REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

JULY, 1913, to JANUARY, 1914.

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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District No. Two,
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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.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

LEONARD STOCKWELL v. J. W. BRINTON.

(142 N. W. 242.)

This is a civil action to recover damages for an alleged unjustifiable assault upon plaintiff by defendant. Defendant denied the assault, and sought to justify any injuries inflicted by him upon the plaintiff as done in his necessary self-defense. The jury found in favor of defendant by a general verdict. Plaintiff appeals. It is *held*:—

Assault — action for damages — justification — self-defense.

1. No reversible error appears in the admission or exclusion of testimony; many rulings complained of examined.

Assault — weapon — presumption.

2. It not appearing from the record that any request or demand was made upon defendant, his counsel or any witness for defendant for the production of the weapon admittedly used by Brinton, no presumption can be indulged in that the same had been secreted and that evidence had been suppressed.

Instructions — punitive damages.

3. Any error in the instructions concerning punitive damages cannot amount

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Note. — The authorities on the right to limit the time of argument of counsel for accused are collated in a note in 25 L.R.A.(N.S.) 1027, and in a supplement note in 42 L.R.A.(N.S.) 209. See also note in 46 Am. St. Rep. 23.

to reversible error, as the jury have by their verdict found no actual damages to have been unlawfully sustained by plaintiff at the hands of defendant.

Error — jury — instructions.

4. No error was committed in refusing the requested instructions reviewed on assignments of error.

Conflict of evidence — verdict.

5. Under the conflict of evidence as to the affray, there is sufficient proof to sustain the verdict.

Arguments limited by court — submitting case to jury without — objections waived.

6. By waiving right of argument upon facts to the jury at the close of the trial, after the court had limited the respective counsel to forty-five minutes for argument on each side of the case, they thereupon stipulating to and thereunder submitting the cause to the jury without argument, all objection to the time limit so imposed was thereby waived.

Opinion filed May 31, 1913. Rehearing denied July 5, 1913.

From an order of the District Court for Billings County, *Nuchols*, Special Judge, presiding, denying new trial, plaintiff appeals.

Affirmed.

M. A. Hildreth, for appellant.

The court's charge upon the question of damages is clearly erroneous. Punitive damages may be recovered without the showing of *actual malice.* Penal Code 1905, § 9524; Rev. Codes 1905, § 6562; Shoemaker v. Sonju, 15 N. D. 518, 108 N. W. 43, 11 Ann. Cas. 1173; Fotheringham v. Adams Exp. Co. 1 L.R.A. 474, 36 Fed. 252; White v. Spangler, 69 Iowa, 222, 26 N. W. 85.

Malice may be inferred from an act or acts of the defendant, and the weapon used by defendant at the time of the assault, and his general conduct, as well as previous threats, are all proper matters of proof. Fotheringham v. Adams Exp. Co. supra; Selland v. Nelson, 22 N. D. 14, 132 N. W. 220.

There was a conspiracy between Haigh and defendant to injure plaintiff, and *evidence* of such fact was admissible. State v. Anderson, 92 N. C. 737; State v. Stark, 63 Kan. 529, 54 L.R.A. 912, 66 Pac. 243; 1 Wharton, Crim. Law, 702; 3 Greenl. Ev. 95; Taylor, Ev. 527;

Place v. Minster, 65 N. Y. 89; People v. Sharp, 45 Hun, 460; State v. Winner, 17 Kan. 298; Cox v. State, 8 Tex. App. 302, 34 Am. Rep. 746; Avery v. State, 10 Tex. App. 210; Heard v. State, 9 Tex. App. 1.

Statements made by a party to a common scheme of conspiracy to do a wrong are admissible. State v. Gilmore, 151 Iowa, 618, 35 L.R.A. (N.S.) 1084, 132 N. W. 56; Joyce v. State, 88 Neb. 599, 130 N. W. 291; Clinton v. Estes, 20 Ark. 216; Miller v. Dayton, 57 Iowa, 423, 10 N. W. 817.

