondent.

BRUCE, J. This action was commenced by Burleigh county on July 20, 1910, and seeks to perpetually restrain the defendant, H. C. Rhud, from obstructing a certain trail alleged by the plaintiff to be a public highway. Although the complaint alleges that the highway in question is a public highway, the claim of the plaintiff (Burleigh county) is based upon prescription, merely. A permanent injunction was granted by the trial judge, and an appeal has been taken to this court. The lower court found as findings of fact, "that for more than twenty-two years prior to the year 1909, and up to the commencement of this action, a highway extending across the east half of section 27, township 139 north, range 80 west, of the fifth principal meridian, Burleigh county, beginning at a point on the center of Soo Railway, 1.15 chains west of the corner of sections 22, 23, 26, and 27 of said township and range, thence running in a southwesterly direction across said portion of section 27 to a point 1.65 chains east of the southwest corner of said east half of section 27 on the east and west line between section 27 and 34 of said township and range, and thence continuing into the city of Bismarck, as alleged in plaintiff's complaint, has been used and traveled by the general public openly, notoriously, continuously, peaceably, and adversely." This finding seems to us to be borne out by the evidence. It is shown that until the defendant acquired such land on April 28, 1909, the same had at all times been an open, wild, and uncultivated

prairie. It is also shown that after the purchase of the land by Rhud, the plaintiff county graded and built a road on the north line of said section 27, west from the bridge hereinafter noticed, and, at a point west of where the trail turns south, made a slight curve to the south in such road, and went around a hill, and at the top of that hill turned to the north line of said section 27. This work was begun by the plaintiff and finished by the county commissioners. There is no proof, however, in the record, though the fact is claimed, that the county commissioners at any time consented to discontinue the trail or highway in controversy. On the other hand, there is no proof that the county at any time did any work or expended any money upon the particular trail, but merely upon a bridge on the road upon the north line of the section before referred to, and upon said north section line from which the trail in question diverges. Defendant claims that the trail at no time was so definite and certain as to furnish the subject of a highway by prescription. We, however, think otherwise. For the last twenty-two years, at any rate, the road seems to have been continuously traveled, openly, notoriously, peaceably, and adversely, along practically the identical route mentioned in the complaint, the only variations being at certain places in the hillside, where new and parallel tracks would be followed for a short distance, and which were such variations, indeed, as are usually to be found in prairie roads. Such variations we do not hold to have been material, nor to have destroyed the identity of the line of travel. Walcott Twp. v. Skauge, 6 N. D. 382, 386, 71 N. W. 544. The mere fact, indeed, that a road is widened from time to time, owing to the conditions of the weather and exigencies of travel, is immaterial where the same objective points are practically preserved. It is, in fact, an evidence of user, rather than nonuser. Nor do we believe that there is anything in the contention of appellant that the adverse use was not known to the owner of the land during all of its continuance. Rather, it seems to have been established by this court that it is immaterial whether such adverse use was known or unknown. See Walcott Twp. v. Skauge, 6 N. D. 382, 387, 71 N. W. 544.

Nor do we understand the law to be as contended for by counsel for appellant, that under a statute such as ours it is necessary to show that the public authorities have worked or expended money upon the particular road in question. Such lack of improvement and expenditure

may be used as evidence to show that no highway exists, but it is by no means conclusive as to its nonexistence. See 27 Cyc. pp. 29 et seq., and cases cited. Such a failure of improvement is stronger evidence against the prescriptive right in localities where work is usually put upon roads, and is usually necessary for their maintenance, than in localities such as the one under consideration. Often, the raw and unimproved prairie road is the best of all roads.

Although we hold that the highway in question has been in the open, notorious, and peaceable use of the public for more than twenty years prior to the bringing of this suit, and the attempt to fence it on the part of the defendant, we agree thoroughly with counsel for appellant that such adverse user does not date back to a period prior to the year 1876, nor did the trial court so find. If, therefore, his contention is correct that a user for twenty or twenty-two years prior to the fencing will not be sufficient to vest the use of the highway in the public, and that such user must be dated back twenty years from January 1, 1896, when § 1050, Rev. Codes, 1895, went into operation, plaintiff fails, and the judgment of the district court must be reversed. Appellant's contention, in short, is that we have no statute in North Dakota providing for the acquiring of public highways by prescription except chapter 112, p. 212, Laws of 1897, and that that act was prospective merely. The title of this act reads: "An Act Relating to Opening and Vacating Highways. Prescribing the Duties of Supervisors and County Commissioners in Relation thereto, and Regulating Appeals from the Awards thereof, and the Repeal of §§ 1050 to 1075, both inclusive, of the Revised Codes of North Dakota." Section 1 therefor provides: The "public roads and highways within this state, which have been open and in use as such and included in a road district in the town in which the same are respectively situated during twenty years next *preceding* the time when this article shall take effect, are hereby declared to be public roads or highways, and confirmed and established as such, whether the same have been lawfully laid out, established, and opened, or not." Prior to the enactment of this statute, highways by prescription were recognized, and there was a long and varied course of legislation upon the subject, which culminated in § 1050 of the Revised Codes of 1895, which went into effect January 1, 1896, and which read: "All section lines are public highways as far as practicable, and all existing high-

ways shall continue as such until changed or vacated according to law, *but no road traveled or used by one or more persons over another's land shall hereafter become a public highway by use.*" This statute was construed in the case of Walcott Twp. v. Skauge, before referred to, and this court, on page 389 of its opinion, said: "Under this section it is clear that no highway by prescription can hereafter be claimed if the twenty years' use covers any time subsequent to the enactment of this statute." The argument of counsel is that since § 1050 of the Revised Codes of 1895 went into effect on January 1, 1896, and chapter 112 of the Laws of 1897, which repealed it, did not go into operation until March 9, 1897, there was a period of time in which the lands in this state were free and clear from all future prescriptive highway rights, and in which the common-law rule in regard to prescription and adverse user had been abrogated. He therefore claims that, in order to succeed in this case, the plaintiff must prove that its adverse user began to run prior to January 1, 1876, that is to say, twenty years before January 1, 1896. In this we believe he is correct, and that any other construction of chapter 112 of the Laws of 1897 would render it unconstitutional. It is perfectly clear that, prior to the passage of the act in question, and after the passage of § 1050 of the Revised Codes of 1895, no highway by prescription could be claimed if the twenty years covered any time subsequent to the enactment of the statute of 1895. See Walcott Twp. v. Skauge, supra. It is equally clear to us that the legislature, in passing the statute of 1897, had no intention that it should apply retroactively, and create highways by prescription based upon an adverse user by the public which merely covered a period of twenty years prior to the enactment of the statute. Its retroactive features clearly were intended to apply merely to roads which had been laid out by the proper authorities, but in some defective manner. It is true that it repealed § 1050, Revised Codes of 1895, which, in turn, repealed the old state and territorial laws providing for the obtaining of highways by prescription. Section 6727, Rev. Codes 1905, which has always been a part of our statutory law, provides that "whenever any act of the legislative assembly is repealed which repealed a former act, such former act shall not thereby be revived unless it shall be expressly so provided." We have, therefore, no statutory right of prescriptive in the state of North Dakota. It, however, is also true that when a stat-

ute which abrogates a rule or principle of the common law is repealed, the common-law principle or rule is, *ipso facto,* revived, unless there is something to show a contrary intent on the part of the legislature (8 Cyc. 377, and cases cited), and that therefore we may say that since the enactment of the statute of 1897, the common-law rule in regard to highways by prescription has been revived. Prior to the passage of such statute, however, there was no such rule in North Dakota, as § 624, Rev. Codes 1905, provides that "this Code establishes the law of this state respecting the subjects to which it relates," and until the passage of the statute of 1897 we have always had statutes which have spoken directly upon the subject of prescriptive right.

Freedom from prescription can, it is true, be afterwards taken away, for no legislature can bind the hands of its successors in such matters. It cannot be taken away, however, by a retroactive statute, or in such a manner as to work a confiscation of property. "Highways by user," says Mr. Justice Bartholomew, in the case of Walcott Twp. v. Skauge, supra, "are considered by the law to be based either upon original legal establishment or dedication, the continuous user for the period of twenty years being regarded as conclusive evidence either of an original legal establishment or of a dedication." How, however, could a future legislature decree that a legal establishment or dedication should be presumed from the allowance of a use to the public, when, within the retroactive period of use prescribed by it, there was time when the statute absolutely negatived any theory of dedication and the obtaining by the public of highways by adverse user was disallowed? The analogy between statutes of this kind and statutes of limitations is very close. "It is competent," the authorities say, "for the legislature within certain limits, either by extending or reducing the period of limitation, to regulate the time within which even existing causes of action may be brought, but the power to enact such statutes is subject to the fundamental condition that a reasonable time shall be allowed for the exercise of the right of action, whether existing or prospective, after it comes within the prospective or present operation of the statute, and before the bar becomes effective." 25 Cyc. 986. See also Merchants' Nat. Bank v. Braithwaite, 7 N. D. 358, 66 Am. St. Rep. 653, 75 N. W. 244; Osborne v. Lindstrom, 9 N. D. 1, 46 L.R.A. 715, 81 Am. St. Rep. 516, 81 N. W. 72. It would seem that identically the same rule would apply in cases where a prescriptive

right is claimed or sought to be created by statute. Section 14, of article 1 of the Constitution of North Dakota, provides that "private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner." The public may condemn and may prescribe rules of evidence under which a dedication will be presumed after an uninterrupted use by the public for a certain number of years, provided, however, that during these years the owner was on his guard, and knew that a failure by him to interfere would be used in evidence against him. Section 1 of chapter 112 Laws of 1897, indeed, must be construed as merely applying retroactively to such highways as have been opened and laid out by the proper authorities, but in a defective manner, and cannot apply to highways the claim to which is based upon adverse user merely. The judgment of the District Court is reversed, and the injunctional order is vacated.

BERTHA GREUNEICH v. CHRISTOPH GREUNEICH.

(137 N. W. 415.)

Husband and wife — alienation of husband's affections — proof — malice.

1. In an action brought by the wife against the parent of her husband for the alienation of such husband's affections, no recovery can be had unless there is clear proof that the defendant acted maliciously and with a purpose to alienate. If a husband leave his wife and is induced so to do by the advice and counsel of, or by words uttered by, his parents, the parent will not be held liable unless it is made to appear that in giving such advice or counsel he acted in bad

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Note.—All the authorities are agreed, as shown by a note in 9 L.R.A.(N.S.) 322, that a parent will not be liable to the spouse of his child for causing their separation if the counsel given and persuasion used by him are such as he fairly and honestly considers to be called for by the best interests of the child; in other words, if his acts are done in good faith and without malice. And the rule is the same whether the child advised or persuaded is a son or daughter. But, in harmony with the above case, the decisions hold that if the parent acts maliciously and unjustifiably in bringing about the separation, he is liable to the injured party as if he were a stranger. See also notes in 46 Am. St. Rep. 477 and 44 Am. St. Rep. 850.

As to the right of a wife, under modern married women's acts, to sue for alienation of the affections of her husband, see notes in 4 L.R.A.(N.S.) 643; 29 L.R.A.(N.S.) 842; 28 Am. St. Rep. 217, and 46 Am. St. Rep. 472.

faith, and not honestly to promote the interest and welfare of his child, and with the intention to so alienate. The law in such cases recognizes the natural and proper solicitude of a parent for the welfare and happiness of his child, even after the child has married and has left the parental roof.

Husband and wife — alienation of affections — instructions — action.

2. In such a case, instructions which absolutely ignore the question of malice and intention, and lead the jury to infer that a verdict may be returned against the defendant in the absence of a finding of such facts, are erroneous.

Opinion filed June 17, 1912.

Appeal by defendant from a judgment of the District Court for McIntosh County, *Allen*, J., in plaintiff's favor in an action brought to recover damages for alienation of her husband's affections.

Reversed.

This is an action for damages brought by a wife for the alienation of her husband's affections. The case was tried to a jury, and the trial resulted in a verdict for plaintiff for $4,000, and judgment was entered thereon. The defendant moved for a new trial, and the motion was overruled. The defendant now prosecutes this appeal to secure a reversal of the said judgment.

In his instructions in regard to the measure of damages, the trial court charged the jury as follows: (1) "But if you find by a preponderance of the evidence that Wilhelm Greuneich treated his wife cruelly, and mistreated her as alleged in the complaint, and that Wilhelm was induced to so treat his wife because of what the defendant said and did, then the defendant, Christoph Greuneich, would be responsible and your verdict in such case should be in favor of the plaintiff." (2) "On the other hand, gentlemen, if you find by a preponderance of the evidence that Wilhelm treated his wife in a cruel manner, and separated himself from her and cast her off, and you further find by a preponderance of the evidence that the defendant was the controlling cause, and that he is responsible on account of what he did and said to his son for the treatment of Wilhelm towards his wife, then he would be responsible for the result and should therefore respond in damages." (3) "It is proper, gentlemen of the jury, in considering this matter to take into account all the facts and circumstances, and the statements and acts of

the respective parties, as far as the same have been testified to here which took place before the date of the alleged separation, as tend to show whether the separation of the plaintiff from her husband was brought about as a consequence of, and was the outcome of, the wrongful acts and statements of defendant herein, or that said separation was due to some other cause for which the defendant was not responsible." (4) "And I instruct you further that if the jury find that the defendant acted *maliciously* in causing the separation of the plaintiff from her husband, they may allow plaintiff, in addition to actual damages, such further additional sum by way of punitive damages, as they shall in their sound judgment deem just, not in all, however, exceeding the sum claimed in the complaint. Punitive damages are damages awarded against defendant by way of punishment for his malicious acts; and in assessing such punitive damages you have a right to take into consideration the wealth or poverty of the defendant as disclosed in the evidence, and you may make your award of punitive damages large or small according to the defendant's wealth, always keeping in mind that such damages must be just and reasonable; that is, upon the theory that punitive damages being by way of punishment, a small amount which might be a severe punishment to a poor man would be no punishment at all to a rich man. And if you find this a proper case under the instructions of the court for the infliction of punitive damages, you should make your award of such damages after a due consideration of all the facts proved, and taking into consideration the wealth or poverty of defendant as shown by the evidence, and you must be satisfied that there was actual malice on behalf of defendant, and that he acted maliciously and wilfully, before you award damages of this kind." (5) "I instruct you, further, gentlemen, that if you find by a preponderance of the evidence that the plaintiff was abandoned by her husband, and further find that the misconduct of the defendant was the controlling cause which induced the plaintiff's husband to abandon her, and without which it would not have occurred, this action could be maintained, and your verdict should be for the plaintiff although other causes contributed to the separation."

W. S. Lauder and *Wishek & Shubeck,* for appellant.

If a wife leave her husband, or a husband his wife, and he or she is

induced so to do by the advice or counsel of a parent, even though such advice was not wisely given, the parent will not be held liable, unless it is made to appear that in giving such advice or counsel the parent acted in bad faith, and not honestly to promote the interest and welfare of the child. Luick v. Arends, 21 N. D. 614, 132 N. W. 353; Trumbull v. Trumbull, 71 Neb. 186, 98 N. W. 683, 8 Ann. Cas. 812; and cases cited; Smith v. Lyke, 13 Hun, 204; Multer v. Knibbs, 193 Mass. 556, 9 L.R.A.(N.S.) 322, 79 N. E. 762, 9 Ann. Cas. 958; Leavell v. Leavell, 122 Mo. App. 654, 99 S. W. 450; Miller v. Miller, 122 Mo. App. 693, 99 S. W. 757; Smith v. Gillapp, 123 Ill. App. 121; Huling v. Huling, 32 Ill. App. 519; Oakman v. Belden, 94 Me. 280, 80 Am. St. Rep. 396, 47 Atl. 553; Brown v. Brown, 124 N. C. 19, 70 Am. St. Rep. 574, 32 S. E. 320; Campbell v. Carter, 6 Abb. Pr. (N. S.) 151; Tucker v. Tucker, 74 Miss. 93, 32 L.R.A. 623, 19 So. 955; Rath v. Rath, 2 Neb. (Unof.) 600, 89 N. W. 612; Rabe v. Hanna, 5 Ohio, 530; Payne v. Williams, 4 Baxt. 583.

G. M. Gannon, Alfred Zuger, and *T. A. Curtis,* for respondent.

Instructions of the court must be applicable to the issues and in harmony with the facts in the case. It is error for a court to charge the jury on an issue not raised by the pleadings or evidence. Bailey v. Bailey, 94 Iowa, 598, 63 N. W. 343; State v. Peltier, 2 N. D. 188, 129 N. W. 452; 21 Cyc. 1623; Rath v. Rath, 2 Neb. (Unof.) 600, 89 N. W. 612; Johnson v. Allen, 100 N. C. 131, 5 S. C. 666; Williams v. Williams, 20 Colo. 51, 37 Pac. 619; Schouler, Dom. Rel. § 41; Hutcheson v. Peck, 5 Johns. 210; Luick v. Arends, 21 N. D. 614, 132 N. W. 364.

BRUCE, J. (after stating the facts as above). It will be noticed that in none of the instructions relating to compensatory damages did the court call the attention of the jury to the fact that before damages could be awarded they must find that the defendant acted maliciously, and with the intention to alienate the affections of the husband. It is true that, in his instruction in relation to punitive damages, the court stated that a malicious motive had to be found. This instruction, however, merely served to emphasize and strengthen the belief in the minds of the jury that on the question of compensatory damages no malice was necessary to be proved; and it is, of course, impossible for us to determine

from the verdict how much was given as punitive damages, or whether in fact any punitive damages at all were allowed, or whether the jury found that there was any malice in the conduct of the defendant at all. The instructions, in fact, as counsel for appellant argue in their brief, entirely ignore the right of the defendant, and of a parent, generally, to advise and counsel his son in such matters, provided that he acted in good faith. The law recognizes the natural solicitude of a parent for the happiness and welfare of a child, even after the child has married and left the parental home; and it is well settled in the authorities that if a wife leave her husband, or a husband his wife, and he or she is induced so to do by the advice or counsel of a parent, the parent will not be held liable in an action for alienation of affections, unless it is made to appear that, in giving such advice or counsel, he acted in bad faith, and not honestly to promote the interest and welfare of his child. This is the case, even though the advice was not wisely given. Luick v. Arends, 21 N. D. 614, 132 N. W. 353; Oakman v. Belden, 94 Me. 280, 80 Am. St. Rep. 396, 47 Atl. 553; Brown v. Brown, 124 N. C. 19, 70 Am. St. Rep. 574, 32 S. E. 320; Trumbull v. Trumbull, 71 Neb. 186, 98 N. W. 683, 8 Ann. Cas. 812; Multer v. Knibbs, 193 Mass. 556, 9 L.R.A.(N.S.) 322, 79 N. E. 762, 9 Ann. Cas. 958; Busenbark v. Busenbark, 150 Iowa, 7, 129 N. W. 332. It is true that it has been held by some authorities, and perhaps is the correct rule, that if a parent relies on the defense of parental advice honestly given, he must plead it, and that this was not done in the case at bar. Rath v. Rath, 2 Neb. (Unof.) 600, 89 N. W. 612; 21 Cyc. 1623. The defense in this case, however, is hardly a defense of parental advice. It is a denial of the fact that the father maliciously alienated the affections of his son from his wife, and induced him to leave her. In the case at bar the complaint alleged malice on the part of the defendant, and it would seem that in such a case it was necessary that malice should have been alleged. Reed v. Reed, 6 Ind. App. 317, 51 Am. St. Rep. 310, 33 N. E. 638. It seems to be the general rule that an *intentional alienation* must be shown. Warner v. Miller, 17 Abb. N. C. 221; Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397. The acts of the defendant that caused the alleged injury must have been malicious, and though malice may be implied whenever there is a deliberate intention to do a grievous wrong without legal justification or excuse (Williams v. Williams, 20 Colo. 51, 37 Pac.

614), the existence of such malice or deliberate intention must be found by the jury. An unjustifiable act is not necessarily malicious, and a distinction must be made between the intentional commission of a wrongful act and the doing of a wrongful act through mere error of judgment. Ibid. The jury in fact may have found from the evidence that the defendant doubted the purity of his son's wife, and expressed such a doubt in words, without finding that in the expression of such doubt, the father *maliciously intended to alienate* the affections of his son and bring about a separation; and it is perfectly possible that the verdict of the jury may have been based upon the admission of the defendant that, on the occasion of the wedding, he asked the question as to what would be the name of a child of the plaintiff if it happened that she was pregnant at the time of her marriage, and the facts of the subsequent separation of the parties, without finding that the defendant, in uttering those words, maliciously intended to alienate the affections of his son. As to all of the other words spoken, there is a sharp conflict in the testimony, and we do not know which side the jury believed. There is, in short, a clear distinction between an action for slander or libel and an action for the alienation of affections. The gist of the latter is a malicious intention to alienate; and this fact is nowhere brought to the attention of the jury by the instructions.

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

HACKNEY v. ELLIOTT.

(137 N. W. 433.)

Drains — establishment of drains — petition — tax certificates — assessments — notice — order establishing drain.

This is an action to cancel tax certificates on sale for special drainage assess-

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Note.—The authorities on the procedure for establishment of drain or sewer are collated in an elaborate note in 60 L.R.A. 161.

As to what property is liable for assessment for construction of drains or sewers, see notes in 58 L.R.A. 353 and 26 L.R.A.(N.S.) 973.

On the question of the waiver of the objection that assessment exceeds the percentage limited by charter or statute, see note in 38 L.R.A.(N.S.) 582.

ments arising from the tri-county drain in Ransom, Sargent, and Richland counties, on nonpayment of which assessments plaintiff's lands were sold. *Held:*—

1. That the petition for drainage presented to the Richland county drainage board was sufficient to confer jurisdiction upon said board to act.

(a) Our drainage statutes were adopted from the Michigan drainage statutes in force in 1893.

(b) A petition for drainage of agricultural lands need not contain an averment of the necessity for the proposed drain, nor that it will drain agricultural lands, nor that the signers thereto are freeholders whose lands will be affected by the proposed drain, nor other than a general description with beginning and end of the course of the proposed drain. Upon the board finding the existence of necessity for the drain, and that the petition was signed by a sufficient number of qualified petitioners; and finding the purpose to be that of drainage of agricultural lands, with such finding based upon a survey had of the course of the drain and establishment of its commencement, terminus, route, width, and depth thereof; and after the preparation and filing of profiles, plans, specifications, estimates of cost, and map or plat of the lands to be drained, and a finding that the benefits to be derived will exceed the total cost of construction thereof,—the drainage board is then authorized by law to construct said drain, such findings curing defects in the petition because of its failure to designate the purpose thereof, and that the same will result to the benefit of the health, convenience, or welfare, or show that the signers thereof are legally qualified as such.

(c) In determining the sufficiency of the petition to confer jurisdiction to act thereunder, the drainage board may take judicial notice of and consider with said petition the fact that the course of the drain as petitioned for will traverse agricultural lands, and also of the character of another drain of which the petition recites the one petitioned for would be but a continuation of, and of all such other matters of location, place, distance, extent, area, topography, and general condition of lands within its county as a court would be authorized to take judicial notice of under Code, §§ 7318 and 7319.

(d) Where the order establishing a drain makes reference to the surveyor's minutes of a survey, profiles, plans, and specifications filed with the county auditor, these may be considered with and as supplementing the description contained in the order establishing such drain.

(e) Where a petition has been acted upon and a drain established thereunder, the fact that it contains an unnecessary word obscuring its meaning, when with such word omitted the meaning would be plain, the petition will not be held void as unintelligible.

(f) The action of the county drainage board in incorporating in the order establishing the main drain an order establishing a spur or branch drain will not, under the record herein, be held to invalidate all proceedings had, and relieve plaintiff's lands in another county from their assessment to defray con-

struction of the tri-county drain. Such are but irregularities, and do not go to the board's jurisdiction.

Drains — assessment — apportionment — percentage.

2. The apportionment of benefits by percentages *held* valid.

(a) The placing of the words "per cent" at the head of a column of decimal fractions, apportioning such decimal fractional part of the total benefits as is received by the specific tract opposite such decimal fraction to it, does not indicate that the tax to be calculated thereon shall be computed by taking such decimal fractional part of 1 per cent of the entire cost of construction, but instead, such decimal fractional part of the entire cost. The words "per cent," as so used, mean the decimal fractional part or share by decimal part or percentage of the whole. Such schedule of apportionment of benefits by decimal fractional part or percentage thereof will be calculated under the usual interpretation, instead of by a strained construction.

(b) In the absence of a showing of a want of uniformity in such apportionment of specific benefits, the presumption will be in favor of its validity and that the tax computed therefrom was not excessive.

Drains — constitutional law — assessments — apportionment — process — tri-county drains.

3. The apportionment of specific benefits, when made, not being based upon or having any relation to either the estimated or actual cost of the project, the fact that the actual cost may far exceed the estimated cost thereof can in no wise affect the validity of the apportionment of benefits by percentages.

(a) Nor can any excess of actual overestimated cost of construction be considered as in effect the taking of property without due process of law, or as rendering the drainage act unconstitutional because thereof.

(b) The fact that the notice of hearing of apportionment of benefits by percentages as to specific tracts, and that the notice of confirmation thereof, contained an erroneous estimate of the total cost of construction, does not alone render the portion of the assessment in excess of the estimated cost, but within the actual cost of construction as levied against such tracts and computed by such percentages of the total actual cost, invalid as the taking of property without due process of law.

(c) After petitions for the establishment of the portion of the tri-county drain within each county had been severally granted, and the portion of the drain in each county severally established by each county board, it was the duty of the three county drainage boards to meet in joint session, under § 1836, to determine the proportion of the whole benefits to be derived from the drain the lands within each county will receive therefrom; in so acting the tri-county board does not deal with individual tracts as such, but instead, with a county apportionment of benefits, considering collectively each county's lands benefited, and determining the proportion each county's lands bears to all the lands benefited; as in percentages of benefits received, so in damages for right of way

and property taken under eminent domain for public use. Such joint board has no duties other than such county apportionments and calculation of total cost of drain.

(d) In such apportionment, each county board acts severally as an integral part of the joint or tri-county body.

(e) After such apportionment between the counties by percentages of benefits received, proportionate to total benefits from the drain, the fact that thereafter the three boards met in joint session and jointly and severally as boards signed and put forth a list of special assessments as to each and all the tracts within the three counties so benefited by the drain, but computed on a proper basis of percentage of benefits in the same manner as would have resulted had each board separately determined said assessment in specific amounts, will not invalidate the tax so apportioned in specific amounts to each tract, where the lands are classified by counties, with a direction accordingly to the county auditors to spread the assessments against such lands described as are situated within their several counties. Such a list amounts but to the issuance of three several lists in which each county board determines the tax in specific amounts upon lands within its county. The fact that they unauthorizedly so acted in joint session does not invalidate such assessments.

Statutory requirements — drains — establishment — irregularities.

4. Section 1827 in terms requires the board of drain commissioners of each county, prior to the letting of contracts for the construction of the drain, to make a return to the county auditor, and requires that "such return shall contain" certain papers, minutes, and proceedings. The board of drain commissioners of Ransom county made such return. This statute requires the recording of said return by the auditor. This return was never recorded. *Held*, that the making of such record is not inherently a part of or condition precedent to the assessment, but instead, merely a legislative requirement, and as such for the purpose of procuring a record to be made of prior proceedings; that such recording is not required that constructive notice be given thereby of previous proceedings, notice of which had prior thereto been required to be given otherwise. Such failure to record is a mere irregularity not invalidating the assessment; the statute being directory, and not mandatory.

Drains — assessments — sales — notice to purchaser — estoppel.

5. The pendency of an action at the time of the tax sale, brought by this plaintiff against Ransom county to determine the validity of these special drainage assessments, but not enjoining the sale therefor, is not of itself constructive notice to a purchaser at such tax sale of any rights of the plaintiff, so as to prevent such purchaser from asserting in a subsequent action brought by the former plaintiff any rights of estoppel, or otherwise that might have been available by the county in its defense in the original action.

Drains — assessments — estoppel — rights of county.

6. Jurisdiction having been conferred upon the drain boards to establish and

construct this drain, and an apportionment of benefits and assessment based thereon having been made by the proper authorities, resulting in the tax having been spread and becoming a lien by operation of law, all without plaintiff's objection, and with his actual knowledge that his lands, with others, were being benefited by the construction of the drain, at great expense, of the making of which he had actual notice, said proceedings covering a period of nearly five years, during which period before and since the completion of the project he has remained acquiescent, he having granted right of way though not a petitioner for drainage, plaintiff will not be heard in equity to assert the invalidity of special assessments levied upon his property to defray such property's proportionate share of the cost of the drain.

(a) Such rule of estoppel is enforceable and applicable in this action between private parties. The distinction applied in early tax cases in this state, to the effect that there was a difference in principle between an action against a county for cancelation of a tax and the determination of such an issue in an action to quiet title between private parties, and since in later cases disapproved, refused recognition and application in this action to quiet title.

(b) Defendant as a purchaser at a tax sale is *held* to be subrogated to all the rights possessed under said tax by Ransom county at the time of such sale.

Drains — assessments — evidence — fraud.

7. There is no sufficient proof of any fraud on the part of the drainage board.

Drains — assessments, valid as levied, together with interest.

8. The special assessments so levied for said purposes upon plaintiff's land in 1908 were and are valid as such for the amount so levied, together with interest thereon at 7 per cent from date of delinquency, March 1, 1909.

Taxation — sales — notice — uncertainty of description of land.

9. That the notice of delinquent tax sale was invalid and vitiated the sale as to plaintiff's lands in Rosemead civil township. The first of the three published notices of sale listed the lands as situated within the township of Rosemead, but the township was particularly described by range as range 55, instead of the correct description of range 53. After one publication the sale notice was corrected. *Held* to have been an insufficient notice of tax sale and void for uncertainty of description of land to be sold, and as two publications were insufficient notice, the sale had thereon was void.

Drains — assessment — delinquent drainage assessments bear interest.

10. Under the statutes prior to chap. 298, Session Laws 1911, and as existing at all times in issue, no statutory interest or statutory penalty having been specifically provided to be collected upon delinquent drainage assessments arising from the construction of drains to agricultural lands, none can be collected. And the provisions of law applicable to the collection of penalty and interest on real estate taxes, and that such assessments "shall be collected and enforced in the same manner as other taxes," is insufficient to authorize the collection of

such statutory interest and penalty on drainage assessments. Such delinquent drainage assessments bear interest at 7 per cent per annum from and after delinquency.

Taxation — sufficiency of payment of taxes.

11. Following State ex rel. Moore v. Furstenau, 20 N. D. 540, 129 N. W. 81, plaintiff's payment of his general taxes before sale, without a tender of the special assessments for drainage purposes, was a payment of the general land tax; and such sale for plaintiff's general taxes and the certificates issued thereon are void and are ordered canceled. General land taxes may be paid without making payment of special drainage assessments.

Tax sale for drainage assessments — costs — test case.

12. Equitable relief as to the tax sale for drainage assessments is awarded as to certificates issued and interest, penalty, and costs of sale; but relief is conditioned, however, upon payment being made by plaintiff within sixty days from the filing of the remittitur herein in the district court of the amount of all special assessments involved, with interest at 7 per cent per annum from March 1, 1909, to date of payment. In case of payment within said period, no costs will be taxed, this being a test case. In default of payment within said period, plaintiff's action will be dismissed and judgment entered against plaintiff for all of respondent's taxable costs and disbursements.

Opinion filed May 1, 1912.

Appeal by plaintiff from a judgment of the District Court for Ranson County, *Allen,* J., holding valid certain drainage assessment taxes levied against plaintiff's property.

Modified on condition and affirmed.

Purcell & Divet, and *Ashley Coffman,* of counsel, for appellant.

The petition presented to the Richland county board was insufficient to confer jurisdiction to establish the drain. Deisner v. Simpson, 72 Ind. 435; Whitford Twp. v. Phinney, 53 Mich. 130, 18 N. W. 593; Morse v. Omaha, 67 Neb. 426, 93 N. W. 734; Miller v. Amsterdam, 149 N. Y. 288, 43 N. E. 632; Barker v. Wyandotte County, 45 Kan. 699, 26 Pac. 591; Noffzigger v. McAllister, 12 Kan. 315; Allen v. Portland, 35 Or. 420, 58 Pac. 509.

The order should not only establish the length and course of the drain, but its width, as the necessities of a right of way are not otherwise ascertainable. Mitchell v. Lane, 62 Hun, 253, 16 N. Y. Supp. 707; Page & J. on Taxation by Assessment, § 800; Watkins v. Griffith, 59 Ark. 344, 27 S. W. 234; Re Drake, 69 Hun, 95, 23 N. Y. Supp.

264; London v. Sample Lumber Co. 91 Ala. 606, 8 So. 281; Vail v. Morris & E. R. Co. 21 N. J. L. 189; State, Trenton & N. B. Turnp. Co., Prosecutors, v. American & E. Commercial News Co. 43 N. J. L. 381; California C. R. Co. v. Hooper, 76 Cal. 404, 18 Pac. 599; Null v. Zierle, 52 Mich. 540, 18 N. W. 348; Mathias v. Carson, 49 Mich. 465, 13 N. W. 818; Ross v. State, 119 Ind. 90, 21 N. E. 345.

The provision, providing for the record of the return of the drainage board to the auditor must be held to be mandatory. Sweigle v. Gates, 9 N. D. 544, 84 N. W. 481; Cooley, Taxn. pp. 284, 285; Deitz, Taxn. § 106; Fraser v. Mulany, 129 Wis. 377, 109 N. W. 139; Indiana Bond Co. v. Shearer, 24 Ind. App. 622, 57 N. E. 276; Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337.

The assessment roll must show the amount of the assessment with such certainty that the amount can be readily determined therefrom. Page & J. Special Assessments, § 883; People v. San Francisco Sav. Union, 31 Cal. 132; People v. Hastings, 34 Cal. 571; Chicago v. Walker, 24 Ill. 494; Etchison Ditch Asso. v. Hillis, 40 Ind. 408; Spokane Falls v. Browne, 3 Wash. 84, 27 Pac. 1077; Lake County v. Sulphur Bank Quicksilver Min. Co. 66 Cal. 17, 4 Pac. 876; McChesney v. People, 145 Ill. 614, 34 N. E. 431.

Curtis & Curtis and *Rourke & Krello,* for respondent.

The petition is valid. Sim v. Rosholt, 16 N. D. 77, 11 L.R.A. (N.S.) 372, 112 N. W. 50; Karr v. Putnam County, 170 Ind. 571, 85 N. E. 1; Auditor General v. Bolt, 147 Mich. 283, 111 N. W. 74.

The petition, if irregular or invalid, cannot be impeached in collateral actions of this kind. Morrill v. Morrill, 20 Or. 96, 11 L.R.A. 155, 23 Am. St. Rep. 95, 25 Pac. 362; Smith v. Morrill, 12 Colo. App. 233, 55 Pac. 824; Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757; Oliver v. Monona County, 117 Iowa, 43, 90 N. W. 510; Griffith v. Pence, 9 Kan. App. 253, 59 Pac. 677; State ex rel. Mayfield v. Myers, 100 Ind. 487; Jackson v. State, 104 Ind. 516, 3 N. E. 863; Pickering v. State, 106 Ind. 228, 6 N. E. 611; McMullen v. State, 105 Ind. 334, 4 N. E. 903; Deegan v. State, 108 Ind. 155, 9 N. E. 148; Montgomery v. Wasem, 116 Ind. 343, 15 N. E. 795; McBride v. State, 130 Ind. 525, 30 N. E. 699; State ex rel. Wilcox v. Jackson, 118 Ind. 553, 21 N. E. 320; Perkins v. Hayward, 132 Ind. 95, 31 N. E. 670.

Whether the Richland county board was properly organized would not affect the validity of the Ransom county tax. Cleveland v. McCanna, 7 N. D. 455, 41 L.R.A. 852, 66 Am. St. Rep. 670, 75 N. W. 908; Merchants' Nat. Bank v. McKinney, 2 S. D. 106, 48 N. W. 841; People ex rel. Selby v. Dyer, 205 Ill. 575, 69 N. E. 70; Sim v. Roshholt, 16 N. D. 80, 11 L.R.A.(N.S.) 372, 112 N. W. 50; State ex rel. Utick v. Polk County, 87 Minn. 325, 60 L.R.A. 161, 92 N. W. 216.

Flynn & Traynor and *C. F. Clark,* for intervener, E. R. Moore.

The facts are clearly sufficient to establish the estoppel. State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112; State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984; Powers v. First Nat. Bank, 15 N. D. 466, 109 N. W. 361; Brosemer v. Kelsey, 106 Ind. 504, 7 N. E. 569; Prezinger v. Fording, 114 Ind. 599, 16 N. E. 499; Ross v. Stackhouse, 114 Ind. 200, 16 N. E. 501; McCoy v. Able, 131 Ind. 417, 30 N. E. 528; Lewis v. Albertson, 23 Ind. App. 147, 53 N. E. 1071; Page & J. Taxation by Assessment, § 1015; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; Turnquist v. Cass County, 11 N. D. 514, 92 N. W. 852; Treat v. Chicago, 64 C. C. A. 645, 130 Fed. 443; Atwell v. Barnes, 109 Mich. 10, 66 N. W. 583; Harmon v. Omaha, 53 Neb. 164, 73 N. W. 671; State ex rel. Schintgen v. La Crosse, 101 Wis. 208, 77 N. W. 167; Bryam v. Detroit, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698; Patterson v. Baumer, 43 Iowa, 477; Thompson v. Mitchell, 133 Iowa, 527, 110 N. W. 901; Wood v. Hall, 138 Iowa, 308, 110 N. W. 270; Vickery v. Hendricks County, 134 Ind. 554, 32 N. E. 880; Atkinson v. Newton, 169 Mass. 240, 47 N. E. 1029; Cass County v. Plotner, 149 Ind. 116, 48 N. E. 636; Busenbark v. Clements, 22 Ind. App. 557, 53 N. E. 665.

The law presumes the regularity of all proceedings, and this includes the presumption that the improvement was a proper one, and that the land was benefited to the extent of the assessment. Page & J. Taxation by Assessment, §§ 1282, 1285, 1299; Conwell v. Tate, 107 Ind. 171, 8 N. E. 36; Morrow v. Geeting, 15 Ind. App. 358, 41 N. E. 849, 44 N. E. 59; Tripper v. Drainage Dist. 193 Ill. 230, 61 N. E. 1114; Chicago Union Traction Co. v. Chicago, 207 Ill. 544, 69 N. E. 849; Pinkstaff v. Allison Ditch Dist. 213 Ill. 186, 72 N. E. 715.

Goss, J. Plaintiff appeals from a judgment of the district court of Ransom county, holding valid certain drainage assessment taxes levied against various tracts of land belonging to plaintiff in Ransom county. Defendant holds an interest sought to be removed as a cloud on plaintiff's title, because of tax sale certificates issued him as a purchaser at a tax sale of delinquent taxes, for tracts belonging to plaintiff covered by such special assessments. Plaintiff offers to pay the amount of any valid assessment upon his lands, but alleges their invalidity.

The assessments were levied to defray a portion of Ransom county's share of the expense occasioned by the construction of a tri-county drain, commencing within Ransom county and crossing the northeast corner of Sargent county, and extending about 5 miles into Richland county, constructed in the years 1905 and 1906, to pay for which taxes were levied in 1908, with sale thereon for delinquent taxes occurring in December, 1909, at which sale defendant purchased the certificates in question. This action was begun in the early part of 1910.

Appellant attacks the legality of the proceedings leading up to the assessment, contending, for a want of jurisdiction in the tri-county drainage board, to apportion the assessment of benefits between the three counties, for the reason that no sufficient petition for such a drain was ever presented to the Richland county drainage board; and that the proceedings of the joint drainage board of the three counties was invalidated by the unwarranted participation therein of the Richland county board as a member of such joint body; further, that the levy of benefits by percentages was insufficient; also that no interest or penalty can be collected on such delinquent drainage assessments, if such assessments are valid. Other questions are raised as appear from the following opinion:

To the validity of every special assessment levied under the drainage laws, it is essential that jurisdiction exists in the board to order the establishment and construction of the drain; or that such jurisdiction can be conferred by some act; or by an omission to act upon which an estoppel to deny jurisdiction may be based, or upon which a court of equity will refuse to entertain an equitable action to set aside the tax. As a general rule, as stated in Alstad v. Sim, 15 N. D. 629, 109 N. W. 66, the primary question is whether the objections urged go to the jurisdiction of the board in the establishment of the drain, or whether, in-

stead, are but irregularities or departure from the statute in procedure after jurisdiction is vested in the board to proceed.

The history of our present drainage laws discloses early piece-meal legislation in which statute after statute has been repealed, to be later followed by an entire and wholesale substitution of borrowed enactment. Our present law has little, if any, resemblance to the early drainage statutes. Chapter 38 of the Laws of Dakota Territory of 1875, granting to Union and Clay counties right of establishment of drains, required that the petition should set forth "the necessity of the same, with a description of its proposed starting point, route, and terminus, together with the names of the owners or occupants or agents of the land through which the same may pass." The first comprehensive drainage act was chapter 75 of the Territorial Laws of 1883, in many respects the most comprehensive drainage act ever enacted in this jurisdiction, when taken with chapter 76 of the same year as to bonding. Chapter 75 provided for the filing of "a petition signed by one or more of the landowners whose lands will be liable to be affected or assessed for the construction of the same, setting forth the necessity thereof, with a general description of the proposed starting point, route, and terminus," with a bond to be furnished by petitioners, conditioned to pay the expense incurred if the project was not found feasible. This was somewhat changed by chapter 43 of the Laws of 1887. Then followed the new and substituted act of chapter 55 of the Laws of 1893, the language, phraseology, and substance of which, as to petition, preliminary proceedings, and survey, is still retained in our present statutes. This drainage act of 1893 was held void as unconstitutional in Martin v. Tyler, 4 N. D. 278, 25 L.R.A. 838, 60 N. W. 392, because of the unconstitutionality of its eminent domain features, the holding being in substance that the payment provided by the act was not a money payment for property taken for public use. In the opinion on page 281, we find: "The act (of 1893) is a general drainage law, and is largely copied from the Michigan drainage laws." And at page 297 the court distinguishes between the Michigan Constitution and our own, and in so doing says: "The manner in which this provision found its way into statutes is entirely clear. It was the result of a literal copy of the Michigan drainage act." And an inspection of chapter 40, 1 Howell's Annotated Statutes (Mich.), verifies this conclusion. To remedy the defects

pointed out in this court decision, chapter 51 of the Laws of 1895, practically identical with §§ 1821 et seq., Laws of 1905, was enacted. Should any doubt as to this exist, it will be put beyond question by reference to house journal of 1895, page 356, containing the committee report on this drainage bill, reading: "The committee further report that after a careful examination of the bill they find it so drawn as to avoid the unconstitutional features in the original law as construed by the supreme court, and that the amended bill now presented appears to provide legal measures to accomplish the drainage desired." Consult also Redmon v. Chacey, 7 N. D. 231, 73 N. W. 1081, testing the constitutionality of the 1895 drainage act. The petition for drain and procedure thereon, as well as practically the whole of the drainage law as it existed when the drain involved was constructed, then has parentage in the Michigan statutes as they existed after the amendments of 1887 and 1889 to the Michigan drainage act of 1885. Prior to 1885 we find the Michigan court holding repeatedly that the petition must recite all conditions necessary by statute to exist to the establishment of a drain, and holding any omission thereof a jurisdictional defect. Kroop v. Forman, 31 Mich. 144; Harbaugh v. Martin, 30 Mich. 234, and decisions prior thereto collected in a footnote; Null v. Zierle, 52 Mich. 540, 18 N. W. 348; Whiteford Twp. v. Phinney, 53 Mich. 130, 18 N. W. 593; Frost v. Leatherman, 55 Mich. 33, 20 N. W. 705, the last three construing the Michigan statutes of 1881. But later decisions upon the Michigan statutes in existence after 1885, and from which our enactment of 1893 was borrowed, presumably with that court's interpretation thereof, hold unnecessary such particularity in the petition, and that the findings of the drainage commissioner, or the court, of the existence of essential facts, cures defects in their omission from the petition. See Kinnie v. Bare, 68 Mich. 625, 36 N. W. 672; of date 1888; Hall v. Slaybaugh, 69 Mich. 484, 37 N. W. 545; Gillett v. McLaughlin, 69 Mich. 547, 37 N. W. 551.

Bearing in mind the strict construction of the petition given by the early Michigan cases, the following from the opinion by Justice Champlin, in Kinnie v. Bare, supra, is illustrative, as well as interesting, as applying equally to our present statute of nearly identical wording with the one then being construed by that court. On objection made that the petition was indefinite as to description of course and points of

beginning and termination, and failure to show the same to have been signed by freeholders of the township, the court comments as follows: "Several changes were made in the act of 1885 from the laws previously in force relative to laying out and establishing drains. The present law is a new enactment, and all other laws inconsistent with it are repealed, saving rights and proceedings commenced thereunder. Act No. 227 does not require that the petitioners shall be residents of the township; it is sufficient if they are freeholders thereof. The present law also contemplates that the course of the drain may be described by its center line. . . . It is not contemplated by the provisions of act No. 227, nor is it longer necessary, that the petition for the drain should contain an accurate description of the termini and route of the proposed drain. It could not be well done without the petitioners first went to the expense of a survey, in order to determine the feasibility of the route. This the law does not require. What it contemplates is that the termini and route shall be approximately described for the information of the drain commissioner; and it is left for him to ascertain and determine the practical route and termini. To accomplish this, he is authorized to employ a surveyor, and it is made his duty to cause an accurate survey to be made, which shall embrace the termini, route, width, length, and depth thereof; and it is expressly provided that, 'in locating such drain, the commissioner shall not be limited or confined to the precise starting point, route, or terminus set forth in the application.'" The above is applicable to § 1821, Rev. Codes 1905. In Gillett v. McLaughlin, supra, decided in 1888 under the drainage act of 1885, on questions of the sufficiency of the petition as to description of the proposed location of the drain, and that the petition failed to "show that it was signed by five resident freeholders" and therefore void for want of jurisdiction in the drain commission to act, the court says: "We have examined the petition in this case and find it sufficient to give the drain commissioners jurisdiction to act, and, with the exception of the action taken by the township board on appeal, all the objections made to the proceedings of the commissioner were such as a party interested might waive and which we think were completely waived under the evidence in the case." The syllabus reads: "In proceedings to establish a drain the petition omitted to state there was any public necessity for the same, to sufficiently describe the location, and to show

that it was signed by five resident freeholders. Neither the final order of the commissioners, nor notice of letting of contracts, contained a description of the depth and width of the drain; and on a second letting of contracts no notice was published or posted as required by statute; and the tax was assessed and entered upon the assessment roll without the proceedings being first filed with the county clerk. Held that these were such defects as might be waived by acquiescence in the proceedings." If they were jurisdictional defects they could not of course have been so waived. Such was the construction of the parent statute prior to its adoption here. And in Michigan the statutes of 1885, as amended by subsequent decisions thereon, are very persuasive of the interpretation to be given to the portions of our adopted drainage act. That no petition requirements other than those prescribed in the statute are necessary to its validity, see Brady v. Hayward, 114 Mich. 326, 72 N. W. 233, from which we quote: "It is urged that where a drain goes through or into more than one township, the application to establish the drain must be signed by not less than five freeholders of each township where such drain is situated, or the lands to be drained thereby are situated, one or more of whom shall be owners of lands liable to be assessed in each of said townships. The statute does not so read. Section 1740–B–5, 3 How. Stat. provides that the petition shall be 'signed by not less than five free-holders of the township or townships in which such drain or the lands to be drained thereby and to be assessed therefor may be situated, one or more of whom shall be owners of the lands liable to be assessed for benefits,' etc. If the legislature had intended that the petition must be signed by five freeholders of each township, it would have been easy for it to have said so. It is said the description of the drain in the application is defective. The section of the statute just referred to provides that the application shall give 'a general description of the beginning, the route, and the terminus thereof.' We think the application in that respect was sufficient." For a recent similar holding of the same court, see Auditor General v. Bolt, 147 Mich. 283, 111 N. W. 74, holding: "Where a petition for the repair of a county drain does not state that petitioners own lands liable to assessment, nor which of the owners signing are residents of respective townships, nor whether a sufficient number are liable to assessment for benefits, and prays that the repair may be made in the man-

ner set forth, though it is silent as to the manner, there is no such defect as will deprive the probate court of jurisdiction." This holding was upon an application to widen, deepen, and clean out an established drain under a statute akin to § 1835. These and other cases cited in vol. 2 of Michigan Digest of the American Digest Classification, under "Drains," establish beyond question that for ten years prior to our adoption of the Michigan drainage statutes that court had been interpreting the parent enactment liberally on jurisdictional and all questions. If, then, we follow the decisions of that state, we must hold that a written petition for a drain, reciting general course proposed, disclosing thereby that lands are to be drained, is sufficient to confer jurisdiction upon the drainage board to act, if said petition be in fact signed by six or more freeholders whose property shall be affected by the proposed drain; and that where such jurisdictional facts are found by the board to exist they are empowered by law to proceed.

And this conclusion is the only one to be arrived at from an interpretation of the statute with reference to its various amendments. Chapter 75 of the Territorial Laws of 1883, provided for the presentation of "a petition signed by one or more of the landowners whose lands will be liable to be affected by or assessed for the expense of the construction of the same, setting forth the necessity thereof, with a general description of the proposed starting point, route, and terminus," together with a bond. This phraseology evidently came from § 2 of chap. 38 of the Laws of Dakota Territory of 1875, prescribing drain privileges for Union and Clay counties, but omitting the requirement that the petition contain the names of the owners and occupants through whose lands the proposed drain was to pass. The drainage act of 1893, as borrowed from the Michigan statutes, disregarded previous legislation and left indefinite the petition requirements; and subsequent legislative acts, chap. 51, Laws of 1895, §§ 1444–1474, Rev. Codes of 1895, chap. 79, Laws of 1899, and chap. 80, Laws of 1903, have left said provisions of statute practically unchanged. After the proceedings were had for the establishment of this particular drain, chap. 93 of the Laws of 1907, defined that the petition "shall designate the starting point and terminus and general course of the proposed drain;" re-enacted in chapter 125, Session Laws 1911.

The tendency is thus shown toward less particularity in petition re-

quirements. In reality the laws of 1907 and 1911 require no more than what would necessarily have to be stated in any event, and are as lax as could be exacted and make any written petition essential to jurisdiction. The inference to be drawn from such change from stringent requirements of territorial days to the present absence thereof must certainly negative to any legislative intent that the statute shall be held, by inference or interpretation, to require more than it prescribes by express terms as to what the petition shall contain to confer jurisdiction.

Again, as well shown by the quotation from the Michigan opinion, the statute contemplates full investigation by personal inspection, survey of the route, the consideration of the opinions of those affected by the drain as to its feasibility, the weighing of the cost against the benefits to be derived,—all prior to its establishment, and all of which are to be conducted by the drain commissioners *ex parte*. There would seem to be no good reason why it should be held that, before the board can make such determination of fact, a formal petition containing all of such matters necessary to be determined by it should be presented. In this connection we might remark that the early statutes, down to and including chapter 51 of the Laws of 1895, required that the petition be signed by the owners of land to an amount greater than half the aggregate land liable to assessment. But this requirement has been omitted, and, instead, a petition for six freeholders whose property is affected is all that is required. This further illustrates the tendency toward more ease in setting the drain commissioners in operation.

On the question of purpose of the petition, and the necessity that it discloses affirmatively that it is agricultural land that is being drained, the petition recites that as proposed it is to be a continuation of the drain proposed by the other two counties, with a recommendation as to size and depth, with a statement of the course proposed. Most assuredly the drain commissioners could take judicial notice of the proposed route of the drain within the limits of their own county. Under the statute they are commanded to do even more, as they must personally examine the route. We fail to see what prejudice to anyone's rights could possibly come from such omission to more definitely state in the petition the purpose of the drain.

Counsel claims the petition for drain is unintelligible. It is true the word "that" in the second line of the petition is unnecessary, and tends

to obscure the meaning thereof, but, with the omission of this single word, the petition is as plain as English could make it. It was understood by the board, and doubtless by the petitioners and all others interested. Authorities are cited for the contention that the petition does not state facts sufficient to clothe the board with jurisdiction to act, among them the Michigan cases of Whiteford Twp. v. Phinney, 53 Mich. 130, 18 N. W. 593; Mathias v. Carson, 49 Mich. 465, 13 N. W. 818; and Null v. Zierle, 52 Mich. 540, 18 N. W. 348. These cases are all on the old Michigan statute, and not the statute from which our law was taken; and these decisions are not authority under the later Michigan holdings. Counsel cite Deisner v. Simpson, 72 Ind. 435, to the effect that "an application or petition for the construction of a ditch or drain must allege, and the allegation must be proved, that the proposed ditch or drain will be conducive to the public health, convenience, or welfare, or that the same would be a public benefit or utility to render the subsequent proceedings thereunder valid or legal." The holding is but giving force to an amendment to their previously existing law. Early Indiana holdings are to the contrary. See Brown v. McCord, 20 Ind. 270, the syllabus of which case reads: "A petition for the location of a highway need not affirmatively show that the petitioners are freeholders, or that six of them reside in the immediate neighborhood of the contemplated highway, and such facts may be proved on the hearing of the petition, although not alleged therein." The legislature of Indiana evidently made more stringent the highway and drain provisions; while Michigan, from whom we borrowed our statute, legislated the other way, toward ease of operation with less of technicality.

Appellant also cites Morse v. Omaha, 67 Neb. 426, 93 N. W. 734, a case upon a petition for repaving that city, construing a statute reading: "No repaving shall be ordered except upon the petition of the owners of the majority of the taxable front feet in any improvement tax." The statute is no wise similar to the provisions of § 1821, and we do not regard the holding as applicable. We therefore conclude that assignments of appellant based upon alleged want of jurisdiction in the Richland county board was not well taken.

Appellant urges that the order establishing the Richland county drain was too indefinite in the description of its course to establish a legal drain. The order was made after the survey, profiles, plans, and speci-

fications had been filed in the office of the auditor of said county as recited in the order made in reference thereto, tending to make more certain the description contained therein. But the description given is sufficiently definite. It is: "Beginning at a point on the county line at the southwest corner of section 6, in township 132, range 52, going thence east along the section line across sections 5 and 4 in said township and range to a point approximately the southwest corner of said section 4, where the same intersects with Elk creek, thence following Elk creek approximately 9,000 feet." See Kinnie v. Bare, 68 Mich. 625, 36 N. W. 672. State ex rel. Utick v. Polk County, 60 L.R.A. 161, and extensive note thereto. And the order having been made with reference to a survey had and plans and specifications prepared, the drain was located with particularity and definiteness.

Appellant has assigned and briefed error on the action of the Richland county board in ordering what that board termed as a spur drain "from Star Lake in section 5, in said township and range, running in a southeasterly direction to a point where the same intersects with the main drain above mentioned," quoting from the order establishing the Richland county portion of the tri-county drain. This spur drain was not petitioned for, or mentioned in the Richland county drain petition, nor in the recitations of findings preceding the order establishing the Richland county drain. It is inserted after the order establishing that drain apparently as a separate matter from the drain petitioned for. It is mentioned in the same manner in Exhibits F, G, and H. The record does not show its construction as a part of the Richland county portion of the tri-county drain, and for aught we can ascertain from the record it may have been built as a separate enterprise upon a separate petition therefor. The same can be said of another spur drain mentioned in said exhibits. If built as a part of the tri-county enterprise, had seasonable proceedings been taken and if its construction would add to the burdens of taxation to be borne by plaintiff's lands, with such facts shown, relief might have been afforded plaintiff. But he cannot be heard to complain on such grounds after sale, on proceedings to vacate the tax. Such irregularities did not go to the jurisdiction of the joint county board or the Ransom or Richland county boards. Alstad v. Sim, 15 N. D. 629, 109 N. W. 66.

Appellant has assigned error on alleged uncertainty in the per cent of

benefits as assessed to the various tracts belonging to plaintiff, and a discrepancy between the per cent as levied and the computation in specific amounts thereon after ascertainment of the total expense, and based on such total expense of the construction. In other words, appellant claims uncertainty exists as to whether the assessment of benefits to each tract is apportioned upon a basis of 100 per cent, or 1 per cent, claiming uncertainty arises because at the top of the column of percentage apportionments by decimal fractions the words "2 per cent" appear. And that because the assessments in percentages is indefinite and the specific amounts ascertained by such per cent of the total cost so apportioned to each tract is erroneous, and one hundred times what appellants assert should be the proper computation of the tax from the percentage of benefits levied, the tax spread is void. Appellant had notice that his property was chargeable with its proper share of benefits as an assessment basis. He was chargeable with notice that the manner of its apportionment to his property was to be expressed by a per cent or decimal fraction evidencing on such basis the portion of the whole expense of the project his property was ultimately to bear. That such fractional part of the whole expense was to yield his assessment. We do not construe the words "per cent" at the top of the column of decimal fractions to change the interpretation to be given the list thereunder, or render its construction any different than though the word "share" or "portion" was used, instead of the term "per cent," which in reality means decimal part, share, or portion of the whole. And such apportionment under a heading of "share," "part," "decimal part," or "decimal portion," would undoubtedly be valid as answering the statutory requirement of an apportionment by percentages. The levy is not in this respect uncertain. Such uncertainty cannot be read into the assessment or notice of assessment. The assessment as made would ordinarily be construed as the decimal fractional part of one hundred per cent, the equivalent of the whole benefits accruing from the drain across the three counties. In this connection there is no showing of an absence of a uniformity of the levy as computed with all other tracts assessed within Ransom county, nor is there any showing that in fact the assessment as computed was excessive or wrongful. The objection urged does not go to the jursidiction or the power of the Ransom county drainage board to levy the assessment as levied, but is rather an objection to the

computation of specific amounts from the benefits, and as such, goes merely to alleged irregularity in procedure. And under the authorities hereafter given, defendant is estopped, by his own laches, from asserting such irregularities in the assessment.

Appellant urges that because the tax was finally figured on the basis of an ascertained actual cost of $67,500, instead of upon the amount of the estimated cost of $60,000, as contained in the notice of review, that such increase of $7,500 over the estimated cost is invalid, and such proportion of the total expense as figured in specific amounts against the tracts involved is invalid as the taking of property without due process of law. A comparison of § 1826 with § 1821 and § 1831 will disclose that at no place is it required that the assessment by per cent of benefits to accrue to the property shall be made upon or with reference to any estimated cost of construction of the project. While the levy and notice stated the estimated cost as $60,000, it was wholly an unnecessary statement so far as it concerned the assessment by percentage of benefits. The statute contemplates the assessment by percentages based upon benefits to accrue to the property, and this wholly without regard to the estimated cost of the project. Section 1821 provides that the surveyor who prepares the profiles, maps, plans, and specifications of the proposed drain shall therewith prepare an estimated cost of such drain; but this is for the benefit of those whose lands will be affected by the drain, and for the use of the commissioners in determining the preliminary question of whether the drain shall be constructed; and is to aid in applying the rule announced by § 1822, to the effect that the benefits to be derived must exceed the cost, otherwise the drain shall not be built. And, after such decision made this estimate had fulfilled its purpose. Under Alstad v. Sim, supra, after jurisdiction has been conferred upon the board by petition, the failure of the surveyor to map the lands and make estimates of the cost may be considered as irregularities. We quote from page 635 of the court opinion: "The filing of the petition gives the board jurisdiction. . . . After the establishment of the drain the proceedings were irregular in many ways, so far as the extension is concerned. There was no survey by the surveyor and no maps or estimates were made by the surveyor." "The omissions as to surveys would not render the proceedings void in this kind of an action." "If timely objections had been made before the

board on these grounds, and disregarded, equity would interfere by injunction, enjoining further proceedings until all statutory requirements had been complied with; but courts will grant no relief in such actions when invoked solely to avoid payment of assessments which were levied in good faith and without objection from any source until after the work was completed." As the estimate of the total expense made in connection with the assessment of benefits by percentages was a needless, useless act, it cannot affect the validity of the assessment in specific amounts, which would have been unassailable even though no estimate of cost of construction had ever been made.

But the validity of the proceedings had by the joint board adopting computations of assessments in specific amounts is challenged. Appellant contends that "it was not intended (by the board) to be an assessment. If it was intended to be, it is absolutely void as such, because in specific amounts, and not in percentages; because of the lack of authority to levy it in the manner and at the time it was levied; because no opportunity of review has been had; and because it was participated in by the members of the three drainage boards, whereas the assessment against the lands in each county must be made by the board of the county."

The proceedings had by the joint board in March took place before the act of 1907 became effective on March 20th of that year. As to the power of the joint board, composed of the several county boards, it is true that its powers are limited to and consist only of meeting and agreeing "upon the proportion of damages and benefits to accrue to the lands affected in each county affected, and for this purpose they shall consider the entire course of said drain through all said counties as one drain. They may apportion the cost of establishing and constructing such entire drain ratably and equitably upon the lands in each county in proportion to the benefits to accrue to such lands, and when they have so apportioned the same they shall make written reports of such apportionment to the auditors of the several counties affected, which reports shall show the proportion of cost of such entire drain to be paid by tax upon the lands in each of such counties, and such reports shall be signed by the boards of drain commissioners of all counties affected." The statute further provides that, "upon the filing of such reports, the several boards of drain commissioners shall meet and assess against the

lands in each of such counties, ratably and equitably as provided by law, an amount sufficient to pay the proportion of cost of such drain in each of such counties, so fixed by all said commissioners." Section 1836. The duty of the joint board is to determine the proportion of the whole benefits the lands within each county will receive from the tri-county drain. It does not deal with individual tracts as such, but, instead, with a county apportionment of benefits. It considers collectively each county's lands benefited, and determines the proportion each bears to all the lands benefited; as in percentages of benefits received, so in damages, for right of way and property taken under eminent domain for public use. When this proportion is determined the full duty of the joint board has been performed, and their authority to act as a joint board exhausted. Though acting collectively when in joint session, in law each board acts severally as an integral part of the joint body. Chesbrough v. Putnam & Paulding Counties, 37 Ohio St. 508. It is true, as appellant states, that there is no provision in the statute whereby the joint board has any duties to perform after the apportionment of benefits between the counties, except that such joint board must determine the total cost of the project under §§ 1830 and 1836 as a necessary basis for computation of specific amounts from the apportionment had of benefits estimated in percentages. This apportionment as to the counties had been had in September, 1906, as appears from the recitals in Exhibits F, G, and H. The joint meeting had in March, 1907, while without authority of law as such, was three several meetings of as many boards, and amounted to the apportionment in specific amounts by each county board of the assessments against particular tracts within its county. At this meeting the Ransom county board in fact did adopt the computation made as to the specific amounts to be borne by each tract of land within Ransom county, including among them these lands of plaintiff. We do not see any prejudice resulting to plaintiff, because two other county boards at that same time acted likewise as to the lands within their counties. It does not appear that the computation made was based upon anything other than the percentages of benefits previously assessed, and upon which notice of hearing had been had as mentioned in the above exhibits, followed by confirmation. No notice is provided to be given of specific amounts so computed, it being merely a calculation from a basis, of the fixing of which notice had

been given. There was no lack of authority in the several boards to determine the specific amounts at the time of the determination thereof. Though the boards as the result of their meeting put forth the list of computations covering the lands in the three counties, signed by the three boards, it is apparent from the closing paragraph containing the direction to county auditor of each county that it was intended to operate severally upon the lands in each county, and was no more than the joining in one instrument of the three several county lists. In State v. Blake, 86 Minn. 37, 90 N. W. 5, a consolidated report on two separate bridge projects, susceptible of determination of amounts as to each, was held valid. That court's reasoning is applicable: "At most this was an informality, irregularity, or variance in the proceedings which would not affect this objector's rights or injure him in any manner. The assessment of which he complains would have been the same if the assessments, awards, or reports had been made exactly as his counsel claims; and it must follow that he was not materially injured by the fact that they were combined." A valid apportionment in specific amounts was made.

It is urged that the tax levied against plaintiff's lands was invalid because of noncompliance by the county auditor of Ransom county with the provisions of § 1827, providing for the filing in the office of the county auditor of the return of proceedings had concerning the assessment of benefits. This section reads: "After the assessment of benefits has been made . . . the board of drain commissioners shall make return thereof to the county auditor, who shall record the same in a book to be provided by the county for that purpose. Such return shall contain the petition for the drain, the minutes of the survey, signed by the surveyor, a copy of the order establishing the drain, conveyances of the right of way, if any, and the assessment of benefits." Such a return was filed with the auditor, but the evidence discloses that there was no book provided by the county for that purpose, and hence no recording of the return. What has been said by the court in Alstad v. Sim, 15 N. D. 629, 109 N. W. 66, as quoted, regarding the failure of the surveyor to make a survey, the minutes of which are required by this section to be recorded, must be applicable to the failure to record this return. We do not regard it as essential to the validity of the assessment. While the record may be intended as a benefit to the taxpayers,

by perpetuating the record of such proceedings, the mere recording thereof can be no part of the essentials of a valid tax to be thereafter levied with such proceedings as a basis, but, instead, is no more than a statutory requirement exacted of a clerical officer for the obvious purpose of procuring a record to be made. Early tax cases in this state tended toward holding taxes invalid if any departure from the statute was had in the regularity of the proceedings creating the tax. See Eaton v. Bennett, 10 N. D. 347, 87 N. W. 188, and cases therein cited. This case held the failure of the assessor to verify an assessment roll to invalidate the tax based thereon. The court there said: "Mandatory provisions—and those intended solely for the benefit of the taxpayer are mandatory—must be substantially complied with by the officials who attempt to impose the tax burden upon the citizen; and the omission to do so, under the decided weight of authority, is fatal to all proceedings based upon such attempted taxation, including tax certificates and deeds issued thereon pursuant to a sale for such pretended taxes." Much similar reasoning is there found. But later cases have expressly disapproved of this and other technical holdings on such class of statutory requirements. Douglas v. Fargo, 13 N. D. 467, quoting from page 480, 101 N. W. 919: "The mere allegation of a want of the assessor's verification is not the equivalent of an allegation that the assessment is excessive, unequal, or unjust. Such an allegation does not negative a just and honest assessment. Great stress is laid upon the constitutional provision that property shall be assessed in the manner provided by law (N. D. Const. § 179), and the contention is made that such provisions are mandatory, and any deviations therefrom render the tax void. So far as this point is concerned, we do not think that the constitutional provision has any application." See State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112, in which Eaton v. Bennett, supra, was expressly overruled in the following language, equally applicable to the statutory requirement here urged as invalidating subsequent proceedings: "We hold that the verification of the assessment roll by the assessor is not any inherently necessary part of the act of assessment proper, but is merely a legislative requirement. The act of assessment is performed as to the land when the assessor determines its value. That is all that is inherently necessary, and it is clear that under our system of real estate taxation no less will suffice.

The assessment must, of course, be evidenced by some authentic record. It is self-evident that the assessor's affidavit is not inherently essential, either as to the assessment or as an authentication thereof. The Constitution does not expressly or impliedly require it. The provision for the affidavit is a purely legislative requirement." Although the court was there passing upon a revenue measure different from that involved in Eaton v. Bennett, in speaking of that case the opinion states: "In that case the court said in effect that the act of verifying the assessment roll by the prescribed affidavit was a part of the act of assessing, and that a valuation by the assessor, although sufficient in all other respects, was no assessment if the assessor's affidavit was not attached to the roll. This unqualified language was in effect disapproved by the decision in Douglas v. Fargo. In that case the assessment rolls were not verified by the assessor's oath. The plaintiff in that case, relying on Eaton v. Bennett, asserted that there was no assessment and hence no tax. The court held that, although the defect might be fatal at law, it was not fatal in equity." Then followed the express holding quoted, that the authentication by affidavit of the assessor to the assessment roll was not an inherent part of the assessment proper; and Eaton v. Bennett is expressly disapproved in the syllabus in State Finance Co. v. Mather.

As further illustrating the holdings of recent years of this court towards sustaining the tax, as distinguished from early holdings practically to the contrary, see decisions upon the validity of descriptions in tax certificates, sufficiently shown by a comparison of the opinion in Power v. Bowdle, 3 N. D. 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404, with Beggs v. Paine, 15 N. D. 436, 109 N. W. 322. If noncompliance with the statute requiring an assessor to verify his own creation, his assessment roll, should be considered as but an irregularity, most certainly the failure of this clerical officer to record a return should not invalidate this assessment.

But additional reasons exist why the recording is not essential to the validity of the tax. Section 1828, prescribing the step next following and filing and recording of the return, required by § 1827, clearly distinguishes between the filing and recording thereof, in that it authorizes the letting of contracts (for construction of the drain) at any time "after filing the return with the county auditor," making no

reference to the recording thereof by that official as a condition precedent to the letting of contracts, but making the filing thereof such a condition precedent. This is significant. See 2 Page & Jones on Taxation by Assessment, § 1304, reading: "If it is not required by statute that certain acts must be recorded as a condition precedent to their validity, the acts of the council may be shown, although they do not appear of record." Section 907 of the same work states: "Under some statutes it is provided that the assessment when made must be recorded. Such provisions are usually made in order to give constructive notice of the assessment to the owners of the property upon which such assessments are to be levied. When this is the object of the statute, failure to record the assessment, as provided for by statute, invalidates the assessment. . . . If, on the other hand, the provision requiring the assessment to be recorded is not for the purpose of giving constructive notice, but simply for the preservation of the assessment, failure to have it recorded does not render it invalid." We cannot conclude that the object of the recording of the many previous proceedings, as required by § 1827, is to give constructive notice, as constructive or actual notice is otherwise provided to be given concerning the assessment of benefits; to that point, the most important to the taxpayer of all prior proceedings, and concerning which notice to him would be necessary previous to its apportionment, otherwise a question of taking of property without due process of law might be involved. There being no reason for concluding that such recording is meant to operate as constructive notice, such notice having been required at the step next preceding the recording requirement, we conclude that the record required to be made is for the purpose of preservation of the assessment, and the failure to record in no wise invalidates subsequent proceedings; nor does it involve a loss of jurisdiction to thereafter proceed. Instead, it is a mere irregularity. Section 1827 is a directory, as distinguished from a mandatory, provision.

Appellant raises the question of constitutionality of the entire drainage law, urging that it contravenes the state Constitution and the 14th Amendment to the Federal Constitution, in the taking of private property without due process of law. This assignment was taken prior to the final decision of Soliah v. Cormack, 17 N. D. 393, 117 N. W.

125, appealed and affirmed in 222 U. S. 522, 56 L. ed. 294, 32 Sup. Ct. Rep. 103, holding the contrary.

Appellant urges that the pendency of the first action began in October preceding the tax sale, was constructive notice to this defendant of plaintiff's intent to contest the validity of the tax and notice of any defense he might be able to interpose against its payment; and that because thereof defendant should not be heard to assert any defense of estoppel if plaintiff has established a cause of action otherwise sufficient as against these taxes. No actual notice to defendant of the pendency of said action is shown, nor is constructive notice thereof imputed by law. We know of no requirement that an intending tax-sale purchaser shall search the records of the clerk of the district court to determine whether any actions are pending against any tracts to be offered for sale. Instead, the policy of the state in such matters is to encourage bidding at sales for delinquent taxes, as is manifested by the provisions of the revenue laws requiring a refund to purchasers at void tax sales. At the time of sale plaintiff had no standing in equity as against the county of Ransom. Hence he had none as against Ransom county's transferee, this defendant.

In what we have said heretofore we have not referred to the doctrine of estoppel, waiver, or laches because of defendant's delay in commencing this action. Many courts hold that this alone is sufficient to bar him relief in equity. The uncontroverted facts certainly convict plaintiff of laches, and estop him from urging any defense other than that the proceedings had were void for want of jurisdiction; and if we follow the holdings of the state from whence we obtained our drainage law, we would hold defendant estopped from asserting a want of jurisdiction, even if there was an entire absence of jurisdiction in the first instance in the Richland county board to entertain these proceedings. See Farr v. Detroit, 136 Mich. 200, 99 N. W. 19; Atwell v. Barnes, 109 Mich. 10, 66 N. W. 583; 4 Dill. Mun. Corp. 5th ed. 1455 et seq., citing cases and classifying states on this question.

We will briefly recite the record bearing on estoppel. Proceedings were had in all three counties, purporting to establish the drain in the respective counties, in the summer of 1905. On July 26, 1905, the order establishing the drain in Richland county was made upon a petition previously filed, and under the stipulation of regularity of con-

duct of proceedings made by counsel, as well as from the presumption of regularity of official conduct, the petition upon which this order was based must have been filed a sufficient time before to have allowed an examination, survey, specifications of the ditch, and map of the lands to be drained, to be made and filed with that board prior to July 26, 1905. Such proceedings were had in Ransom and Sargent counties that an attempted apportionment of benefits by percentages between the three counties by the joint drainage boards was had October 17, 1905. Before this date certain expenses thereunder were incurred. Afterwards, for alleged irregularity, the drain board of Ransom county set aside its proceedings theretofore had, and on August 27, 1906, the joint drainage board of the three counties vacated all prior action taken, and determined the value and labor expended in such prior invalid proceedings. Acting pursuant to § 1841, the joint board gave notice of a hearing to be held before it to determine the value of such services and labor previously performed. This hearing was set for September 23, 1906, under an order dated August 27, 1906. Coupled therewith was a notice given by the joint board of a reapportionment of benefits by percentages to be apportioned to the land throughout the entire course of the drain. The Ransom county board afterwards renoticed such apportionment as to Ransom county, under notice dated September 25, 1906, setting time of hearing for October 9, 1906, noticing confirmation at that time of the apportionment as made by percentages and of the percentage of the whole estimated cost apportioned as Ransom county's share thereof. The following appears from the minutes of the Ransom county board of proceedings as had by them on October 9, 1906: "The commissioners having duly considered the assessment against the lands described in said notice of review and assessment, the same are hereby confirmed and established." In the notice of review and confirmation, under a column headed "per cent," the decimal fraction of the proportion of the entire estimated tri-county expense of $60,000 was designated as the percentage or decimal fractional part of such total expense to be borne by each individual tract, including therein all the land of plaintiff subsequently assessed in specific amounts. Thereafter such proceedings were had that a joint meeting of the tri-county board was held March 7 and 8, 1907, after due notice given by publication, to determine the apportionment in

specific amounts by the entire expense to be borne by the three counties. The joint board there determined that it had expended as the cost of excavating in Sargent and Richland counties $30,660; and Ransom county, $23,677. That the cost of bridges had been $4,722, and interest on warrants $1,500, and cost of surveying and warrants for other expenses $6,536." And that future incidental expenses would be $1,535, making a total cost of $67,500 for the drain through the three counties, of which amount about $66,000 then had been expended. At said meeting, under arrangements previously made, Mr. Wallace, as attorney for the board, presented a list of all lands to be assessed in the three counties, with the tax in specific amounts calculated as to each piece or parcel. The minutes of the board in such respect are as follows: "Mr. Wallace having completed the list showing the amounts of tax that each piece or parcel of land was liable to pay on account of the construction of what is commonly known as tri-county drain, said lists are, on motion, adopted." And he "as authorized to serve a copy of said lists on the various township boards, and to file a copy with the respective county auditors of Ransom, Richland, and Sargent counties." The list was signed severally by each and all the boards and their members as the joint act of the tri-county board and the several act of each county board. It contained the following order: "Be it known that we, the undersigned drain commissioners in and for the counties of Ransom, Sargent, and Richland, in the state of North Dakota, hereby fix and determine that the several sums respectively set opposite each of the following municipalities, lots, or tracts of land shall pay, by reason of the benefits thereto on account of the construction of said drain, to wit." Then followed the list of assessments, and thereafter, immediately preceding the signature of the boards, was the following order: "And the county auditor of the county in which each piece or parcel of land is respectively located is required to extend upon the tax list as a special tax the amounts respectively set opposite each description within his county as aforesaid, specifying in such list for which drain the tax is levied; and the same shall be levied as a tax against such descriptions for the year 1907, unless bonds are issued therefor." This list was filed in the office of the county auditor of Ransom county June 18, 1907. It contained descriptions of all of plaintiff's land in Ransom county, together with the assessment apportioned to each tract; and

thereon the tax assailed was spread as a tax against said tracts for the year 1908, becoming due December 1, 1908, and delinquent March 1, 1909, and going to sale in December, 1909, at which delinquent tax sale defendant purchased tax-sale certificates therefor. In October 1909, an action was instituted in the district court of Ransom county to enjoin the county and its auditor and treasurer from collecting or receiving these drain taxes, and asking their cancelation. But no injunctional order issuing, the sale for delinquent taxes was not restrained; and said action was dismissed prior to the commencement of this present action, brought against the defendant as a purchaser at the sale. This action was begun February 11, 1910, and trial had below in June following. Plaintiff testifies that during all times involved in these proceedings he has owned the lands assessed; that right of way across certain of plaintiff's lands in Sargent county was given or sold by him for a portion of the tri-county drain within that county. His testimony proves his actual knowledge of proceedings from their inception.

We quote his testimony:

Q. You knew from the time of the commencement of the proceedings for the construction or building of the ditch, up to the present time, all about that ditch, did you not? A. I knew of it in a way.

Q. You knew it was being constructed? A. Yes.

Q. How much of it was being constructed? A. Yes.

Q. Did you ever take any steps to test the legality or validity of these actions? A. I don't suppose I did.

Q. Did you make any protest to the drain commissioners of Ransom county in regard to this ditch? A. No. I didn't until I had notice of the way the assessment was made and the amounts.

Q. Did you make a written protest against your assessment? A. No, I didn't have a chance; my assessment was made before I knew anything about it; I didn't suppose it would be so high, and I didn't believe it would be over one fifth or one fourth of what it was.

Q. You never made any protest against the drainage board? A. I don't remember that I did.

Q. And you were lead to believe that the cost of the construction of the ditch was not to exceed $40 to $50 per quarter section on the land, and that these were assessed the heaviest? A. Yes.

Q. State whether or not it was for this reason that you brought no action to prevent the building of the ditch. A. It was.

It is clear that plaintiff has remained inactive and acquiescent for five years in the proceedings had, from the summer of 1905 until the commencement of this suit in 1910, with full knowledge that great expense was necessarily being incurred in the construction of a drain, for a portion of the benefits of which over 1,000 acres of his land would be assessed; and with knowledge imputed to him that his property would necessarily have to carry its proportionate share thereof. He never murmurs until after the state has forced collection and defendant has invested the amount of the taxes on sale. Then, and not until then, plaintiff seeks to avoid payment for the benefits of his land, the basis of the tax; and to that end does not hesitate to, by the precedent set in this action, jeopardize over $65,000 of obligations other than his own, similarly incurred, that he may escape the payment of his proportionate share of the total expense of the project. And with this most inequitable prayer he enters a court of equity, seeking relief under guise of equity.

This is not the first time such a claim has been urged in similar proceedings, to be condemned as untenable. See Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841, from page 509 of which we quote: "The drain is ten miles in length and its construction necessarily covered a considerable period of time, and, as we have seen, involved the expenditure of large sums of money and the contracting of many obligations. The period of time covered and the character of the work being done makes it necessary to assume that the plaintiffs whose lands are adjacent to the ditch were fully cognizant of all these facts. No steps of any kind were taken by any of the plaintiffs to arrest the progress of the work or to challenge its legality in court, by notice to the board or to contractors or otherwise. This action was not instituted until the drain had been fully completed and after all of the benefits accruing therefrom had been conferred. Under such circumstances a court of equity will not stop to inquire into questions of legality or irregularity. The cases are numerous and the courts unanimous, we believe, in denying equitable relief on facts such as are here presented." In the case cited it is true part of the plaintiffs were petitioners for the

drain, but the facts on the whole in that case are not more inconsistent with the granting of equitable relief than in the case before us, in fact or in law. See also Turnquist v. Cass County, 11 N. D. 514, 92 N. W. 852; Alstad v. Sim, 15 N. D. 629, 109 N. W. 66, from the syllabus of which we quote: "Persons whose lands are assessed for benefits on account of a drain will not be heard in a court of equity when asking for a perpetual injunction against the collection of assessments against their land, on account of benefits, after the drain is completed, they having had notice of the fact that work was being done on the drain pursuant to proceedings authorized by the drainage board."

But counsel seek to differentiate these cases cited from the case at bar, claiming that "the doctrine of estoppel by failure to object to an improvement is only applicable in actions against the county when seeking the extraordinary relief of injunction or cancelation of a tax; and it has no application in actions between individuals, affecting titles or interests in lands under purchase at tax sales." And counsel call attention to the fact that, in the previous drainage cases before this court, an injunction was asked against the county or its officials to restrain collection of the tax, or otherwise attacking it. They cite as a principle applicable the portion of the opinion in Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188, on page 350, there distinguishing actions permissible between private parties from those between an individual and a county, in tax matters. The court there held such a distinction to exist in principle, in the following: "It is true that a majority of this court held in Farrington v. New England Invest. Co. 1 N. D. 102, 45 N. W. 191, that a court of equity will not enjoin the enforcement of a tax on the ground that the assessment was irregular or void in this, that the assessor's oath was not attached to the roll. The reasons for so holding are set forth in the opinion, and were satisfactory to a majority of the court as it was then constituted. But that case will show that the rule there laid down has no application to a controversy such as this in which public rights are not involved and where private rights are alone at stake." But this is not the only case in which such a distinction has sought to be applied in tax cases. In Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919, in distinguishing that holding from Farrington v. New England Invest. Co. supra, on page 479, the court makes use of the following language: "The cases in which the rule of

that case has been modified were not cases involving the same facts, and were cases between individuals involving private rights in which the public was in no way interested. Such cases were expressly excepted from the rule laid down in the Farrington Case." And the court adheres to the necessity for tender of payment of void taxes in an action by an individual against the taxing municipality, by the following at the close of the opinion: "Conceding, then, for the purpose of this case, that the levies and assessments are void in courts of law, still under the rule in the Farrington Case the defects, omissions, irregularities, or illegalities do not bring the assessments or levies within any of the classes of assessments or levies that are held void, to the extent that tender or payment may be dispensed with in a purely equitable action." Because the municipality was involved, the case was distinguished from Power v. Larabee, 2 N. D. 141, 49 N. W. 724; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; and Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188, they being cases between private individuals and where a tender of void taxes was held unnecessary prior to relief. A distinction was thus drawn as to the necessity of tender, based on whether the action was against the taxing municipality or between private individuals; in the former, a tender being held necessary, in the latter, not. Such distinction was urged in State Finance Co. v. Beck, 15 N. D. 375, 109 N. W. 357; Fenton v. Minnesota Title Ins. & T. Co. 15 N. D. 365, 125 Am. St. Rep. 599, 109 N. W. 363; Powers v. First Nat. Bank, 15 N. D. 466, 109 N. W. 361; State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112,—in which series of decisions the distinction for which recognition is here asked, and which was there presented on the necessity of tender of payment of taxes, is expressly disaffirmed. In State Finance Co. v. Beck, 15 N. D. 375, on page 381, 109 N. W. 357, on page 359, the court, in denying the soundness of this distinction, uses the following language, as applicable to the case at bar as to the one there under consideration: "We recognize the fact that this decision is in conflict with the practice heretofore prevailing as established by the decisions of this court. Those decisions were cited in Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919. It is true, as pointed out in that case, that there is a distinction between a suit for cancelation against the county, such as that, and an action to quiet title such as this. The difference is only

in form, however. Both invoke the equity jurisdiction of the court for the same purpose; namely, the cancelation of an adverse claim. The inherent powers of the court as an equity tribunal, and the general principles governing the court in equity cases, are precisely the same in whatever form the questions are presented." And, again, in Powers v. First Nat. Bank, 15 N. D. 466, on page 469, 109 N. W. 361, on page 363, the court says: "This is an equitable action to be determined on equitable principles, although the county interests be eliminated from the issues. The plaintiff seeks the cancelation of certificates and the setting aside of levies and taxes. He seeks to set aside the lien created by a tax certificate. He asks for general equitable relief. Under the issues framed, it is an equitable action and held to be such in this state. . . . The relief sought is equitable. Hence equitable principles must be applied in the determination of the issues. The mere fact that the action is between private parties only is not enough to take it out of the rules applicable to equity cases. It is not an answer to say that the doctrine of *caveat emptor* applies in suits to determine the validity of taxes, sales, or tax deeds. That rule does apply in such cases, but that does not justify a court of equity in holding that a tax-sale purchaser shall be compelled to look elsewhere for his money, and the owner be relieved from all payments and burdens imposed upon owners of property by the revenue laws. The owner comes into a court of equity asking that he be relieved from tax proceedings which he claims to be illegal. Before his prayer should be granted, he should do equity himself, and reimburse the tax purchaser, and save the county from the burden of having to pay out the money received as taxes on the plaintiff's land which the latter does not claim not to owe. A new rule is announced in this case overruling previous cases in this court. So far as the application of this equitable principle in actions between private parties to determine the validity of tax sales or certificates or deeds is concerned. Upon mature consideration we conclude that no sound distinction can be drawn between such actions and those against public officers, that will warrant the application of this equitable principle in the one case and withholding it in the other." Which holding is followed in Fenton v. Minnesota Title Ins. & T. Co. 15 N. D. 365, 125 Am. St. Rep. 599, 109 N. W. 363; Noble

v. McIntosh, ante, 59, 135 N. W. 663, and Tee v. Noble, ante, 225, 135 N. W. 769.

Counsel then incorrectly assume that a distinction now exists in equity between actions against public officials to annul a tax, and actions between private individuals to quiet title. No distinction being recognized in equity as existing in such actions, we see no reason for departing from the reasoning illustrated by the foregoing quotations. We hold as applicable in this action between individuals the rule of estoppel available had the individual sued the county before defendant purchased the county's interest in the tax at the sale. Defendant may invoke the doctrine that plaintiff has, by his delay, laches, and neglect, barred himself from asserting the invalidity of the tax in question because of irregularities not jurisdictional. Alstad v. Sim, 15 N. D. 629, 109 N. W. 66; State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984.

Appellant does not question the jurisdiction of the Ransom and Sargent county boards, except as an alleged want of jurisdiction might result from the alleged wrongful participation, without jurisdiction, of the Richland county board in the proceedings of the tri-county drain board. The proceedings of the Richland county board not being vulnerable to attack for jurisdictional reasons, the jurisdiction of the several and the tri-county boards cannot be questioned. With jurisdiction existing, in the absence of fraud, plaintiff is estopped from urging the invalidity of the assessment because of irregularities in the levy of the tax. Although appellant has briefed an assignment based on alleged fraudulent conduct of the board of Ransom county, the proof of fraud is wholly wanting, all that can be said to be established being that two of the board were in 1907 removed, if even that can be deemed proven. Assuming their removal for fraud, there is no proof that the fraud was committed in connection with the drain here involved, and consequently the proof in that respect is immaterial and without this case.

Our holding being that the special assessment upon the lands of plaintiff was valid as such, we now consider the proceedings had after such tax became due. This involves the assignments concerning the validity of the tax sale because of defective notice thereof; and, further, the right of the municipality to collect, by sale or otherwise, the

usual tax penalty and interest imposed after delinquency for failure to pay these special assessments. In order that no question of the effect of § 1578, Revised Codes 1905, making certificates of sale otherwise valid prima facie evidence of regularity of all prior proceedings except as provided by said statute, whereby under the decision of Beggs v. Paine, 15 N. D. 436, 109 N. W. 322, if the sale was had under the proper notice, the statute might foreclose raising the question of penalty on sale, which we do not decide however, we will first consider the validity of the sale.

Plaintiff's land was described by specific tracts, together with all other lands in the civil township of Rosemead. But Rosemead township was erroneously described in the first required published notice of sale as in range 55, instead of its correct description as range 53. After the first publication, correction was made, and the publication was continued with the correct description for the remaining required publications. Does this discrepancy in the notice of sale invalidate the sale as to this particular land within Rosemead township? The trial court held the sale void, and, in our opinion, properly so. Respondents contend that this defect in description was but an irregularity. It is true that plaintiff was bound to know the statutory time fixed for such tax sale, and that his special assessments were unpaid and a lien upon his sale, and that his land was subject to sale thereunder, and that the description in the assessment as spread upon the county tax records was correct. Respondent claims that, by the designation of such civil township by its proper name, notice was thereby constructively given, to the effect that such description by name should control over the particular description; and that in general the published notice sufficiently described the land to inform the owner that his land was to be sold. Respondents contend that the test of sufficiency in relation to description of real estate in tax proceedings is whether a man of ordinary intelligence would identify the land described with reasonably certainty, the rule announced in 37 Cyc. 1295; Doherty v. Real Estate Title Ins. & T. Co. 85 Minn. 518, 89 N. W. 853, and other authorities cited. We recognize the rule as undoubtedly the proper one, but the facts do not come within the rule. The description as published was indefinite in that uncertainty existed as to whether the sale noticed was for land in Rosemead township or in the township described.

Notice might be taken that the township described was within the limits of Ransom county, but that does not alter the fact that the particular description of the land to be sold was uncertain; and as to such land in Rosemead township no notice of sale was given. Two publications do not answer the statutory requirement of three, the statute being mandatory, as is established by a line of decisions in this state. Sweigle v. Gates, 9 N. D. 538–544, 84 N. W. 481; Dever v. Cornwell, 10 N. D. 123–129, 86 N. W. 227; Lee v. Crawford, 10 N. D. 482, 88 N. W. 97; Beggs v. Paine, 15 N. D. 436, 109 N. W. 323–330; Nind v. Myers, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335. 2 Cooley, Taxn. 928–938; 2 Page & J. Taxation by Assessment, §§ 1174 & 1178; Blackwell, Tax Titles, § 416. The sale was void.

Counsel contends that these drainage assessments bear no interest and that no penalty can be imposed for their nonpayment, the statute not having specifically provided for the collection of interest and penalty upon drainage assessments. Respondent cites the various provisions of the revenue laws, and urges that they sufficiently cover such special assessments to authorize the collection of interest and penalty. Section 1831 provides that these special drainage taxes "shall be collected and enforced in the same manner as other taxes." Section 1832 provides the county treasurer shall collect and credit the same to the drain fund to which the tax belongs. Section 1575 is a general provision of the revenue laws, that "all penalty and interest collected on taxes shall belong to the county and become a part of the general fund, or of such other fund as the county commissioners may direct; except the penalty and interest collected on special assessment due to cities, and all such penalties and interest shall be paid to the city thereunto entitled." Section 1571 provides: "All real estate taxes shall become due on the 1st of December in each and every year for which the tax is levied, and become delinquent on the first of March following, and if unpaid there shall attach thereto a penalty of 3 per cent as soon as the same becomes delinquent." And § 1722 declares all taxes upon real property a paramount lien thereon. Chapter 298, Session Laws 1911, provides that special assessments for drainage purposes shall bear interest and penalty after delinquency, and is the first statutory provision to explicitly and definitely require interest and penalty to be paid on drainage assessments.

Cooley on Taxation, vol. 1, pages 452 and 464, lays down the general rules for construction of revenue laws. This authority rejects the doctrine that tax laws are to be given a strict or narrowed construction in favor of the taxpayer and against the state, because they are revenue measures, but rather "the construction without bias or prejudice should seek the real intent of the law; and if the leaning is to strictness, it is only because it is only and fairly presumable that the legislature which was unrestrained in its authority over the subject has so shaped the law as without ambiguity or doubt to bring within it everything that was meant should be embraced." And accordingly the same authority in vol. 2, page 902, declares the rule that "penalties [in matters of tax collection] must be plainly imposed or they cannot be exacted. . . . The laws imposing them must be followed strictly, and they cannot be given retroactive effect." The most instructive case on the subject probably is Vicksburg, S. & P. R. Co. v. Traylor, 104 La. 284, 29 So. 141, where numerous authorities supporting this appellant's position are collected. Consult, also, Henderson Bridge Co. v. Com. 120 Ky. 690, 87 S. W. 1088; Illinois C. R. Co. v. Com. 30 Ky. L. Rep. 190, 98 S. W. 1008; Chicago, R. I. & P. R. Co. v. People, 217 Ill. 164, 75 N. E. 368; Murphy v. People, 120 Ill. 234, 11 N. E. 202; Hosmer v. Hunt Drainage Dist. 134 Ill. 317, 25 N. E. 747; Bucknall v. Story, 36 Cal. 67; Bump v. Jepson, 106 Mich. 641, 64 N. W. 509; Ankeny v. Henningsen, 54 Iowa, 29, 6 N. W. 65; Augusta v. Dunbar, 50 Ga. 387; Sargent v. Tuttle, 67 Conn. 162, 32 L.R.A. 822, 34 Atl. 1028; 37 Cyc. 1542–1546, that "the imposition of such penalties will be strictly and carefully limited to the exact amounts and the precise contingencies laid down in the law; anything beyond this is null and void."

The fact of the amendment by the last legislature signifies a legislative construction that, prior thereto, penalty and interest could not be collected on drain assessments, otherwise no necessity existed for the amendemnt. The foregoing authorities distinguish also in principle between ordinary taxes and special assessments. The latter are for the sole purpose of reimbursing expenditures incurred for improvement of or benefits to property of the individual. Special assessments are not, strictly speaking, for the collection of public revenue, and, in the absence of statute so requiring, no reason exists for the collection

of more than the amount of the principal, with simple interest, to liquidate the amount due for the benefits received. Though the statute permits the collection and enforcement of the assessment in the manner provided for tax collections, we hold that the penalty and interest provided by statute, to be collected for nonpayment of general taxes after delinquency, cannot be exacted. But instead under §§ 5508-5510, there should be collected the amount of such drainage assessment or special tax, together with 7 per cent interest per annum from the date said tax became delinquent, March 1, 1909, to the time payment of said assessment shall be made. State Finance Co. v. Beck, 15 N. D. 375, 109 N. W. 357.

One other question remains. Plaintiff has tendered to the county treasurer of Ransom county prior to tax sale the full amount due because of his general taxes for the year in question, for all of the land involved. This the county treasurer properly accepted, but thereafter, presumably acting under the mistaken apprehension that the general land taxes could not be paid without full payment therewith of the special drainage land assessments in question, retendered the money to plaintiff, who refused to receive the same. Thereafter sale was had for such general taxes separate and apart from the sales for the special assessments. This sale as to general taxes was void, as the general taxes had been fully paid. That the payment of special taxes cannot thus be enforced, see State ex rel. Moore v. Furstenau, 20 N. D. 540, 129 N. W. 81, holding that the payment of general taxes may be made without the payment of special assessments against real estate. The certificates issued on such sale for general taxes are void, and judgment is directed to be entered canceling them. Appellant contends that the certificates issued on the sale are void for the further reason that, while the assessments are made against each individual tract, the sale was had in certain instances for several tracts together, and certificates of sale covering several descriptions in one certificate were issued to defendant. It is unnecessary to pass upon this assignment, holding, as we do, the certificates to have been issued without the statutory notice of sale having been previously given.

We hold, then, that the special drainage assessments involved are valid, and as such are liens existing on the day of the purported sale for the amount of said assessments, exclusive of any attempted charge

of penalty or costs in favor of Ransom county; to which rights of the county, and all thereof, this defendant by this sale became subrogated in equity, and which rights he still possesses, and for the protection of which a court of equity should provide in determining the relief to be adjudged in the action. Revised Codes, 1905, § 1585. If precedent is needed, we have it in Beggs v. Paine, 9 N. D. 538–544, 84 N. W. 481; State Finance Co. v. Beck, supra, and Fenton v. Minnesota Title Ins. & T. Co. 15 N. D. 365, 125 Am. St. Rep. 599, 109 N. W. 363, for both the principle of subrogation and the form of judgment to be awarded.

Accordingly the district court of Ransom county will enter a provisional decree permitting the payment to the defendant (or in lieu thereof, to the clerk of said district court to be paid to the defendant on his demand) of the amount of the special assessments on all of plaintiff's lands involved, within the period of sixty days from the date of the filing of the remittitur herein with the said district court; which amount to be so paid, in addition to said special assessments, shall include interest thereon at 7 per cent per annum computed from March 1, 1909, to the date of such payment. And in case said payment is so made the tax-sale certificates issued on said purported sale to enforce collection of said special assessments shall be adjudged canceled and void in the final judgment to be thereafter entered accordingly. But in default of such payment of such assessments in full, including both principal and interest as above, and within said sixty-day period, upon the expiration of the same with said special assessments remaining unpaid, final judgment shall be entered dismissing this action and denying plaintiff any relief on the merits thereof as to said special assessments and tax-sale certificates thereunder. In view of the judgment granted, the costs of this court will be taxed as to appellant's briefs and abstracts only in favor of appellant and against respondent herein, if payment of said special assessments are made; but if not made, costs are to be taxed and judgment to be entered on dismissal of this action in respondent's favor for all taxable costs and disbursements of respondent herein. Let judgment be entered accordingly.

We should mention that according to counsel much litigation growing out of this same drain is in the trial courts of these counties, awaiting the outcome of this decision. To that extent this is decisive of

many similar actions. We have endeavored to fully pass upon all points raised and presented, hoping to thus furnish precedent decisive of all litigation awaiting this decision. One E. R. Moore, a purchaser on said sale and interested in the event of this decision, has, by permission of court, filed by his counsel an intervener's brief in aid of defendant.

SPALDING, Ch. J. I concur in the result on the grounds covered by ¶ 6 of the syllabus.

NITSCHKA v. GEISZLER.

(137 N. W. 454.)

Assault and battery — liability — actions — damages — jury.

In an action for damages for personal injuries received by plaintiff at the hands of defendant, *held:*—

(1) The only issue for the jury was the amount of damages assessable, the proof by defendant's own testimony establishing the commission of a wanton and malicious assault by defendant upon plaintiff.

Assault and battery — liability — actions — damages.

(2) Plaintiff's recovery of $1,200 sustained as not excessive.

Averments of complaint — sufficiency — rulings on testimony approved.

(3) The averments of the complaint were sufficient to admit the proof offered, and certain rulings on testimony approved.

Opinion filed June 17, 1912.

Appeal by defendant from a judgment of the District Court for McIntosh County; *Allen,* J., in plaintiff's favor in an action brought to recover damages for personal injuries.

Affirmed.

Alfred Zuger and *John Carmody,* for appellant.

It must appear that the injuries were wantonly, maliciously, and intentionally inflicted, before plaintiff is entitled to exemplary damages. Shoemaker v. Sonju, 15 N. D. 518, 108 N. W. 42, 11 Ann. Cas. 1173; Selland v. Nelson, 22 N. D. 14, 132 N. W. 220.

The court should always set aside a verdict and grant a new trial

in any case where the damages are excessive or appear to have been given under influence of passion or prejudice. Murray v. Leonard, 11 S. D. 22, 75 N. W. 272.

W. S. Lauder and *Franz Shubeck,* for respondent.

The amount of the several items of special damages need not be stated separately, but the whole damage, both general and special, may be stated in a gross sum. 1 Sutherland, Damages, p. 770; Shepard v. Pratt, 16 Kan. 209; Watson, Damages and Personal Injuries, § 699; Northern P. R. Co. v. Haas, 2 Wash. 383, 26 Pac. 866, 10 Am. Neg. Cas. 401; Gardner v. Burlington, C. R. & M. R. Co. 68 Iowa, 588, 27 N. W. 768; Reed v. Chicago, R. I. & P. R. Co. 57 Iowa, 23, 10 N. W. 285; Stafford v. Oskaloosa, 57 Iowa, 748, 11 N. W. 668; Eckerd v. Chicago & N. W. R. Co. 70 Iowa, 353, 30 N. W. 615, 3 Am. Neg. Cas. 373; Turney v. Southern P. Co. 44 Or. 280, 75 Pac. 144, 76 Pac. 1080; Bast v. Leonard, 15 Minn. 304, Gil. 235.

Where the injury complained of was of such a character that it could reasonably have been foreseen that medical attendance would be necessary, money paid for such attendance could be recovered under a general allegation of damages, and without being specially pleaded. Lindholm v. St. Paul, 19 Minn. 245, Gil. 204; Bast v. Leonard, 15 Minn. 304, Gil. 235; Hopkins v. Atlantic & St. L. R. Co. 36 N. H. 9, 72 Am. Dec. 287; Hawes v. O'Reilly, 126 Pa. 440, 17 Atl. 642; Shoemaker v. Sonjou, 15 N. D. 518, 108 N. W. 42, 11 Ann. Cas. 1173.

Goss, J. This action is for personal injuries received by plaintiff in an assault made upon him by the defendant. The proof abundantly supports the complaint. Defendant's own testimony alone makes full proof of the cause of action against him, and the court properly instructed the jury that plaintiff should recover, and that the only issue was the amount of damages to be assessed. The complaint charges two different assaults, occuring on the same day. As to the first assault the testimony preponderates in favor of plaintiff's version, to the effect that, without provocation, defendant struck him a powerful blow in the face, while the parties were within a building adjacent to a restaurant, from which plaintiff, bleeding profusely, immediately left. Defendant testifies to circumstances that might tend in some degree to justify his use of force as in self-defense. So far as the decision of this case is con-

cerned his contentions in this respect may be taken for granted, as the trial court instructed the doctrine of self-defense under defendant's theory and of which he has no complaint.

Some little time thereafter defendant renewed hostilities, pursuing plaintiff, who was seeking to avoid trouble, through and across the middle of a block and beyond, a distance at least of several hundred feet, and as plaintiff was entering, for protection, the house of a friend, defendant seized him, whirled him around, and struck him with his fist one or more very hard blows in the face, according to defendant's own testimony. Plaintiff's description of this occurrence is that the first assault was wholly unprovoked and unexpected, and was soon followed by the second, in which defendant used a board in mauling plaintiff while in his pursuit, and, upon overtaking him as he was about to enter his friend's house, beat him over the head and in the face with the board until he became unconscious, and from the effects of which he was confined for some weeks to his bed, under the care of a physician. Plaintiff's testimony is strongly corroborated not alone by physical facts and injuries received, but by the testimony of an eyewitness there present, who forced defendant to desist from this malicious assault. There is no substantial dispute but that plaintiff's injuries so received were of a serious nature. The jury assessed as compensatory and exemplary damages $1,200 therefor.

Defendant assigns error in the court's instruction that the plaintiff would be entitled in any event to some damages, and that the only question in that connection for the jury's consideration was the amount they should assess. The court instructed as to the law of self-defense relative to the first assault. As bearing upon the last assault, to put our conclusions beyond question, we will recite the portion of defendant's testimony bearing thereon.

"Q. Did you meet or come up with Nitschka near Nagel's place that evening?" "A. Yes, sir, I did; I struck him there with my fist. No, I did not have a stick or a piece of board in my hand, I am sure of that."

Then, again, describing events occurring after the first assault, and relative to the assault above admitted, defendant, as a part of his own direct examination, states:

"Then I went out [of the building wherein the first trouble occurred],

and I was kind of nervous, of course, and I went up a little ways and turned across the lots, them vacant places, and came around behind the postoffice, behind the hall, on the west side, towards home; and I went around the hall and I seen Nitschka standing about in the center of the street, this street going up and down to the depot, and about three steps from the crossing; and when I came around from the west side I turned to the northeast to get home, and he—In the first place he didn't say a word; then I got about five steps further, and then he started to call me names again, and then I run after him, and I just caught him when he grabbed the door knob [of Nagel's house, more than a block away], and was trying to open the door, and I gave him another blow there with the fist." "I just grabbed Nitschka at the door knob, and pulled him back, and hit him with my fist and turned right around" and left. Again, under cross-examination, he testifies: "I just hit him once; I struck him here on the cheek. I think he went backwards, I don't know if he fell down. I didn't notice any blood then. I didn't look at him. I grabbed him by the back and turned him around and give him a blow and turned around, and there was a light in the house and a lot of people there, so I walked right home. I took hold of him with the right hand, and I hit him with the right hand. I turned him around and then hit him. I just pulled him towards me, turned him around this way, and let go with my right hand. Yes, sir, I struck him as hard as I could, I didn't put no pillow under the blow. I didn't stop to see what became of him, and I didn't wait until someone came out."

Comment on the foregoing testimony of the defendant is unnecessary. He appeals as the aggrieved party, because the court instructed the jury that they must find for the plaintiff. To have instructed otherwise would have been reversible error. The assignment as to the verdict being excessive is not well taken, as under this testimony the jury was fully warranted in allowing exemplary damages in the full amount of the verdict awarded.

This brings us to assignments of error concerning the admission or exclusion of testimony. The court permitted an answer to the question: "How many times did the doctor visit you?" over the objection that the testimony sought to be elicited was "incompetent, immaterial and that no allegation of loss of time and value of time was set forth in the pleadings." This is urged as error. The complaint alleges, after reciting de-

fendant's wrongful acts and the injuries received by plaintiff because thereof, that plaintiff "has as a result been compelled to and has spent large sums of money for medical attendance and care, and has ever since been disabled" to an extent and in a manner described, all "to the damage of plaintiff in the sum of $10,000." The fact of medical attendance and treatment, and the amount thereof, as a foundation for the value of medical services necessarily received, was certainly material and competent, and not open to serious question. As to the portion of the objection regarding loss of time and value of time of the plaintiff, the testimony sought was not offered for such purpose, and did not tend to prove loss of time or value thereof.

In response to the question: "Did your wife get medicine for you while you were sick?" Plaintiff answered, without objection, "Yes, . . . Once I paid him $3 and the first doctor bill of $17 or $18." Defendant moved "that the testimony relative to the amount paid the doctor for doctor services and medicine be stricken out as incompetent and immaterial, no special allegation of the value of the same having been alleged in the complaint," which motion was denied, and error is assigned. Had the motion been made upon other grounds, it would, no doubt, have been granted, but on the grounds alleged the ruling was proper. The testimony was competent and material. The portion of the objection going to an omission to plead the value of the doctor's services and medicine does not raise the question as to the foundation laid for the admission of the testimony, or its nonrespectiveness to the question. The witness was testifying as to an expense and money disbursed as an expense in curing himself from the injuries received at defendant's hands. The motion is leveled at the allegations of the complaint, and the testimony offered was within the part of the complaint, alleging the expense of "large sums of money for medical attendance and care," which allegation necessarily covers expense for medicines and physician's services.

The testimony discloses that plaintiff was confined to his bed for some weeks because of the injuries received. One witness saw him in bed fourteen days after the injuries were inflicted, and was permitted to describe, after a proper foundation laid, such marks of violence as then appeared upon plaintiff's body. This was in response to the question: "Did you look over Nitschka's body to see if there was any

marks on him or not?" to the answering of which the objection was interposed that the same was "incompetent and immaterial, calling for an examination made after the happening of the event." Under the foundation laid, and under the issues, this testimony was properly admitted.

The court denied a motion to strike out certain testimony of one Mertz, as to the finding of blood the next morning outside of the door of the house plaintiff was about to enter when he received his beating. The evidence relative thereto was offered in rebuttal, and defendant moved to strike the same out as not proper rebuttal testimony, but belonging in the main case. Under the record, this testimony was properly received as rebuttal.

Finding the record free from substantial error, the judgment appealed from is affirmed with costs. It is so ordered.

BLESSETT et al. v. TURCOTTE et al.

(136 N. W. 945.)

Mortgages — rights of parties — mortgagee takes possession before foreclosure.

1. A mortgagee who, after condition broken, but before foreclosure, enters upon the mortgaged premises and takes possession thereof, will be presumed to do so for the purpose of collecting the rents and profits, and of applying them upon the mortgage debt.

Mortgages — statute of limitations — redemption.

2. Such mortgagee does not hold adversely to his mortgagor under § 6793, Revised Codes of 1905. The ten-year statute of limitations will not, therefore, begin to run against an action for redemption, until he asserts a claim as a purchaser under a foreclosure sale, or some other claim inconsistent with that

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Note.—On the question whether possession of party to mortgage is adverse within rule against conveyance of land held adversely, see note in 35 L.R.A.(N.S.) 751. And as to whether limitation runs against mortgagee in possession, see note in 34 L.R.A.(N.S.) 356.

For accounting by mortgagee in possession for rents and profits, see note in 4 Am. St. Rep. 70.

of a mere lien holder, or until a tender of the mortgage debt has been made, and he has refused to surrender the possession of the land.

Mortgages — redemption — accounting from mortgagee for rents and profits.

3. In an action to redeem from a mortgagee in possession, plaintiff is entitled to an accounting from such mortgagee of the rents and profits during the latter's occupancy of the premises, and where, for any reason, such accounting is not or cannot be made, plaintiff will be permitted, in lieu thereof, to recover from such mortgagee in possession the reasonable rental value of such premises.

Opinion filed May 23, 1912. Rehearing denied June 18, 1912.

Appeal by plaintiffs from a judgment of the District Court for Towner County, *Buttz,* Special Judge, in defendants' favor in an action brought to quiet title to certain land.

Reversed.

Robinson & Lemke and *J. E. Robinson,* for appellants.

Possession of real property under any lien, without the consent of the owner, is piratical, and the owner may recover his property, regardless of the lien. McClory v. Ricks, 11 N. D. 38, 88 N. W. 1042; Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855; Newton v. McKay, 30 Mich. 380; Bowen v. Brogan, 119 Mich. 218, 75 Am. St. Rep. 387, 77 N. W. 942; Lewis v. Hamilton, 26 Colo. 263, 58 Pac. 196; Galloway v. Kerr, — Tex. Civ. App. —, 63 S. W. 180.

A party may not occupy inconsistent positions. He may not claim the benefit of a consent to his possession, and at the same time repudiate the consent by claiming an adverse possession. 1 Enc. Law, 251; Backus v. Burke, 63 Minn. 272, 65 N. W. 461.

Where the entry is permissive, the statute will not begin to run until an adverse holding is declared and notice of such change is brought to the knowledge of the holder of the legal title. St. Joseph v. Seel, 122 Mich. 70, 80 N. W. 987; Cameron v. Chicago, M. & St. P. R. Co. 60 Minn. 100, 161 N. W. 814; Bartlett v. Secor, 56 Wis. 520, 14 N. W. 714; Smith v. Hitchcock, 38 Neb. 104, 56 N. W. 793; Doris v. Story, 122 Ga. 611, 50 S. E. 348; Stafford v. Stafford, 96 Tex. 106, 70 S. E. 75.

Any acknowledgment of the mortgage as a lien, or any acknowledgment that the mortgage debt is still due and owing, cuts off and bars any prior operation of the statute. 2 Bl. Com. 157; 15 Enc. Law 830;

Buswell, Limitations, 318; 27 Cyc. 1071; Jones v. Foster, 175 Ill. 459, 57 N. E. 862; Rockwell v. Servant, 63 Ill. 424; Waldo v. Rice, 14 Wis. 286; Robinson v. Fife, 3 Ohio St. 551; Marks v. Pell, 1 Johns. Ch. 594; Morgan v. Morgan, 10 Ga. 297; Borst v. Boyd, 3 Sanf. Ch. 501; Proctor v. Cowper, 2 Vern. 277, Perc. in Ch. 116; Edsell v. Buchanan, 2 Ves. Jr. 83; Cutts v. York Mfg. Co. 18 Me. 190.

Fred E. Harris and *Engerud, Holt, & Frame,* for respondents.

A mortgagee who takes possession of the land covered by his mortgage, and occupies it for a period of ten years, asserting a right to it hostile to that of the mortgagor, acquires an absolute title to the land. Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792; Mears v. Somers Land Co. 18 N. D. 384, 121 N. W. 916; 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; Kelso v. Norton, 65 Kan. 778, 93 Am. St. Rep. 308, 70 Pac. 898.

The right of a mortgagee to acquire a title by adverse occupation is not confined to cases of void foreclosure. Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792; Spect v. Spect, 88 Cal. 437, 13 L.R.A. 137, 22 Am. St. Rep. 314, 26 Pac. 203.

Notice to the mortgagor of the hostile possession, while necessary, need not be express. Mears v. Somers Land Co. 18 N. D. 384, 121 N. W. 915; Nash v. Northwest Land Co. 15 N. D. 574, 108 N. W. 792.

Pledgee, having acquired possession of the thing pledged, may keep it till the debt for which it was pledged is paid. Spect v. Spect, 88 Cal. 437, 13 L.R.A. 137, 22 Am. St. Rep. 314, 26 Pac. 203; Brinkman v. Jones, 44 Wis. 512; Trimm v. Marsh, 54 N. Y. 606, 13 Am. Rep. 623; Kortwright v. Cady, 21 N. Y. 364, 78 Am. Dec. 145; Henry v. Confidence Gold & S. Min. Co. 1 Nev. 622; Packer v. Rochester & S. R. Co. 17 N. Y. 295.

The fact that the pledgee may retain possession of the thing pledged until his debt is paid does not prevent him from setting up a right to the pledge hostile to that of the mortgagor or pledgeor. Spect v. Spect, 88 Cal. 437, 13 L.R.A. 137, 22 Am. St. Rep. 314, 26 Pac. 203; Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792; Backus v. Burke, 63 Minn. 272, 65 N. W. 459.

Because the mortgagee asserted a hostile right to the land in controversy, and the mortgagor was bound to pay the debt before he could re-

cover this property, his only remedy was an action to redeem. Nash v. Northwest Land Co. 15 N. D. 575, 108 N. W. 792; Hubbell v. Sibley, 50 N. Y. 468; Houts v. Hoyne, 14 S. D. 176, 84 N. W. 773.

BRUCE, J. The questions presented in this controversy do not come before us as matters of first impression, but the law of the case has been largely determined upon a former appeal. Blessett v. Turcotte, 20 N. D. 151, 127 N. W. 505. Upon that appeal this court held the action to be an equitable action to quiet title, as claimed by respondent herein, rather than an action to recover the possession of land and the value of its use, as claimed by the appellant. We must therefore consider that the question of the form and nature of the action is settled, and that adversely to the contention of the appellant.

The original action was begun on February 17, 1907. It was brought by the plaintiffs as owners under a government patent to the plaintiff Robert Blessett, and a quitclaim deed from said Blessett to R. Percy Abbey, and against the defendants E. L. Turcotte and M. Turcotte, with Robinson & Lemke intervening (on motion of the defendants) as grantees of one half of the property as security for fees earned in the suit. The answer alleges that the defendants "are the owners of said property mentioned therein, and entitled to the possession thereof by virtue of a certain real estate mortgage dated January 25, 1890, made, executed, and delivered by Robert Blessett to William F. Galloway, for the sum of $700 and interest; that ever since the spring of 1896 the said defendants E. L. Turcotte and M. Turcotte have been the owners and holders of said mortgage; that the same is, and has been since the 25th day of January, 1891, due, owing, and wholly unpaid; that in the spring of 1896, under and by virtue of their interest in said land under said mortgage, said defendants, with the consent of the plaintiffs, did enter into possession of said land, and have been in the possession of said land under said mortgage, and have held and claimed the same adversely to the plaintiffs ever since, and such adverse possession has been at all times well known to said plaintiffs; that said mortgage is a good, valid, legal, and subsisting mortgage, and was given for a good, valid, and legal consideration; that plaintiffs have been in the open, actual, adverse, and undisputed possession of said land for more than ten years prior to the commencement of this action, and that they have,

prior to the starting of this action, paid all taxes and assessments legally levied upon such land during such time; that the defendants have been mortgagees in possession of said land, claiming the same adversely to the plaintiffs for more than ten years prior to the institution of this action, and that plaintiffs' alleged cause of action therein accrued more than ten years prior to the commencement of this action, and that the same is barred by the statute of limitations in such case made and provided, which defendants herewith plead as a defense to this action." The complaint also, among other things, alleges "that the defendants assert an adverse claim based on a mortgage dated January 25, 1890," etc. It, however, also alleges that the use of the land since the occupancy under the mortgage has been reasonably worth $400 a year, in all more than enough to satisfy the mortgage debt, and that the mortgage is therefore extinguished."

The only difference between the issues presented upon this and upon the former appeal lies in the fact that in the former trial and appeal the defendants relied upon a tax deed, while in this case they rely upon their occupancy under the mortgage. It is true that plaintiffs stated in their complaint in the former case that "said adverse title is based on a mortgage made by Robert Blessett to William F. Galloway to secure $700, and on an assignment of the mortgage to the defendant, and also on a pretended tax deed dated March 11, 1897; also on a deed from Galloway to the defendants, dated May 20, 1898." Defendants, however, in their answer, and upon the trial, relied solely upon the tax deed in question, and upon such trial asked leave to strike out of their answer an allegation in regard to the mortgage, similar to that contained in the answer on this appeal, and on which, in fact, the whole defense in the present case is based. In the former appeal the issues and claims under the tax deed were decided against the defendants, and the case was sent back for retrial, but merely upon the question of the mortgage, and the proper basis of the accounting if an accounting was to be had. It is for the court, therefore, upon this appeal, to determine whether the claim of plaintiffs is barred by the ten-year statute of limitations, and, if not barred, on what basis the accounting between the parties should be had. Certain facts seem to be abundantly proved; namely, that at the time that plaintiff Blesset proved up on the land in question he gave his note to W. F. Galloway for money loaned to him to make the proof, and for

his living expenses while making proof; that this note was secured by the mortgage in controversy, and was dated January 25, 1890; that in addition to this indebtedness Blessett owed Galloway considerable sums of money which were secured by a chattel mortgage on certain crops and on stock; that in the fall or winter of 1890 Blessett sold the grain covered by Galloway's chattel mortgage, turned the stock over to neighbors, and left for Canada with the proceeds of the sale in his pocket, where he has since continued to reside; that at the time of such departure Blessett owed Galloway over $1,100 on the chattel mortgage and real estate mortgage in question; that on learning of Blessett's departure G. F. Galloway, acting under instructions from W. F. Galloway, entered into possession of the land and paid up the taxes, and rented it for the year 1891, and that he paid the taxes on it every year until he sold it; that on August 10, 1896, he sold the land to the defendant E. L. Turcotte for three notes for $300, but told him that he could not give him a deed for it until W. F. Galloway got a tax deed, and that he had a mortgage on the land; that he agreed that Turcotte was to have the mortgage; in other words, that for his three $100 notes Turcotte was to have the mortgage and the land; that afterwards and when he got the tax deed, which was on the 20th day of May, 1897, W. F. Galloway gave a deed of the land to Turcotte, and four years later, on December 30, 1901, assigned and turned over to him the said real estate mortgage; that G. F. Galloway was in possession of the land on behalf of W. F. Galloway until he sold the land to Turcotte, and during such time was trying to find a purchaser therefor; that he gave the deed and turned over the mortgage to Turcotte when he had only paid $60 on the $300 claim; that the mortgage was never recorded; that at the time the mortgage from Robert Blessett to W. F. Galloway was taken there was a house on the land, but there is no proof as to the amount cultivated; that from 1890 to 1896 the taxes were paid by W. F. Galloway; that when the sale was made to Turcotte, G. F. Galloway agreed to send to W. F. Galloway, in Canada, and secure the $700 note and mortgage, and did so, and turned them over to Turcotte some time in the month of August, 1896, but the written assignment of the mortgage was not delivered to Turcotte until December, 1901; that the deed from Galloway to Turcotte was dated May 20, 1897, and was delivered to Turcotte as soon as Galloway got the tax deed; that on leaving North Dakota,

Blessett went to Manitoba, where he has a home and farm; that he has never been back to North Dakota, and has made no attempt to recover possession of the land, has paid no taxes, and has paid no part of his indebtedness to Galloway; that in 1901 a neighbor of Turcotte's saw Blessett in Winnipeg, and had a long conversation with him, but that Blessett said nothing about North Dakota, his neighbors, or his old property; that sixteen years after Blessett had left the country and Galloway had taken possession of the land, and ten years and nine months after Turcotte had entered into possession of the land, and ten years and five months after Turcotte had secured the physical possession of the note and mortgage, but only about nine years and eleven months after the issuance of the tax deed to the said Galloway (March 11, 1897), and about nine years and ten and one-third months after the delivery of the deed from Galloway to Turcotte, Blessett, on February 13, 1907, executed a quitclaim deed to the land in controversy to the plaintiff Abbey, for the expressed consideration of $1, and that this action was commenced on February 13, 1907, or sixteen years after Galloway entered into possession, and ten years and nine months after Turcotte entered into possession of the land. There was also evidence of an oral agreement between Blessett and Galloway, made prior to the execution of the mortgage in question, to the effect that in case Blessett should decide to give up or dispose of the land in question he would turn it over to Galloway, and Galloway was then to pay Blessett the difference between the value of the land and Blessett's indebtedness to Galloway. Proof of this agreement, however, was objected to as incompetent, irrelevant, and immaterial, and as tending to prove a contract that was fraudulent and void under the laws of the United States, and the statement was afterwards somewhat modified by the witness in the following questions and answers: "Q. Isn't it a fact that he was helping Blessett to get a start in a new country for himself? A. Yes, that is what he did, and he advanced money to help him along. Q. To help him get a new home in a new land? A. Yes, sir. Q. And then in case he should decide finally to sell this land, before turning it over to anybody else he was to give the first chance to Galloway? A. Yes, sir, that was the understanding and agreement between Blessett and W. F. Galloway in Canada." The mortgage, also, which was given after the alleged conversation, contained the following provisions:

"And it is further agreed that should the party of the first part fail to pay the taxes aforesaid when due, the party of the second part, if he so elect, may pay the same, and the amount so paid shall draw interest at the rate of 10 per cent per annum, and this mortgage shall stand as security therefor. The party of the first part further agrees that if default be made in the payment of said notes, principal or coupons, or the taxes as aforesaid, then, in that case, said party of the second part, his heirs, executors, administrators, or assigns may, at his election, declare the principal note due and payable, and may proceed to collect the same with all accrued interest and taxes due up to the time of payment. And the said party of the first part further agrees that if said note, principal or coupons, or either of them, be not paid when due, whether on the full maturity thereof or on being declared due on account of default made, as aforesaid, when, and in that event, the said party of the second part, his heirs, executors, administrators, and assigns, is hereby authorized and empowered to sell the hereby granted premises, and convey the same to the purchaser, agreeable to the statute in such cases made and provided, and out of moneys arising from such sale, to retain principal and interest which shall be then due upon said note, and all taxes upon said land, together with all charges, disbursements, and the sum of $25 attorneys' fees, paying the surplus, if any, to the party of the first part, his heirs, executors, administrators, and assigns." The court below found the issues for the defendant Turcotte, and rendered a judgment quieting the title in him and taxing the costs of both the first and second trials against the interveners, Robinson & Lemke. From this judgment this appeal was taken and a trial *de novo* asked in this court.

The questions for discussions upon this appeal are: (1) Were the respondents holding adversely to the mortgagor, or were they holding the land merely as a security, and for the purpose of using the rents and profits thereof for the purpose of collecting the mortgage debt? (2) If the respondents were holding the land adversely to the mortgagor, did they have that possession long enough to bar the appellants' right of redemption? and (3), If the respondents did not acquire an adverse title to the property, and the statute of limitations has not run, what should the appellants pay for the privilege of redeeming, if anything; in other words, what should be the basis of the accounting between the parties?

We can see nothing in this case by which we can imply any consent on the part of Blessett to Galloway's entering into the possession of the land, much less to an assertion by him of an adverse right or title therein. Whatever oral agreement there may have been between the parties (and the validity of this oral agreement is seriously in question, and even if valid is qualified by the witness's statement as to the "first chance as a purchaser"), there can be no question that this agreement is superseded by the written instrument, the mortgage. The mortgage merely gives to the mortgagee the right to sell. It gives him no right to enter into possession or to assert an adverse ownership. When a mortgage gives the right to sell, the law implies a right and duty to sell at a public, and not at a private sale. Even a mortgagee in possession is not necessarily held to assert a right or title adverse to his mortgagor. A mere right to possession is not color of title, and to possess and to acknowledge a right of possession is not the allowance or assertion of an adverse claim. As Justice Engerud has well pointed out in the case of Nash v. Northwest Land Co. 15 N. D. 566, 573, 108 N. W. 792, a mortgagee in possession may or may not hold adversely. Under our lien theory of mortgages, it is the right of the mortgagor to retain possession of the mortgaged premises until a sale foreclosing his equity of redemption is made and a deed issued thereunder. He may, however, waive the right of possession, either by the terms of the mortgage or by consent, and give to the mortgagee the right to the possession before the foreclosure, for the purpose of collecting the rents and profits and applying them towards the payment of the debt. While holding thus, however, and while vested with this temporary right of possession, the mortgagee is not vested with the legal title, or even an adverse possession. He is holding as a trustee for, and not as an antagonist to, his mortgagor. After the foreclosure sale and deed to him thereunder he will hold adversely. He will also hold adversely after he has notified the mortgagor of his assertion of an adverse title, or has done some positive act which would imply a notification. 2 Jones, Mortg. 3d ed. §§ 1144–1152; McPherson v. Hayward, 81 Me. 329, 17 Atl. 164. The general rule requires actual notice. The exceptions have been only in cases where a positive intention to occupy adversely or to foreclose has been shown, as by evidence of entering under execution or under mortgage sale. There is a difference between

entering the land for the purpose of collecting rents and profits and entering land under a foreclosure sale. See Munro v. Barton, 98 Me. 250, 56 Atl. 844. McPherson v. Hayward, supra. Entering under a foreclosure sale is, under the former decisions of this court, probably adverse. Entering to collect rents and profits is not.

It is clear from the evidence in this case that, until this action was brought, defendants never asserted any adverse title to the land in controversy, or adverse right of possession, except under their void tax deed, nor did they enter the land for the purpose of foreclosing the mortgage. It is true that Turcotte purchased the mortgage, but the evidence is clear that it was the claim under the tax deed which was being bought, and not the adverse claim of a mortgagee in possession. Even if the defendants could have been held to have been holding under the mortgage, they held by license implied from the leaving of Blessett alone. A permissive holding is never adverse. Backus v. Burke, 63 Minn. 272, 65 N. W. 459–461, and cases there cited. They could not be ousted, it is true, without the satisfaction of their mortgage debt, but they were not adverse claimants. They did not enter after foreclosure proceedings, or for the purpose of foreclosing. The purchaser entering under color of foreclosure proceedings, enters adversely, and not by the consent of the mortgagor, and continues to hold adversely from the time he enters. Ibid. The defendants did not assert any adverse claim until the issuance of a tax deed, which was on March 11, 1897, and which was declared void on the previous appeal. The adverse possession, at any rate, did not begin until March 11, 1897. The presumption of the law is against, and not in favor of, an adverse possession. Dutton v. Warschauer, 21 Cal. 625, 82 Am. Dec. 765.

Defendants claim that the "right of a mortgagee to acquire title by adverse occupancy is not confined to cases of void foreclosure. It extends, as well, to situations where the mortgagee enters with the express consent of the mortgagor, and thereafter repudiates the right of the mortgagor to the mortgaged property, and gives notice of his change of attitude," and cites Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792, and Spect v. Spect, 88 Cal. 437, 14 L.R.A. 137, 22 Am. St. Rep. 314, 26 Pac. 203. But when was there notice given in the case at bar, and when a repudiation of the title of the mortgagor

and of any claim under the mortgage until the claim under the tax deed on March 11, 1897, even if we concede that the abandonment of the land by Blessett implied an assent to the entry under the mortgage? The case of Nash v. Northwest Land Co. is a case of entry under a void foreclosure sale, and in it the rights of an innocent purchaser are involved. It is not a case which is similar to the one at bar. Practically the only cases, indeed, where they can be said to be an adverse title asserted by the mortgagee in possession, under the new rule where the legal title is in the mortgagor, and not in the mortgagee, is such a case as Nash v. Northwest Land Co. supra, where the mortgagee forecloses his mortgage and takes possession under the sale. The case of Nash v. Northwest Land Co. does not, when closely examined, bear out the contention of the defendants in any particular. In it all that Judge Engerud says is that "a mortgagee in possession may or may not be holding adversely. The only necessary essentials to give rise to that relation are the existence of a mortgage and the consent by the mortgagor that the mortgagee take or hold possession of the property by reason of the mortgage and as security for the debt. The acknowledgment or recognition of the mortgagor's right on the part of the mortgagee when the possession is taken or while it is held is not essential. So long as the relation continues, the rights and liabilities arising out of it are the same whether the mortgagee acknowledges the relation or not. This is illustrated by the case of Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855, above cited. The defendant in that case was held to be a mortgagee in possession, although her possession was unquestionably adverse from its inception. The following cases illustrate and support the same proposition: Robinson v. Fife, 3 Ohio St. 551; Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; Hubbell v. Sibley, 50 N. Y. 468; Miner v. Beekman, 50 N. Y. 337; Wood, Limitations, § 225. So long as the mortgagee acknowledges or recognizes the mortgagor's right to the land, the statute of limitations does not run against the latter's remedies." So, too, the case of Finlayson v. Peterson is merely a case where a title was sought to be quieted against a purchaser under an illegal foreclosure, and the mortgage permitted the mortgagee to pay the taxes against the land and add the amount so paid to his claim, and such mortgagee obtained a tax deed on the land. It was held that as the foreclosure was illegal, the defend-

ant acquired no title to the land, either by said tax deeds or by the deed of warranty given him by the purchaser at the foreclosure sale, and that having taken possession peaceably and by the express consent of the mortgagor, and by her knowledge and acquiescence, he could not be ejected from the land in any form of action until his debts and other just claims for taxes had been paid. In the opinion the court expressly said: "It will readily be seen in this case that the question is not presented whether a mortgagee, after default or upon a sheriff's deed based upon an abortive foreclosure, may, without consent, take peaceable possession of the premises and maintain such possession as against the mortgagor or his assignees." And the case of Rogers v. Benton is a case of a mortgage foreclosure sale where, after such sale, the mortgagee went into possession of the land with the consent of the mortgagor, asserting, of course, a title not on the basis of the old mortgage or his right to collect thereunder, but on his title as a purchaser at the sale. The same is true of Backus v. Burke, supra. Judge Engerud, in short, is merely explaining his premise. "It is contended by appellants that a mortgagee in possession cannot be in law an adverse claimant. It is true that loose expressions to that effect may be found in the books, but such an unqualified statement is very far from the truth. A mortgagee in possession may or may not be holding adversely." When he says that "the only necessary essentials to give rise to that relation are the existence of a mortgage," etc., he is speaking of the relation of the mortgagee in possession, whose possession, he says, may or may not be adverse. The distinction between a mortgagee who holds possession for the purpose of collecting rents and profits, and one who holds adversely under an abortive mortgage sale, is thoroughly explained in the case of Backus v. Burke, 63 Minn. 272, 65 N. W. 459. "We are of the opinion," the Minnesota court says in that case, "that when there is a default in the mortgage, and the mortgagee in apparent good faith makes a void foreclosure, and after the end of the year to redeem, the purchaser at the foreclosure sale takes possession under color of the foreclosure proceedings, he should be treated as a mortgagee in possession, whether he takes possession with or without the consent, either express or implied, of the mortgagor. It is true that, unlike a mortgage at common law, a mortgage under our statute gives the mortgagee neither the title nor right of possession. But the courts were long ago com-

pelled to recognize a marked difference between the character of our statutory mortgage after default but before foreclosure, and the character of the same mortgage after an abortive foreclosure and the year to redeem has expired. Thus it has been held that an ordinary conveyance, made by the mortgagee of the mortgaged premises before foreclosure, does not transfer or assign his mortgage lien. Hill v. Edwards, 11 Minn. 22, Gil. 5; Everest v. Ferris, 16 Minn. 26, Gil. 14. But it is also held that such a conveyance, made by the purchaser at an abortive foreclosure sale, does convey his mortgage lien on the premises so attempted to be conveyed. Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889; Holton v. Bowman, 32 Minn. 191, 19 N. W. 734; Jellison v. Halloran, 44 Minn. 199, 46 N. W. 332. Every mortgagor understands, when he executes a mortgage, that if he defaults in the conditions to be by him performed an attempt will be made to foreclose the mortgage. If he makes no effort to take advantage of the irregularities in an abortive foreclosure until after the year to redeem has expired, and the purchaser at the foreclosure sale has in good faith taken possession, what court will then oust such purchaser without payment of the mortgage indebtedness, even though there was no express consent of the mortgagor to such possession, and the circumstances raise no presumption of an implied consent? In the cases of Pace v. Chadderdon, 4 Minn. 499, Gil. 390; Johnson v. Sandhoff, and Holton v. Bowman, supra,—the mortgagee's right to such possession was not made to depend on any such express or implied consent of the mortgagor. Surely the mortgagor cannot, in such a case, obtain possession except through an action to redeem, whether the purchaser has been in possession one day or nine years. But if the purchaser has been in possession only one day, it cannot be held that so short a period of possession is of itself sufficient evidence of the consent of the mortgagor to that possession. Then it cannot be held that the purchaser's right to continue in such possession, taken peaceably and in good faith, after the year has expired, is based on the mortgagor's consent, express or implied, but, on the contrary, it is based on that rule of law which denies to the mortgagor in such a case any remedy but one in equity, which will compel him to do equity; and in the meantime the statute of limitations has been running against him since the purchaser took possession. But how can the statute of limitations run against the mortgagor if it is by his consent or

license that the purchaser is in possession? It is a well-settled principle of law that the statute of limitations does not run in favor of an occupant of land in possession by the license or consent of the owner. 1 Am. & Eng. Enc. Law, 251; 2 Wood, Limitations, § 256. This rule is applied to the mortgagee of a common-law mortgage who takes possession by agreement with the mortgagor. 2 Wood, Limitations, § 235 and note 2; Marks v. Pell, 1 Johns. Ch. 594, and cases cited. Of course, there are cases where the licensee in possession may, by his acts, repudiate his license, and thereafter hold adversely to the licensor. 1 Am. & Eng. Enc. Law, 251; 2 Wood, Limitations, § 256. But if such a purchaser at a foreclosure sale cannot be a mortgagee in possession unless he is in with the consent of the mortgagor, he will cease to be a mortgagee in possession, and becomes a mere trespasser, liable to an action of ejectment, as soon as he repudiates his license and commences to hold adversely. We cannot hold that such is the law. Such a purchaser, entering under color of the foreclosure proceedings, enters adversely, not by the consent of the mortgagor, and continues to hold adversely from the time he enters. Neither is he liable to an action of ejectment, but the mortgagor is put to an action in equity in which he must do equity."

In the Minnesota case just referred to, as well as in the case of Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765. the possession was with the consent of the mortgagor, and under a void foreclosure sale, and the court held that the ten-year statute of limitations would run. It is not the case at bar. The distinction is very clear. Where a person asserts an adverse claim under a mortgage sale he has repudiated the debt and the right to collect the same. He, however, has the possession, and the debt not being paid, the mortgagor, if he seeks to recover the property, should be compelled to pay the mortgage debt, that is to say, redeem. This redemption, however, is merely an equitable duty, and his right to maintain the action begins from the time when the adverse possession is first asserted. Where the mortgagee holds with the consent of the owner, but has not asserted an adverse title, the case is one merely in which the owner has consented that he may hold the property as a pledge. The statute runs against neither party in such a case, or, rather, it does not begin to run until tender of the debt for which the pledge is given and a refusal of the pledgee to re-

store the pledge upon demand by the pledgeor. Nor does it begin to run merely because of a mere delay on the part of the pledgeor in claiming a redemption of the pledge. Whelan v. Kinsley, 26 Ohio St. 131; Van Zile, Bailm. § 280; Jones, Pledges & Collateral Securities, § 581; Galloway v. Kerr, — Tex. Civ. App. —, 63 S. W. 185.

There is confusion in the *dicta* of the authorities, it is true, but not in the judgments or decisions thereunder. The words "mortgagee in possession" have both a general and a special meaning, and the courts have often failed, in their *dicta* at least, to be careful in their use. In the statutes of North Dakota the legal title is in the mortgagor, and not in the mortgagee, and the only theory on which the mortgagee can, before foreclosure, be allowed to enter upon and to hold the mortgaged property is upon the theory and analogy of a pledge. This is the contention of the defendants' counsel in this case. In the case of a pledge, however, the law is well settled that the statute of limitations does not run against the right to redeem until a tender of the debt and a request to deliver. Laches will not defeat the pledgeor's right to redeem, unless the pledgee has been injured by such laches. Whelan v. Kinsley, supra; Groeltz v. Cole, 128 Iowa, 340, 103 N. W. 977; Potter v. Kimball, 186 Mass. 120, 71 N. E. 308. The defendant can hardly be said to have been injured in this case, as he has had the use of the land and can offset the mortgage debt and the taxes which he has paid. Neither does the statute of limitations begin to run against the right of redemption from the maturity of the debt, but only from the time demand is made on the pledgeor to redeem, or his interest in the property is repudiated by the pledgee by a claim of title in himself. 31 Cyc. p. 861 and cases cited. Mere delay, too, on the part of the pledgeor in redeeming will not raise a presumption of abandonment. Whelan v. Kinsley, supra.

It may be true, as contended by counsel for respondents, and as intimated in the case of Nash v. Northwest Land Co. 15 N. D. 575, 108 N. W. 792; Hubbell v. Sibley, 50 N. Y. 468; Houts v. Hoyne, 14 S. D. 176, 84 N. W. 773, that §§ 6774 and 6775 of the Code relate solely to actions at law, and have no application to cases of an equitable nature, and that in the cases mentioned, and under such and similar statutes, the ten-year statute of limitations was held to run, and its running to begin from the time of the entry into the possession. In all of these cases, however, the possession was that of a mortgagee in possession, as

we understand the term, and as the term was formerly used; that is to say, the possession of one who was asserting title as a purchaser, and not as a holder of a lien, or who was holding the property for the purpose of foreclosure.

If, then, the plaintiffs may maintain their action, on what basis should the accounting be made? Since there is no evidence in the record as to what the land actually produced, and it would seem that the duty was upon the defendants to produce this proof, the reasonable value of the use, or the reasonable rental value, would seem to be the proper measure. This was the measure adopted in the case of Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855, and is conceded by all the parties to this suit to be the only one available. We do not, however, believe with appellants that the rental value should be based upon rental values prevailing in localities where the highest efficiency in agriculture prevails, but on the value of the use of the land as ordinarily used by ordinarily prudent men in the locality. Nor do we believe that it should be based upon the theory that all of the land was cultivated or utilized. The rental value, we believe, should be based upon the acreage actually cultivated, as cultivated land, and upon the remainder as wild land. Appellants, we know, strenuously contend that the defendant Turcotte was a trespasser, and as such should be held liable for the fullest value of the property. We hardly can look at the matter in that way. Though the plaintiffs have the naked legal right, we do not believe that they have any equities in the case. The nominal plaintiff, Blessett, abandoned the land for a number of years, and, until very recently, has paid no taxes upon it, and if the defendant had not taken possession of the land he would, when he sought to redeem from the mortgage, have been compelled to pay the full amount of the mortgage and interest, and taxes and interest thereon, and would have had no offset on account of the crops produced, whatsoever. The equities of his grantees are even smaller. Their venture, indeed, is but a land speculation, and that of men who have bought a title for little or nothing and the lawsuit connected therewith, and which, under the common law, would have been considered against public policy. The defendant Turcotte, however, purchased the land, and paid a valid consideration therefor. We believe that in the case of an abandonment such as this the parties in possession should be held liable merely for the reasonable rental value of

the land, which they actually occupied, used, and enjoyed, and should be made to respond for the profits made thereon, but not for what they might or should have made.

When we come to the subject of rental value, however, we experience much difficulty in arriving at an estimate. This difficulty is enhanced by the fact that the plaintiffs have hardly been fair in their various petitions and arguments. They have absolutely ignored the fact that on the former appeal this case was sent back for retrial upon the issues involved, and that it is upon the evidence introduced in the present case and on the retrial that the court must pass, and not upon any theories of its own, nor even upon the evidence of the former trial, nor upon ex parte evidence sought to be interposed for the first time in the appellate court. In the opinion filed in the former appeal (see Blessett v. Turcotte, 20 N. D. 151, 127 N. W. 505), this court, on page 160, said: "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 the defendant has been in possession of same." Under this opinion we have no right on this appeal to go outside of the record upon this appeal, and we do not believe that counsel, except in the heat of controversy and the fervor of desire, would urge us to do so. Even, however, when quoting the testimony upon the former trial, counsel are not fair nor ac-

curate. He, for instance, entirely neglects to state that on such trial the witness Arthur Sumner testified that "all of the land is now under cultivation that can be profitably cropped, and the balance of it is cropped for hay, and cannot be used. . . . There are portions there that are under water practically year after year. This year they may possibly be dry. I don't know. But I do know last year you could not cut around any slough any more than one swath with the mowing machine. This year, if it is dry, the hay will be useless because it will be so full of dead grass. Q. You don't mean to say that there is any slough in the middle of that land in which there is any water standing at the present time? A. If there is not, it is the first year it has not for quite a few years. There is a slough hole of about 10 acres. I should judge about 10 acres. Practically all of it remains covered with water during the season. Q. Do you know that there is any water on that 10 acres now? A. If there is not, I say that it is the first year for the last four or five years that there has not been." Counsel for appellant also cites, in his brief, the testimony of a number of witnesses as to the value of the use of the land, but in nearly every instance entirely neglects to consider the cross-examination. He also neglects entirely to give the testimony of his own witness, Herman Shaver, who testified on the present trial that he owned from 500 to 700 acres in the vicinity of the farm; that the lands he farmed were worth to him $1 an acre; that the only real money he made was on the rise in the value of the land; that he had rented a quarter section for two years for $10, and taxes, and for two years for $20 and taxes, this being in the years 1902, 1903, and 1904; that in 1901 he used to rent land sometimes as cheap as 50 cents an acre; that in 1906 he could have rented land for less than 50 cents an acre, and could have rented a quarter for from $50 to $75, with 25 acres under cultivation, "back as far as 1896, and 50 acres, and 75 acres under cultivation."

It is well, indeed, to review the testimony in some detail. We have just given that of the witness Shaver. The witness Gores testifies that the rental value of land, on the share plan, was from $2 to $2½ an acre; that the grass land was just as valuable as cultivated land, and that $2 an acre would be the rental value of the whole farm, and that there are now from 100 to 120 acres under cultivation. The witness Geo. Klier testifies that for the last twelve years the rental value was from $2½ to

$3 an acre, but he would have rented for less if he had had land to rent; that if you could get hay it would be worth a dollar an acre; that from 1897 down he made on an average $500 a quarter, farming his land himself. He testifies that he would not give $2 an acre, now, and that new land only is worth from $2 to $3 an acre. John Klier also testifies to the value of $2½ an acre for cultivated land, and $2 an acre for pasture land. He, however, states that he only makes about $500 a quarter out of his land, including hay and wild land, farming it himself. George Calloway testifies that from 1897 to 1907 the rental value was 50 cents an acre for the cultivated land, and the pasture land was worth nothing. S. J. Atkins testifies that in 1907 he rented land at $3 an acre with good buildings on it; that the cash value during all of the years, of cultivated land, was $1½ an acre; that uncultivated land was not worth more than 25 cents an acre; that until 1900 and 1901 $1½ would be big rent; that for the last four or five years prior to 1907, $2½ an acre would be the rent; since 1907, $2½ an acre. He, however, testifies that he is testifying as to his own land, and not as to the value of the land under consideration, and that the land in his part of the country is much more valuable than the land in question; that for the years 1896, 1897, 1898, and 1899 the cash value of the land would be very small; that 50 cents would be a low figure for the land that was under cultivation; that as a matter of fact, land could be got very easily up there. There was a lot of land held by the government open to entry; that the value depended largely upon the price of wheat; that during those years the price of wheat was low; that wheat commenced to go up in 1896; in the fall of 1896 it went up to a fair price, around 60 or 65 cents, and in 1897 it was up to 60 and 70 cents; that land that was not broken and put into crop would not be worth more than $25 cents an care. George Blose testifies to the renting of one piece of land for $3 an acre for one year, and $2 an acre for four years; that from 1897 with good farms and with good farming, a man renting on shares could make from $1.25 to $2 per acre, and probably more. J. E. Robinson, the plaintiffs' attorney, and the owner of at least a portion of the land, testifies to a rental value of about $3 an acre. He testifies, also, that there is a depression of 5 or 6 acres which has been apparently covered with water, and that in the center of the quarter section there is a "depression covered with growing grass. This is hay land, and it

is about 40 rods in length in the longest part and about 20 rods wide in the widest part. I went there with a view of measuring it, but it is so irregular that it would not be very easy to measure it. On the south side of the quarter section there is a tract of hay land in regular form, and it is from 20 to 25 rods from north to south, and it extends over the quarter section from two thirds to three fourths of the distance. All the rest of the land, except that which I have described is plow land, and has been plowed, and at most the land which has not been plowed is 40 acres." He testifies, however, that he had only been on the land once, and that was just prior to the trial and in the year of 1911. In regard to the hay land, on cross-examination he also testified: "Q. You do not know the condition which the land has been in before this spring? A. No, only as I can observe from its present condition. It is now in the condition that I have described. Q. If a large part of this land which you call hay land was covered with water in the past years you would not know anything about it? A. I would know that it has not been covered with water so as to interfere with the growth of the grass, except the 5 or 6 acres in the northwest corner. All the rest is under cultivation or covered with a heavy growth of grass. Q. Is there a ravine that runs across that land? A. Yes, that is what I have described. Q. That would be a slough in a wet year? A. I do not know. There is no slough there now, and it is covered with a heavy growth of grass." E. L. Turcotte testifies that the rental value of the land under cultivation was $1½ an acre; that as to the hay land down to three years ago, hay land was worth $5 a quarter; three years ago, $10 a quarter, and that for seven years he rented a half section for $10 a quarter, and that he now, at the time of the trial, gets it for $10 a quarter; that prior to eight years ago he did not pay anything, because he could go out and get hay anywhere without paying anybody for it. J. S. Lewis, on being recalled, testified that the rental value of the land from 1897 to 1902 would be 75 cents an acre for the cultivated portion, and that that would be a big price; that from the year 1902 to the time of the trial the value would be $1 an acre; that hay land from 1896 to 1902 was worth $2½ a quarter; from 1902 to 1905, $5 a quarter, and from 1905 to the time of the trial, $10 a quarter. He testified that at the time of the trial 100 acres were under plow. He also said: "The rest of it, the most of it I should judge, about 5 acres, may be,

has always been under water up to this last year, the biggest part of the time the entire season, and was so soft that they could not cut the grass in the slough. It has been of no use to the owner of the land up to this last year," that in 1896 a farm with 100 acres broken and 5 acres ready for crop, a farm house, a large building and granary, and a well, sold for $800; that breaking and stoning would cost $4 an acre in the past, and now would cost $4½. James Taylor testified that he owned 120 acres of land in the neighborhood; that in 1900 land 4 miles from the land in question rented for $1 an acre; that he did not know of any land being rented for cash prior to that time. Q. Would it have been possible, in your opinion, to have rented that land for cash? A. No, I don't think it would. I would like to add this, or I would like to make a little explanation of why I did not consider it of any value. During 1888 to 1890 there was a bunch of settlers came out to that part of the country and settling on the land, proving it up, and leaving the country, and the land went back to the mortgage companies or men who held the mortgages, and up until 1901 you could get all that land you wanted just for farming it,—go out there and get it free of charge. They would give it to you in order to keep it under cultivation." He testified that there were 100 acres under cultivation at the time of the trial, and the rest was grass. "There has been what we call Turcotte's lake there, and part of it is on that particular piece of land. Q. About how much of that land would that lake take up? A. Well, the lake proper, I don't know as it takes up such an awful lot of it, but there is a kind of draw or ravine that runs down from the west side of the place. It is not in the lake proper. Part of it is, and some of it is in a big slough. Q. It is so wet you could not cut it? A. I don't know of them cutting it. I have seen it when it was so wet you could not cut it. There may have been some years it could be cut. Q. What would be the value of the use of the land that was not cultivated upon that section? A. It has not, until this last year, been of any value—practically of no value. The reason for that is that there is a great deal of state land, state and school land, up in that locality, and you can rent it. In fact, a year ago last August I offered a quarter section for sale at public auction right in that neighborhood there, and we did not get a bid on it. Q. Have you heard of any parties being paid for hay land up there? A. No, with the exception that

they rent the school lands; I have a quarter section rented, and pay $10 for it. I think this is the fifth season. Prior to that, sometimes we would pay $2 and $3 and $5 per quarter, and in the early days we did not use to pay anything. We used to go out and cut all we wanted." He also testified that when, on the former trial he said that he had known land to rent as low as $2 an acre, and as high as $3½ an acre, he was not speaking of land in the vicinity of that under consideration. He also testified that the cost of breaking and stoning was $4 or $4½ an acre. George Galloway testified that in 1891 he rented the land to Miller for one half of the crop, and hunted ducks on the farm, and the witness Herman Shaver, as we before said, testified that the land he farmed brought in $1 an acre; that he made his money out of the rise in value in land; that he rented a quarter section in 1902, 1903, and 1904, for two years for $10 and taxes, and two years for $20 and taxes; that in 1901 he used to rent land as cheap as 50 cents an acre; that in 1906 he could have rented a quarter section for from $50 to $75, with 25 acres under cultivation, perhaps 50 and 75 acres, and this back as far as 1896.

From all of this evidence we cannot help feeling that there is nothing in the record that would justify us in allowing more than $8 a quarter for the wild land. There is no evidence in the record, whatever, that the wild and uncultivated land is of any value whatever; and the weight of testimony tends to show that what little hay land there was was usually under water, and, when not so, was so covered with dead grass as to be of little value. It also shows conclusively that during the greater number of the years of the possession of the defendant there has been a large amount of unoccupied wild land, and that hay could be obtained almost anywhere. As far, too, as the rental value of the land is concerned, and since we do not, upon this appeal, attempt to determine the value of the crop or of the use for the season of 1911, we believe that an average of $1½ an acre is a reasonable allowance, and practically the only allowance which is justified by the testimony, especially as we are, perhaps, somewhat liberal in estimating the acreage. Even plaintiff's strongest witnesses testify that they have only made, out of their land, farmed by themselves, an average of $500 a quarter. A rental price of $1.50 an acre, or $240 a quarter seems to be a fair rental under these conditions. It may be that during some par-

ticular years the value was much greater, but we must remember that in this case we are seeking to determine the average value for a period of some thirteen or fourteen years, and that it is the average value, and not the value for any particular year, that we must arrive at. We, too, wish to remind counsel that we are limited by the proof in the case, and have no right to go outside of it. He, of course, except in the heat of argument and in the fervor of contest, would not seriously press his contention that the court must take judicial notice of the value and nature of crops that are raised on some particular quarter section of land, nor that when this court is reviewing a retrial, it can take into consideration statements and utterances which are entirely outside of the record of the present case.

When we come to the question of the amount of land under cultivation, we also experience much difficulty in arriving at a satisfactory conclusion, owing to the incoherence of the testimony. It is clear, however, and undisputed, that the mortgage had run and taxes had accrued and were unpaid, for a number of years before the land was either occupied or cultivated by the defendant Turcotte, and that at no time after his occupation has all of the land been placed under cultivation, and for many years but a very small portion thereof. On examining all of the evidence, we are not at all sure that in 1896, and when the defendant Turcotte first entered upon the land, there were 40 acres broken, as claimed by counsel for appellants. We are quite satisfied, however, that at the time of the trial there were some 120 acres under plow, and that even if 40 acres were not cultivated in 1896 and the amount then under cultivation was 20 acres, the additional 20 acres was soon added. We are aided in this conclusion by the fact that the amended complaint positively states "that in the summer of 1896, the land being vacant and unoccupied, the defendants did enter upon the same and plowed back 40 acres that had previously been broken and cultivated," and that no denial whatever is made of this allegation in the answer. It is true that the witness Turcotte sought to refute the same, but his testimony is absolutely incoherent. It is true, he said that he only plowed back 20 acres the first year, but he qualified this statement by saying that he plowed back all that had previously been broken. When asked as to what he broke the subsequent years, he was entirely indefinite, and only began to make positive statements

when recalled by his counsel at the end of the trial. So, too, this court, on the former appeal, found the amount to be 40 acres, and the fact may perhaps be said to have been established and to be in the record. We believe, however, that an allowance should be made to the defendants of $320 for breaking and stoning the land, and which turned the land from wild to cultivated land, and increased its rental value to the benefit of the plaintiffs. We utterly fail, however, to agree with counsel for appellant in his contention that the defendant should be mulcted in damages for a deterioration in the value of the land on account of seeding it successively to wheat, or be charged a rental value based upon the rental value of land cultivated according to the highest degree of agricultural skill. Appellant bases his contention throughout upon the supposition that defendant was a trespasser. In this, as we have before said, we believe he is entirely wrong, and that the equities, though not the mere naked law, is in favor of the defendant, and not of the plaintiffs. Much as we regret the fact, it is not yet the custom in this state to cultivate land with the same degree of skill as if it were the $200-an-acre land in central Illinois.

After allowing defendants for their mortgage and interest thereon, and their taxes and interest thereon, and the cost of breaking and stoning the land and interest thereon, and the plaintiffs the value of the use of the land upon the basis heretofore outlined, we find that there is still owing to the defendants the sum of $869.50. The judgment of this court is that the title to the land in controversy be quieted in the plaintiffs and interveners according to their respective interest, as shown by the amended complaint and the complaint in intervention herein, and as against said mortgage, said taxes, and said defendants, on the plaintiffs paying, within sixty days of the filing of the remittitur herein, to the clerk of the district court, for the use of said defendants and to be paid on demand by said clerk to said defendants, the sum of $869.50, less the sum of $175, which this court orders allowed to the appellants towards their printing expenses. No other costs or disbursements will be taxed or allowed to either party; and the district court is hereby directed to vacate its judgments hereintofore entered and to enter judgment in accordance with this opinion. The judgment entered herein, however, is not to prejudice the right of the plaintiffs to institute an action against the defendants to compel an accounting for the value of

the use of the land subsequent to the season of 1910, as, there being no proof upon this subject in the record, the matter has not been taken into consideration by us. If the said sum of $694.50 shall not be paid as herein provided, and within the time herein provided, the district court is directed, upon proof of such failure, to enter a judgment dismissing this action.

The judgment of the District Court is vacated and reversed, and judgment is ordered to be entered in such court in conformity with this opinion.

BURKE, J. (dissenting in part). There are several propositions in the foregoing opinion to which I cannot assent.

Plaintiff brings this action to quiet title to a quarter section of land. Defendants first claimed hostile title under a tax deed. This court held the tax deed void. Defendant next claimed title as a mortgagee in possession with the consent of the mortgagor, for a period of ten years, during which time he claims to have been in open, notorious, adverse possession, and has paid all taxes. This court has now decided this claim against him. Therefore plaintiff is entitled to a decree quieting title in himself, subject only to the rights of defendant under his mortgage. This court now makes an accounting between the parties in which the defendant is allowed taxes and interest thereon, and for breaking the land and interest thereon, and for stoning the land and interest thereon, although defendant has not asked for those items in his answer, and incurred such expense in attempting to take the land away from plaintiff, and not for his benefit. On the other hand, when it comes to allowing the plaintiff for the use of his land, the most rigid economy is observed. Pasture land is only worth 5 cents an acre. This for some 2,000 year acres, and no interest thereon either. But while this manner of accounting is not equitable by any means, yet it is not so objectionable as the next order of this court. The opinion says that this mortgage, and the breaking and stoning expenses, and the interest thereon, must be paid within ninety days, or the action will be dismissed. When we remember that defendant has not asked for his money at all, this seems to me to be unjust. In my opinion plaintiff is entitled to have his title quieted, subject to the mortgage, and not be forced to pay up so suddenly. Again, § 7178, Revised

Codes of 1905, says: "Costs shall be allowed, of course, to the plaintiff in the following cases: (1) In an action to recover real property."

Sec. 7180 reads: "In the following cases the costs of an appeal must be in the discretion of the court: (1) When a new trial shall be ordered; (2) when a judgment shall be affirmed in part and reversed in part." Under these sections, I believe the plaintiff entitled to his costs in this action; he is the plaintiff and has recovered real property, and he has secured a straight reversal of the judgment of the trial court.

STATE v. BANCROFT.

(137 N. W. 37.)

Indictment and information — rape.

1. Under an information which charges that the defendant "did commit the crime of rape in the first degre as follows, to wit: That at said time and place said defendant, A, in and upon B, violently and feloniously did make an assault, and her, the said defendant, then and there violently, by force, overcoming her resistance and against her will, feloniously did ravish and carnally know, and did then and there have sexual intercourse, and she, the said B, did then and there make resistance against the aforesaid acts of said defendant and said resistance was by the defendant overcome by force, she, the said B, being then and there a female, and not then and there the wife of said defendant," a verdict of guilty of rape in the second degree, or of assault with the intent to commit rape, may be returned; and such an information will sustain such a verdict even though § 8890 of the Codes of 1905 classifies the various ways in which the crime may be committed, and provides that rape in the first degree exists where the female "resists, but her resistance is overcome by force or violence," and that the crime of rape in the second degree exists where "she is prevented from resisting by threats of immediate and great bodily harm accompanied by apparent power of execution."

Rape — threats.

2. In such a case the threats may be physical as well as verbal, and may be prior to, as well as at the time of, the consummated act.

Note.—On the question of the effect and of the necessity of resistance, see notes in 36 Am. Rep. 860 and 80 Am. Dec. 364.

Rape — resistance of female.

3. The nature and amount of the resistance which must be made by the female in the case of rape is dependent upon the circumstances of the case, and on the possibility of success.

Opinion filed June 18, 1912.

Appeal from the District Court of Stark county; *W. C. Crawford*, J.

Defendant was convicted of the crime of rape in the second degree, and appeals.

Affirmed.

Defendant was convicted of the crime of rape in the second degree. The information charged that the defendant "did commit the crime of rape in the first degree, committed as follows, to wit: That at said time and place the said defendant, Leroy H. Bancroft, in and upon Maude Paddock, violently and feloniously did make an assault, and he, the said defendant, then and there, violently by force overcoming her resistance and against her will, feloniously did ravish and carnally know, and did then and there have sexual intercourse, and she, the said Maude Paddock, did then and there make resistance against the aforesaid acts of said defendant, and said resistance was by the defendant overcome by force, she, the said Maude Paddock being then and there a female, and not then and there the wife of said defendant. The jury returned a verdict of "guilty of rape in the second degree," and this appeal is taken from an order of the court denying a motion for a new trial.

Alfred Zuger, Assistant Attorney General, and *T. F. Murtha*, of Dickinson, for the State.

H. C. Berry, of Dickinson, for appellant.

Bruce, J. (after stating the facts as above). The principal contention of appellant is that under the information and the evidence, but two forms of verdict should have been submitted to the jury; namely "guilty of rape in the first degree," and "not guilty." He contends that under an information charging the accomplishment of rape in the first degree, by force alone, rape in the second degree, accomplished

"by threats of immediate and great bodily harm, accompanied by apparent power of execution," cannot be proved, or a conviction thereof be sustained. He calls attention to our statute, which is as follows, § 8890: "Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances: (1) When the female is under the age of eighteen years; (2) when she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent; when she resists, but her resistance is overcome by force or violence; (4) when she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution; (5) when she is prevented from resisting by an intoxicating, narcotic, or anesthetic agent, administered by or with the privity of the accused; (6) when she is at the time unconscious of the nature of the act, and this is known to the accused; (7) when she submits under the belief that the person committing the act is her husband, and this belief is induced by artifice, pretense, or concealment practised by the accused with intent to induce such belief." § 8893: "Rape committed upon a female under the age of eighteen years, or incapable through lunacy or any other unsoundness of mind, of giving legal consent, or accomplished by means of force overcoming her resistance, is rape in the first degree." § 8894: "In all other cases, rape is of the second degree." He maintains that each of the paragraphs of § 8890 defines a specific offense, and that in order that one may be found guilty of the crime of rape, the indictment or information must come within the terms of one of them, and must specifically set forth the constituent elements. He claims that one who is charged with the commission of rape by force overcoming resistance, which is rape in the first degree, cannot be found guilty of rape accomplished by threats of immediate and great bodily harm accompanied by apparent power of execution, which is rape in the second degree. Defendant also complains because the court, in its charge to the jury, intimated that if the facts warranted it, they could return a verdict for assault with intent to commit rape.

The contention of the state, on the other hand, is that under the information a verdict of either first or second degree rape, or assault with intent to commit rape, is permissible, and lays much stress upon § 8892 of the Code, which provides that "the essential guilt of rape con-

sists in the outrage to the person and feelings of the female. Any sexual penetration, however, slight, is sufficient to complete the crime." Also, upon § 9501, which provides that "an act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime. Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetuated by such person in pursuance of such attempt, unless the court, in its discretion, discharges the jury and directs such person to be prosecuted for such crime."

We believe that no error was committed in these matters, and that the contention of the state is correct. We are aware that there are cases to the contrary, noticeably State v. Vorey, 41 Minn. 134, 43 N. W. 324; Williams v. State, 1 Tex. App. 90, 28 Am. Rep. 399. We are also aware of the fact that there are some words used by way of *dicta* in the opinion of this court in the case of State v. Rhoades, 17 N. D. 580, 118 N. W. 233, which would seem to express a view which is contrary to that herein contained. The former cases, however, do not seem to be in accord with the general weight of authority, or with the logic of our statutes; and in the North Dakota case mentioned, the question was not thoroughly considered, nor was it necessary that it should have been. We have, indeed, to choose between the construction put upon statutes such as ours by the Minnesota court in the case of State v. Vorey, 41 Minn. 134, 43 N. W. 324, and the Texas court in Williams v. State, 1 Tex. App. 90, 28 Am. Rep. 399, and that of the California court in the case of People v. Snyder, 75 Cal. 325, 17 Pac. 208, and People v. Vann, 129 Cal. 119, 61 Pac. 776. We prefer to follow the rule laid down by this latter court, both because it appears logical and sensible, and because it is in accord with the general growth and history of the common law in relation to rape. "This contention," the California court said, "is that while the information charges the crime to have been committed by force, violence, etc., the proof shows that it was committed . . . by means of an an intoxicating or narcotic substance administered to the prosecuting witness by the accused, and that under § 261 of the Penal Code an information charging the crime to have been committed by force cannot be supported by proof showing it to have been committed by fraud or artifice. The common-law definition of rape was 'the carnal knowledge of a wom-

an forcibly and against her will;' . . . and the indictment was substantially in the form of the information in the case at bar, and through decisions made from time to time it gradually came to be the settled law (although there are cases to the contrary) that under such an indictment it was competent and sufficient to prove that the act charged was committed upon a child of tender years incapable of consent; upon a lunatic or insane woman; by intimidation; when the woman was unconscious of the nature of the act; by the administration of intoxicating or narcotic substances; by false personation of a husband, etc. The criminal law of this state followed the common-law definition of the crime down to the adoption of the Codes. Hittel's Gen. Laws, § 449. Sec. 261 of the Penal Code commences as follows: 'Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circuumstances.' Then follows six subdivisions, which recite substantially the things which (as above briefly indicated) could be proven under the general common-law indictment, and the position taken by appellant really is that the indictment and the proof must follow and be confined to one of the six subdivisions of the section. We think the true construction of § 261 to be that thereby the legislature meant merely to put beyond doubt the rule that on information for rape the things mentioned in the subdivisions could be proven and would establish the crime. It is not intended to allow, or establish a rule of pleading, or to create six different kinds of crime. Now, as before the adoption of the Code, under an indictment similar to the information in this case, any of the matters mentioned in § 261 may be proved. They are included in the words, 'by force and violence and against her will,' and 'did feloniously ravish,' as fully now as they were then." See also Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283, 10 Enc. Ev. p. 581.

We believe that it would have been better practice to have charged the several specific methods of accomplishing the crime in the manner in which they are specified in the statute and under the subdivisions of the statutes; and that, if such had been done, no objection could have been made on the ground of duplicity, as the facts then charged would have constituted but a single offense, and have been but component parts or preliminary stages of committing the same offense. See 33

Cyc. pp. 1450, 1451, and cases cited. We do not, however, hold that such particularity was necessary.

It also seems quite clear to us, from the authorities and from our statutes, that one charged with the commission of rape can be found guilty of assault with intent to commit rape. Nor do we see that any prejudice occurred from the refusal of the court to allow the witness to answer the question, "You were going to give him another chance?" and, "Everything was all squared between you at that time?" The witness had testified fully as to the facts, and the jury was fully competent to form its conclusions therefrom. These questions were asked for the purpose of showing that the woman had come to believe that, after the pursuit of her over the prairie, and the indecencies committed in the earlier part of their ride, that the defendant would desist from further persecution. The facts of the case answer the questions in the affirmative, and it was unnecessary for the witness to go further. In fact, she, at a later period of the testimony, testified that she thought the defendant was going to be civil to her, and had practically answered the questions. Nor do we believe that any prejudicial error was occasioned by refusing to allow the complaining witness to answer the question, "Did you call Dr. Tweedle to testify in this case?" The fact was that the doctor was not present, and the only inference that the jury could possibly draw would be that he was not called, and the circumstances of the trial answered the question for the defendant as strongly and advantageously as any verbal answer could have done.

Nor do we believe that there was any error in the charge of the court that "you are not at liberty to disbelieve as jurors, if, from the evidence, you do believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered." It is claimed that this instruction allows the jury to base their belief on facts outside of the evidence, but this is not true. Appellant does not, in his brief, give the whole instruction. The whole instruction is as follows: "The jury should confine themselves to the evidence before them, and are not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjectures as to possible states of fact differing from that established by the evidence, nor can they go beyond the evidence to seek for doubts. You are not at liberty to disbelieve as jurors, if, from the evidence, you

do believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered." Again, the court said: "If you are satisfied beyond a reasonable doubt, from the evidence, that the defendant took hold of said Maude Paddock," etc.

Nor do we believe that any error was committed by the court in instructing the jury as to the crime of assault with intent to commit rape. It is well established, as before said, that this crime can be proved under the charge of rape, and need not be specifically alleged. The evidence is perfectly clear and uncontroverted that during the course of the ride the defendant committed numerous indecent assaults upon the prosecuting witness, and it was not improper for the court to leave it to the jury to infer the intention.