It is always competent to show that parties have fabricated or suppressed evidence. Cover v. Com. 5 Sadler (Pa.) 79, 8 Atl. 196; Underhill, Crim. Ev. § 121, and notes; Moore, Facts, § 585, and cases cited. Miller v. Dayton, 57 Iowa, 423, 10 N. W. 817; Barber v. State, — Tex. Civ. App. —, 69 S. W. 515; 3 Enc. Ev. 432, 433; Musser v. State, 157 Ind. 423, 61 N. E. 1; Fitzpatrick v. United States, 178 U. S. 304, 44 L. ed. 1078, 20 Sup. Ct. Rep. 944; People v. Cleveland, 107 Mich. 367, 65 N. W. 216; Pierson v. State, 18 Tex. App. 524; Allen v. State, 12 Lea, 424; Abbott, Trial Brief, Crim. Cas. 274, 275.

Where defendant in an assault case attempts to justify his acts, he must do so by a preponderance of the evidence. As to this, the burden of proof is upon defendant. Sellman v. Wheeler, 95 Md. 751, 54 Atl. 515; Gizler v. Witzel, 82 Ill. 326; Johnson v. Strong, 22 Ky. L. Rep. 577, 58 S. W. 430; Phillips v. Mann, 19 Ky. L. Rep. 1705, 44 S. W. 379; Rhinehart v. Whitehead, 64 Wis. 42, 24 N. W. 401.

Haigh was an abetter and encouraged the affray, and was jointly liable. People v. Yslas, 27 Cal. 630; Cooley, Torts, 186; Hilmes v. Stroebel, 59 Wis. 74, 17 N. W. 539; Bishop, Non-Contract Law, § 535; Brown v. Perkins, 1 Allen, 89; Little v. Tingle, 26 Ind. 168; State v. Speyer, 182 Mo. 77, 81 N. W. 433; Darling v. Homer, 16 Mass. 289; Sexton v. Rhames, 13 Wis. 99; Eastman v. Porter, 14 Wis. 49; Druecker v. Salomon, 21 Wis. 632, 94 Am. Dec. 571; United States v. Kane, 23 Fed. 748; State v. Jones, 83 N. C. 605, 35 Am. Rep. 586; Lamb v. People, 96 Ill. 73.

L. A. Simpson, for respondent.

The questions in this case were for the jury, and the order of the trial court overruling plaintiff's motion for a new trial should not be

disturbed. Nilson v. Horton, 19 N. D. 187, 123 N. W. 397, and cases cited.

Where the evidence is conflicting,—the jury being sole judges of its weight, and of the credibility of the witnesses,—the verdict should not be disturbed. Bailey v. Walton, 24 S. D. 119, 123 N. W. 701.

Where different conclusions may be drawn from the evidence, the finding of the jury is conclusive. Berry v. Chicago, M. & St. P. R. Co. 24 S. D. 611, 124 N. W. 859; Coughran v. Western Elevator Co. 22 S. D. 214, 116 N. W. 1122.

Where the verdict is supported by substantial evidence, and the trial court having refused to disturb it, such ruling will be sustained. Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225.

The matter of limiting counsel in their argument to the jury is wholly discretionary with the trial court. Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760; 2 Enc. Pl. & Pr. 702 and cases cited; Selland v. Nelson, 22 N. D. 14, 132 N. W. 220; Kerley v. Gernscheid, 20 S. D. 363, 106 N. W. 136.

Goss, J. The complaint alleges that the defendant, Brinton, on August 22, 1909, in Beach, North Dakota, "did make a violent assault upon plaintiff and did with a billy or bludgeon wilfully and unlawfully strike, beat, and wound the plaintiff over and about the left arm and left side of the head, then and there inflicting upon the plaintiff great injuries to his head and arm, to the damage of the plaintiff in the sum of $5,000." Defendant by answer denies the assault and injuries, but alleges that the plaintiff wilfully and maliciously assaulted him, defendant; and that if plaintiff received any injuries from defendant the same were inflicted while plaintiff was unlawfully assaulting defendant, and that any injuries suffered were inflicted by defendant in the necessary defense of his person from the unlawful assault made upon him by plaintiff. The jury found for defendant by a general verdict. Plaintiff appeals from an order denying a new trial, assigning error in the admission and exclusion of testimony and instructions given and refused.

It appears that upon the day in question, and prior to the altercation made the basis of this suit for damages, Stockwell and Brinton met in the early afternoon, when a difficulty arose and the parties grappled,

Brinton being thrown to the ground with Stockwell upon him. They were separated. Some hours thereafter, and about 6 o'clock the same day, a second encounter ensued. Concerning who was then the aggressor the testimony is in dispute, each claiming the other to have been. Between the two affrays defendant had armed himself with a billy, and at the second *mêlée* used it to considerable effect upon the head and arm of the plaintiff. When they were then separated, the billy was taken into possession by its owner, Haigh. Defendant testifies to taking the club to his office some time before the day in question, but after the publication by him in his newspaper of matter concerning plaintiff, which answered an article previously caused to be published by Stockwell. It appears that Haigh and Brinton had talked over these published articles and the possibility of trouble between Brinton and Stockwell when they met, and defendant, in order to be prepared for emergencies that might arise, had procured the club from Haigh's office and taken it to his newspaper office, in readiness for anticipated trouble, and from which place he got it between the altercations that took place upon the day in question. Both affrays occurred in the afternoon of August 22, 1909, and upon the streets of Beach, in the presence of many bystanders, a dozen or more of whom have testified in this action.

Error is grouped under many assignments, discussed as follows in the order taken: Defendant was called for cross-examination under the statute as the first witness, and among other things had testified in substance that he had gone over to Haigh's office and "helped myself to the club." Whereupon the question was asked: "You never told him where it was?" to which the court sustained an objection. Haigh subsequently testified that "I told Brinton the club was there (in my office), because I believed that Stockwell was going to pitch onto him. Guess I told him the billy was on the side of the wall (of my office); and again: "When I talked with him about looking out for Stockwell, about this article, I said something about the billy. I had warned him on account of this former talk with Stockwell. He could do as he saw fit about arming himself with it." Defendant admits he took it pursuant to such permission, in anticipation of the trouble subsequently had; so any error in the ruling, conceding the same to have been error, was subsequently cured. Both parties were fully examined, touching

all phases of this matter inquired about. On this assignment counsel for appellant states: "We started in the beginning to find out what had become of this weapon." The alleged error has nothing to do with the question of what became of the bludgeon, and could not have been so understood.

Counsel's second assignment is based upon the exclusion of the following, asked of Webber: "Could you tell from that point of vantage in which direction these blows were falling, as to what portion of the body of Stockwell, as to whether they were aimed at his head or his neck or his arm?" The witness had previously testified on the subject that defendant "walked out to him and hit him on the head with a club, . . . followed him up, striking him, and Stockwell guarding with his left arm, backing away, Brinton following, striking him,—landing on Stockwell mostly on the left arm. There was blood on the side of Stockwell's face; probably half the side of the face was discolored by blood. I did not see his arm closely at that time." Witness was testifying to events occurring from 150 to 180 feet from him, and concerning events described in detail by a dozen witnesses and a circumstance merely of the affray. Any error must be nonprejudicial under such circumstances. In the cross-examination of this witness he was asked: "Where did Stockwell have his hands at that time he was facing Brinton and saying something to him?" to which the plaintiff objected on the ground that "it assumes that Stockwell was saying something to Brinton, and the witness has testified that he could not tell who was talking." This is assigned as error. Witness had just testified that Stockwell had "walked in a southeasterly direction, stopped, turned, and faced Brinton. There were some words passed between them. He turned and faced Brinton; stood still a few feet from him." This is a sufficient basis in the testimony to warrant the question on cross-examination. The same witness was asked on cross-examination: "Can you tell us just where Mr. Brinton was when you think you saw Haigh jerk the club out of Murphy's hands?" To this question counsel interposed the objection "that the question assumed that the witness had said that he thought Haigh jerked the club out of Murphy's hands." The issue was whether the club had been taken from Brinton or Murphy. Witness had previously testified: "I was up closer when Murphy took the club from Brinton. Did not see Haigh