We now come to the main question, and that is as to whether there was sufficient evidence in the record on which to support the verdict, and which would justify the conviction. We believe that there was. It is not for us to pass upon the credibility of the witnesses, and as far as this appeal is concerned we can take the testimony of the complaining witness alone. Her testimony conclusively proves that during the course of the ride there were numerous indecent assaults; that she was chased over the prairie; that at one time the defendant threatened to shoot her; that there was a continuous course of persecution and solicitation, accompanied both by pursuit and indecent handling; that she was completely exhausted, and that when at the river the defendant threw her down. As before stated, we believe that the information warrants a verdict for rape in the second degree accomplished by threats of great bodily harm, and that force itself can be proved by proof merely of threats and of fear. The persecution was continuous, and, earlier in the transaction there was proof, if we believe the prosecuting witness, of a verbal threat, and all of the circumstances of the case would justify one in assuming physical threats and the overcoming of resistance both by force and fear. We are not, indeed, willing to take the position that a woman, no matter how indiscreet she may have been in the first instance in riding into the country with a man who is more or less a stranger to her, must, when assaulted in a lonely place and miles from any chance for succor or aid and when outcries would have been unavailing, and when she is at the mercy of her assailant even as

to the opportunity of returning home, fight to the uttermost in order to protect her honor, before her assailant, whose every act is reprehensible, can be convicted of the crime of rape. As to how far the resistance should go depends entirely upon the circumstances and the possibility that it may, in any way, be effective. To hold, indeed, that a woman under such circumstances must fight as a man, at the risk of personal injury and laceration, is too opposed to common decency and common sense to merit our consideration in any manner. So, too, we do not believe that, in order to show that one's resistance has been overcome by threats of great bodily harm, it is necessary to show that the threats were made verbally, or immediately before or at the time of the commission of the act of intercourse. Sharp v. State, 15 Tex. App. 171. Nor, too, are we prepared to argue an acquiescence from the fact that while driving home with the defendant, which it seems the complaining witness had no option but to do, that she did not proclaim her disgrace to every casual passer-by, but that it is sufficient that she made it known immediately upon reaching the town of Dickinson. Such holdings, indeed, are responsible for and merely lead to lynch law, and no one who really respects woman would require her to submit to any such humiliation. It is true that rape is easy to charge, and that sometimes a defendant is convicted when not technically guilty, but this does not justify us in stretching probability in order to create a defense. There is one way to escape danger, and that is for men to refrain from the lechery and indecencies which this defendant himself freely admits having committed. There is, indeed, in his testimony, no pretense of seduction on the part of the woman, and no evidence whatever of any solicitation or consent, except that which may, possibly, have occurred at the time of the act, when she was worn out by his frequent assaults and pursuits, was far from any person or from any habitation, and was completely at his mercy. The jury evidently believed the testimony of the complaining witness, and the trial judge who heard the evidence evidently concurred with them in their belief. We do not feel justified in setting aside the verdict.

The judgment of the District Court is affirmed.

LANDIS v. KNIGHT.

(137 N. W. 477.)

Appeal and error — disposition of cause — new trial ordered in the district court.

Sec. 7229, Revised Codes of 1905, providing for trials *de novo* in the supreme court on all appeals in cases not properly triable with a jury, also provides that the supreme court may, if it deems such course necessary to the accomplishment of justice, order a new trial of the action.

Held that where, as in the case at bar, the record is in such condition that an intelligent disposition of the case in this court is rendered impossible on account of the vague, indefinite, and uncertain state of the testimony, a new trial will be ordered in the district court.

Opinion filed June 19, 1912.

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

Action in foreclosure. From a judgment in plaintiff's favor, defendants appeal.

New trial ordered.

S. E. Ellsworth, of Jamestown, for appellants.

Edward P. Kelly, of Carrington, and *Lee Combs,* of Valley City, for respondent.

FISK, J. This is an action to foreclose two certain real estate mortgages, one of which mortgages securing two notes of $175 each, and the other one note of $3,000. It is admitted by the answer that all these notes and mortgages were executed as alleged in the complaint, and that plaintiff is the owner and holder thereof. No defense is interposed to the first cause of action based upon the two small notes and the mortgage securing payment thereof, the sole defense urged being with reference to the $3,000 note and mortgage. The answer alleges that the only consideration for the latter note and mortgage was to indemnify plaintiff or secure him for any advances or payments which he might thereafter make to the wholesale creditors of the firm of which plaintiff and defendant, John W. Knight, were partners, on claims due such creditors from such firm. And it is contended by defendants that

plaintiff has not advanced or paid to such creditors a sum equal to the face of such note, and they pray for an accounting of all sums thus paid and also for all funds received and disbursed by plaintiff, belonging to said copartnership.

Plaintiff contends, on the other hand, that such note and mortgage were executed and delivered to him for the purpose of securing him for all advances made by him for such copartnership, and also for any and all advances made by him for defendant, John W. Knight, personally, and that such advances aggregate a sum in excess of the face value of such note. The district court rendered judgment in plaintiff's favor for the full sum prayed for in the complaint, and from such judgment defendants have appealed and have demanded a trial *de novo* in this court.

While the issues are very plain and simple, we find the testimony in the record so vague, indefinite, and unintelligible that it is utterly impossible for us to arrive at any satisfactory or intelligent conclusion as to the merits. As we view the record, nothing but a mere guess as to the true facts is possible from the unsatisfactory condition of the testimony; and while we are, of course, anxious, when possible, to retry the cases appealed for trial *de novo* and determine them on the merits, thus ending the litigation, we are prevented from so doing where, as in this case, the testimony is in such condition as to make it impossible to do so with any degree of certainty as to the respective rights and claims of the parties, and we see no alternative but to remand the cause for a new trial, which we do. This practice is expressly authorized by § 7229, Revised Codes of 1905, under the provisions of which trials *de novo* in the supreme court in equity cases are required.

We trust that on the next trial counsel will be able to elicit testimony relevant and material to the issues presented, in a more lucid manner.

In view of the fact that a supersedeas undertaking on appeal was not given, and in view of the further fact that the correctness of the judgment as to the first cause of action is not challenged, the judgment appealed from will be permitted to stand awaiting the result of the new trial. If upon such new trial it shall be found erroneous as to the second cause of action, the district court is directed to modify the same in such particulars as to make it conform to the law and the facts, but

otherwise the same will stand as already rendered. The costs on this appeal shall abide the result of such new trial.

BURKE, J., being disqualified, did not participate in the decision.

MOVIUS et al. v. PROPPER.

(136 N. W. 942.)

Judgment — entry of judgment — sufficiency.

1. On January 16, 1905, the district court of Richland county made its order for judgment, the material portion of which is as follows:

It is now, on motion of A. L. Parsons, attorney for the plaintiff, ordered that plaintiff have judgment against the defendant herein for the sum of $616, the amount asked in the summons and complaint, together with the costs and disbursements of this action, to be taxed by the clerk.

Let judgment be entered accordingly.

By the Court,
Frank P. Allen, Judge.

Attest: J. M. Kramer, Clerk.

Costs allowed on above judgment as ordered $8.50, making total judgment of $624.50.

J. M. Kramer, Clerk of Court. [Seal.]

Such order was entered at length by the clerk in the judgment docket and thereafter certain real property of the judgment debtor was levied upon and sold under execution, and no redemption having been made, a sheriff's deed was duly issued to plaintiffs, who have expended large sums of money in reliance upon their title thus acquired, with the knowledge and implied consent of defendant in the case at bar.

Held, that such order when entered in the judgment docket constituted a valid judgment as against the defendant in the case at bar, who is a stranger to the record in the action in which such judgment was rendered, and under the facts stated in the opinion he cannot be heard to challenge the validity thereof.

McTavish v. Great Northern R. Co. 8 N. D. 333, 79 N. W. 443, is referred to and distinguished.

Evidence — quieting title.

2. Evidence examined and held that the trial court properly found that defendant did not purchase the interest of the judgment debtor in the real property in controversy, as contended by him.

Appeal and error — modification of judgment.

3. Respondents being the owners of an undivided one-half interest in the real property in controversy, and appellant being the owner of the remaining interest therein, an accounting was had in the district court as to advances made by each of the parties in the payment of the purchase price of such property, together with interest and taxes, and also the value of the use and occupation thereof by appellant, and a balance of $42.85 was found due to plaintiffs from defendant and this court finds a balance of only $13.78 thus due plaintiffs on such accounting. The judgment is accordingly modified to this extent.

Appeal and error — trial court — theory of case.

4. Where parties have adopted a certain theory in the trial of a case in the district court, and that court has decided the case pursuant to such theory, neither party will be permitted in this court to change the theory thus adopted.

Opinion filed April 29, 1912. Rehearing denied June 20, 1912.

Appeal by defendant from a judgment of the District Court for Sargent County; *Frank P. Allen,* J., in plaintiffs' favor in an action brought to quiet title to certain real estate.

Modified and affirmed.

Action to determine adverse claims to real property. The complaint is substantially in the statutory form. It was adjudged in the court below that plaintiffs were the owners of an undivided one-half interest in the real property in controversy, defendant owing the other one-half interest, such respective interests being subject to certain advances made by the parties for the purpose of protecting the title. Defendant has appealed from the judgment, and demands a retrial of the entire case in the supreme court. We deem the following statement of facts made by respondent's counsel in the printed brief substantially correct:

"The action was brought to determine adverse claims to a quarter section of land in Sargent county, described as follows: The northwest quarter of section 36, in township 130 N. of range 53 W. Originally this was state school land, and on the 28th day of September, 1901, at a public school land sale, the land in question was purchased jointly by the defendant, Propper, and one Ralph Maxwell, and a contract for sale was duly entered into between the said purchasers and the state land commissioner.

As will be seen, the purchase price of the land was $2,000. One fifth

of this sum of $400 was paid in cash and the balance was to be paid in four equal instalments, the first instalment on January 1, 1907, and an instalment at the end of each succeeding five-year period thereafter, until the whole should be paid, with interest on the deferred payments at the rate of 6 per cent per annum. The defendant and the said Maxwell each contributed $300 to the down or cash payment made at the time the land was purchased. Possession of the land was given to defendant and the said Maxwell immediately upon the execution of the contract. Sometime after the purchase of the land, a part thereof was inclosed by a fence, but the exact date when this was done does not appear in the evidence. The defendant owned and occupied other lands in the immediate vicinity of the land in question, and from the date of the purchase the defendant has had the entire use of this land, either for the purpose of pasturage or for raising crops, and has never paid to anyone any sum whatever for such use.

On the 4th day of December, 1904, said Maxwell was indebted to plaintiffs on a promissory note in the sum of $559, with interest at the rate of 10 per cent per annum from January 5, 1904; this note fell due on October 1, 1904. On the 4th day of December, 1904, plaintiffs sued said Maxwell in the district court of Richland county on said promissory note, and on that day the summons and complaint in the action were personally served on Maxwell. No answer was interposed, and on the 16th day of January, 1903, a judgment by default was entered in favor of plaintiffs and against Maxwell for the sum of $616 damages and the costs, making in all the sum of $624.50. Later a transcript of said judgment was filed in the office of the clerk of the district court of Sargent county, and later still an execution was duly issued out of the district court of Richland county, wherein said judgment was entered to the sheriff of Sargent county, and under and by virtue of said execution the interest of the said Maxwell in the land in question was levied upon, and later a proper notice of sale was duly published, and later still the interest of the said Maxwell in the said land was sold to satisfy said judgment. The plaintiffs were the purchasers at the said sheriff's sale, and the certificate of sale was duly issued to them, there being no redemption; and on the 29th day of June, 1906, a sheriff's deed was duly issued to plaintiffs, purporting to convey to them the interest of the said Maxwell in the land in question. No question is

raised as to the regularity of the proceedings with respect to the said judgment sale and sheriff's deed, except it is contended that no proper and legal judgment was ever entered in the case referrd to; that, after the purchase of the Maxwell interest in the land in question, the plaintiffs paid, to protect the title to said land, the several amounts embraced in Exhibit F; that the payments made by plaintiffs as stated, with accrued interest up to the time of the entry of the decree, amounted to $859.99; that to protect the title, and between the date of the purchase of the land from the state and the date of the entry of judgment, defendant paid certain sums which are set forth in Exhibit G; that the amounts so paid by defendant, with accrued interest up to the time of the entry of judgment, aggregated $1,305.64; that the value of the use and occupation of the land from the time of the purchase of the same by plaintiffs at said sheriff's sale, and while defendant was in the exclusive possession thereof, amounted to $488.50.

In January, 1906, the plaintiffs paid to the state interest due on the contract of sale the sum of $96. Subsequently, and at the request of plaintiffs, the defendant paid to plaintiffs one half of this amount of $48, but made no statement to plaintiffs at that time or any other time that he had purchased, or claimed to have purchased, Maxwell's interest in the land. Plaintiffs also, on the 31st day of January, 1907, paid to the state $96, interest due on the land contract, and also paid on January 31, 1908, a like amount for the same purpose. Plaintiffs also paid the taxes on the land for the years 1906, 1907, 1908, 1909, and 1910.

On the trial the defendant claimed that some time in 1904 or 1905 (the date was indefinite) he entered into some kind of an oral agreement with Maxwell for the purchase of Maxwell's interest in the land in question. He claimed that Maxwell was indebted to him on account in about the sum of $200, and that he and Maxwell orally agreed that defendant could have Maxwell's interest in the land in payment of this debt. At the time defendant claims to have purchased Maxwell's interest in the land in question, the quarter section was worth $4,800, and there was then due the state on the contract of sale the sum of $1,600, and that the equity in the land was then worth $3,200. On the 31st day of January, 1906, when plaintiffs made their first interest payment

on the contract, defendant knew that they claimed to have succeeded to Maxwell's interest in the land.

This action was commenced in December, 1909. Plaintiffs and defendant lived in the village of Lidgerwood and frequently met, and defendant never informed plaintiffs that he claimed to have purchased Maxwell's interest in the land, until he served his answer in this action."

Forbes & Thorpe, for appellant.

There was no judgment. McTavish v. Great Northern R. Co. 8 N. D. 333, 79 N. W. 443.

Complete performance on the part of one party to a contract takes the contract out of the statute of frauds. Pfifner v. Stillwater & St. P. R. Co. 23 Minn. 343; Blanchard v. McDougal, 6 Wis. 167, 70 Am. Dec. 458; Morrison v. Herrick, 130 Ill. 631, 22 N. E. 537; Shearer v. Gibson, 123 Mich. 467, 82 N. W. 206; Pawlak v. Granowski, 54 Minn. 130, 55 N. W. 831; Barton v. Dunlap, 8 Idaho, 82, 66 Pac. 832; Brown v. Hoag, 35 Minn. 373, 29 N. W. 135; Ruch v. Ruch, 159 Mich. 231, 124 N. W. 52; Brown v. Brown, 163 Mich. 337, 128 N. W. 195.

W. S. Lauder, for respondent.

The judgment is valid and binding although irregular in form. Hagler v. Kelly, 14 N. D. 218, 103 N. W. 629; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016; Rolette County v. Pierce County, 8 N. D. 613, 80 N. W. 804.

Fisk, J. (After stating the facts as above). It will be seen from the above facts that plaintiffs deraign whatever title they have through a sheriff's deed issued pursuant to an execution sale under a purported judgment rendered in an action wherein they were plaintiffs and one Ralph Maxwell was defendant, a transcript of which purported judgment was duly filed and docketed on April 10, 1905, in Sargent county, and thereupon such judgment, if valid, became a lien on all lands then owned by Maxwell in such county. Appellant claims, however, that Maxwell did not own such land at that time, but that he had sold such undivided one-half interest to him in the month of May, 1904, by an executed oral contract. This is challenged by respondents, but appellant's counsel contend that respondents are not in a position to thus

challenge said oral sale and purchase, for the alleged reason, among others, that their so-called judgment against Maxwell is not a judgment at all, but merely an order for judgment. If this be true, then of course respondents have no stand in court, as they must recover, if at all, on the strength of their alleged title, which is based solely on the sheriff's deed, and this deed in turn is wholly dependent for its validity on the judgment aforesaid. We will first consider the question whether respondents recovered a judgment against Maxwell as alleged by them. As before stated, it is asserted by appellant's counsel that such alleged judgment was nothing more than a mere order for judgment, citing and relying in support thereof on McTavish v. Great Northern R. Co. 8 N. D. 333, 79 N. W. 443. On the contrary, respondent's counsel, while conceding that it is not strictly correct in form, contend inasmuch as it was treated as a judgment and duly entered at length in the judgment docket, and inasmuch as it determines the issues involved in the action and fixes definitely the amount plaintiffs are entitled to recover from defendant, that it is a sufficient judgment. The case of Hagler v. Kelly, 14 N. D. 218, 103 N. W. 629, is claimed by respondents to settle the point in their favor. We do not thus construe the opinion. The case at bar is not distinguishable from the McTavish Case in the form of the order for judgment. In the case at bar the language of the order is, "Ordered, that plaintiff have judgment against the defendant for the sum of $616, . . . together with the costs and disbursements of this action, to be taxed by the clerk. Let judgment be entered accordingly."

In the Hagler Case the language used in the order was, "It is hereby adjudged that the plaintiff recover of the defendant the sum of . . . $25.46, and the clerk of court is hereby directed to enter judgment accordingly."

In the McTavish Case the question arose in a different manner from that in the case at bar. There, the question merely involved a question of practice, *viz.*, the right to appeal. Here it involves property rights of long standing, claimed to have been acquired through execution sale under the alleged judgment. In the McTavish Case the question was raised by a party to the proceeding, while here it is raised by a third person,—a stranger to the record. As well stated by Judge Engerud in Hagler v. Kelly, supra, at page 223 of the opinion: "The situation with which the court was dealing on the appeal in that case [McTavish

v. Great Northern R. Co. supra] was the same as that which existed in the trial court when the irregularity in question was discovered. The transaction was fresh and the litigation still in actual progress. It will be readily seen that under such circumstances the propriety and sufficiency of the acts of the clerk to accomplish the intended purpose were to be tested by an entirely different standard from that which must be applied in the case at bar. That case simply involved a question of practice in a pending litigation. In this case we are dealing with rights to property of long standing, acquired or supposed to have been acquired through legal proceedings. Those proceedings are attacked for irregularity of procedure of a purely formal nature, which neither denied nor prejudiced any substantial right of any adverse party."

Whether the court, as it was constituted at the time the McTavish Case was decided, would have held the same as it did if the facts were as disclosed in the case at bar, is very doubtful. At any rate we are constrained to hold, and do hold, that such rule should not be enforced at the behest of a stranger to the record, and especially after such a long lapse of time during which respondents, in reliance upon the regularity of the judgment and the proceedings thereunder, expended large sums of money, and this with appellant's knowledge and implied consent. Indeed, we are disposed to the belief that at most the judgment was merely irregular or voidable, and not void; and that even though appellant might, if he had acted promptly, have questioned the same, he is, on account of the above facts, now estopped from so doing. We reach a conclusion on this point, therefore, adverse to appellant's contention.

We will next consider the question whether appellant, in fact, purchased Maxwell's interest as alleged by him, for if he did, such fact would settle this litigation in his favor. The trial court found that no such purchase took place, and after a careful review of the evidence we are fully agreed that such finding was correct. We deem it useless to narrate the testimony in this opinion bearing on this issue of fact. Suffice it to say that the testimony of appellant and his witnesses is of an unsatisfactory nature, while that of the respondents and their witnesses is clear, persuasive, and in full accord with every material, if not controlling, circumstantial evidence against appellant's contention, and which he has not satisfactorily explained away.

The only remaining question requiring consideration, in view of the above conclusions, is the matter of the accounting. The trial court found that there was a balance due from appellant to respondents of $42.85. This was arrived at by crediting each party with payments of principal and interest on the contract with the state, as well as taxes paid by each, and after computing interest on the various items, a balance was struck between them. Appellant contends that the lower court erroneously allowed certain credits to respondents and disallowed certain proper credits to which he was entitled. Respondents were allowed credits, with interest, of only $859.99, instead of $1,305.64, as stated in appellant's brief, and appellant expressly concedes that such credit should be $860.85. Appellant was allowed credits, with interest, aggregating the sum of $1,305.64. This should have been $1,320.92 as claimed by appellant. This difference is, no doubt, the result of an oversight in not allowing for the taxes paid by appellant in the years 1903 and 1904 as stipulated at the trial. The trial court properly refused any credits to appellant for the alleged improvements made on the land by him. This was proper. There is no competent proof of the value thereof, and furthermore it does not appear that they tend to enhance the value of the property, and they were evidently made for the sole benefit and convenience of appellant. Hence he is not entitled to any credit therefor. Gjerstadengen v. Hartzell, 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. 230. We think the finding as to the value of the appellant's use of the premises is in accordance with the evidence, and consequently such finding will not be disturbed. The case was tried in the court below upon the theory that he should account to plaintiffs for such use, and this court in deciding the case will not permit a change in the theory of the case thus adopted by the parties in that court.

The judgment will be modified by reducing the balance found due plaintiffs from defendant from $42.85 to $13.78, being one half of the balance we find existing on such accounting, and as thus modified it will be affirmed, neither party to recover costs on the appeal.

SUMMERVILLE et al. v. SORRENSON, Sheriff, et al.

(42 L.R.A.(N.S.) 877, 136 N. W. 938.)

Mortgages — redemption — certificate of redemption.

Relators claimed to be junior mortgagees and as such entitled to redeem from a certain sheriff's foreclosure sale upon mortgage foreclosure, and attempted to comply with § 7146, Revised Codes of 1905, but furnished a certificate signed by the deputy register of deeds in his own name, instead of one signed in the name of the register of deeds by said deputy. *Held*, that such certificate was and is a nullity, and the sheriff was justified in refusing to issue the certificate of redemption. The section above mentioned, being enacted for the protection of the sheriff and subsequent redemptioners, must be complied with.

Opinion filed February 14, 1912. Rehearing granted April 1, 1912. Opinion on Rehearing filed June 21, 1912.

Appeal by relators from a judgment of the District Court for Ward County; *Goss*, J., quashing a writ of mandamus to compel defendant to issue to relators a certificate of redemption on certain property.

Affirmed.

H. L. Halvorson and *Palder, Aaker, & Greene*, for appellants.

The record made by relators on their offer to redeem was sufficient on its face. North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453; Williams v. Lash, 8 Minn. 496, Gil. 441; Tinkcom v. Lewis, 21 Minn. 132; Pamperin v. Scanlan, 28 Minn. 345, 9 N. W. 868; Sardeson v. Menage, 41 Minn. 316, 43 N. W. 66; Wilson v. Hayes, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467; Spackman v. Gross, 25 S. D. 244, 126 N. W. 393; Bridgeport v. Blinn, 43 Conn. 274.

Francis J. Murphy and *G. S. Wooledge*, for respondent and intervener.

A deputy is merely one who is appointed, designated, or deputized to act for another; he can do nothing whatsoever in his own name, and

Note.—The authorities on the question, in whose name acts by deputy officers should be performed, are reviewed in a note to the above case as reported in 42 L.R.A.(N.S.) 877. Other cases on this point are to be found in notes in 19 L.R.A. 177; 26 Am. Dec. 415; and 106 Am. St. Rep. 825.

any act done by him, unless in the name and by the authority of his principal, is a nullity. Wilson v. Russell, 4 Dak. 376, 31 N. W. 649; Ditch v. Edwards, 26 Am. Dec. 414, and note (2 Ill. 127) Gibbens v. Pickett, 19 L.R.A. 177, and note (31 Fla. 147, 12 So. 17); Joyce v. Joyce, 5 Cal. 449.

BURKE, J. The Kenmare National Bank was the holder of a sheriff's certificate issued to it upon a tract of land sold under mortgage foreclosure by advertisement. Upon the last day but one of the period of redemption, plaintiffs attempted to redeem from said certificate in accordance with § 7146, Revised Codes of 1905, claiming that they were junior mortgagees. They served upon the sheriff, at different times during said day, the following papers: First, a notice of redemption, stating that they desired to redeem "by virtue of a junior mortgage upon said premises dated July 25, 1906, and recorded September 1, 1906, at 8:30 A. M., in book 65 of mortgages, page 42, said mortgage being made to the Minneapolis Thresher Company and by them assigned to the undersigned by an instrument in writing dated May 11, 1909, and filed for record in the office of the register of deeds, Ward county, North Dakota, on the 17th day of July, 1909, and recorded in book 113 of mortgages, page —, and we the undersigned tender herewith the sum of $1,517.85," etc.; second, a certified copy of the assignment of the mortgage; third, an affidavit of the plaintiffs to the effect that they were legally entitled to redeem from the sheriff's certificate by virtue of the mortgage held by them, and that there was due upon said mortgage the sum of $2,500; fourth, a purported note by the deputy register of deeds of Ward county, in words as follows:

I, S. S. Reishus, deputy register of deeds in and for Ward county, North Dakota, do hereby certify that I have examined the records in regard to the S. ½ N. W. ¼ and lots 3 and 4 sec. 5, twp. 163, rge. 88, and find that the statements regarding the mortgage recorded in book 65 of mortgages, page 42, as above set forth, are correct and true.

(Signed) S. S. Reishus,
Deputy Register of Deeds.

At the same time they paid to the sheriff the money above mentioned.

The sheriff, upon the instigation of the bank, refused to execute and deliver to them a certificate of redemption and an alternative writ of mandamus issued from the district court to the sheriff. The return of the sheriff set forth the facts as stated above, and asked that the Kenmare bank be allowed to intervene and contest the regularity of the redemption. This was allowed, and the defendant bank insisted that the attempted redemption was void for failure to comply with said § 7146. The question for us to decide is whether the redemption was valid or void. Sec. 7146 reads: "A redemptioner must produce to the officer or person from whom he seeks to redeem and serve with his notice to the sheriff: (1) A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the district court of the county where the judgment is docketed, or if he redeems upon a mortgage or other lien, a note of the record thereof certified by the register of deeds; (2) A copy of the assignment necessary to establish his claim, verified by the affidavit of himself or of a subscribing witness thereto; (3) an affidavit, by himself or his agent, showing the amount then actually due on the lien."

Respondents contend that the proceedings taken by the plaintiff do not amount to a legal redemption, for the following reasons: First, that the relators did not serve with their notice of redemption a note of the record of the mortgage under which they claim to redeem, certified by the register of deeds; second, that the copy of the assignment of the mortgage served upon the sheriff was not verified by the relators or the subscribing witnesses as required by law. Under the first head they point out that the certificate served upon the sheriff was signed by the deputy register of deeds in his own name and right, without signing the name of his principal. In the case of Wilson v. Russell, 4 Dak. 376, 31 N. W. 649, this court, speaking of a deputy sheriff, says: "A deputy sheriff has no power nor authority other than that which pertains to him and which he exercises as acting for the sheriff by whom he is appointed, to whom he gives bond, and to whom also he is responsible for his acts as such deputy; the sheriff himself, in turn, being responsible for the acts of his deputy as such." As the statute authorizing the appointment of a deputy register of deeds and a deputy sheriff are the same, we think the above entitled case is in point. This is also the holding of Ditch v. Edwards, 2 Ill. 127, 26 Am. Dec. 414,

and of the authorities collected in the note in the American Decisions, supra, wherein it is stated: "The question of a deputy's power to sign his own name without specifying his principal most often arises. And the cases, with few exceptions, are uniform that the return, to be valid, should be in the name of the sheriff." Citing many cases. In line with these authorities we must hold that the purported note of record issued by the deputy register of deeds was a nullity, having no effect whatever, and leaving the redemption in the same condition as though none had been served whatever upon the sheriff. As to the legal effect of this omission, we quote from 27 Cyc. page 1832 (F) the following general rule: "Where redemption from a mortgage is made on common-law or equitable grounds, the form in which the transaction is cast is not very material. . . . But in the case of a redemption after sale on foreclosure, the provisions of the statute granting the right and regulating the manner of its exercise must be strictly pursued." In Wilcoxson v. Miller, 49 Cal. 193, it was held that "a person claiming the right to redeem from a sheriff's sale, as a judgment creditor, must produce for the sheriff a copy of the docket of the judgment, and an attempted redemption is ineffectual without such production, and the sheriff's deed is void. The power of the sheriff in relation to redemption is purely statutory, and his acts are nugatory unless the provisions of the statute are pursued." In the case of Tinkcom v. Lewis, 21 Minn. 132, the attempting redemptioner failed to file the affidavit as to the amount due upon his lien, as required by their statutes. The court held this omission fatal to the redemption, and used this language: "The sections of chapter 81 which confer the right to redemption, . . . being of a remedial character, . . . should receive such liberal construction, . . . but by no allowable liberality of construction can we hold that the computation made by the defendants and the sheriff 'of . . . L. & S's claim on the 80 acres' is equivalent to the affidavit required by the third subdivision of § 14. The right of redemption from sales upon foreclosure by advertisement is wholly the creature of the statute; and while we would construe the statute liberally in favor of the mortgagor and redeeming creditors, we cannot dispense with or repeal its positive terms. Merely formal deviations or irregularities may be overlooked; but there must be a substantial compliance with the express requirements of the statute, in order to a valid redemption.

The language of § 14 is clear and imperative. The person desiring to redeem shall produce to the sheriff . . . 'an affidavit of himself or his agent, showing the amount then actually due on his lien.' The object of this requirement is to provide the evidence whereby a junior creditor may know the amount necessary to be paid to the senior creditor upon a redemption from him." In the same case it is held that the holder of the certificate "is not affected by the sheriff's waiver, the sheriff not being in any sense his agent." Citing Horton v. Maffitt, 14 Minn. 289, Gil. 216, 100 Am. Dec. 222; Davis v. Seymour, 16 Minn. 210, Gil. 184. The redemption was held invalid. We have purposely quoted at length from this Minnesota case, because it is one of the cases relied upon strongly by the appellant. In the same case, and as an additional reason for the invalidity of the redemption, it is insisted that the junior mortgagee did not produce to the sheriff a copy of his assignment as required by the Code, but in its stead produced the original instrument, together with the indorsement of the register of deeds that it had been duly recorded. The court said that the statute did not require the sheriff to refuse a higher class of proof than named therein. This seems to be their idea of informal deviations from the Code. To the same effect are the cases of Wilson v. Hayes, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467; Pamperin v. Scanlan, 28 Minn. 345, 9 N. W. 868, and other cases relied upon by appellant. Whenever the omission is material the redemption fails. In Spackman v. Gross, 25 S. D. 244, 126 N. W. 393, the redemption certificate issued to Spackman was set aside because a duplicate of the notice of redemption was not filed with the register of deeds, although he had made some attempt to comply with the said provision by leaving the notice there several days. See also Chapin v. Kingsbury, 135 Mass. 580, where it is held that recording an instrument does not comply with the statute requiring it to be filed.

Upon the authority of the above cases we are inclined to the holding that the omission of the note by the register of deeds required by § 7146 is fatal to the redemption, and that the purported certificate by the deputy does not supply the omission.

This conclusion renders it unnecessary to pass upon the other objections raised by the respondents,—that the copy of the assignment of the mortgage was not properly verified, and that the appellants are not,

upon the records before us, proven to be redemptioners. The trial court properly quashed the writ upon the return, and the judgment is affirmed.

Mr. Justice Goss, being disqualified, took no part in the decision. Honorable CHARLES F. TEMPLETON, Judge of the First Judicial District, sitting in his stead on the rehearing only.

On Rehearing.

PER CURIAM. Upon rehearing, plaintiffs complain of that part of the decision wherein we held that a certificate made by the deputy register of deeds in his own name was not sufficient to meet the requirements of § 7146, Revised Codes of 1905, which calls for a certificate by the register of deeds. They insist that a certificate made by the deputy is just as good as one made by the deputy in the name of his principal, and point out defects in the law whereby they claim that, if the register should die upon the last day of redemption, they would have been without power to obtain this certificate.

We cannot agree with their view. The deputy is responsible upon his bonds only for his official acts. For his private acts he is responsible to no one. When he signs the name of his principal to a certificate, it is an official act. When he signs his personal name to a certificate it is his private business. So far as we know, there is no law against any citizens examining the records and making certificates as to their contents. The deputy might claim that he was running a personal information bureau. Supposing the certificate issued in this case was false and the register of deeds was called upon in a suit to stand the damages, he would reply that the act of the deputy was not an official act, and no liability rested upon the register therefor. The deputy gives no bond to the state or county. His bond runs to the register only, and is for his official acts only. The laws are passed with due consideration for the rights of all of the people, and not for the benefit only of redemptioners.

And again, admit for the sake of argument that the law is not a good one, and does not meet every contingency. Is that any reason why this court should amend it? It would not be the first time that a court has found an imperfect law that could have been immensely improved by

the addition of a few sentences. When some fatherly courts have made the attempt to insert such provisions, however, they were loudly accused of usurpation of legislative power. It is just possible that this law should be amended to provide that the deputy should be able to make this certificate in his private capacity, and it is further possible that this duty should be imposed upon the clerks of the office, the office boy or the janitor, but the legislature has seen fit to place it upon the register of deeds, or his deputy acting in his official capacity, under his official bond. We have nothing to do but give to this legislative act its plain English meaning. That the language does not admit of any other interpretation is shown by the fact that all of the courts passing upon the language have given to it the same reading. Plaintiffs cite no cases, and there are likely none holding otherwise. Just why we should now establish a minority line of decisions with such a light excuse we cannot see.

We hold to our former decision that the certificate of the private citizen, though self-described as a deputy register of deeds, was a nullity, and the redemption attempted void, even though it should be further conceded that plaintiffs were in fact redemptioners.

FISK and BRUCE, JJ., dissenting.

On the rehearing, Honorable Chas. F. TEMPLETON, Judge of the First Judicial District, sat with the court by request in place of Mr. Justice Goss disqualified.

FISK, J. (dissenting). After reargument, and on more mature deliberation, I am obliged to dissent in this case. The majority opinion announces a rule which, in my judgment, is technical in the extreme. It gives effect to the mere letter of the statute, and ignores its true meaning and intent. I believe in a case like this, involving, as it does, the right of redemption, the court should give the statute a liberal construction in favor of the redemptioner. Such is the rule as I understand it; and the rule is a wise and salutary one, as it works no injustice to the certificate holder who gets his money with interest, while the property is made to satisfy as much of the debtor's liabilities as possible. It is held by the majority of my associates that, because the certificate or note of the record as to the mortgage under which a redemption is

sought was signed by the deputy register of deeds in his own name, and not in the name of his principal by himself as such deputy, that the alleged redemption is utterly null and void. This in the face of the fact that the officer from whom the redemption was attempted to be made was satisfied with the proof submitted by appellant of his right to redeem, and accepted the money necessary to effect such redemption.

I deem the majority opinion erroneous and the precedent thereby established most dangerous, and will, without elaboration, state my reasons.

1st. I believe that the statutory requirement as to proof of the mortgage was sufficiently complied with. In other words, the language of the Code (§ 7146), "or, if he redeems upon a mortgage or other lien, a note of the record thereof certified by the register of deeds" should not be construed literally, but that all that is and was intended to be required was a note of such record signed by the officer in charge of the office, having authority to represent and act for the register. In any event where such deputy affixed the official seal of the office to such document, together with his own signature, it is, I believe, a substantial compliance with the statute, and cannot be treated as a nullity. At most it is a mere irregularity. I think the affixing of the seal of the office when the certificate is signed by the deputy should be treated in a case like this as the equivalent of subscribing the officer's name by such deputy. There can be no doubt that, in making the certificate or note of the record in question, the deputy acted in the line of his official duties, and is responsible on his bond to the register of deeds for a failure to perform such duties according to law. The case of Wilson v. Russell, 4 Dak. 376, 31 N. W. 645, is chiefly relied on by my associates as sustaining their conclusion. As I read the opinion it is far from being in point in the case at bar. There, a deputy sheriff, in conducting foreclosure proceedings by advertisement, did so in the name of his principal, the sheriff. He made the certificate of sale, and acknowledged the same in the name of his principal by himself as deputy, and the sheriff's deed was signed and acknowledged by the sheriff in person. The foreclosure was sought to be set aside upon the alleged grounds that the deputy was an independent officer, and should have acted in his name as deputy merely, and that the acknowledgments of the certificate of sale and deed were insufficient. The court very

properly held that the proceedings were valid, and it refused to vacate the same. No such question as is here involved was before the court. The inevitable logic of the majority opinion, in exacting a compliance with the strict letter of the statute, is that no redemption can be made during a vacancy in the office of the register of deeds by death or otherwise, although the Code gives the debtor or redemptioner one full year from the sale in which to redeem. I apprehend that in such an event some other proof of the record of the instrument under which it is sought to redeem would suffice.

2d. I do not think the statutory provisions (§ 7146, Revised Codes), requiring certain proof to be made to the officer, were intended for the benefit of the certificate holder. Such proof is made *ex parte* to such officer, and is in no way binding on the holder of the certificate. He may always question the fact of the alleged redemptioner's right to redeem, even though such proof is strictly in conformity with the statute. He ought not to be permitted to use technicalities as to such proof. If the same, although not technically as required by statute, is satisfactory to the officer to whom such proof is made, and he accepts the redemption money, the certificate holder ought not to be permitted to complain, for he is not injured. He, of course, may always question the alleged redemptioner's right to redeem, but if he is in fact a redemptioner, the holder of the certificate is in no way injured. Suppose a person who is unquestionably a legal redemptioner applies for a certified note of the record of the mortgage under which he claims the right to redeem preparatory to effecting a redemption, and the deputy in charge of the office of the register of deeds prepares and delivers to him a certificate identically like the one in this case. He presents it to the sheriff with his other proof, without examining the same, relying on the presumption that it is properly executed. Such proof is satisfactory to the sheriff, and he accepts the redemption money one week before the expiration of the year of redemption. The day following the expiration of the redemption period the certificate holder, while conceding that the alleged redemptioner was a lawful redemptioner under the statute, repudiates such redemption solely on account of the irregularity of the certificate aforesaid. Is it possible that any court would uphold such a contention? I think not. Whether the attempted redemption was made a week before the expiration of the redemption

period or on the last day thereof, the rule would, of course, be the same.

For the above briefly stated reasons, I find myself unable to concur in the majority opinion.

GROW et al. v. TAYLOR et al., as STATE BOARD OF NORMAL TRUSTEES.

(137 N. W. 451.)

Schools and school districts — school property, how acquired — board of normal trustees — vendor's title.

1. Where the board of normal trustees of the state of North Dakota passed a resolution to the effect "that the board proceed to formal ballot for the selection of a site to contain at least 60 acres of ground, in accord with the legislative act establishing such school. Warranty deeds of the tract selected, together with abstract of title showing the property to be free from encumbrances of any kind or nature, to be furnished this board, title in the name of the state of North Dakota, not later than June 27, same to be presented to the board at its Mayville meeting on the date above mentioned; otherwise the location as made under this vote and motion to be null and void, and in no wise binding upon this board or the state of North Dakota," said resolution called for and demanded the production of a merchantable abstract of said 60 acres not later than said 27th day of June.

Vendor and purchaser — merchantable abstract of title — vendor's title.

2. An abstract is not merchantable which needs to be supported by extrinsic evidence; and since the abstract in question disclosed the fact that on said tract of land avenues and alleys had been dedicated to the public, and that said avenues and alleys had never been revoked, canceled, vacated, or set aside, and also disclosed an unsatisfied mortgage upon unrecorded oil and gas leases, said abstract was not a merchantable or marketable abstract.

Schools — donation or dedication of site — acceptance.

3. The mere fact that a donation or dedication had first been offered by the citizens of Minot to the board is of no importance. A donation or dedication, in order to be binding upon the donee or grantee, must be accepted. In the case at bar there is no proof of an acceptance, but rather of a counter offer or proposal, which, in turn, the proof does not show to have been accepted by the plaintiffs, by compliance with the terms thereof.

Schools — delivery and sufficiency of deed.

4. Under the facts disclosed, it is held that a delivery of a deed to one of the members of the said normal board and the subsequent recording of said deed by the grantors did not constitute either an acceptance or fulfilment of the counter-proposal of the board by the donors, or an acceptance by the board itself, it not being shown that the said member had authority to accept the said deed, or that the abstract demanded had upon its face shown a marketable title, or that the defects therein had been waived by the said board.

Schools — acquisition of property — delivery and sufficiency of deed.

5. In an action to enjoin a board of trustees from selecting a site for the location of a normal school, and the establishment of such school thereon, on account of the alleged fact that said board has already accepted a prior offer for a location, it must be shown that the plaintiffs and objectors have an actual interest in the prior location. Where it is shown that the prior location was offered nominally and generally by the citizens of a town, but actually by two persons, and the record discloses that only one of such persons had legal title to the land offered, and the other merely a speculative interest in the proceeds of the sale thereof, and in the advantage to be derived to other property from the location, and such prior person dismisses his appeal, the latter has no privity or mutuality of contract between him and the defendant board which will entitle him to maintain an action of specific performance or such injunction proceedings.

Opinion filed June 28, 1912.

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

Application for permanent writ of injunction restraining defendants from proceeding to the selection of a certain site for, and the erection of, certain buildings for the Minot Normal School.

Judgment for defendants.

Affirmed.

The defendants herein constitute the state board of normal school trustees, provided for by chap. 61 of the Laws of 1911. Pursuant to the provisions of chap. 22, Laws of 1911, said board proceeded to select a site for the normal school to be located at the city of Minot. Several sites were tendered by the citizens of Minot, and on the 24th of May, 1911, at a meeting of said board, according to the minutes of said board, "it was moved by Mr. Willson, and seconded by Mr. Nelson, that the board proceed to formal ballot for the selection of a site to contain

at least 60 acres of ground in accord with the legislative act establishing said school. Warranty deeds of the tract selected, together with abstract of title showing the property to be free from encumbrances of any kind or nature to be furnished this board, title in the name of the state of North Dakota, not later than June 27th, same to be presented to the board at its Mayville meeting on the date above mentioned; otherwise the location as made under this vote and motion to be null and void, and in no wise binding upon this board or the state of North Dakota." This resolution was duly carried. After its passage, the board proceeded to vote upon the selection of a site, in conformity therewith, and, by a vote of five to two, selected what is known as the Olsen-Grow site, which is the site sought to be established in this case; namely, "the West half and the N. W. ¼, of the S. W. ¼, and the N. ½ of the W. ½ of the S. W. ¼ of the S. W. ¼ of sec. 25, township 155, range 83, and all of blocks 2, 3, 4, 5, 6, and 7, of Warrendale Addition to the city of Minot." On or about the 26th day of June, 1911, warranty deeds of the tracts in controversy were placed by the plaintiffs in the hands of Martin Jacobson, one of the defendants in this action, and one of the members of the board of normal school trustees. The proof, however, shows that the said Jacobson had not been authorized by the defendant board to accept the same. On receiving such deeds, said Jacobson returned them to one of the grantors, and asked him to place them on record, in conformity with the resolution before referred to, and such deeds were placed of record on the 26th day of June, 1911, and were, a few days after the 27th day of June, 1911, mailed by the plaintiffs to E. J. Taylor, superintendent of public instruction, and *ex-officio* president of the defendant board of normal trustees, and one of the defendants in this action. At the meeting of the board of normal school trustees held at Mayville on the 27th day of June, 1911, an abstract of said tracts of land was delivered to the defendants, sitting as such board, and on said 27th day of June, said Martin Jacobson, one of the defendants herein, and a resident of the city of Minot, asked permission to take the said abstracts back to Minot for correction of some clerical errors therein. It does not appear, however, that the abstracts were examined or accepted at the time, and a few days thereafter they were mailed by the plaintiffs to the defendant E. J. Taylor, president of the board of normal school trustees, aforesaid. They were by him

submitted to the attorney general, and at the next meeting of the board of normal school trustees, which was held on the 1st day of August, 1911, they were delivered to the board, together with an opinion from said attorney general holding that they did not show title in the state of North Dakota, free and clear of encumbrances and defects. After the receipt of such abstracts, and at such meeting, two members of the board were appointed to visit the city of Minot for the purpose of securing an expression of the choice of the people of that city as to the several sites proposed, and on the 16th day of August, 1911, and after a straw vote had been taken by the citizens of the city of Minot, the defendants, in regular session as the board of normal school trustees, formally selected another site, known as the Ramstad site, as the permanent site for the Minot Normal School. Before anything was accomplished by the board, however, under this resolution and selection, the present action was commenced by plaintiffs for the purpose of enjoining the establishment of the school on the Ramstad site and the expenditure of money therefor in the erection of buildings, etc., a claim being set forth that the city of Minot had complied with the requirements made in the motion or resolution adopted on the 24th day of May, and that the Olsen-Grow site had been formally selected. The trial court found the issues for the defendants and dismissed the action, and an appeal has been taken to this court.

E. R. Sinkler and *J. A. Heder,* for appellants.

The action of the State Board of Normal School Trustees in selecting the south hill site was final, and they had no power or authority, after having once determined the matter, to review or alter their first determination. Throop, Pub. Off. §§ 552, 553; Multnomah County School Dist. v. Lambert, 28 Or. 209, 42 Pac. 224; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Brown v. Otoe County, 6 Neb. 116; State ex rel. Clark v. Buffalo County, 6 Neb. 454; People ex rel. Hotchkiss v. Broome County, 65 N. Y. 227; Babcock v. Goodrich, 47 Cal. 513; Onondaga v. Briggs, 2 Denio, 26; Jermaine v. Waggener, 1 Hill, 279; Woolsey v. Tompkins, 23 Wend. 324; Beall v. State, 9 Ga. 367; Thomas v. Churchill, 84 Me. 446, 24 Atl. 899; People ex rel. Chase v. Wemple, 144 N. Y. 478, 39 N. E. 398; Northern Trust Co. v. Snyder, 113 Wis. 516, 90 Am. St. Rep. 867, 89 N. W. 464;

Orange County Law Library v. Orange County, 99 Cal. 571, 34 Pac. 244; Richards v. Low, 38 Misc. 500, 77 N. Y. Supp. 1102; Keenan v. Harkins, 82 Miss. 709, 35 So. 177; Osterhoudt v. Rigney, 98 N. Y. 234; People ex rel. Williams v. Reid, 11 Colo. 138, 17 Pac. 302; Clarke County v. State, 61 Ind. 75; State ex rel. Hymer v. Nelson, 21 Neb. 572, 32 N. W. 589; Burke v. Perry, 26 Neb. 414, 42 N. W. 401; 7 Enc. Law, 1008, note; Hanna v. Putnam County, 29 Ind. 170; Hall v. Holden, 116 Mass. 172; New Orleans v. St. Louis Church, 11 La. Ann. 244; Northampton County's Appeal, 57 Pa. 452; Western Sav. Fund Soc. v. Philadelphia, 31 Pa. 175, 72 Am. Dec. 730; Flournoy v. Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Mechem Pub. Off. § 637.

The recording of a deed is prima facie evidence of delivery to and acceptance by the grantee. 13 Cyc. 567; Ellis v. Clark, 39 Fla. 714, 23 So. 410; Stallings v. Newton, 110 Ga. 875, 36 S. E. 227; Neel v. Neel, 65 Kan. 858, 69 Pac. 162; Kelsa v. Graves, 64 Kan. 777, 68 Pac. 607; Holmes v. McDonald, 119 Mich. 563, 75 Am. St. Rep. 430, 78 N. W. 647.

Andrew Miller, Attorney General, *C. L. Young,* and *Alfred Zuger,* Assistant Attorneys General, for respondents.

An offer and an unequivocal acceptance of a dedication are necessary to make it complete. 9 Am. & Eng. Enc. Law, 43; 13 Cyc. 461; State v. Trask, 6 Vt. 355, 27 Am. Dec. 563; State v. Bradbury, 40 Me. 154; Jordan v. Otis, 37 Barb. 50; Rhodes v. Brightwood, 145 Ind. 27, 43 N. E. 942; Elliott, Roads & Streets, § 114, 2d ed.; 9 Am. & Eng. Enc. Law, 21; Flack v. Green Island, 122 N. Y. 107, 25 N. E. 267; Livingston v. Livingston, 29 Neb. 167, 45 N. W. 233; Ingram v. Colgan, 106 Cal. 113, 28 L.R.A. 187, 46 Am. St. Rep. 221, 38 Pac. 315, 39 Pac. 437; Re Campbell, 7 Pa. 100, 47 Am. Dec. 503; Gray v. Nelson, 77 Iowa, 63, 41 N. W. 566; Scott v. Berkshire County Sav. Bank, 140 Mass. 157, 2 N. E. 925; 14 Am. & Eng. Enc. Law, 1027; Brown v. Manning, 6 Ohio, 298, 27 Am. Dec. 255; Rutherford v. Taylor, 38 Mo. 319.

The title called for by the resolution was in effect one free from the lien of all burdens, charges, or encumbrances, and from palpable defects and grave doubts. 1 Warvelle Vend. & P. § 299; Roberts v. Bassett, 105 Mass. 409; Davidson v. Van Pelt, 15 Wis. 342; Jenkins

v. Fahey, 73 N. Y. 355; Smith v. Taylor, 82 Cal. 534, 23 Pac. 217; Horn v. Butler, 39 Minn. 515, 40 N. W. 833; Parker v. Porter, 11 Ill. App. 602; Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504.

BRUCE, J. (after stating the facts as above). The first point to be considered in this case is whether the plaintiffs complied with the resolution of May 24, and furnished to the board, not later than June 27, 1911, "abstracts of title showing the property to be free from encumbrances of any kind or nature." This question we are compelled to determine in the negative. The abstracts which were presented disclose, and, as far as we can learn, still disclose that blocks 2, 3, 4, 5, 6, and 7 of Warrendale Addition was a part of the S. W. ¼ of the N. W. ¼ of sec. 25, township 155, Range 83, and that on the 21st day of June, 1907, the owners thereof had caused the same to be surveyed and platted as Warrendale Addition to the city of Minot, North Dakota, and by a certificate of ownership and dedication executed and acknowledged on said day had conveyed to the public and for public use all the streets, avenues, and alleys so made, and said dedication had, insofar as the abstract revealed, never been revoked, canceled, or set aside, nor had said streets, avenues, or alleys ever been vacated. This fact was established both by the abstracts themselves and by the parol evidence. The abstract also showed that on the 5th day of August, 1909, the Great Northern Oil, Gas, & Pipe Line Company executed and acknowledged their mortgage for $26,000 to E. A. Parsons, R. A. Barron, and W. B. Parker, on all of its assets, schedule B of said assets covering certain unrecorded leases for oil and gas purposes on some of the lots included in said tract, and that said mortgage was unsatisfied and still of record on June 27, 1911. The abstract also disclosed that the title to the W. ½ of the N. W. ¼ of the S. W. ¼ and the N. ½ of the W. ½ of the S. W. ¼ of the S. W. of said sec. 25 was based upon the foreclosure of a certain mortgage, but failed to show upon said abstract a copy of the notice of foreclosure sale, affidavit of publication, or any memorandum relating to such notice or affidavit, nor any copy or memorandum of any decree of foreclosure in any action brought for such purpose. The abstract also disclosed a contract for deed of such premises executed by the Bank of Minot on the 21st day of April, 1903, to the North Dakota Title, Insurance, & Trust Company, and a contract

executed by the said North Dakota Title, Insurance & Trust Company to convey the said premises to one A. S. Drake as trustee, and another agreement by which the Guaranty Company of North Dakota and the North Dakota Title, Insurance, & Trust Company agreed to sell and convey said premises, with other lands, to one E. H. Mears.

These abstracts, disclosing the facts such as we have mentioned, can hardly be said to have been merchantable abstracts, or to have shown the property to be "free from encumbrances of any kind or nature." The resolution called for what is commonly called a marketable title, and such was not furnished. 1 Warvelle, Vendors, § 299; Roberts v. Bassett, 105 Mass. 409; Davidson v. Van Pelt, 15 Wis. 341; Jenkins v. Fahey, 73 N. Y. 355; Smith v. Taylor, 82 Cal. 534, 23 Pac. 217; Horn v. Butler, 39 Minn. 515, 40 N. W. 833; Parker v. Porter, 11 Ill. App. 602; Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504.

It may be that on the trial many of these defects were cured by the production of deeds, quitclaims, certificates, etc. The question to be determined, however, was not what was the actual condition of the title at the time the abstracts were furnished, nor what was the condition of the title at the time of the trial, but what was the condition of the title as disclosed by the abstracts on June 27, 1911. Horn v. Butler, 39 Minn. 515, 40 N. W. 833; Parker v. Porter, 11 Ill. App. 602; Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504; Smith v. Taylor, 82 Cal. 534, 23 Pac. 217. There is no pretense, however, of showing that even on the trial the defect which was undoubtedly created by the dedication of the streets had been remedied, and that such dedication was a defect is beyond controversy. 2 Warvelle, Vendors, 972; Barlow v. McKinley, 24 Iowa, 69; Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Turner v. Reynolds, 81 Cal. 214, 22 Pac. 546; Koshland v. Spring, 116 Cal. 689, 48 Pac. 58; Maupin, Marketable Title, 2d ed. p. 775, and note, 16. That the abstract was not general merchantable is also further established by the following authorities: Clark v. Fisher, 54 Kan. 403, 38 Pac. 493; Fritz v. Pusey, 31 Minn. 368, 18 N. W. 94; Edwards v. Clark, 83 Mich. 246, 10 L.R.A. 659, 47 N. W. 112; Roberts v. McFadden, 32 Tex. Civ. App. 47, 74 S. W. 105; Stambaugh v. Smith, 23 Ohio St. 584, 15 Mor. Min. Rep. 82; Spurr v. Andrew, 6 Allen, 420; Clark v. Zeigler, 79 Ala. 346; Gates v. Parmly, 93 Wis. 294, 66 N. W.

253, 67 N. W. 739; Maupin, Maretable Title, pp. 728, 786. Shriver v. Shriver, 86 N. Y. 575; 1 Warvelle, Vendors, § 229.

Nor is there anything in the proposition advanced by the plaintiff Youngman, that a binding contract had been made with the board, and that the board could not afterwards rescind it. A donation by the owner is merely an offer, and, until the municipality or board accepts it, it cannot be bound. Littler v. Lincoln, 106 Ill. 353. Proof of an acceptance is necessary. 9 Am. & Eng. Enc. Law, 43; 13 Cyc. 461; State v. Trask, 6 Vt. 355, 27 Am. Dec. 563; State v. Bradbury, 40 Me. 154; Jordan v. Otis, 37 Barb. 50; Rhodes v. Brightwood, 145 Ind. 21, 27, 43 N. E. 942; Elliott, Roads & Streets, § 114; 9 Am. & Eng. Enc. Law, 2d ed. 21; Flack v. Green Island, 122 N. Y. 107, 25 N. E. 267; Gray v. Nelson, 77 Iowa, 63, 41 N. W. 566; Scott v. Berkshire County Sav. Bank, 140 Mass. 157, 2 N. E. 925. The gift or dedication was never really accepted. In place of an acceptance a counter proposition was made, to the effect that the site would be accepted provided that, within the time specified, the terms of the resolution in regard to the abstract, etc., was complied with. Sec. 5306, Revised Codes of 1905; Page, Contr. § 46; Corcoran v. White, 117 Ill. 118, 57 Am. Rep. 858, 7 N. E. 525; 9 Am. & Eng. Enc. Law, 51. The plaintiff has not shown that he met the requirements of this conditional acceptance or counter proposition. Page, Contr. § 39; Stinson v. Dousman, 20 How. 461, 15 L. ed. 966; Page, Contr. § 1159; Vorwerk v. Nolte, — Cal. —, 24 Pac. 840; Slater v. Emerson, 19 How. 224, 15 L. ed. 626.

Nor do we consider that the delivery of a deed to the trustee, Jacobson, amounted to anything. He was not authorized to accept it or to waive the conditions of the resolution. Nor, in the absence of any acceptance, did the mere fact of its being recorded amount to anything. Parmelee v. Simpson, 5 Wall. 81, 18 L. ed. 542; Samson v. Thornton, 3 Met. 275, 37 Am. Dec. 135; Welch v. Sackett, 12 Wis. 253; 1 Devlin, Deeds, § 290; Hawkes v. Pike, 105 Mass. 560, 563, 7 Am. Rep. 554.

Another reason why the judgment of the trial court must be affirmed is that the plaintiff Grow, prior to the hearing in the supreme court, dismissed his appeal, and the case comes before us on the appeal of F. W. Youngman, alone. We do not see that Youngman has any interest in the controversy at all, which this court or the trial court should have protected. The record shows that all of the property in controversy

belonged to the plaintiff, C. A. Grow, except the part described as being in the Warrendale Addition, and that that part did not belong to the plaintiff Youngman, but to one C. P. Olsen. It is true that the complaint discloses that F. W. Youngman had some speculative interest in the controversy on account of having the contract for the sale of adjacent lots, and by having aided in perfecting the title to the land in controversy, but we find no privity or mutuality of contract between him and the defendant board which would entitle him to maintain an action of specific performance or the injunction proceedings before us. 4 Pom. Eq. Jur. § 1341.

High, Inj. § 1109-a.

The judgment of the District Court is affirmed.

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

JOHN LESLIE PAPER COMPANY v. WHEELER.

(42 L.R.A.(N.S.) 292, 137 N. W. 412.)

Bankruptcy — discharge of bankrupt — such discharge does not affect vested liens.

1. A discharge in bankruptcy leaves intact all liens except those specially stricken down by the bankruptcy act, the effect of a discharge being to release the personal liability only. Such discharge does not affect vested liens upon property acquired more than four months prior to the proceedings in bankruptcy, and the same may be enforced after a discharge is granted.

Bankruptcy — discharge of bankrupt — cancelation and satisfaction of judgment.

2. Chapter 125, Session Laws 1905, construed and *held* that the legislative intent in the enactment thereof was merely to authorize the cancelation and

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Note.—In harmony with the above case, it has been almost universally held, as shown by the note thereto as reported in 42 L.R.A.(N.S.) 292, that real property liens existing for a proper length of time before the adjudication in bankruptcy are not affected by a discharge in such proceeding.

On the question whether or not a judgment on an antecedent debt constitutes a lien on property to which exemption law has attached in the meantime, see note in 37 L.R.A.(N.S.) 156.

satisfaction of record of such judgments only as are affected by the discharge in bankruptcy. The legislative purpose was merely to give record notice that judgments extinguished by the bankruptcy proceedings no longer have any vitality to attach as liens to real estate subsequently acquired.

Homestead — real estate not subject to judgments — process.

3. Whether the lots described were and are defendant's homestead, and therefore not subject to the lien of plaintiff's judgment, must be determined in an appropriate action, and not on motion by affidavits.

Opinion filed June 28, 1912.

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

From an order directing the cancelation of a judgment against defendant and owned by plaintiff, the latter appeals.

Reversed.

W. J. Mayer, of Grand Forks, for appellant.

No appearance by respondent.

FISK, J. This is an appeal from an order of the district court of Grand Forks county entered September 7, 1910, directing the cancelation and satisfaction of record of the judgment hereafter referred to. Respondent makes no appearance and has filed no brief.

Appellant's statement of facts is, we think, a fair and correct statement. It is as follows:

"On the 5th day of December, 1902, George A. Wheeler, Sr., died leaving a will by which he bequeathed lots 8, 9, 10, and 11 of Westerman's & Sheehan's Ad. to the city of Grand Forks, county of Grand Forks, state of North Dakota, to his wife, Ellen M. Wheeler, for life, remainder to George A. Wheeler, Jr., the defendant in this action.

"On the 4th day of June, 1908, plaintiff recovered a judgment in the above-entitled action against the said George A. Wheeler, Jr., for the sum of $348.44, which judgment was duly entered and docketed on that day, and, until the time of the making and entry of the order from which this appeal is taken, remained of record and undischarged; during all of this period Ellen M. Wheeler resided upon said lots.

"On the 18th day of February, 1909, respondent was adjudged a bankrupt, and on the 21st day of May, 1909, was discharged from all

debts provable in bankruptcy which existed on the 19th day of February, 1909.

"In June, 1910, defendant made a motion in the district court of Grand Forks county in the original action brought by appellant as hereinbefore referred to, to vacate and set aside the judgment therein, resting his claim to such relief upon chapter 125 of the Laws of 1905.

"This motion was resisted by the plaintiff, who appeared, and by affidavit set up the facts as hereinbefore stated.

"An issue was also raised by the affidavits offered by respective parties as to the value of the land, it appearing from appellant's affidavit that the land was worth in excess of $5,000 and by the affidavits of respondent that it was worth less than that amount.

"It also appears from the affidavit offered by appellant that Ellen M. Wheeler, owner of the life estate, was entitled to the possession under the will when the judgment was docketed, while from the affidavits of respondent it might be understood that respondent was in joint possession with her at that time, with her permission, under some kind of an agreement which does not clearly appear."

Appellant makes the following contents in its printed brief:

"1st. That chapter 125 of the Laws of 1905 was never intended to enlarge the relief granted by the Federal bankruptcy statute, but was simply intended to provide a means to show by the court records what has already been accomplished.

"2d. That the question as to whether or not appellant has a lien upon specific real property of the respondent by virtue of its judgment is not a proper question to be litigated upon affidavits.

"3d. That even though it were conceded to be proper for the court to try an issue of this kind upon affidavits, the court must find as a matter of law that a lien existed upon respondent's vested remainder in the several lots described, by virtue of the judgment at the time the proceedings to vacate were instituted."

We are agreed that the first two contentions are sound, and that the order appealed from must be reversed, and will briefly give our reasons therefor.

We take it to be well settled that a discharge in bankruptcy leaves intact all liens except those specially stricken down by the bankruptcy act. As stated in 2 Loveland on Bankruptcy 4th ed. § 749: "The

effect of a discharge is to release the personal liability only. It does not affect liens upon his property. If they are valid, under the laws of the state and bankrupt act, they may be enforced after a discharge is granted. Thus a judgment which has become a valid lien on property will continue to be so, . . . but if the judgment is merely a personal liability it is released by a discharge." Among the numerous authorities cited in the foregoing section are Paxton v. Scott, 66 Neb. 385, 92 N. W. 611, 10 Am. Bankr. Rep. 80; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 58 L.R.A. 770, 88 N. W. 703; Woods v. Klein, 223 Pa. 256, 72 Atl. 523.

In the first case cited it is, among other things, said: "The effect of the discharge is personal to the bankrupt, and it does not affect any lawful lien, charge, or encumbrance existing on his property, but judgment may be specially entered thereon in rem. . . . The bankruptcy law was carefully designed to save all liens against property from being affected by the discharge, and its terms seem ample for that purpose."

In Woods v. Klein, supra, it was said: "No provision of the bankrupt act contemplates that a valid lien, acquired more than four months before the filing of a petition in bankruptcy, shall be vacated by the bankruptcy proceedings, or that the enforcement of such a lien by execution shall constitute an illegal preference. Owen v. Brown, 57 C. C. A. 180, 120 Fed. 812. There is a clear distinction between the bald creation of a lien within the four months and the enforcement of one previously acquired. Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306. The lien that is invalidated by the bankrupt act is one created by a levy, judgment, attachment, or otherwise, within four months. Where the lien is obtained more than four months prior to the institution of the bankruptcy proceedings, it is not only not to be deemed null and void on an adjudication of bankruptcy, but its validity is recognized."

If the foregoing authorities are sound, and we think they are, it follows that, if the judgment in question was a lien upon any real property of respondent, that such lien is in no way affected by the discharge in bankruptcy, and appellant is entitled to enforce such lien in so far as the proceedings in bankruptcy court are concerned.

But the learned trial court, in making the order complained of, no doubt construed chapter 125, Session Laws of 1905, as authorizing the

cancelation of such judgment. In this we think there was error. As we construe said chapter the legislative intent merely was to authorize the cancelation and satisfaction of record of such judgments only as are affected by the discharge in bankruptcy. It is true that the language of such statute, if literally construed, would support the trial court's interpretation. Sec. 1 of such act provides: "Any person discharged by his debts pursuant to the act of Congress known as 'An Act to Establish a Uniform System of Bankruptcy throughout the United States,' approved July 1, 1898 [30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418] may, at any time, after obtaining such discharge in bankruptcy, file in the office of the clerk of any court of record in which a judgment shall have been rendered, or a transcript thereof filed against him, a certified copy of such discharge in bankruptcy, and may make application to the judge of such court for a discharge of such judgment from record; and, if it shall appear to the court that the applicant has thus been discharged from the payment of such judgment, the court may order and direct that such judgment be discharged and satisfied of record; and, when such order is filed in the office of the clerk of such court, the said clerk shall immediately enter a satisfaction of such judgment upon his records; provided, however, that no such application shall be made, or order granted, except upon thirty days' notice to the judgment creditor whose judgment is sought thereby to be satisfied of record, or his executors, administrators, or assigns, served in the manner provided for the service of notices in civil actions; or, in case such judgment creditor or his executors, administrators, or assigns shall not reside within the state of North Dakota, in such manner as the court shall provide by order; provided, further, that nothing in this act shall be construed to apply to judgments not listed among the liabilities of the bankrupt in his petition in bankruptcy under said act of Congress." But we are agreed that the legislative intent, in enacting such statute, was merely to give record notice that judgments extinguished by the bankruptcy proceedings no longer have the vitality to attach as liens to real estate subsequently acquired. Any other construction would convict the legislature of an attempt to destroy vested rights in property without providing for compensation, for it must be conceded that if such judgment was a lien on any real property of respondent, such lien created a vested right in appellant.

That such judgment was a lien upon respondent's interest in the lots described is, we think, apparent, unless said property, at the date the judgment was docketed and since, constituted respondent's homestead, and therefore was exempt from judgment liens.

Sec. 7082, Revised Codes of 1905, provides that the docketing of a judgment in the district court creates a lien on all the real property, except the homestead, in the county where the same is so docketed, of every person against whom any such judgment shall be rendered. Respondent, through his father's will, was vested with a title to these lots, subject to a life estate in his mother. Such interest created in respondent a vested remainder, constituting him the owner of real property within the meaning of § 7082, supra, and the judgment attached as a lien thereon unless, as before stated, the same constituted his homestead. Revised Codes 1905, §§ 4769, 4725, and 4729; 17 Am. & Eng. Enc. Law, 2d ed. 783, and cases cited.

Whether respondent could base his homestead right upon such vested remainder we need not here determine, for the obvious reason that the homestead character of real property cannot be determined on affidavits. But see 21 Cyc. 503, and cases cited. Appellant is clearly entitled to have such question tested and determined by an action in court. His remedy is pointed out in the recent case of Klemmens v. First Nat. Bank, 22 N. D. 304, 133 N. W. 1044.

The order appealed from is reversed, and the District Court is directed to reinstate such judgment.

UNION NAT. BANK of Grand Forks v. RYAN.

(137 N. W. 449.)

Limitations of action — action on judgment — will be supported against judgment debtor after lapse of ten years.

1. Under § 6796, Revised Codes of 1905, the absence of the judgment debtor from this state tolls the statute of limitations found at § 6786, Revised Codes of 1905, and the judgment, though dormant, so far as it relates to liens and for the purposes of execution, is not dead, and will support an action against the judgment debtor after ten years have elapsed.

Judgment — action on judgment — judgment creditor must pursue remedies provided by statute.

2. Secs. 7083–4, Revised Codes of 1905, did not repeal § 6796, Revised Codes of 1905, but provided for a concurrent remedy. The judgment creditor may renew his judgment by either affidavit or by action if he pursue the remedies provided by said sections.

Opinion filed June 28, 1912.

Appeal by defendant from a judgment of the District Court for Pembina County; *Burr,* J., in plaintiff's favor in an action for the renewal of a domestic money judgment held by plaintiff against defendant.

Affirmed.

Guy C. H. Corliss, for appellant.

After ten years the judgment is absolutely extinguished for all purposes. Merchants Nat. Bank v. Braithwaite, 7 N. D. 358, 66 Am. St. Rep. 653, 75 N. W. 244; Lamberton v. Grant, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127; Berkley v. Tootle, 163 Mo. 584, 85 Am. St. Rep. 592, 63 S. W. 681; St. Louis Type Foundry Co. v. Jackson, 128 Mo. 119, 30 S. W. 521; Dempsey v. Oswego Twp. 2 C. C. A. 110, 4 U. S. App. 416, 51 Fed. 97; Gaines v. Grunewald, 102 Minn. 245, 113 N. W. 450; Brown v. Dooley, 95 Minn. 146, 103 N. W. 894; Davis v. Munie, 235 Ill. 620, 85 N. E. 943; Smalley v. Bowling, 64 Kan. 818, 68 Pac. 630; Beadles v. Fry, 15 Okla. 428, 2 L.R.A.(N.S.) 855, 82 Pac. 1041.

The time shall continue to run so long as the plaintiff can fully protect his rights, and therefore, if he can fully protect his rights despite the absence of the defendant from the state, the statute will run on despite such absence. Smalley v. Bowling, 64 Kan. 818, 68 Pac. 630; McFarland v. Cornwell, 151 N. C. 428, 66 S. E. 454; Holt v. Hopkins, 63 Misc. 537, 117 N. Y. Supp. 177; St. Paul v. Chicago, M. & St. P. R. Co. 45 Minn. 387, 48 N. W. 21; Burleigh v. Hecht, 22 S. D. 301, 117 N. W. 367; Penley v. Waterhouse, 1 Iowa, 498; Dent v. Jones, 50 Miss. 265; Rhodes v. Farish, 16 Mo. App. 430; Bensley v. Haeberle, 20 Mo. App. 648; Gray v. Fifield, 59 N. H. 131; Omaha & F. Land & T. Co. v. Parker, 33 Neb. 775, 51 N. W. 139; Hunton v. Nichols, 55 Tex. 217.

H. B. Spiller, for respondent.

The statute did not run while defendant was absent from and residing out of the state, and therefore the action on the judgment is not barred by the statute of limitations. Stern v. Bates, 9 N. M. 286, 50 Pac. 325; Shelden v. Barlow, 108 Mich. 375, 66 N. W. 338; Newlove v. Pennock, 123 Mich. 260, 82 N. W. 54; Seymour v. Deming, 9 Cush. 527; Craig v. Anderson, 96 Ky. 425, 29 S. W. 311; Brittain v. Lankford, 110 Ky. 484, 61 S. W. 1000; McArthur v. Goddin, 12 Bush, 274.

BURKE, J. This action is for the renewal of a domestic judgment for money, held by plaintiff against defendant, who has been absent from the state during the ten-year period of limitations. If the time of his absence be counted, the judgment has been barred by the terms of § 6786, Revised Codes of 1905. If, however, his absence be considered as tolling the statute of limitations, as provided in § 6796, the old judgment is sufficient as a basis for this suit.

Many other states have similar statutes, and their courts have frequently passed thereon, but we can find no state having identical laws with ours. As it is obviously a matter of statutory construction, we get less than the usual help from similar decisions of sister states. The portions of our statutes applicable follow:

"Section 6785. The following actions must be commenced within the periods set forth in the following five sections after the cause of action has accrued:

"Section 6786. Ten years; within ten years. 1. An action upon a judgment or decree of any court of the United States or of any state or territory within the United States. . . ." (The other four sections are not material).

"Section 6796. If, when the cause of action shall accrue against any person, he shall be out of the state, such action may be commenced, within the terms herein respectively limited, after the return of such person into the state; and if after such cause of action shall have accrued such person shall depart from and reside out of this state, and remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action; provided, however,

that the provisions of this section shall not apply to the foreclosure of real estate mortgages by action or otherwise. . . . ."

Sections 7083-4 and 5 provide that the judgment creditor may make and file an affidavit stating the ownership, amount due, counterclaims, if any, and other information regarding his judgment, and, upon filing such affidavit with the clerk of the district court within ninety days of the expiration of the ten-year time of limitations, have a new judgment equal in all respects to the old, which new judgment would run for another period of ten years. This section was passed in 1901, and makes no effort to repeal any other section of the Code.

Section 6768 forbids the bringing of an action upon any judgment within nine years after its rendition, without leave of court, "for good cause shown and upon notice to the adverse party." Ch. 192, S. L. 1911, is a re-enactment of § 6796, making no change in this case so far as claimed by counsel.

1. We will consider first the general law of tolling the statute of limitations. By reference to § 6796 we find that it refers to the preceding five sections. Those sections relate to judgments, ten years; contracts, etc., six years; actions against sheriffs for forfeiture, etc., three years; slander, libel, etc., two years; against sheriff for escape of prisoner, one year, and it relates to all of them. Not only does the statute refer to them all, but it immediately follows them in the Code. And, further, the said § 6796 points out its own exceptions, to wit, actions upon mortgage foreclosures by action or otherwise, and actions against trustees acting under the town-site laws of the United States and this state. Had the legislature desired to except domestic judgments from the provisions of § 6796, the exception would probably have been noted with real estate mortgages in the section itself. And still, again, it stands the test of reason that the legislature did not desire to extend the protection of our statute of limitations to nonresidents. When we look for precedent, we find the great weight of authority to be in favor of the tolling of the statute while the judgment debtor is out of the state. In fact only two states have been called to our attention wherein the rule seems to be otherwise, and those are hardly authority upon our statutes. Minnesota has the same, or similar tolling statute, but differs regarding the life of a judgment. The Minnesota statute, § 277, chap. 66, Gen. Stat. 1878, declares that a money judgment "shall survive ten year,

and no longer." It is upon this clause that the Minnesota decisions have turned. Brown v. Dooley, 95 Minn. 146, 103 N. W. 894, wherein Judge Lovely says: "It is impossible to avoid the conclusion which follows from this clear and explicit language. It will admit of no other construction than that a judgment becomes legally dead . . . after the time prescribed." See also Lamberton v. Grant, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127, which is a decision of the supreme court of Maine following the Minnesota courts in construing a Minnesota judgment. A very fine digest of the Minnesota decisions up to 1901 is there contained. It is only fair to say that the case of Gaines v. Grunewald, 102 Minn. 245, 113 N. W. 450, uses language that intimates that it might be held that even under our statute they would hold the judgment dead at the end of ten years, but said case was upon a foreign judgment; to wit, an Iowa judgment made the basis of a suit after the judgment debtor had removed to Minnesota, and thus not exactly in point. The Minnesota cases are, therefore, hardly authority in this state. Kansas is the other state we referred to as being a holder with the minority rule. The courts of that state for many years have held a judgment dead after ten years, and so hold that it will not survive even though the debtor were absent from the state. The Federal courts recognize this as the Kansas rule as to the courts of Missouri; but in the last decision in Kansas itself (Smalley v. Bowling, 64 Kan. 819, 68 Pac. 630), a very strong inclination was shown to break away from the precedent established, and three of the seven judges dissent upon following longer the rule, while the writer of the opinion intimates that nothing but the fact that the decisions had become a rule of property in the state kept him from holding that the absence of the judgment debtor tolled the statute of limitations.

As against those two states we have Massachusetts (Seymour v. Deming, 9 Cush. 527), Kentucky (Brittain v. Lankford, 110 Ky. 484, 61 S. W. 1000), Michigan (Newlove v. Pennock, 123 Mich. 260, 82 N. W. 54; Shelden v. Barlow, 108 Mich. 375, 66 N. W. 338), Missouri, New Mexico, Ohio, and Nebraska. Appellant cites us to the case of Merchants' Nat. Bank v. Braithwaite, 7 N. D. 358, 66 Am. St. Rep. 653, 75 N. W. 244, wherein the court inadvertently said that a judgment was dead after ten years. However, such was mere *dictum* in said case, and this court has several times since been obliged to apologize

for that unfortunate opinion. See Osborne v. Lindstrom, 9 N. D. 1, 46 L.R.A. 715, 81 Am. St. Rep. 516, 81 N. W. 72, wherein Judge Bartholomew says that the court takes the first opportunity to correct the Braithwaite opinion, says that much of the same was not carefully considered, and "uses language . . . that needs qualification, and some that needs disapproval." See also Adams & F. Co. v. Kenoyer, 17 N. D. 302, 16 L.R.A.(N.S.) 681, 116 N. W. 98, wherein the discredited Braithwaite Case is discussed again. In the case of Weisbecker v. Cahn, 14 N. D. 390, 104 N. W. 315, this court uses *dictum* as follows: "The absence of the judgment debtor from the state is conceded by the respondent to stop the running of the statute of limitations upon the judgment, and that § 5210, Revised Codes 1899, providing that the time during which a person is absent from the state after a cause of action shall have accrued against him, the time of his absence, if for one year or more, shall not be deemed or taken as any part of the time limited for the commencement of an action . . . arising on judgments."

Upon reason and weight of authority then, we must hold that the absence of the defendant in this case has tolled the statute of limitations unless §§ 7083 and 7084 can be said to have repealed § 6796 so far as it relates to judgments. This will be taken up next.

2. Whether or not §§ 7083, 7084 act as a repeal of that part of § 6796 depends, of course, upon the legislative intent. Sections 7083, 7084 were passed in 1901 while the other statutes were in full effect. No mention was made of any repeal of the earlier section, and the 1901 statute does not even include the common clause repealing all acts or parts of acts inconsistent therewith. We must take it that the legislature had no thought of repealing any part of the tolling statute, and that if we are to hold that it has been repealed it must be on account of some inconsistency in the two remedies. We are unable to discover any. Of course it may be easier to renew a judgment by affidavit, but it by no means follows that the old judgment may not be made the basis of a new suit, and many cases arise where it is an advantage to be able to bring suit, instead of renewing by affidavit. The case at bar being an example.

It is our conclusion that the two remedies are not inconsistent, and that a judgment creditor may either sue upon his judgment or renew it

by affidavit, if he complies with the respective laws. It follows that the judgment of the trial court was correct, and is accordingly affirmed.

HARRIS v. JONES.

(136 N. W. 1080.)

Principal and surety — remedies of surety — action for contribution will not lie.

1. Defendant was requested by one T. to become his surety upon a negotiable promissory note. He declined until T. should obtain plaintiff to sign first. This information was conveyed to plaintiff who signed as surety, and thereupon defendant also signed as a surety. Later, and after judgment upon the note, plaintiff paid the note, and brings this suit for contribution. *Held*, that while plaintiff and defendant were cosureties as to the payee of the note, yet as between themselves such relation did not exist, but that defendant was a surety for both T. and the plaintiff, and plaintiff was a principal as to defendant.

Therefore an action for contribution will not lie. This principle is supported by the great weight of the common law, and has been enacted into the statute law of this state with the new negotiable instrument law. See §§ 6366 and 6370, Revised Codes 1905.

Evidence — negotiable paper — principal and surety — liability of indorsers.

2. Indorsers of negotiable paper, as respects one another, are prima facie liable in the order in which they indorse, but evidence is admissible to show that each has agreed to be liable for the principal debtor alone, and therefore that all indorsers are cosureties; but in the case at bar plaintiff has failed to show any such agreement, and on the contrary what evidence was offered tended to show that plaintiff and defendant both understood that the liability of plaintiff should be for T. alone, and the liability of defendant should be for T. and plaintiff.

Opinion filed June 29, 1912.

Appeal by defendant from a judgment of the District Court for Richland County; *Allen*, J., in plaintiff's favor in an action for contribution.

Reversed.

Note.—For the right of one surety to enforce contribution from another, and the remedies for its enforcement, see notes in 10 Am. St. Rep. 639, and 70 Am. St. Rep. 450.

McCumber & Forbes, of Wahpeton, and *Martin Scramstad,* of Wyndmere, for appellant.

Wolfe & Schneller, of Wahpeton, for respondent.

BURKE, J. In the spring of 1906, one Carl Tronsgard, a druggist of this state, was indebted to Boyes Brothers and Cutler, wholesalers, in the sum of $805.11. Being pressed for payment, he applied to Jones, the cashier of the local bank, to indorse a note for that amount, due in one year, and thus secure a year's extension upon his debt. Jones replied that, owing to his position in the bank, and his bonds, he could not assume the risk, unless he had security; and, to use Jones's own words, "it happened that Tronsgard asked me to sign a note with him for about $800,—because of the business I was in—in the bank—it was unlawful, that is, it wouldn't be safe to do it, I told him on account of my personal bonds, unless I had some security to protect me. I says, if you get your brother-in-law, Harris, to sign that first, so there would be no risk on my part, I would sign, and he said he would go and see him, and he brought back the note with his name on it, and I signed it." That Tronsgard related to Harris the substance of the conversation had with Jones is apparent from the testimony of Harris himself, wherein he says in answer to a question: "Q. And didn't Tronsgard say that he first went to Jones to get him to sign the note, but that he wouldn't sign the note until you first signed it? A. Yes." And again he was asked: "Q. But, however, he did say that Martin Jones had said he wouldn't sign until you had signed? A. Yes, sir." And still again he was asked: "Q. What was the talk you had with Tronsgard about your signing that note, and Martin Jones signing it? A. He says Martin would sign, if I did. Q. Martin would sign if you signed it first? A. Yes, sir." That this was the understanding of both Harris and Jones further appears from the correspondence between these two persons written before the lawsuit was begun. At all events the note was signed by Tronsgard as maker, and indorsed upon the back first by Harris and next by Jones. Two others signed their names later, but their rights are not in litigation herein. When the note became due it was not paid and was reduced to judgment, and an execution placed in the hands of the sheriff. When a threat of levy was made to Harris he paid and caused to be satisfied of record the judgment, and took in his

own name two notes from Tronsgard and his wife, for the amount of the debt, which notes fell due in about six months' time. After the maturity of said notes, Harris sued Jones for contribution as a cosurety, under § 6110, Revised Codes of 1905, alleging that the Tronsgards and the other sureties were insolvent. The case is before us for trial *de novo*.

1. The first question arising is the relation of Jones to Harris. Counsel for both sides seem to act upon the assumption that they were cosureties for all purposes, and the trial court naturally followed them. This relation existed, of course, between them, for the view point of the payee of the note, Boyes Brothers and Cutler, but when we come to consider the matter from the standpoint of Jones and Harris a very different relationship exists. Jones had refused to extend his name as a surety for Tronsgard alone. He told Tronsgard that he would not sign. That Tronsgard told this to Harris there can be no doubt. Harris admits that Tronsgard told him that Jones would not sign the note until he, Harris, had signed it first. It thus appears, that Jones was a surety upon the note for both Tronsgard and Harris, only bound to pay if neither of the others paid it. Of course, he could not assert this defense in a suit by the payee of the note, but that is not before us.

The first time this doctrine was announced, so far as we are able to learn, was in the case of Craythorne v. Swinburne, 14 Ves. Jr. 160, 9 Revised Rep. 264, 21 Eng. Rul. Cas. 636. The facts in that case being almost identical with these. It was therein announced that while the several persons signing their names as indorsers upon the back of a promissory note were liable to each other in the order in which they had signed, because the presumption was that each signer obligated himself upon the strength of all of the names before his, yet it might be shown by parol that all of the signers were in fact sureties for the original debtor alone, and consequently cosureties with each other and liable to contribution. This principle was followed with very few dissents for nearly a hundred years, many of the cases being confused with the question of the liability towards the payee of the note, but upon the simple question of the liability as between the cosureties being practically unanimous. To those wishing a full list of these decisions, we refer to 7 Cyc. pages 664 to 673. Thus stood the law when the various states, including North Dakota, adopted the negotiable in-

strument law, §§ 6303 to 6498, Revised Codes 1905. Section 6366, in particular, seems to have been intended by the framers of said law to give expression to the well-settled law upon that subject. It reads: "When a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as an indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties" (subdivisions 2 and 3 not being in point). Section 6370 reads: "As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally."

2. From the established law, therefore, of our state, it appears that, prima facie, at least, Harris was liable to Jones for the full debt, in case Jones paid it, and liable to pay it himself in full without right of contribution from any subsequent indorser. Of course he might show by evidence, parol or written, that such was not the true understanding, but that Jones meant to be bound for Tronsgard alone the same as did Harris, but this burden is upon Harris. The evidence already quoted shows that Harris offered no such evidence, but on the contrary the evidence received at the trial showed the very opposite, to wit, that Jones refused to be bound for Tronsgard alone.

That this is the proper construction of the negotiable instrument law is supported by the following named cases, arising upon a similar state of facts and based upon the same statute:

Mercantile Bank v. Busby, 120 Tenn. 652, 113 S. W. 390; Haddock v. Haddock, 192 N. Y. 499, 85 N. E. 682, 19 L.R.A.(N.S.) 136 (valuable note by editor); Citizens' Nat. Bank v. Burch, 145 N. C. 316, 59 S. E. 71; Wilson v. Hendee, 74 N. J. L. 640, 66 Atl. 413; 7 Cyc. 673 (F) and cases cited, note 84 to the same found in the Cyc. annotations.

Harris and Jones not being cosureties upon the note in question, no cause of action existed in favor of Harris. The trial court is directed to change the judgment of the lower court to conform to this opinion.

LONG v. AMERICAN SURETY COMPANY.

(137 N. W. 41.)

Principal and surety — faithful performance of subcontractor — breach — contract — measure of damages.

1. In an action upon a surety bond given to a contractor to secure the faithful performance of a subcontract, and where knowledge of the principal contract can be imputed to the surety, the measure of damages may be the difference between the price agreed to be paid to the principal contractor and the price agreed by him to be paid to the subcontractor, or the profits of the contract. Such surety company may also be held liable for any cost or damage or charge which he may incur by reason of the breach of his own contract with his principal which is brought about by the default of the subcontractor. Such liability, however, must be definitely proved, and a mere possible and problematical liability cannot be made the basis of a recovery.

Drains — ditches — subcontractor — contract — bond — breach — damages.

2. Where a contract was made with a subcontractor for the construction of a portion of the drainage ditch, and such contractor default, and after the default and the failure of the principal contractor to perform his contract with a board of drainage commissioners, on account thereof, the board of commissioners, after such default and before the trial of an action brought by the contractor on the bond of his subcontractor, entered upon and completed the ditch, and there was no evidence that the cost of completion to them exceeded the price agreed by them to be paid to the principal contractor, no damages can be recovered by the said contractor against the surety company on account of a possible liability on his part to the drainage commissioners, and the possibility that the cost of completion by them was greater than the contract price.

On Rehearing.

Principal and surety — breach of bond — release of surety.

3. Where, in such case, the bond provides that a portion of the contract price shall be retained by the principal contractor until the whole of the work is completed, a failure to retain such portion will release the surety.

Principal and surety — bond — default — notice.

4. Where the bond requires notice "of any default in any of the terms, covenants, and conditions of the contract" to be given to the surety company within a specified time, an abandonment of the work before the time of completion will constitute such a default, and notice must be given thereof and within the time prescribed.

Principal and surety — surety company — terms and conditions of bond.

5. Where a surety company is paid a premium for issuing its bond, it will usually be treated rather as an insurer than according to the strict law of suretyship. This rule, however, does not exempt the beneficiary from living up to the terms of his own agreement, and the provisions of such bond are not to be construed strictly for or against either party, but reasonably as to both.

Opinion filed April 24, 1912. On rehearing, June 29, 1912.

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

Action upon a surety bond to recover damages caused by the alleged breach of subcontract to perform work. Verdict and judgment for plaintiff. Defendant appeals.

Reversed.

This is an action on a bond and against the defendant surety company to recover damages for the breach of a subcontract to excavate a portion of a drainage ditch. The principal contract was made on October 3, 1906, between the plaintiff, Long, and the tri-county drainage board of Ransom, Sargent, and Richland counties, and an extension thereof was made on April 6, 1908. The subcontract for the faithful performance of which this bond was given, was made between Long and the subcontractor, Chas. C. Gentry, on May 12, 1908, and the bond sued upon was executed by the defendant on August 6, 1908, Gentry has defaulted under his contract, and the plaintiff sues on the bond to recover damages for his loss.

The principal contract of October 3, 1906, fixed the price to be paid Long by the commissioners, at 17 cents per cubic yard. The subcontract of May 12, 1908, fixed the price to be paid Gentry by Long at 13½ cents per cubic yard. The so-called extension agreement of April 6, 1908, reduced the price to be paid Long from 17 to 15 cents per cubic yard, but provided "that if the said C. A. Long shall comply with all the conditions herein contained, and within the times herein mentioned, time being declared as the essence of this contract, the parties of the first part agree to pay to C. A. Long, as a bonus, an additional 1½ cents per cubic yard for contract excavation upon completion of said drain." The extension agreement provided that the drain should

be completed by January 1, 1909, and the same provision was contained in the subcontract between Long and Gentry. Both the principal contract and the subcontract contained the provision that "if the party of the second part fails to proceed with said work with reasonable diligence, the said party of the first part may enter upon the work and complete the same, holding said party of the second part liable for all costs and expenses in finishing said ditch, over and above the amount of the contract price hereinbefore referred to," while the extension agreement also contained the provision that "in the event the conditions herein are not complied with in the manner herein specified, and within the times herein specified, then, and in that event, this extension agreement and the original contract are declared forfeited and determined, and all rights to continue work under said original contract and this extension are ended." There is some question as to the validity of this so-called extension agreement, except in so far as its extension of time to January 1, 1909, was concerned. The obligation of the bond was that the principal should "faithfully perform said contract on his part according to the terms, covenants, and conditions thereof," and the contract referred to was the contract of May 12, 1908, between Long and said Gentry, and a copy of both the contract between Long and Gentry and the principal contract between Long and the drainage board, of October 3, 1906, was attached to the bond. There were also provisions in the bond "that, in the event of any default on the part of the principal in the performance of any of the terms, covenants, and conditions of said contract, written notice thereof, with a verified statement of the particular facts showing such default and the date thereof, shall within fifteen days after such default be delivered to the surety at its office in the city of Minneapolis; and in case of any such default, all moneys which, but for such default, would be due, or would thereafter become due to the principal, shall be held by the obligee and by him applied for indemnification of the surety. . . . The obligee shall retain not less than 15 per cent of the value of all work performed and materials furnished in the performance of such contract, until the complete performance by said principal of all the terms, covenants, and conditions thereof on said principal's part to be performed."

The defense of the surety company was that the plaintiff had failed and neglected to make payments to said Gentry as provided for in his

contract with him, and, having violated his contract in that behalf, could not insist upon its performance; that the plaintiff, after the default, had not entered upon and completed the work, and therefore could not recover any damages based thereon; that the plaintiff had failed to notify the defendant within fifteen days after the default; that the plaintiff had hindered and delayed Gentry in the performance of his work; that the plaintiff did not furnish Gentry with proper plans and profiles, and, from time to time, required Gentry to make alterations in the work not provided for in the contract. There was also a claim that the defendant made and executed the bond sued upon, relying upon the representations in the contract between the plaintiff and Gentry, and with the understanding that the contract to perform the work described in said contract had been made and was then existing by and between said plaintiff and the drainage commissioners, and that the terms and conditions of the contract between the drainage commissioners and the plaintiff had been adopted to apply to the performance of the work provided for in the contract between the plaintiff and Gentry; with the exception, however, that the time for the ultimate performance had been extended until January 1, 1909; that the contract between the board and the plaintiff had, without the knowledge or consent of the defendant, been modified to the extent of extending the time of the performance to January 1, 1909, and the price agreed to be paid to the said Long was changed from 17 cents per cubic yard to 15½ cents per yard, as a condition for said extension, said new contract being unknown to the defendant, and the defendant claiming that at the time it made and executed the bond it believed that the only contract for the performance of said bond was the original contract between the plaintiff and the board and the subcontract between the said plaintiff and Gentry; that notice and knowledge of said change was wilfully withheld from the defendant by plaintiff for the purpose of inducing him to make and deliver its bond, and that if the defendant had known of the change it would not have executed the bond. A recoupment was also pleaded on account of money alleged to be due and owing on account of the work from Long to Gentry. A verdict was rendered in favor of the plaintiff for $1,392.49, and interest at 7 per cent from January 1, 1909, and from a judgment based upon this verdict this appeal is taken. Prior to the entry of a judgment, a motion for a

judgment in favor of the defendant, and notwithstanding the verdict, was made and denied, as well as a motion for a new trial in the alternative. Prior to the verdict, also, the ordinary motions to dismiss and for a directed verdict was made and denied.

Wolfe & Schneller and *Kerr & Fowler,* for appellant.

When a contractor abandons a contract absolutely, he then and there commits a serious default,—such a default as puts the contract in jeopardy and imperils his surety. State ex rel. Broatch v. Moores, 52 Neb. 770, 73 N. W. 299; Burrill v. Crossman, 16 C. C. A. 381, 35 U. S. App. 608, 69 Fed. 752; 1600 Tons of Nitrate of Soda v. McLeod, 10 C. C. A. 115, 15 U. S. App. 369, 61 Fed. 851; Watson v. De Witt County, 19 Tex. Civ. App. 150, 46 S. W. 1061.

Written notice of any default is a condition precedent to recovery from the surety on the bond, and failure so to give notice entitled the surety to a dismissal of the suit against it, or a directed verdict in its favor. National Surety Co. v. Long, 60 C. C. A. 623, 125 Fed. 887; California Sav. Bank v. American Surety Co. 82 Fed. 866, 87 Fed. 118; United States Fidelity & G. Co. v. Rice, 78 C. C. A. 164, 148 Fed. 206; George A. Hormel v. American Bonding Co. 112 Minn. 288, 33 L.R.A.(N.S.) 513, 128 N. W. 12; Van Buren County v. American Surety Co. 137 Iowa, 490, 126 Am. St. Rep. 290, 115 N. W. 241; Frost, Guaranty Ins. 2d ed. pp. 535–540; Rice v. Fidelity & D. Co. 43 C. C. A. 270, 103 Fed. 427.

The provision of the contract giving Long the right to enter and complete the work cannot be ignored, as it was by the plaintiff in his offer of proof and in his actual proof. It secures a valuable right to the surety on Gentry's bond, of which it should not be deprived. American Surety Co. v. Woods, 45 C. C. A. 282, 105 Fed. 741; Hunt v. Oregon P. R. Co. 1 L.R.A. 842, 36 Fed. 481; Reichenbach v. Sage, 13 Wash. 364, 52 Am. St. Rep. 51, 43 Pac. 354; Texas & St. L. R. Co. v. Rush, 19 Fed. 239; Dermott v. Jones, 2 Wall. 1, 17 L. ed. 762; Public Schools v. Bennett, 27 N. J. L. 515, 72 Am. Dec. 373; 3 Am. & Eng. Enc. Law, § 900, and note; Warren v. Stoddart, 105 U. S. 224, 26 L. ed. 1117; Cunningham Iron Co. v. Warren Mfg. Co. 80 Fed. 878; Watson v. Kirby, 112 Ala. 436, 20 So. 624; 13 Cyc. 72, 73.

Plaintiff must allege in his complaint, and prove upon the trial,

the performance by himself of all conditions precedent to a recovery, or waiver thereof, or excuse for their nonperformance. And any material breach of such conditions serve to relieve the defendant surety company from liability under its bond. United States v. American Bonding & T. Co. 32 C. C. A. 420, 61 U. S. App. 584, 89 Fed. 925; Morgan County v. Branham, 57 Fed. 179; Simonson v. Grant, 36 Minn. 439, 31 N. W. 861; First Nat. Bank v. Fidelity & D. Co. 45 Ala. 335, 5 L.R.A.(N.S.) 418, 117 Am. St. Rep. 418, 40 So. 415, 8 Ann. Cas. 241; United States Fidelity & G. Co. v. Thaggard, 130 Ga. 701, 61 S. E. 726; Cowdery v. Hahn, 105 Wis. 455, 76 Am. St. Rep. 921, 81 N. W. 882; Backus v. Archer, 109 Mich. 666, 67 N. W. 913; Shelton v. American Surety Co. 66 C. C. A. 94, 131 Fed. 210; Welch v. Hubschmitt Bldg. & Woodworking Co. 61 N. J. L. 57, 38 Atl. 824; National Surety Co. v. Long, 79 Ark. 543, 96 S. W. 745, and on second appeal, 85 Ark. 158, 107 S. W. 384; Frost, Guaranty Ins. 2d ed. §§ 199–203–214; 1 Brandt, Suretyship & Guaranty, 3d ed. §§ 439, 440; 2 Brandt, Suretyship & Guaranty, 3d ed. §§ 748–755; 4 Enc. Pl. & Pr. p. 643; International Cement Co. v. Beifeld (Ill.), 50 N. E. 716; American Bonding & T. Co. v. Gibson County, 76 C. C. A. 155, 145 Fed. 871, 7 Ann. Cas. 522, 62 C. C. A. 397, 127 Fed. 671.

Purcell & Divet, George W. Freerks, and *P. L. Keating,* for respondent.

A contract to be performed *in futuro* is not to be considered as broken and the obligor thereunder in default until its time limit has passed; Stanford v. McGill, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938.

Plaintiff, upon breach of the subcontract, Exhibit F, had the duty to minimize damages in any way reasonably within his power, but there was no time or opportunity for him to minimize damages, and any action on his part was neither available nor possible. Davis v. Bronson, 2 N. D. 300, 16 L.R.A. 655, 33 Am. St. Rep. 791, 50 N. W. 836; Danforth v. Walker, 37 Vt. 239, 40 Vt. 257; Moline Scale Co. v. Beed, 52 Iowa, 307, 35 Am. Rep. 272, 3 N. W. 96; Nebraska v. Nebraska City Hydraulic Gaslight & Coke Co. 9 Neb. 339, 2 N. W. 870; Clark v. Marsiglia, 1 Denio, 317, 43 Am. Dec. 670; Butler v. Butler, 77 N. Y. 472, 33 Am. Rep. 648; Gibbons v. Bente, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 757; Stanford v. McGill, 6 N. D. 536,

38 L.R.A. 760, 72 N. W. 938; Southern Cotton Oil Co. v. Heflin, 39 C. C. A. 546, 99 Fed. 345; Peck v. Kansas City Metal Roofing & Corrugating Co. 96 Mo. App. 212, 70 S. W. 169.

BRUCE, J. (after stating the facts as above). Although there are many assignments of error in this case, they nearly all revolve around one question of damages, and a determination of that question is conclusive of most of them. The question of damages is presented by the defendant, and appellant's exception to the instruction of the court which peremptorily told the jury that the damages to be found by them if they found the issues for the plaintiff must be the sum of $1,392.49 and interest at 7 per cent per annum from January 1, 1909. This instruction was evidently based upon the assumption that the plaintiff was entitled to recover the difference between the 13½ cents which by the subcontract he had agreed to pay the subcontractor, Gentry, and the 17 cents which he was entitled to recover from the drainage board under the principal contract; and added to this, the court evidently allowed him to recover the sum of 35 cents per cubic yard for the estimated cost of the completion of the work, or 18 cents per cubic yard, the difference between the 17 cents provided for in the principal contract and the 35 cents per cubic yard which the witness, Baker, testified would be the cost of completing the work. The defendant insists that, on account of the fact that Long did not enter and complete the work, he is entitled to no damages for the cost of completion. He also insists, in the alternative, that even if the court should find that a personal entry and completion was not necessary to a recovery, the plaintiff cannot recover damages based on an assumed cost of completion which might be charged up to him by his principals, the drainage board, when it was within his power to positively prove the cost of such completion. He insists that plaintiff's damages should, at any rate, be confined to the loss of the profits on the principal contract, *i. e.*, to the difference between the amount agreed to be paid to him by the drainage board and the amount he agreed to pay to his subcontractor, and that against this sum may be set off the 20 per cent on the 59,840 yards, at 13½ cents per yard, removed by Gentry before the default, and which sum Long was entitled to withhold under the subcontract with Gentry until the completion of the work, and which the terms of

the bond required to be applied to the reduction of damages against the surety.

The rule is well established that where an obligator, under a collateral or subcontract, fails to perform his agreement within the stipulated time, knowing at the time that the obligee, depending upon such performance, must carry out his agreement with a third person within a certain time or be liable in damages therefor, and there is proof in the record that such obligee has been compelled to pay or account for such damages, such obligor will be liable to the obligee for the damages occurring through his default, as well as for the loss of the profits of the transaction. Such damages are deemed to have been within the contemplation of the parties. Shurter v. Butler, 43 Tex. Civ. App. 353, 93 S. W. 1084; Halstead Lumber Co. v. Sutton, 46 Kan. 192, 26 Pac. 444; Feland v. Berry, 130 Ky. 328, 113 S. W. 425; Sutton v. Wanamaker, 95 N. Y. Supp. 525; Illinois C. R. Co. v. Southern Seating & Cabinet Co. 104 Tenn. 568, 50 L.R.A. 729, 78 Am. St. Rep. 933, 58 S. W. 303; O. H. Perry Tie & Lumber Co. v. Reynolds, 100 Va. 264, 40 S. E. 919; Ledgerwood v. Bushnell, 128 Ill. App. 555; Murdock v. Jones, 3 App. Div. 221, 38 N. Y. Supp. 461; Modern Steel Structural Co. v. English Constr. Co. 129 Wis. 31, 108 N. W. 70. We are unable to find any authorities, however, and our attention has been called to none, which permit the recovery of damages based upon the cost of completion, where the obligee has not been compelled to pay the same, or actually incurred any liability therefor, and when the question as to whether he will incur them or not is a matter which is entirely problematical. Much less have we been able to find authorities which allow their recovery when the cost of completion is merely estimated and there is a positive and definite method of ascertaining their amount, which has not been taken advantage of. What the law aims at is to extend a fair measure of compensation for wrong sustained. What it desires is certainty, and what it most abhors is speculation and oppression. To allow the plaintiff to recover against the defendant for the 3½ cents' loss of profits on the principal contract, and in addition thereto for the 35 cents a yard estimated cost of completion, when he did not complete, and, as far as the evidence shows, was not required to complete by his principal, the drainage board, and when the drainage board itself completed the work, and there is no

evidence whatever that the cost to it of such completion exceeded the 17 cents per cubic yard agreed to be paid to the plaintiff under the principal contract, would be to open the door to speculation and in many cases allow a plaintiff to recover a greater profit on the breach of a subcontract than he would have recovered if his subcontractor had performed the same. This the law will not, and should not, tolerate. American Surety Co. v. Woods, 45 C. C. A. 282, 105 Fed. 741; Hunt v. Oregon P. R. Co. 1 L.R.A. 842, 36 Fed. 481.

It is true that the witness Baker testified that the cost to complete the ditch would have been 35 cents a cubic yard. This, however, was merely an estimate, and as the ditch was completed in the summer of 1909, and several months before the trial, there was a positive means of arriving at the cost. There, too, was no proof of any claim or demand of damages on the part of the drainage board, or that the cost of completion by them exceeded the cost of the original contract price. It is true that the bond required the action to be commenced by February 1, 1909 and that, although there is a serious question as to the validity of this provision, there is also a serious question as to whether the bond company could assert its invalidity. The case, however, did not come up for trial until January 1, 1910, and on the trial at least two of the drainage commissioners were present as witnesses, as well as the secretary of the board. The plaintiff could easily have proved, upon the trial, this question of the cost of completion. Instead of doing so, he relies upon speculative estimates. This is not a definite way of proving damages, and such as the law approves. The provisions in the contracts, also, that if the obligor in the contracts did not proceed with the work with reasonable diligence, the obligees might enter and complete the same, "holding the said obligors liable for all costs and expenses in finishing said ditch, over and above the amount of the contract price," were evidence, and in many courts have been held to be conclusive evidence, of an understanding that entry and completion by someone and at some time was a prerequisite to a recovery of damages, and was the agreed basis of the estimate thereof. Ibid.

The measure of damages under the evidence in the case at bar should have been the loss of the profits of the transaction, or the difference between the price per yard agreed to be paid by the board to the principal contractor, Long, and the price agreed to be paid by Long to the

subcontractor, Gentry, and against this the defendant was entitled to an offset of 20 per cent on the yardage removed by Gentry, at 13½ cents a yard, which the bond required should be reserved for the protection of the surety. This credit largely exceeds the loss sustained by the plaintiff, even if we estimate his damages at 3½ cents a yard profit, as provided for under the principal contract, or at 2 cents a yard as contended for by the defendant. We are of the opinion that the court erred not only in instructing the jury upon the question of damages, but also in denying the motion for a directed verdict, and in denying the motion for a judgment *non obstante veredicto.*

This view of the case makes it unnecessary for us to consider the other errors assigned by the appellant. The judgment of the district court is reversed and the case is remanded with directions to said court to enter judgment in favor of the defendant and against the plaintiff.

On Rehearing.

BRUCE, J. It is urged on motion for rehearing that this case should be sent back for a retrial, rather than that a judgment *non obstante veredicto* should be ordered. This should be done if it appears, "from the nature of the case and the circumstances connected with it, that there is no reasonable probability that upon another trial the defects in, or objections to, the proof . . . may be remedied." Meehan v. Great Northern R. Co. 13 N. D. 432, 441, 101 N. W. 183; Richmire v. Andrews & G. Elevator Co. 11 N. D. 453, 92 N. W. 819; Houghton Implement Co. v. Vavrosky, 15 N. D. 308, 109 N. W. 1024; Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614; Welch v. Northern P. R. Co. 14 N. D. 25, 103 N. W. 396. As far as the question of damages is concerned, we think it possible that the missing proof might be furnished, and if this were the only question in the case we would be inclined to order a new trial.

In addition to the reasons given in the principal opinion for ordering a judgment *non obstante veredicto,* there are, however, two others which, in themselves, appear to us to be conclusive, and which were not mentioned before, as the question of damages appeared to us to be the main and controlling feature of the case. These are furnished by

the fact that plaintiff himself undoubtedly defaulted in the terms of his contract with the surety company to such an extent as to release them from their liability. The bond required that "notice of any default in the performance of any of the terms, covenants, and conditions of said contract shall be given to the surety company." Though it is true that there was no specific covenant, term, or condition to proceed with the work with reasonable diligence, there certainly was a covenant and agreement to complete the work by January 1st, and to enter upon and proceed with the work in some manner. It seems to be undisputed that early in the month of November the subcontractor, Gentry, abandoned the work. It is true that he left, in the ditch, a subcontractor, Twitchell, but it is also clear, from the evidence, that this subcontractor had no authority from Gentry to complete the remainder of the work, except the particular job on which he was working, and that, in order to induce him to do so, a separate and new contract would have had to be made between him and Long. There was, therefore, to all intents and purposes, an abandonment of the work by Gentry, which occurred early in November, and within fifteen days of which no notice was given to the surety company as required by the terms of the bond. It is true that the contract was not required to be completed until January 1st, but surely a complete abandonment may be considered as a refusal to complete by such date. A distinction, indeed, must be made between an abandonment as a basis of a suit for a breach of a contract, and abandonment which would require a notice to the surety company. It is well established that provisions in bonds for notice to the surety are inserted for the protection of both parties, and to give the surety an opportunity for self-protection. "The object of requiring notice to be given of a contractor's default which may involve loss," said the supreme court of Minnesota in the case of George A. Hormal & Co. v. American Bonding Co. 112 Minn. 288, 33 L.R.A. (N.S.) 513, 128 N. W. 12, "was to enable the surety company seasonably to take such practicable action as might prevent or minimize the loss by reason of the default; and it is not to be strictly construed for or against either party, but reasonably as to both. So construing it, it is clear that the provision for immediate notice does not require notice to be given instantly upon learning of the default, but that it should be given within a reasonable time in view of all the circumstan-

ces." In that case the bond required that "immediate" notice should be given, and the court construed that word to mean within a reasonable time. The rule certainly should operate both ways, and a bond which required a notice of default should certainly be construed to require a notice of an abandonment, even though the time for the completion of the contract had not expired.

The other reason for ordering a judgment *non obstante veredicto* is even more conclusive. It is that plaintiff absolutely failed to either allege or prove compliance on his part with the terms and conditions of the bond. The bond required that "the obligee (Long) shall retain not less than 15 per cent of the value of all work performed and materials furnished in the performance of such contract until the complete performance by said principal of all the terms, covenants, and conditions thereof on said principal's part to be performed, and that the obligee shall faithfully perform all the terms, covenants, and conditions of said contract on the part of the said obligee to be performed." There is no pretense in the evidence that Long retained this 15 per cent, but it is candidly admitted that he paid the subcontractor, Gentry, in full for what work he had performed, so that when Gentry abandoned the work he lost nothing except the profits which he might have made by the completion of the remainder. If plaintiff's evidence as to the cost of completion is to be relied upon, there would have been no profits, but rather a loss, so that there was every incentive for Gentry to abandon the work. If, on the other hand, the balance required by the contract and the bond had been retained by Long, he might have hesitated in abandoning the job for fear of losing the amounts so reserved. That such payments in violation of the conditions of a bond will release the surety is abundantly sustained by the authorities. Simonson v. Grant, 36 Minn. 439, 31 N. E. 861; George A. Hormal & Co. v. American Bonding Co. 112 Minn. 288, 33 L.R.A.(N.S.) 513, 128 N. W. 12; Brandt, Suretyship, § 245; Leeds v. Dunn, 10 N. Y. 469; Farmers' & M. Bank v. Evans, 4 Barb. 487; Miller v. Stewart, 9 Wheat. 681, 6 L. ed. 190; Morgan County v. Branham, 57 Fed. 179; United States use of Heise, B. & Co. v. American Bonding & T. Co. 32 C. C. A. 420, 61 U. S. App. 584, 89 Fed. 925; First Nat. Bank v. Fidelity & D. Co. 145 Ala. 335, 5 L.R.A.(N.S.) 418, 117 Am. St. Rep. 45, 40 So. 415, 8 Ann. Cas. 241; International Cement Co.

v. Beifield, 173 Ill. 179, 50 N. E. 716; United States Fidelity & G. Co. v. Thaggard, 130 Ga. 701, 61 S. E. 726; Cowdery v. Hahn, 105 Wis. 455, 76 Am. St. Rep. 921, 81 N. W. 882; Backus v. Archer, 109 Mich. 666, 67 N. W. 913; Shelton v. American Surety Co. 66 C. C. A. 94, 131 Fed. 210; Welch v. Hubschmitt Bldg. & Woodworking Co. 61 N. J. L. 57, 38 Atl. 824; National Surety Co. v. Long, 79 Ark. 523, 96 S. W. 745, 107 S. W. 384; Bragg v. Shain, 49 Cal. 131; Taylor v. Jeter, 23 Mo. 244.

We are not unmindful of the fact that a paid surety or bonding company is treated rather as an insurer than as a surety. 32 Cyc. 303. Bank of Tarboro v. Fidelity & D. Co. 126 N. C. 320, 83 Am. St. Rep. 682, 35 S. E. 588, 128 N. C. 366, 83 Am. St. Rep. 682, 38 S. E. 908. This fact, however, does make it less obligatory on the part of the beneficiary to perform his part of the contract.

We have also examined the case of Stanford v. McGill, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938, and § 6105 and § 6092 of the Revised Codes, which have been called to our attention by counsel for respondent. As far as the case of Stanford v. McGill is concerned, we make a distinction between a state of facts which would justify the immediate bringing of an action, and one which would make it obligatory to give a warning notice to the surety. The sections of the Code referred to appear to have been construed adversely to the contention of the respondent in the case of the McCormick Harvesting Mach. Co. v. Rae, 9 N. D. 482, 84 N. W. 346, and seem to be hardly applicable to the case at bar.

The petition for rehearing is denied, and the order heretofore entered will stand.

NORTH DAKOTA LUMBER COMPANY v. HANEY et al.

(137 N. W. 411.)

Mechanics' lien — vendor's interests.

1. Upon the ordinary sale of land upon crop contract, where the title is reserved as security for the purchase price,—the vendor is in practically the

same position as though he had deeded the land to the vendee and taken back a mortgage for the purchase price. When the vendee, therefore, becomes liable upon a mechanics' lien against the land, the interest of the vendor is not subjected to the lien, unless it is shown that he acquiesced in the purchase.

Mechanics' lien — purchasers — vendor and vendee.

2. The purchaser of the legal title from the vendor, subject to the liens of record, takes the same title as had the vendor; that is, he takes the legal title, subject to the crop contract and the lien. He is in the same position as though he had purchased the mortgage mentioned in paragraph 1, and this interest is not subject to the lien.

Mechanics' lien — purchasers — title of land subject to liens of record.

3. Words in the said deed from the vendor to the third person, implying that the third person takes the land subject to "liens of record," relate to the contract between those parties only, and do not imply any promise upon which the lien holder can compel the third person so purchasing to assume the lien.

Mechanics' lien — purchasers — title of land subject to liens of record.

4. If, after such purchase by the third person, the vendee surrenders his crop contract to him, this later interest is subject to the lien, but the prior title, which we have seen is similar to a mortgage, does not merge in his final title so as to make the mechanics' lien a first lien upon the fee title to the land. The court will decree that the equity of the vendee be sold to satisfy the lien, but such lien will be inferior to the amount due upon the contract.

Opinion filed July 9, 1912.

Appeal by plaintiff from a judgment of the District Court, for Benson County; *Cowan,* J., in defendant's favor in an action brought to foreclose a mechanics' lien.

Stuart & Comstock, for appellant.

The land was purchased subsequently to the filing of the lien herein by Spaulding from Targeson, and he took it subject to plaintiff's lien. H. C. Behrens Lumber Co. v. Lager, 128 N. W. 698.

Buttz & Sinness, for respondent.

Plaintiff's lien attached to nothing but Haney's interest. Salzer Lumber Co. v. Claflin, 16 N. D. 601, 113 N. W. 1036; Johnson v. Soliday, 19 N. D. 463, 126 N. W. 99.

BURKE, J. There is no dispute regarding the facts in this case. Prior to 1906, one Targeson owned a tract of land in Benson county,

and in that year sold the same upon crop contract to the defendant Haney. Under this crop contract Haney was to take possession of the land, crop the same, and turn over each year upon the purchase price, one half of the crops. When the said payments amounted to the purchase price, Targeson agreed to issue a warranty deed. No part of the purchase price was paid at the time of making the contract, and the title, of course, was reserved in Targeson as security for the purchase price. While Haney was in such possession he purchased of the plaintiff and used upon a building upon the premises some $88 worth of lumber. It is not shown that Targeson had any knowledge of this purchase or agreed to pay therefor. The plaintiffs perfected a mechanics' lien against the land. The price that Haney agreed to pay was $2,225, but he never paid enough upon the purchase price to equal the interest, and in 1908 Targeson was preparing to cancel the contract. Haney at that time went to one Spalding and asked him to purchase Targeson's interest in the land and extend his (Haney's) contract one year. This Spalding did, taking a deed from Targeson containing this clause, "that the same are free from all encumbrances whatsoever, except such liens as appear of record against said land." It is also clear that Targeson was not to be held to pay such liens, but that Spalding took the land subject thereto,—so far as Targeson was concerned, Haney continued upon the land until 1910, Spalding recognizing his contract. At that time Haney was still in arrears more than the entire purchase price, and abandoned the land. The plaintiff company then started to foreclose their mechanics' lien by action, making Spalding and Haney defendants. The only legal dispute relates to the priority of the plaintiffs' lien. They insist that their lien should attach to the fee title of the land, and that they are prior to any claim of Spalding's. On the other hand Spalding insists that the lien of plaintiff only attached to the equity of Haney. This would leave the lumber company in the same position as Haney,—the owner of an equity only in the land, subject to the rights of Spalding to collect his purchase price.

This court, under similar facts, has repeatedly held that the vendee is the equitable owner of the land, while the vendor holds the legal title as security for his claim. In other words, the parties to this suit are in practically the same position as though Targeson had deeded the

land to Haney, taking back a mortgage for the purchase price, and had sold the mortgage to Spalding. See Nearing v. Coop, 6 N. D. 345, 70 N. W. 1044; Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856; Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623; Salzer Lumber Co. v. Claflin, 16 N. D. 601, 113 N. W. 1036; Johnson v. Soliday, 19 N. D. 463, 126 N. W. 99; the last two cases named being so nearly in point as to be almost decisive of this one.

With this principle in mind it is easy to decide that Spalding took the interest acquired from Targeson, which we have seen to be practically a mortgage, free from the lien of plaintiff. Later on Spalding acquired a further interest in the land upon the abandonment to him by Haney. This last-acquired interest, however, was taken subject to plaintiffs' lien. Upon acquiring the legal and equitable titles to the land, Spalding became the absolute owner, subject to the lien of plaintiff and other possible lien holders. The two titles did not merge so as to allow those liens to become a first lien upon the land. See May v. Cummings, 21 N. D. 281, 130 N. W. 826, and cases cited. The recital in the deed, to the effect that Spalding took the land subject to the liens of record, and his oral agreement with Targeson to the same effect, amount to nothing more than a release to T. of the recitals of a clear warranty, and show plainly that it was not an outright sale of the land, but rather a sale of the mortgage for the purchase price. It certainly does not amount to an agreement that Spalding would pay those liens to obtain a first lien upon his own land. So, also, was the agreement between Haney and Spalding to the same effect. The lumber company was no party to these agreements and in no position to urge a promise of Spalding to pay, if it be conceded that he so agreed.

The position of the parties seems to be this: Spalding has a mortgage lien for the amount due upon the Haney contract. Next he is the owner of two liens against Haney's equity bought by him; and then comes the lien of the plaintiff. After all these comes the interest of Spalding acquired from Haney when he surrendered his contract. If plaintiff wishes to enforce his lien in this order he may do so, and upon acquiring Haney's interest in the contract may redeem from Spalding by paying him the amount due upon the Haney contract and the two assigned liens.

This being the decision of the trial court, such decision is affirmed.

MANN v. REDMON, Administrator of Estate of Edward E. Redmon, Deceased.

(137 N. W. 478.)

Executors and administrators — claims against decedent's estate.

1. Section 8105, providing that if suit is not brought on a rejected claim against a decedent's estate within three months after rejection "the claim is forever barred," declares a statute of nonclaim.

Executors and administrators — claims against decedent's estate — limitations — waiver — nonclaim.

2. The provisions of this statute cannot be waived by an administrator by demurring to a complaint; and a demurrer cannot constitute or be construed as a waiver in law of the administrator's right to plead by answer such statute of nonclaim as a defense.

Executors and administrators — statutes of limitation — pleading — actions.

3. Section 6770, providing that the objection that the statutes of limitations have barred recovery on a debt can be taken only by answer, has no application to this statute of nonclaim.

Executors and administrators — actions — defenses.

4. It is the duty of an administrator to interpose a defense under said statute whenever available.

Demurrer overruled — amendment of answer —statute of nonclaim.

5. Demurrer to complaint ordered overruled, but with leave to defendant to plead by answer the defense of the statute of nonclaim.

Opinion filed July 18, 1912.

From an order of the District Court of Cass county, *Pollock*, J., striking out a demurrer and denying leave to plead by answer the statute of nonclaim, and awarding plaintiff judgment on default, defendant appeals.

Reversed and a new trial ordered.

Augustus Roberts and *S. G. Roberts*, of Fargo, and *Geo. W. Newton*, of Bismarck, attorneys for appellant.

Taylor Crum, of Fargo, for respondent.

Goss, J. Respondent's counsel has filed a motion to strike out appellant's brief and for judgment for his failure to folio the same.

He also asks that the amended abstract be stricken for omission of material parts of the record, and for failure to omit immaterial parts thereof, and moves the dismissal of the appeal because of delay in the transmission of the record. After notice of motion, respondent has endeavored to cure these defects by having his brief folioed, and has transmitted the record on appeal to this court. While appellant is not without criticism, the motion is denied and the merits passed upon.

The complaint purports to state an action for damages for breach of contract on the part of an administrator of an estate. The leasing of certain land to Edward E. Redmon, his subsequent death, the failure to fully perform the lease, and damages resulting therefrom, constitute the alleged cause of action. The complaint pleads the appointment and qualification of the administrator, notice given to creditors, the presentation of this claim for damages against the estate, within the period limited for presentation of claims, and its rejection by the administrator. The claim was overdue on October 25, 1910, when presented. The summons is dated February 11, 1911. The complaint is not dated, except that the verification thereto is concededly erroneously dated in 1910.

To the complaint, defendant interposed the following pleading: "The defendant herein demurs to the complaint of plaintiff herein on the ground that it appears, upon the face of said complaint, that the same does not state facts sufficient to constitute a cause of action in this, that the said action was not commenced within the time limited by statute; namely, §§ 8103 and 8105 of the Revised Codes of the state of North Dakota of 1905." Thereupon, and before said demurrer was ruled upon, respondent's counsel moved the court to strike out the demurrer "as sham and frivolous" and "for judgment for the plaintiff herein as by default, no answer to the complaint having been served upon or received by the undersigned as required by the summons or at all within thirty days after the service of the summons and complaint." The motion was noticed for the first day of a term. Not to be outdone in the matter of motions, defendant's counsel immediately countered with a motion noticed for hearing simultaneously with the plaintiff's motion, "that the plaintiff's complaint in said above entitled action be struck out and dismissed with costs in favor of defendant, and that judgment of dismissal of the action be entered ac-

cordingly with costs." Whether the motions were ruled upon does not appear, except that the court, at the close of a written opinion specifying reasons for its holding, ordered "that said demurrer being regarded by this court as irrelevant, the same is stricken out, and the defendant is permitted to file an answer within thirty days from this date on any issues other than that set forth in the demurrer, to wit, the question of the statute of limitations."

From such order this appeal taken.

Whether the ruling be considered as having been made upon the motion to strike the demurrer, as was evidently intended, or whether the motions were wholly disregarded, as they should have been, and the ruling made instead upon the demurrer, is immaterial, as the effect would have been the same in either event. The same is true as to the grounds of irrelevancy, recited in the order, but not included within the written motion made. The ruling was in effect upon the demurrer. Appellants challenge the order made thereon on the following grounds: (1) That the so-called demurrer is an answer, and as such pleads the statute of nonclaim barring claims against the estate for failure to bring suit on such rejected claim within the time provided by §§ 8103 and 8105, Revised Codes of 1905; (2) that the court erred in denying defendant the right to plead the defense that the statute of nonclaim bars plaintiff's recovery.

The learned trial judge gave this question much consideration, as is apparent from his memorandum opinion. He held that by demurring "defendant waived the question of the statute of limitations," and held that § 6770 applied, requiring the statute of limitations to be invoked by answer, and denied that right. Acting presumably under § 6862, providing that "sham and irrelevant answers and defenses may be stricken out on motion upon such terms as the courts may in their discretion impose," the demurrer was stricken out and the condition imposed that in the answer the statute of limitations should not be plead. The fundamental error of the court was the same as that of respondent's counsel on this appeal, in not distinguishing between the characteristics of a statute of nonclaim and a general statute of limitation of actions. If the doctrine announced in Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381, is applied, to the effect that "the statute of limitations cannot longer be regarded with disfavor by the

courts, and that as a defense it stands on a par with other legal and meritorious defenses," the ruling in any event would have been error. But the statute of nonclaim is not analogous to the statute of limitation of actions, but instead is mandatory in nature, absolutely barring not only the administrator and the probate judgment, but the court in which the litigation may be, from adjudging as valid a claim, formerly rejected by the administrator or county judge as invalid, whenever it shall appear by the pleadings or by the proof that the suit was not brought thereon within the period of three months, provided by § 8105, unless the time be extended by the provisions of § 8106. As is said in Fitzgerald v. First Nat. Bank, 64 Iowa, 260, 89 N. W. 813, it was the duty of the court "on its own motion to insist upon this defense where it was apparent the administrator has neglected it." Part 7, vol. 1 Church's New Probate Law & Practice. 1 Ross Probate Law & Procedure, §§ 339–349; Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470; Jones v. Powning, 25 Nev. 399, 60 Pac. 833; Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473; Clayton v. Dinwoodey, 33 Utah, 251, 93 Pac. 723, 14 Ann. Cas. 926; Union Sav. Bank v. Barrett, 132 Cal. 453, 64 Pac. 713, 1071; O'Keefe v. Foster, 5 Wyo. 343, 40 Pac. 527; Rockport v. Walden, 54 N. H. 167, 20 Am. Rep. 131; Pulliam v. Pulliam, 10 Fed. 53–74, 77; Miner v. Aylesworth, 18 Fed. 199. See title, Limitation of Actions, in 33 Century Dig. § 662; 12 Decen. Dig. § 175; and title, Executors and Administrators, 22 Century Dig. § 1755; and 9 Decen. Dig. § 225.

As to whether the demurrer will here invoke the statute of nonclaim, we hold it will not, because we must consider matter *dehors* the face of the complaint to enable us to determine the date of the commencement of this action. While authorities are found supporting the doctrine that the summons may be considered with the complaint to determine whether the action as brought is barred by a statute of limitations, the weight of authority is the other way. That it may be consulted, see Dielmann v. Citizens' Nat. Bank, 8 S. D. 263, 66 N. W. 311; Patterson v. Thompson (C. C.) 90 Fed. 647; Smith v. Day, 39 Or. 531, 64 Pac. 812, 65 Pac. 1055. But as sustaining our holding and announcing the weight of authority, see Smith v. Day, supra, overruling former contrary holding: Brooks v. Metropolitan L. Ins. Co. 70 N. J. L. 36, 56 Atl. 168; Columbia Sav. & L. Asso. v. Clause, 13

Wyo. 166, 78 Pac. 708, and authorities there collected, a case on all fours with the one at bar. The date of the commencement of the action not appearing from the face of the complaint, the demurrer should be overruled.

Respondent urges that the defendant was in default when the court struck out the so-called demurrer, and that the court, in its discretion, therefore had the right to deny defendant leave to answer and therein plead this statute of nonclaim. The answer to this contention is that under the foregoing authorities the court was obliged to allow the defense to be pleaded; and further, granting that discretion remained in the trial court as to permitting answer after its ruling made on the demurrer, the order striking it out amounting to the overruling of it, the very order appealed from shows an exercise of such discretion in defendant's favor. He was permitted to answer, but the right to plead this particular defense was denied him, and this was error. The court's discretion was exercised when it granted him time within which to plead and the permission to answer. With the right to plead granted he could assert any available defense to plaintiff's cause of action.

One other question needs brief mention. Respondent has plead that the administrator, upon whose official act the estate is sought to be held, was by the will of deceased "made his sole heir." In his brief he urges that this should suspend the application of the statute of nonclaim and allow suit to be maintained against the estate, even after the expiration of the statutory period, and urges that the administrator is not in this instance acting as a trustee, but as the sole heir he is acting for himself alone. We know of no authority for counsel's position. This is an action at law against an estate for damages. The estate is defendant, not the administrator individually. He is a trustee for the estate in which creditors may be interested for aught we know. Whether the estate in fact belongs to one heir or many, or will be consumed in paying creditors of deceased, as to whom the administrator must be a trustee, is not involved in this action, and is immaterial under the issues presented.

The action of the trial court in striking out the demurrer amounted to overruling it. That part of the order entered therein denying defendant the right to plead the statute of limitations by answer was error. The limitation declared by § 8105, and here invoked, is one

of nonclaim regulating the right of review by action of a claim previously declared invalid in a probate proceeding. Section 6770, requiring general statutes of limitation to be availed of by answer if at all, or otherwise be waived, has no application to this mandatory statute of nonclaim, the bar of which cannot be waived.

Accordingly, it is ordered that the order for judgment appealed from be vacated, and that the district court permit an answer to plaintiff's amended complaint to be served and filed; and that defendant be allowed to plead and thereafter defend on the ground of failure of plaintiff to commence action within the period prescribed by §§ 8105 and 8106, after rejection by the administrator of the claim sued on. Appellant will recover the costs on this appeal. It is so ordered.

STATE ON THE RELATION OF B. W. SHAW, Relator v. HARMON, as County Auditor of Morton County.

(137 N. W. 427.)

Sovereignty of state — writ of mandamus — private relator.

1. Where a question is *publici juris* and directly affects the sovereignty of the state or the franchise rights and prerogatives of its citizens, this court will issue its prerogative writ of mandamus on the relation of a private relator, although the attorney general refuses to make the application or to approve the same.

Elections — county auditors — instructions to election officers.

2. Section 621, Revised Codes 1905, requires each county auditor to cause to be printed and furnished to the various election officers cards containing full instructions to electors, etc.

Held, that where the statute relative to certain instructions is ambiguous, it is not a compliance with § 621 to print on such cards the mere language of the statute. Such instruction should be sufficiently explicit so as to fully inform the electors of the proper method of preparing their ballots.

Voters — second choice permissive — validity of votes.

3. Chapter 212, Laws 1911, is construed, and it is *held* that the provisions

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Note.—On the question who may be relators in mandamus proceeding in matter of public interest, see notes in 7 Am. St. Rep. 484, and 98 Am. St. Rep. 865. See also note in 105 Am. St. Rep. 122.

thereof relative to second choice voting are not mandatory, but merely permissive, and that under such act it is wholly optional with the voter whether he shall exercise such right, and a failure to vote for a second choice will not in any way affect the validity of his first choice vote.

Opinion filed July 24, 1912.

Application for a writ of mandamus to compel respondent as county auditor to show cause why a peremptory writ of mandamus should not issue commanding him to amend and correct the instruction cards required by law to be furnished by him to election officers.

Writ granted.

Palda, Aaker, & Greene, of Minot, and *B. W. Shaw,* of Mandam, for relator.

No appearance for respondent.

FISK, J. On the 15th day of June an order was issued by the chief justice requiring respondent, as county auditor of Morton county, to show cause before this court on June 20th, why a peremptory writ of mandamus should not issue commanding him to amend and correct the instruction cards required by law to be furnished by him to the election officers of the several precincts within his county, so as to contain, among other things, the following instruction: "Where there are three or more candidates for the same office, the voter may vote for both first and second choice, but that a failure to vote a second choice will not affect the validity of the ballot for that office."

On the return of such order to show cause there was no appearance on behalf of respondent. Prior to making such application to this court relator applied to the attorney general to approve the same, which he declined to do, but expressly disapproved such application. The question involved being one *publici juris,* wherein is directly involved the sovereignty of the state and its prerogatives and the franchise rights of its citizens, it is well settled that this court may, in the exercise of its original jurisdiction, issue the writ prayed for as a prerogative writ on the petition of a private relator, even though the attorney general refuses to make the application or to approve the same. State ex rel. McDonald v. Holmes, 16 N. D. 457, 114 N. W. 367. Relator is a candidate for nomination for the office of attorney general of the

state at the ensuing primary election, and he makes this application for himself and for all others similarly situated, and for and on behalf of all electors of the state, and his purpose, in brief, is to obtain from this court a construction of that portion of chapter 212, Session Laws of 1911, relating to the subject of first and second choice voting at primary elections, it being his contention: (1) That the provisions in said act relating to the form of ballots and which provides that "there shall be printed above the names of the candidates for such office the following: Vote for both first and second choice for this office, . . .," is not mandatory; (2) that a failure to vote for second choice does not invalidate the first choice vote for any office.

The attorney general, more than a month prior to his application, having given an official opinion contrary to relator's contention, which opinion has been generally published throughout the state, and there being grave doubts entertained as to whether second choice voting is made compulsory rather than permissive by said act, it is of vital importance to the electorate of the entire state that the question be settled by this court in advance of such primary election, to the end that there may be uniformity of voting, and also to avoid serious complications which might otherwise subsequently arise in counting and canvassing the votes and returns following such state-wide election. As stated by counsel for relator, it is not so important as to what the rule is as it is to have such rule settled in advance of the primary election.

Section 621, Revised Codes 1905, prescribes that "each county auditor shall cause to be printed on cards, in large type, full instructions to electors as to the manner of obtaining and preparing ballots, and also containing a copy of §§ 683, 684, 8614, and 8615. He shall furnish ten such cards to the judges of election in each election precinct, and the judges of election shall at the opening of the polls post at least one of such cards in each booth or compartment provided for the preparation of ballots, and at least three of such cards in and about the polling place," etc. Pursuant to this statutory mandate, respondent had prepared and was about to furnish such cards of instruction to the judges of election in the various precincts of Morton county, containing, among other things, the following: "When there are three or more candidates for the same office vote for both first and second choice, but do not vote for the same candidate for both first and sec-

ond choice." It will be observed that this language is similar to that employed in that portion of the act of 1911 relating to the form of ballot. We quote therefrom the portion to which we refer: "When there are three or more candidates for the same office for United States Senator or any congressional or state office, there shall be printed upon the ballot at the right of the name of each candidate for such office, a square in a column marked 'first choice' and at the right of the 'first choice' column a square in a column marked 'second choice.' There shall be printed above the names of the candidates for such office the following: Vote for both first and second choice for this office." This language is followed a little later on by a printed form of ballot in accordance therewith. If it is a sufficient compliance with the statute for the auditor to prepare such printed cards of instructions in the exact or substantial language of the state (§ 1, chap. 212, supra), prescribing the form of ballots, it would be unnecessary to require the furnishing of such cards at all. Section 621 aforesaid requires a card of "full instructions to electors as to the manner of . . . preparing ballots." Manifestly, in view of the uncertainty of the question, such instructions should be explicit upon the point as to whether it is compulsory upon the voter to express both a first and second choice for officers for which there are three or more candidates. What is here said is for the purpose of answering any contention which may be made that respondent ought not to be compelled by mandamus to set forth in such cards of instructions, anything in addition to the language employed in said statute. However this may be, the crucial question in the case is of such transcendent importance to the electorate of the entire state that a mere technical rule of practice ought not to be permitted to stand in the way of a decision of such question on the merits.

With these preliminary observations, we now proceed to construe chapter 212 in so far as it relates to first and second choice voting.

It is important to notice that this statute nowhere expressly and directly commands the voters to vote for both first and second choice, and unless it can legitimately be said that the legislature, by the indirect method of employing the language, "vote for both first and second choice," in prescribing the form of the official ballots, thereby intended to lay down a positive rule making it compulsory for each voter to express a second choice under the penalty of rendering his first

choice vote a nullity, we are forced to the conclusion that relator's construction of such statute is correct. We cannot believe that the legislature intended to make the voting for second choice compulsory. If such was the intent it could, and no doubt would, have been expressed in unmistakable language. The instruction to the voters directed to be printed on the ballots, "vote for both first and second choice, . . ." if intended to be mandatory and compulsory should have read, "you must vote for both first and second choice." Why should we read into the instruction language making it mandatory or compulsory, rather than language making it permissive and optional? Is it not more reasonable to suppose that the legislature intended this instruction to be interpreted as reading, "you may vote for both first and second choice," than that they intended it to be interpreted, "you must vote for both first and second choice," especially when the legislature has wholly failed in any portion of the statute to declare what shall be the result as to the first choice vote in case a second choice is not exercised? Is it not proper and reasonable to presume that the legislature would have in express language prescribed that the first choice votes should not be counted where there was no second choice vote, if such had been their intention? Section 648, Revised Codes 1905, being a part of the general election law and which is made applicable to primary elections by § 17, chapter 109, Laws of 1907, providing for primary elections, expressly provides the instances in which ballots shall be deemed void and the election officers directed not to count the same; and it seems but reasonable that the legislature would have laid down like rules in case of ballots containing only a first choice vote if it was the intent that such vote should not be counted.

But the history of our primary election law is quite conclusive in supporting the construction contended for by relator. At the time of the enactment of chapter 212 of the Laws of 1911, Washington was the only state, so far as we are aware, requiring compulsory second choice voting; the policy of the other states having primary election laws being to make second choice voting permissive and optional. In the state of Washington it is expressly made compulsory to vote both a first and second choice in certain instances. Section 18 of chapter 209, Laws of 1907 of Washington, being their primary election law, reads as follows: "In all cases where there are four or more candidates

of any political party for one state or congressional position, every elector voting at a primary election held under the terms of this act shall be required to designate one first choice and one second choice for each such position. No voter shall vote for the same person for first choice and second choice, and no voter shall, where there are four or more candidates for such nomination, vote for one person only, either as first or second choice, and no ballot so voted for one person only, for either first or second choice, or for the same person for both first and second choice, shall be considered a complete ballot, but any ballot under said conditions, failing to show both first and second choice of different persons, shall not be considered or counted, for that office."

In the light of this express legislative mandate there can, of course, be no question as to the effect of a failure to vote for second choice, and the case of State ex rel. Duryee v. Howell, 59 Wash. 634, 110 Pac. 543, and other cases decided by that court, can, of course, throw no light upon our statute, which radically differs from the Washington statute in this one respect. It is a significant fact and most persuasive to our minds, that our statute was borrowed from the state of Washington with their § 18, supra, omitted. This is made apparent from a comparison of the two statutes which are identical in many respects. This being true, the conclusion is irresistible that our legislature omitted § 18 of the Washington statute deliberately, and with the intention of not adopting that phase of the Washington law making second choice voting compulsory. No other intent is possible. But even were this not so, and if there were no side lights to aid us in the interpretation of our statute, we still would have no hesitancy in sustaining relator's contention. The most that can be said to the contrary is that the words, "vote for both first and second choice," are mandatory. Conceding, for the sake of argument, the correctness of this interpretation, it by no means follows that a failure to comply with such mandate would have the effect of nullifying the first choice vote. To so hold would be judicial legislation, for it would be reading into the statute something which is not there. When the legislature has studiously refrained from prescribing what the penalty shall be for disregarding such mandate, is it the function of the courts to do so? Most clearly not. The courts are not warranted in assuming, from the language employed, any such legislative intent. But we do not deem the

language in question as employed in the statute, mandatory in the absence of a provision, as in the state of Washington, expressly nullifying a first choice vote where a second choice is not expressed. Of course, as stated in 2 Lewis's Sutherland on Statutory Construction, § 709, "if the statute provides that ballots which fail to conform to certain requirements shall not be counted, the command is imperative," but the general rule, in the absence of such a specific statutory mandate, is that courts will in general so construe election laws as to prevent the disfranchisement of voters by reason of irregularities and omissions of officials, or by reason of a voter's failure to comply strictly with the law in preparing and marking his ballot. Ibid. This author in § 622 of his valuable work also says: "Statutes concerning the manner of conducting elections are directory unless the noncompliance is expressly declared to be fatal to the validity of the election, or will change or make doubtful the result. Provisions requiring ballots to be initialed by the judges of election, to be marked in ink, and to contain the name of the party or principle which the candidate represents, were held directory. But a provision that a ballot not conforming to certain requirements shall not be counted is mandatory." See authorities there cited. The decisions of this court in Miller v. Schallern, 8 N. D. 395, 79 N. D. 865; Lorin v. Seitz, 8 N. D. 404, 79 N. W. 869, and Howser v. Pepper, 8 N. D. 484, 79 N. W. 1018, in so far as this point was passed upon, were bottomed on the express statutory mandate contained in § 684, Revised Codes 1905, providing that any ballot not indorsed by the official stamp and initials shall be void and shall not be counted. The action in question, as we have above stated, contains no such provision with reference to ballots in which only a first choice vote is designated. See also Lankford v. Gebhart, 130 Mo. 621, 51 Am. St. Rep. 585, 32 S. W. 1127, where the court said: "When the statute requires that a ballot, on account of want of conformity to any particular provision of the law, shall not be counted, it is mandatory." It is noticeable that the act in question contains no negative words—an additional reason for inferring the legislative intent to have been that it should be held as merely directory and permissive, and not mandatory and working partial disfranchisement by such a forced construction of a statute of such indefinite and uncertain terms. The words of the act in question, "vote for first and second choice for this office," are not more in the form of a

command and therefore mandatory, than are the words, "vote for three" or "vote for four," which are found toward the end of the statutory ballot. If the former expression is to be construed as mandatory, the latter expressions should receive a like interpretation, yet, we believe, no one will contend that the latter expressions were intended to be other than permissive. The words we refer to are found opposite the offices of commissioners of railroads, justice of the peace, and constable, in the statutory form of ballot.

We are not unmindful of the fact that the supreme court of Idaho in the recent case of Adams v. Lansdon, 18 Idaho, 483, 110 Pac. 280, under a like statutory provision, reached the conclusion that such statute was mandatory, and that a failure to vote for second choice rendered the first choice vote a nullity. In giving his opinion, the attorney general, no doubt, relied on this case. We have carefully read the opinions in such case, and, with due respect for the judgment of that court, we are, for the foregoing reasons, forced to disagree with both the reasoning and conclusion of the court on this point. It is apparent that the construction placed on the Idaho statute by the court did not meet with favor by the people, for, within a few months after such decision was made, the legislature of Idaho amended the law so as to permit optional second choice voting. We held in the recent case of Fitzmaurice v. Willis, 20 N. D. 372, 127 N. W. 95, in an opinion by the present chief justice, that "negative words are generally held to be mandatory," and it was accordingly there held that the words, "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 . . .," were mandatory. But, as we have above stated, no negative words are employed in the act in question relative to first and second choice voting.

The writ will issue as prayed for.

SPALDING, Ch. J., and BRUCE, J., dissent.

BRUCE, J. (dissenting). I can see much force in the argument of the majority opinion in this case. I cannot, however, believe that it rightly construes the statute in question, or the legislative intent which lay behind it. It is to be remembered that, in determining such case, it is

not the intention or understanding of the author of the bill, or of the committee which proposed it, which we must seek to determine, but rather the intention of the legislative body as a whole, which voted upon and approved it. When a statute is taken from another state, the rule is well established that the presumption will be that the construction put by the courts of that state upon it will be followed in the state of its adoption. Our statute was either framed upon that of the state of Washington or that of the state of Idaho, perhaps upon both. It is more like the Idaho statute than that of Washington. The Idaho court construed the statute of that state to be mandatory as to second choice, and construed the words, "vote for first and second choice," as being imperative, not directory. It is true that a later legislature amended the form of the statute, and changed the words, "vote for first and second choice," to, "You may at your option vote for both first and second choice if there are more than twice as many candidates as there are positions." But this is an argument for, rather than against, the presumption that our statute should be construed to be mandatory until so amended. Our legislature, indeed, had before it the acts of both the Idaho and Washington legislature, which were held by the courts of those states to be mandatory, and in addition thereto the magazine articles of many years, all of which had insisted upon the democratic necessity of nomination by a majority vote. The opinion in chief is in error in regard to the passage of the amendment of the Idaho statute. That statute was not amended until after our own legislative session had adjourned. The same conclusion must follow from a consideration of the facts surrounding the Washington decision. At the time of the adoption of the North Dakota statute the Washington court held their statute to be mandatory. It is true, as suggested in the majority opinion, that there was a clause in that statute which also provided that if the voter did not vote for both first and second choice his ballot should be thrown out. The Washington court, however, in holding the words, "vote for both first and second choice," to be mandatory, and not directory, construed these words by themselves alone, and made no reference to, nor paid any attention whatever to, the other clause referred to.

"But if there were doubt as to the proper construction of other provisions of this act," the Washington court says in State ex rel. Duryee v. Howell, 59 Wash. 634–639, 110 Pac. 543, "that doubt is removed by the

form of ballot which the legislature has itself prescribed in § 4813. The form of ballot there given follows literally the provisions of the section preceding it. It first contains the names of candidates for representatives in Congress; next, the names of candidates for the several state offices, and next, the names of candidates for United States Senators. Above the names of candidates for representatives in Congress and state offices is a warning to the voter to vote for both first and second choice for these offices, while above the names of candidates for United States Senators is a warning to vote for one choice only. To remove any room for doubt, the names of four senatorial candidates are inserted, which would bring the ballot within the second choice provision of the statute if that provision had any application. To avoid the force of this provision the relator contends that legislative forms are only directory, and that a substantial compliance therewith satisfies the requirements of the law. As a rule this contention is sound, but we are not asked to uphold a form of ballot which substantially conforms to the requirements of the law. On the contrary, we are asked to compel a state officer to certify a form of ballot at variance with the form prescribed by the legislature itself. This we must decline to do."

The form of ballot prescribed in Washington was practically the same as ours. Above the names of the candidates were the words, "vote for both first and second choice for this office." The Washington court held that it could not instruct the auditors to prepare a ballot which was contrary to the form of the statute. The relator in this case has asked the court to instruct the auditors that the language of the statute and of the ballots which has been prescribed by the legislature does not mean what it says. See also State ex rel. Zent v. Nichols, 50 Wash. 508, 97 Pac. 728.

When the act in question was passed by the legislature, we must remember that the Idaho and the Washington decisions were in the books and before it. In the Idaho decision of Adams v. Lansdon, 18 Idaho, 483, 110 Pac. 280, the court, on page 492, said: "The language used in said § 14 in regard to voting for a second choice is as follows: 'Vote for both first and second choice if there are more than twice as many candidates as there are positions.' Said language is a command, and indicates a clear intention on the part of the legislature to require the voter as a condition on which he might exercise his first choice, that he

also express his wish as to a second choice in case of the contingency that no first choice selection be made. This is not an unreasonable regulation. In the same section we find the following command: 'Mark only your party ticket.' Is that language directory only? And, again, 'Do not vote for the same person for both first and second choice.' Can anyone reasonably imagine or contend that these provisions are merely directory and may be disregarded by the voter if he desires to disregard them? I think not. Can the voter, under said last-quoted provision, vote for the same person for both first and second choice, and legally insist that his vote be counted? It requires a peculiar temperament to seriously contend that said provisions are merely directory, to be followed or not at the mere whim or caprice of the voter? Those are commands conveyed directly to the voter by being printed at the top of each ballot, and he must obey them, or his vote will not be counted for any candidate where a second choice vote is required to be cast. If the legislature had not intended that candidates should be nominated by a majority vote if possible, they certainly would not have injected into said act the provisions for a second choice vote at all. The intention of the legislature which naturally results or is gathered from the context of the act, from the occasion and necessity of the law, from the mischief felt and the remedy in view, is too clear to be misunderstood. Said provision of the statute requiring the voter to vote for both first and second choice where there are more than two candidates for the same position or office is mandatory, and not unreasonable."

It is strange, indeed, that if our legislature did not intend that the words, "vote for both first and second choice," should be mandatory, that they should have adopted the Idaho statute as construed by the decision aforesaid and by the decision of the supreme court of Washington, when, by merely adding the words, "if you desire," or "at your option," they could have made the contrary intention perfectly plain.

Another reason for holding the statute to be mandatory is the history of the legislation, and the political and social thought which led up to it, and the evil which the legislation was intended to obviate. One cannot read the articles and addresses which for the last twenty years have appeared upon the subject in the reviews and magazines of America, without being impressed with the fact that what the proponents of the idea had in mind was a majority vote and the making it impossible for

any candidate to be nominated by less than a majority of his fellow citizens. Its purpose was to prevent "the possibility of a man representing the principles of only one fourth of the voting strength of the party being nominated as the candidate of the party, and in direct conflict with the view of three fourths of the voters of the party. It was the recognition of this principle that caused conventions to nominate by a majority vote of the delegates, instead of by plurality." Chas. K. Lush, in "An Essential Amendment to the Primary Election Law." "The present primary," the same author continues, "is in effect a convention in which every voter is a delegate, and in which the candidate receiving the most votes on the first ballot is the nominee. The remedy lies either in the adoption of the second choice amendment, or by return to the convention system. The present primary law is an absurdity because it applies to the plurality rule to what is, to all intents and purposes, a political convention." "The principal argument against the second choice provision," says Mr. Justice Fullerton in State ex rel. Zent v. Nichols, 50 Wash. 527, 97 Pac. 728, "is that it interferes with the freedom of election guaranteed by the Constitution, and compels the elector to vote for a person other than the candidate of his choice. This contention is untenable. The elector has the utmost freedom of choice in casting his first choice ballot, though his choice will not avail him unless at least 40 per cent of his party agree with him. It was entirely competent for the legislature to provide that a candidate receiving less than 40 per cent of his party vote should not be deemed its nominee, and with such provision in the law it was incumbent on the legislature to provide some other method of nomination whenever a candidate failed to receive the required vote at the primary. It might have provided a second primary, but a second primary would, perhaps, prove equally fruitless unless the number of candidates to be voted for were restricted. If the candidates to be voted for at the second primary were restricted to the two or three receiving the highest vote at the former primary, then all those who did not favor these particular candidates might complain, with equal justice, that they were compelled to vote for candidates other than those of their choice."

Again we find the following in the November, 1909, number of the Political Science Review: "Following our universal practice in regular elections, most of the direct primary laws provide for nomination by

a mere plurality, hence, when there are three, and especially when four or more candidates for nomination, the nominee is frequently chosen by a minority, even a small minority, in direct contravention of the fundamental principle of majority rule. This has given rise to what is generally recognized as a distinct problem in the actual workings of the direct primary system. Thus far only two methods of meeting this problem has been made by our statutes; the second ballot and the minimum percentage plan." We cannot, indeed, but come to the conclusion from reading the literature upon the subject, that it was nomination by majority that was sought to be aimed at. We are also equally as clear that, unless such statutes are construed to be mandatory, there is every opportunity for fraud, the very fraud which the second choice amendment was sought to obviate, and that, in most instances, there will be no second choice at all. The facts of the recent elections in all of the states, indeed, have shown that where the second choice has not been made mandatory, the privilege has not been generally taken advantage of. Each candidate has generally instructed his followers to vote for him and him alone, and not only has the very purpose of the statutes been nullified, but the candidates and voters who have conformed to the spirit of the law have been placed at a disadvantage.

We are cognizant of the fact that the law writers generally state that in the absence of a specific statutory mandate, "the courts will . . . so construe . . . [election] laws as to prevent the disfranchisement of voters by reason of irregularities and omissions of officials, or by reason of a failure of the voter to comply strictly with the law in preparing and marking his ballot." 2 Lewis's Sutherland, Stat. Constr. § 709. We know of no cases, however, where this rule has been applied, where the voters, by their failure or omissions, have nullified the whole purpose of the election laws under which they were acting. There is a wide difference between throwing out a ballot because it is not properly initialed by the judges of election, and throwing out a ballot because the statute has applied to the primary the majority rule of the convention (and after all a primary is merely a statutory political convention), and the voter has refused to abide by that rule. As we said before, the very purpose of the statute and of the second choice idea is to bring about majority nominations, and we are assured that the construction given by the majority of this court will defeat the very purpose for

which the law was enacted. We must take into consideration the evils which the statute sought to prevent, and which led to its enactment, and, in the light of said facts and of the contemporaneous history and decisions, pass upon the legislative intention. This court is not a legislature, nor is it a constitutional convention. It must seek to enforce the laws as they are, and to express the intention of the legislature at the time that it enacts statutes, and not its own ideas, or even a maturer judgment which has later influenced the legislators themselves.

SPALDING, Ch. J. I concur in above.

JULIA GAUSTAD v. CITY OF ENDERLIN.

(137 N. W. 613.)

Municipal corporations — injuries to abutting property — right of action — damages.

1. A claim for damages, based on injuries to abutting property occasioned by and during the construction of a street grade on the street adjacent to said property, is not such a claim as is enumerated in §§ 2703 and 2704, Revised Codes 1905, and on such a cause of action it is not necessary that the complaint show the filing with the city auditor of a claim for damages, with an abstract of the particulars thereof, mentioned in §§ 2703 and 2704.

Municipal corporations — injuries to abutting property — action against city —complaint.

2. Complaint examined and *held* not to state a cause of action.

Opinion filed August 17, 1912.

Note.—On the question of the necessity of written notice as to defect as condition of liability of municipal corporation for injuries due to the positive act of its officers or servants, see note in 23 L.R.A.(N.S.) 282. See also note in 103 Am. St. Rep. 280. And for statutes requiring presentation of claims against municipality, see note in 55 Am. St. Rep. 204.

As to the liability of a municipal corporation for damming back surface water by grading of streets, see notes in 29 L.R.A.(N.S.) 126, and 30 Am. St. Rep. 390. And upon the liability for injuries to adjacent property by grading streets, see note in 34 Am. St. Rep. 847.

Appeal from the District Court of Ransom county; *Allen*, J., from an order sustaining a demurrer to plaintiff's complaint.

Affirmed.

Curtis & Curtis, of Lisbon, for appellant.

C. G. Bengert, of Enderlin, for respondent.

Goss, J. The issues presented on this appeal arise on a demurrer to plaintiff's complaint. The complaint recites that the defendant is a municipal corporation; that plaintiff is the owner of certain property therein, consisting of two lots upon which "plaintiff had her residence, garden, lawn, well, trees, and other improvements, and where she lived and resided with her family. That during the summer and up to the 1st day of October, 1911, the defendant, the city of Enderlin, constructed, cut, kept up, and maintained a certain grade on the street in front of said premises, which grade or street was constructed or graded to a height of from 5 to 6 feet higher than the grade to plaintiff's said property, and causing a certain ditch on the side of the street next adjoining plaintiff's property; and in the construction of said grade threw up and maintained and kept embankments along the center of said street from 5 to 6 feet higher than the grade of plaintiff's property; and also constructed and kept up upon streets adjacent to the plaintiff's property several culverts and drains, by reason thereof the waters falling on the said adjacent property and on said grade were flown down and upon the property of the plaintiff, carrying mud, gravel, and *debris* thereon, overflowing, injuring, polluting, and making unwholesome the plaintiff's premises and destroying her trees, grass, and lawn, and occasioning great damage and loss in value of her property in the sum of $1,500." Then follows a demand for judgment "for the abatement of said ditch, culverts, and embankments, and for her damages in the sum of $1,500." To this complaint the city demurred on the grounds: (1) That said complaint does not state facts sufficient to constitute a cause of action; (2) that the court has no jurisdiction of the subject of the action, for the reason that the plaintiff fails to allege and plead the filing of a claim and abstract as provided in §§ 2703 and 2704 of the Revised Codes of 1905.

As the second ground of demurrer goes to the maintenance of the action, irrespective of the sufficiency of the complaint to state a cause

of action, we will treat the questions in inverse order and pass upon the necessity of the filing of a claim for damages and abstract of facts upon which the claim is based, under §§ 2703 and 2704, Revised Codes 1905.

The question is whether these provisions of the statute apply to an action for damages brought by an abutting property owner for consequential damage resulting from flowage of waters which are, because of the construction of a street on the change of a grade in a street, thrown or precipitated upon, together with mud and *debris,* the abutting property. Do the provisions of §§ 2703 and 2704 have reference to claims for damage so arising? From a casual reading of the statute, one might be lead to conclude that § 2704 in particular would cover claims of this kind and bar action against the city, unless, as therein provided, plaintiff "shall plead and prove the file of such claim and abstract," required in § 2703; but we are convinced to the contrary, and that these statutory provisions have no reference to such damages as are sought in this case.

The statute was drawn with reference to claims against cities for damages arising from travel thereon, or the use of the streets by the public for the purposes to which they are as public streets dedicated and generally used, and claims founded upon some breach of duty on the part of the municipality in failing to maintain its streets in a fit condition for such public use. The statute reads: "All claims against cities for damages or injuries alleged to have arisen from the defective, unsafe, dangerous, or obstructed condition of any street, crosswalk, sidewalk, culvert, or bridge of any city, or from the negligence of the city authorities in respect to any such street, crosswalk, sidewalk, culvert, or bridge, shall, within thirty days from the happening of such injury, be filed in the office of the city auditor, signed and properly verified by the claimant, describing the time, place, cause, and extent of the damages or injury, and the amount of damages claimed therefor," together with other provisions covering the case of inability of the complainant, because of injuries, to file such claim, and providing that then the time shall be extended, or that in case of death of the person injured the statement may be filed by any person having knowledge of the facts. Section 2704 provides: "No action shall be maintained against any city as aforesaid for injury to person or property, unless it appears that the claim for which the action was brought was filed in the office of the

city auditor as aforesaid, with an abstract of the facts out of which the cause of action arose, duly verified by the claimant, and that the city council did not, within sixty days thereafter, audit and allow the same; . . . and no action shall be maintained unless the plaintiff therein shall plead and prove the filing of such claim and abstract as hereinbefore provided." Section 2705 provides: "No action shall be maintained upon any claim mentioned in § 2703, unless the same shall be brought within six months after the filing of the claim therefor, in the office of the city auditor, as hereinbefore provided." For necessity, and particularly as to form of claim and when to be filed, consult Coleman v. Fargo, 8 N. D. 69, 76 N. W. 1051; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Johnson v. Fargo, 15 N. D. 525, 108 N. W. 243; Wells v. Lisbon, 21 N. D. 36, 128 N. W. 308. This legislation originated with chapter 31 of the Session Laws of 1893, in which, instead of § 2705, and the part of § 2704 requiring the pleading as a part of the complaint, the prior filing of such claim and abstract, there was contained in § 4 of said chapter the following: "It shall be a sufficient bar and answer to any action or proceeding in any court for the collection of any demand or claim, either for injury to person or property, that it had not been presented to the mayor and common council of such city in the manner herein described for audit and allowance within said sixty days as aforesaid." And § 1 of said act provided that the mayor and common council should constitute a board of audit for cities. It so remained until by the Session Laws of 1905 the law was changed to its present form, and § 2705, corresponding to § 4 of the act of 1893, was expressly limited in application to claims arising under § 2703. By amendment the act excluded "any demand or claim," and limited the application of the statute to those claims covered by § 2703 only. And from its terms § 2703 applies only to claims caused by a defective or obstructed condition of any street or crosswalk, culvert, or bridge, or from the negligence of the city authorities in respect thereto, arising because of or during its use as a street or sidewalk, or from its obstructed condition as a street or thoroughfare. This § 2703 has no reference to injuries to abutting property, because of the construction of the street or the obstructed condition of it or of obstructions in any culvert or bridge. Section 2704 in terms limits its provisions to those claims to be asserted under § 2703, by the words, "as aforesaid," in the first

sentence thereof: "No action shall be maintained against any city as aforesaid for injury to person or property" without the claim having prior thereto been filed. And again the succeeding section, 2705, limiting to six months after the filing of the claim the time within which suit on such claims must be brought, in explicit terms refers particularly and solely to § 2703. The entire act is harmonious when so construed. Besides, as an additional reason for such construction, we find the rule to be that a strict construction of such statutes is always adopted. We quote from 28 Cyc. 1450: "Such charter or statutory provisions, so far as the requirement of a notice or presentment as a condition precedent is concerned, are in derogation of common right, and should be strictly construed, and cannot be extended by implication beyond their own terms. . . . It has been held that the requirement of a prescribed notice of presentation does not apply where the injury is caused by a nuisance; nor to a suit in equity for relief from continued wrongful acts in the nature of a trespass, although there is also involved a demand for damages in the past; nor to injuries sustained by reason of a breach of municipal contract or repair, nor to injuries received in a city where the statute applies to towns only." For cases supporting our holding, see Pye v. Mankato, 38 Minn. 536, 38 N. W. 621; Maylone v. St. Paul, 40 Minn. 406, 42 N. W. 88; Ray v. St. Paul, 44 Minn. 340, 46 N. W. 676; Moran v. St. Paul, 54 Minn. 279, 56 N. W. 80; McIntee v. Middletown, 80 App. Div. 434, 81 N. Y. Supp. 124; Brown v. Salt Lake City, 33 Utah, 222, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 570, 14 Ann. Cas. 1004; Giuricevic v. Tacoma, 28 L.R.A.(N.S.) 523, and case note (57 Wash. 329, 106 Pac. 908). For a discussion of this subject and the various statutes, see 4 Dillon on Municipal Corporations, 5th ed. §§ 1613, 1614 and note, from page 2818 of which we quote: "Statutes imposing special limitation on claims against cities, or requiring notice of claims for injuries received from any defect, or want of repair, or obstruction of any street or highway, have in some cases been construed as applying only to causes of action growing out of defects in public ways as such, and with regard to their usefulness and safety for purposes of travel, and as having no application to claims arising from other causes, *e. g.*, from injuries or damages sustained in the construction of the street." Most, if not all, the states have similar statutes, their application to depend upon their terms. Some are broad

and cover all claims against municipalities; some are like ours, limited to claims arising from travel on streets from their defective condition. We are satisfied that the statute in question was not intended to have reference to actions such as this for consequential damages to abutting property arising from public improvements, but should be limited to claims clearly within its terms. This ground of demurrer is not well taken.

As to whether the complaint states a cause of action, we conclude that it does not, and that on this ground it is subject to demurrer. It charges the maintenance during the summer and up to October 1st of a certain grade on the street in front of plaintiff's premises, and the causing of a certain ditch on the side of the street adjoining plaintiff's property, and that in the construction of said grade certain embankments were thrown up, and that during said time certain culverts and drains were constructed and kept up upon streets "adjacent to plaintiff's property;" and that by reason thereof surface waters were caused to flow upon plaintiff's property to her damage described. It is to be noted all the damage is consequential only, and arises from the flowage of surface water, and upon this subject an irreconcilable conflict of authority exists; hence we refrain from any extended discussion of this question. The complaint, as we construe it, relates to matters wholly in the past, and to injuries that arose from the flowage of surface water during the construction of a street grade in front of plaintiff's property. It is not charged that defendant city collected surface water and discharged it in one or more places upon plaintiff's property, or diverted the natural flow of surface water to and upon plaintiff's property, or increased the natural flow of water thereon by any act complained of. It does not plead facts establishing a nuisance or from which a nuisance must be inferred. No unauthorized or negligent acts or omissions on the part of the city or its officers are charged, nor are facts plead from which the same can be inferred. The complaint is most indefinite as to wherein any liability to plaintiff arose. And the pleader is dealing with a matter in which distinctions are many and closely drawn between liability and nonliability of municipal corporations to abutting property owners while a municipality is constructing public improvements, to which is added the complicated question of liability of the city to the abutting property owners for temporary or occasional flowage of surface waters during

such construction. We conclude the complaint is so indefinite that it does not state facts sufficient to constitute a cause of action, and that on this ground the trial court properly sustained the demurrer.

The judgment of the trial court is affirmed, with costs. It is so ordered.

SPALDING, Ch. J. (concurring). I concur fully in that part of the foregoing opinion covered by the first paragraph of the syllabus, and concur in the holding that the complaint fails to state a cause of action. I, however, do not wish to be understood as having an opinion that the city might not be liable, if the facts were properly stated. In fact, I am of the opinion that a city is liable for damage done to property in the construction of public improvements like streets, or the raising of grades, and under any of many circumstances the turning of water on to property. And in this case it is altogether probable that a complaint stating the facts fully would state a cause of action. However, in the complaint before us we are left to conjecture or inference as to the facts and the grounds of plaintiff's injury, if any.

NICHOLS & SHEPARD COMPANY v. DALLIER et al.

(137 N. W. 570.)

Foreclosure — mortgages — evidence.

In an action in foreclosure, the sole defense urged is that of a total failure of consideration for the giving of the notes and mortgage. On a trial *de novo* in the supreme court, *held*, for reasons stated in the opinion, that such defense is not established by the evidence.

Opinion filed June 26, 1912. Rehearing denied September 13, 1912.

Appeal by defendants from a judgment of the District Court for Stutsman County; *J. A. Caffey*, J., in plaintiff's favor in an action brought to foreclose a mortgage.

Affirmed as modified.

S. E. Ellsworth, for appellant.

There was an entire failure of consideration for the notes and mortgage given by defendants, and made the basis of plaintiff's cause of action. Slater v. Foster, 62 Minn. 150, 64 N. W. 161; Snyder v. Kurtz, 61 Iowa, 593, 16 N. W. 722; Rowe v. Blanchard, 18 Wis. 441, 86 Am. Dec. 783; Aultman & T. Co. v. Trainer, 80 Iowa, 451, 45 N. W. 757; Brown v. Weldon, 99 Mo. 564, 13 S. W. 342; Aultman v. Wheeler, 49 Iowa, 647; Toledo Sav. Bank v. Rathmann, 78 Iowa, 288, 43 N. W. 193.

Turner & Murphy, of Fargo, for respondents.

FISK, J. This is an action to forcelose a mortgage on certain real property in Stutsman county, which mortgage was given to secure the payment of three promissory notes,—one for the sum of $750 due November 1, 1907, and the others each for the sum of $700 due respectively on November 1, 1908, and November 1, 1909. The execution and delivery of the note and mortgage are admitted by defendant, and the sole defense relied upon is a total failure of consideration.

Judgment was entered in the court below in plaintiff's favor as prayed for in the complaint, and from such judgment defendants have appealed and demand a trial *de novo* of the entire case in the supreme court.

The facts as disclosed by the record are not seriously in dispute and, in substance, are as follows:

On April 19, 1907, defendant Frank W. Dallier purchased from plaintiff a certain threshing rig consisting of a second-hand engine and one second-hand separator with drive belt and attachments, consisting of a new drive belt, a second-hand stacker, and new self-feeder, a water box and second-hand perfection weigher, at the agreed price of $2,150, and that the three notes aforesaid were given as the purchase price thereof. Defendant Frank W. Dallier signed a written order for such machinery on April 19, 1907, which order, among other things, contained the following stipulations: "The above machinery to be equipped as follows; separator to have new teeth in cylinder and to be given an overhauling at Fargo, and repainted. Engine to have new fire brick and to be generally overhauled. Freight to be paid on above machinery from Fargo, North Dakota, by purchaser. . . . Second-hand ma-

chinery and machinery not built by Nichols & Shepard Company is not warranted. . . . It is further hereby agreed that I (the purchaser) will not hold Nichols & Shepard Company responsible for any agreement not expressed in this order. . . . No representations have been made by the salesmen on behalf of Nichols & Shepard Company which are not herein expressed."

Such contract was made in duplicate, defendant retaining one copy. The notes and mortgage were executed at Eldridge, and plaintiff, after examining the same, was dissatisfied with it, whereupon he caused notice to be given to plaintiff at its Fargo office, stating the objections to receiving the same. A couple of days later plaintiff's representative, Landblom, visited Eldridge and prevailed upon defendant to unload the engine and try it, whereupon Dallier paid the freight, $37, and took the engine to his farm, 4 miles distant, where he started breaking sod with eight plows. Defendant testifies to having had considerable trouble with the engine, claiming that the flues leaked and that it was in other respects not in good condition and as represented. Nevertheless he used the same during the spring and summer in plowing and breaking, and used it to operate the separator during the threshing season, in the fall of that year, and also during the year 1908, and until the same was taken from his possession in a replevin suit instituted by plaintiff. The separator was not shipped to the defendant until some weeks later and during the summer of 1907. The record fails to disclose that there was any objection made by defendant to the separator and other attachments. Defendant testified that "the separator looked fine, was all painted up in first-class shape." After the first fall's threshing was completed Dallier informed the company's agent that he couldn't use the engine, but that the separator was all right. All such machinery was retained and used by the defendant during the years 1907 and 1908, until replevined from him as above stated. When pressed for payment of the notes in the fall of 1906, defendant stated to plaintiff's agent, "If you will hold off for eight or ten days, I will pay this note." Defendant was at such time engaged in threshing with such rig.