come out of the drug store, not until he was trying to grab the club. He was trying to take the club away from Murphy. Did not notice Brinton's hands on the club after Murphy had it. Murphy and Brinton were fighting over the club." And after the objection was overruled this answer, explanatory of the matter, was given: "Brinton was right on the other side of Murphy when Haigh jerked the club out of Murphy's hands. Haigh was at Murphy's left; the club was in Murphy's hand. All three were trying to get it. It was my understanding that Haigh jerked it out of Murphy's hands." The answer shows conclusively that the witness was not misled by the question, and the objection discloses that one purpose for the making of it may have been to see that the witness did not get misled. The question was asked upon cross-examination and was legitimate, being one way to test the knowledge of the witness as to who, then, had possession of the club. But conceding the ruling to have been error, the witness was not misled, his answer corresponding with his previous testimony and the plaintiff's theory of the case; and manifestly the ruling did not result to plaintiff's prejudice. This same witness, after testifying, "I feel friendly toward Mr. Brinton, ever since I knew him," was asked, on cross-examination, this question, the answer to which, over objection, is assigned as error: "Let's see; you were one of those who joined in asking the government to appoint him postmaster, or did you refuse to do it?" Plaintiff's counsel in his brief says that this question was asked "to get as much venom into the case as he could." This line of examination was permissible to determine the amount of "venom," bias, or prejudice had by the witness toward Brinton, and bore directly upon the credibility of the witness in this specific case, as has been held in State v. Malmberg, 14 N. D. 523, 105 N. W. 614; and State v. Kahallek, — N. D. —, 140 N. W. 1135. Witness Bond had described at length the billy, and had testified that "there was a strap attached to it,—to the small end." He was thereupon asked by counsel for the plaintiff, "Do you know what the strap on a billy is for?" objection to which question was sustained and is assigned as error. The ruling was discretionary, and, if error, was nonprejudicial as concerning a matter of so common knowledge that such proof was wholly unnecessary. Another assignment of error concerns the following questions asked of witness Bond, a justice of the peace, called on behalf

of plaintiff, and based upon the overruling of plaintiff's objections to the following questions asked upon cross-examination: "And he (Brinton) was brought before you (under arrest) a few days before he was married, about midnight on Saturday night?" and "what time the second time, getting towards morning?" We have inserted the words in parenthesis to render the meaning intended. The witness answered the first question as follows: "Somewhere between—around 4 o'clock in the afternoon, between 4 and 5, the first time." And to the second question he says: "Do not know exactly what time it was; I had not been to supper yet." Nothing prejudicial to plaintiff is apparent from this testimony received over plaintiff's objection. The same witness was asked on cross-examination: "Is that as true as anything you have stated here on the stand?" concerning some testimony he had given. Plaintiff interposed an objection; no ruling was made and no answer appears to have been given to the question. We can see no error resulting to plaintiff's prejudice in the mere asking of this question. It is a question frequently asked in cross-examination, and is objectionable in that it asks a witness to compare his testimony, but rarely, if ever, is it prejudicial error. The justice on cross-examination also was asked: "The following Monday was a legal holiday, was it not, Mr. Bond?" and "you know Labor Day was a legal holiday?" referring to the Monday after the arrest on Saturday of Brinton, referred to in preceding questions. Error is assigned. This cross-examination was for the declared purpose of counsel "to show bias" on the part of the justice, and was proper cross-examination for that purpose. The same witness was asked the question on cross-examination: "You have never done that which he did not think was right?" to which witness answered over objection: "Well, possibly I have," also assigned as error. This interrogatory followed cross-examination upon the personal relations and feelings of Bond and Brinton, and the ruling was correct. Counsel for defendant on cross-examination of the same witness, with reference to a criminal trial prosecuted for this assault against Brinton, asked the question: "Well, the jury cleared him, did they not?" to which objection was interposed and sustained, and at plaintiff's request the jury were fully cautioned to disregard the question, the court stating: "I shall not pass upon that feature any further than to say to the jury that the question as to whether or not the defendant was convicted in