The testimony discloses that defendant had considerable trouble with the engine, but whether this was plaintiff's fault we need not here determine; nor need we determine whether such engine, when deliv-

ered, complied with the contract. The sole defense urged is a total failure of consideration for the notes and mortgage in suit; and in view of the established fact that the other machinery complied with the contract, the question as to the condition of the engine is rendered immaterial. Relief on the theory of a partial failure of consideration cannot be granted, even if such partial failure were found to exist, for the simple reason that no proper foundation for such relief was laid, either in the pleading or proof.

After due consideration of the testimony contained in the printed record, we are agreed that the findings of the trial court were correct and should be sustained.

The plaintiffs, having received and retained all of this machinery during two seasons, are in a poor position to urge, in a court of equity at this late date, in effect that the machinery fails to conform to the contract, and that the notes given as the purchase price thereof are wholly without consideration; yet this is their attitude in this litigation. In the light of defendants' own testimony, it is apparent that their claim of a total want of consideration for these notes is wholly without merit. In any event it is perfectly apparent that defendant, by receiving, retaining, and using said machinery for two seasons, instead of returning or offering to return the same promptly upon discovering the claimed defects in the engine, most effectually precludes the defense, which is the sole defense urged, that there was a total failure of consideration for the notes in suit. The proposition is so plain and elementary that we deem citation of authorities entirely useless, but if they are desired by the reader they may be found cited in the valuable note to the case of Noble v. Olympia Brewing Co., as reported in 36 L.R.A.(N.S.) page 467.

But one other matter remains to be noticed. Through a mistake the judgment as entered in the court below is concededly $560 too much, but this is in no way the fault of the trial court, and was apparently caused by a clerical error committed in the office of plaintiff's counsel. Such error was not discovered by said counsel until after the appeal had been perfected to this court. Immediately upon discovering such fact, counsel for plaintiff served upon the clerk of the district court, and also upon defendants' counsel, a notice that plaintiff desired to remit said sum from the judgment, and that the same

be modified and corrected accordingly. They also served an affidavit with such notice, setting forth the fact that such error had just been discovered, and stating the cause thereof; and plaintiff's counsel, in such notice, also notified defendants' counsel that they would ask leave of this court, when the case was reached for argument, to remit from such judgment the said sum of $560 as of the date the same was entered, which they did. No doubt such error would have been rectified by the trial court had it been called to its attention prior to the appeal, but respondents' counsel first learned of such error after they were served with a copy of appellants' brief on this appeal, which was about October 20th of last year. Appellants' abstract was, no doubt, printed prior to said time, as it was shortly thereafter filed in this court. The judgment is affirmed, except as to such excess sum, and as to such sum the motion of plaintiff's counsel to remit same is granted, and the district court is directed to modify the judgment accordingly. It does not appear that such error was the controlling ground for the appeal, nor does it clearly appear that appellant was induced to take such appeal on account thereof. However, we have concluded to allow no costs to either party on the appeal.

As thus modified, the judgment is affirmed.

UGLAND v. FARMERS & MERCHANTS' STATE BANK OF KNOX et al.

(137 N. W. 572.)

Quieting title — specific performance — evidence.

1. Plaintiff U. and defendant H. both claim to have purchased N.'s equities in certain land held by him under the usual crop payment contract for deed. Defendant bank holds the legal title in trust merely and as security for the balance due on the purchase price under an executory contract of sale made by the bank's grantor to N. The action is for specific performance as against defendant bank, and to quiet title as against defendant H. The evidence discloses that for valuable consideration N. sold and assigned in writing, with his grantor's consent, his contract to purchase, to plaintiff, but that prior thereto defendant H. had entered into a verbal agreement with N. for the purpose of the title to such land or of N.'s interest therein, and paid the

sum of $1 only the agreed purchase price. This verbal understanding did not authorize H. to enter into possession, although he subsequently did, through his servant, occupy the buildings on the premises with N.'s acquiescence, but under an entirely separate and distinct agreement from the alleged sales contract.

Evidence examined, and *held*, that the trial court properly gave judgment in plaintiff's favor.

Specific performance — statute of frauds — abrogation of contract.

2. The verbal agreement between N. and defendant H. was never executed by either party, and was within the statute of frauds, and prior to the plaintiff's purchase, N. repudiated and abrogated the same after making several unsuccessful efforts to get H. to comply therewith, and tendered back such dollar payment.

Held, that such verbal agreement being voidable, N.'s election to declare it void devested H. of all rights thereunder. *Held*, further, that N.'s act in selling to plaintiff was, in any event, an effectual abrogation of such voidable agreement.

Frauds — statute of frauds.

3. The statute of frauds may be invoked not only by the immediate parties thereto, but by those in privity with them.

Frauds — statute of frauds — verbal contract.

4. *Held*, for reasons stated in the opinion, that plaintiff had the right to and did properly invoke the statute of frauds as against the verbal contract and the alleged claims of H. thereunder.

Appeal and error — theory of case.

5. The theory adopted by the parties in the court below and pursuant to which the trial was there conducted cannot be departed from for the first time in the supreme court.

Tender — no objections made, and therefore statutory provisions waived.

6. On June 4, 1909, plaintiff tendered to defendant bank the sum of $2,615, being the balance of the purchase price then due on the contract. Such tender was in the form of a cashier's check, instead of currency, but no objection on this ground was made.

Held, that by such failure to object, the bank, by the provisions of § 5260, Revised Codes 1905, waived the mode of such tender.

Tender — sufficiency — statutory provisions.

7. Under the provisions of Revised Codes, § 5259, relating to tender and deposit and notice thereof, it was unnecessary to state in such notice that the bank in which such deposit was made was of good repute. Nor was it necessary for plaintiff to prove such fact, as, in the absence of proof to the contrary, the presumption prevails that such bank was of good repute.

Opinion filed June 19, 1912. Rehearing denied September 14, 1912.

Appeal by defendants from a judgment of the District Court for Pierce County; *A. G. Burr,* J., in plaintiff's favor in an action brought to enforce specific performance of a contract for the sale of certain property and to quiet title.

Affirmed.

Action for specific performance of a contract for the sale and purchase of certain real property, and also to quiet title. Plaintiff recovered judgment in the district court, and defendants have appealed therefrom to this court, and a trial *de novo* is demanded.

The statement of facts in respondent's brief is substantially correct, and we adopt such statement without change except in a few immaterial respects. It is as follows:

On July 8, 1904, William M. Noble and I. Wesley Noble purchased the premises involved from the then owner for the sum of $3,000, and received a contract for deed therefor, based upon the so-called crop payment plan. This contract was executed by H. Herbert Steele, apparently in an individual capacity, but afterwards when it was discovered that a mistake had been made, and that the title to this land was in security company, a corporation of which Mr. Steele was the treasurer and managing officer, and for which corporation he had full power to make contracts and execute conveyances, the security company duly ratified such contract of sale, and executed a supplementary contract accepting the terms of the former contract. Under this contract, the two Nobles went into possession of the premises, and cropped same, and made certain payments on the contract. About April 13, 1908, Wm. M. Noble assigned his interest in the contract and premises to his brother, I. Wesley Noble.

During the winter of 1909, the exact date being in dispute, the defendant Hanson had a conversation with the Nobles relative to the purchase of their interest in the land in question, and a verbal agreement was reached whereby I. Wesley Noble agreed to sell, for the consideration of $3,000, $1 of which was then paid by Hanson. As to the exact arrangement made between them the testimony is largely in conflict, with the single exception that the total price or valuation of the premises was fixed at $3,000. Noble claims that he was to assign his contract to Hanson upon the payment to him by Hanson of a sum

afterwards to be ascertained to be equal to the difference between $3,000 and the amount due to the security company, including taxes against the premises. Hanson, on the other hand, absolutely denies this, and claims that he did not in any manner agree to buy Noble's equity in the premises, or agree to take an assignment of his contract, but that the agreement was that he was to pay Noble $3,000 for a warranty deed and a good title to the premises. The contract was merely executory, and it was an open question with both parties as to whether the deal would ever be finally consummated. No agreement was made whereby Hanson was permitted to enter into possession of the premises, and the conversation which took place between them at the time when Hanson obtained the key for the house on the premise shows that even at that time it was still an open question as to whether the deal would ever be consummated. The testimony shows that, so far as obtaining possession of the premises is concerned, defendant Hanson did so without authority from Noble, and under an agreement which recognized that he was not entitled to possession.

One of Noble's reasons for desiring to sell the premises was to obtain money for the purpose of making a redemption of some land which had been foreclosed. Noble claims that it was essential that he get this money during April, 1909, in order to use the money for the purpose desired. It is conceded that Noble, a number of times, called upon Minkler and Hanson, and requested payment of the moneys which would be due him if the deal were consummated, but that they failed and neglected to either pay or tender, or even offer to pay him. On or about April 26, 1909, Noble went to see Hanson, and insisted that either the money would have to be paid to him, or else the deal would have to be declared off; and that Hanson made no serious objection thereto, but on the contrary virtually consented to such an arrangement.

Thereafter, and on the same day, Noble told Hanson that the deal was off, and tendered him the $1 which he, Hanson, had paid to him at the time of their first conversation. It is not contended that up to this time Hanson had done any work upon the premises.

Thereafter on April 30, 1909, Noble sold his interest in the premises and assigned his contract to the plaintiff in this action. This assignment was in writing, and prior thereto the written consent of the vend-

or in such contract had been obtained. At that time the plaintiff paid to Noble for such assignment the sum of $260 in cash, and agreed to assume the balance due on the contract to Steele, making the total price paid $2,800. The balance remaining due on the contract on June 4, 1909, amounted to $2,615, and Ugland, at the time of purchasing the premises from Noble, gave him a draft for $260, and afterwards paid the taxes on the premises amounting to $201.80. It is not disputed that on April 30, 1909, Noble informed Ugland that all his negotiations with the defendant Hanson had been declared off, and that he desired to accept an offer for his equity in the land, which the plaintiff had made some time prior thereto. Thereafter on May 3d and 4th, 1909, the plaintiff notified the defendant Hanson that he had purchased the premises from Noble, and it is not contended that up to this time Hanson had done any work or sown any grain on the premises. Hanson shortly thereafter began to seed on said premises, with the result that on May 10th he had about 40 acres sowed. On or about May 7th, Minckler, the cashier of defendant bank, paid to the security company the amount of their interest in the premises, something between $2,500 and $2,600, and obtained from this company a deed for the premises and an assignment of the contract with Noble, and at the same time and as a part of the same conversation and transaction, Steele, the officer of the security company who executed the deed, exhibited to Minckler the letter received from the plaintiff, Ugland, to the effect that Ugland had purchased the interest of Noble in the premises. The testimony shows that on the day when Ugland, the plaintiff, notified Hanson that he had purchased the premises from Noble and directed him to cease exercising any control over the same, Hanson went to the defendant bank and had a conversation with Minckler, but they both denied that Hanson informed Minckler of the fact that Ugland had notified Hanson of the purchase of the premises, yet, the day following, Minckler went to Mohall and obtained the deed from the security company.

The defendant bank took the deed merely as a trustee, and does not claim to own it or hold it in any other capacity. On June 4, 1910, the plaintiff caused to be tendered to the defendant bank, a cashier's check for the sum of $2,615, the full amount then remaining unpaid on the contract; and the preponderance of the evidence clearly shows

that the defendant made no objection to the tender because it was in a form of a check, but expressly waived this point.

Thereafter, and on the same day, the sum of $2,615 was deposited to the credit of defendant bank in the Security Bank of Knox, a bank regularly organized, and then and still doing business as a bank, under the laws of the state of North Dakota, and that said amount of money has remained on deposit therein ever since. On the same day a notice of such deposit was served upon the defendant bank.

It is conceded that neither the bank nor Hanson has ever at any time paid or offered to pay to Noble or his assignee, the plaintiff, any part or portion of the moneys which remained due to Noble if the negotiations between Noble and Hanson had been carried out.

F. T. Cuthbert, for appellant.

There was a sufficient performance to take the case out of the statute of frauds. See McCullon v. Mackrell, 13 S. D. 202, 83 N. W. 255; Lothrop v. Marble, 12 S. D. 511, 76 Am. St. Rep. 626, 81 N. W. 886; Note to Frame v. Frame, 5 L.R.A. 325.

The contract being executed, it is as valid as though the statute of frauds did not exist. Lindersmith v. Schwiso, 17 Minn. 26, Gil. 10; Evans v. Winona Lumber Co. 30 Minn. 515, 16 N. W. 404; Morrill v. Mackman, 24 Mich. 279, 9 Am. Rep. 124; Laughran v. Smith, 75 N. Y. 205; Larkin v. Avery, 23 Conn. 304; Sovereign v. Ortmann, 47 Mich. 181, 10 N. W. 191; Bishop, Contr. § 634; Peoples v. Evens, 8 N. D. 121, 77 N. W. 93; 1 Dembitz, Land Titles, page 481 and note; Bates v. Babcock, 95 Cal. 479, 16 L.R.A. 751; Pico v. Cuyas, 47 Cal. 174; Lowman v. Sheets, 124 Ind. 416, 7 L.R.A. 787, 24 N. E. 351.

A stranger or third person cannot claim the benefit of the statute of frauds. Kelly v. Kendall, 118 Ill. 650, 9 N. E. 261; Browne, Stat. Fr. § 287; Donellan v. Read, 3 Barn. & Ad. 899, 6 Eng. Rul. Cas. 298; Smith v. Neale, 2 C. B. N. S. 67, 26 L. J. C. P. N. S. 143, 3 Jur. N. S. 516, 5 Week. Rep. 563; Holbrook v. Armstrong, 10 Me. 31; Bell v. Hewitt, 24 Ind. 280; Wolke v. Fleming, 103 Ind. 105, 53 Am. Rep. 495, 2 N. E. 325; St. Louis, K. & N. W. R. Co. v. Clark, 121 Mo. 169, 26 L.R.A. 761, 25 S. W. 192, 906; 1 Dembitz, Land Titles, p. 467; Ryan v. Tomlinson, 39 Cal. 639; Gulf, C. & S. F. R. Co. v. Settegast, 79 Tex. 256, 15 S. W. 228; Richards v. Cunningham,

10 Neb. 417, 6 N. W. 475; Bishop, Contr. 2d ed. § 1239; Bailey v. Irwin, 72 Ala. 505; Miller v. Munroe, 59 App. Div. 623, 69 N. Y. Supp. 861; Skinner v. McDouall, 2 De G. & Sm. 265, 12 Jur. 741, 17 L. J. Ch. N. S. 347; Chicago Dock Co. v. Kinzie, 49 Ill. 289, 293; Bohannon v. Pace, 6 Dana, 194; Cooper v. Hornsby, 71 Ala. 65; Sanborn v. Murphy, 86 Tex. 437, 25 S. W. 610; Grisham v. Lutric, 76 Miss. 444, 24 So. 169.

L. R. Nostdal and *Christianson & Weber* for respondent.

Payment of the consideration alone, upon a contract for an interest in lands, is not sufficient part performance to take it out of the statute of frauds. Cooley v. Lobdell, 153 N. Y. 596, 47 N. E. 783; Aird v. Alexander, 72 Miss. 358, 18 So. 478; Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222, 5 N. E. 666; Merchants' State Bank v. Ruettell, 12 N. D. 519, 97 N. W. 853; Jourdain v. Fox, 90 Wis. 99, 62 N. W. 936; Bruley v. Garvin, 105 Wis. 625, 48 L.R.A. 839, 81 N. W. 1038; Ellis v. Cary, 74 Wis. 176, 4 L.R.A 55, 17 Am. St. Rep. 125, 42 N. W. 252; Scheuer v. Cochem, 126 Wis. 209, 4 L.R.A.(N.S.) 427, 105 N. W. 573; Dicken v. McKinley, 163 Ill. 318, 54 Am. St. Rep. 471, 45 N. E. 134; Smith v. Phillips, 69 N. H. 470, 43 Atl. 183; Nye v. Taggart, 40 Vt. 295; Osgood v. Shea, 86 Neb. 729, 42 L.R.A.(N.S.) 648, 126 N. W. 310; Ross v. Cook, 71 Kan. 117, 80 Pac. 38; Roberts v. Templeton, 48 Or. 65, 3 L.R.A.(N.S.) 790, 80 Pac. 481; Kelsey v. McDonald, 76 Mich. 188, 42 N. W. 1103; Bartlett v. Bartlett, 103 Mich. 293, 61 N. W. 500; Usher v. Flood, — Ky. —, 17 S. W. 132; Riley v. Haworth, 30 Ind. App. 377, 64 N. E. 928; Barickman v. Kuykendall, 6 Blackf. 21; Sailors v. Gambril, 1 Ind. 88; Jackson ex dem. Smith v. Pierce, 2 Johns. 221; Bringhurst v. Texas Co. 39 Tex. Civ. App. 500, 87 S. W. 893; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Gorham v. Dodge, 122 Ill. 528, 14 N. E. 44; Clark v. Clark, 122 Ill. 388, 13 N. E. 553; Osborn v. Phelps, 19 Conn. 63, 48 Am. Dec. 133; Lewis v. North, 62 Neb. 552, 87 N. W. 312.

A vendee or grantee succeeds to the right of their grantors or vendors to the extent that they may plead the statute of frauds as against parties pretending to claim through the same vendors or grantors. Messmore v. Cunningham, 78 Mich. 623, 44 N. W. 145; Dailey v. Kinsler, 35 Neb. 835, 53 N. W. 973; Hansen v. Berthelsen, 19 Neb. 433, 27 N. W. 423; Masterson v. Little, 75 Tex. 682, 13 S. W. 154;

Sanborn v. Murphy, 86 Tex. 437, 25 S. W. 610; Shelton v. Thompson, 96 Mo. App. 327, 70 S. W. 256; Petty v. Petty, 4 B. Mon. 215, 39 Am. Dec. 501; First Nat. Bank v. Blair State Bank, 80 Neb. 400, 127 Am. St. Rep. 752, 114 N. W. 409, 16 Ann. Cas. 411.

Defendant waived any objections which it might have urged, and the tender was perfectly good. Walsh v. St. Louis Exposition & Music Hall Asso. 101 Mo. 534, 14 S. W. 722; Hidden v. German Sav. & L. Soc. 48 Wash. 384, 93 Pac. 668; Mitchell v. Vermont Copper Min. Co. 67 N. Y. 280; Ricketts v. Buckstaff, 64 Neb. 851, 90 N. W. 915; Kollitz v. Equitable Mut. F. Ins. Co. 92 Minn. 234, 99 N. W. 892; Shay v. Callanan, 124 Iowa, 370, 100 N. W. 55; People ex rel. Mulford v. Mayhew, 26 Cal. 655; Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207; Boyum v. Johnson, 8 N. D. 306, 79 N. W. 149; Mitchell v. Vermont Copper Min. Co. 67 N. Y. 280.

Fisk, J. (after stating the facts as above). The chief question in dispute in this litigation is as to who, as between plaintiff, Ugland, and defendant Hanson, is equitably entitled to the land in controversy. Both claim from a common source, while the defendant bank claims to hold the title merely in trust for its codefendant. The crucial question is whether, prior to the time plaintiff purchased the assignment of the contract from Noble, the latter had, by a valid contract, parted with his interest in such land to defendant Hanson, and this, in turn, depends upon the correctness of the contention on Hanson's part that he had so far consummated and executed the prior verbal agreement with Noble as to vest in him the latter's interest.

It is not disputed that some time prior to plaintiff's purchase oral negotiations were had between Noble and Hanson, towards the purchase by the latter of the former's interest, and that such negotiations finally culminated in an oral agreement, whereby Noble agreed to sell and Hanson agreed to purchase the land for a consideration of $3,000, to be paid in a designated manner, and that $1 of such sum was in fact paid, with the intention, as stated by Hanson, of binding the bargain. These parties, however, do not agree in their testimony as to the details of such agreement, Noble testifying to an understanding that he was merely to assign to Hanson his contract with the security company, and to receive from him the difference between $3,000,

and the amount still remaining due to such company on said contract; while Hanson denies this and swears positively to an understanding that he was to pay Noble $3,000 cash for a warranty deed of the premises, free of encumbrances. There was no agreement that Hanson should have possession of the land prior to the consummation of the deal, but some time later Hanson's servant moved into the house without permission from Noble, and thereafter permission to remain was given on condition that, if the deal fell through, the use of the buildings should be treated as an offset to certain needed repairs to be made by Hanson to such buildings. Such preliminary verbal agreement was never consummated. Whether the failure to consummate the same was Noble's or Hanson's fault is in dispute; but, as we view it, such fact is not controlling, for nothing was done by Hanson under this agreement up to the time plaintiff's rights attached, except to pay the $1 aforesaid. It is true he had acquired permission, as above stated, for his servant to remain in the house on the land conditionally, but it is entirely clear that such facts are wholly insufficient to take the contract without the statute of frauds. Noble had the undoubted right to treat such contract at an end, as he did, and to dispose of his equity to plaintiff. His testimony to the effect that he several times demanded of Hanson that he fulfil his agreement, and that he gave him ample opportunity to do so, is, we think, true. It was certainly to his interest to deal with Hanson on a $3,000 basis, if possible, rather than to deal with plaintiff on a $2,800 basis. His principal object in selling was to raise money with which to effect a redemption of other lands from forced sale, and he waited on Hanson as long as he could, and finally notified him that the deal was off and tendered back the $1 payment. We think this effectually terminated any right which Hanson may have had under the verbal agreement. Hanson is not entitled, under this record, to any legal or equitable consideration. The small amount of seeding which he did on this land in the spring of 1909 was done after he was notified that the deal was declared off, and after being informed of plaintiff's purchase; and not only this, but the same was done against the positive protest of plaintiff. Appellant's counsel charges plaintiff with bad faith in purchasing with knowledge of Hanson's contract. This is not justified by the record which discloses by uncontroverted testimony that he was informed, be-

fore purchasing, that Hanson's deal had fallen through. Had he any reason to believe that this was untrue, is it likely that he would have parted with his money as he did, knowing that he was merely buying a lawsuit? The testimony shows that Noble solicited plaintiff to make the purchase, instead of plaintiff soliciting him to sell, as appellant's counsel would have us believe. The evidence discloses that plaintiff acted in making such purchase in the utmost good faith, and with no intention of infringing upon the rights of anyone. His testimony and that of his witnesses is both reasonable and probable, and we deem his cause of action meritorious. Much of appellant's argument is predicated upon the erroneous assumption that the verbal negotiations between Noble and Hanson amounted to an executed contract. Such contention is so manifestly untenable that we pass it without further comment.

But appellant contends that plaintiff is not in a position to invoke the statute of frauds as against defendants, being himself a stranger to the Hanson contract. If such contention is sound, it would logically follow that a vendor in an executory contract, voidable under the statute, would have his hands tied so effectually that he could not transfer the premises to another until he had first procured a judicial decree adjudging the contract at an end. This is not the law. Noble had the undoubted right to do as he did, repudiate such alleged contract by selling to plaintiff. By such sale Noble elected to treat his former voidable contract with Hanson as void. The fact that Noble, both prior to the sale to plaintiff and by such sale, repudiated the former contract unquestionably, may be shown by plaintiff. The authorities cited to the contrary by appellant's counsel do not support such contention. We cite below a few of the many cases announcing what we deem the correct rule.

Messmore v. Cunningham, 78 Mich. 623, 44 N. W. 145; Hansen v. Berthelsen, 19 Neb. 433, 27 N. W. 423; Shelton v. Thompson, 96 Mo. App. 327, 70 S. W. 256; First Nat. Bank v. Blair State Bank, 80 Neb. 400, 127 Am. St. Rep. 752, 114 N. W. 409; Sanborn v. Murphy, 86 Tex. 437, 25 S. W. 613.

We quote from Hansen v. Berthelsen, supra, as follows: "It is contended on behalf of the plaintiff that the statute of frauds is personal, and that no one can plead it but Miss Berthelsen. This is true to

the extent that, as between Miss Berthelsen and the plaintiff, no one can plead the statute for her, and the defense is personal. When, however, she conveys to another, and thereby denies by her act the existence of a valid contract between herself and her grantor for the reconveyance of the land, the grantee from her may set the statute up as a complete defense to the verbal contract, unless it has been so far performed as to take it out of the statute. In other words, the defense is available to parties and privies. Rickards v. Cunningham, 10 Neb, 420, 6 N. W. 475; Breckenridge v. Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 84–86. The defense, therefore, is available to Love."

There is no merit in appellant's contention that the statute of frauds was not properly raised by plaintiff. The complaint alleges that Hanson's claims to such property are based on a certain oral agreement claimed to have been made with Noble. The answer alleges, by way of new matter, an executed agreement between Noble and Hanson, whereby the latter purchased the former's interest in such land and was given possession. This is deemed denied by plaintiff, and it was incumbent on defendants to prove a valid contract as thus alleged, and it was unnecessary for plaintiff, in order to rely on the statute, to serve a reply raising such question. See Feeney v. Howard, 79 Cal. 525, 4 L.R.A. 826, 12 Am. St. Rep. 162, 21 Pac. 984, and cases therein cited. Also Jones v. Pettigrew, 25 S. D. 432, 127 N. W. 538; Traver v. Purdy, 30 Abb. N. C. 443, 25 N. Y. Supp. 452. Furthermore the action was tried throughout in the court below upon the assumption by both sides that the statute of frauds was in issue, and defendants sought to show that the Hanson contract had been so far executed as to take it without the operation of the statute.

The sufficiency of the tender made by plaintiff to defendant bank of the sum of $2,615 on June 4, 1909, being the balance then due from plaintiff on the purchase price, is next challenged by appellants, but under the evidence we entertain no doubt as to its sufficiency. The fact that a cashier's check was tendered, instead of currency, is not fatal; for the tender of currency was waived by not objecting to the form of the tender on this ground. Section 5260, Revised Codes 1905, expressly thus provides in the following language: "All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and

which could be then obviated by him, are waived by the creditor, if not then stated."

But it is argued that such tender was not kept good because the notice of the deposit of said sum in the Security Bank of Knox failed to state that such bank was a bank of good repute. Such contention is wholly devoid of merit. The statute, § 5259, Revised Codes, does not require that the notice shall state such fact. If the fact exists the tender is good, and the obligation discharged, provided the notice is otherwise sufficient. It was unnecessary for plaintiff to prove that this bank was of good repute, for the presumption, in the absence of a different showing, is that it was. There having been a due offer of payment of the amount due, and this sum having been immediately deposited in a bank of deposit in this state of good repute, and due notice thereof given to defendant bank, it follows that under § 5259, supra, the obligation was discharged.

Our conclusions, as above stated, lead to an affirmance of the judgment, and it is accordingly affirmed.

PEDERSON v. BOARD OF COMMISSIONERS OF BILLINGS COUNTY et al.

(137 N. W. 484.)

Counties — division — elections — certificate of votes.

1. Upon a vote for county division, several precincts made returns of their respective votes upon state and county officials, etc., upon the printed blanks furnished for that purpose, and attached thereto by means of metallic fasteners the tally sheet used by them in counting the county division votes. However, the tally sheet so used contained enough writing and figures to con-

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Note.—On the question of the necessity of contestant's showing error in election affecting result, see note in 83 Am. Dec. 750. And on the necessity of showing that error changed the result, see note in 84 Am. Dec. 268.

For irregularities which will avoid elections, generally, see note in 90 Am. St. Rep. 46.

The question of the effect on public election of wrongful disqualification of sufficient number of voters to have changed the result is treated in a note in 38 L.R.A. (N.S.) 1007.

form to the law as a certificate of the vote. *Held*, that it was the plain intent of the precinct officers to make a certificate of the votes so counted, and the case is distinguishable from cases where the tally sheet is merely returned with the ballots and other papers, and no attempt made towards certifying the result.

Counties — division — election, contest of.

2. Four precincts made no return to the county board, and those were not counted. Upon this contest, however, the trial court examined enough of the ballots to said precincts to show that the result of the election could not be changed if every vote uncounted were conceded to be against county division. It was therefore useless to continue the count of the ballots.

Counties — division — election, contest of.

3. Upon the election, friends of county division caused to be printed and distributed at the polls a large number of sticker ballots, being identical in reading with the official ballot, excepting that the sticker ballot was marked with the cross for division, instead of leaving the marking to be done by the voter. This unofficial ballot was to be attached by a gummed portion to the official ballot. *Held*, that such procedure is a violation of the plain purposes of our election ballot laws, and renders all such ballots void. *Held*, further, that the contestant has the burden of showing the number of stickers so used, and that enough were counted by the canvassing board to change the result of the election. In the case at bar the evidence produced does not show enough of such void ballots to change the result. Evidence of bystanders or election officials that there were "many of such stickers" is too indefinite to be acted upon by the court.

After deducting all ballots shown to be illegal and all ballots not produced from those precincts not canvassed, there still remains a majority for the creation of the new county, Golden Valley, and the trial court will so find.

Opinion filed June 29, 1912. Rehearing denied September 19, 1912.

Appeal by interveners from a judgment of the District Court for Billings County, *Templeton*, J., in plaintiff's favor in a proceeding to test the correctness of certain election returns.

Reversed.

R. M. Andrews, George R. Robbins, and *George A. Bangs,* for appellant.

Sheets of paper upon which was recorded the result of the county division votes became a part of the official canvass when folded and placed between the leaves thereof. State ex rel. Sunderall v. McKenzie, 10 N. D. 132, 86 N. W. 231.

Inaccuracy and imperfections in the returns of precinct officers may be corrected by parol evidence. 10 Am. & Eng. Enc. Law, 829, note 9; Howard v. Shields, 16 Ohio St. 190; Powers v. Reed, 19 Ohio St. 189; People v. Vail, 20 Wend. 12; O'Laughlin v. Kirkwood, 107 Mo. App. 302, 81 S. W. 512; McEuen v. Carey, 123 Ky. 536, 96 S. W. 850; Stemper v. Higgins, 38 Minn. 222, 37 N. W. 95; McCrary, Elections, § 503; 5 Enc. Ev. 69; Broaddus v. Mason, 95 Ky. 421, 25 S. W. 1060; Jones v. Glidewell, 53 Ark. 161, 7 L.R.A. 831, 13 S. W. 723; State ex rel. White v. Scott, 171 Ind. 362, 86 N. E. 409; Prairie v. Lloyd, 97 Ill. 197; Stimson v. Sweeney, 17 Nev. 309, 30 Pac. 1000; Mayo v. Freeland, 10 Mo. 630; Dixon v. Orr, 49 Ark. 238, 4 Am. St. Rep. 42, 4 S. W. 774; Wheat v. Smith, 50 Ark. 266, 7 S. W. 161; Merritt v. Hinton, 55 Ark. 12, 17 S. W. 270; Dial v. Hollandsworth, 39 W. Va. 1, 19 S. E. 558.

Before the ballots are admissible in evidence in an election contest it must be made to appear affirmatively by the contestant that they are intact and genuine and have not been tampered with. McCrary, Elections, § 471, p. 346; Howser v. Pepper, 8 N. D. 484, 79 N. W. 1018; Davenport v. Olerich, 104 Iowa, 194, 73 N. W. 603; Doak v. Briggs, 139 Iowa, 520, 116 N. W. 114; DeLong v. Brown, 113 Iowa, 370, 85 N. W. 624; Fenton v. Scott, 17 Or. 189, 11 Am. St. Rep. 801, 20 Pac. 95; Hartman v. Young, 17 Or. 150, 2 L.R.A. 596, 11 Am. St. Rep. 787, 20 Pac. 17; Farrell v. Larsen, 26 Utah, 283, 73 Pac. 227; Fishback v. Bramel, 6 Wyo. 293, 44 Pac. 840; Eggers v. Fox, 177 Ill. 185, 52 N. E. 269; Coglan v. Beard, 65 Cal. 58, 2 Pac. 737; Tebbe v. Smith, 108 Cal. 101, 29 L.R.A. 673, 49 Am. St. Rep. 678, 41 Pac. 454; Rhode v. Steinmetz, 25 Colo. 308, 55 Pac. 814; Powell v. Holman, 50 Ark. 85, 6 S. W. 505; Newton v. Newell, 26 Minn. 529, 6 N. W. 346; Albert v. Twohig, 35 Neb. 563, 53 N. W. 582; Martin v. Miles, 40 Neb. 135, 5 N. W. 732; McMahon v. Crockett, 12 S. D. 11, 80 N. W. 137.

The following courts have approved the sticker ballots: Roberts v. Bope, 14 N. D. 311, 103 N. W. 935; Snortum v. Homme, 106 Minn. 464, 119 N. W. 59; Erickson v. Paulson, 111 Minn. 336, 126 N. W. 1097; People ex rel. Bradley v. Shaw, 133 N. Y. 493, 16 L.R.A. 606, 31 N. E. 512; People ex rel. Goring v. Wappingers Falls, 144 N. Y.

616, 39 N. E. 641; State ex rel. Harkins v. Roundtree, 28 Wash. 669, 69 Pac. 404; Coughlin v. McElroy, 72 Conn. 99, 77 Am. St. Rep. 301, 43 Atl. 854; DeWalt v. Bartley, 146 Pa. 529, 15 L.R.A. 771, 28 Am. St. Rep. 814, 24 Atl. 185.

W. F. Burnett and *Engerud, Holt, & Frame,* for respondent.

When the evidence discloses that the county board's abstract was not properly made, and was not a tabulation of the precinct returns, but was made up in part from unauthorized data, it obviously loses its effect as evidence of what the aggregate vote was. People ex rel. Judson v. Thatcher, 55 N. Y. 525, 14 Am. Rep. 312; People ex rel. Hardacre v. Davidson, 2 Cal. App. 100, 83 Pac. 161; Rhodes v. Driver, 69 Ark. 501, 64 S. W. 272; Londoner v. People, 15 Colo. 557, 26 Pac. 135; State ex rel. Davis v. Willis, 19 N. D. 209, 124 N. W. 706; Spencer v. Morey, Smith, Elec. Cas. 437; Gause v. Hodges, Smith, Elec. Cas. 291; Small v. Tillman, 2 Ellsw. Elec. Cas. 432.

He who claims the majority of the vote must prove that fact, whether he is contestant or defendant. People ex rel. Judson v. Thatcher, 55 N. Y. 525, 14 Am. Rep. 312; Lawrence County v. Schmaulhausen, 123 Ill. 321, 14 N. E. 255; Scholl v. Bell, 125 Ky. 750, 102 S. W. 248; People ex rel. Hardacre v. Davidson, 2 Cal. App. 100, 83 Pac. 161; People ex rel. Keeler v. Robertson, 27 Mich. 116; Littlefield v. Newell, 85 Me. 156, 27 Atl. 156; High Extr. Legal Rem. §§ 629, 630.

Tally sheets cannot be accepted as substitutes for the returns prescribed by statute. State ex rel. Sunderall v. McKenzie, 10 N. D. 132, 86 N. W. 231; State ex rel. Davis v. Willis, 19 N. D. 209, 124 N. W. 706; People ex rel. Ryan v. Nordheim, 99 Ill. 553; Jackson v. Wayne, Cl. & H. Elect. Cas. 47; Chrisman v. Anderson, 1 Bart. Elect. Cas. 328. Opinions of Justices, 68 Me. 582; Perry v. Whitaker, 71 N. C. 473; Simon v. Durham, 10 Or. 52.

There being no returns to furnish prima facie proof of what the vote was, the ballots themselves were the best evidence of the vote. Howser v. Pepper, 8 N. D. 484, 79 N. W. 1018; Reynolds v. State, 61 Ind. 423; People ex rel. Keeler v. Robertson, 27 Mich. 129; Hartman v. Young, 17 Or. 150, 2 L.R.A. 598, 11 Am. St. Rep. 787, 20 Pac. 17; Sinks v. Reese, 19 Ohio St. 319, 2 Am. Rep. 397.

Sticker votes are void. Waterman v. Cunningham, 89 Me. 295, 36

Atl. 395; Howser v. Pepper, 8 N. D. 484, 79 N. W. 1018; Atty. Gen. v. Duncan, — N. H. —, 78 Atl. 925; Re Wilcox, 27 R. I. 117, 60 Atl. 838.

BURKE, J. At the general election of 1910 there were submitted to the voters of Billings county four propositions to divide the county. The official certificate returned by the canvassing board showed that two of the new counties had been defeated. One of the new counties, Golden Valley, received 837 votes for and 756 votes against, according to the said certificate. A contest was instituted by plaintiff to test the correctness of the said returns, and the proceedings had in district court resulted in findings adverse to Golden Valley county, by whom this appeal has been taken.

Plaintiff has challenged the correctness of the election certificate in appropriate proceedings, and it becomes necessary to review the canvass in all precincts called to our attention by the contestant. These number some twelve. The first six precincts are so similarly circumstanced that we will dispose of them together.

1. The election returns from several precincts made by the township election officers were in the condition following: The regular statement or certificate of votes printed in the back of the poll book contained no forms for the certificate of the election returns upon county division. Instead of writing such certificate in the said returns, the election officers took the tally sheet prepared by themselves, totaled the votes thereupon, and attached it by metallic fasteners or by paste to the statement of the general vote. The officers of the said precincts testify that they thus intended the tally list to become a part of the certificate. Contestant refers to the case of State ex rel. Sunderall v. McKenzie, 10 N. D. 132, 86 N. W. 231, which he claims decides that the tally sheets cannot become part of the official returns. We think he has not correctly read the above opinion. It holds merely that the tally list is not *per se* part of the official return, for the very good reason that it is not certified. It is going a long step further to say that the tally sheet might not be incorporated into the election returns if properly certified, or that the election returns may not be supplemented by having attached thereto a duly certified tally list. We take it that the election officers were attempting to make a proper return of

the vote upon division. Finding no place upon the blank certificate furnished to them, they amended the certificate by adding thereto upon another sheet of paper physically attached thereto a statement of the votes as canvassed by them. These additional sheets of paper contain the statement, "Golden Valley County" for new county (in one instance) 137; against new county 26, and also included the marks made by the clerks in canvassing thus, "1111" for five votes, etc.

We are of the opinion that as so attached the whole became the election return for such precinct, and that it should not be rejected because the tally mark appeared thereon. The main point being that it was duly certified by the proper officers along with the original return sheets, which, by the way, consists of five pages itself fastened together in the poll book. If the contention of the contestant is correct, only the last sheet containing the signatures of the election officers would be competent as a return sheet.

The learned trial court, who reached a contrary conclusion, was mislead by the testimony of the auditor McGregor who was testifying to an unofficial return sheet that is attached to the poll book and perforated so as to be readily removed and mailed to the auditor for the benefit of the public. When questioned by the court about the official certificate which is sealed up until opened by the canvassing board, the auditor understood the inquiry to be about the unofficial statement above mentioned. Our conclusion, then, is that those votes should have been counted by the canvassing board unless otherwise defective.

2. The second attack upon the correctness of the returns made by the county canvassing board relates to four precincts from which there were received no returns. The canvassing board completed the count without making any effort to compel the precinct officers to make proper return for those four precincts. There were 126 votes cast in the whole of those four precincts for several state officers. Two of the ballot boxes from those precincts were opened, and the ballots counted, yielding a new gain for Golden Valley county of 35 votes. There remained uncounted in said precincts, however, 73 votes, which we will assume were all cast against Golden Valley county, leaving a net loss to the county of 38 votes, which, substracted from the return

made by county canvassing board of 81 majority, leaves the county with still a majority of 43 votes with which to meet the next ordeal.

3. The friends of Golden Valley and of Slope county had entered a combine and worked together. To aid in their work they had printed an unofficial ballot, very similar to the official ballot upon division, but with the squares crossed in favor of those two counties and against the other two. They had those blanket ballots gummed, and some voters merely pasted the unofficial ballot upon the official, and thus got it into the ballot box. We are clear that this is such an invasion of the spirit of the Australian ballot law that it should be discouraged. We see no excuse for such conduct. Our liberal laws upon voting are to insure the individuality of the voter, and prevent the influence thereof by outsiders and political workers. If a ballot all marked may be pasted over the official ballot, then we might as well repeal our extremely satisfactory ballot law. We therefore hold such ballots void. There was testimony that thirty sticker ballots were counted by the various officials. These should be deducted, but it still leaves a majority for division. It is true some evidence was introduced to show that the voting of stickers "as general" and that "many such stickers were used," but such general expressions lack the precision of facts, and cannot be considered. Other objections were stated in the contest notice, but are not supported by evidence.

The trial court will correct its judgment to show Golden Valley entitled to have its certificate certified to the secretary of state.

On Rehearing.

BURKE, J. Respondent has filed a petition for rehearing, complaining principally of certain statement of fact contained in the opinion. He complains especially of the statement that the tally sheets upon county division were physically attached to the official certificate by the precinct officers. We have gone over the testimony again very carefully, and still believe the statements made by us warranted by the evidence. Only two of the poll books were attached to the statement of the case, although about ten were received in evidence. In one of those two the tally sheet is attached to the certificate by means of gummed strips of paper. The other was merely folded

between the leaves of the official certificate, but bears plain marks of having been attached to the certificate by means of a patented metallic fastener. Throughout the testimony it is stated that the other poll books were in the same general condition as those introduced. Two witnesses testified that they had examined the returns in the county auditor's office upon November 10th after election, and stated that "these certified statements from the precincts (naming those in dispute) were then with the county auditor." They intimate that some of the certificates were upon the unofficial sheets, but were in envelops addressed to the county auditor. A member of the county canvassing board testified that some of the certificates upon county division were "written right in the book . . . some were attached, and some were not, and some were pinned on. The ones that were pinned on we considered part of the canvass, we assumed that it was part of the official canvass."

On the other hand the witness McGregor, the only auditor, gives the testimony relied upon by respondent. His testimony is mostly narrated in the statement of the case, and it is hard to tell just what he means in much of his testimony, on account of referring to various returns held in his hands, but not so identified that he can now say which he meant. As an example of his testimony, we quote: "Ex. 1 is the only official return sent in by the precinct officers. Ex. 2 was in the poll book, Ex. 1, when I received it. Ex. 1, with the loose sheet, Ex. 2, folded in it, was all the canvassing board had before it." Now ex. 1 and 2 are before us, and the ones that show the same to have been fastened together as before stated. At the trial below, two of the precinct officers testified that they had fastened the two exhibits together and delivered them in that condition to the county officer. Again in Stecker precinct we find the following narration: "(Witness produces the poll book from Stecker.) Ex. 3 is the official return in my office . . . is precisely similar to Ex. 1, differing only as to number of votes. . . . In Ex. 3 (not attached but folded and between the leaves) there was found Ex. 4, which is same as Ex. 2." Ex. 3 and 4 are not before this court, therefore their exact condition is a matter of conjecture. From anything the witness states, the tally list might have been fastened to the returns by the precinct officials and removed by someone later, as was the case with Ex. 2.

However, as we view the matter, it is not so material how the precinct officers attached the tally sheet to the return. Whether they made a certificate upon the unofficial returns and mailed the same to the county auditor, or placed the crude tally sheets prepared by themselves in between the leaves of the certificate of election and mailed or delivered the same to the county auditor, they—in any event—intended to make it a part of the return to the county canvassing board, showing those figures. We believe the canvassing board was justified in counting the same, in the absence of any showing of fraud or mistake. The case of State ex rel. Sunderall v. McKenzie, supra, was based upon a very different state of facts. In that case the precinct officers had made a certificate showing the vote for superintendent of schools in the precinct. This certificate was forwarded to the county canvassing board, and counted by them. Upon an inspection of the tally lists in the front of the poll book from that precinct, it appeared that the precinct officers had made a mistake in the count, or rather had overlooked the women's vote entirely, and that the said certificate was not correct. One of the candidates sought by mandamus to compel the county canvassing board to reject the certificate and go back to the tally lists for the correct vote. This court held that the county canvassing board was bound by the certificate until overturned by contest. In this case the tally lists are not introduced to contradict the certificate of the precinct officers at all. They are part of the certificate of such precinct officers, prepared by them and sent in as such to the county canvassing board.

The motion for rehearing is denied.

EDWARDS et al v. CASS COUNTY et al.

(137 N. W. 580.)

Drains — validity of assessments.

1. In an action to restrain levy of special drainage assessment in specific amounts as to tracts, though begun prior to the completion of drain, *held:* the failure of the surveyor or the board to cause to be filed with the county auditor the surveyor's duplicate report of profiles, plans, and specifications

of the proposed ditch petitioned for, prior to hearing on feasibility of establishment of the drain, does not defeat the jurisdiction or authority of the drainage board to proceed, hear, and by order establish the drain, when a duplicate of said surveyor's report, with plans, specifications of drain, and map of drainage area, was, prior to hearing, on file and before the drain board, and when no prejudice is shown to have resulted to appellants from such omission.

Drains — statute as to posting notices of hearing on establishment of drain.

2. Statute as to posting notices of hearing on establishment of drain was substantially complied with.

Drains — special assessments — procurement of deed to right of way.

3. Delay in procurement of a deed to a portion of the right of way contracted for, and obtained after hearing on apportionment and review of special assessment of benefits by percentages, does not invalidate such special assessment.

Drains — assessments — tracts and highways omitted from such assessment.

4. The trial court's finding confirmed that certain tracts and highways omitted from such assessment of benefits by percentages were, by the board omitted, in good faith upon substantial grounds and after personal examination of the lands in the drainage area.

Drains — assessments.

5. This court will not review the judgment of the drainage board as to specific benefits to be derived, apportioned in percentages, in the absence of allegations and proof of fraud or something more than error of judgment on the part of the board.

Drains — proceedings reviewed.

6. The contract entered into for the construction of the drain having been assailed in the pleadings, but the question of the validity of which having been abandoned on appeal, the contract is *held* valid and the trial court's findings in said respect confirmed.

Drains — assessments — statutory provision — review.

7. Failure to post notices of time and place of review of special percentage assessments of benefits in one township of the three within the drainage area is *held* to be a noncompliance with § 1828, Revised Code 1905, as amended by the Session Laws of 1907, rendering the proceedings as to review had in said township invalid.

Findings of lower court affirmed — legal establishment — judgment modified.

8. The findings of the lower court are affirmed as to the ditch being legally established and constructed under a valid contract, and that certain highways omitted from the attempted assessment of benefits by percentages were, under

the evidence and the pleadings, properly omitted. But said judgment is modified to the extent that judgment will be entered, holding void the review had on the special assessment by percentages as to the specific tracts in Rush river township within the drainage area of the ditch. No costs to be taxed or allowed to either party.

Opinion filed July 31, 1912. Rehearing denied September 20, 1912.

Appeal by plaintiffs from a judgment of the District Court for Cass County, *Pollock,* J., dismissing an action brought to enjoin the construction of a drain.

Modified and affirmed.

McEnroe & Wood, for appellants.

Failure to comply with the statutory requirements in taking steps for the establishment of drains renders the assessment invalid. 2 Page & J. Taxn. §§ 770, 777; Fraser v. Mulany, 129 Wis. 377, 109 N. W. 139; 1 Cooley, Taxn. 3d ed. 631, 632.

Failure to show in the notice the signers of the petition is not a compliance with the statute. Re Central Irrig. Dist. 117 Cal. 382, 49 Pac. 354; People v. Berkeley, 102 Cal. 298, 23 L.R.A. 838, 36 Pac. 591; Roche v. Farnsworth, 106 Mass. 509; McVichie v. Knight, 82 Wis. 137, 51 N. W. 1094; McCuaig v. City Sav. Bank, 111 Mich. 356, 69 N. W. 500; 7 Enc. Law, 2d ed. 506; Dunbar v. Phœnix Ins. Co. 72 Wis. 492, 40 N. W. 386.

Notice of hearing on the petition for drain, actually given by said board, was not such notice as would fairly and reasonably apprise the property owners affected of the pendency of the assessment proceedings. Page & J. Taxn. §§ 119–121, 130, 137; 1 Cooley, Taxn. 3d ed. 631–633, 1243; Curran v. Sibley County, 47 Minn. 313, 50 N. W. 237; Fraser v. Mulany, 129 Wis. 377, 109 N. W. 139; McLauren v. Grand Forks, 6 Dak. 397, 43 N. W. 710.

Drainage board arbitrarily, intentionally, and wilfully omitted to assess lands within the drainage district, which the board acknowledged were equally benefited with other lands assessed. 2 Paige & J. Taxn. §§ 639–648, 1432; Powers v. Larabee, 2 N. D. 141, 49 N. W. 724; Pickton v. Fargo, 10 N. D. 469, 88 N. W. 90; 1 Cooley, Taxn. 631.

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

The jurisdiction of the board is established by the filing with it of a sufficient petition. Sim v. Rosholt, 16 N. D. 77, 11 L.R.A.(N.S.) 372, 112 N. W. 50; Alstad v. Sim, 15 N. D. 629, 109 N. W. 66.

Notice is knowledge, and where parties have knowledge, and especially where they appear and are heard, they cannot complain of the inadequacy of the notice. 2 Page, & J. Taxn. p. 774, and cases cited.

Goss, J. This action was brought by property owners to restrain the construction of a drain in Cass county, and to restrain further action by the drain board and board of county commissioners, county auditor, county treasurer, and contractors in the matter. The necessary petition for drain had been presented to the drainage board and by it acted upon, establishing the drain, after preliminary steps in the matter of survey, inspection, and location had been taken. The hearing to be had on the petition, provided by chapter 93, Session Laws 1907, was had. Right of way had been obtained. A special assessment of benefits, computed by percentages, had been determined upon and reviewed after hearing thereon. Contracts for construction had been let when this suit to restrain all further proceedings towards construction, bonding, levying of final assessment or collection thereof. was begun. A temporary restraining order was issued, but, after hearing on affidavits, was dissolved. The work of construction was thereupon completed. Then trial on the merits was had of the issues involved and the action dismissed, and this appeal is from such dismissal.

We are met with a motion by respondents to strike out the brief for want of assignments of error, and to dismiss the appeal and affirm the judgment for this and the additional claim that the case has, pending trial, become moot, inasmuch as the original action was begun to restrain proceedings, and the record shows that the matters sought to be restrained have, in the main, been fully performed, so that the full relief prayed for cannot be granted. It is conceded, however, that no final assessment in specific amounts has ever been extended against the lands involved and within the drainage area, and to this extent at least an issue remains for determination. Accordingly, we will decide this controversy on the merits.

Section 1821, Revised Codes 1905, as amended by Chapter 93, Session Laws 1907, provides that, on a petition for drain being presented to the drainage board, that board shall cause a surveyor to prepare profiles, plans, and specifications, and estimate of the cost of the proposed project, accompanied by a map of the lands to be drained, all of which, embodied in a report, must be made in duplicate, one of such reports to be filed with the drainage board and the other in the office of the county auditor, both for the inspection of the public. Prior to the amendment of 1907 but one set was required, and that was filed with the county auditor. The amending statute does not specify the exact time of the filing of the duplicate with the county auditor, but by necessary inference from the original statute, § 1821, it is to be filed with such official before the hearing afforded interested parties under the amended act concerning the feasibility of the project, and as to whether the benefits to be derived from the drain would exceed the cost thereof. The duplicate of the surveyor's report of his proceedings, required in ordinary procedure to be filed with the county auditor before the hearing on the question of the establishment of the drain, was not filed until some little time after such hearing had been had and the drain by order established. The duplicate required to be filed with the drainage board was filed with it before said hearing and before the order was made establishing the drain. And on this omission plaintiffs predicate error.

The law is settled in this state that upon the filing of a sufficient petition for drain with the drainage board jurisdiction is vested in that board to proceed with the drain petitioned for. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; Turnquist v. Cass County, 11 N. D. 514, 92 N. W. 852; State ex rel. Dorgan v. Fisk, 15 N. D. 219, 107 N. W. 191; Alstad v. Sim, 15 N. D. 629, 109 N. W. 66; Sim v. Rosholt, 16 N. D. 77, 11 L.R.A.(N.S.) 372, 112 N. W. 50; particularly first and last two cases cited. See also Hackney v. Elliott, — N. D. —, 137 N. W. 433 (too recently decided to be yet reported). Prior to chapter 93, Session Laws 1907, providing for a hearing before the drainage board on notice to the parties whose lands are affected, the board acted without affording a public hearing. The object of the surveyor's report is to furnish information to those interested and to perpetuate the record. For this purpose it is to be

filed with the auditor. The board derives its knowledge from personal inspection and from the duplicates filed with it, as well as from any matters brought out on such preliminary hearing. But the board is the court to pass upon the necessity and feasibility of the proposed drain. And we do not deem the failure of an employee of the board, the surveyor, to file his duplicate report with profiles, plans, and specifications of the proposed drain, and plat of the drainage area with the county auditor, such as irregularity as should defeat the action of the board establishing the drain, especially in the absence of a showing of actual prejudice resulting therefrom to the appellants. The duplicates were on file with the drainage board and under the law open to inspection, and it does not appear that appellants were denied the privilege of inspection. Besides, by providing that upon the board filing the surveyor's report it may proceed to hearing on the question of the establishment of the drain, the statute by necessary inference, from the omission to require it not to proceed until the auditor should have on file a duplicate report, authorizes the board to act on the surveyor's report filed by and before it.

Equally technical is the assignment that the notice of the preliminary hearing on the establishment of the drain did not contain a sufficient copy of the petition because the names of the signers thereof were omitted, although the notices contained a literal copy of the petition for drain, except the names or signatures of the petitioners were omitted. Appellants also urge that the statute as to posting of said notices was not complied with. It requires that "the board shall fix a date for hearing objections to the petition, and shall give notice of such hearing by causing five notices to be posted along the line of the proposed drain at such points as will be likely, in the opinion of the board, to secure the greatest publicity." The requisite number of notices were posted, but were not all of them posted exactly "along the line of the proposed drain;" one being posted a mile distant, in the postoffice at Argusville. We do not construe the statute to require that all the notices must be posted on the line of the proposed drain, but, instead, that the board should consider, as provided by statute, the element of publicity to be derived from the posting, and certainly, if posting of notices can afford notice, the statute was here substantially complied with. We do not hold the giving of this notice to have

been, under the 1907 statute, a jurisdictional prerequisite. Erickson v. Cass County, 11 N. D. 494–506, 92 N. W. 841; Alstad v. Sim, 15 N. D. 629, 109 N. W. 66; 2 Page & J. Taxation by Assessment, § 759, and cases cited.

Appellants complain, also, that a certain deed to right of way was not filed in the office of the county auditor in advance of the apportionment of specific benefits by percentages. It appears that a contract for deed for this portion of the right of way had been executed, but the death of the landowner prevented the transfer of the right of way by deed until appointment of an executor. The conveyance was thereafter made. This is, by § 1841, Revised Codes 1905, classed as a mere irregularity or informality which was cured by the conveyance. Alstad v. Sim, 15 N. D. 628, 109 N. W. 66; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841.

Appellants also assign error on failure to post the notice in Rush river township of the time and place of hearing on review of apportionment of benefits in percentages as to specific tracts. A portion of Rush river township, all of which was more than 6 miles from the drain, was determined as within the drainage area, and an apportionment of benefits was made to property therein. No notice was posted in said township, although more than the required number of notices were distributed among the other townships. Proper notice by publication was given in strict conformity with the statute in such respect. Section 1828, as amended by the Session Laws of 1907, provides that after the completing of the percentage assessment the board shall give at least ten days' notice of the time and place where it will meet parties for the purpose of letting contracts for construction. "Such notice shall be published in some newspaper of general circulation in the county, and printed notices, not less than five in all and at least one in each township or municipality interested in such drain, shall be posted in such township and municipalities at such points as will be likely, in the opinion of the board, to secure the greatest publicity for such notice. Such notice shall also state that at the time and place of letting of contracts the assessment of benefits shall be subject to review unless such assessment has already been reviewed." Does the omission to post a notice in Rush river township invalidate the review of such special assessment? Respondents assert that, in order for the

statute requiring the posting of notices in every township to be applicable, the township as a legal entity must be interested in such drain; reasoning that the inhabitants with lands affected, and within the drainage district, are notified constructively by the publication of the notice, while the township as such is so notified by posting of notices in it, at least one of which must be posted within each township within the drainage area. Such construction is hardly consistent with the reason for the posting, as stated in the statute, to be "at such points as will be likely, in the opinion of the board, to secure the greatest publicity for such notice." No need of publicity exists if the township only is to be bound by such posted notice. If notice to the township was all that was so intended by posting, service on a township officer no doubt would have been required instead. And though the statute strictly construed might bear the interpretation contended for, it reading, "and printed notices not less than five in all, and at least one in each township or municipality interested in such drain, shall be posted in such township, "we conclude it was not meant to be so interpreted. It is identical in language in these respects with Code § 1828, which one of counsel urging this strict construction, in Erickson v. Cass County, 11 N. D. 494, at page 506, 92 N. W. 841, speaking for the court, has aptly interpreted by the following: "Neither can the objection to the form of the notice of assessment and the sufficiency of the posting and publication of such notices be sustained. The record shows that the notice was published in a newspaper of general circulation ten days prior to the hearing, and five printed copies of such notice were posted in the township traversed by the drain at such points as were likely, in the opinion of the board of drain commissioners, to secure the greatest publicity for such notices. This was a full compliance with the statute." While this question of construction was not there urged, yet the court there gave the correct interpretation of this statute as to notice to the parties affected.

Respondents also urge that appellants are estopped from urging want of notice, because they participated in the proceedings before the board on said hearing in review of the assessment of benefits by percentages as to specific tracts. Appellants' contention should, undoubtedly, be sustained if it applied to all of these plaintiffs; but the evidence does not establish that Joseph Kellye, Carl Gangness, T. H.

Cruden, P. J. Helland, William Blake, and Mrs. Hattie Gardner of these appellants participated or appeared before said board on the review of said assessment; nor probably are other residents of Rush River township, aside from those defendants bound by appearance, foreclosed from asserting the invalidity of the assessment as to lands within the drainage area and within Rush River township.

As to such hearing on review of special assessments, it is the all-important hearing and day in court so far as the taxpayers, the landowners, whose assessments thereby virtually became fixed for all time, are concerned. This is the hearing which, with notice thereof, constitutes due process of law in the levying of the assessment which may result in deprivation of property. The legislature prescribes the notice taxpayers shall have to here comply with constitutional provisions. Its declaration as to what shall constitute legal and sufficient notice at this point and for such purposes is mandatory. 2 Page & J. Assessment, §§ 729, 730, 732, 735, 745, 748, 756, 759, the last section of which, in relation to this bearing, reads: "Service by posting notices in public and conspicuous places where the owners of property affected by the improvement would see them in the ordinary course of events, in going to and from their property, is a sufficient compliance with the constitutional rights of the property owners; and if such service is made in compliance with the statutory provisions it is sufficient. Such service can, however, be made only in substantial compliance with the provisions of the statute, or it will be insufficient," citing authority. Hamilton, Special Assessments, §§ 141 et seq.

Our conclusion is that the statute is mandatory, and for want of posting, in Rush River township, of the notice of review of assessment of benefits by percentages, as to specific tracts within said township and within the drainage area of the ditch in question, the proceedings had on review is invalid.

At the time this action was commenced all proceedings subsequent to the review of the assessment were enjoined, but on dissolution of the injunction the work proceeded and the drain was constructed, as the record discloses, under contract or contracts entered into after notice as required by § 1828, as amended by the Session Laws of 1907, notice of the entry of which contracts was given by the notices herein declared insufficient. Pending trial, said contract has become exe-

cuted. If the legality of this contract has not become a moot question, we will say, to put the matter beyond doubt as to where the board may commence in proceeding anew herein, that the invalidity of said contract is not determined by this decision. But rather that counsel by placing in issue, as they have in paragraph twelve of their complaint, the validity of said contracts and on the particular grounds therein stated, and having on the trial failed in proof, and here abandoned said question adjudged against them in the lower court by not assigning error thereon or mentioning the same in their brief, we affirm the findings of the trial court in this respect, and hold the contract under which construction of the ditch was had to be valid.

As to the assignments attacking the validity of the purported assessments by percentages as confirmed after review, wherein appellants urge that the omission of certain highways from assessment invalidated the same, our holding of the assessment invalid on other grounds obviates the necessity of passing upon this question. We may state, however, that we see nothing in the evidence to have invalidated the assessment on this ground. The trial court found that any omissions of tracts from the assessment was done by the board "in good faith and upon substantial grounds, and that the assessment of benefits was made in good faith and without fraudulent intent or purpose, and was made after personal examination of the lands in the drainage area and a consideration of the levels theretofore made." Our conclusions are the same. Appellants disclaim any fraudulent acts on the part of the board, and any such omissions are not pleaded as purposely done to defraud. The benefits to be derived from the drain were matters within the judgment of the drainage board, they being "the tribunal created by law and clothed with authority to make the same and pass upon the question of benefits. There is no allegation of fraud, and the determination of the board must therefore be accepted as conclusive." Turnquist v. Cass County Drain Commrs. 11 N. D. 514–518, 92 N. W. 852; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; State ex rel. Dorgan v. Fisk, 15 N. D. 219, 107 N. W. 191.

We have passed upon all questions raised. And under § 1841, requiring the court to "on final hearing make such an order in the premises as shall be just and equitable," we have determined the status of proceedings so that the drainage board may commence with the assess-

ment of benefits by percentages as tentatively apportioned to specific tracts, and proceed anew with a review thereon, to be followed by such further proceedings as are authorized by law in the premises. And the judgment of the trial court is in all things affirmed, except that portion thereof holding valid the review had on the assessment of benefits by percentages as apportioned to specific tracts within the drainage area, which review is adjudged void as had upon insufficient notice; all proceedings concerning the drain in question to that point being confirmed, including the letting of the contract for the construction of the drain. As so modified and affirmed the case is remanded, with directions that judgment be entered in accordance herewith.

As the judgment herein ordered is not a recovery of all demands urged by either party, and as defendants are public officials who were not wilfully negligent, judgment against whom for costs could probably not be assessed as a part of the cost of construction of this drain (4 Dill. Mun. Corp. § 1440, and note citing State, Dewitt, Prosecutor, v. Rutherford, 57 N. J. L. 619, 31 Atl. 228), we direct that no costs be taxed and no judgment for costs be entered.

GRACE FARLEY v. LAWTON SCHOOL DISTRICT, NO. 41.

(137 N. W. 821.)

Schools and school districts — contract made with school-teacher — segregation and organization of new district.

1. **Plaintiff seeks to recover salary as a school-teacher under a contract with the school board of Homer school district. Prior to the date of such contract the territory in which such school was located was duly segregated from Homer school district and organized into a separate and distinct school corporation known as "Lawton school district No. 41," the defendant herein, although the school officers for such new district were not elected and did not qualify until later.**

***Held*, that the action of the county commissioners and county superintendent of schools, in granting the petition for the segregation of such territory and the organization of such new school district, operated *ipso facto* to create the defendant district as a distinct school corporation, and at that time the school board in the old district ceased to possess any authority or jurisdic-

tion over the schools in such new district, and the contract upon which plaintiff seeks to recover is therefore of no binding force or effect.

Opinion filed September 21, 1912.

Appeal by plaintiff from a judgment of the County Court of Stutsman County, *Marion Conklin*, J., in defendant's favor in an action under an alleged contract to recover salary as a school teacher.

Affirmed.

C. S. Buck, of Jamestown, for appellant.

F. Baldwin and *John U. Hemmi*, of Jamestown, for respondents.

FISK, J. Appellant seeks to recover from defendant under an alleged contract entered into by her with the school board of Homer school district No. 15 in Stutsman county, on July 14, 1908, whereby such board undertook to employ her as a teacher for the period of nine months, beginning on the first Monday of September thereafter. The facts are not in dispute, and the sole question of law involved is as to whether the school board of Homer school district No. 15 had any legal authority to enter into the contract of hiring, and this in turn involves the question as to whether, at the date of such contract, defendant Lawton school district No. 41 had been organized as a separate and distinct school corporation.

Until duly organized as a separate and distinct district, Lawton school district No. 41 was embraced within Homer school district No. 15, but prior to July 6, 1908, the voters of Homer school district duly petitioned the county superintendent of schools and the board of county commissioners of Stutsman county to divide said Homer school district and create a new district to be known as Lawton school district No. 41, and on July 6, 1908, such petition was granted by said officials. Thereafter the county superintendent of schools, pursuant to statute, gave notice of an election to be held on the 28th day of July for the purpose of electing officers for such new district, on which date such officers were duly elected and they qualified on August 6th thereafter.

It is the contention of appellant that Lawton school district No. 41 did not become organized as a separate and distinct school corporation until such time as it had elected its officers, and that until such

election took place the school board of the old district had jurisdiction over the schools in such proposed new district, with authority to enter into any and all contracts pertaining thereto, which contracts may be enforced against such new district upon the final completion of its organization as such.

We are clearly of the opinion that appellant's contention is unsound. Lawton school district No. 41 became a distinct legal entity immediately upon the action of the county commissioners and superintendent of schools segregating such territory from the old district. This is made manifest from the language employed in the following sections of the Code: 786, 794, 798, and 792, Revised Codes 1905. The fact that such new district was temporarily without officers is in no manner controlling. This court in the early case of Coler v. Dwight School Twp. 3 N. D. 249, 28 L.R.A. 649, 55 N. W. 587, settled this question adverse to appellant's contention. Judge Corliss, in writing the opinion, among other things said: "The county superintendent creates the district. His decision, embodied in written form, is the act which calls the new corporation into being. . . . The corporation exists; the district officers exist; but no election of officers can be held until after certain acts are performed. This is the plain reading of the statute. . . . A municipal corporation may have life although there are no officers in office."

This court in State ex rel. Laird v. Gang, 10 N. D. 331, 87 N. W. 5, reasserted, in effect, the same doctrine, and we see no reason at the present time to depart from the reasoning and conclusions in the foregoing cases on the point here in question, and we deem them decisive and controlling in the case at bar. It would serve no useful purpose to review at length in this opinion the argument contained in appellant's brief. Suffice it to say that, after duly considering the same, we are unable to concur in the views therein expressed.

Our conclusion calls for an affirmance of the judgment, and it is accordingly affirmed.

BURKE, J., disqualified and not participating.

FIRST STATE BANK OF KERMIT v. KRENELKA (Meyer, Garnishee).

(137 N. W. 824.)

Garnishment — application to be relieved from default judgment — discretion of trial court.

Respondent, who was an ignorant German of very limited education and wholly unfamiliar with court proceedings, and not comprehending or understanding that he had been sued as a garnishee, suffered a default judgment to be taken against him. Thereafter and in due time he made application to be relieved from such default, basing such application upon his affidavit, setting forth the above facts, and also that he was not at the time such summons was served, nor has he at any time since, been indebted to the defendant in any sum. The trial court granted such application upon condition that respondent pay to plaintiff as costs the sum of $25.

Held, for reasons stated in the opinion, that in making the order appealed from the district court did not abuse the discretion vested in it, and that accordingly this court will not interfere with the action of the trial court.

Opinion filed September 21, 1912.

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

From an order relieving the respondent, garnishee, from a default judgment, plaintiff appeals.

Affirmed.

Murphy & Wooledge, of Minot, for appellant.

L. F. Clausen, of Kenmare, and *F. A. Leonard*, of Crosby, for respondents.

FISK, J. This is an appeal from an order of the district court relieving respondent as garnishee from a judgment taken against him by default. The application to be relieved from such default was made pursuant to the provisions of § 6884, Revised Codes 1905, which provides, in effect, that the 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. Appellant's counsel concede that such application was made

in time, and no claim is made by them that respondent was guilty of laches in applying for relief from such default. Their sole contention in this court is that such application was insufficient, both in form and in substance, to authorize any relief, and that it was a palpable abuse of discretion to grant such application. In other words, appellant's counsel assert that on such application, respondent furnished neither an affidavit of merits nor a proposed verified answer or their equivalent, and that he made no showing of "mistake, inadvertence, surprise, or excusable neglect" sufficient to entitle him to relief.

It is well settled that applications of this nature are addressed largely to the sound discretion of the trial court, and that an appellate court is loath to disturb the decision on such application, and it will not do so unless it is made clearly to appear that there was a manifest abuse of discretion. It is also well settled that no hard and fast rule can be applied in the disposition of such applications, and that the facts in each case should control.

The following affidavit of respondent constitutes the only showing made on such application. Omitting formal parts it is as follows:

Gust A. Meyer, being first duly sworn, deposes and says that he is the garnishee in the above entitled action; that affiant is a resident of Williams county, state of North Dakota, and has resided there during the last three years; that he is a German by birth, and that he has not had a great deal of schooling, and is a man of very limited education; that on or about the 1st day of August, A. D. 1907, the garnishee summons in the within action was served upon him in said Williams county; that owing to his said limited education and ignorance of court proceedings, never having been sued in his life, or had anything to do with court proceedings, affiant was unable to comprehend the meaning of said garnishee summons, and did not in fact comprehend and understand the same, and did not understand that it was necessary for him to file an affidavit or answer the said summons within thirty days from the service thereof or a judgment would be entered against him for the amount asked for in the plaintiff's complaint, or for any amount whatever; that the affiant was not indebted to the defendant in the within action at the time that said summons was served upon him in any amount whatever, nor has he at any time since the service of said summons been indebted to the defendant in any sum.

That owing to the garnishee's ignorance of court proceedings and his inability to comprehend the meaning and understand the nature of said garnishee summons, coupled with the fact that he was not indebted to the defendant, the affiant did not know that it was necessary to answer the said summons, and therefore failed to answer the same, or file any affidavit within the time described therein.

That on the 24th day of March, A. D. 1908, owing to the failure of this affiant in not answering the said summons, as aforesaid, judgment was entered up in this action against the affiant as garnishee herein, and in favor of the plaintiff for the sum of $429.

Wherefore, affiant prays that the said judgment may be opened as to this garnishee, upon such terms as the court may deem just, and that affiant may have permission to file an answer therein.

(Signed) Gust A. Meyer.

Subscribed and sworn to March 8, 1909.

While it is true, as contended by appellant's counsel, that this showing was somewhat meager, we are not prepared to hold that the learned trial court clearly abused its discretion in granting such relief. We think it fairly discloses a meritorious defense, and to this extent substantially complies with the rule acquiring an affidavit of merits, and we are not prepared to say that the lower court was not warranted, under the circumstances, in treating such showing of excusable neglect, sufficient. It may be that had the trial court ruled otherwise, on such showing, we would, on appeal, have refused to interfere therewith. However this may be, where, as in this case, the trial court, in the exercise of its discretion, has seen fit to relieve from such default and thus permit a trial upon the merits, and where no contention is made that this will work any serious injustice to appellant, we must decline to interfere therewith in view of the showing made in this record. The order granting such relief was made conditional upon the payment by respondent to appellant of costs in the sum of $25, and we do not think appellant has any just cause for complaining of such order.

While § 6982, Revised Codes 1905, provides, in effect, that all provisions of law relating to proceedings in civil actions at issue, including amendments and relief from defaults, etc., shall be applicable to garnishment proceedings, we think a somewhat more liberal rule should be applied to applications by garnishees to be relieved from defaults,

than is applied to a principal defendant. There is a very good reason for such a distinction. As stated in Waples on Attachment & Garnishment, 2d ed. § 501: "The court should be even more liberal in allowing the belated garnishee to answer after default, than in granting the privilege to an ordinary suitor defaulted, since he is a disinterested party in the proceeding so far as any prospect of being benefited is concerned, yet an interested third person so far as the danger of being injured is concerned."

In Evans v. Mohn, 55 Iowa, 302, 7 N. W. 593, the Iowa court affirmed the lower court's action in relieving a garnishee from default caused by mere forgetfulness, holding that the garnishee was not necessarily negligent, and the court expressly recognized a distinction to be made between a garnishee and an ordinary defendant in such cases. There is nothing said in Bismarck Grocery Co. v. Yeager, 21 N. D. 547, 131 N. W. 517, inconsistent with the views above expressed.

Affirmed.

Goss, J., being disqualified, took no part in the decision.

MINOT FLOUR MILL COMPANY v. GEORGE W. SWORDS.

(137 N. W. 828.)

Appeal and error — insufficiency of assignments of error.

1. Rule 14 of the supreme court, which requires that an assignment of errors "must, in a way as specific as the case will allow, point out the errors objected to," is not complied with by assignments in the following form: "Defendant assigns as error specification of error No. 3." An assignment which, on its face, fails to advise the court of the alleged error complained of, but merely refers to the place in the printed record in which such alleged error may be found, is wholly insufficient under the above rule.

Action to recover balance of purchase price — evidence.

2. In an action to recover an alleged balance due on account as the purchase price of seed grain claimed to have been sold by plaintiff to defendant, there was a substantial conflict in the testimony as to whether two items in the account, one consisting of 34 bushels and 40 pounds, and the other of 40 bushels and 40 pounds, (being the only items in dispute), were delivered by

plaintiff to defendant. The trial court found in plaintiff's favor on such issue.

Held, that such finding has ample support in the testimony, and will not be disturbed by this court.

Opinion filed September 21, 1912.

Appeal by defendant from a judgment of the County Court for Ward County, *N. Davis*, J., in plaintiff's favor, and from an order denying a new trial in an action to recover a balance claimed to be due for certain seed wheat alleged to have been sold and delivered by plaintiff to defendant.

Affirmed.

E. R. Sinkler and *J. A. Heder*, of Minot, for appellant.

F. B. Lambert, of Minot, for respondent.

FISK, J. Plaintiff sues to recover a balance of $101.70 claimed to be due it from defendant on account as the purchase price of certain seed wheat alleged to have been sold and delivered by plaintiff to defendant in April, 1909. The case was tried in the county court of Ward county without a jury, and resulted in a judgment in plaintiff's favor, from which judgment this appeal is prosecuted. A bill of particulars was served on defendant, and the whole dispute relates to two items only in the account between the parties, as follows:

April 17, to 34 bu. and 40 lbs. seed wheat	$46.80
April 24, to 40 bu. and 40 lbs. seed wheat	54.90

It is appellant's contention that he neither ordered nor received these items, and he challenges the sufficiency of the evidence to sustain the lower court's decision.

In his brief, appellant has attempted to assign thirty alleged errors, but such assignments do not comply with rule 14 of this court, which rule, among other things, provides: "The appellant's brief . . . shall contain . . . Second. An assignment of errors which need follow no stated form, but must, in a way as specific as the case will allow, point out the errors objected to, and only such as he expects to rely on and ask this court to examine."

Assignments numbered 1 to 29 are all in the following form: "1. Defendant assigns as error specification of error No. 3. (Abstract page 5. of the evidence page 20.)" It is entirely clear that this is not a compliance with either the letter or spirit of such rule. It is true the court is referred to the place in the abstract where the matter complained of may be found. This necessitates a useless waste of the court's time. The purpose of the rule is to enable the court to ascertain from the assignments as contained in the brief of what the alleged error consists. The object of such rule is to require the presentation of the matter raised by the assignment of error so that this court may understand just what it is called upon to decide, without the necessity of going beyond the assignment itself. As stated in 2 Enc. Pl. & Pr. 943: "Just what will constitute a sufficiently specific assignment must depend very largely upon the special circumstances of the particular case; but always the very error relied upon should be definitely and clearly presented, and the court not compelled to go beyond the assignment itself to learn what the question is. The assignment must be so specific that the court is given some real aid, and a voyage of discovery through an often voluminous record not rendered necessary."

On page 941 of the same treatise it is said: "The assignment should refer to the page of the record which the alleged error may be found; but such reference by itself will not constitute a sufficient assignment."

The last assignment is also, we think, too general, and is also subject to the same criticism as the prior assignments. See 2 Enc. Pl. & Pr. page 953, and cases cited.

We might properly decline to notice any of appellant's alleged assignments of error for the foregoing reasons, but we have concluded to briefly notice the various contentions in the body of appellant's brief, and for the purpose of a correct understanding of such contentions a brief statement of the facts is necessary.

Plaintiff, at the times mentioned, was operating a flour mill in the city of Minot, and defendant, George W. Swords, resided in Minot, but owned and operated a farm near such city, his brother John Swords being in charge of such farm as defendant's representative; and while the testimony is not clear as to just what authority he possessed in the operation of such farm, we deem it a fair assumption, from all the testimony, that he possessed general authority from defendant in relation

thereto, and was, in effect, defendant's general agent in the management of such farm. It is an admitted fact that on or about April 11, 1909, the defendant telephoned to plaintiff's manager, William Dunnell, regarding the purchase of certain seed wheat, and was informed by Dunnell that plaintiff would furnish it, and defendant at that time stated that John Swords would call the next morning and get one load. There is a square conflict in the testimony as to the exact conversation which took place between these parties on that occasion, the witness Dunnell testifying that defendant stated that he wanted to purchase three or four loads, while the defendant testified that he stated that he wanted only enough to seed about 30 acres. On the morning of the 12th, John Swords and one Henning, who was employed on defendant's farm, called at the mill, and plaintiff delivered to them 2,750 pounds of seed wheat, the purchase price of which amounted to $61.85. This, as well as certain other items in the account, were paid by defendant, and are not involved in this litigation. On April 17th, Swords and Henning again called at the mill, and there was delivered to them 34 bushels and 40 pounds of seed wheat, and that at that time John Swords stated to Mr. Dunnell that either he or Mr. Henning would be after the next load in a few days; and on April 24th Henning called and procured 40 bushels and 40 pounds of seed wheat, and these last two items were charged by plaintiff's employee to defendant, George W. Swords. Defendant admits that he did not know how much seed wheat would be required to seed such farm, as he did not know how much land John had prepared to be seeded to wheat, although when he purchased the land sometime prior thereto there were only about 30 acres broken.

Defendant insists that the disputed items were not delivered to him, and that he is not legally liable for the purchase price thereof. The case having been tried in the court below without a jury, the findings of that court are, of course, entitled to the same weight as the verdict of a jury, and this court will not disturb such findings if they are supported by competent testimony.

As we view the record, the lower court's findings are amply supported in the testimony, and the judgment of that court must accordingly be affirmed. The basic fallacy running throughout appellant's brief and argument consists in his assumption that John Swords was merely a special agent of his brother, the defendant. As before stated, we do not

think the record justifies such assumption. So far as the testimony discloses, John was apparently managing this farm, and had full authority to do whatever he deemed it necessary to do in the operation thereof; but even if he was a mere special agent, still the trial court, if it believed the testimony of Dunnell, to the effect that defendant ordered over the 'phone three or four loads of said wheat, stating that John would be down after it, would be amply justified in holding defendant liable for the disputed items, even though the last item was delivered to Henning, who was sent there by John according to the testimony. Certainly under these facts, if established, Dunnell would be clearly justified in delivering such grain, and it would not be incumbent upon him to inquire what disposition was to be made of the same, for he had express authority from defendant to deliver three or four loads to John, which would imply that he might deliver to him or to anyone whom he might send to receive it. The testimony discloses that Henning was employed on this farm as a servant, and was subject to John's directions, and if John Swords had a right to get this wheat he certainly had a right to send Henning after it.

It is next contended by appellant that there is no competent proof in the case showing the amount of grain delivered on these two dates. We think such contention without merit. In the first place the amount of these items was not a disputed issue, the defense merely being that plaintiff was not authorized to deliver such seed grain to anyone on defendant's account; in other words, defendant's contention was that he merely ordered one load, or enough to seed 30 acres. Furthermore, the witness Adam Robb, grain buyer for plaintiff, testified to the delivery of the wheat on the 12th, 17th, and 24th days of April, but of course he could not remember the exact amount delivered. And the witness Presby, who was plaintiff's bookkeeper and cashier, testified that invoices for these sales were immediately made out, and mailed on the following days to defendant, and he identified carbon copies thereof, and stated that they constituted the original and only charge or entry on the plaintiff's books. While the testimony does not disclose such to be the fact, the fair inference is that the originals of these invoices were the ones which were mailed to defendant. We think there was sufficient foundation for the introduction of these exhibits, and that they were competent testimony under the statute of this state (Session Laws 1907,

page 173), as follows: "Any entries in a book or other permanent form, in the usual course of business, contemporaneous with the transactions to which they relate and as a part of or connected with such transactions, made by persons authorized to make the same, may be received in evidence when shown to have been so made, upon the testimony either of the person who made the same, or, if he be beyond the reach of a subpœna of the trial court or insane, of any person having custody of the entries and testifying that the same were made by a person or persons authorized to make them in whose handwriting they are, and that they are true and correct to the best of his knowledge and belief. In case such entries are, in the usual course of business, also made in other books and papers as a part of the system of keeping a record of such transactions, it shall not be necessary to produce as witnesses all of the persons subject to subpœna who were engaged in the making of such entries; but before such entries are admitted the court shall be satisfied that they are genuine and in other respects within the provisions of this section."

Suffice it to say that, in any event, we are convinced, after reading the record, that the court was amply justified in finding as it did that these items were delivered as contended for by plaintiff, and we find no valid reason for disturbing the decision of the trial court.

Judgment affirmed.

GROVER v. MURALT.

(137 N. W. 830.)

Corporations — negotiable instruments — statutory provision — action by assignee of note.

1. The defendant as "the maker of a negotiable instrument, engaged that he will pay it according to its tenor, and admits the existence of the payee." Revised Codes 1905, Sec. 6362. *Held*, that under this provision, on the facts of this case, it became unnecessary for plaintiff endorsee or assignee of a promissory note payable to the order of the N. I. Ry. Co. to prove the incorporation of the payee.

Appeal and error — amendment of pleading nonprejudicial.

2. This action is on a negotiable promissory note payable to the order of the payee therein named. Plaintiff brought suit thereon as assignee thereof. Defendant offered no evidence showing any equities in his favor or any defense against the note if in the hands of the original payee. After both parties had rested plaintiff asked permission to amend by changing the word "assigned" to "endorsed." *Held*, that under the facts and in the absence of any evidence showing a defense it was immaterial whether he held it as assignee or indorsee; and that the granting of such amendment was nonprejudicial.

Promissory notes — real parties in interest — actions.

3. The possession of a promissory note payable to the order of the payee by an assignee, proof of payment of a valuable consideration therefor to the payee by the plaintiff holder, and failure to show any defense, renders the maker liable to the plaintiff assignee, particularly under our statute requiring actions to be brought in the name of the real party in interest.

Opinion filed September 23, 1912.

Appeal by defendant from a judgment of the District Court for Ransom County, *Allen*, J., in plaintiff's favor in an action on a promissory note.

Affirmed.

T. A. Curtis and *C. O. Heckle*, of Lisbon, for plaintiff and respondent.

A. C. Lacy, of Fargo, for defendant and appellant.

SPALDING, Ch. J. This is an appeal from a judgment in favor of plaintiff in an action upon a promissory note. A jury was impaneled, and when both parties rested, motions were submitted by plaintiff and defendant respectively for directed verdicts, whereupon the court discharged the jury and made findings of fact and conclusion of law upon which judgment was entered. While the record is brief, a great number of errors are assigned. They need not be considered in detail, as our conclusion covers all the assignments which are material. The complaint alleges that on or about the 7th of March, 1908, defendant made, executed, and delivered to the Northwestern Interurban Railway Company his promissory note in writing for the sum of $260, whereby he promised to pay to the order of said company said sum, nine months after said date, with interest before and after maturity at the rate of

6 per cent per annum; that in the regular course of business, in good faith, without notice, on April 8, 1908, before maturity, the plaintiff purchased such note, which was duly assigned to him, and that plaintiff then and there paid a valuable consideration therefor; that he is, and ever since has been, the owner thereof; and that no part of it has been paid.

The answer denies each and every allegation, matter, and thing in plaintiff's complaint contained. The evidence regarding the purchase of the note by plaintiff is without conflict, and is to the effect that the bank of which plaintiff is cashier received a letter from the payee, bearing date April 2, 1908, inclosing the note and offering it for sale for the sum of $240. On failing to receive a reply, the payee, on April 8th, again wrote plaintiff's bank, calling its attention to the former letter, and requesting it, if the paper could not be used, to return same, whereupon the plaintiff drew his personal check on the bank for the sum of $240, and therewith procured a draft payable to the order of the Northwestern Interurban Railway Company, for $240, which he transmitted to the payee in payment for the note, and took it as his own property.

Plaintiff testified that he had no knowledge or information that would lead him to believe there was any equity or defense against the note; that he purchased it in the ordinary course of business and in good faith. The note bore an indorsement at the time it was received by plaintiff about April 8, 1908, as follows: "Northwestern Interurban Ry. Co., by James J. Lambrecht, Pres't." No proof was made of the character of the payee, nor of the fact that Lambrecht was president or otherwise authorized to make the indorsement. The defendant made no offer of evidence to show any defense against the payment of such note, and his signature thereto was duly proved. All his objections went to the admissibility of evidence or to the form in which it was offered.

When defendant rested, plaintiff asked permission to amend his complaint by changing the word "assigned" to "indorsed," which amendment was permitted. To this amendment the defendant strenuously objected.

"The defendant, as the maker of a negotiable instrument, engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse." Revised Codes 1905, § 6362. From this section it would appear that defendant is not in position to

deny the existence of the party to whom the note was originally made payable. We may, therefore, dismiss all questions raised regarding lack of proof of incorporation of the payee. The defendant failed to show any equities in his favor or any defense against the note if in the hands of the original payee. For this reason we consider it immaterial whether the court properly granted the plaintiff's motion to amend, and may consider the note as payable to the order of the payee named and in the possession of the plaintiff, either with or without indorsement, who paid $240 therefor. The possession by the plaintiff, the payment of a valuable consideration therefor by him to the payee, and the failure to show any defense, equitable or otherwise, renders the maker liable. This is particularly so in view of the fact that defendant rested before the motion to amend was made, and without offering any evidence. The amendment availed plaintiff nothing because of these facts. It was immaterial whether he held it by indorsement or by assignment, and his possession and payment therefor were presumptive evidence of ownership, which there was no evidence to rebut. 8 Cyc. 69. And the proof shows the plaintiff to be the real party in interest. 8 Cyc. 71, and authorities cited under note 23. See also Bank of Bromfield v. McKinlay, 53 Colo. 279, 125 Pac. 493.

Various errors are assigned on the evidence offered by plaintiff, to the effect that questions were leading and called for conclusions of witnesses, but they are without merit. The defendant had had his opportunity before he rested to submit evidence showing a defense against the note, but had utterly failed to avail himself of his rights in the premises, if he had any defense. The signature of the defendant was proved, and we see no reason for disturbing the judgment. It is therefore affirmed.

AULTMAN & TAYLOR MACHINERY COMPANY v. RUNCK et al.

(137 N. W. 831.)

Principal and agent — contract — liability.

1. Plaintiff and defendants entered into a contract in writing whereby defendants were constituted the agents of plaintiff for the sale of machinery manu-

factured and handled by it, in certain territory in this state. The contract fixed the prices at which the machinery was to be furnished defendants, the terms on which it might be sold by them, how commissions should be paid to them, and contained a provision that defendants should not deliver or use any machinery covered by the contract until a regular order should be taken on one of the plaintiff's blank orders, nor until fully settled for by the purchaser, in cash or by notes, and that in case defendants should deliver any such machinery to any customer or other person before taking a written order therefrom or before such machinery should be fully paid for by cash or notes, the defendants would pay to said plaintiff on demand, the net list price of such machinery, and waive all claims under the contract of warranty by plaintiff on any machinery so delivered without settlement.

Such agency contract also provided that when any traveling agent or employee of the plaintiff should in any way render any assistance to the defendants in making sales, or otherwise, he should be considered solely the agent or employee of the defendants, and no act of such agent or employee should in any way bind plaintiff. The evidence received is without conflict in any material respect, and shows that one Lake, traveling agent of the plaintiff, with the consent and advice of defendants, made a special price to a third party on certain machinery included in such agency contract, for the purpose of introducing it in defendants' territory. Defendants completed negotiations for the sale thereof, and obtained the signature of the purchasers to the order. The machinery was shipped to defendants, accompanied by a draft on the purchaser, attached to the bill of lading. It was to be a cash sale. Defendants delivered such machinery without settlement of any kind. *Held:* that the facts bring the sale within the terms of the agency contract recited, and render defendants liable, as a matter of law, for the price of such machinery, and that by delivering the same without settlement they waived any claim for breach of warranty, and that the trial court erred in submitting the question as to who made the sale, to the jury.

Facts relating to contract.

2. For other facts relating to the contract and bearing upon this decision, see opinion.

Opinion filed September 23, 1912.

Appeal by plaintiff from a judgment of the District Court for Barnes County, *Burke,* J., in defendants' favor in an action brought to recover the price of certain machinery sold and delivered by defendants in violation of an agency contract between them and plaintiff.

Reversed.

Turner & Murphy, for appellant.

Had plaintiff sent experts to visit said machine in response to notice

sent it by defendant or by the purchasers it would not and could not be charged with waiving any of the terms of the two contracts, it at such times being in ignorance of the facts. Fahey v. Esterley Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 466, 92 N. W. 826.

Page & Englert, for respondents.

Lake was an agent of more than ordinary or special authority, and he would undoubtedly have the authority to waive a provision in a contract which would be for the company's benefit. First Nat. Bank v. Dutcher, 128 Iowa, 413, 1 L.R.A.(N.S.) 142, 104 N. W. 497.

The company ratified whatever he did in seeking to take the benefits of the special sale by drawing upon the purchasers, through the bank and directing the said bank to make the collection. Westby v. J. I. Case Threshing Mach. Co. 21 N. D. 575, 132 N. W. 137.

When the question as to who made the sale or who the parties are to the contract in controversy, the same is a question for the jury. 35 Cyc. 44, note 91; Burkhalter v. Farmer, 5 Kan. 477; Dousman v. Peters, 85 Mich. 488, 48 N. W. 697; Loranger v. Foley, 79 Mich. 244, 44 N. W. 781; Oothaut v. Leahy, 23 Wis. 114; Dickinson v. Buskie, 59 Wis. 136, 17 N. W. 685; Bridgeman v. Hallberg, 52 Minn. 376, 54 N. W. 752; Walker v. Moors, 125 Mass. 352.

If the company acts upon such notice as it receives, it thereby waives the strict requirements of the notice provided for in the written contract. Advance Thresher Co. v. Vinekel, 84 Neb. 429, 121 N. W. 433; Reeves & Co. v. Younglove, 148 Iowa, 699, 127 N. W. 1019; West-Brooke v. Reeves & Co. 133 Iowa, 655, 111 N. W. 11; First Nat. Bank v. Dutcher, 128 Iowa, 413, 1 L.R.A.(N.S.) 142, 104 N. W. 497.

SPALDING, Ch. J. The complaint in this case, aside from the formal parts, alleges that on the 29th day of March, 1909, plaintiff and defendants entered into a contract whereby plaintiff appointed defendants its sales agents to sell machinery manufactured by it, in the territory of Cathay and vicinity during the year 1909; that plaintiff agreed to furnish defendants machinery at prices agreed upon, and that they agreed upon a certain rate of commission for the sale of different kind of machinery, which rates were set forth in their agreement; that defendants

agreed to canvass said territory for the sale of plaintiff's goods, and that it would sell said goods upon the written contracts and warranties provided by plaintiff, and not otherwise; it was further agreed in such contract that defendants would not deliver to any purchaser, or use, any machinery belonging to plaintiff or manufactured by it, covered by such contract, until a regular order, upon blanks furnished by plaintiff, was taken, and until it was fully settled for by the purchaser by cash or by notes, as provided for in such contract, and upon the terms and conditions of said written order; and that they specifically contracted that in the event of their so delivering any of plaintiff's property covered by said contract of agency to any purchaser without settlement as set forth, in such event defendants would, without notice, pay to the plaintiff the amount of the list price for any goods so delivered without settlement, upon demand of plaintiff; that, if deliveries were made without settlement, defendant should pay interest on the list price; and, further, that they waived all claims under the warranty by plaintiff on such machinery sales and all their claims on any machinery so delivered without settlement.

That on the 26th day of July, 1909, defendants sold to Salthammer and Olsberg a separator, feeder, and band cutter, with blower, weigher, and belt, at the agreed price of $950, to be paid for in cash upon the delivery of said machinery; that the order therefor was transmitted to plaintiff by defendants and accepted by plaintiff, and the machinery called for thereby was duly shipped to defendants at Cathay, North Dakota; that thereafter, in violation of the terms and conditions of said contract and order, defendants delivered said machinery to the purchasers without settlement, to the damage of plaintiff in the sum of $950.

The answer is a general denial and special matter in defense. So far as material it alleges that one Lake, an agent of plaintiff, sold the machinery described, to Salthammer and Olsberg, without the aid or assistance of the defendants and at a price made by plaintiff, without paying or allowing any commission to defendants on such sale, and without paying or offering to pay defendants anything in connection with the sale thereof. It then attempts to allege a breach of warranty and the grounds thereof; and that the purchasers deposited in a bank the purchase price and refused to turn the same over or permit it to be turned over until the machinery was made to do work in accordance with the

warranty, and that purchases had demanded the return of the amount so deposited by them. The only question involved is whether the sale was made by defendants or by the traveling agent or employee, Lake, when the facts are considered with reference to the contract made by the parties. An order for the machinery, executed by Salthammer and Olsberg, was received in evidence, and it was shown that settlement had never been made by defendants with plaintiff, and that the machinery so ordered was shipped to defendants and by them delivered without any settlement being made therefor by the purchasers.

We need not take into consideration any question of warranty or breach of warranty. Lake testified that in 1909 he made the arrangements with defendants to handle the machinery manufactured by the plaintiff. The agency contract was admitted in evidence. He testified that he wrote the order executed by Salthammer and Olsberg, and left it with defendants to get the purchasers' signatures; that defendants procured such signatures and sent the order in; that he tried to get the signatures of the purchasers while he was there, but failed; that Runck asked him to write the order out and leave it with him, which he did, and a few days later it was sent in and the company delivered the machinery to Runck & Company, at Kathryn, and a bill of lading, with sight draft, was sent them to get settlement and send to the company. The machinery was not shipped direct to the purchaser; that he did not know what became of the machinery after it was sent; that it was supposed to be delivered by defendants to the purchasers and settlement taken and sent in to the company; that they never received any settlement; that it was shipped to (and received by) Runck & Company by plaintiff, pursuant to the contract of agency; that after being notified by the company that no settlement had been made, he went there and visited the defendants, who told him that the machinery had been delivered to the signers of the order; that he, on behalf of the company, demanded of defendants a settlement for the machinery in accordance with instructions from plaintiff; that they refused to settle and never delivered a settlement to plaintiff or to him; that he delivered the order to the defendants, but did not take the order from Salthammer and Olsberg; he had seen the purchasers and made them a price agreed upon between him and defendants, which was a net price and made for the benefit of both parties, to introduce the machinery into that territory; that the

price was made with the knowledge and consent of defendants, and the order written by the witness because defendants did not know whether they could prepare one properly; that defendants got the order; that the machinery was shipped to defendants as plaintiff's local agents, by virtue of their agency contract.

One of the defendants was a witness, and was asked who made the purchase of the machinery in controversy. To this question, plaintiff objected on the ground that it is incompetent, irrelevant, and immaterial, for the reason that the evidence showed an agency contract between plaintiff and defendants for the year 1909; and that said contract provided that all goods shipped by the plaintiff to the defendant should be received and kept by them, and only sold upon orders taken upon blanks furnished by the plaintiff; and that when any traveling agent or employee of the plaintiff should in any manner render any assistance to the defendants, either in making a sale or otherwise, he should be considered solely the employe or agent of the defendants; and that no act of such traveling agent or employee should in any way bind the plaintiff; and that said contract further provided that if defendants should deliver any machinery to any customer before it was fully settled for in cash or by notes, as required by the order taken, the defendant should account to plaintiff on demand for the net price of such machinery; that in case defendant should permit any machinery to be so taken or used without being settled for, defendants waived all warranties on the part of plaintiff; and that the contract signed by Salthammer and Olsberg provided for payment for said machinery in cash on its arrival at the station at Kathryn, together with freight charges; and that in case it should be taken and used by the purchasers, without full settlement therefor, as provided by said order, said purchaser waived all warranties, express or implied; and that the evidence in this case shows that the machinery was shipped by the plaintiff to the defendant by reason of receiving such order and under the conditions thereof.

This objection was overruled and an exception reserved, and the witness answered that the purchase was made by Salthammer and Olsberg. Whereupon Runck testified, over the same objection, that Lake was the salesman who really made the sale; that he, Runck, was present part of the time that the deal was being made; that it was made partly on the sidewalk and partly in his (Runck's) office; that the order was not

signed at that time for the reason that it was too early for the crop to be assured, and that the purchasers did not want to buy the machinery in case of a poor crop, and wanted to defer it a week or ten days to see if the crop was assured, and that for that reason it was left unsigned in his office, but that the purchasers later came and signed it.

Olsberg, one of the purchasers, testified, over objection as above stated, that the agreement and price for the machinery was made with Lake; the order was afterwards signed in Runck's office. This is all the evidence that need be considered on this appeal.

When both parties rested, the plaintiff moved for a directed verdict for the amount demanded in the complaint, upon substantially the same grounds stated in his former motion. This motion was overruled, and the question submitted to the jury as to whether the sale was made by Lake or by the defendants, whereupon the jury returned a verdict in favor of the defendants. The plaintiff then moved for judgment notwithstanding the verdict or for a new trial, which motion was denied.

Was the trial court justified in submitting the question of who made the sale, to the jury? We have here a contract in writing, duly executed, wherein the defendants specifically agreed that any assistance rendered by any traveling salesman employed by the plaintiff, in making a sale or otherwise, should render such salesman the employee or agent of the defendants, and any act of such traveling agent or employee should in no way bind the plaintiff. We have as parties a traveling salesman in the employ of the plaintiff, the defendants, local agents of the plaintiff, and parties contemplating the purchase of machinery listed in the contract of agency. We have the combined acts of the traveling agent and the local agents in attempting to persuade the prospective purchasers to become actual purchasers. We have these acts taking place on the sidewalk and in the defendants' office, and a special price made, with the full knowledge and consent of the defendants, for the mutual benefit of both parties to this action. We have before us the fact that the sale was not completed while the traveling agent was present, for reasons hereinbefore stated, and that it was consummated when the character of the crop was evident, by the defendants securing the purchasers' signature to the contract or order.

We have the shipment of the machinery in exact accordance with the terms of the contract, *viz.*, to the defendants, and not to the purchasers.

We find the draft drawn on the purchasers through the bank, likewise in conformity to the provisions of the contract entered into. This contract, for the protection of both plaintiff and defendants, provided for settlement by cash or notes before the delivery of the machinery to the purchasers, and contained the provision that in case such settlement was not obtained before delivery the agents should become, on demand, indebted to plaintiff for the purchase price, and that defendants should thereby waive all warranties, express or implied, on the subject of the agency. In other words, every step in the progress of the negotiations and sale was covered by the express terms of the contract of agency, which provided what the liability of the agents would be in case such steps were taken. We cannot very well understand how a contract could be entered into more fully and expressly covering the facts of a case than the one here in evidence. Neither can we imagine how the facts could bring the parties more closely within the purview of that part of the contract referred to. True, it is a misfortune to the defendants to have to pay for the machinery which the purchasers did not retain, but courts are not constituted to relieve parties from obligations they may incur by contracts voluntarily and knowingly entered into and violated. Defendants had it in their power to fully protect themselves. The machinery was in their own possession; there was no need of their delivering it without a settlement. The purchasers likewise, under the terms of their contract, had full protection, but they voluntarily waived all warranties contained in that document by taking the machinery without making a settlement. Had the defendants complied with the plain terms of the agreement made with plaintiff, they would have been relieved of all litigation and all questions growing out of any breach of warranty. All such questions would have been subject only to litigation between the purchasers and the plaintiff herein. There is no conflict in the evidence. The questions set out, to which objection was made, clearly called for conclusions, and the objections should have been sustained; but the error was probably without prejudice, as the witnesses later testified to the details of the transaction and brought them within the express terms of the agency contract.

It is strenuously insisted that the fourth paragraph of the agency contract, which contains the provisions regarding commissions to be paid defendants on sales and excepts *special sales,* was intended to ap-

ply to cases like this, and contemplates sales being made by traveling agents in defendants' territory. This is answered by another paragraph of the contract, against defendants' contention.

We find in such contract a division relating to and headed "securities." Under this subject is a subtitle on "special sales," defining them and clearly showing that it has no bearing upon this sale. It need not be set out at length, as its terms are clear and explicit.

Taking the agency and sale contract together, it is obvious that they were intended to protect plaintiff against claims of purchasers who had been permitted to take machinery in violation of their terms, and without payment or liability established or incurred, and who might get the use of the machinery, and, on settlement being demanded, claim a breach of contract by plaintiff.

But laying all considerations of the contracts aside, it is evident that defendants became liable for an additional reason. The undisputed evidence shows that the property in controversy was shipped to Runck & Company, with bill of lading and sight draft attached to insure settlement before delivery. Under this evidence, even had the sale been wholly consummated by Lake, defendants made themselves liable for a delivery without collecting the draft. This would not have rendered the plaintiff liable to defendants for breach of warranty, because they were, in such case, not concerned with any warranty, and the purchasers waived all claims on that subject by taking the machinery without making settlement (per terms of their contract). If defendants made no sale, the purchasers had no claim against them.

It is clear that the motions submitted by plaintiff should have been granted. The judgment is reversed and the trial court is directed to enter judgment in favor of the plaintiff.

Mr. Justice BURKE being disqualified, Honorable Chas. F. TEMPLETON, Judge of the First Judicial District, sat in his place by request.

JOHANNES v. COGHLAN.

(137 N. W. 822.)

Judgment — default — vacation is largely within discretion of trial court.

1. The granting of an application to vacate a default judgment after appearance by defendant is largely within the discretion of the trial court.

Judgment — default — meritorious defense.

2. Such judgment will not be vacated when the defense pleaded is not meritorious; but is clearly frivolous.

Trial — it is the duty of litigants to be present.

3. It is the duty of litigants to watch the progress of proceedings in court, rather than of the court to accommodate its business to the convenience of a single litigant, and perhaps thereby inconvenience all other parties having business before the court, hold jurors at the expense of the public, and interfere with the orderly prosecution of its regular business.

Appeal and error — judgment — motion to vacate — discretion of trial court.

4. Under the showing made on application to vacate a judgment in this case it is *held*, that there was no such clear abuse of discretion on the part of the trial court in denying defendant's application as will warrant this court in reversing its order.

(Opinion filed September 23, 1912.)

Appeal by defendant from an order of the District Court for Stutsman County, *Burke*, J., denying his application for the vacation of the judgment in an action to recover damages for an assault and battery.

Affirmed.

The plaintiff brought this action against the defendant, charging him with assault and battery committed on the 11th of September, 1909, and alleges the damages as $10,000, and prays judgment accordingly. Defendant answered, which answer is as follows:

"Now comes the defendant by his attorney, F. Baldwin, of Jamestown, North Dakota, and makes answer to plaintiff's complaint.

"1. The defendant admits allegation of said complaint.

"2. The defendant denies each and every other allegation not hereinafter admitted, gratified, or explained.

"3. The defendant, for a further answer, says that during the last several years plaintiff and defendant lived in the same section of the county, and that plaintiff has been during the last four years constantly telling defendant's neighbors that he, defendant, was a thief, had stolen one of plaintiff's steers; had taken plaintiff's stallion out of plaintiff's barn and had stolen the service thereof on one of defendant's mares; that defendant had stolen potatoes and also tried to injure defendant's property by varnishing his plow so that it could not clean, and by driving defendant's stock away from home, and that he had given plaintiff warning to keep off defendant's land, and not abuse and slander him. That, notwithstanding all this, plaintiff came upon defendant's land and without permission on or about September 11, 1909, and that defendant went up to him in the presence of a number of people and said to him, "Jim, you have one coming," and gently placed his fist against plaintiff's nose, and that, after so doing, waited for plaintiff to resent said challenge, but plaintiff got off defendant's premises.

"4. That the foregoing is the act complained of; that afterwards plaintiff had defendant arrested for assault and battery before justice of the peace, J. W. Carr, and defendant plead guilty and paid a fine of $10 and costs, amounting in the whole to about $48, all of which this defendant will prove and asks for judgment for the dismissal of plaintiff's complaint and for costs."

Notice of trial was duly served upon defendant's attorney, and the action was upon the regular calendar of the December, 1909, term of the District Court for Stutsman county. It was regularly reached for trial on the 17th day of December, 1909, when plaintiff appeared in person and by his attorney, and on the failure to appear, either personally or by attorney, on the part of defendant, a jury was waived and the case tried to the court, and on the same day the court made its findings of fact and conclusions of law, and judgment entered thereon in favor of plaintiff and against the defendant in the sum of $1,500.

On the 24th day of December, 1909, defendant, having secured a new attorney, served notice of a motion for an order setting aside the judgment and reinstating such cause upon the calendar for trial. The motion was noticed upon the files and pleadings of the case and the affidavits of the defendant and one John Kelly. So far as material the

affidavit of defendant alleges that he had employed and retained one Baldwin, an attorney at law, to defend such action and appear for him at the trial thereof; that Baldwin notified defendant about the 8th of December, 1909, that he had been served with a notice of trial and that the case would come on for trial "at this term of court;" that upon receipt of such notice defendant went to Jamestown, and to the office of said Baldwin once on the day of his arrival and twice the next day, but that he was unable to find his said attorney; that defendant had at his place a large number of horses requiring his constant attention; that by reason thereof he was unable to stay longer in Jamestown, and returned to his home, situated about 14 miles therefrom, on the 9th of December, 1908; that he had no notice of the day when such action was to be tried, and relied upon Baldwin to keep him advised thereof; that from his return home, on the 9th of December, he had been ill, and a portion of the time unable to leave his house; that on the 9th of December, before returning home from Jamestown, he went to the courthouse and interviewed the clerk of the district court with reference to when said cause might be expected to be reached for trial, and was by such clerk informed that it had been entered for trial on the 4th of December, 1909, that he did not think it would come on for trial before the last of the week beginning December 13th, or until toward the latter end of the term, but that said clerk was unable to give him any accurate information as to when said cause would be tried; that he intended to be present on the 13th day of December, 1909, at the opening of court, but because of his physical condition and of the large quantity of snow, it was impossible for him to leave his home; that he had stated all the facts relative to his defense to his attorney, C. S. Buck, and had been informed by said Buck that, in his judgment, he had a good and valid defense to said action; that he, defendant, had used every means in his power to provide for the defense, and had no intention of allowing judgment to be taken against him by default; that said Baldwin failed and neglected entirely to attend the said case.

Kelly's affidavit was, in substance, that he was employed by the defendant during the month of December, 1909, and that he knew said defendant was suffering, after the 1st day of December, 1909, with a severe attack of lumbago and during a portion of the time was unable

to leave his house, and that on the 13th of December, 1909, defendant was in such physical condition that it was impossible for him to leave his house; that at the same time the weather conditions were such that it would have been impossible for him to drive to Windsor, the closest railroad point for him to go to Jamestown.

On the hearing plaintiff submitted the affidavit of one Berkland, to the effect that on the 22d of December, 1909, he was stopping at the same hotel in Jamestown at which the defendant was stopping; and that in a conversation between them defendant stated that plaintiff had obtained judgment against defendant, and that defendant remarked, "I did not think they could do that when I was not here;" that in the conversation regarding the action and judgment defendant made no statement of having been sick, nor of any reason for not being present at the trial, and that at the time when such conversation occurred defendant was in apparent good health and was a vigorous looking man.

The affidavit of one McFarland was also offered, to the effect that he was the attorney for the plaintiff; that he had at all times informed defendant and his attorney, Baldwin, that he intended to move said case for trial on the first day of the regular December term of the district court, *viz.*, on December 13, 1909, or as soon thereafter as counsel could be heard; that he so informed defendant in person on the 26th day of November, 1909, and on the 8th or 9th of December, 1909; that on the 8th or 9th of December, he informed him in person that the case would be moved at the coming term of court, and that he also informed him of the day when the term would open; that defendant was, on said last-mentioned date, in apparent good health, and then stated to affiant in effect that he only wished he could have ten men like plaintiff around him, and he would like to take on the bunch at one time; that at such time defendant was active and a vigorous looking man, and made no complaint of his physical condition and no mention of his being unable to find his attorney, Baldwin; that plaintiff and defendant resided in the same neighborhood, about 18 miles distant from Jamestown, and that on the first day of the term of court in question plaintiff and his wife drove to Jamestown, and made the return trip to their residence on the 14th or 15th of December, 1909; that two material witnesses for plaintiff had, since the submission of said case to the court, departed to places unknown, and could not be produced at

a retrial of said action; that he informed defendant's attorney, Baldwin, on the first day of the term, that he intended to move the trial of such action, and again on the day before the action was tried he notified him that it would be moved for trial on the following day.

The affidavit of defendant's attorney, Baldwin, was also submitted, in which he stated that when he prepared defendant's answer he informed him of the date of the next term of court, *viz.*, December 13, 1909; that defendant called on him a few days afterwards and he again told him when court would convene, and promised to advise him about when his case would be reached for trial, and accordingly he wrote defendant later that the case was on the calendar and noticed for trial, and that the trial would be pushed by plaintiff's attorney at said term; that he did not see or hear from defendant again until the 18th of December, 1909; that he was at his office on the 8th and 9th days of December, 1909, or at his residence in Jamestown; that he had a telephone and telephone service in each place; that he had done and performed all acts that were in his judgment advisable to protect the interests of his client in such matter.

On these facts being presented, the trial court denied defendant's application. From this order an appeal is taken to this court.

R. G. McFarland, of Jamestown, for respondent.
Knauf & Knauf, of Jamestown, for defendant and appellant.

SPALDING, Ch. J. (after stating the facts as above).

The only question for our consideration is whether we can say that the trial court abused its discretion in denying defendant's application to vacate the judgment. In deciding upon such application the trial court undoubtedly took into consideration not only the facts disclosed by the affidavits which we have recited, but the character of the answer interposed by the defendant and his own knowledge of the condition of the weather and roads at the time the trial was had. It is clear that the defendant's answer was frivolous. In effect it was an admission of the allegations of the complaint concerning the cause of action, and judgment will not be vacated when the defense pled is not meritorious. 23 Cyc. 964, note 43 and b.

The affidavits on the part of defendant are vague and uncertain in their statements as to time and as to the condition of the defendant, and

disclose no earnest effort on his part to find his counsel and secure his attendance at the trial or to be present himself. As far as appears, his counsel may have been justified in assuming that he had abandoned his defense. He had given him as definite information as is usually possible in such cases as to the day when the case could be reached for trial. It was then defendant's duty to be present, particularly when he lived 18 miles from the county seat. It is the duty of litigants to watch the progress of proceedings in court, rather than of the court to accommodate its business to the convenience of a single litigant and perhaps thereby inconvenience all other parties having business before the court, hold jurors at the expense of the public, and interfere with the orderly prosecution of its regular business.

The departure of two material witnesses for the plaintiff for points unknown, between the trial and the hearing of the motion, was a proper circumstance for the court to take into consideration. The necessity for their presence after the trial and entry of judgment could not be anticipated by the plaintiff, and their absence might seriously prejudice his cause.

There was no such clear abuse of discretion on the part of the trial court in denying defendant's motion to vacate the judgment as will warrant this court in reversing the order. See Bazal v. St. Stanislaus Church, 21 N. D. 602, 132 N. W. 212; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228; Cline v. Duffy, 20 N. D. 525, 129 N. W. 75, and authorities cited in such cases.

The order of the trial court is affirmed.

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

SCHAFER v. JOHNS et al., School Board.

(42 L.R.A.(N.S.) 411, 137 N. W. 481.)

Schools and school districts — teachers — contract — statutory provision.

Under the school laws of this state, as revised and re-enacted in chapter 266,

Note.—The authorities on the effect of a contract by a teacher without license or certificate of qualification are collated in a note to the above case as reported in 42 L.R.A.(N.S.) 412.

Laws 1911, a contract otherwise duly entered into between a school board and a teacher is not void or voidable merely because, at the date of such contract, the teacher did not hold a certificate or permit qualifying him to teach. The case of Hosmer v. Sheldon School Dist. 4 N. D. 197, 25 L.R.A. 383, 50 Am. St. Rep. 639, 59 N. W. 1035, is differentiated on the ground of a change in the statute.

Opinion filed September 23, 1912.

Appeal by plaintiff from an order of the District Court for McHenry County *K. E. Leighton,* Special Judge, quashing a writ of certiorari to review proceedings of the defendant school board with reference to the hiring of teachers.

Reversed.

Palda, Aaker, & Greene, of Minot, for appellant.

Geo. A. McGee and *John E. Martin,* of Minot, for respondents.

FISK, J. This is an appeal from an order of the district court of McHenry county quashing a writ of certiorari issued by such court to review the proceedings of the defendant school board with reference to the hiring of teachers. For the purposes of this appeal the facts stated in the petition for the writ must be taken as true, the defendants' motion to quash which was granted being in the nature of a demurrer admitting the facts alleged, and merely challenging their legal sufficiency to authorize the issuance of such writ. The petition, omitting formal parts, is as follows:

State of North Dakota }
County of Ward } ss.:

A. L. Schafer, being first duly sworn, says that he is the plaintiff named in the above entitled action; that he is of the age of twenty-nine years; that he is a regular graduate of the Dakota Wesleyan University of Mitchell, South Dakota, and during all the times hereinafter men-

As to the right of school teachers to pay during absence, see note in 38 L.R.A. (N.S.) 513.

For cases on the right of teachers to salary during temporary interruption of school in term time for causes other than their own act or omission, see note in 50 L.R.A. 371.

On the question of the interference by courts with revocation of school teacher's license, see note in 15 L.R.A.(N.S.) 1147.

tioned was the possessor of a certificate or diploma of graduation from said institution. That heretofore and on the 14th day of May, A. D. 1912, the school board of said South Bend school district No. 1 of the county of McHenry in the state of North Dakota, at a regular meeting of said board, was presented with this affiant's application for the position of superintendent of the schools of said school district for the then ensuing year. That at such meeting said application was considered by the school board of said district, and upon resolution duly carried this affiant was elected as such superintendent of schools for the ensuing year at a salary of $1,600 for said period. That due and sufficient record of said proceeding were made and kept by the school board of said district. That thereafter and on the 20th day of May, A. D. 1912, the said school board, pursuant to its action hereinbefore set forth, made and entered into a contract in writing with this affiant in duplicate, one copy of which was delivered to this affiant and one copy was filed with the clerk of said school board. That said contract so made and entered into between the plaintiff and the said school board was in the words and figures following, to wit:

Teachers' Contract (Original).

State of North Dakota }
County of McHenry } ss.:
South Bend School }
District No. 1 }

This agreement, made and entered into this 20th day of May, A. D. 1912, between A. L. Schafer, a duly qualified teacher, of McHenry county, state of North Dakota, and the school board of South Bend school district No. 1, county of McHenry, state of North Dakota.

Witnesseth: That the said A. L. Schafer is to teach school No. 1 in said school district for a term of twelve months, beginning on the 1st day of August, A. D. 1912, for which services truly rendered the school board of said school district agrees to pay the said A. L. Schafer at the expiration of each month of service, the sum of one hundred thirty-three and 33/100 dollars.

Provided, That the salary of the last month in the term shall not be paid until the term report shall be made, filed with, and be approved

by the county superintendent of schools, as provided by § 381, Revised Codes 1905.

Provided further, That the school may be discontinued at any time as provided by § 832, Revised Codes 1905, and that no compensation shall be received by said teacher from the date of such discontinuance.

A. L. Schafer, Teacher,
Scintilla S. Ritchie, President,
A. E. Welo, Clerk.

That at the time of making such contract and of the proceedings prior thereto, this affiant was entitled to receive from the state board of examiners a first-grade professional certificate as a teacher in the public schools of the state of North Dakota, upon presentation of his certificate and diploma from the said Dakota Wesleyan University of Mitchell, South Dakota, all of which facts were well known to the school board of said school district at the time of its said meeting on May 14, 1912, and at the time of the execution of the contract hereinbefore set forth.

That in and by the terms of said contract the term of employment of this affiant as such teacher and superintendent of said school district began on the 1st day of August, 1912. That prior thereto this affiant duly presented to the board of examiners of the state of North Dakota his said certificate and diploma from said Dakota Wesleyan University of Mitchell, South Dakota, and thereupon there was duly and legally issued to him by the board of examiners, provided for by the laws of this state in relation to schools and school officer, a professional first-grade certificate, which qualified this affiant to teach in all the common and graded and high schools of the state of North Dakota for the period of two years, such certificate bearing the 26th day of July, A. D. 1912; and that thereafter and on the 30th day of July, 1912, and prior to the commencement of this affiant's term of service as teacher and superintendent of said school district, the said first-grade professional certificate so issued to and held by him was duly recorded by the county superintendent of schools of the county of McHenry and state of North Dakota; and that thereupon this affiant became fully qualified and authorized to enter upon the employment set forth in said contract, and has ever since been and now is so qualified and entitled to perform the duties incident to such employment, and to receive from said school district the compensation provided therefor by the terms of said contract.

That subsequent to the making and execution of the contract of such employment, the defendants herein as such school board at a meeting of such board held in said school district on July 13, 1912, made and adopted a certain preamble and resolutions, which were then and there entered upon and recorded in the records of said school district, and which preamble and resolutions are in the words and figures following, to wit:

"Whereas, The board of directors of South Bend school district No. 1, of Velva, McHenry county, North Dakota, at a regular meeting held on the 14th day of May, 1912, elected A. L. Schafer as superintendent of schools of said district for the ensuing year, and, in conformity with said action of the school board, a contract was made between said school board and A. L. Schafer, employing him as superintendent of schools of said district, services to begin August 1, 1912, and

"Whereas, It has become the knowledge of said board of directors that said A. L. Schafer has no legal qualifications to teach in the public schools of the state of North Dakota, he is therefore incompetent to contract with said board of directors to teach, and by reason therefore said action of the board becomes illegal.

"Be it therefore resolved, that the said contract made between said board of directors and A. L. Schafer be hereby declared null and void and that said contract be canceled.

"Be it further resolved, that the position of superintendent of schools of said district be declared vacant, and that said board of directors proceed to elect a lawfully qualified teacher to fill the position made vacant by this resolution."

That thereupon at that said meeting the said defendants, as such school board, voted to and did enter an order declaring the contract of this affiant hereinbefore set forth to be void on account of his not having as yet qualified in the state of North Dakota, and that the position of superintendent of said schools was made vacant thereby. That thereupon said defendant, as such school board, proceeded and did, in form, elect and employ one O. J. Lokken as superintendent of schools of said school district for the ensuing year.

That this affiant is informed and believes that the said defendants as such school board, and pretending to act for and on behalf of said school district, signed and executed an instrument purporting to be a

contract with the said O. J. Lokken as said superintendent of the schools of said district. That this affiant had not, at the time of the action of said defendants as such school board in attempting to cancel and rescind his said contract, been guilty of any violation of his contract, gross immorality, or flagrant or other neglect of duty, and this affiant avers and is so advised that the action of said defendants, in so attempting to cancel and annul said contract and dismiss this affiant from the employ of said district, was illegal in all respects and wholly beyond the power and authority of said defendants as such school board. And that the action of said school board in attempting to employ and to contract with the said O. J. Lokken as superintendent of the schools of said district was also wholly illegal and void, as will appear on the face of said proceedings. That the said defendants as such school board have refused and still refuse to recognize this affiant as the employee as such superintendent and teacher in said school district, and to permit him to assume and perform the duties which were imposed upon him by his said contract with said school district. And by reason of the matters and things aforesaid, this affiant has been greatly injured by being so refused the right to perform his said contract, and otherwise.

That the public schools within said school district will begin their sessions on or about the 9th day of September, A. D. 1912, and that in the interval between the date of this petition and the commencement of the sessions of said school there is a large amount of necessary preliminary work to be performed by this affiant as such superintendent and teacher, and that unless affiant be permitted to enter upon such duties, and unless the said board be restrained and enjoined from suffering the said O. J. Lokken to enter upon the performance of said duties, this affiant will be greatly delayed and annoyed in the conducting of the schools of said district in the manner in which they should be conducted.

A. L. Schafer.

Subscribed and sworn to before me this 10th day of August, A. D. 1912.

(Seal)

John E. Greene,
Notary Public, Ward Co.,
N. Dak.

No question is raised as to certiorari being a proper remedy under the facts, the respondents' contention being that because on May 20th, the date the contract of hiring was entered into between plaintiff and the school board, the former was not the holder of a lawful certificate of qualification or permit to teach in the public schools of the state, said contract is and at all times has been void and of no force or effect. Concededly, the whole controversy grows out of a disagreement regarding the proper construction to be given to certain provisions of our school law hereafter noticed. Respondents' counsel rely upon the decision of this court in Hosmer v. Sheldon School Dist. 4 N. D. 197, 25 L.R.A. 383, 50 Am. St. Rep. 639, 59 N. W. 1035, and the trial judge no doubt considered that case controlling. It was there held that a contract to teach school is void if, at the time such contract was entered into, the teacher did not hold a certificate entitling him to teach. Such decision was, however, based upon the provisions of two sections of the old school law which, in express language, among other things, provided:

"No person shall be employed or permitted to teach in any of the public schools of the state, except those in cities organized for school purposes under special laws, who is not the holder of a lawful certificate of qualification or permit to teach. *Any contract made in violation of this section shall be void.*" (§ 122, chap. 62, Laws 1890, as amended in 1891.)

And the other section reads: "It [the school board] shall employ the teachers of the schools of the district, . . . provided, that no person shall be *employed as teacher or* permitted to teach in any public school who is not, *when so employed or permitted to teach,* the holder of a teacher's certificate valid in the county or district in which such school is situated; . . ." (Laws 1890, chap. 62, § 75).

The court evidently construed such statute as prohibiting the entering into of such a contract when the teacher at such time does not hold a certificate or permit entitling him to teach, and the language which the court deemed controlling and decisive was above quoted. In that case it should be noticed also that "neither at the time of entering into the contract nor at the time of commencing to teach, did respondent hold a certificate valid in Ransom county." This fact no doubt was considered of some weight in that case, but however this may be, certain language found in the opinion is very significant, and unmistakably dis-

closes that the court recognized what it deemed a vital distinction between the Colorado statute construed in Hotz v. School Dist. 1 Colo. App. 40, 27 Pac. 15, and the North Dakota statute which it was there construing; and as we shall presently see, this same distinction exists between such old law and chapter 266, Laws 1911, which governs the case at bar. The language in the Hosmer opinion, to which we refer, is as follows: "The learned counsel for respondent is correct in stating that the evil against which the statute was directed consisted in having the public schools taught by unqualified persons. And there are cases supporting the contention that when the teacher held the proper certificate at the time the services were renderd, or offered to be rendered, the statute was sufficiently met; and the teacher entitled to recover under the contract. Hotz v. School Dist. supra, is of that class. A recovery of damages for breach of the contract was allowed there, in a case very similar to this. But the difference in the statutes clearly distinguishes the cases. The Colorado statute prohibited the school district officers from employing a teacher who did not hold a proper certificate. There was no penalty fixed for the violation of the provision on the part of the officers, nor was the contract declared void."

In revising and codifying our school laws in 1911 the legislature re-enacted the old sections construed in the Hosmer Case, but in a materially changed form. The portions of the old statute which we have italicized were entirely omitted. In doing so, we think it was the plain intent to change the rule announced in the Hosmer Case. The section dealing with the powers and duties of school boards (Laws 1891, chap. 62, § 75) reads: "No person shall be employed as teacher or permitted to teach . . . who is not, when so employed or permitted to teach, the holder of a teacher's certificate," etc. And as revised and re-enacted in 1911 it reads: "No person shall be permitted to teach who is not the holder of a teacher's certificate, . . .," etc.

Why this change in the statute, if no change in its meaning and operation was contemplated? It is not reasonable to presume that something more than a mere change in the phraseology of the statute was intended, especially in view of the Hosmer decision, which had been the settled law in this state for so many years? Furthermore, and with no intention of questioning the correctness of the Hosmer decision, we think a wise public policy demanded such change. There appears to us no good

reason for such a drastic statute. The enforcement thereof operated, no doubt, to hamper and greatly interfere with school boards in the employment of teachers. It, no doubt, frequently happened that a teacher could not obtain from the board of examiners the necessary certificate or permit until a regular meeting of such board, and still it may have been desirable and to the best interests of the schools that definite arrangements by contract be made with such teacher in advance of such meetings. This fact no doubt led to the change in the law. In any event we see no reason, in the light of our present statute, why valid contracts may not be entered into for the employment of teachers at any time. Of course in the absence of an express stipulation in such contracts to that effect, the law would raise an implied stipulation that the person thus employed should, before entering upon the performance of the contract, obtain the necessary credentials qualifying him to perform the same. It would serve no useful purpose to review decisions from other states having statutes differing from ours. The cases cited in respondents' brief involved quite different statutes from those in this case.

Our conclusion leads to a reversal, and the District Court is accordingly directed to reverse its decision and to enter judgment in accordance herewith.

PAULSON v. WARD COUNTY.

(42 L.R.A.(N.S.) 111, 137 N. W. 486.)

Accord and satisfaction — claims against county — allowance — acceptance of warranty presumed to be in full payment.

1. Where unliquidated claims against a county are duly presented to its board

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Note.—The effect of the acceptance of partial allowance of claim by a public body as an accord and satisfaction is the subject of a note appended to the above case as reported in 42 L.R.A.(N.S.) 112, in which it is shown that, where the claim is unliquidated or disputed, a payment and acceptance of part in compromise is deemed to be a sufficient satisfaction of the whole; and, in harmony with the above case, it is held that the acceptance of a reduced amount allowed by a county upon a disputed claim concludes the claimant.

For the general subject of accord and satisfaction by part payment, see note in 20 L.R.A. 785.

of county commissioners for allowance, and the claims are considered together and allowed at a lump sum less than the amount claimed and a warrant is drawn for the amount so allowed, which warrant is accepted by the claimant, such acceptance is presumed to be in full payment of the claims presented.

Accord and satisfaction — claims against county — allowance — acceptance of warrant.

2. Claimant cannot accept said warrant and credit the amount thereof upon the total of the claims presented and then sue for the balance rejected. He must repudiate the allowance and submit his claim as a whole to the courts or accept the warrant in full payment.

Opinion filed July 24, 1912. Rehearing denied September 24, 1912.

Appeal by defendant from an order of the County Court for Ward County, *N. Davis,* J., overruling a demurrer to the complaint in an action brought to recover for professional services for the support of the poor of Ward County.

Reversed.

Dudley L. Nash, State's Attorney, and *George L. Ryerson,* Assistant State's Attorney, for appellant.

Where a claim against the county is presented to the Board of Supervisors and they allow a part of it and reject the rest, a claimant accepting the portion allowed, knowing that the rest has been rejected, cannot recover in an action, the portion rejected. Brick v. Plymouth County, 63 Iowa, 462, 19 N. W. 304; Cleveland County v. Seawell, 3 Okla. 281, 41 Pac. 592; Eakin v. Nez Perces County, 4 Idaho, 131, 36 Pac. 702.

For payment of part of a liquidated and undisputed debt as a consideration for the discharge of the whole, see notes in 11 L.R.A.(N.S.) 1018, and 21 L.R.A.(N.S.) 1005.

On the effect of acceptance of remittance of part of the amount of an unliquidated or disputed claim, accompanied with the statement that it is in full, or words of similar import, as assent to its receipt in full payment, see notes in 14 L.R.A.(N.S.) 443, and 27 L.R.A.(N.S.) 439.

For acceptance of principal sum as affecting the right to interest, see note in 40 L.R.A.(N.S.) 588.

For cases on agreement in advance to accept less than amount of appropriation, salary, or fee, see note in 36 L.R.A.(N.S.) 244.

Upon the right of town, county, or municipality to surrender valid claim upon a partial payment thereof, see note in 19 L.R.A.(N.S.) 320.

George A. McGee and *John E. Martin,* for respondent.

The unauthorized act of the overseer of the poor, in employing respondent to provide for the county charges in his district outside of the asylum may be ratified by a subsequent resolution of the board of county commissioners, where they could have authorized him, in the first place, to engaged said respondent. Hughes County v. Ward, 81 Fed. 314.

The allowance of a claim in part only by the board of county commissioners is no bar to an action against said county for the balance, where no appeal has been taken from such action of the board. Campbell County v. Overby, 20 S. D. 640, 108 N. W. 247.

Goss, J. This action is brought by a physician to recover for professional services and supplies furnished by him for the support of the poor of Ward county. The complaint recites the performance of services and the furnishing of supplies of the total reasonable value of $750, and that "bills in due form or law, duly verified and approved by a commissioner of the board as aforesaid, were presented to the board of county commissioners of Ward county for their consideration; and after mutilating said bills said board of county commissioners allowed the plaintiff herein the sum of $265, and no more. Wherefore plaintiff prays judgment against the defendant for the sum of $750, less a credit of $265." The trial court overruled a demurrer interposed on the ground that the complaint did not state facts sufficient to constitute a cause of action. From this order defendant appeals.

The only deduction to be drawn from the complaint is that the county commissioners allowed $265 in full for the $750 of claims presented against the county, and that plaintiff has credited the $265 so allowed, and brought this action for the balance. This necessarily implies an acceptance by plaintiff of a warrant for county funds for the $265 allowed. Does the complaint show an executed accord and satisfaction barring plaintiff's recovery in the face of the demurrer? If this action was between private parties, we would have no hesitancy in holding the demurrer not well taken, as it would not sufficiently appear that the partial payment received was under an agreement that the same should be in full for the claim and so constitute an accord. But

where, as in this case, in the payment of claims by counties or municipalities, the law requires the presentation of itemized and verified claims to the board of county commissioners as the administrative and fiscal agents of the county for their approval and determination, upon the fact of whether the services were rendered and goods furnished as charged for, as well as the reasonable value thereof, and consequent approval in whole or in part before allowance, and with the requirement that said board shall order warranty in payment to issue for the full amount and no more at which the claim is approved, under the presumption of the regularity of official action, the warrant is issued as the result of a quasi judicial finding by the board on the claim presented. Of all this plaintiff was conclusively presumed to have knowledge before acceptance of the warrant or the cash proceeds thereof, as he is bound to know the law under which he presented his claim and sought its allowance and under which the warrant was issued. And the pleading of the issuance of the warrant and in effect its acceptance amounts to the pleading of an accord and satisfaction, and precludes him from claiming only partial payment, and thereunder crediting the amount received as a partial payment on the claim presented. He was bound to know that a warrant could not be issued, and accordingly tendered him as other than full payment of his claims, which he pleads were presented and considered, and for which *in toto* the warrant was issued. With knowledge of the law thus imputed and conclusively presumed, the acceptance of the warrant operated as an accord and satisfaction within the provisions of §§ 5269 and 5271, Revised Codes 1905. As to necessity of presentation of claims and allowance and payment to the amount allowed, see §§ 3162–3166, 2389, 2393, Revised Codes 1905. As sustaining our conclusions, see Perry v. Cheboygan, 55 Mich. 250, 21 N. W. 333; Wapello County v. Sinnaman, 1 G. Greene, 413; Brick v. Plymouth County, 63 Iowa, 462, 19 N. W. 304; People ex rel. O'Mara v. Cayuga County, 43 N. Y. S. R. 77, 17 N. Y. Supp. 314; Zirker v. Hughes, 77 Cal. 235, 19 Pac. 423; Rawlins v. Jungquist, 16 Wyo. 403, 94 Pac. 464, and opinion on rehearing in same case, 16 Wyo. 426, 96 Pac. 144; La Plata County v. Morgan, 28 Colo. 322, 65 Pac. 41; La Plata County v. Durnell, 17 Colo. App. 85, 66 Pac. 1073; Eakin v. Nez Perces County, 4 Idaho, 131, 36 Pac. 702; Yavapai County v. O'Neill, 3 Ariz. 363, 29 Pac. 430; Cleveland

County v. Seawell, 3 Okla. 281, 41 Pac. 592; Bowman v. Ogden City, 33 Utah, 196, 93 Pac. 561; Green v. Lancaster County, 61 Neb. 473, 85 N. W. 439; United States v. Adams, 7 Wall. 463, 19 L. ed. 249; United States v. Mowry, 154 U. S. 564, and 19 L. ed. 256, 14 Sup. Ct. Rep. 1213; 1 Cyc. 239, and notes, and Cyc. annotations. Consult also Flagg v. Marion County, 31 Or. 18, 48 Pac. 693; Rio Grande County v. Hobkirk, 13 Colo. App. 180, 56 Pac. 993; People ex rel. Morrison v. Board, 56 Hun, 459, 10 N. Y. Supp. 88; which three cases recognize the doctrine, but turn on the question of pleading.

All the foregoing cases are in point. We give the following excerpts from some of them: "The council audited the claim at $50. Now if plaintiff was dissatisfied with this allowance, he should not have applied for and received the warrant on the treasurer and obtained payment thereof. He must be held to have acquiesced in the settlement thus made. . . . There is no good reason why plaintiff is not estopped, by accepting payment of the amount allowed, from making a further claim for the same services passed upon by the council." Perry v. Cheboygan, 55 Mich. 250, 21 N. W. 333. "The acceptance of the part allowed should be considered satisfaction for the whole. If the party desired to bring suit he should repudiate the allowance, refuse to accept the amount allowed, and bring his action." Wapello County v. Sinnaman, 1 G. Greene, 413. "The proposition is now made by the learned counsel for the plaintiff that, inasmuch as the board of supervisors did not pass upon the several items of the account rendered by him, but only upon the account as a whole, the case of the claimant is taken out of the ordinary and well-established rule. The force of this contention, however, is not apparent. If before accepting the sum of $412, the relator had ascertained that the board of supervisors had not passed upon the several items, he could undoubtedly, by refusing to accept the money thus offered, require that there should be an examination of and a passing upon the several items of his account. Not having done so, however, he is now, as it seems to us, precluded from making any claim upon such contention." People ex rel. O'Mara v. Cayuga County, 43 N. Y. S. R. 77, 17 N. Y. Supp. 314, which would answer any similar contention of this plaintiff regarding the act of the board in passing jointly upon all bills presented and making a lump allowance therefor. In Yavapai County v. O'Neill, 3

Ariz. 363, 29 Pac. 430, the complaint recites the reception and cashing of the warrant under an agreement between the claimant and the county commissioners that such acts should not foreclose the right to sue for the part of the claim rejected. On demurrer the court held the agreement to be void, and that the acceptance of the money discharged the claim in full. We quote the following: "That manner of presentation, allowance, and payment of claims against the county, prescribed by the statute from which we have quoted, being exclusive of any other, the right of the plaintiff to maintain this action is governed thereby, and as well, is the board of supervisors. It is a salutary rule that requires the claimant, if he be dissatisfied with the allowance by the board, to either forego its part rejected or submit his claim as a whole to the courts. It would be unfair to the county that he should accept that part of the determination of the board that is to his advantage, and make the other a subject of litigation. The observance of the rule that when his claim is only partially allowed the claimant must accept the part so allowed in satisfaction of his whole claim, or litigate it as an entirety, would directly tend to the discouragement of the presentation of fictitious and extortionate claims against the county." This case is quoted and followed in Eakin v. Nez Perces County, 4 Idaho, 131, 36 Pac. 702. In Cleveland County v. Seawell, 3 Okla. 281, 41 Pac. 592, we read: "It appears that the board of county commissioners allowed in part his claims presented for the use of such rooms. Warrants were drawn in his favor for the sums so allowed, which he accepted. As we find the law, such acceptance is a waiver of any further claim against the county. It is in the nature of an executed agreement to receive less than the amount claimed, and an acceptance of such sum will estop the party receiving the same from asserting his claim to the balance." And such are the holdings generally of all the cases. Some are placed upon the doctrine of estoppel, and some upon that of accord and satisfaction; the result is the same in either case, though technically the latter is probably the true doctrine.

We are not unmindful that as a general rule a defense of accord and satisfaction must be specially plead by answer to be available, and under Webster v. McLaren, 19 N. D. 751, 123 N. W. 395, proven as plead to avail a defense. But where an accord and satisfaction is alleged in the complaint, in an action against a county, we see no

good reason why a demurrer should not be sustained. And some of the foregoing authorities, particularly Yavapai County v. O'Neill, supra, decided on demurrer, and Rawlins v. Jungquist, 16 Wyo. 403, 426, 94 Pac. 464, and 96 Pac. 144, on page 147, wherein the defense was held available when defectively plead, are authority for our holding on this demurrer. It would seem that, in the absence of a plea of accord and satisfaction, public policy alone would be sufficient grounds for denying plaintiff judgment should he prove all the averments of his complaint, inasmuch as the legality of the disbursement of public money is involved.

Accordingly the order appealed from is reversed and the trial court will enter an order sustaining the demurrer. Appellant will recover taxable costs on this appeal.

WHALEN v. GREAT NORTHERN RAILWAY COMPANY.

(137 N. W. 576.)

Common carriers — transportation of stock — negligence — liability.

An action founded upon alleged negligence of defendant in transporting plaintiff in charge of two cars of horses and emigrant moveables from Minneapolis to Williston. Plaintiff claims he was compelled to remain during one night in a cold stock car during a storm, and from the exposure so occasioned he contracted sickness, to his injury.

Held, that no liability is proven in that defendant company did not, as plead, compel plaintiff to ride in said stock car and endure such exposure, but he had ample opportunity, without risk of injury, to go to the caboose attached to the train. Plaintiff could not needlessly expose himself to the cold and recover damages occasioned thereby.

Opinion filed July 15, 1912. Rehearing denied September 25, 1912.

Note.—As to the duty of a carrier to care taker accompanying shipment of live stock, see note in 31 L.R.A.(N.S.) 632. And on the carrier's liability for personal injuries to consignor or consignee or their employees caused by unsafe car, see note in 9 L.R.A.(N.S.) 857.

Appeal by defendant from a judgment of the District Court for Towner County, *Cowan, J.*, in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence.

Reversed.

Frederic T. Cuthbert, L. H. Sennett and *A. R. Smythe* for respondent.

Respondent involuntarily and of necessity became a passenger in the car in which he was entrapped by the negligent operation and management of the appellant railway company's cars and trains. Lake Shore & M. S. R. Co. v. Teeters, 166 Ind. 335, 5 L.R.A.(N.S.) 425, 77 N. E. 599; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Blatcher v. Philadelphia, B. & W. R. Co. 31 App. D. C. 385, 16 L.R.A. (N.S.) 991.

A passenger is not negligent in not riding in the passenger coach or caboose. Norvell v. Kanawha & M. R. Co. 67 W. Va. 467, 29 L.R.A. (N.S.) 325, 68 S. E. 288; Graham v. McNeill, 20 Wash. 466, 43 L.R.A. 300, 72 Am. St. Rep. 121, 55 Pac. 631; Benedict v. Minneapolis & St. L. R. Co. 86 Minn. 224, 57 L.R.A. 639, 91 Am. St. Rep. 345, 90 N. W. 360; Lake Shore & M. S. R. Co. v. Teeters, 66 Ind. 335, 5 L.R.A.(N.S.) 425, 77 N. E. 599.

Murphy & Duggan, of Grand Forks, for defendant.

Goss, J. This is an appeal from a judgment entered on a verdict for $500 against defendant for alleged negligence, resulting in plaintiff's sickness from exposure endured while *en route* on a freight train from Minneapolis to Williston, such exposure occurring between Minneapolis and Wilmar, Minnesota.

The complaint recites a relationship of carrier and passenger existing between defendant and plaintiff, arising from defendant's contract to transport two cars of horses and emigrant moveables, and a negligent performance thereof to plaintiff's injury. The negligence is charged to have consisted in starting, without notice to plaintiff the freight car in which he was working at arranging its contents for the trip, and without affording him opportunity to leave it and get to a place of comfort, and because of it being kept continuously moving he

was compelled to remain within the cold and unlighted stock car from Minneapolis to Wilmar, during an entire cold and stormy night, resulting in plaintiff, because thereof, contracting a sickness to his damage in the sum of $2,000.

Many assignments of error are urged for reversal of judgment, among them being one based on the denial of defendant's motion for a directed verdict, made at the close of the testimony testing the sufficiency of the evidence to warrant the submission to the jury of any question of negligence.

The first question then is whether, under the testimony, the verdict founded on defendant's negligence as a cause of action can be sustained. We give the following *résumé* of the testimony bearing on negligence. We assume the testimony is sufficient to raise a question of fact on negligence in defendant's starting plaintiff's car on the trip without previous warning, with him inside of it arranging its contents, and without previous opportunity afforded him to get to a caboose if one was attached to the train.

Plaintiff testifies:

I didn't notice how many cars there were in the train. There were more than fifteen or twenty cars between ours and the caboose. We noticed them making up the train while we were engaged in loading our cars. They made the train up as far as I know out of cars at the freight platform. The cars at the platform had not been moved while we were loading, until the train started.

Q. Now, the train never stopped until it got out of Minneapolis some distance?

A. No, it didn't. They hitched on to our cars, and a few more were added, and then run out to the end of the switch and backed in, and then started. I don't know of these cars of ours having been pulled down to Clearwater junction and left there until the other train came from Como and picked them up. That may be so, but not that I know of. They pulled us out.

Q. They pulled you out and left you standing in the yard until the other train came along?

A. It didn't look like the yard to me.

Q. After your cars started to pull away from that depot platform, didn't they stop up in the yard for a while until this other train came along and picked them up?

A. The only stop I remember is somewhere they stopped long enough to couple on the main train. We were pulled away from the depot some where around 10 o'clock. I don't remember any station or stop that night outside of Minneapolis. We reached Wilmar somewhere around 5 o'clock. We didn't see any man connected with the railroad to talk to after the cars started from the depot the first time. At places where the train stopped I made no effort to get out or to see the train crew or anybody. We were in charge of those horses, taking care of them. We knew we had a right to ride on that train, in the caboose or anywhere else. I understood this from the contract. I didn't have the time with me. I had a watch, but it was not running. I don't believe Gorman had a watch. I have no recollection of stopping. I don't know where we did stop until we got to Wilmar. When I looked out of the door I saw no lights.

Q. Were there lights in the Minneapolis yards there?

A. I don't remember seeing any lights there when we stopped.

Q. You didn't see any lights there at all when you stopped—is that what you said?

A. Yes.

Q. Then you did stop there up in the yards a short ways from the depot?

A. I don't know how far it was.

Q. How long did you remain there when you stopped?

A. We remained there long enough, while the train was made up there.

Q. Then your cars were put in the train there?

A. Yes.

Q. And your two cars were left alone standing on the track there for a while, is that a fact?

A. Yes.

Q. And there was a lot of switching done, was there, in making up this full train, is that right?

A. I guess there was; I didn't pay any attention to it.

Q. You knew that the engines were working around through the

yards, and they were coupling the train up, making up the train into which your two cars were put—you knew that to be a fact, didn't you?

A. Yes, I knew that to be a fact.

Q. And after that work had been done and the train completed, it pulled out, you remember that?

A. Yes. We were loading while they were making up the train. This was not after we pulled down from the depot, the train was made up on the main siding or track right out from the depot. I guess it would be west of the depot, a matter of three quarters of a mile or so.

Q. I can't just quite understand the position that you intend to take, because, as I understand it, there is a little conflict; is it not a fact that your cars pulled out there a short ways in the yards where they stood for while?

A. The only place where I remember of that is I remember in the yards where they came in with the engine and hooked on to us and pulled up to end of the switch and put us in the main train, and left.

Q. Some time elapsed after they pulled you out to the end of the switch before you were put in the train?

A. No.

Q. And you mean to say that when you were started away from the loading platform at the depot and pulled out to the end of the main switch, you were immediately put in the train, and left town?

A. That is my answer, yes. I can't say how far out I was pulled because it was dark. They pulled us out of the Minneapolis yards. This switch that I refer to was not in the Minneapolis yards. The switch was probably a mile away from the depot. Our cars stopped long enough to reswitch back. They took the engine off of our cars, and put it on those other cars there, and put both together and pulled out.

Q. What were you doing while your two cars were standing there in the yard?

A. In the car.

Q. Why didn't you get out and go to the caboose?

A. I didn't want to get out there with the trains pulling around.

Q. What is that?

A. There were trains pulling around there. I really didn't know where it was. I knew there was a caboose on the rear of that train that

was going to pick us up. I didn't know which way to look for it. I didn't know whether we were on our own train or out in the yards. I didn't see men working in the yards, but saw the cars and the engines moving. I didn't know whether there were any men there or not. Neither Gorman nor I got out to make inquiries at that time, but simply remained in our car until it was coupled on, and went on out in the train. We remained in the car during every time the train stopped between there and Wilmar without getting out. We saw nobody. I knew where Howard Lake is, about 40 or 50 miles this side of Minneapolis. I don't know whether the train stopped at Howard Lake, Litchfield, or Delano. The train stopped a few times. It might have stopped over a half dozen times. It didn't stop a considerable length of time at those points. I didn't have any time. I was not sleeping on reaching Wilmar, and mean to say that after we pulled into Wilmar yards I immediately got out of this car and ran to the caboose, and just succeeded in reaching it when the train pulled out of Wilmar. I can't say whether the train remained at Wilmar thirty minutes or not. At the time they coupled on to the cars I didn't know they were going to pull out of the yards. This was probably a mile from the depot, or may be more. I looked out and couldn't see anything only box cars along there.

Q. Did you know they were going to pull you out then, or take you back?

A. I knew nothing about it. Figured they would run up back into the yard and up closer to the depot somewhere.

Q. And you figured that you would then go back to the caboose?

A. Yes. We were still within the city limits of Minneapolis when we pulled out of there a mile. I saw the green switch lights, but saw no city or electric lights. This was about 10 o'clock in the evening. There were box cars along on both sides, and we were in this car, and the only way I could see lights would be in the sky; the box cars obstructed the view. I could have gotten out of the car. There was not anything to interfere with that. There wasn't anyone told me that the train would pull back to the depot. I made no inquiries about that. I was in Minneapolis all of the 17th of March, and had lots of time to inquire and find out when this train left and when it arrived there. The man that showed us the cars said the train was due to pull out some-

where after 8, but it was late. He didn't say where it would pull from, and we asked nobody about it. Whenever the train stopped after it left Minneapolis until it got to Wilmar was looking out for an opportunity to get out and make the caboose. When these two cars of ours were being put in the train at the junction, there may have been cars put on both ends of them by cars being switched on to the head end and again on to the rear. We could not see the caboose at any of the points where the stops were made. We were probably eight or ten cars from the engine. I should judge this when I could see the train at Wilmar. We could see the sparks from the engine once in a while a short distance ahead. We made no effort to get out and go to the engine during any of these stops. I was looking for the caboose. I knew there were train men on the engine. We had no way of knowing how long the train would stop when it made the different stops.

Plaintiff further testifies in substance that the night was dark, their whereabouts strange and unknown to them. They were without light; were afraid to jump out of the car, not knowing but what to do so would be to injure themselves. At no stop were there lights so they could see a way to safety, nor see where they were, or see the caboose. It was storming and very cold.

His companion, Gorman, testified substantially the same, and "that the train made some stops once or twice. I saw nothing but storm. I did not get out of the door, because I didn't want to take chances on being frozen to death or lost. At Wilmar we got out and went to the caboose. My watch was not running. I didn't know what time we got into Wilmar. I don't know whether the cars were pulled out about a mile, as claimed by Whalen, or not. I don't remember. I don't think the train remained in the yards until 3 o'clock in the morning. I can't swear to it. They was moving around all the time, and going. I suppose, they was going right along. I can't tell whether they backed up or not, and would not swear that they were going forward all the time. They were doing some bumping. During the two hours that we were working there, loading after 8 o'clock, we did not ask anybody what train would take us out, when it would take us out, or where it would go. It took some time to tie the horses and nail up planks after we got started."

Q. It may have stood as long as an hour and fifty minutes in the

yards there, so that your cars may have stood while they were being put into the train, or may have stopped as high as an hour and twenty minutes out at some station on the road, as far as you knew?

A. I don't think, but it might have.

Q. If the records of the train made at the time by the conductor should show that, I will ask you whether or not you are in a position to dispute, whether you would dispute it or not?

A. I wouldn't swear to it.

Q. It may be so?

A. It may be. I made no effort to get out of the cars while we were in the yards, or find anybody and make inquiries about anything. Whalen did not get out of the car either. We talked together and wondered where they were going to stop so we could get off.

Q. And did it not occur to either one of you to get out of the car and go and make inquiries of somebody you might be able to find?

A. We supposed someone would come and tell us. We expected somebody to notify us that we were pulling out. After pulling away from the platform I don't know where they stopped, can't say. The train master said to us at the time, "Look out boys, the train is pulling out." I understood they were going to leave town. If they did stop in the yards, it was dark and stormy, and we saw no persons there. We did not know what part of the city we were in. We didn't know how long the train would stop at any of the places where stops were made. No one told us where the caboose was. Nothing was said to us with reference to finding the caboose. This was a very long train. I should judge there were forty or fifty cars in it on reaching Wilmar. We were nearer the engine than the caboose. I had no opportunity to get out of the car from the time we were pulled away from the platform at Minneapolis until arrival at Wilmar. I was looking for such an opportunity. Witness Gorman testified he has an action pending against the defendant, arising out of the same transaction, for "exposure."

The testimony of the defense was to the effect that Whalen was told at 6:30 that night that the cars would be pulled away from the platform between 7 and 8, and taken to Clearwater junction, where the regular freight would pick them up about midnight; that they would

have to stay in the cars and ride to the junction with their stuff, though this is denied by plaintiff; that the caboose would be at Clearwater junction, about three quarters of a mile from where their cars were loaded, also denied by plaintiff. The conductor's written train records, received in evidence, show that the freight train left Como one minute past midnight, or at 12:01 in the morning of March 18th, arriving at Wilmar at 9:15 the following morning, instead of at 5 o'clock, as plaintiff testified. The time tables for this freight train over that division scheduled it to leave Como at 12:01 A. M., to arrive at Clearwater junction at 1:05 A. M., and to depart therefrom at 2:35 A. M. Conductor's testimony is that the train was run according to this time schedule. The conductor's written delay report in evidence shows the following stops, after leaving Clearwater junction, at which place the two stock cars in question were placed in the train; namely, at Delano, 10 minutes for taking water; at Howard Lake, 42 miles from Minneapolis, one hour and ten minutes delay in meeting trains Nos. 4 and 10; at Smith Lake, five minutes taking coal and ten minutes delay taking water; at Litchfield, twenty minutes delay for train No. 22, and at Atwater, ten minutes delay for train No. 52, with arrival at Wilmar at 9:15 A. M., one half hour later than time schedule.

Will the foregoing testimony support the verdict, and sustain the jury's finding that the defendant company was guilty of negligence, and that such negligence was the proximate cause of plaintiff's injury? After a most careful consideration of all the testimony, we have arrived at the conclusion that it is not proven that any act of defendant or its servants was the proximate cause of plaintiff's injuries from exposure. Granting that plaintiff's version is correct, as to an enforced and hasty departure immediately after loading, and while they were arranging the stock and goods in the second car, from this simple fact alone no injury to plaintiff is proven to have followed as the proximate result thereof. To constitute a cause of action, plaintiff must also prove, as he has plead, that besides such negligent act in starting plaintiff on the trip without warning or opportunity to get to the caboose or notify him of its whereabouts, that he was thereafter compelled to so remain against his will, subject to exposure, by circumstances thereafter intervening, or that he was so placed as to compel him to elect between staying subject to exposure, or invite danger, real or apparent, to his person

in extricating himself therefrom. Gorman testifies that, for sometime after their cars were moving, they were busy tying the horses and arranging things within the car, and "while the switching was going" depended upon someone "to come and tell us" where the caboose was. It is equally conclusive from plaintiff's cross-examination that soon after pulling out from the loading platform they stopped for a considerable time during which the train was made up, or their car incorporated in another train. Conceding that the loading platform was left at about 10 o'clock, as plaintiff and Gorman testify, they must have remained for between four and five hours at Clearwater junction, three quarters of a mile from their starting point, during which time ample opportunity must have been afforded plaintiff and his companion to determine whether they wanted to stay in the stock car, or find a place more comfortable, and to go there. It appears, also, that more than reasonable opportunity was afforded them to go to the caboose during the run from the junction to Wilmar. If they had doubts about reaching the caboose, they could easily have reached the engine, five to ten cars ahead, and either gotten aboard or notified the trainmen of their predicament. They do not claim that they did anything to better their condition. They were grown men, not children, and the defendant was warranted in dealing with them on the supposition that they possessed average intelligence and were using it *en route*. It was their duty to use reasonable and ordinary diligence and care to protect themselves from exposure, or be held to suffer the consequences. That they chose the latter alternative is their own, and not the company's negligence. They were not compelled, as they assert in their complaint, to remain in the stock car. They have failed on this part of their case to raise any question of fact for the jury. Besides, they had the right to remain where they did and care for their stock. Plaintiff states that such was his right under the contract. And the company's agents were not negligent if they assumed plaintiff elected so to do, instead of riding in the caboose. The company was not to blame for the inclement weather, nor for the voluntary election of plaintiff to expose himself to the elements, instead of doing the contrary. Unless the act of the defendant's agents or employees in charge of the train prevented plaintiff from going to the caboose or place of shelter afforded, the defendant would not be liable, and we cannot see that any serious

obstacles intervened to prevent plaintiff from having, with reasonable diligence, extricated himself from this predicament, without danger, real or apparent.

If authority for our conclusions is necessary, we cite 1 Cooley on Torts, 3d ed. 99,—under proximate cause,—and 3d subd. page 101, reading: "If the original act was wrongful and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause passing by those which were innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another the injury shall be imputed to the last wrong as the proximate cause and not to that which was more remote." See also same authority, page 123, from which we quote: "But if the acts or neglect were not concurrent in time, and the party last in fault was chargeable with some duty to the other, which if performed would have prevented the injury, the law will attribute to his culpable conduct the injurious consequence, and refuse to look beyond it. For illustration, the case may be instanced of the escape of gas into a dwelling in consequence of the negligence of the gas company, and the subsequent ignition of the gas through the negligence of a tenant. 'If the tenant, upon discovering the presence of gas in large quantity in the house, neglected to give notice to the agents or servants of the defendant, or to take reasonable precautions to remove or exclude the gas, and recklessly brought the flame of a candle in contact with it, thus bringing about injurious effects, which would not have followed but for such reckless or negligent conduct on his part, the defendant ought not to be held responsible for those results. Whatever of care was requisite for the protection of the premises under the circumstances was due from the occupant. The defendant, as well as the plaintiff, had a right to expect and require it of him. . . . If the intervening misconduct of the occupant produced the explosion which was the immediate cause of the injury to the building, the plaintiff cannot charge the legal responsibility for that result upon the original negligent act or omission of the defendant.'" Granting, then, that the company was negligent in the first instance, in hauling defendant's car, with him in it, away from the loading platform without notice to him, and that the

results of such negligence continued as a direct cause of plaintiff's exposure until the time came for plaintiff to extricate himself from his exposed situation, and prevent injury to his person by exposure to the elements, such direct and formerly proximate cause immediately became the remote cause or act of negligence when plaintiff failed to avail himself of any reasonable opportunity to avoid exposure. Realizing this to be the law applicable, and that would arise under the facts, counsel for plaintiff have specifically plead that the exposure resulted from the original negligent act, kept alive as a proximate cause for the injury by force of circumstances over which defendant had no control, compelling him to remain continuously exposed until therefrom injury by the cold was occasioned, from which sickness developed. In the proof, as heretofore stated, the circumstances conclusively disprove such compulsion, and lower the original negligent act from the proximate to the remote cause of injury by exposure.

And what is true as to the assumed negligent act as above discussed is true as to alleged negligence predicated upon the stock car being out of repair, besides it has no basis under the proof. No defect, as such, is shown,—simply an inability to fully close the door from the inside. The company carried a caboose for plaintiff's comfort. As before stated, it was unnecessary for him to remain in the stock car. Granting that it was defective, and conceding that the proof establishes that the door was defective in that it could not be closed from the inside, such defect is not the proximate cause of the exposure, but, instead, said cause is plaintiff's failure to go to the caboose wherein he belonged if he would avoid exposure.

We conclude that plaintiff has wholly failed to establish a cause of action against defendant for the alleged negligence complained of, or at all. While granting due consideration for the findings of fact necessarily embraced in the verdict, we are satisfied that no facts exist from which it can be said that defendant was guilty of negligence which, as a proximate cause, resulted in plaintiff's exposure to his injury; and that the judgment of the trial court must be reversed and set aside, and this action dismissed, and it is so ordered.

It is not out of place to here remark that appellant's abstract contains an original complaint only, with answer thereto, as the purported basis for the issues upon which trial was had. The trial court's instructions

being so out of harmony therewith, we have explored the record and found an amended complaint, served and filed by stipulation of counsel, radically changing the questions of alleged negligence involved. Such amended complaint is not printed in appellant's abstract. We know this to have been an oversight, but that does not excuse the presenting to this court in this manner upon appeal false issues. There may also have been a duty resting upon respondent's counsel to call our attention thereto, which they have not done, but that does not excuse appellant. This court has a right to insist that the abstract presented by an appellant fully, fairly, and correctly reflect all the issues presented below. And it is the duty of an appellant to see that no misleading issue is presented on an appeal.

STATE EX REL. JOHNSON et al. v. THOMAS ELY et al.

(137 N. W. 834.)

Mandamus — nature of writ — when issued.

1. Mandamus is not a writ of right, and will not be granted to compel the performance of an act when no beneficial result would be attained by its performance.

Mandamus — discretionary writ — evidence.

2. Mandamus as a general rule is a discretionary writ, and when application is made to the trial court to issue mandamus, that court may take testimony to aid it in determining how its discretion should be exercised.

Mandamus — discretion — evidence.

3. It is not an abuse of discretion to deny a writ of mandamus when it is shown that its issuance would avail nothing to the relators.

Elections — establishment of voting precincts.

4. The county commissioners of Ward county, when what is now Burke county was a part thereof, established the voting precincts and designated the polling places in certain townships now in Burke county. On the organization of Burke county, the commissioners thereof failed to re-establish voting precincts or designate polling place. *Held*, that the precincts and polling places established by the commissioners of Ward county remain such until the commissioners of Burke county act thereon.

Elections — establishment of voting precincts — voting at different place.

5. In accordance with Elvick v. Groves, 17 N. D. 561, 118 N. W. 228, it is *held* that where a voting place is duly established by the county commissioners, an election held at another place a considerable distance therefrom in the absence of special reasons, is unauthorized, and the returns thereof should not be canvassed.

Elections — establishment of voting precincts — voting at different place — mandamus — canvassing boards.

6. In each of the precincts involved in this proceeding the commissioners of Ward county in 1908 established the voting places at "the usual place." The record shows that, at the next election after such establishment, the voting was done at places near the center of the townships or precincts. A motion of relators and a demurrer filed to the return of the respondents both admit that the election of 1910 was not held at the place designated. The evidence shows that it was held at places several miles distant, on the extreme boundaries of the precincts; and it is held that, in the absence of any conflict in the evidence, the trial court did not abuse its discretion in declining to issue its writ of mandamus to direct the canvassing board to canvass the votes alleged to have been cast at such illegal polling places, and which such board had refused to include in its canvass of votes cast at the 1910 election.

Elections — canvassing boards — contest of election — mandamus — discretion.

7. Members of a canvassing board are presumed to know the locality of the designated voting places, and to take notice of the geography of the townships in their jurisdiction, and when returns clearly indicate that an election was held at a point distant from the designated place such board is justified in declining to canvass such returns, in the absence of special considerations. The trial court found, on inquiring into the facts, and on the demurrer and motion above referred to, in substance that on a contest of the election there would be no justification for changing the certificate issued by the canvassing board, and declined to issue its writ of mandate. *Held*, that this was not an abuse of its discretionary power.

Elections — change of voting place.

8. It may be conceded that a minority rule invoked by relators differs from the rule established in this court; but even if such minority rule were to be followed it would avail relators nothing, as under it the burden was on them to show that the change was made in good faith, without fraud, and with no intent to injure the cause of respondents, and that in fact no one was deprived of his vote by reason of the unauthorized change in the voting places. Relators showed none of these things.

Opinion filed September 3, 1912 Rehearing denied September 30, 1912.

Appeal by relators from an order of the District Court for Burke County, *Templeton,* J., refusing to issue a writ of mandamus to compel defendants to canvass the votes of omitted precincts.

Affirmed.

Burke county was organized in July, 1910, from territory theretofore a part of Ward county. At the general election held November 8, 1910, the question of a permanent county seat was submitted to the electors. The defendants constitute the canvassing board of Burke county, and they duly convened as such after such election, as required by law. The vote on the county-seat question, as canvassed by them, gave 440 votes for Lignite and 783 for Bowbells; but such result was reached by the omission, on the part of defendants, to canvass any vote from certain precincts which, if entitled to be canvassed, would change the result. The relators, who are residents, citizens, electors, and taxpayers of the county of Burke, thereupon instituted this proceeding for the purpose of securing a writ of mandamus from the district court directed to defendants as the canvassing board, commanding them to canvass the votes of the omitted precincts and include them in their computation, and to issue a certificate of election and a notice declaring Lignite to be the county seat of Burke county.

We need not give in detail the allegations of the petition. To such petition the defendants answered by general denial and admissions of certain paragraphs, and setting forth their reasons for not canvassing the votes of the omitted precincts. Briefly stated, paragraph 4 of such answer, which is the only one we need refer to specifically, alleges that what purported to be returns of such precincts were rejected because the village of Powers Lake, one of them, was organized as a village, and had never been designated as an election precinct, and no polling place ever designated as required by law; that as to the other townships, nine in number, they had never been established as election precincts; that in 1908, when said townships were a part of Ward county, the Ward county commissioners had designated the polling places therein; that the votes alleged to have been cast on the county-seat question at the 1910 election were not cast at the places designated as polling places, but were cast at places far distant therefrom,—in most cases nearly 4 miles, and in each, more than a mile; that the designation of the poll-

ing places made by the Ward county commissioners was "the usual voting place;" that the votes alleged by relators to have been cast on the county-seat location were not cast at the usual voting places in such precincts, but on the contrary were cast at unauthorized and undesignated voting places, distant from the usual voting place 3 or more miles, stating what the usual voting place was and the place where the votes in question were cast; with the exception of one township, where it was alleged that no usual voting place existed, that the voters removed it from year to year to places 3 or 4 miles distant from each other.

Upon the trial the relators objected to the sufficiency of the return, on the ground that it set forth no facts sufficient to warrant, if true, the refusal of the writ prayed for, and moved the court that the writ issue by reason of the insufficiency of the showing made upon the return. This objection and motion were overruled and exception taken. Whereupon records of the county commissioners of Ward county were received in evidence, over objection, showing the organization of the respective townships, with the exception of Powers Lake, which it was afterwards stipulated had never been established as a precinct. Whereupon testimony was received, showing that the board of county commissioners of Burke county had never established election precincts or voting places as required by § 607, Revised Codes 1905, or at all. That section reads as follows:

"The board of county commissioners of each county in the state shall, at its first session after the taking effect of this section, divide its county into election precincts and establish the boundaries of the same, if it has not heretofore done so. . . . Such board of commissioners shall designate one voting place in each precinct. . . ."

Evidence was received as to the custody of the records and the alleged returns from the township in question. It was also stipulated that a certificate of election had theretofore been issued by the canvassing board of Burke county, certifying the election of Bowbells as the county seat. It was shown beyond controversy that in March, 1908, while these townships were included in Ward county, the board of county commissioners had designated the voting places and each thereof as at "the usual voting place;" that at the next general election after such designation the voting was done at a place near the center of each of such precincts or townships; that the election in 1910 was held with-

out any further action on the part of any board of county commissioners, at a place distant from such voting place of 1908 generally from 3 or 4 miles,—we believe in one case a mile and a quarter distant.

After the evidence was all submitted, and after an adjournment from the 16th day of December, 1910, to February 8, 1911, relators interposed a general demurrer to the facts set out in paragraph 4 of respondent's answer or return. No evidence was thereafter submitted, and no evidence was received during the hearing in conflict with that which we have stated.

The court made findings of fact to the effect that Powers Lake was an organized and incorporated village from July 26, 1910, but that it was never created, designated, or established as an election precinct by the board of county commissioners of either Ward or Burke counties. As to each of the other townships, the finding was substantially that they were duly established election precincts at and prior to the general election held November 8, 1910. It was then found where the duly established voting place of each precinct was, and where the election was held November 8, 1910, and that all the votes cast in each of such precincts at such election were cast or polled at a place distant several miles from the duly and legally designated voting place; and that in each case such voting or polling place was still in existence and there was no reason for holding the election or casting the votes at any other place. And as conclusions of law, that the election held in the precincts of Powers Lake, Dale, Lucy, Fay, Portal, Vale Keller, Soo, and Colville, November 8, 1910, was illegal, null and void, and of no effect, and that the votes attempted to be cast thereat were illegal and null and void; that the city of Bowbells received a majority of the legal votes cast at such general election for county seat, and is the duly elected county seat of Burke county; and that it would be an abuse of discretion of the county by mandamus to compel the canvassing board to reconvene and canvass the illegal votes attempted to be cast in the precincts set forth. Judgment was directed, dismissing the alternative writ, and for costs. Such judgment was entered on the 5th day of October, 1911. From it relators appeal.

Noble, Blood, & Adamson, of Minot, for relators and appellants.

Fred B. Andrews, George R. Robbins, and *George A. Bangs,* of Grand Forks, for defendants and respondents.

SPALDING, Ch. J. (after stating the facts). It is unnecessary to enter into details regarding the objection to evidence offered and the exceptions taken to rulings of the court thereon, as they all center around the general proposition which we shall discuss briefly.

1. The relators were seeking to have the votes of these townships canvassed and included in the result of the election. They applied to the court to compel such action on the part of the canvassing board, and the court held that the issuance of a writ of mandamus was an act of judicial discretion, and that he might take testimony for the purpose of securing information to enable him to intelligently exercise the discretion reposed in the court. It does not follow that the court was bound to decide in conformity with the testimony taken, particularly had it been conflicting. There was no conflict, and an adjournment for several weeks was taken, undoubtedly for the purpose of giving the relators an opportunity to meet the defense of the respondents, but it resulted in no attempt to do so, further than the filing of the demurrer referred to.

That the court may take evidence for the purpose of enlightening it in the exercise of its discretion cannot be doubted. Had he made private inquiry and sought private sources of information on which to rest the exercise of such discretion, it would have been to the appellants' disadvantage. No record would have been made, and in case of appeal this court would be compelled to rest upon the lack of showing of abuse of such discretion, but when evidence is taken the record can be present, and the appellate court is in position to review more intelligently the discretion exercised by the trial court, and determine whether it was a legal exercise of such discretion or an abuse thereof. It would be an improper use of the writ of mandamus to issue it when clearly apparent to the court to which application is made, or when it could be readily ascertained, that it could serve no purpose and would be useless when issued. Hence evidence regarding the location of the voting places and the unauthorized change was pertinent and material.

Mandamus is not a writ of right, and will not be granted to compel the performance of an act, even though required by law, when no bene-

ficial result would be attained, and it is issued only under extraordinary conditions, to compel the performance of a duty imposed by law, in favor of a party beneficially interested therein. State ex rel. Davis v. Willis, 19 N. D. 209, 124 N. W. 706; State ex rel. Hathorn v. United States Exp. Co. 95 Minn. 442, 104 N. W. 556; Baker v. State Canvassers, 111 Mich. 378, 69 N. W. 656; State ex rel. Vereen v. Marion County, 27 Fla. 438; People ex rel. Wood v. Assessors & Collector of Taxes, 137 N. Y. 201; Rice v. Coffey County, 50 Kan. 149, 32 Pac. 134; State ex rel. Mitchell v. Stevens, 23 Kan. 456, 33 Am. Rep. 175; State ex rel. Smith v. Drake, 83 Wis. 257, 53 N. W. 496. Many other authorities might be cited.

In State v. Drake, supra, mandamus was sought to compel the board to canvass votes. The regular time for opening the polls was 9 o'clock, and they were required to be kept open until sundown. They were open from 9 until 10, when they were closed, and the votes cast before that time destroyed. They were reopened and remained open until 4 o'clock. The Wisconsin court held that "it was no election within any law of the state," and said that "there must be shown a clear, legal right to the writ. . . . Neither the relator nor anyone else has any legal right to have the result of such a void election determined or carried into effect. It would be illegal to canvass and determine such a vote or return it to the village clerk."

In State ex rel. Mitchell v. Stevens, 23 Kan. 456, 33 Am. Rep. 175, Judge Brewer, for the court, refused to issue its writ compelling the board of canvassers to convene and canvass the returns where such returns did not correctly reflect the actual vote returned. That court held that "the writ, to a great extent, was within the discretion of the court where application was made," and that "it would be a singular discretion for a court whose duty it was to uphold purity, justice, and honest dealing to give an apparent sanction to such an outrage, so gross and manifest." The facts were, in that case, that the returns showed a vote cast altogether out of proportion to the population.

We hold that the writ is not one of right, but one to be granted, as a general rule, in the discretion of the court, and that in determining how his discretion should be exercised, that court to which application is made may take testimony, and that it is not an abuse of discretion to

deny the writ when it is shown that its issuance would avail nothing to the relators. Belcher v. Treat, 61 Me. 577.

2. Was the alleged election in the precincts in question void? This court has already held in Elvick v. Groves, 17 N. D. 561, 118 N. W. 228, that where a voting place is duly established by the county commissioners, an election held at another place, over 3 miles distant, is unauthorized, and that the returns of such election should not be canvassed. The only question is whether that holding is applicable to the facts in the instant case. It is unquestioned that no precincts or voting places had been established by the commissioners of Burke county, and if there were legal voting places in these precincts they existed by reason of the action of the Ward county commissioners in March, 1908. The action of that board was subject to criticism. No resolution was passed by the board, as shown by their records, but their books show that they established the voting places at "the usual place." The records show that in 1908, that is, at the next election after such establishment, the votes were cast at places near the center of the townships. This evidence was offered for the purpose of showing that that was the usual voting place, but it is argued by the appellants that it has no tendency to prove that fact; that evidence should have been introduced showing where the election was held in 1906 and prior years. We, however, are of the opinion that the evidence offered was some evidence of the central localities being "the usual voting places" as designated by the commissioners.

The presumption of law is that the public officials did their duty, and that the 1908 election, held shortly after the designation, was held in accordance with the action of the commissioners. Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. ed. 552; Nofire v. United States, 164 U. S. 657, 41 L. ed. 588, 17 Sup. Ct. Rep. 212; State ex rel. Anderton v. Kempf, 69 Wis. 470, 2 Am. St. Rep. 753, 34 N. W. 226; Powers v. Hitchcock, 129 Cal. 325, 61 Pac. 1076. We think that, in the absence of action by the Burke county commissioners, the places designated by the Ward county commissioners when they had jurisdiction continued to be the polling places until the matter might be acted upon by the Burke county commissioners. In any event, the evidence offered was sufficient, in the absence of any evidence to show the contrary; that is, of any evidence to show that the places where the voting was done in

November, 1908, were not the usual voting places. Relators were given ample time in which to submit proof of this fact. They had long been residents of the vicinity, and such proof must have been readily obtainable if it were a fact. The law regarding the place of holding elections is well settled. We need but make reference to Elvick v. Groves, supra, on this question. The reasons are patent to anyone who considers them. Take the instant case as an illustration: The 1908 election, held in the center of the township, the 1910 election on the border of the township, nearly 4 miles distant. It would be an easy matter for the people interested in one candidate as against another, or in one proposition as against another, to advise a portion of the voters of the change in the place of voting, and secure votes enough to carry any proposition, while those opposed remained entirely ignorant of the change or where to cast their ballots. We are not saying that any such practice prevailed in the instant case, but we must determine these matters upon what is possible, and the reason for the strict adherence to the law required as to conducting elections at the legal voting place. To sustain such unauthorized changes would be to open the door to fraud upon the electorate, and could only result in the frequent defeat of justice. The loss of a few votes on one election is of trifling importance as compared with what might happen if proceedings of this nature were sustained by the courts.

As to this question we may say further that we are not limited to the testimony taken, because the motion hereinbefore referred to and the demurrer filed by the relators both confessed, for the purpose of this case, the truth of the facts alleged in the answer or return. They were adequate to sustain the judgment of the court, and the court would have been justified in granting judgment on the demurrer.

3. The third and last point which we need consider relates to the action of the canvassing board in rejecting the returns of these precincts. It is said that they are wholly ministerial officers, and that they are disqualified to pass judgment upon the validity of an election. As a general proposition this is correct, but they were presumed to know the locality of the designated voting places and to take notice of the geography of their respective townships, and when the returns clearly indicated that the election had been held at a point distant from the designated place they were justified in declining to canvass such

returns. They are not returns. Of course facts might be made to appear which would not justify them in their action, as intimated in the Elvick Case, but no such facts are found in the case at bar; on the contrary it is expressly found that none existed. We do not, however, think that it is necessary for us to determine whether they had a right to reject such returns. In fact, they did reject them, and the relators called upon the court to consider that fact and direct the officers to include them in their totals on which to base the certificate of election, when it invoked the extraordinary powers of the court to execute its mandate for that purpose. The court, properly, as we have seen, inquired into the facts, and, finding that on a contest of the election there would be no justification for changing the certificate, declined to issue the writ. This is the sum and substance of the proceeding.

We do not discover any abuse of discretion on the part of the learned trial court warranting a reversal. Relators assert that the defense sustained by the trial court was purely technical. We do not so regard it. We are aware of the motion prevalent in the minds of many people, to the effect that citizenship gives the right to vote, regardless of the regulations wisely provided by the legislature for preserving the purity of elections and the sacredness of the ballot. The Constitution expressly authorized the regulation of elections by the legislative assembly. That body has acted and prescribed the manner and method of holding elections, and by law has provided general rules for fixing the places where voting shall be done.

It is not a technicality to require the law to be obeyed, in spirit at least. If a part of a community may, in direct conflict with express provisions of law, change the voting place at will or to suit the convenience of a portion of the voters, other portions of the same community may do likewise, and there may be as many elections held in a precinct as there are persons to be accommodated or ends to be served. Officers and courts alike are bound by the law.

Those whose desires are defeated are wont to term the cause of their defeat a technicality, and inveigh at officers and courts who read and obey. Yet this cry furnishes no excuse for those whose sworn duty is to obey and construe to disregard the wise regulations made by the legislative department.

Litigants are fortunate if not required to obey unwise legislation,

and courts cannot relax the rule simply because they see, as they often do see, that a provision might be improved or might have been made more reasonable. We have, in this case, disregarded everything but the merits, when we might in fact, with less trouble, have rendered a decision on questions of practice, with the same result.

The holding in Elvick v. Grove, supra, is supported by the great weight of authority, but even if we were inclined to depart from the rule therein announced, and follow the minority rule, it would avail relators nothing, as they have not brought themselves within its terms. Under it the burden was on them to show that the change was made in good faith, without fraud, and without no intent to injure the cause of respondents, and that in fact no one was thereby deprived of his vote.

Relators showed none of these things. See Whitcomb v. Chase, 83 Neb. 360, 119 N. W. 673, 17 Ann. Cas. 1088, and note p. 1090.

The judgment is affirmed.

Mr. Justice Goss, being disqualified, did not participate.

JOHNSON v. BARTRON.

(137 N. W. 1092.)

Licenses — revocation — contract — compensation.

1. Where A and B owned adjacent lots, and, together with C, a professional well digger, agreed to dig and equip a well on the line dividing said lots, in which all should equally share the expense and should equally participate, and said contract being reduced to writing and not being signed by any of said parties, and the location of said well was arrived at by rough measurements made by said parties, but the line was not then surveyed; and it was contemporaneously orally agreed that if the well was not on the true line, that the same rights in the well should exist, and that if C desired to sell his interest, A and B should have the first option to purchase the same in equal shares, and C did afterwards sell his interest to A and B; and after the digging of said well and the sale of the interest of C to A and B, A and B jointly constructed a windmill over said

Note.—The authorities on the revocability of a license to maintain burden on land after licensee has incurred expense are gathered in notes in 49 L.R.A. 497; 19 L.R.A. (N.S.) 700, and 25 L.R.A. (N.S.) 727. See also note in 31 Am. St. Rep. 714.

well, each paying half of the cost thereof, and afterwards B, my warranty deed, sold his lot and interest in said well and appliances to D, and A afterwards refused to allow D to use said well, and fenced in the same, two subsequent surveys of said premises having shown that as a matter of fact the well was 20 inches from the dividing line and wholly within A's lot; *held*, that equity will, in case of such a mistake of location, presume a license in B and his grantees to use said well and to the reasonable access thereto, but that said license will be revocable upon the payment to said B or his grantees of the money expended both in the digging of said well and their proportionate interest in the improvements constructed thereon.

Boundaries — evidence.

2. It is further *held*, that the digging and location of said well was in no manner a settlement of the boundary line between the two lots, and that a subsequent survey, though not made by the county surveyor of the particular county in which the well was located, would be competent, and, if not disproved by better evidence, conclusive evidence of the true location of said dividing line.

Quieting title — Homestead.

3. *Held*, further, that it was immaterial that the wife of A did not join in any written deed or conveyance, the evidence though tending to show that A's lot was probably occupied as a homestead at the time of the purchase of the adjoining lot by D, being absolutely silent as to whether said lot was occupied as a homestead at the time of the construction of the well.

Homestead — defense.

4. A defense of homestead must be specially pleaded.

Opinion filed October 3, 1912.

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

Action to quiet title to an undivided half interest in a well, as an interest in real property, and for further equitable relief. Judgment for defendant. Plaintiff appeals.

Reversed.

This action was brought to have adjudged to the plaintiff an undivided one-half interest in a certain well, pump, and windmill, and to have the defendant enjoined from interfering with the plaintiff's use and enjoyment thereof, and to compel such defendant to remove a certain fence constructed for the purpose of preventing such use. The evidence showed that in May, 1905, one E. A. Hull, who owned and resided on lots 9 and 10, block 10, in the town site of the village of Wilton, James Bartron, Sr., who owned and resided upon lot 8, block

10, and one R. A. Laubach, a professional well digger, entered into an agreement that said Laubach should sink a well with a pump and other necessary appliances upon the line between said lots 8 and 9, and that each of said three parties should have a common one-third interest in said well and appliances, and that each should bear a third of the cost of digging and equipping the same. It was also contemporaneously agreed that if it was afterwards ascertained that the well was not upon the true boundary line of the said lots, "the ownership should remain as it was, regardless of any change in the line." This contract was put in writing, but at no time was it signed by either of the parties. A day or two afterwards measurements were made by Hull and Bartron, Jr., and there being no corner stake or monument, the line was located as nearly as it could be by such measurements, and the well sunk on the line of a fence which was supposed to extend between said lots. The evidence also shows that the original town-site plat of the village was used, but whether such fence was marked upon said plat or not does not appear. While the well was in process of construction, Hull and Bartron, Jr., told Laubach that they desired the original contract so qualified that if, and whenever, said Laubach got ready to sell his one-third interest, Hull and Bartron, Jr., should have the preference as purchasers, and to this Laubach consented. Each party paid his share of the expenses of construction.

In December, 1905, Laubach sold his interest to Hull and Bartron, Jr., in equal shares. Later a windmill was erected over the well at a cost of $60, and paid for by both parties in equal shares. On November 23, 1906, Hull sold and conveyed his lot and his one-half interest in said well and appliances, including the windmill, by warranty deed to the plaintiff, Johnson, and plaintiff seems to have used the water without verbal objection by Bartron until about May, 1908, though the latter seems to have interfered with plaintiff's use by "taking pails and the spout off," as early as two days after plaintiff's purchase of the lot. In the summer of 1909, however, Bartron, Jr., built a fence across the platform of the well so as to shut off the plaintiff's access thereto, and though there was a gate in the fence for sometime and a short distance from the well, it was closed by the defendant in the spring previous to the trial of the lawsuit. A surveyor (though not the county surveyor of McLean county) testified that two surveys made by him had located

the well some 21 inches on defendant's side of the boundary line between the two lots.

The trial court found as a conclusion of facts that the well was entirely upon the land of the defendant, and as a conclusion of law that the plaintiff was not entitled to the relief prayed for. From a judgment dismissing this complaint, plaintiff appeals and asks for a trial *de novo* in this court.

J. P. Williams (*Newton & Dullam*), for appellant.

The conveyance of a well with appliances or utensils includes the site of the well, and is distinguished from a mere water right, which is an easement. Johnson v. Raynor, 6 Gray (Mass.) 107; Ocean Causeway v. Gilbert, 54 App. Div. 122, 66 N. Y. Supp. 401; Mixer v. Reed, 25 Vt. 257.

So far as the conveyance of Labauch's interest to defendant and Hull is concerned, the evidence of this conveyance was entirely oral; but since no objections were interposed, the best evidence rule does not apply. Goodall v. Norton, 88 Minn. 1, 92 N. W. 445; 17 Cyc. 468; Courtney v. Neimeyer, 33 Neb. 796, 51 N. W. 234.

There was a duty on the part of the defendant to assert his claim before plaintiff purchased in reliance upon Hull's ownership. Johnson v. Erlandson, 14 N. D. 518, 105 N. W. 722.

The location of the well would be sufficient to raise a presumption that the boundary thus determined was the correct boundary. 5 Cyc. 939; Radford v. Johnson, 8 N. D. 182, 77 N. W. 601; Arneson v. Spawn, 2 S. D. 269, 39 Am. St. Rep. 783, 49 N. W. 1066; 5 Cyc. 941, 949; Diehl v. Zanger, 39 Mich. 601.

T. R. Mockler, for respondent.

Adverse possession is never acquired by a mutual mistake between parties as to the boundary lines. Webster v. Shrine Temple Co. 141 Iowa, 325, 117 N. W. 665.

BRUCE, J. (after stating the facts as above.) It seems to be perfectly clear from the evidence that there was no conveyance of land from the defendant to the plaintiff's grantor, Hull, or any intention that there should be. It is equally clear, however, that it was the intention of the three parties to the original agreement that each should enjoy the use of the well in common, and that each contributed towards the cost of the

construction thereof. The intention of such parties was that the well should be upon the boundary line, and the whole controversy has arisen from a mistake as to where such line was actually located. It is, however, undisputed that at the time of the location of the well it was agreed that the ownership "should remain as it was, regardless of any change in the line." Under the peculiar circumstances of the case, a court of equity should imply a license to pass upon the land of the defendant and to use the well, in the plaintiff, but a license which would be revocable upon the payment to the licensees of the money expended by the plaintiff's grantor in the construction of the well, and his half of the interest purchased from Laubach, and half of the reasonable value of the windmill which was erected jointly by the defendant and the plaintiff's grantor.

We know that there is a wide divergence among the authorities as to whether a license is revocable at all, where the licensee had acted under the authority conferred and has incurred expense in the execution of it by making valuable improvements or otherwise. See 25 Cyc. 646–648; Notes to Lawrence v. Springer, 31 Am. St. Rep. 702–719, and to Ricker v. Kelly, 10 Am. Dec. 38–45; Washb. Easements, 4th ed. 7–18. We believe the better rule to be that where nothing more than a mere license appears it is revocable at the will of the licensor, whatever expenditures the licensee may have made, provided the licensee has reasonable notice and opportunity to remove his fixtures and improvements, or, in case of joint ownership, that the licensor compensate him for the value thereof. To hold such license irrevocable would, on the other hand, be to override the statute of frauds and convert an executed license into an estate in lands, which we believe is going too far. See 25 Cyc. 646–648. To hold, on the other hand, that such a license can be revoked without making compensation or giving opportunity for the removal of the improvements would, in our opinion, be inequitable.

The fact that the wife of the defendant did not join in any deed or conveyance, though strongly urged by plaintiff as ground for sustaining the judgment of the trial court, is, in our opinion, of no moment. The rule seems to be well established that the defense of homestead should be formally pleaded. Bergsma v. Dewey, 46 Minn. 357, 49 N. W. 57; Hemenway v. Wood, 53 Iowa, 21, 3 N. W. 794; 10 Enc. Pl. & Pr. 68, notes 1 and 2. In the case at bar, also, there is no evi-

dence tending to show that the lot owned by the defendant was occupied as a homestead by him at the time of the construction of the well. All that the evidence tends to show is that it was so occupied at the time of the conveyance from plaintiff's grantor to the plaintiff.

The judgment of the district court will be reversed and the cause remanded to said court, with instructions to take testimony as to the value of the windmill erected over said well at the time of plaintiff's exclusion therefrom, and with directions to enter judgment in favor of the plaintiff for the dismissal of the suit on the payment to said plaintiff of the sum of $135 (being the $90 originally paid by plaintiff's grantor for his one third of the cost of the construction of the well and the $45 paid by him for the half interest of Laubach) plus one half of whatever the said district court shall find to be the value of the said windmill. On the failure of the defendant to pay the said sum of money within a reasonable time to be fixed by the said district court, a judgment will be entered enjoining the defendant from obstructing plaintiff's approach to and use of said well at all times until he shall have paid to the said plaintiff the sum of $135 and one half of the value of the said windmill, or until the said well, from disuse on the part of both parties, shall have lost its value and use as a well altogether.

WANNEMACHER v. VANCE.

(138 N. W. 3.)

Judgment — vacation — discretion.

Defendant was personally served with a summons, complaint, and other papers in claim and delivery on March 5, 1908. On March 31st thereafter he caused an answer in due form to be served on plaintiff's attorney, but gave no further attention to the case until August 12, 1911, nearly one year after plaintiff had procured judgment. Defendant states as a reason for vacating the judgment that he believed said case was disposed of and settled, and that when the answer was served he was informed (by whom he fails to state) that there never would be any judgment entered. The undisputed facts disclose, however, that his attorney was served with a notice of trial in said cause in August, 1908, and in April, 1909, with a notice to produce at the trial certain exhibits. It also appears that after judgment was ordered in plaintiff's favor in 1910, notices were

duly served on defendant's counsel of applications for the taxation and retaxation of the costs therein, and no application to be relieved from such judgment was made until about one year after its rendition.

Held, that while the granting or refusal to grant applications of this nature rests largely within the sound discretion of trial courts, under the facts disclosed in this record there was no room for the exercise of any discretion, and the order granting defendant's motion to vacate the judgment was therefore an abuse of judicial discretion necessitating a reversal thereof.

Opinion filed October 4, 1912.

Appeal by plaintiff from an order of the District Court for Stark County; *W. C. Crawford*, J., vacating the judgment in his favor in an action to recover possession of two horses.

Reversed.

Heffron & Baird, of Dickinson, for appellant.

L. A. Simpson, of Dickinson, for respondent.

FISK, J. This is an appeal from an order of the district court of Stark county made on August 15, 1911, vacating a judgment rendered in said court on August 15, 1910, and granting defendant leave to defend in said action. We are asked to reverse such order upon the ground that the making therefore was an abuse of discretion. The facts necessary to an understanding of the controversy are as follows:

The action is in claim and delivery to recover the possession of two horses and was commenced on March 5, 1908, by the service of the summons and complaint, together with the usual affidavit, notice, and undertaking in claim and delivery. The two horses in controversy were taken by the officer and retained until March 7th, when they were rebonded by defendant and their possession returned to him. The defendant thereafter and on March 31, 1908, served upon counsel for plaintiff an answer duly verified, and stating a good defense on the merits. Such answer, however, was not filed in the clerk's office until after the entry of the judgment by default as above stated. On August 28, 1908, notice of trial was served on defendant's counsel, and on April 29th a notice to produce certain notes at the trial were likewise served upon him and service admitted. The cause was placed on the trial calendar at a term which commenced on September 8, 1908, where it remained until the entry of judgment. On May 24, 1910, the cause was moved for trial

before Honorable E. B. Goss, who was then judge of the eighth judicial district, and who was presiding at said term by request of the Honorable W. C. Crawford, judge of the tenth judicial district. Neither the defendant nor his counsel was present, but H. C. Berry, a practising attorney at Dickinson, appeared and asked leave to defend at the request of one Krusee and one Merrill, whom he claimed were the real parties in interest, as they had sold the horses to defendant, Vance, and were under obligations to defend his title. The application, however, was refused, a jury was impaneled, testimony introduced, a verdict returned in plaintiff's favor, and judgment entered on August 15, 1910, pursuant to an order of Judge Goss. Prior to entry of such judgment, notices of taxation and retaxation of costs were duly served on defendant's attorney. On August 14, 1911, defendant's attorney applied for and procured an order from Judge Crawford returnable on the following day, requiring plaintiff to show cause why said judgment should not be vacated and the defendant permitted to defend said action on its merits. Such order was based upon three affidavits, which were served with the order upon plaintiff's counsel, as follows, omitting formal parts:

Otto Vance, being first duly sworn, states that he is the defendant in the above-entitled action, which action was begun by the issuance and service of a summons therein in March 1908; that within the thirty days' time specified in said summons the defendant duly appeared in said action and served his verified answer to the complaint therein upon Messrs. Heffron & Baird, the plaintiff's attorneys; that from the date said answer was served this affiant, until Saturday, August 12, 1911, believed that said case was disposed of and settled; he was informed at the time said answer was served that there never would be any judgment entered in said action, and relied thereon; that he is now informed and believes, and was first informed August 12, 1911, that a judgment in this action on August 15, 1910, was entered against him; affiant states that the action was one in claim and delivery, and that this affiant, the defendant in the action, was the sole and absolute owner of the property in question and the plaintiff, G. R. Wannemacher, had no right, title, or interest therein; that affiant was in possession of the property at the time that action was commenced, had bought and paid for the same, and was the absolute and exclusive owner thereof; that the judgment en-

tered in said action was entered by default of the defendant not being in court at the time said judgment was entered; that the judgment in said action was not entered until a period of over two years had elapsed since the case was first at issue; and over two years after defendant was informed that no judgment would ever be entered in the case; affiant hereby makes reference to his verified answer for his defense to said action, which answer is filed in the clerk of court's office; affiant further states that he has stated all the facts of his case to Mr. L. A. Simpson, an attorney at law of Dickinson, North Dakota, and is advised by the said L. A. Simpson that this defendant has a full, complete, and absolute defense to plaintiff's cause of action and to each and every part thereof; affiant makes this affidavit for the purpose of being relieved from the judgment entered in said case, and asks that the same, on such terms as the court may deem just and reasonable, be set aside, canceled, and annulled, and that the case be set down for trial and the defendant be permitted to prove the allegations of his answer; that during all the time since the summons and complaint was served upon the defendant he has been a resident within the tenth judicial district, and has frequently seen the plaintiff in this action and his attorneys, and never at any time or place has affiant been notified, by either said plaintiff or his attorneys, any judgment in said action was entered; that affiant did not have his attorney of record, L. A. Simpson, appear at the trial of said case when said judgment was entered, because affiant was acting under the belief and understanding that the case had been settled, and that no judgment would ever be entered therein.

Further affiant saith not.

Otto Vance.

H. C. Berry, being first duly sworn, states that he is an attorney at law residing at Dickinson, North Dakota; that he is well acquainted with G. R. Wannemacher, the plaintiff in the above-entitled action; that he also is familiar with the pleadings in this case and with the facts and circumstances connected with this case; that he recalls the time when said case in the district court of Stark county was moved for trial at the April, 1910, term of said court, according to affiant's best recollection; that L. A. Simpson, the attorney of record for the defendant in the case, was absent from the city at said time and place, and that one

R. A. Krusee, who is the real party in interest defendant in this case, and the person through whom the defendant derived his title to the horses in question in the litigation herein, requested this affiant when the case was called on the calendar to appear and defend the action in behalf of said defendant, Vance, the said R. A. Krusee claiming that he had the witnesses there on behalf of the defendant; affiant further states that the Honorable E. B. Goss was the presiding judge at said trial, sitting in the place of Honorable W. C. Crawford, and affiant states that the trial judge, Honorable E. B. Goss, refused to permit affiant to appear for the defendant in said action, and based his refusal upon the ground that this affiant had no authority from the defendant, Vance, to appear in said case; affiant states that he had no authority direct from said Vance, and never had, but that he was requested to appear and defend the action in the name of Vance by the said R. A. Krusee; affiant further states that the said R. A. Krusee stated that the defendant above named, Otto Vance, had been informed at the time the action was commenced that no judgment would be taken aaginst him (Vance), and that the defense of the action would be attended to by him, R. A. Krusee; that upon the court's refusal to let this affiant defend the action at the trial thereof, judgment in default of the defendant was thereupon taken by the plaintiff as affiant is informed and believes; affiant further states that he does not personally know the defendant, and that he never at any time communicated to him the fact of his undertaking to appear and defend the case, or any other fact or circumstance connected with the case.

Further affiant saith not.

H. C. Berry.

L. A. Simpson, being first duly sworn, says that he was the attorney of record for the defendant in said action, having been retained as such on or about the day said action was stated, in March, 1908; that within the statutory time he presented a duly verified answer for the defendant, and due service of said answer was made upon plaintiff's attorneys; that more than two years elapsed from the time of the service of said summons and complaint before any judgment was ever entered in the case, and that said action was continued in court by the plaintiff over several terms to which continuance, as affiant is informed and believes,

the defendant took no part in and had no notice of; that at the time of the entry of said judgment herein this affiant was absent from the state of North Dakota, and had been absent for about one year; affiant understood about the time that the answer of the defendant was interposed in this case the said action had been settled and adjusted by G. R. Wannemacher, the plaintiff herein, and one R. A. Krusee, who, as affiant was informed and believes, was the real party defendant in interest, and affiant was informed by said G. R. Wannemacher in March or April, 1908, that said action would not be tried, but that the same would be settled and adjusted between the said Wannemacher and said R. A. Krusee, who at that time, as affiant is informed, or had lately been in partnership, and that the litigation was the result over the dispute of the ownership of partnership property; affiant further states that he never notified the said Otto Vance at any time that said case would be brought on for trial, because affiant was acting in the belief that the said action would not be brought to trial, and affiant never had any personal notice of the entry of judgment against the defendant herein until recently, and got notice thereof to defendant, Otto Vance, as speedily as possible after said notice; that the entry of said judgment, as far as this affiant or the defendant is concerned, is a result of a mistake of the facts and a misunderstanding concerning the settlement of the case.

L. A. Simpson.

At the hearing of such order to show cause, plaintiff's counsel submitted the following affidavit, omitting formal parts:

F. C. Heffron, being duly sworn, says that a number of months ago L. A. Simpson, Esq., attorney for defendant, came into the office of Heffron & Baird, and made inquiries of affiant in reference to the judgment in favor of plaintiff and against defendant in this action, and several times since then has made inquiries in reference to said judgment; that affiant has conversed with H. C. Berry, Esq., and L. A. Simpson, Esq., many times since said judgment, with regard to appealing from the same, some of which conversations were more than a year ago; that said case of G. R. Wannemacher versus Otto Vance was regularly on the calendar for the May, 1910, term of district court of Stark county, as was also the case entitled G. R. Wannemacher against Krusee; both of

said actions being actions in claim and delivery; that from the affiant's knowledge of said action, the defense in this case was much weaker than it was in said case against R. A. Krusee.

That when said case of G. R. Wannemacher versus R. A. Krusee was called, said R. A. Krusee was present in court with his attorney, H. C. Berry, and others reported to be witnesses for defense; that in said case against R. A. Krusee said R. A. Krusee interposed no defense whatever. That this affiant is informed and believes, and from his knowledge of both cases states it to be a fact, that the alleged defense in the R. A. Krusee Case and this case would have been the same; that this case, when called on the calendar, was regularly tried before the court, Honorable E. B. Goss presiding, and a jury and verdict rendered thereon in favor of plaintiff. That plaintiff, G. R. Wannemacher, now resides in Columbus, Ohio, and has done so practically since time of said trial, and of which fact the defendants are well aware and have been aware ever since the removal of said G. R. Wannemacher from the state of North Dakota. That affiant verily believes said G. R. Wannemacher, if possible to have him present or get an affidavit from him, would testify or make affidavit to the fact that he never informed the defendant's attorney or anyone else that he expected to settle this action with said R. A. Krusee. That since March, 1908, to August, 1911, affiant has not known of the whereabouts of said Otto Vance, though making repeated inquiries in regard to him; affiant verily believes from his knowledge of said case that neither plaintiff nor any of his attorneys have known of the whereabouts of said Otto Vance since March, 1908.

F. C. Heffron.

And defendant's counsel submitted two rebuttal affidavits which were considered by the court as follows:

L. A. Simpson, being first duly sworn, states that he has read the affidavit of F. C. Heffron made herein and sworn to on August 15, 1911, before Thos. H. Pugh, notary public; he further states that the statements made by Mr. Heffron in his affidavit that "L. A. Simpson, attorney for defendant, came into the office of Heffron & Baird and made inquiries of affiant in reference to the judgment in favor of the plaintiff and against the defendant in this action . . . and conversed with

L. A. Simpson many times since said judgment with regard to appealing from the same, some of which conversations were more than a year ago" is a mistatement of the fact inadvertently made by Mr. Heffron; affiant states that on or about July 7, 1911, an action was begun in the district court by Heffron & Baird entitled, G. R. Wannemacher v. Otto Vance and others, and that when affiant was retained by T. N. Hartung, one of the defendants in said last case, he made an examination of the records and files in said case, and then went to the office of Heffron & Baird and talked with Mr. Heffron, but not with respect to the appealing of the case, but only concerning the setting aside of the judgment entered therein by default; that affiant then stated to Mr. Heffron, that no notice of the entry of judgment had been served upon this affiant to his best recollection; affiant further states that he then told Mr. Heffron that he would endeavor to communicate with Mr. Vance and advise the said Vance of the condition of the case, and affiant states that he did communicate with Mr. Vance, and that immediately upon said Vance calling upon this affiant the application to set aside the judgment was made.

Further affiant saith not.

L. A. Simpson,

Subscribed and sworn to before me this 15th day of August, 1911.

C. M. Coleman, Notary Public,
Stark Co., N. D.

H. C. Berry, being first duly sworn, states that he is the identical H. C. Berry mentioned in the affidavit of F. C. Heffron made in said case and sworn to on the 15th day of August, 1911; affiant further says that he respectfully hereby calls the attention of the court to the transcript of the things occurring in the court on the 24th day of May, 1910, at the time the above-entitled action was called for trial as on default; affiant further states that Mr. Heffron, in his said affidavit, is in error when he says that he has talked with this affiant many times or at all since August 15, 1910, about the judgment in favor of the plaintiff and against the defendant, Otto Vance, save and except that at one time this affiant stated to F. C. Heffron and others that he believed the defendant, Vance, had a good defense to said action, and that the order of his Honor, Judge Goss, was arbitrary and unjust; and also in error when he states that affiant has talked with Mr. Heffron with regard to appeal-

ing from the said judgment; affiant states that he has talked with Mr. Heffron during the times referred to in his affidavit concerning the judgment in favor of the plaintiff that was entered against R. A. Krusee.

Further affiant saith not.

H. C. Berry.

And there was also submitted at said time a transcript of the proceedings had at the time the case was called for trial before Judge Goss. This transcript merely shows what took place with reference to the application of Mr. Berry to be permitted to defend said action in the interest of Krusee and Merrill, and we do not deem it of sufficient importance to incorporate into this opinion.

At the conclusion of the hearing on such order to show cause, Judge Crawford made an order from which this appeal is prosecuted.

Respondent's counsel filed no brief in this court, but did file an amended abstract.

From the above facts we are required to decide whether, in vacating such judgment, the lower court abused its discretion. It is, of course, elementary, and this court has repeatedly held that in such matters trial courts are vested with a sound judicial discretion, and the exercise thereof by such courts will not be interfered with by the supreme court, except in cases of manifest abuse of such discretion, and we are especially loath to interfere with orders of the district court where such orders as in this case vacate the default and permit a trial on the merits. We have considered the appeal in the light of such rule, and we are agreed that, in granting the motion to vacate the judgment, the trial court clearly abused its discretion. There was no valid excuse shown for defendant's neglect to appeal and defend such action. On the contrary, the record convicts him not only of gross and inexcusable negligence in failing to thus defend the cause, but it also convicts him of gross laches in applying for relief after the judgment was rendered. The only excuse offered by defendant for permitting such default is that "he was informed at the time said answer was served that there never would be any judgment taken against him and relief thereon." He does not state that such information came from a source that would bind the plaintiff, or that he was justified in relying thereon. In this the case at bar differs radically from the case of Minnesota Thresher Mfg. Co. v. Holz, 10 N.

D. 16, 84 N. W. 581. Furthermore, he does not contend that there was any valid or lawful agreement entered into to that effect, and when on August 28, 1908, a notice of trial was served on his attorney, and when on April 29, 1909, a notice to produce at the trial certain exhibits was served on his attorney, he was definitely apprised of plaintiff's intention to prosecute such action to a final determination. Defendant, however, apparently ignored such notices and paid no further attention to the litigation. This, under the circumstances, was, we think, gross and inexcusable negligence. Again, after plaintiff had submitted proof of his cause of action and obtained an order for judgment in 1910, notices of taxation and retaxation of the costs were served upon defendant's counsel in July and August of said year, and yet no steps were taken to be relieved from the judgment until more than one year after such notices were served. This was gross laches for which defendant does not offer any adequate excuse. True, he states in his affidavit "that from the date said answer was served this affiant, until Saturday August 12, 1911, believed that said case was disposed of and settled," but he shows no basis which authorized any such belief on his part, and the undisputed facts disclose that he was not justified in such belief. The fact that Mr. Berry appeared when the case was called for trial, and requested leave to defend in behalf of persons not parties to the record, and asked leave to intervene and was denied such requests, affords no excuse to defendant, in the light of the record facts, for his palpable negligence and laches aforesaid.

For the above reasons the order appealed from is reversed and the District Court is directed to reinstate such judgment.

Appellant will recover costs on the appeal.

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

GOETZ et ux v. MERCHANTS' BANK OF RUGBY.

(138 N. W. 10.)

Contracts — action for breach of agreement — burden of proof.

1. Plaintiff's cause of action is based on defendant's refusal to pay to him the sum of $800, the proceeds of a loan which it is alleged defendant promised to pay

to him in cash. The answer puts in issue the allegation of a promise by it to pay plaintiff in cash, and alleges that the agreement was that it should apply the proceeds of the loan in paying and discharging certain indebtedness owing by plaintiff, and that it applied such proceeds accordingly.

Held, that the burden of proof was on plaintiff to establish the truth of his contention as alleged, and that it was prejudicial error not to instruct the jury to this effect.

Evidence.

2. Certain rulings in the admission and exclusion of testimony at the trial, examined and *held* erroneous.

Opinion filed October 4, 1912.

Appeal by defendant from a judgment of the District Court for Pierce County; *John F. Cowan,* Special Judge, and from an order denying its motion for new trial in an action to recover an amount due plaintiffs upon a loan negotiated with the defendant.

Reversed.

Paul Campbell, of Rugby, for appellant.

H. S. Kline and *J. K. Murray,* of Anamoose, and *L. J. Palda, Jr.,* of Minot, for respondents.

FISK, J. This is an appeal from a judgment of the district court of Pierce county, and also from an order denying defendant's motion in the alternative for judgment notwithstanding the verdict or for a new trial. The record discloses that the appeal from the judgment was taken more than a year after notice of the entry of the judgment, and such appeal is therefore ineffectual. This point is not raised, however, by respondents' counsel, and is not material, in view of the fact that the appeal from the order raises all the questions which could have been raised on the appeal from the judgment had it been taken in time.

Appellant's counsel has exhibited great industry in the preparation of his appeal papers, his printed brief and argument containing eighty-seven pages in which he has assigned no less than thirty-seven alleged errors, many of which we deem insufficient in form and substance to require notice. We shall not attempt to notice more than a few of such assignments, as the conclusion to which we have arrived renders it unnecessary to do so. We are agreed that for certain errors of law occurring at the trial the order appealed from must be reversed and a new trial or-

dered. Before noticing these errors, a brief statement of the facts will be made.

The action was brought by George Goetz and his wife, Barbara Goetz, and the complaint as originally drawn contained two separate and distinct causes of action; but at the trial the complaint was, on motion of plaintiff's counsel, amended by striking out the name of Barbara Goetz as one of the plaintiffs, and the second cause of action was dismissed. In brief, the first cause of action alleges that on or about December 8, 1905, defendant bank agreed to loan to plaintiff and to pay and to deliver to him the sum of $800 in consideration of plaintiff's executing and delivering to it his promissory note for such sum, together with a mortgage on certain real property securing the payment of said note, and that pursuant to such agreement plaintiff executed and delivered to defendant said note and mortgage, and defendant accepted the same, but has wholly failed to pay or deliver to plaintiff the said sum of $800 or any part thereof, though requested so to do; and the complaint alleges that plaintiff has been damaged thereby in the sum of $800, and he prays for judgment for said amount, together with interest at the rate of 7 per cent per annum from said date. The answer to this cause of action in effect denies the contract as alleged in the complaint, but admits the execution and delivery of the note and mortgage, and alleges that the agreement was that the proceeds of said loan should be applied by it in the payment of certain designated expenses and in satisfying certain indebtedness in the form of notes held by defendant against the plaintiffs, which notes, with interest, amounted to $746.75, and that the proceeds of such loan were by defendant applied in such manner, leaving a balance of only $36 to be paid to plaintiff, which amount, it is alleged, was paid to him. These are the issues, the trial of which resulted in a verdict in plaintiff's favor for the sum of $267.25, with interest. In due time a statement of the case was settled, containing specifications of error on which a motion for judgment in the alternative or for a new trial was made and denied.

The principal assignments, and the only ones which we shall notice, relate to the instruction as to the burden of proof and to certain rulings upon the admission and exclusion of testimony.

The court charged the jury in effect that the defense interposed was that of payment, and that the payment under the law is an affirmative

defense, and the burden of proof is upon the defendant to establish, by a fair preponderance of the evidence, that it made such payment. We think this was prejudicial error. The defense, strictly speaking, was not that of payment. The answer squarely puts in issue the allegations of the complaint as to the nature of the agreement, and such answer, as we have seen, sets up an altogether different agreement from that alleged, under which it is claimed that the note and mortgage were given to pay and discharge certain specified indebtedness owing by plaintiff. It was therefore incumbent on plaintiff to establish his cause of action as pleaded. It would be otherwise if defendant's answer admitted that the transaction was as alleged in the complaint, and merely pleaded payment of such money; but, according to its answer and its contention at the trial, the agreement was that it should pay the defendant no money except the small balance of $36, which remained after satisfying the various claims owing by plaintiff. In other words, if the answer had admitted that the proceeds of such loan were to be paid to plaintiff in cash, but that afterwards it applied such proceeds pursuant to directions of plaintiff, the defense would be that of payment, and the general rule that the burden of proof would be on a person claiming to have made such payments would apply. We think the rule announced in Anderson Mercantile Co. v. Anderson, 22 N. D. 441, 134 N. W. 36, is applicable and controlling on this point in appellant's favor. This conclusion compels us to order a new trial, and in view of such disposition of the appeal we will briefly notice such other rulings as are likely to arise on another trial.

On the direct examination of plaintiff, he testified in effect that the bank had not advanced to or paid him any money for this note and mortgage, and on cross-examination defendant sought to show that since the making of such note plaintiff had drawn checks on the bank, which were paid by it. We think the ruling excluding such testimony was erroneous. It was certainly proper cross-examination to show that plaintiff had received money from defendant bank if followed by proof showing that such receipts were from the proceeds of the so-called loan. Whether such ruling was prejudicial we cannot determine from the record, as it does not appear what the answer to the question objected to would have been, there being no offer of proof.

It was also error to sustain plaintiff's objection to the following ques-

tion asked the witness McClintock, president of defendant bank, as follows:

"Have you in your possession any of the notes which the plaintiff Goetz authorized you to deduct from this loan?" It was certainly competent for defendant to show that these notes had been paid and satisfied by the bank in accordance with the agreement as contended for by it, and which was testified to by this witness just prior to the above question, and this was, no doubt, the object in view in asking such question.

This witness, after testifying that at the time of making the loan he figured up on a memorandum the amount due on these old notes and told plaintiff the amount, was not permitted to give such figures, nor was such memorandum admitted in evidence. We think these rulings also constituted error. This testimony was clearly competent, relevant, and material. The memorandum, under the facts testified to, was a part of the *res gestæ* of the transaction.

Defendant was not permitted to prove by such witness that plaintiff had never asked for any accounting as to the proceeds of such loan. We are unable to conceive why such offered proof was not proper. Even though a demand for an accounting was not a prerequisite to plaintiff's cause of action, his counsel alleged such a demand in the complaint, and certainly a failure for several years to request such accounting would be an important and material circumstance proper for the jury to consider.

The same may be said of the next ruling, sustaining an objection to the question, "Has he (plaintiff) ever asked you to turn over to him these notes?" Such question was, we think, clearly proper.

It was also error to sustain plaintiff's objection to Exhibit D. This is a note for $325 stipulated to have been executed by plaintiff, and is one of the notes owned by the bank at the time the transaction in question took place, and which defendant contends was to be satisfied out of the $800 loan.

The foregoing are the chief errors disclosed by the record and are the only ones deemed worthy of mention in this opinion. The rulings denying the motions for a directed verdict were entirely proper in the light of the testimony which was squarely in conflict upon the material facts in dispute.

The order appealed from is reversed and a new trial ordered.

OLESEN v. HOGE.

(137 N. W. 826.)

Elections — contests of nominations — affidavit of contestant.

The provisions of chap. 109, known as the primary election law, in so far as they relate to contests of nominations, construed and *held*, that such contests must be initiated by serving upon the contestee within ten days after the completion of the canvass of the ballots, an affidavit of contest setting forth the grounds therefor, and that the affidavit mentioned in § 31 of said act, which may be made on information and belief as a basis for procuring an order for a recount of the ballots, is not the affidavit of contest elsewhere referred to in said section.

Opinion filed October 12, 1912.

Appeal by defendant from a judgment of the District Court for McLean County; *W. H. Winchester*, J., in plaintiff's favor in a proceeding for the contest of a nomination for the office of representative.

Reversed.

J. T. Hoge, of Underwood, and *Newton, Dullam, & Young*, of Bismarck, for appellant.

McCulloch & Nelson, of Washburn, for respondent.

FISK, J. This is an appeal from a judgment of the district court of McLean county in an alleged contest proceeding involving the nomination of a candidate to the office of representative in and for the forty-sixth legislative district. The primary election was held on June 26th and the canvass of the returns was completed on July 15th, showing that contestee received one more vote than the contestant at such primary election.

On July 23d, contestant presented to the district court his affidavit setting forth the fact that he was a candidate at such primary election for nomination to the office of representative, and also setting forth the number of votes received by the candidates thereat according to the official canvass as declared by the county canvassing board. He then states, upon information and belief, that in three designated precincts in such county the ballots on the question of the nomination of representative

were not correctly counted, and that he received more votes in such precincts than the returns disclose. Thereupon the district court made its order directing the inspectors of election in such precincts to appear before the court at the city of Washburn on August 30th, with such ballot boxes, and directing that a copy of such order and the affidavit of contestant be served upon such inspectors, and also upon the contestee, at least eight days prior to such date, and the record discloses that such service was made upon contestee accordingly. On August 30th, the date set for hearing, the contestee appeared and filed written objections to the jurisdiction of the court upon the ground that the pretended contest proceeding was not instituted within the time required by statute. Such objection was overruled. The court proceeded to take testimony in behalf of the contestant, and made its findings of fact and conclusions of law favorable to him, directing the county auditor of said county to issue to such contestant a certificate of nomination to the office of representative in said legislative district.

The sole question presented for our determination is whether the district court had any jurisdiction in the premises, and this involves a construction of those portions of the primary election law as enacted in chapter 109, Session Laws, 1907, relating to contests of nominations thereunder.

We are agreed that no such jurisdiction was acquired, for the obvious reason that the alleged contest proceedings were not instituted within ten days after the completion of the canvass. The portions of such primary election law relative to contests is one of the most vague and indefinite statutes which we have ever been called upon to construe, and the exact intention of the legislature is left largely to inference and conjecture, and we trust that the next legislature will correct and put into intelligent language this portion of said statute to the end that the citizens, as well as the courts, may not be left in doubt as to the legislative will.

Notwithstanding the very crude provisions of such statute it is, we think, reasonably clear that by § 31 of said act it was the legislative intent that such contests should be initiated within ten days after the completion of the canvass. The first sentence in said section is as follows: "Any candidate at a primary election, desiring to contest the nomination of another candidate or candidates for the same office, may proceed

by affidavit within ten days after the completion of the canvass." When this language is construed in connection with § 688 of the Revised Codes of 1905, which is expressly made applicable, except as otherwise provided, to the primary election law, we have no hesitancy in saying that the intention was to require such contest to be commenced within ten days after such canvass is completed, by serving upon the contestee a verified statement of the grounds of the contest in the form of an affidavit or verified notice, setting forth such grounds.

While the statute above quoted uses the words, "may proceed by affidavit," we think that when such expression is construed in connection with § 17 of the act making § 688 of the Revised Codes applicable, the intention was as we have above stated.

Counsel for contestant and the trial court evidently misconstrued § 31, and were misled by the language therein employed. Among other things it provides: "In case the contestant shall set forth in his affidavit, upon information and belief, that the ballots in any precinct have not been correctly counted, and that he has been prejudiced thereby, the judge shall make an order requiring the custodian of such ballots to appear before him at such time and place, and abide the further order of the court. At the time and place stated, the ballot boxes shall be opened and the ballots recounted in the presence of the court. If it should be found that a mistake has been made in counting such ballots, then the contestant shall be permitted, upon application, to amend his affidavit of contest by including such additional facts therein." As we construe this language, the intention merely was to enable the contestant to have a recount in court of the ballots in any precincts, upon a showing by affidavit upon information and belief that such ballots have been incorrectly counted to his prejudice. Counsel and the trial court erroneously construed this as prescribing a method of contesting a nomination where the sole ground of the contest is an incorrect counting of the ballots, whereas, as we construe the language, the evident legislative intent was to provide a method whereby in a regularly pending contest the contestant may procure a recount of the ballots. In other words, it is merely a provisional remedy afforded the contestant in his contest proceedings, but in order to invoke such remedy he must first have pending a contest in due form. He can no more invoke such remedy without a pending contest than a plaintiff can have an attachment issued without a pending action.

Counsel for contestant treat the affidavit referred to in this portion of the statute which is to be made on information and belief and for the sole purpose of procuring a recount of the ballots, as the affidavit referred to in the first portion of the section which is requisite to initiate the contest. This is where they fall into error, and by such process of reasoning they are logically forced into the additional error of concluding that service of the affidavit upon the contestee need not be made within any stated time after the canvass is completed, but that its service within a reasonable time prior to the hearing is all that is required. It would indeed be strange if the legislature intended merely that the contestee should be given only sufficient notice to enable him to appear at the hearing. Such a statute would be unprecedented.

The affidavit mentioned in § 31, which may be made on information and belief to be used as a foundation for procuring a recount of the ballots, is not the same as the contest affidavit previously mentioned therein, although on a superficial reading of this section such a conclusion is apt to be deduced, owing to the peculiar phraseology of the statute. The fourth sentence of this section, however, effectually refutes such a conclusion. It provides that if on such recount of ballots it is found that a mistake was made in counting them, "the contestant shall be permitted, upon application, to amend his affidavit of contest by including such additional facts therein." The affidavit used as a basis for procuring a recount has, after such recount, fulfilled its mission, and there is no necessity for its amendment, but not so as to the contest affidavit. The legislature evidently contemplated that the latter should be couched in positive averments. Hence, the recognized necessity of an amendment thereof after the facts are discovered. Why should the "additional facts" disclosed by a recount of the ballots be included in the affidavit used as a basis for procuring such recount?

But contestant's contention inevitably leads to the conclusion that a mistake in counting the ballots is the only ground of contest provided for by the statute. This is not correct, for if so, many provisions found therein would be utterly meaningless. We must, of course, if possible, so construe the law as to harmonize and give effect to all its provisions, but we cannot do this if we adopt contestant's construction thereof.

For the foregoing reasons, the contestee's objection to the jurisdiction of the court should have been sustained.

Judgment reversed and the proceedings will be dismissed.

INDEX.

ACCEPTANCE.

Of offer, see Contracts, 1.

ACCORD AND SATISFACTION.

1. The holder of unliquidated claims against a county, which have been considered together and allowed at a lump sum less than he claims, cannot accept a warrant for that amount, and credit it upon the total of the claims presented, and sue for the balance rejected, but must either repudiate the allowance and submit his claim as a whole to the court, or else accept the warrant in full payment. Paulson v. Ward County, 601.
2. Where unliquidated claims against a county are duly presented to its board of county commissioners for allowance, and the claims are considered together and allowed at a lump sum less than the amount claimed, and a warrant is drawn for the amount so allowed, which warrant is accepted by the claimant, such acceptance is presumed to be in full payment of the claims presented. Paulson v. Ward County, 601.

ACCOUNTING.

By directors of corporation, see Corporations, 2, 3.

By mortgagee in possession, see Mortgages, 5.

ACTION.

Appearance, see Appearance.

By stockholders, see Corporations, 2.

On insurance policy, see Insurance.

Against municipality, see Municipal Corporations, 4.

1. Under Code practice, facts which at common law would constitute both trespass and trespass on the case may be united in the same complaint. Slattery v. Rhud, 274.

ACTION—continued.

JOINDER.

2. The mismanagement of corporate affairs is not the same transaction and does not grow out of the same subject of action as the alleged fraudulent obtaining and conversion of stock so as to permit them to be joined, under North Dakota Rev. Code 1905, § 6877. Niven v. Peoples, 202.
3. A cause of action to compel a return or accounting for the value of corporate stock given to a defendant, on the ground of his fraudulent representations, cannot be joined with a stockholder's action, under N. D. Rev. Codes 1905. § 7366, against a director or officer for mismanagement of the corporate business or misappropriation of the corporate property. Niven v. Peoples, 202.

ADMINISTRATORS. See Executors and Administrators.

ADMISSIONS. See Evidence, 6.

ADOPTED STATUTES. See Statutes, 8.

ADVERSE POSSESSION.

Establishment of highway by prescription, see Highways.
See also Statutes, 10.

CHARACTER OF POSSESSION.

1. A permissive holding is never adverse possession. Blessett v. Turcotte, 417.
2. The remedies of a mortgagor against the mortgagee in possession are not barred by the statute of limitations so long as the mortgagee acknowledges or recognizes them, since his rights are similar to those of a pledgor, against whose right to redeem the statute does not run until a tender of the debt and demand for the delivery of the pledge, and whose delay or laches will not defeat him unless it has injured the pledgee. Blessett v. Turcotte, 417.
3. A mortgagee in possession after default and before foreclosure is presumed to be holding for the purpose of collecting rents and profits and applying them to the mortgage debt, and not adversely to the mortgagor's title, so that ten years of holding after such an entry will not give him title by adverse possession under Rev. Codes 1905, § 6793, in the absence of actual notice to the mortgagor that he claims adversely, or some positive act implying such notification. Blessett v. Turcotte, 417.

ADVERSE POSSESSION—continued.

4. The equitable right of action of the mortgagor's assignee by quitclaim deed to quiet title in him is not barred, under Rev. Codes 1905, § 6793, by the mortgagor's entry and possession and use and occupation of the land and payment of the taxes and assessments for ten years prior to the bringing of the action, when the original entry was permissive, and an actually adverse claim was never asserted until the issuance of a void tax deed. Blessett v. Turcotte, 417.

EVIDENCE.

5. A grantee in possession of land under a void tax title fails to show the open, adverse, undisputed actual possession under color of title during ten years, which ripens into a title by prescription under N. D. Rev. Code 1905, § 4928, when the evidence shows that the occupant had obtained a quitclaim from the holder of the tax deed, pursuant to a neighborly arrangement to redeem the land from the tax sale for the benefit of a fourteen-year-old boy who owned an undivided one third in the land by grant from the government, and the facts supported the inference that the occupant had assumed a voluntary trust toward the infant, and had advanced the money in order to keep the land for him. Wright v. Jones, 191.

AGENCY. See Principal and Agent.

ALIENATION OF AFFECTIONS. See Husband and Wife.

ANIMALS.

Killing of live stock on railroad track, see Appeal and Error, 11; Evidence, 9; Railroads.

APPEAL AND ERROR. See also Assault and Battery, 6; Contempt; Counties, 8; Death, 3; Drains, 23, 25; Judgment, 2–4; Justice of the Peace, 2–4; Libel and Slander, 4–7; Sales; Trial. 6; Witnesses, 2.

RIGHT OF REVIEW.

1. In an action to restrain the selection of a normal school site and the erection of buildings thereon, brought on the ground that there had been a valid acceptance of another site, the owner of an interest in property adjoining the latter site, whose interest in the controversy was speculative merely

APPEAL AND ERROR—continued.

because of having aided in perfecting the title, has no standing to take an appeal, as there is no privity or mutuality of contract between him and the board whose duty it was to select the site. Grow v. Taylor, 469.

PRESENTATION AND PRESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

2. The theory adopted by the parties in the court below, and pursuant to which the trial was there conducted, cannot be departed from the first time in the supreme court. Ugland v. Farmers' & M. State Bank, 536.
3. When the case was tried in the district court, upon the theory that the defendant should account to the plaintiffs for the value of his use of the real estate, for the determination of adverse claims to which the action was brought, the supreme court will not permit a different theory of the case to be adopted by the parties in the latter court. Movius v. Propper, 452.
4. Assignments of error on the judge's charge cannot be based upon unchallenged oral charges to which no exceptions were taken and filed within twenty days, when the only timely taken exceptions were those to proper refusals to charge requests, and to the coupling with requests charged the law applicable to the other side's theory of the case. Fawcett v. Ryder, 20.

RECORD AND PROCEEDINGS NOT IN RECORD.

5. When an appeal is taken upon the judgment roll alone, and the record contains no statement of the case and no abstract or review of the testimony, the supreme court has no basis for determining whether the trial court's instructions to the jury were based upon the evidence and the proof, or not, and, strictly speaking, the instructions and the exceptions are not before it for review; neither can questions as to the admissibility, credibility, and conclusions be considered. Heiszler v. Beddow, 34.

ASSIGNMENT OF ERRORS.

6. Under a rule of the supreme court which requires that an assignment of errors "must, in a way as specific as the case will allow, point out the errors objected to," an assignment which on its face fails to advise the court of the alleged error complained of, but merely refers to the place in the printed record in which such alleged error may be found,—as, "Defendant assigns as error specification of error No. 3 (abstract page 5 of the evidence page 20),"—is wholly insufficient under the above rule. Minot Flour Mill Co. v. Swords, 571.

APPEAL AND ERROR—continued.

REVIEW.

7. The right to amend the pleadings upon a trial *de novo* in the district court on appeal from a justice's garnishment judgment does not extend to defeat vested rights or liens already acquired by the garnishing creditors. Burcell v. Goldstein, 257.

8. Curtailing the cross-examination of witnesses upon an immaterial issue is not prejudicial error. Stotlar v. German Alliance Ins. Co. 346. Stotlar v. Citizens' Ins. Co. 352.

9. In an action on a negotiable promissory note payable to the order of a payee therein named, on which the plaintiff brought suit as assignee, and in which the defendant offered no evidence showing any equity in his favor, or any defense against the note if in the hands of the original payee, an amendment allowing the plaintiff to change the word "assigned" to "indorsed" is immaterial, and the granting of such amendment nonprejudicial. Grover v. Muraet, 576.

10. Errors committed in excluding questions asked upon the cross-examination of a complaining witness may be cured thereafter by permitting the subject-matter to be fully covered, since both the scope of cross-examination and the order of proof, are necessarily largely within the discretion of the trial court. State v. Tolley, 284.

11. It is reversible error to so instruct the jury in an action for the negligent killing of live stock upon a railroad right of way as to leave it free to find for the plaintiff, notwithstanding that it found that the stock was killed by certain of the trains passing over the defendant's right of way, concerning which the defendant's testimony overcame the prima facie case of negligence made by the statute out of the mere fact of the killing. Reinke v. Minneapolis, St. P. & S. Ste. M. R. Co. 182.

DETERMINATION AND DISPOSITION OF CAUSE.

12. Where by a clerical error which is no fault of the trial court a judgment is entered for too large a sum and immediately upon the discovery thereof, which is not until after appeal, an offer to remit the excess is made, the judgment will be affirmed as to the correct amount, and the motion to remit the excess will be allowed. Nichols & S. Co. v. Dallier, 532.

13. Under N. D. Rev. Codes 1905, § 7044, a motion for judgment *non obstante veredicto* can be granted in the district court after the entry of judgment there, and by the supreme court on an appeal from an order granting or denying a motion for a new trial, or an appeal from a judgment. Schumacher v. Great Northern R. Co. 231.

14. On an appeal in an equity case, in which a trial *de novo* was demanded in

APPEAL AND ERROR—continued.

the supreme court, the case will be remanded for a new trial in the district court, when the record presents testimony so vague, indefinite, and unintelligible as to render it impossible to arrive at any satisfactory conclusion. Landis v. Knight, 450.

15. In an action tried in the district court on the theory that it was one to redeem real estate from a foreclosure sale under an agreement that one of the parties should take an assignment of a sheriff's mortgage foreclosure certificate of sale, and permit the other party to redeem by paying the amount of the certificate and other indebtedness, of which a new trial was demanded in the supreme court, which was not clear whether the suit was intended as one for specific performance of an oral contract to convey, but adopted the view that it was an action to redeem and also one for an accounting, the supreme court will vacate the judgment and remand the action, instead of modifying and affirming the judgment in accordance with its view of the facts, when the record discloses that persons not made parties in the action had an interest in the subject-matter thereof, and that the question involved could not be completely determined and settled without bringing them in. Murdock v. Hanson, 280.

16. The sound discretion of the district court is properly exercised under N. D. Rev. Codes 1905, § 7228, in a case sent down from the supreme court after an appeal, when it refused to dismiss the action for failure to bring it to trial within one year after the supreme court's decision, upon affidavits that two attorneys were employed, the principal one of whom thought, when he saw the case upon the calendar, that the other counsel had noticed it for trial, but that it had been put on the calendar by the clerk, and that, had it been properly on the calendar, it could not have been reached for trial. Corbett v. Great Northern R. Co. 1.

APPEARANCE. See also Certiorari; Jury.

1. Since an attorney cannot delegate his authority to another, attorneys appearing for a nonresident by request of his former attorney, whose authority had ceased by the termination of the action he was employed to prosecute, cannot bind him in the absence of ratification by him of their acts; and a judgment entered upon such unauthorized appearance, taken without knowledge on his part, is voidable on his application, not as a matter of discretion, but as a matter of right, under N. D. Rev. Codes, § 6884, in the absence of laches or acquiescence on his part. Reibold v. Hartzell, 264.

2. When a party opposing a motion to change the place of trial, on the ground of local prejudice, on the return day appeared "specially," as he styled it, and presented first an objection that the judge who signed the order

APPEARANCE—continued.

to show cause had been devested of jurisdiction to make it by the filing of an affidavit of prejudice against him, and secondly and thirdly, that the moving affidavits were insufficient and had not been served in time, the objection to the sufficiency of the affidavits made the appearance a general one, and was a waiver of the objection to the jurisdiction of the judge who signed the order to show cause. Stockwell v. Haigh, 54.

ASSAULT AND BATTERY. See also Evidence, 3, 5, 6, 10.

EVIDENCE.

1. In an assault action, evidence is admissible as to the finding of blood the morning after, at the place where the assault was committed. Nitschka v. Geiszler, 412.
2. Under the issues in an assault case, and after laying a proper foundation by showing that the plaintiff was kept weeks in bed by his injuries, testimony is proper that the witness saw the plaintiff in bed fourteen days after the assault, and, a proper foundation having been laid, he may describe the marks of violence which then appeared upon the plaintiff's body. Nitschka v. Geiszler, 412.
3. Under an allegation as to expense for medical care and attendance caused by an assault, testimony that the plaintiff paid certain amounts for medicine and for the doctor's bill, in answer to the question whether the plaintiff's wife got medicine for him when he was sick, is competent and material as against the objection that the complaint contained no allegation of value, and was incompetent and immaterial, which did not raise the question as to the proper foundation for testimony concerning the value of the medicine and of the doctor's services. Nitschka v. Geiszler, 412.
4. Under a complaint in an action for assault, alleging, in laying the damages, expense for medical care and attendance, evidence is competent as to the number of times the doctor visited the plaintiff, and is not objectionable on the ground that it tended to prove the loss and value of the plaintiff's time, concerning which there was no allegation in the complaint. Nitschka v. Geiszler, 412.

INSTRUCTIONS.

5. When the defendant's own testimony in an action for assault makes full proof of the cause of action against him, it is proper to instruct the jury that the plaintiff should recover, and that the only question for it to consider was the amount of damages. Nitschka v. Geiszler, 412.

ASSAULT AND BATTERY—continued.

EXCESSIVE VERDICT.

6. In an action for assault a verdict for $1,200 is not reversible as excessive, when the evidence warranted the jury in imposing the full amount as exemplary damages. Nitschka v. Geiszler, 412.

ASSESSMENTS. See Drains.

ASSIGNMENTS OF ERROR. See Appeal and Error, 6.

ASSUMPSIT. See Master and Servant, 1.

ATTACHMENT. See Evidence, 4; Sheriffs and Constables.

ATTORNEY AND CLIENT.

Appearance by attorney, see Appearance, 1.

The authority of an attorney employed to begin an action and prosecute it to a finish, who issued and filed a summons and complaint, and thereafter entered a judgment which was wholly void because prior thereto the action was in law deemed discontinued under N. D. Rev. Codes 1905, § 6884, because of the lapse of sixty days after filing an affidavit for publication without a personal service or a first publication, did not survive this termination of the action so as to make valid a service upon him of moving papers to vacate the void judgment, three years later, followed by proceedings in which the defendant obtained affirmative relief against him. Riebold v. Hartzell, 264.

BANKRUPTCY. See also Garnishment, 1.

N. D. Rev. Codes 1905, § 7082, does not authorize the cancelation of a judgment lien docketed against the real estate of a judgment debtor more than four months prior to his discharge in bankruptcy, when the bankruptcy decree left the judgment lien unaffected, and operated only upon the debtor's personal liability. John Leslie Paper Co. v. Wheeler, 477.

BANKS AND BANKING. See Contracts, 2–7.

BATTERY. See Assault and Battery.

BILLS AND NOTES.

Mortgage to secure note, see Mortgages, 4.

See also Appeal and Error, 9; Corporations, 1.

1. When the first indorser on a note signed at the maker's request, by request of the second indorser, because the latter was unwilling to indorse without security for his protection, he cannot, after paying and satisfying the note after it was reduced to judgment, hold the second indorser for contribution as cosurety, since under Rev. Codes, §§ 6366, 6370, the prima facie liability was in the order of the indorsements, and the evidence in the case did not establish as between them, the rights and remedies of cosureties. Harris v. Jones, 488.
2. The possession of a promissory note payable to order of a payee by an assignee, proof of payment of a valuable consideration therefor to the payee by the plaintiff holder, and failure to show any defense, render the maker liable to the plaintiff assignee,—especially under a statute requiring actions to be brought in the name of the real party in interest. Grover v. Muralt, 576.

BONDS.

Judgment in action on, see Judgment, 6, 7.

The liability to a subcontractor, of the surety of a subcontractor, for the latter's failure to perform, is measured by the difference between what the subcontractor would have received for the work and what it cost the contractor to finish it, and also for the contractor's loss of profits, since such damages are within the contemplation of the parties; but where the contractor has not finished the work, is not compelled to do so, has not incurred any liability therefor, and when the question whether he will incur liability is speculative, and there is no positive method of ascertaining the cost of completion, the contractor is not entitled to recover from the surety a sum on account of the cost of completion, in addition to the profit, and so recover a greater profit for a breach of the subcontract than if the subcontractor had performed. Long v. American Surety Co. 492.

BOUNDARIES.

1. Under an agreement between adjoining lot owners, which was reduced to writing, but not signed by the parties, to the effect that if a well agreed to be sunk on the boundary line between the lots should afterwards be ascertained not to be upon the true boundary line, "the ownership should remain as it was, regardless of any change in the line," the digging and

BOUNDARIES—continued.

location of such well is in no manner a settlement of the boundary line between the two lots. Johnson v. Bartron, 629.

2. A survey made subsequent to the digging and location of a well on what was supposed to be the boundary line between adjoining lots, though not made by the county surveyor of the particular county in which the well was located, is competent evidence, and, if not disproved by better evidence, is conclusive of the true location of the dividing line between the lots. Johnson v. Barton, 629.

BREACH.

Of contract, see Contracts.

BURDEN OF PROOF. See Evidence, 1, 2.

CARRIERS.

A railway company is not liable for injury to a shipper, resulting from exposure while remaining in a car containing stock and goods belonging to him, during a cold and stormy night, where it did not compel the shipper to ride in such car and endure such exposure, but afforded him ample opportunity, without risk of injury, to go to the caboose attached to the train. Whalen v. Great Northern R. Co. 607.

CERTIORARI.

On a petition for alternative certiorari upon a showing that the district court was about to act in excess of jurisdiction in the removal of a county commissioner for taking illegal fees, petitioners have no standing during the pendency, in the removal proceedings, of the equivalent to a demurrer to the basis for the proceedings, pending and undisposed of, notwithstanding that it was filed under a so-called special appearance, since a demurrer is equivalent to a general appearance, and the petitioners could not at the same time recognize jurisdiction by interposing a demurrer, and question it by certiorari proceedings. Albrecht v. Zimmerly, 337.

CHANGE OF VENUE. See Venue.

CHATTEL MORTGAGES. See also Trial, 9.

A judgment is insufficient in a foreclosure action on three chattel mortgages which contains no finding, conclusion, or order authorizing the clerk to

CHATTEL MORTGAGES—continued.
enter personal judgment, does not indicate the amount due under each mortgage sued on, and merely contains conclusions of law that the plaintiff was entitled to the foreclosure of each of the mortgages sued on, and for costs and disbursements, but did not fix the amount due upon each of the several liens, or designate the officer or person to make the sale, or the application of the proceeds of sale, and so did not comply with N. D. Rev. Codes, 1905, § 7516. First Nat. Bank v. Mahoney, 177.

CLAIMS.
Against county, see Accord and Satisfaction.
Against decedents' estates, see Executors and Administrators.

CLOUD ON TITLE. See Quieting Title.

COMMISSIONERS. See Counties, 7; Drains, 1.

COMMON CARRIERS. See Carriers.

COMPENSATION.
Of officers, see Officers.

CONSIDERATION.
For mortgage, see Mortgages, 4.

CONSTITUTIONAL LAW.
The drainage statutes of North Dakota do not violate provisions of the Federal Constitution as to taking property without due process of law. Hackney v. Elliott, 373.

CONSTRUCTION.
Of statute, see Statutes, 3–10.

CONTEMPT.
In a proceeding to punish for contempt of court for violation of an injunction against maintaining a common nuisance consisting of carrying on a place for the sale of intoxicating liquors, it is harmless to ask a witness if he knew where the defendant's place of business was. State ex rel. Smith v. Finlayson, 181.

CONTRACTORS.
Bonds of, see Bonds.
Judgment in action on bond of, see Judgment, 6, 7.

CONTRACTS.
Statute of frauds, see Frauds, Statute of.
Of municipal corporation, see Municipal Corporations.

ACCEPTANCE OF OFFER.

1. A donation of premises by the owner to a public body is merely an offer, which does not bind the latter until acceptance. Grow v. Taylor, 469.

ACTIONS FOR BREACH.

2. In an action against a bank, based on its refusal to pay to the plaintiff a certain sum, the proceeds of a loan, which it is alleged the bank promised to pay to him in cash, in which it is alleged in the complaint that a demand for an accounting had been made, it is error to exclude evidence tending to prove that no such demand had ever been made. Goetz v. Merchants' Bank, 643.
3. In an action based on the defendant's refusal to pay to the plaintiff a certain sum, the proceeds of a loan, which it is alleged defendant promised to pay to him in cash, where the answer put in issue the allegation of a promise by it to pay in cash, and alleges that the agreement was that it should apply the proceeds of the loan in paying and discharging certain indebtedness owing by the plaintiff, and that it applied such proceeds accordingly, the burden of proof is on the plaintiff to establish the truth of his contention as alleged. Goetz v. Merchants' Bank, 643.
4. In an action based on a bank's refusal to pay to the plaintiff a certain sum, the proceeds of a loan, it is alleged the defendant promised to pay to the plaintiff in cash, it is error to exclude on cross-examination evidence that, since the making of the loan in question, the plaintiff had drawn checks on the defendant which were paid by it. Goetz v. Merchants' Bank, 643.
5. In an action against the bank for its refusal to pay to the plaintiff proceeds of a loan, which it is alleged the bank promised to pay to him in cash, in which the defense is that the agreement was that it should apply the proceeds of the loan in paying and discharging certain indebtedness owing by the plaintiff, and that it applied such proceeds accordingly, it is error to exclude evidence on the part of the defendant that, at the time of making the loan, it figured up on a memorandum the amount due on the old notes evidencing the indebtedness, and told the plaintiff the amount. Goetz v. Merchants' Bank, 643.

CONTRACTS—continued.

6. In an action against a bank for its refusal to pay to the plaintiff a certain sum, the proceeds of a loan, which it is alleged the bank promised to pay to him in cash, in which the bank alleges that the agreement was that it should apply the proceeds of the loan in paying and discharging a certain indebtedness owing by the plaintiff, and that it applied such proceeds accordingly, it is error to exclude evidence of a request by the plaintiff to turn over to him certain notes evidencing the indebtedness in question. Goetz v. Merchants' Bank, 643.

7. In an action based on a bank's refusal to pay to the plaintiff a certain sum, the proceeds of a loan, which it is alleged the defendant promised to pay to him in cash, where the defense is that the agreement was that the defendant should apply the proceeds of the loan in paying and discharging certain indebtedness owing by the plaintiff, and that it applied such proceeds accordingly, it is error to exclude evidence of possession by the defendant of notes which the plaintiff authorized to be deducted from the loan. Goetz v. Merchants' Bank, 643.

CONTRIBUTORY NEGLIGENCE. See Negligence, 1, 2.

CONVERSION. See Trover and Conversion.

CORPORATIONS. See also Action, 2, 3.

Corporate Existence.

1. Under a statutory provision that the maker of a negotiable instrument engages that he will pay it according to its tenor, and admits the existence of the payee, it is unnecessary for an indorsee or assignee of a promissory note payable to the order of the "N. I. Ry. Co." and indorsed "N. I. Ry. Co. by J. J. L. Pres't." to prove the incorporation of the payee. Grover v. Muralt, 576.

Members and Stockholders.

2. Under N. D. Rev. Codes 1905, § 7366, an action against directors for an accounting of corporate property may not be maintained by an individual stockholder without allegation and proof of a demand on the corporation itself to bring the action, and a refusal on its part, or that such demand would have been unavailing; and the absence of direct allegation as to this essential is not supplied by a showing that the defendants themselves were officers and directors, when there is no showing as to the number

CORPORATIONS—continued.
of directors, or that the defendants constituted a majority of the board. Niven v. Peoples, 202.

OFFICERS AND AGENTS.

See also supra, 2.

3. A cause of action is not stated in a suit against directors for an accounting as to mismanagement and misappropriation of corporate property against a defendant, of whom all that is alleged is that he is a director and lives in another state, without any allegation regarding his acts, or pleading that he had been given an opportunity to join in the suit as plaintiff before being made a defendant. Niven v. Peoples, 202.

COUNTIES.

Right to jury in proceedings for removal of commissioner, see Jury.
See also Accord and Satisfaction.

ALTERATION AND CREATION OF NEW COUNTIES.

1. Where, upon a vote for county division, several precincts make returns of their respective votes upon state and county officials, etc., upon the printed blanks furnished for that purpose, and attached by means of metallic fasteners to tally sheets used by them in counting the county division votes, the tally sheets so used containing enough writing and figures to conform to the law as a certificate of the vote, it is the plain intent of the precinct officers to make a certificate of the votes so counted, and it should be thus treated. Pederson v. Billings County, 547.
2. Where, upon an election for county division, certain precincts make no return to the county board, and are not counted in determining the result of the election, but upon a contest the trial court examines enough of the ballots of said precincts to show that the result of the election could not be changed if every vote uncounted were conceded to be against the result of the election as declared, it is not necessary to continue the count of the remaining ballots. Pederson v. Billings County, 547.
3. An unofficial ballot similar to the official ballot in an election for county division, but with squares crossed in favor of certain counties, and gummed so that the voters merely pasted the unofficial ballot upon the official, and thus got it into the ballot box, renders the ballot thus cast void. Pederson v. Billings County, 547.
4. The contestant of an election for county division, in which an unofficial ballot similar to the official ballot, but with squares crossed in favor of

COUNTIES—continued.

certain counties, and gummed so that the voters merely pasted the unofficial ballot upon the official, and thus got it into the ballot box, has the burden of showing the number of stickers so used, and that enough were counted by the canvassing board to change the result of the election. Pederson v. Billings County, 547.

5. Under N. D. Rev. Codes 1905, § 2336, subdiv. 2, in making the adjustment of county property and indebtedness between the old and the new counties, it is proper to charge the old county with the cost of record books purchased for use in the county offices and remaining there, since they are of value and constitute public property used by the county. State ex rel. Mountrail County v. Amundson, 238.

6. Under N. D. Rev. Codes 1905, § 2336, subdiv. 2, as to the adjustment of county property and indebtedness between the old and new counties upon the erection of a new one, the old county should neither be credited for depreciation nor charged with appreciation in the value of property remaining within its territorial limits, since the legislature fixed the cost of the property, and not its value, as the test for the adjustment; monies expended for roads and bridges are not to be deducted from the total indebtedness of the old county, since they are not county property, and the county's interest therein is qualified by the ownership of the public at large. Public ownership is inconsistent with the theory of proprietary ownership by the county, and county ownership in roads and bridges is quite different from that in a court house and public grounds. This rule works no inequity upon the inhabitants of the new county, since their benefit from the roads and bridges in the old county does not cease. State ex rel. Mountrail County v. Amundson, 238.

OFFICERS AND AGENTS.

7. When a county voted to increase its commissioners from three to five under N. D. Rev. Codes 1905, § 2386, and the old board redistricted the county under § 2387, and then met with the county judge and auditor, and appointed two new commissioners for the new district, under Laws 1907, chap. 66, an action will not lie to oust the new appointees, since the redistricting created two vacancies in the absence of legislative intent to postpone the creation of the new officers, in lieu of a fairly deducible legislative intention that the offices should be created and filled immediately upon the redistricting. State ex rel. Atty. Gen. v. Davies, 334.

8. When the thirty days within which by N. D. Rev. Codes 1905, § 9646, all issues raised in district court proceedings for the removal of county officers should have been tried, had been consumed by abortive certiorari proceedings, in which the action of the district court was stayed, the

COUNTIES—continued.
supreme court has the power to extend the time for the trial of the removal proceedings for thirty days after the filing of its remittitur with the district court, under §§ 6884 and 7328. Albrecht v. Zimmerly, 337.

COURTS.
Contempt of, see Contempt.
Review of judgment of drainage board, see Drains, 22.

It is a proper case for the exercise of prerogative power by original writ of the supreme court, when the sovereignty of a state is affected by the promulgation throughout the state of an opinion from the office of the attorney general that a recently enacted state-wide primary law, under which a primary was about to be held, and compliance with which would require action by local officers in several thousand districts, was void as unconstitutional, owing to the interest of the electorate of the state in the uncertainty over its right of franchise. State ex rel. Miller v. Flaherty, 313.

CRIMINAL LAW. See also Larceny; Libel and Slander, 4–8; Rape.

An instruction to the jury, advising them that they could not consider the defendant's failure to become a witness, is not prejudicial error, and cannot be made the subject of an exception,—especially when the instruction was given out of solicitude for the defendant, and to avoid a misunderstanding proceeding from the mistaken zeal of his own counsel. State v. Dodson, 305.

DAMAGES.

In an action for damages to ice stored in an ice house, by reason of encroachments by the defendant upon the plaintiff's lot while excavating upon his adjoining lot, the measure of damages as formulated in N. D. Rev. Codes 1905, § 6582, is the difference between the value of the ice if it had not been injured, and its value after the exposure to sun and air caused by the trespassing excavation; and it is erroneous to charge the jury that they should find against the defendant for the difference between what was in the ice house after the damage, and what was in it before the damage, the plaintiff's claim being based upon deterioration in quality, rather than diminution of quantity. Slattery v. Rhud, 274.

DEATH.

1. The presumption of death from unexplained absence does not apply by virtue of N. D. Rev. Codes 1905, § 7302, to a man who in 1890 removed from North Dakota and took up his residence in the state of Washington, of whom it was heard in 1909 that a certain woman having a postoffice address in Washington knew of his whereabouts, since that information destroyed the presumption, and it was necessary to create a new presumption of death by showing that he had not been heard of in the state of Washington during seven years. Wright v. Jones, 191.
2. Since courts will take judicial notice of the mortality tables, they will be assumed to have been before the jury, even in the absence of a request by the plaintiff for an instruction based upon them on appeal from a verdict directed for the defendant, in an action for causing the death of a three and one-half year-old child, so as to avoid the application of the rule that a reversal will not be ordered in favor of a plaintiff who could on the record have recovered nominal damages only. Ruehl v. Lidgerwood Rural Teleph. Co. 6.
3. In an action to recover damages for the death by negligence of a three and one-half year-old child, mortality tables need not be introduced, nor need the life expectancy of the child be proved, and it is sufficient for the reversal of a verdict directed for the defendant, and to avoid the rule that reversals will not be ordered when a new trial would result in nominal damages only that the age and health of the child was proved, and the business occupation and circumstances of the father. Ruehl v. Lidgerwood Rural Teleph. Co. 6.

DECEDENTS' ESTATES. See Executors and Administrators.

DECLARATIONS. See Evidence, 7, 8.

DEEDS.

As mortgage, see Mortgages, 2.

DEFAULT JUDGMENT. See Judgment, 1–5.

DEFENSES.

In action for libel, see Libel and Slander, 2.

DEMURRER.

Under special appearance, see Jury.

DISCRETION.

In vacating default judgment, see Judgment, 2–4.
As to grant of mandamus, see Mandamus, 1, 3.
As to examination of witnesses, see Witnesses, 2.

DISMISSAL AND NONSUIT.

In a mortgage foreclosure action in which an attempt was made to foreclose also a tax certificate lien, the answer in which asked for cancelation of the certificate, and offered to pay the amount due on the mortgage lien, without, however, offering to pay the tax lien, which omission was repeated in an amended answer, the plaintiff cannot escape the issue tendered by the counterclaim or cross bill, by subsequent amendment of the complaint striking therefrom all allegations as to the tax certificate, but such counterclaim will not be considered when it fails to back up allegations regarding collusion and conspiracy to defeat bidding at a tax sale, with a tender of the amount of the taxes. Tee v. Noble, 225.

DONATION.

Of premises to public, see Contracts, 1.

DRAINS.

Constitutionality of drainage, see Constitutional Law.
See also Subrogation.

Drainage Commissions.

1. Judicial notice may be taken by drain commissioners of the proposed route of a drain within the limits of their own county, since the statute compels them to do even more than take judicial notice by making a personal examination of the route. Hackney v. Elliott, 373.

Proceedings for Establishment.

2. A commissioner's order establishing a drain locates it with sufficient particularity and definiteness if it is made with reference to a survey had and plans and specifications prepared, and on its face locates the course along stated lines of sections and townships by their numbers, with distances given. Hackney v. Elliott, 373.
3. In the absence of jurisdictional defect in the proceedings of a county drainage board, subsequent proceedings of a tri-county board and separate county

DRAINS—continued.

boards cannot be questioned for jurisdiction; and the burden of showing fraud in the subsequent proceedings, in order to vacate the tax levy for mere irregularity, is not met by showing that certain of the levying officers were removed for fraud, without showing that the removal was for fraud in the proceedings in question. Hackney v. Elliott, 373.

4. A sale for nonpayment of drainage assessments is void when the notice of sale described the township in which the land affected was situated as in range 55, instead of range 53, in the first publication, and, although the mistake was corrected in the subsequent publications of the notice, there was not the full number of publications of a correct notice required by statute. Hackney v. Elliott, 373.

5. Statutory requirements as to the number of publications of a notice of sale for nonpayment of assessments, containing a correct description of the property affected, are mandatory, and two correct publications after correction of an error in the first publication, when the statute requires three publications, renders the sale void. Hackney v. Elliott, 373.

6. A written petition for a drain is sufficient to confer jurisdiction for the levy of an assessment of the cost of extending it into a county where the lands assessed were situated, if it discloses no more than the general course proposed, if it shows that lands are to be drained, and if it be in fact signed by six or more freeholders whose property will be affected by the proposed drain. It need not contain formal averment as to matters which the drain commissioners are to determine *ex parte*. Hackney v. Elliott, 373.

7. A drain petition is sufficient to confer jurisdiction to impose a drainage assessment if it contain no more than is expressly prescribed in the statutes of 1907 and 1911. Hence a petition is not jurisdictionally defective which merely recites that as proposed it is to be a continuation of the drain proposed by two other counties, coupled with a recommendation as to size and depth and a statement of the course proposed. Hackney v. Elliott, 373.

8. No prejudice is worked to anyone, and a *fortiter* none to owners of property on which drainage assessments are levied by the omission of the petition on which the proceedings were instituted to state definitely that the purpose of the drain was to drain agricultural land, because the drain commissioners may not only take judicial notice of the route, but are also compelled by the statute to make a personal examination of it. Hackney v. Elliott, 373.

9. The objection to a drain petition, that it is unintelligible because of the interjection of a superfluous conjunction tending to obscure the meaning, does not avoid a drainage assessment for want of jurisdiction, when the

DRAINS—continued.
omission of the superfluous word made the petition understandable by the drainage board and everyone interested. Hackney v. Elliott, 373.
10. A notice of a preliminary hearing on the establishment of a drain, which contains a literal copy of the petition for the drain, except the names or signatures of the petitioners, is not insufficient because of the omission of the names of the petitioners. Edwards v. Cass County, 555.
11. A statute requiring five notices of the preliminary hearing on the establishment of a drain to be posted "along the line of the proposed drain, at such points as will be likely, in the opinion of the board, to secure the greatest publicity," is substantially complied with by posting one of the notices in a postoffice a mile distant from the drain. Edwards v. Cass County, 555.

Assessments and Special Taxes.

12. In the absence of express statutory authorization, drainage assessments are not subject to any penalty beyond simple interest for nonpayment; and such assessments levied prior to the enactment of Laws 1911, chap. 298, do not carry penalties for nonpayment, although they carry simple interest under Rev. Codes, §§ 5508–5510. Hackney v. Elliott, 373.
13. A drainage assessment is not void because it is based on the actual cost of the improvement, instead of the estimated cost, either *in toto* or as to the excess of the actual over the estimated cost, since the statute contemplates the actual cost, and in no way gives any binding effect to the preliminary estimates. Hackney v. Elliott, 373.
14. The validity of a drainage assessment is not affected by the failure of the county auditor to record the return of the proceedings filed with him, because the county had not provided a book for the purpose, since the statutory direction to record the return when filed was directory merely, and not mandatory, and the omission was a mere irregularity, in view of other provisions of the statute, and was not intended to serve as constructive notice of the assessments. Hackney v. Elliott, 373.
15. A drainage assessment levy is not void for uncertainty because the column tops of the list contained figures indicating a decimal part of a per cent, and the assessment figures extended below were one hundred times that indicated by the tops of the columns, as against a property owner chargeable with notice that his property was assessable for benefits, and that the apportionment was to be expressed fractionally, and estopped by his laches from questioning mere irregularities. Hackney v. Elliott, 373.
16. An assessment for the benefit of a three-county drain may not be declared invalid because the drain boards of the three separate counties met together at the same time and place, and apportioned the benefits among the several counties, and, acting as three several boards, adopted computations of the

DRAINS—continued.

several assessments to be levied against the lands in each county, in advance of statutory authority to meet as a joint tri-county board for the apportionment in gross of the benefits among the several counties, there being no showing that the property owner was in any way materially prejudiced. Hackney v. Elliott, 373.

17. A property owner seeking to cancel drainage assessments after sale for nonpayment cannot complain because the county drain board inserted in the order provisions for spur drains neither asked for nor mentioned in the petition nor recited in the findings preceding the order, apparently inserted as a separate matter, there being nothing in the record to show that it was not built as a separate enterprise upon a separate petition, since the matter did not go to the jurisdiction of the several county boards or of the joint board. Hackney v. Elliott, 373.

18. In an action to restrain levy of special drainage assessment in specific amounts as to tracts, though begun prior to the completion of drain, the failure of the surveyor or the board to cause to be filed with the county auditor the surveyor's duplicate report of profiles, plans, and specifications of the proposed ditch petitioned for, prior to hearing on feasibility of establishment of the drain, does not defeat the jurisdiction or authority of the drainage board to proceed, hear, and by order establish the drain, when a duplicate of said surveyor's report, with plans, specifications of drain, and map of drainage area, was, prior to hearing, on file and before the drain board, and when no prejudice is shown to have resulted to appellants from such omission. Edwards v. Cass County, 555.

19. Delay in the procurement of a deed to a portion of the right of way contracted for in a drainage improvement, and obtained after hearing on apportionment and review of special assessment of benefits by percentages, does not invalidate such special assessment. Edwards v. Cass County, 555.

20. A property owner seeking to quiet title in himself against the purchaser at a sale for nonpayment of drainage assessments, who, during the pendency for five years of the proceedings out of which the assessments grew, with full knowledge that great expense would be incurred in the drain construction, and that his property would have to bear its proportionate share of the cost, remained inactive and quiescent, and took no hostile step until after the state had enforced collection, and the defendant had invested the amount of the taxes at a sale, is barred by his laches and by estoppel from relief in equity against mere irregularity and defects not jurisdictional. Hackney v. Elliott, 373.

21. The same rule of estoppel is applicable to a property owner in favor of the purchaser at a sale for nonpayment of a drainage assessment as in favor of the county before the sale, when he had remained inactive and quiescent during the proceedings which resulted in the assessment, and took no hostile

DRAINS—continued.

action until after the public improvement involved had been completed at public expense and public obligations issued to pay for it. Hackney v. Elliott, 373.

22. A court will not review the judgment of a drainage board as to specific benefits to be derived, apportioned in percentages, in the absence of allegations and proof of fraud, or something more than error of judgment on the part of the board. Edwards v. Cass County, 555.

23. Where the defendants, upon an appeal, are public officials who were not wilfully negligent, and judgment against whom for costs could probably not be assessed as a part of cost of construction of the drain over which the case arose, and the judgment upon appeal is not a recovery of all demands urged by either party, no costs will be taxed and no judgment for costs entered. Edwards v. Cass County, 555.

24. The requirements of a statute relating to the construction of drains, that notices of the time and place of review of special percentage assessment of benefits shall be posted, "not less than five in all and at least one in each township or municipality interested in such drain," are mandatory, and failure to post such notices in one township of the three within the drainage area renders the proceedings as to review had in such township invalid. Edwards v. Cass County, 555.

25. The validity of a contract entered into for the construction of a drain having been assailed in the pleading but abandoned on appeal, the validity of the contract will be affirmed. Edwards v. Cass County, 555.

26. An intending purchaser at a sale of land for nonpayment of a drainage assessment is not compelled to examine the records of the clerk of the district clerk to determine whether any actions are pending against any of the tracts offered for sale. Hence, and in view of the policy of the state to encourage bidding at tax sales, an action begun before the tax sale is not notice of the owner's intention to contest the validity of the tax, or of any defense interposible against its payment. Hackney v. Elliott, 373.

27. One who has no standing in equity against the county at the time of a sale for nonpayment of a drainage assessment has none against a purchaser at such sale. Hackney v. Elliott, 373.

DUPLICITY.

In information for criminal libel, see Libel and Slander, 8.

ELECTIONS.

On question of county division, see Counties, 2–4.

ELECTIONS—continued.

ELECTION DISTRICTS AND PRECINCTS.

1. The voting precincts and polling places established in certain townships by the county commissioners of the county in which the townships are located remain the same, upon the establishment of a new county, including the townships in question, until the commissioners of the new county have acted thereon. State ex rel. Johnson v. Ely, 619.

NOMINATIONS AND PRIMARY ELECTIONS.

Partial invalidity of primary law, see Statutes, 1.

2. A state-wide primary election is not a state election within the application of North Dakota Constitution, § 121, declaring that every male person having resided prescribed periods in the state, county, and precinct shall be a qualified elector, since the purpose of primaries is to select party candidates, and not the election of public officers. State ex rel. Miller v. Flaherty, 313.

3. Denial to one who has no party belief whatever, of the right to participate in a party primary, does not deny any legal or moral right belonging to him as a qualified elector. State ex rel. Miller v. Flaherty, 313.

4. N. D. Laws, 1911, chap. 213, in providing as a test for the preliminary enrolment required for participation in a state-wide primary, of a test oath by the voter, that he belongs to the party in the primary of which he attempts to participate, infringes neither North Dakota Constitution, § 122, as amended, nor § 123, prohibiting restriction of the right of suffrage except by majority vote at a general election, nor § 124, fixing the time for the general elections in the state, or § 129, providing that all elections by the people shall be by secret ballot. State ex rel. Miller v. Flaherty, 313.

5. The strict construction of inapt and indefinite language used in N. D. Laws 1911, chap. 213, §§ 2 & 3, cannot be resorted to to render the act abortive on the ground of a supposed discrimination between native and naturalized citizens, as to the privilege of participating in the primary election, extended to persons reaching the voting age after the end of the enrollment period, since the statute, although referring to an enrollment day, did not provide for one, and in view of the fact that under the Federal statute no one may be naturalized during the thirty days after registration and before election. State ex rel. Miller v. Flaherty, 313.

6. The North Dakota primary election law (Laws 1911, chap. 112) makes it optional with the voter to indicate his second choice, and he is not under the compulsion of doing so, arising from the nullification of his vote in case he limits himself to a first choice only, pursuant to the general rule of statutory construction that election statutes are directory, and not man-

ELECTIONS—continued.

datory, unless noncompliance is expressly declared to be fatal, or, in other words, literal compliance declared to be vital. State ex rel. Shaw v. Harmon, 513.

7. Instructions to voters, printed and issued under Rev. Codes 1905, § 621, should be full and explicit, and it is not a sufficient compliance therewith merely to follow the exact or the substantial language of the statute. State ex rel. Shaw v. Harmon, 513.
8. The affidavit mentioned in § 31 of the primary election law, which may be made on information and belief, as a basis for procuring an order for a recount of the ballot, is not the affidavit of contest elsewhere referred to in that section. Olesen v. Hoge, 648.
9. The provisions of chapter 109, known as the primary election law, in so far as they relate to contests of nomination, require that such contest be initiated by serving upon the contestee, within ten days after the completion of the canvass of the ballot, an affidavit of contest setting forth the ground therefor. Olesen v. Hoge, 648.

CONDUCT OF ELECTION.

10. Members of a canvassing board are presumed to know the locality of the designated polling places within their jurisdiction. State ex rel. Johnson v. Ely, 619.
11. Where a voting place is duly established by the county commissioners, an election held at another place a considerable distance therefrom is, in the absence of special reason, unauthorized, and the returns thereof should not be canvassed. State ex rel. Johnson v. Ely, 619.
12. Under the minority rule relating to a change of polling place from that regularly established, the burden is on those who would maintain the validity of the change to show that it was made in good faith, without fraud, and with no intent to injure the cause of others, and that in fact no one was deprived of his vote by reason of the unauthorized change. State ex rel. Johnson v. Ely, 619.

COUNT OF VOTES, RETURN, AND CANVASS.

Mandamus to compel canvass of votes, see Mandamus, 6.

13. Where the members of a canvassing board upon returns of an election which clearly indicated that the election was held at a point distant from the designated voting place of the township from which the return was made, in the absence of any special fact, decline to canvass such return, and the trial courts, in an action in mandamus to compel them to do so, found.

ELECTIONS—continued.
on inquiring into the facts, that there would be no justification for changing the certificate issued by the canvassing board, and therefore declined to issue a writ of mandamus, such exercise of the discretion of the trial court will not be interfered with by the appellate court. State ex rel. Johnson v. Ely, 619.

EMBEZZLEMENT.
Libel in imputing to person, see Libel and Slander, 7.

EQUITY. See Taxation, 4.

ESTOPPEL.
To complain of irregularities in proceedings to establish drain, see Drains, 20, 21.
Of insurer, see Insurance, 5–8.

EVIDENCE.
Variance between pleading and proof, see Master and Servant, 1.
See also Adverse Possession, 5; Assault and Battery, 1–4; Contracts, 2–7; Negligence, 3; Principal and Agent, 7; Sheriffs and Constables.

PRESUMPTIONS AND BURDEN OF PROOF.

See also Contracts, 3; Death, 1; Negligence, 3; Principal and Agent, 5, 6.

1. Spoliation of the evidence raises the presumption that it is against a party guilty of the act of spoliation, and an unsuccessful attempt at suppression or spoliation of evidence is a strong circumstance against the good faith of a party and the validity of his claim. Wipperman Mercantile Co. v. Robbins, 23 N. D. 208.
2. The question where the burden of proof lies in an issue between attaching creditors and a third party claimant whom the sheriff dispossesses under an attachment is open in North Dakota. It is unnecessary to pass upon it in a case where the issue raised by the evidence was whether the attachment debtor was in actual possession of the property at the time of the levy. In such a case the general rule applies, and it is not erroneous to refuse an instruction that the burden of proof is on the sheriff to estab-

EVIDENCE—continued.

lish that the title to the goods levied on had been transferred to the debtor by the claimant. Wipperman Mercantile Co. v. Robbins, 208.

RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

3. Evidence offered in behalf of defendants in a civil action for assault, in explanation of their plea of guilty before a justice of the peace, as to statements made at the time to them by their friends, who advised them to plead guilty because it would be cheaper, is properly excluded as immaterial. Satham v. Muffle, 63.
4. The statements of a bystander at a sheriff's attachment levy, in answer to inquiries made by the levying officer, that the property belonged to the debtor, are not objectionable as hearsay, but are admissible in evidence as part of the *res gestæ*, in a conversion action against a sheriff, based on the levy. Wipperman Mercantile Co. v. Robbins, 208.
5. Evidence offered in behalf of the plaintiff in a civil action for assault, that he and one of the defendants had an altercation sometime before the assault in issue, is admissible to show the condition of the defendant's mind towards the plaintiff,—at least upon the question of punitive damages; and evidence is also admissible that one of the defendants carried a knife, and threatened to use it, in explanation of the fact that the plaintiff armed himself with an iron bar at a previous meeting. Satham v. Muffle, 63.

ADMISSIONS.

6. In a civil suit for assault and battery, a justice of the peace record of the conviction of two of the defendants on their pleas of guilty is admissible in evidence as an admission against interest, notwithstanding that the complaint was drawn by the justice in unartificial English, if it contained enough fairly to apprise the defendants of the charge against them, particularly when the defendants had themselves pleaded in their answer in the civil suit that they had been arrested and had pleaded guilty to the charge. Satham v. Muffle, 63.

DECLARATIONS.

7. It is erroneous to exclude testimony, from memory of a railroad engineer as to the contents of a particular order delivered to him on a certain occasion, when he testified that he did not have a copy of that order, and no means of producing a copy, and supposed he had destroyed it. Reinke v. Minneapolis, St. P. & S. Ste. M. R. Co. 182.
8. In a conversion action against a sheriff for a levy on a car load of mixed

EVIDENCE—continued.

poultry, wild game, and dead ducks, which the attachment debtor had purchased from the plaintiff without having completed payment of the purchase price, evidence is properly received in behalf of the defendant regarding declarations by the attachment debtor as to his ownership and possession of the property at the time of the levy, upon the issue of ownership, as explanatory of his possession. Wipperman Mercantile Co. v. Robbins, 208.

OPINION EVIDENCE.

9. In an action for the killing of live stock upon a right of way, in which the plaintiff relied entirely on the statutory presumption raised by the mere killing, it is erroneous to strike out, on the objection that it was not responsive and was a conclusion of the witness, and not the best evidence, an explanation of entries on the defendant's train register that it evidently meant that a train was made up at a certain station, and did not go further west, and an explanation of other entries as meaning that the conductor and engineer of a certain train were running over time, as it should have been given to the jury for them to weigh as proof that a certain passenger train passed over the place of an accident at a time materially different from that shown by the train register. Reinke v. Minneapolis, St. P. & S. Ste. M. R. Co. 182.

WEIGHT AND SUFFICIENCY.

10. Evidence is sufficient to hold a father civilly liable for participation in an assault, that he encouraged his sons by telling them to kill the plaintiff and soak him, and otherwise incited their joint and several chastisement of the plaintiff, although it did not show conspiracy, and did not show that the father actually touched the plaintiff. Satham v. Muffle, 63.

EXCAVATION. See Trespass.

EXECUTORS AND ADMINISTRATORS.

Necessity of pleading statute of nonclaim, see Limitation of Actions, 2.

1. A statute of nonclaim is to be distinguished from general statutes of limitations in that it absolutely bars both the administrator and the courts from recognizing the validity of a claim which is not put in suit within three months from the rejection of the claim by the administrator. Mann v. Redmon, 508.

EXECUTORS AND ADMINISTRATORS—continued.

2. A demurrer to a complaint against an administrator, on the ground that it shows that the action was not begun within the time limit set by the statute of nonclaim, must be overruled when the court cannot determine the date of beginning the action from the face of the complaint, but must consider the summons in order to fix the date. Mann v. Redmon, 508.
3. In respect to the application of the statute of nonclaim to actions against a decedent's estate, not brought within three months after rejection of the claim by the personal representative, it is immaterial that an administrator is the sole distributive beneficiary of the estate after payment of creditors. Mann v. Redmon, 508.

EXEMPTIONS. See also Homestead.

1. Since exemption of property from creditors' process is purely statutory, there must be strict compliance with the statute in order to obtain the benefit of exemption provisions. Hence, it is not a sufficient compliance with the requirement of N. D. Rev. Codes 1905, § 8405, as amended, that a schedule of the debtor's personal property be filed with the justice of the peace, that he file his written claim for exemption and a schedule of his personal property with the constable under § 7199; and upon a trial *de novo* in the district court upon an appeal by the debtor and the garnishee from a justice's court garnishment (judgment taken by default), the schedule filed with the constable is not available in support of the defense that the garnished property was exempt, in lieu of the schedule required to be filed with the justice three days after the service of the garnishment summons. Burcell v. Goldstein, 257.
2. The lien of a garnishing creditor cannot be defeated by the debtor's claim to an exemption which is not asserted in the time and manner prescribed by law. Burcell v. Goldstein, 257.

FEES.

Of officers, see Officers.

FIRE INSURANCE. See Insurance.

FORECLOSURE.

Of mortgage, see Mortgages.

FORFEITURE.

Of insurance policy, see Insurance, 2–4.

FRANCHISE.

Of water company, see Municipal Corporations, 1.

FRAUDS, STATUTE OF.

1. A verbal agreement to purchase land, on which a payment of $1 is made, and an agent of the vendee allowed to go into possession under a subsequent conditional arrangement, is within the statute of frauds; and upon the election of the vendor to repudiate the same, and offer to return the advance payment, the rights of the vendee are terminated. Ugland v. Farmers' & M. State Bank, 536.
2. The statute of frauds may be invoked not only by the immediate parties thereto, but by those in privity with them. Ugland v. Farmers' & M. State Bank, 536.
3. A purchaser of land from one who had previously entered into a contract for the sale thereof, voidable because not in writing, may, where such owner has expressly repudiated the contract and also repudiated it by the second sale, invoke the statute of frauds against the first purchaser. Ugland v. Farmers' & M. State Bank, 536.
4. Where, in an action by a vendee to quiet title to land against a prior vendee under an oral contract, the complaint alleges that the prior vendee's rights are based on an oral agreement, and the answer of the prior vendee alleges an executed agreement by which he purchased the land and was given possession, it is incumbent on such prior vendee to prove a valid contract as thus alleged, and it is unnecessary for the second vendee, in order to rely on the statute of frauds, to serve a reply raising such question. Ugland v. Farmers' & M. State Bank, 536.

GARNISHMENT. See also Appeal and Error, 7; Exemptions.

1. The lien acquired by a garnishment creditor cannot be defeated by the debtor's subsequent discharge in bankruptcy, although the lien was obtained within four months of the filing of the bankruptcy petition, when the bankruptcy court had disclaimed jurisdiction over the property by listing it as exempt. Burcell v. Goldstein, 257.
2. Where an ignorant German of very limited education, and wholly unfamiliar with court proceedings, and not comprehending or understanding that he had been sued as a garnishee, suffered a default judgment to be taken against him, and thereafter, in due time, made application to be relieved from such default, basing his application upon his affidavit setting forth the above facts, and also that he was not, at the time such summons was served, nor at any time since, indebted to the defendant in any sum, and the trial court granted such application upon condition that he pay to the

GARNISHMENT—continued.

plaintiff as costs the sum of $25, no such abuse of discretion is shown as will warrant the interference with the judgment by the appellate court. First State Bank v. Krenelka, 568.

HIGHWAYS.

Injuries by change of street grade, see Municipal Corporations, 2, 4.

1. For the establishment of a highway by prescription, it is immaterial whether the adverse use of the land was known to the owner or not; nor is it necessary to show that the public authorities have worked the road and expended money on it from time to time. Burleigh County v. Rhud, 362.
2. N. D. Laws 1897, chap. 112, § 1, refers in its retroactive features to roads laid out defectively by the proper authority, and it was not the intention of the legislature to create highways by prescription based upon adverse public use covering twenty years prior to its enactment. Burleigh County v. Rhud, 362.
3. Under N. D. Rev. Codes 1895, § 1050, a highway by prescription cannot exist unless there had been an adverse use by the public, for twenty years prior to the date when it took effect, on January 1, 1896. Burleigh County v. Rhud, 362.
4. Variations in the track, the widening of the road from time to time, due to weather conditions and exigencies of travel, are immaterial upon the question of the existence of a highway by prescription, providing the same objective points are preserved. Burleigh County v. Rhud, 362.

HOMESTEAD.

1. A defense of homestead must be specially pleaded. Johnson v. Bartron, 629.
2. The homestead character of real property, in determining whether or not it is subject to the lien of a judgment, cannot be decided on affidavits, but must be left to an appropriate action. John Leslie Paper Co. v. Wheeler, 477.
3. Query—whether a vested remainder can be the basis of a homestead right. John Leslie Paper Co. v. Wheeler, 477.

HORSES. Theft of, see Larceny.

HOSPITALS.

1. A physician operating a private hospital for profit is responsible for the negligence of a nurse in so preparing the bed for a patient after he had

HOSPITALS—continued.

been operated on for appendicitis that his back was burned by a hot-water bottle. Fawcett v. Ryder, 20.

2. A patient in a private hospital who was burned by the contents of a hot-water bottle put in bed under him when he was moved from the operating table and was still under the influence of anæsthetics after an operation for appendicitis, supports sufficiently the finding of the jury that his injury was caused by coming into contact with the hot-water bag by the negligence of the physician, who operated the hospital for profit in connection with his practice, and not by reason of the breaking of the hot-water bag or any leak in it, by evidence consisting of the size and location of his burns, which indicated contact with the bottle. Fawcett v. Ryder, 20.

3. In an action against a physician who maintained a private hospital for profit, it is not error to refuse to charge the jury that physicians are not liable for the negligence of hospital nurses or attendants, of which they are not personally cognizant; nor is it error to refuse a charge which would have limited recovery, to one only of several ways by which, through the physician's negligence, the patient's back could have been burned by contact with a hot-water bag; nor was it error to refuse to charge that the verdict must be for the defendant, if the jury found that the patient, after having been burned by the hot-water bag, refused and neglected to have proper treatment. Fawcett v. Ryder, 20.

HUSBAND AND WIFE.

Joinder of wife in action by husband, see Justice of the Peace, 1.

Joinder of wife in instrument creating revocable license, see Quieting Title.

As to marriage, see Marriage.

1. A parent is not liable, in an action for alienation of affections, for having induced a child to leave husband or wife, unless the advice or counsel was given in bad faith, and not in an honest endeavor to promote the interest and welfare of the child, nor unless the facts show an intentional alienation. Greuneich v. Greuneich, 368.

2. In an action by a wife against her husband's father for alienating his affections, it is error to omit to instruct the jury that a malicious motive was necessary in order to award compensatory damages. Greuneich v. Greuneich, 368.

INDEBITATUS ASSUMPSIT. See Master and Servant, 1.

INDEBTEDNESS.
Of municipality, see Municipal Corporations, 3.

INDEPENDENT CONTRACTORS. See Master and Servant, 2.

INDICTMENT AND INFORMATION.
Information for criminal libel, see Libel and Slander, 8.

INDORSEMENT.
Of note, see Bills and Notes.

INFANTS.
Negligence of, see Negligence, 2.

INJUNCTION. See Appeal and Error, 1.

INSTRUCTIONS. See Assault and Battery, 5; Criminal Law; Hospitals, 3; Libel and Slander, 6; Rape, 5; Trial, 2–4.

INSURANCE.

AVOIDANCE OF POLICY FOR MISREPRESENTATIONS.

1. In an action on a fire insurance policy, the defense that the plaintiff had no insurable interest in a building is not sustained by a written contract between the insured and a third person, which did not reserve the title in him until he had been paid the whole of the purchase price, when the entire writing showed an intention that the title should pass at once, and contained merely a stipulation that the purchasers should insure the building for the vendor's benefit, instead of his insuring it himself, so that the purchasers were the owners, subject to the vendor's right to look to the building for the unpaid portion of the price. Stotlar v. German Alliance Ins. Co. 346. Stotlar v. Citizens' Ins. Co. 352.

FORFEITURE FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

2. Under the clause in a standard fire policy providing that the insurer shall not be liable for loss caused, directly or indirectly, by neglect of the insured to use all reasonable means to save and preserve the property at and after

INSURANCE—continued.

a fire or when the property is endangered by fire in neighboring premises, there can be no recovery for loss of personal property by fire, if the agent of the insured was present when the building was set on fire to prevent the fire from spreading, and made no attempt to remove desks and other furniture, when the exercise of diligence would have enabled all of it to be saved by removal from the building. First Nat. Bank v. German-American Ins. Co. 139.

3. N. D. Rev. Codes 1905, § 5909, providing that the voiding of a fire policy covering a bank building and the furniture and fixtures therein contained, by the procuring of additional insurance without the consent of the insurer does not extend to the insurance upon the property not covered by the additional insurance, and that in case of loss the proportion of the doubly insured property to the value of all the property shall be deducted from the policy, is to be construed according to its ordinary meaning, and the policy must be treated as divisible and as two separate and distinct policies, one on the building and the other on the personal property and fixtures, when the additional insurance referred to the building alone. First Nat. Bank v. German-American Ins. Co. 139.

4. When the additional insurance taken out by the insured exceeds the value of the risk, so that the property is overinsured, the hazard is increased by means within the control and knowledge of the insured, within provisions in the standard policy voiding the insurance for increase of hazard. First Nat. Bank v. German-American Ins. Co. 139.

ESTOPPEL OR WAIVER.

5. A provision in a fire insurance policy, voiding it if the ownership of the insured be not unconditional, is unavailable as a defense, when the policy itself shows that the loss, if any, is payable to a mortgagee as his interest may appear, and the oral testimony shows that the insured acquired title to the building covered by the policy by an oral contract, and that the insurer's agent was fully and fairly apprised of the nature of the title of the insured before the policy was delivered, which was also shown by the policy itself. Stotlar v. German Alliance Ins. Co. 346. Stotlar v. Citizens' Ins. Co. 352.

6. Under a standard fire insurance policy issued to a bank by its cashier, who was also the insurer's local agent, containing a clause voiding the policy for additional insurance without the consent of the insurer, the knowledge of the bank cashier concerning an additional policy which he obtained from another company is not equivalent to a consent to additional insurance indorsed on the policy. Knowledge thereof acquired by the local agent in this way is not imputable to the insurer and it is not estopped from urg-

INSURANCE—continued.

ing as a defense in an action on the policy the breach of the condition against reinsurance. First Nat. Bank v. German-American Ins. Co. 139.

7. Knowledge on the part of the local agent of the insurer, fairly inferable from the record of the facts regarding a sale of an old armory separate from the lots on which it stood, to purchasers who were to move it and use it for a roller skating rink, and keep it insured for the security of a mesne vendor, but who instead got from the agent merely an assignment of an old policy held by a former owner, estops the insurer from pleading the facts, when with such knowledge it had accepted the premium. Stotlar v. German Alliance Ins. Co. 346. Stotlar v. Citizens' Ins. Co. 352.

8. Knowledge of additional insurance acquired by the adjuster of the insurer after a fire loss, and the adjuster's failure to make complaint thereof is not a waiver of the defense that the policy had been voided by additional insurance. First Nat. Bank v. German-American Ins. Co. 139.

JUDGMENT.

On appeal, see Appeal and Error, 12–16.

Lien of, on homestead, see Homestead, 2.

By Default.

1. It is the duty of litigants to watch the progress of proceedings in court rather than of the court to accommodate its business to the convenience of a single litigant, and perhaps thereby inconvenience all other parties having business before the court, hold jurors at the expense of the public, and interfere with the orderly prosecution of its regular business. Johannes v. Coghlan, 588.

2. The granting of an application to vacate a default judgment after appearance by defendant is largely within the discretion of the trial court. Johannes v. Coghlan, 588.

3. Where a defendant, in seeking to have a default judgment set aside, relies on his inability to attend court on account of sickness, and also on his inability to find his attorney, and the affidavits on his part are vague and uncertain in their statements as to time and condition of the defendant, and disclose no earnest effort on his part to find his attorney and secure his attendance at the trial or to be present himself, and the trial court, on the showing, denied the motion to vacate the judgment, there is no such clear abuse of discretion as will warrant the appellate court in reversing the order. Johannes v. Coghlan, 588.

4. Where, in a proceeding to satisfy the judgment in a claim and delivery action, it is shown that the defendant was personally served with a sum-

JUDGMENT—continued.

mons, complaint, and other papers in the action on March 5, 1908, and on March 31 thereafter, he caused an answer in due form to be served on the plaintiff's attorney, but gave no further attention to the case until August 12, 1911, nearly one year after the plaintiff had procured judgment; that his attorney was served with a notice of trial in such cause in August, 1908, and in April, 1909, with a notice to produce at the trial certain exhibits; and also that after judgment was ordered in the plaintiff's favor in 1910, notices were duly served on defendant's counsel, of application for the taxation and retaxation of the costs therein, and no application to be relieved from such judgment was made until about one year after its rendition; and the only reason given by the defendant for vacating the judgment is that he believed such case was disposed of and settled, and that when the answer was served he was informed (by whom he fails to state) that there would never be any judgment entered,—the order of the district court vacating such judgment is an abuse of discretion, and will be reversed. Wannemacher v. Vance, 634.

5. A default judgment will not be vacated when the defense pleaded is not meritorious, but is clearly frivolous. Johannes v. Coghlan, 588.

JUDGMENT NOTWITHSTANDING VERDICT.

6. When the surety on a subcontractor's bond sued by the contractor, for the subcontractor's failure to complete performance, is entitled to offset of a certain percentage of the payments to the subcontractor on account of so much of the work as he did, which the bond required should be reserved for the surety's protection, which exceeds the damages proved by the contractor as to his loss of profit, the defendant surety's motions for a directed verdict, and for judgment *non obstante veredicto*, should be granted, and not denied. Long v. American Surety Co. 492.

7. The possibility of supplying missing proof of the measure of damages in a contractor's action against the surety on a bond given by a subcontractor for the faithful performance of the work will not prevent ordering judgment for the defendant, notwithstanding the verdict of a jury for the plaintiff, when the record shows noncompliance by the contractor with a requirement in the bond that notice of any default in the performance of the subcontract should be given to the surety, the subcontractor having abandoned the work, and no notice thereof having been given within fifteen days. Long v. American Surety Co. 492.

ENTRY, RECORD, AND DOCKETING.

8. An order for judgment made by the court, attested by the clerk, and entered at length in the judgment docket, is sufficiently the equivalent of a judg-

JUDGMENT—continued.

ment entered at length in the usual form, to sustain the title acquired under a sheriff's deed issued pursuant to execution sale held under it; and the irregularity is of no avail to a stranger not a party in the action, against the sheriff's deed in a statutory action to determine adverse claims to real property. Movius v. Propper, 452.

JUDICIAL NOTICE. See Death, 2.

JUDICIAL SALES.

In order validly to redeem from a sheriff's sale, there must be substantial compliance with the requirements of the permissive statute. Summerville v. Sorrenson, 460.

JURY.

Questions for, see Trial, 1.

A district court order in proceedings for the removal of a county commissioner, that the issues be tried by the court for failure of the accused commissioner to request that the issues be submitted to a jury, is premature and contrary to the fact, when the accused had, under a so-called special appearance, filed objections which were equivalent to a demurrer to the accusation, since the accused could not be compelled to answer and raise issues of fact for trial, either by the court or by the jury, before their objections in the nature of a demurrer had been passed on. Albrecht v. Zimmerly, 337.

JUSTICES OF THE PEACE.

PROCESS.

1. The objection that the complaint in a justices' court action showed that the claim included in part the services of the plaintiff's wife and that she was not joined as plaintiff in the summons, is not jurisdictional, since it is necessary that a justices' summons contain only sufficient of the cause of action to apprise the defendant of the nature thereof, and need not contain a complete statement of the grounds of action. Howard v. Dawson, 165.
2. The objection to a civil summons issued by a justice of the peace, that it did not indicate the location of the justices' office, and mentioned no township, village, or city, cannot be raised on appeal, when it was not made one of the grounds for the motion to dismiss before the justice. Howard v. Dawson, 165.

JUSTICES OF THE PEACE—continued.

REVIEW OF PROCEEDINGS.

3. The reversal in the county court of the dismissal of a suit in the justices' court carries with it the cancelation of the costs awarded by the justice against the plaintiff. Howard v. Dawson, 165.
4. Although a defendant is not entitled of right to time in which to answer after a dismissal of the complaint by a justice of the peace has been reversed in the county court, it is not an abuse of sound discretion on the part of the county court to allow him five days in which to answer before standing for trial. Howard v. Dawson, 165.

LAND CONTRACT. See Vendor and Purchaser.

LANDLORD AND TENANT.

The continued silence and the acquiescence of a lessor in a lessee's defaults in paying monthly rentals in advance is an implied waiver of provisions of the lease that time was of the essence of the contract, and estops the lessor from enforcing forfeiture for a default without having first given notice that in the future strict compliance would be exacted; and under this rule evidence is admissible in the lessor's action of forcible detainer, as to a custom of paying and receiving instalments of rents after the time they became due under the lease. Hanson v. Hanson Hardware Co. 169.

LARCENY.

1. A comment by the State's attorney in summing up in a horse stealing case, upon the absence of witnesses to prove where the defendant was on the night charged in the indictment, is not infringement of the defendant's right embodied in the prohibition against referring to his neglect or refusal to testify in the trial of a prosecution against him, when immediately explained by the State's attorney as referring not to the defendant but to the failure to prove an *alibi* by other witnesses. State v. Dodson, 305.
2. It is not error, on the trial of a horse thief, to receive in evidence a check which an accomplice who turned state's evidence testified was given to him as part of the purchase price of horses which the accomplice shipped, since it tended to prove the sale by the accomplice of the horses which he and the defendant had obtained. State v. Dodson, 305.
3. To sustain the conviction of a horse thief, it is not necessary that the testimony of an accomplice that he helped ship the stolen horses should be corroborated as to every material point, or that the corroborative testimony should be in itself sufficient to warrant a verdict of guilty, since it is

LARCENY—continued.

enough if the accomplice be corroborated as to some material fact tending to connect the defendant with the commission of the offense. State v. Dodson, 305.

LIBEL AND SLANDER.

Mitigation.

1. It is not a full and fair retraction under N. D. Rev. Codes 1905, § 8889, relieving from damages the defendant sued for publishing of the plaintiff that he was a ruffian who ran a blind pig, and on the 4th of July ran amuck and killed a blacksmith, who left a large penniless family; that he was in jail, and that mob violence was threatened,—to publish that the plaintiff's hands were "not red with gore," and that it was now asserted that there was no murder; that the blacksmith was not dead and did not leave a penniless family; that the plaintiff was not a ruffian, did not run a blind pig, never was in jail; that the only foundation for the story appeared to be that the plaintiff had a fight with a man, was arrested and fined $20; that the man he beat up was reported to be able to be at work again; that the sensational story put the plaintiff in the limelight in a manner that he did not desire; and that the defendant regretted that it in any way assisted in giving publicity to the unfounded rumors. Goolsby v. Forum Printing Co. 30.

Defenses.

2. It is not justification or mitigation of a libel imputing embezzlement, that the complainant had published of the defendant that he refused to contribute toward a campaign fund in a county division contest, and there is no error in excluding the prior publication on the ground of its incompetence, irrelevance, and immateriality. State v. Tolley, 284.

Trial, Judgment, and Review.

3. N. D. Const. § 9, art. 1, goes on further than to vest in the jury the right to render a general verdict determining the law and the facts, under the direction of the court in libel cases as in other cases, and to deprive the court of the power in libel cases to require a special verdict, under which the jury could only determine the facts without applying the law. State v. Tolley, 284.

LIBEL AND SLANDER—continued.

CRIMINAL RESPONSIBILITY.

4. When a defendant charged with criminal libel was permitted to testify fully concerning his reasons and motives for the publication, he cannot complain because his direct examination was limited, and because he was permitted to be cross-examined without limit, to an extent which did not amount to an abuse of discretion. State v. Tolley, 284.
5. No prejudice is worked by the remark of the court during the examination of a defendant tried for criminal libel, when asked whether the complainant had not deposited to defendant's credit, in a certain bank, monies collected by him belonging to the defendant, which questions he answered evasively, finally saying that the books did not show it, to the effect that the court thought that the defendant had answered the questions both ways, meaning merely that the witness answered both that no such deposit had been made, and that the books did not disclose such a deposit. State v. Tolley, 284.
6. Instructions to the jury on the trial of an information for criminal libel are not prejudicial to the defendant's rights when, considered as a whole, they clearly place the burden of proof, beyond a reasonable doubt, upon the state throughout the entire case. State v. Tolley, 284.
7. Under the rule of N. D. Rev. Codes, § 10157, that judgment must be given in criminal appeals without regard to insubstantial technical errors, the error will be disregarded, of calling the jury's attention, in the trial of an information for the publication of a libel imputing embezzlement to the complainant, and therefore libelous *per se*, to the immaterial and improper allegation in the information, that it was the defendant's intention to charge the complainant with the crime of embezzlement. State v. Tolley, 284.
8. An information for criminal libel is not bad, either for uncertainty or for duplicity, in charging that the defendant published and caused to be published the defamatory matter, since it is well settled that when a statute mentions several things disjunctively as constituting one and the same offense, all punishable alike, the whole may be charged conjunctively in a single count, as constituting a single offense. State v. Tolley, 284.

LICENSES.

Where two adjoining lot holders and a third person entered into an agreement which was reduced to writing, but not signed by the parties, that the first person should sink a well, equip it with pump and other necessary appliances, upon the line between the lots, and that each of the three parties should have a common one-third interest therein, and that each should bear

LICENSES—continued.

a third of the cost in digging and equipping the same, and it was contemporaneously agreed that if it was afterwards ascertained that the well was not upon the true boundary line of the said lot "the ownership should remain as it was, regardless of any change in the line," and the well is afterwards, owing to an error in measurement, sunk a short distance from the true boundary line between the lots; and subsequently the third person sells his interest in the well to the lot owners, who erect a windmill thereon, and bear the expense thereof equally, and the lot owner on whose land the well is not located sells his lot and interest in the well,—there exists a revocable license in his grantee to use said well, and to reasonable access thereto, but such license may be revoked upon the payment to the said grantee of the money expended both in the digging of the well and the proportionate interest in the improvements constructed thereon. Johnson v. Bartron, 629.

LIENS. See Mechanic's Liens.

LIFE TABLES. See Death, 2, 3.

LIMITATION OF ACTIONS.

Adverse possession, see Adverse Possession.

Statute of nonclaim, see Executors and Administrators.

Implied repeal of statute of limitations, see Statutes, 2.

1. Under N. D. Rev. Codes 1905, § 6786, the ten-year limitation period does not run in favor of the debtor against a money judgment during the time when he is absent from the state, by analogous application of the provisions of § 6796. Union Nat. Bank v. Ryan, 482.

2. N. D. Rev. Codes 1905, §§ 8103–8105, providing that suits must be brought against an administrator within three months after formal rejection of the claim, is a statute of nonclaim, and not of limitations, need not be pleaded by answer in order to be availed of, and, unlike the statute of limitations, is mandatory upon the courts, whether pleaded or not. Hence when the defendant demurred to a complaint on a claim in an action brought three months after rejection by the administrator, on the ground expressed that the action was not brought within the time limited by the Code section referred to, it is error for the district court to strike out the demurrer as irrelevant, and permit the defendant to file an answer upon any issue other than that presented by the demurrer, since the defendant should be allowed to plead in the answer the statute of nonclaim. Mann v. Redmon, 508.

LIMITATION OF INDEBTEDNESS. See Municipal Corporations, 3.

LIVE STOCK.
Transportation of, see Carriers.
Killing of, on railroad track, see Appeal and Error, 11; Evidence, 9; Railroads.

LOOKOUT. See Railroads, 1.

MANDAMUS.

DISCRETION AS TO GRANT OF WRIT.
See also infra, 3.

1. Mandamus, as a general rule, is a discretionary writ; and when application is made to the trial court to issue mandamus, that court may take testimony to aid it in determining how its discretion should be exercised. State ex rel. Johnson v. Ely, 619.

WHEN INEFFECTUAL OR NOT BENEFICIAL.

2. Mandamus is not a writ of right, and will not be granted to compel the performance of an act, even though required by law, when no beneficial result will be attained. State ex rel. Johnson v. Ely, 619.
3. It is not an abuse of discretion to deny a writ of mandamus when it is shown that its issuance would avail nothing to the relators. State ex rel. Johnson v. Ely, 619.

SUBJECTS AND PURPOSES OF RELIEF.

4. The due and legal organization of a special school district cannot be inquired into by mandamus,—especially after taxes have been levied and bonds issued and large sums expended for educational purposes. State ex rel. Nicholson v. Ferguson, 153.
5. The provision of N. D. Political Code, art. 19, chap. 9, § 949, that any part of adjacent territory more than 3 miles from the central school in a special district may be detached therefrom and attached to any adjacent school or special district or districts, does not authorize the issue of a mandamus for the segregation and organization, into a district by itself, of a part of a duly organized special district, and in the absence of statutory

MANDAMUS—continued.

authorization, equitable considerations are not a basis for granting such relief. State ex rel. Nicholson v. Ferguson, 153.

6. In an action in mandamus to compel the canvass of the votes in certain precincts where it is shown that the commissioners of a county established the precincts and the voting places therein at "the usual place," and it is also shown, without any conflict in the evidence, that at the next election after such establishment the voting was done at places near the center of the townships or precincts, and it is admitted in the action and shown by the evidence that the election, the canvass of the votes of which is sought in the mandamus action, was not held at the places designated, but at places several miles distant, on the extreme boundaries of the precincts, the trial court did not abuse its discretion in declining to issue a writ of mandamus to direct the canvassing board to canvass the votes alleged to have been cast at such illegal voting places. State ex rel. Johnson v. Ely, 619.

PARTIES PLAINTIFF.

7. Where a question *publici juris*, raised by conflicting constructions of an election statute, involves the sovereignty and prerogatives of the state and the franchise rights of its citizens, the supreme court will issue its original prerogative writ of mandamus on the petition of a private relator, even though the attorney general refuses to make or to approve the application. State ex rel. Shaw v. Harmon, 513.

MARRIAGE.

1. A provision of N. D. Laws 1890, chap. 91, § 1, that the marriage relation shall be entered into, maintained, annulled, or dissolved only as provided by law, has the plain effect of intentionally abrogating the previous policy of the state regarding the validity of so-called common-law marriages. Such abrogation is within the legislative power, and since its enactment a valid marriage cannot be established in North Dakota by mere proof of the common-law elements of mutual consent and cohabitation. Schumacher v. Great Northern R. Co. 231.

2. The express repeal, in a marriage statute, of provisions of a prior statute providing for declaration, authentication, and registration of unsolemnized marriage, is conclusive evidence of a legislative intent to prohibit common-law marriages. Schumacher v. Great Northern R. Co. 231.

MASTER AND SERVANT.

Liability for negligence of nurse in hospital, see Hospitals.

1. A complaint alleging that the plaintiff performed work, labor, and services

MASTER AND SERVANT—continued.

of the value amounting to, etc., which amount the defendant agreed to pay, does not state a cause of action upon *quantum meruit*, but pleads a count in *indebitatus assumpsit;* and it is error to dismiss the complaint for variance between the complaint and proof that the plaintiff was hired at $30 a month, for no definite term except from month to month, that the employment was terminated by mutual consent, and that the amount sued for was agreed upon as due, and was not paid. Tharp v. Blew, 3.

2. A post-hole digger employed to dig a line of holes along a telephone extension at 12½ cents per hole, to be paid when the job was finished and accepted by the company, is not an independent contractor in any sense, relieving the telephone company for his negligence in the performance of the work, consisting of neglect to cover the hole when dug; and the fact that he was paid by the piece, and not until the termination of the job, did not alter the case, since it was the legal duty of the telephone company to safeguard the holes, and it was subject to the distinction which is recognized, between the letting of a contract for work which is in itself dangerous, such as the digging of a pit, and the letting of work which is not in itself dangerous, such as the building of a house, out of which injury arises by an act collateral to the contract work. Ruehl v. Lidgerwood Rural Teleph. Co. 6.

MAXIMS.

De minimis non curat lex. Ruehl v. Lidgerwood Rural Teleph. Co. 6.

MECHANICS' LIEN.

PRIORITY.

1. The vendor and vendee under a crop contract, a mechanics' lienor for material, and the grantee both of the vendor's legal title and the vendee's equitable title, occupy to each other the same position as though the vendor had conveyed to the vendee, taken back a purchase-money mortgage, and then sold it to the grantee; and the mechanics' lienor can enforce his lien by foreclosure by acquiring the vendee's equity, and redeeming from the vendor's grantee by paying him the balance due on the purchase price. North Dakota Lumber Co. v. Haney, 504.

2. A mechanics' lien for lumber put into a building upon the premises at the request of a vendee in a crop contract, in possession, is junior to the claim for the purchase price of the vendor, who was not privy to the lumber purchase, and when the vendor transferred the legal title which he held, as security for his claim, to a grantee who had knowledge of the mechanic's lien, purchase by the grantee of the vendee's equity did not so merge the legal and the equitable title as to confer priority upon the mechanics's lien, notwithstanding recitals in the vendor's deed that the grantee

MECHANICS' LIEN—continued.
took the legal title subject to existing liens, and notwithstanding a similar agreement between the grantee and the vendee, to none of which the materialman was a party, and which amounted to nothing more than a release of the vendor on the recitals of a clear warranty, and did not amount to an agreement by the grantee to pay off the mechanics' liens in order to obtain a first lien upon his own land. North Dakota Lumber Co. v. Haney, 504.

MITIGATION.
Of libel, see Libel and Slander, 1, 2.

MORTALITY TABLES. See Death, 2, 3.

MORTGAGES.
Adverse possession by mortgagee in possession, see Adverse Possession, 2–5.
Attempt in mortgage foreclosure action to foreclose also tax lien, see Dismissal and Nonsuit.
See also Chattel Mortgages.

WHETHER TRANSACTION IS MORTGAGE.

1. A person who advances money to bid in property at a sheriff's sale, at the request of a mortgagor, and takes title in his own name for the benefit of the other, with the understanding that he would convey back to the other on payment of the money, has only a mortgagee's interest in the premises. Smith v. Hoff, 37.
2. When a deed absolute and unconditional on its face is accompanied by an instrument providing for a reconveyance or revesting of title on payment of a debt or performing some other act, in order that the transaction may be regarded as a mortgage, it is not necessary that it be embodied in one and the same document; and where the evidence is undisputed that the property was worth two or three times the amount of the debt, and the contract to reconvey on payment of a sum stated was not conditional or optional in its nature, the transaction will be treated in equity as a mortgage, notwithstanding that one or both of the parties labored at different times under the impression that the transaction was a sale, since the transaction, originally a mortgage, could not be converted into a sale by reason alone of the mutual mistake of the parties. Smith v. Hoff, 37.
3. When property under a $1000 mortgage, which was foreclosed, was sold by

MORTGAGES—continued.

the sheriff to a bank for $1,400, and the bank's receiver brought a sheriff's certificate, issued upon a judgment sale, of a part of the premises, for $487, and then assigned both certificates for $2,500 to an assignee to whom the sheriff's deeds were issued, and the assignee agreed with the owner and mortgagor to convey the land to him for $2,500, and afterward served notice of cancelation of this contract for failure to make payment agreed upon, the question whether the certificates of sale and the sheriff's deeds created only an equitable mortgage, out of which a title could come only by another foreclosure, is not, under the rule that if a conveyance in fee with a covenant of warranty has no defeasance, either in the conveyance or in the collateral paper, the parol evidence relied on to show that the deed was intended to secure a debt and operate only as a mortgage, and overcome the presumption that the instrument is what it purports to be, must be clear, unequivocal, and convincing, but is under the exception that where there is a conveyance by deed and a defeasance in a collateral paper, or a contract for resale, and the evidence is doubtful whether the transaction was intended as a conditional sale or a mortgage, the transaction will be treated as a mortgage, and doubt as to the intention will be resolved in favor of the construction that the conveyance is security for a debt. Smith v. Hoff, 37.

CONSIDERATION.

4. In an action to foreclose a mortgage given to secure the payment of notes evidencing the purchase price of machinery, where the sole defense urged is that of a total failure of consideration for the giving of the notes and mortgage, in which it appears on an appeal and a trial *de novo* in the supreme court that the machinery was retained and used by the defendant, although a part thereof was defective, the defense of total failure of consideration is not established. Nichols & S. Co. v. Dallier, 532.

RIGHTS AND LIABILITIES OF PARTIES.

5 In an accounting by mortgagees in possession, during ten years, as against the mortgagor's quitclaim guaranty, the occupants are liable only for the reasonable rental value of the land which they actually occupied, used, and enjoyed, and that according to a moderate degree of agricultural skill, when much of the land was practically wild land, and not according to the highest degree of skill in cultivating high-priced land in a highly advanced agricultural community; and they are not liable to profits which they might or should have made. They will also be allowed for breaking and stoning the land, and converting it from wild to cultivated land and

MORTGAGES—continued.

increasing its rental value for the benefit of the redemptioners. Blessett v. Turcotte, 417.

REDEMPTION.

6. The certificate of a private citizen describing himself as a deputy register of deeds is not an official certificate by the register of deeds, and is a nullity in so far as it is a basis for redemption by a junior mortgagee from a sheriff's certificate of a foreclosure sale under a mortgage. Summerville v. Sorrenson, 460.

7. For redemption from a mortgage foreclosure sale, a certificate as to the recording of a junior mortgage is insufficient which purports to have been signed by a person describing himself as deputy register of deeds, in lieu of a certificate bearing the name of the register of deeds, signed by himself, or his deputy authorized to sign his name. Summerville v. Sorrenson, 460.

MUNICIPAL CORPORATIONS.

CONTRACTS IN GENERAL.

1. It is within the power of a municipal corporation to provide in an ordinance for the renewal of an expired water company franchise, that the corporation would reimburse the water company for expenses occasioned by future changes in street grades, and the power extends to the making of a contract making no distinction between liability to reimburse for expenses caused by changing street grades already established, and those occasioned by an alteration for the first time of the natural grade to a legally established grade; and such a provision in the ordinance is not objectionable on the ground that it bargained away a governmental power. Bismarck Water Supply Company v. Bismarck, 352.

PUBLIC IMPROVEMENTS.

2. A complaint in an action against a municipal corporation to recover for an injury to abutting property by a change of street grade, which charges the maintenance of the grade for a certain period, and the causing of a ditch on the side of the street adjoining plaintiff's property, and further alleges that in the construction of said grade certain embankments were thrown up, and that during said time certain culverts and drains were constructed and kept up upon streets "adjacent to plaintiff's property." and that by reason thereof surface waters were caused to flow upon plaintiff's property, to her damage described,—does not state facts sufficient to constitute a cause of action. Gaustad v. Enderlin, 526.

MUNICIPAL CORPORATIONS—continued.

LIMITATION OF INDEBTEDNESS.

3. A provision in a municipal ordinance renewing a water company's franchise, for reimbursing the company for expenses to which it is put in relaying its mains by street grade changes, is merely the incurrence of a contingent future liability, and not the incurrence of an indebtedness subject to attack for being in excess of a constitutional limit imposed upon municipal indebtedness. Bismarck Water Supply Co. v. Bismarck, 352.

ACTIONS.

4. A claim for damages, based on injuries to abutting property, occasioned by and during the construction of a street grade on the street adjacent to said property, is not such a claim as is enumerated in §§ 2703 and 2704 N. D. Rev. Codes 1905; and on such a cause of action it is not necessary that the complaint show the filing with the city auditor of a claim for damages, with an abstract of the particulars thereof, mentioned in §§ 2703 and 2704. Gaustad v. Enderlin, 526.

NEGLIGENCE.

Of nurse, see Hospitals.

CONTRIBUTORY NEGLIGENCE.

1. A right of recovery for injuries by negligence is not defeated by any subsequent negligence of the plaintiff to cure himself of the injuries suffered. Fawcett v. Ryder, 20.
2. Contributory negligence is not chargeable to a child three and one-half years old, which fell into an unguarded post hole dug by a telephone company on the edge of the highway near its parents' residence; nor can contributory negligence be imputed, either to the father for his failure to anticipate that the hole would be left uncovered, nor to the mother for allowing the child to play in the yard of the house; and at most the question is for the jury, and not for the court, and it is error to direct a verdict for the defendant on this ground. Ruehl v. Lidgerwood Rural Teleph. Co. 6.

EVIDENCE.

3. Negligence on the part of a telephone company may be inferred by the jury from the fact of its leaving unprotected, three fourths of an hour, a post hole which it had caused to be dug in extending its line. Ruehl v. Lidgerwood Rural Teleph. Co. 6.

NEGOTIABLE PAPER. See Bills and Notes.

NOMINATIONS. See Elections.

NONCLAIM.
Statute of, see Executors and Administrators.

NON OBSTANTE VEREDICTO. See Judgment, 6, 7.

NURSES.
Negligence of, see Hospitals.

OFFER. See Contracts, 1.

OFFICERS.
Of corporations, see Corporations, 2, 3.
Of county, see Counties, 7, 8.
See also Sheriffs and Constables.

COMPENSATION AND FEES.

1. According to the principles that rendition of service by a public officer is presumed to be gratuitous unless compensation for it is fixed by statute, that salary statutes are construed strictly against claimants under them, and doubts resolved in favor of the government, the superintendent of instruction of the state is not entitled to retain as his own an unexpended balance of teachers' examination fees transmitted to him by the county superintendents, on the ground that he did the work of looking over examination papers himself as extra work, or because he did it after ordinary office hours, instead of hiring the necessary clerical help as authorized by the statute. State v. Stockwell, 70.
2. A balance of teachers' examination fees transmitted by county superintendents to the state superintendent of public instruction, remaining in his hands from disbursements for clerk hire incident to reading the examination papers, is public money for which the state superintendent is required to account and turn over; and he is not entitled to retain it as his own, on the theory of compensating himself for additional or for night work, notwithstanding that the statute (Rev. Codes 1905, §§ 876 et seq.) made no provision for the ultimate disposition of the balance after it reached the superintendent's hands. State v. Stockwell, 70.

OFFICERS—continued.

3. A legislative intent that all of certain fees directed to be collected and forwarded to a public officer should be expended in clerical assistance incident to the performance of work enjoined upon him in the same connection is not equivalent to an intent to transfer individual ownership of the fund to that officer, but, on the contrary, indicates nothing more than an intent to limit the expense to the state for such clerical help to the amount derived from the fees. State v. Stockwell, 70.
4. A statutory direction that a portion of fees collected by one public officer should be forwarded to another officer, "such sums to be used by him as hereinbefore provided," referring to "such clerical assistance as he may deem necessary and competent," etc., does not give him the individual ownership of the unexpended balance of such fees, since the use is in no sense synonymous with ownership. State v. Stockwell, 70.
5. Appropriation by the legislature of a portion of fees collected by a public officer, to a public purpose, is indicative, in the absence of specific contrary expression, of a legislative intent that the entire collection is for public purposes; and the burden is on a salaried officer claiming the right to retain as his own the unappropriated remainder, to show his title thereto by statute; and although the particular statute relating to his reception and disbursement of the fees does not specifically require him to account for the unexpended balance, such a fund falls within the moneys received by him in his capacity as a public officer, for which he is required to account under a general statute. State v. Stockwell, 70.
6. Increase of the duties incumbent upon a public officer does not of itself indicate an intention to increase his compensation, and he cannot recover extra compensation for incidental or collateral services properly belonging to and forming part of the main office. State v. Stockwell, 70.
7. The mandate of N. D. Const. § 84, forbidding the raising or lowering of the salaries of state officers during the terms for which they are elected, and requiring all fees and profits arising from any of said offices to be covered into the state treasury, extends to an unexpended balance in the hands of the state superintendent of instruction from teachers' examination fees remitted to him by the county superintendents; and it is not contrary to equity or good conscience for the state to sue him for the balance, when he refuses to turn it over. State v. Stockwell, 70.

OPINION EVIDENCE. See Evidence, 9.

ORAL CONTRACTS. See Frauds, Statute of.

OWNERSHIP. See Words and Phrases, 2.

PARENT AND CHILD.
Liability of parent for alienating affections of husband, see Husband and Wife.
Contributory negligence of parent, see Negligence, 2.

PARTIES.
In mandamus proceeding, see Mandamus, 7.

PHYSICIANS AND SURGEONS.
Liability for injury to patient in hospital, see Hospitals.

PLEADING.
Necessity of pleading defense of homestead, see Homestead, 1.
Necessity of pleading statute of nonclaim, see Limitation of Actions, 2.
Variance between pleading and proof, see Master and Servant, 1.
See also Municipal Corporations, 4.

POLLING PLACES. See Elections, 1, 10–12.

PREROGATIVE WRITS. See Courts; Mandamus.

PRESCRIPTION.
Establishment of highway by, see Highways.

PRESUMPTIONS.
Of death, see Death, 1.
Of agent's authority, see Principal and Agent, 5, 6.
In general, see Evidence, 1, 2.
See also Negligence, 3.

PRIMARY ELECTIONS. See Elections, 2–9.

PRINCIPAL AND AGENT.

MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

1. Under an agency contract by which it is expressly provided that, if the

PRINCIPAL AND AGENT—continued.

agent should deliver any of the goods to any customer or any other person before taking a written order therefrom, or before such goods should be fully paid for by cash or note, the agent would pay to the principal on demand the net list price of such goods, and waive all claims under the contract of warranty on any goods so delivered without settlement, where goods were shipped to the agent, accompanied by draft on the purchaser, attached to the bill of lading, and such goods are delivered by the agent without any settlement of any kind, they thereby waive any claim for breach of warranty. Aultman & T. Machinery Co. v. Runck, 579.

2. A sale of machinery completed by agents at a special price fixed by a traveling agent for the purpose of introducing the machinery into that territory is a sale by the regular agents, and within the terms of their agency contract, which makes them liable for the price of machinery delivered without payment in full by cash or note, where the contract also provides that any traveling agent or employee who assists the regular agents in making sales shall be considered their agent or employee. Aultman & T. Machinery Co. v. Runck, 579.

3. An agent is liable for the purchase price of machinery shipped to him by his principal, with bill of lading and sight draft on the purchaser attached, to insure settlement before delivery to the purchaser, if he delivers it without such settlement. Aultman & T. Machinery Co. v. Runck, 579.

RIGHTS AND LIABILITIES AS TO THIRD PERSON.

4. An agent cannot bind his principal by an implied authority as to acts in which he is representing his own interest conflicting with that of the principal. Smith v. Courant Co. 297.

5. An authority to sell or assign a mortgage note to another person is not to be implied from authority to collect it, particularly when the principal has at the same time an additional claim for taxes due and unpaid upon the land covered by the mortgage. Tee v. Noble, 225.

6. A newspaper employee engaged as manager and editor, with general power to hire help, buy stock, and pay bills, who deposited receipts in a bank account, with his rate of compensation left open, because of a disagreement whether it should be $30 a week or $100 a month, has no implied authority as agent to issue checks to himself for his compensation, which could validly bind the principal, in the absence of evidence of knowledge or acquiescence in his practice upon which an estopped could be predicated. Smith v. Courant Co. 297.

7. In an action by a married woman on checks indorsed to her for value by her husband, who was managing a newspaper plant, against the owner

PRINCIPAL AND AGENT—continued.

of it, after dishonor by the bank on the ground of no funds, it is error to exclude evidence that the agreement under which the husband was employed limited him to paying the help out of the profits of the business, since such evidence would tend to show that he had no authority as manager to draw checks in excess of the receipts of the business; and it is similarly erroneous to exclude evidence of a director and officer of the defendant, that the husband was to receive as his compensation such a sum as might be agreed upon in cash, which in no event was to exceed the profits of the business, and that the business showed no profits, so that accordingly the husband was without authority to draw checks payable to himself, presumably for his compensation, which were among those cashed by the plaintiff and indorsed to her after dishonor at the bank for want of funds to meet them. Smith v. Courant Co. 297.

PRINCIPAL AND SURETY.

Liability on bonds, see Bonds.

1. That a paid surety or bonding company is an insurer rather than a surety does not excuse the obligee in a surety bond from compliance, in order to recover upon it, with a stipulation in it that he should retain as security to the surety, 15 per cent of payments due, from time to time, to the principal. Long v. American Surety Co. 492.
2. Payments by the obligee in a surety bond, to the principal, in violation of the conditions of the bond, will release the surety from liability for the principal's default. Long v. American Surety Co. 492.

PROCESS.

Service upon attorney, see Attorney and Client.

Justice's summons, see Justice of the Peace.

PUBLIC IMPROVEMENTS. See Drains; Municipal Corporations, 2.

PUBLIC OFFICERS. See Officers.

QUANTUM MERUIT. See Master and Servant, 1.

QUIETING TITLE.

It is immaterial that the wife of a lot owner did not join in any written deed or conveyance creating a revocable license in favor of an adjoining owner

QUIETING TITLE—continued.

and his grantee, where the evidence, though tending to show that the lot was probably occupied as a homestead at the time of purchase of the adjoining lot by the grantee, is absolutely silent as to whether the said lot was occupied as a homestead at the time of the creation of the license. Johnson v. Bartron, 629.

RAILROADS.

Error in instruction in action for killing stock, see Appeal and Error, 11.

See also Evidence, 7, 9.

1. A railroad company is required to use ordinary care only to keep from running down live stock upon its right of way, upon discovering it, and it is not required to keep a lookout upon its locomotives for animals upon the track. Reinke v. Minneapolis, St. P. & S. Ste. M. R. Co. 182.
2. In an action against a railroad company for killing two horses and injuring their harnesses by the negligent management and running of a locomotive and cars upon a cold stormy night in January, during which it was impossible to distinguish between a horse and a snow bank, the statutory presumption of negligence without actual proof thereof, raised by N. D. Rev. Codes 1905, § 4297, is sufficiently overcome by evidence of a train engineer as to the stormy conditions, that he saw no horses on the track, and did not think that he struck any. Reinke v. Minneapolis, St. P. & S. Ste. M. R. Co. 182.

RAPE.

1. An intent to commit rape may be inferred by the jury from the commission by the defendant of numerous indecent assaults upon the complainant during the course of a ride. State v. Bancroft, 442.
2. A woman who has been indiscreet enough to accompany a strange man to a lonely place need not show that she made unavailing outcries, and that she resisted to the extent of injury and laceration, in order to support the charge of rape accomplished by threat, under N. D. Rev. Codes 1905, § 8890 (4); nor need she show that while driving home, she proclaimed her disgrace to the first passerby, instead of waiting until she got to town. State v. Bancroft, 442.
3. One charged with rape by force alone may be convicted of rape by threats of immediate and great bodily harm, accompanied by apparent power of execution, when he assaulted the complainant indecently, threatened to

RAPE—continued.
shoot her, and chased her over the prairie until she was completely exhausted, and then threw her down at the river. State v. Bancroft, 442.
4. In order to sustain a conviction for rape in the second degree, it is not necessary, in order to meet the burden of proving that the complainant's resistance was overcome by threats of great bodily harm, to show that they were made verbally, or at or immediately before the carnal act. State v. Bancroft, 442.
5. In a prosecution for rape it is proper to instruct the jury that they may, under the evidence, convict of assault with intent to commit rape, without its being specifically alleged. State v. Bancroft, 442.

REAL PROPERTY.
Sale of, see Vendor and Purchaser.

RECORD.
On appeal, see Appeal and Error, 5.

REDEMPTION.
From mortgage, see Mortgages, 6, 7.

RELEASE.
Of surety, see Principal and Surety.

REPEAL.
Of statute, see Statutes, 2.

RETRACTION.
Of libel, see Libel and Slander, 1.

REVOCATION.
Of license, see License.

SALARY.
Of officers, see Officers.

SALES.
In an action to recover an alleged balance due on account as the purchase price,

SALES—continued.

of seed grain claimed to have been sold by the plaintiff to the defendant, where there is a substantial conflict in the testimony as to whether two items in the account were delivered by the plaintiff to the defendant, and the trial court found in plaintiff's favor on such issue, and there is support of such finding in the testimony, the judgment will not be disturbed on appeal. Minot Flour Co. v. Swords, 571.

SCHOOLS AND SCHOOL DISTRICTS.

Who may appeal in action to restrain selection of school site, see Appeal and Error, 1.

Inquiry by mandamus into organization of district, see Mandamus, 4, 5.

Accounting by state superintendent for teachers' examination fees, see Officers, 2.

CREATION AND ALTERATION OF DISTRICTS.

1. When a congressional township had been organized as a general school district, and a section in it had afterward been incorporated as a municipality, and subsequently a proposition for the creation of a special school district was carried, and directors were elected and duly qualified, and then the remainder of the congressional township was organized into a civil township, mandamus will not lie to compel the county commissioners and the county superintendent of schools to set apart and organize into a distinct school district the territory comprised in the civil township, for the reason that the mere creation of the civil township did not *ipso facto* constitute it a separate school district, but left the previously created school organization intact. State ex rel. Nicholson v. Ferguson, 153.

2. Where a teacher entered into a contract with a school board to teach a school in a certain district, and prior to the date of such contract the territory in which such school was located was duly segregated from the old district, and organized into a separate and distinct school corporation, but at the date of the contract the school officers of such new district had not been elected and did not qualify until later, the action of the proper authorities in granting the petition for the segregation of such territory and the organization of the new school district operated *ipso facto* to create the new district a distinct school corporation, and at that time the school board in the old district ceased to possess any authority or jurisdiction over the schools in such new district, and the contract with the old school board is of no binding force or effect upon the new. Farley v. Lawton School Dist. No. 41, 565.

SCHOOLS AND SCHOOL DISTRICTS—continued.

DISTRICT PROPERTY.

3. A resolution of a board of normal school trustees for the selection of a site, providing for the furnishing of an abstract of title showing the property to be free from encumbrances of any kind or nature, calls for a marketable title as of the date mentioned in the resolution; and when on that date there was a defect consisting of a dedication of a portion of the premises for street purposes, there was no binding action as to the selection of a school site, even though a deed to the premises was recorded after delivery to one of the trustees, who had no authority either to accept it or waive the conditions of the resolution. Grow v. Taylor, 469.

4. A resolution of a state board of normal school trustees for the selection of a site, prescribing as a condition that warranty deeds of the site, together with abstracts of title showing the property free from encumbrances of any kind or nature, be furnished the board, is not complied with when the abstracts furnished show that a portion of the site had been conveyed and dedicated to the public for a street use; that the dedication had never been revoked, canceled, or set aside, and that the streets, avenues, and alleys had never been vacated; that part of the premises was subject to an unsatisfied mortgage covering unrecorded oil and gas leases; that the title to another portion of the premises was derived from a mortgage foreclosure as to which the abstract did not show a copy of the notice of sale, the affidavit of publication, or any memorandum relating thereto, or any copy or memorandum of the foreclosure decree, and that another portion of the premises was affected by an executory contract of sale. Grow v. Taylor, 469.

TEACHERS.

5. Where a statute provides that "no person shall be permitted to teach who is not the holder of a teacher's certificate, . . ." a contract otherwise duly entered into between a school board and a teacher is not void or voidable merely because, at the date of such contract, the teacher did not hold a certificate or permit qualifying him to teach. Schafer v. Johns, 593.

SHERIFFS AND CONSTABLES.

Sheriff's sale, see Judicial Sale. See also Trial, 4.

1. In a conversion action against a sheriff, based on an attachment levy brought by a third party claiming ownership, the attachment debtor's acts and statements after the levy, tending to deceive the sheriff as to the property held and the burglarious removal of contraband property and discovery of it

SHERIFFS AND CONSTABLES—continued.

in the plaintiff claimant's possession, are material, competent, and relevant against him as bearing upon the good faith of his claim. Wipperman Mercantile Co. v. Robbins, 208.

2. As circumstantial proof of ownership and possession in a third person's conversion action against a sheriff for an attachment levy, the presence of contraband wild game and contraband liquors in the car where the levy was made are admissible in evidence against a claimant upon the issue of ownership and possession, as well as the statement of a person in possession of removed and secreted property; and the plaintiff claimant's disclaimer of knowledge as to how contraband property came to be found where it was removed from the place where the levy was made, and the attachment debtor's admission subsequent to the levy, that he might as well settle with the attaching creditor,—all constitute facts and circumstances for the jury's consideration. Wipperman Mercantile Co. v. Robbins, 208.

3. In an action against a sheriff for a conversion effected by an attachment levy, it is not error to exclude evidence offered in behalf of the plaintiff claiming title to the property levied on, that after he discovered contraband wild game upon the plaintiff's premises, which had been taken by burglary from the sheriff's possession, he at once notified the authorities, and that the game warden took possession of it, since it did not tend to prove or disprove any fact regarding the ownership of the property levied on. Wipperman Mercantile Co. v. Robbins, 208.

SLANDER. See Libel and Slander.

SPECIAL VERDICT. See Trial, 7, 8.

SPECIFIC PERFORMANCE.

When a vendor of land acquired under the homestead and pre-emption laws made an executory contract to give a deed upon the receipt of a final payment of $2,630, containing the usual clauses for forfeiture in case of nonpayment, and that prior payments should be retained by the seller as damages; and his vendee, acting as owner, made a similar contract with the defendant at a price insuring a profit to himself, with the times of payment arranged so as to meet the payments due the first seller; and on the date fixed for the final payment, the latter had his deed ready, but the other parties offered him less than the amount due to him under the contract,—Held, in his action to quiet his title to the land, possession of which he had retained, that the last purchaser, having no assignment of the first contract, but a separate and distinct contract with the first purchaser, was not entitled to

SPECIFIC PERFORMANCE—continued.

specific performance, was not the successor in interest of the purchaser, and had no standing in the suit, and was not entitled either to a deed to the premises on payment of the balance due, or to judgment for a return to himself of any part of the money paid on the contract by his vendor. Ugland v. Kolb, 158.

STATUTES.

Partial Invalidity.

1. Although the requirement of N. D. Laws 1911, chap. 213, that a naturalized citizen must produce his naturalization papers in order to participate in a state-wide party primary election, would exclude from the primaries foreign-born electors naturalized by act of Congress on the admission of the state to the Union, that portion of the statute is but an incidental detail, which may be disregarded without impairing the remainder of the statute as a plain, workable, and complete piece of legislation, and the discriminatory provision does not invalidate the entire statute. State ex rel. Miller v. Flaherty, 313.

Implied Repeal.

2. Rev. Codes 1905, §§ 7083, 7084 (passed in 1901), have no repealing effect upon § 6796, as to the tolling effect of the judgment debtor's absence from the state upon the ten-year life of a judgment under the statute of limitations, but adds a concurrent remedy whereby the judgment creditor may either sue on the judgment or renew it by affidavit. Union Nat. Bank v. Ryan, 482.

Construction.

3. The rule of statutory construction, that when an ambiguous statute has been amended, it will be construed on the theory that the amendment had some purpose, and was not a mere futility, cannot be invoked to support a construction contended for, when, instead of amendment, the old statute was repealed and replaced by an unambiguous statute embodying the contrary construction. State v. Stockwell, 70.

4. The phrase "as provided by law," in a statute, always refers to provisions of statutory law only, and the meaning is never extended so as to cover the common law. Schumacher v. Great Northern R. Co. 231.

5. Long-continued administrative construction contrary to the plain intent of an unambiguous statute has no interpretative authority. State v. Stockwell, 70.

STATUTES—continued.

6. Legislative construction put upon old statutes has no force in their judicial interpretation, which must be based by the courts upon the statutes themselves. State v. Stockwell, 70.
7. Controlling deductions as to the intent of a statute may be drawn from other acts passed at the same session of the legislature. State v. Stockwell, 70.
8. Laws enacted as a result of the legislative habit of transplanting statutes from other states must be construed liberally by the courts in order to prevent them from being unintelligible, indefinite, contradictory, and inapplicable, and in order to harmonize the new statute with existing law, instead of nullifying and endangering the whole act. State ex rel. Miller v. Flaherty, 313.
9. A statutory direction to an officer to do an act or cause it to be done makes it his official duty, whichever alternative he adopts, even though the statute be permissive in form. State v. Stockwell, 70.
10. Where a prescriptive right is claimed or sought to be created by statute, the same rule applies as in the case of statutes of limitation, that a reasonable time must be allowed before the bar of the statute becomes effective, and after the right proposed to be barred comes within the present or future operation of the statute, for the exercise of the right, whether it be existing or prospective. Burleigh County v. Rhud, 362.

STREETS. See Highways.

SUBROGATION.

The purchaser at a void sale for valid special drainage assessments is entitled, in the owner's suit to quiet title, to be subrogated in place of the county, and to be paid the amount of the assessment, with interest, which he paid at the sale, and to a decree making payment of the assessments within sixty days a condition to the cancelation of his certificates, or to a dismissal of the complaint and denial of relief on the merits, in default of compliance with the condition within the time limited by the court. Hackney v. Elliott, 373.

SURETYSHIP. See Principal and Surety.

SURFACE WATERS. See Municipal Corporations, 2.

TAXATION.

Adverse possession under void tax title, see Adverse Possession, 5.

TAXATION—continued.

Dismissal of action to foreclose tax certificate lien, see Dismissal and Nonsuit.

Drainage assessment, see Drains.

1. To prevent land from being sold for general taxes, it is sufficient to tender the amount of those taxes, and it is not necessary to tender also to the county treasurer the amount of unpaid special assessments for drainage. Hackney v. Elliott, 373.
2. In obedience to the principle that the courts will not change a long-recognized rule of property, a tax title is invalid under a precedent of twenty-one years' standing, when the assessment roll upon which it was based listed the property in the year 1889 in the name of an unmarried woman who made a homestead entry on it in 1882, shortly afterwards married, and died in childbirth in 1887. Wright v. Jones, 191.
3. In an action brought to have tax certificates adjudged null void and canceled of record, and to enjoin perpetually the issuance of tax deeds under them, brought in equity, and not in statutory form to determine adverse claims, the complaint is bad on demurrer, and fails to allege facts sufficient to constitute a cause of action, when it appears that the plaintiff has come into court asking affirmative equitable relief, without offering to do equity by paying or tendering the holder of the tax certificates the amount of the taxes, with legal interest, there being no allegation in the complaint of injustice or illegality in the levy of the taxes represented in the tax certificates. Noble v. McIntosh, 59.
4. A plaintiff suing in equity to have tax certificates adjudged null and void and canceled of record, and to enjoin the issuing of tax deeds under them, need pay or tender only the amount paid by the certificate holder at the tax sale, and need not pay or tender interest from that date, or any penalties, since it is more consistent with a wise public policy, and more equitable, that the redemptioner pay the certificate holder merely what the latter has paid to the county as his share of the public burdens, without also paying him a profit on the transaction. Noble v. McIntosh, 59.

TEACHER. See Schools and School Districts.

TENANTS. See Landlord and Tenant.

TENDER.

Of taxes, see Taxation, 1.

1. Under the provisions of a statute relating to tender and deposit and notice

TENDER—continued.

thereof, not requiring the notice to state that the bank in which such deposit is made is of good repute, such a statement is unnecessary, and it is not necessary for the person making the tender to prove such fact, as, in the absence of proof to the contrary, the presumption avails that such bank is of good repute. Ugland v. Farmers' & M. State Bank, 536.

2. By a failure to object to a tender made in the form of cashier's check, instead of currency, the person to whom such tender is made waives the mode thereof, under the provision of a statute that all objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time, to the person making the offer, and which could be then obviated by him, are waived by the creditor if not then stated. Ugland v. Farmers' & M. State Bank, 536.

THEFT. See Larceny.

TRESPASS. See also Action, 1; Damages.

Under a complaint in an action to recover damages sustained by reason of excavations made by the defendant near the plaintiff's ice house, which caused a part of the wall to collapse, and exposed the ice to the action of sun and air, alleging in effect that the defendant, in excavating lawfully upon his own lot, carelessly and negligently encroached upon the plaintiff's adjoining lot, it is erroneous for the trial judge to instruct the jury in effect that for the plaintiff to recover it was necessary for him to show negligence in the trespassing excavation, since the trespass was *per se* actionable, whether accompanied by negligence or not. Slattery v. Rhud, 274.

TRIAL.

Comments by state's attorney, see Larceny, 1.

Remark of court in action for criminal libel, see Libel and Slander, 5.

QUESTIONS OF LAW OR FACT.

1. Where the facts as conclusively shown by the evidence are covered by the express terms of a written contract, the rights of the parties constitute a question of law, and it is error to submit the case to the jury. Aultman & T. Machinery Co. v. Runck, 579.

TRIAL—continued.

INSTRUCTIONS.

See also Assault and Battery, 5; Criminal Law; Hospitals, 3; Libel and Slander, 6; Rape, 5.

2. In submitting a case to the jury for special verdict, the court should not charge upon the general law of the case any further than necessary to aid the jury in answering each interrogatory propounded. Lathrop v. Fargo-Moorhead Street R. Co. 246.
3. N. D. Rev. Codes 1905, § 7021, does not bind the court to give instructions to the jury requested by counsel in the order as requested, and coupled with no other instructions, and without change or modifications except those the counsel consent to. Fawcett v. Ryder, 20.
4. It is proper to refuse a charge that a right of stoppage in transit existed in a plaintiff suing the sheriff for conversion under an attachment levy upon property sold to the attachment debtor, and not entirely paid for by him, whereunder the plaintiff could claim the property until it was actually delivered to the attachment debtor in another state, when there was no proof in the record that the seller had ever attempted to exercise the right of stoppage in transit. Wipperman Mercantile Co. v. Robbins, 206.

DELIBERATIONS OF JURY.

5. An additional instruction to a jury which had been out twenty-four hours in a case submitted to them for a special verdict upon twenty-two questions, after they had reported that they could not agree, is not objectionable as coercive, when it merely exhorted dissenters to pay proper respect to the opinions of the others, and listen with a disposition to be convinced by each other's arguments, and seriously ask themselves whether they may not be reasonable, and ought to doubt the correctness of their judgment, not concurred in by the others, etc., in language approved by the courts of Massachusetts, or Connecticut, and by the Supreme Court of the United States, without in any way invading the province of the jury as to passing on the facts. Lathrop v. Fargo-Moorhead Street R. Co. 246.

VERDICT.

6. It is not reversible error for the trial judge to himself write the answers to some of the questions propounded to a jury for their special verdict, when as to those questions there was no conflict in the evidence for the jury to resolve. Lathrop v. Fargo-Moorhead Street R. Co. 246.
7. It is not in conformity with N. D. Rev. Codes 1905, §§ 7033 and 7034, to so

TRIAL—continued.

frame a special verdict as to require the jury to find evidential facts, rather than conclusions of fact. Lathrop v. Fargo-Moorhead Street R. Co. 246.

8. Judgment cannot be entered by the court upon a special verdict when its separate findings are inconsistent. Lathrop v. Fargo-Moorhead Street R. Co. 246.

TRIAL BY COURT.

9. In an action to foreclose three chattel mortgages, a general finding of fact that the mortgagor had removed and disposed of part of the mortgaged property, failed to take proper care of it, and that it was running down and deteriorating, is insufficient when it does not separately point out the property covered by each of the mortgages, so as to indicate whether it applies to all or some of them, although it would be sufficient were there but one mortgage involved in the suit. First Nat. Bank v. Mahoney, 177.

TROVER AND CONVERSION.

Conversion action against sheriffs, see Sheriffs and Constables.
Instructions, see Trial, 4.
See also Evidence, 8.

A general denial in an action for the conversion of money puts the plaintiff to strict proof of his allegations, and under it the defendant may show either that "the contract sued upon did not exist," or that the money in controversy was paid and received under a different contract; but under such plea a counterclaim cannot be proved, and evidence is inadmissible for that purpose alone, or to establish the right to an affirmative judgment. Heiszler v. Beddow, 34.

TRUSTEE PROCESS. See Garnishment.

UNCERTAINTY.

In information for criminal libel, see Libel and Slander, 8.

USE. See Words and Phrases.

VARIANCE. See Master and Servant, 1.

VENDOR AND PURCHASER. See also Frauds, Statute of, 1, 3, 4.
Priority as between vendor's lien and mechanics' lien, see Mechanics' Liens.
Sale of land for school site, see Schools and School Districts, 3, 4.
See also Specific Performance.

Where a vendor, under a land contract void under the statute of frauds because not in writing, subsequently sells the land, such act of the vendor is an effectual abrogation of such voidable agreement. Ugland v. Farmers' & M. State Bank, 536.

VENUE.

1. An affidavit for change of venue on the ground of local prejudice is sufficient which shows that the facts at issue and the questions involved have been widely discussed in the county where the venue is laid and great publicity given to the case, that it has provoked a great deal of bitter feeling, and that people generally have taken sides, although the allegations be made on information and belief, since by its very nature such a motion must be based upon information and belief, instead of positive knowledge; and where the affidavits furnish facts from which the court can determine judicially that an impartial trial cannot be had in the county where the venue was originally laid, the exercise by the district court judge of his discretion in changing the venue will not be disturbed on appeal, in the absence of clear proof that the discretion has been abused. Stockwell v. Haigh, 54.
2. A recital, in a supreme court opinion, of the filing of an affidavit of prejudice in one case, is not proof that such affidavit was filed in another case. Stockwell v. Haigh, 54.

VERDICT. See Libel and Slander, 3; Trial, 6–8.

VESTED REMAINDER.
As basis of homestead right, see Homestead, 3.

VOTERS AND ELECTORS. See Elections.

WAIVER.
By insurer, see Insurance, 5–8.

WATERS.

Validity of contract by municipality with water company, see Municipal Corporations, 1, 3.

WITNESSES.

Error in curtailing cross-examination, see Appeal and Error, 8, 10.

In libel case, see Libel and Slander, 4.

1. The veracity of witnesses is not discredited by their refusal to conform their testimony to the theory of the counsel who called them. Smith v. Hoff, 37.
2. It is a proper exercise of the trial judge's discretion to exclude an attempt at the immediate redirect examination of a defendant called by the plaintiff for cross-examination under the North Dakota Statute, since a plaintiff calling his adversary had the right to keep the defendant's testimony which he needed for his main case separated from the testimony offered by the defense. Fawcett v. Ryder, 20.

WORDS AND PHRASES.

1. "Use"—various meanings, definitions, and applications cited and discussed. State v. Stockwell, 70.
2. Use and ownership are in no sense synonymous or identical in meaning. State v. Stockwell, 70.

WORK AND LABOR.

Complaint in action to recover for, see Master and Servant, 1.