any criminal proceedings growing out of the matters alleged in this action is not admissible in evidence in this case and ought not to be considered by you one way or the other." Counsel should not have asked the question, and the ruling of the court excluding the answer, and its action in cautioning the jury, were manifestly proper and fully safeguarded the rights of the plaintiff. Dr. Smith was sworn as a witness in plaintiff's behalf, and testified to making a professional examination of plaintiff, soon after the last *mêlée* on the day in question, and described in detail the injuries plaintiff had received, and that in his opinion they were contusions, and the result of blows received from a weapon of the character shown by the evidence to have been wielded by Brinton that day. Upon cross-examination he was asked: "The wounds that you saw on Stockwell's arms and face, were they or were they not dangerous?" to which he answered: "Well, that might depend, they evidently did not prove to be dangerous;" the latter part of which answer counsel for plaintiff moved to strike as irresponsive, incompetent, irrelevant, and immaterial, the denial of which is assigned as error, counsel in his brief urging that the use of the weapon in question was a circumstance "leading up to the fact that a violent assault had been made upon the plaintiff by the defendant with a dangerous weapon;" and that this question, and the subsequent examination of the witness permitted along the same line, were error. The witness, immediately thereafter, explained that the wounds plaintiff received were not dangerous, describing them minutely. The rulings were correct. The witness was offered to prove the physical condition of plaintiff immediately after the altercation, and testified concerning the wounds, their nature and the character of the weapon from which they were probably received. And no good reason exists why the expert should not be allowed, on cross-examination, to pronounce his opinion upon the dangerous or trivial character of the wounds concerning which he has testified in detail. This action is for damages, and the testimony of the witness was offered presumably as a basis for an award of substantial damages; and therefore, to have excluded the question asked on cross-examination, had a recovery been had, would manifestly have been error. On redirect examination immediately following, counsel for plaintiff asked: "Doctor, I will ask you as to whether or not in your opinion such blows by the use of such an in-

strument as has been described here were dangerous or otherwise to the life and limb of Stockwell?" The court sustained an objection, because the same question had been asked and answered on direct and cross-examination. The ruling was discretionary and nonprejudicial inasmuch as the witness had been fully examined both on direct and cross-examination touching the same matter, and no useful purpose would have followed further redirect and recross-examination necessarily following, concerning the matter already testified to in detail.

A dozen or more assignments revolve around the testimony and offers of testimony concerning the billy or policeman's club. This is described as being from a foot to 15 inches long, weighing a pound or a pound and a half, loaded, made of leather, with a strap on the handle. Naturally its size and importance is not magnified by the defendant, but it is described in detail and given much attention by the plaintiff and his witnesses. It was not produced upon the trial, and counsel for plaintiff argues strenuously that its suppression by the defendant, and his inability to procure and cause the production of the same, together with the fact of Haigh being its owner and its being taken by defendant from Haigh's office in preparation for the affray, is evidence (1) that Haigh and the defendant had entered into a conspiracy to beat Stockwell with the billy; (2) that there was sufficient evidence from which the acts and declarations of Haigh concerning the affray, made soon thereafter, were admissible and should have been admitted in evidence; and (3) that because Haigh received possession of the club after the assault, and has not produced it, he has suppressed evidence concerning which certain rulings of the trial court constituted error.

All of the assignments and arguments thereon, based upon the suppression of testimony because the club was not produced on the trial, are disposed of by mention of the fact that counsel for the plaintiff has at no place, as appears from the record, demanded the production of this club. He has assumed, evidently, that it could not be produced, but nothing appears in the record upon which to base such an assumption. Haigh testifies under cross-examination: "I carried the billy home with me; didn't bring it down with me this morning; have not searched for it; have not seen it since March, 1910; don't know whether I saw it at that time or not; laid it on the shelf in the cellar, on the south side near the coal bin; cannot tell when I saw it last; it was some time

after this affair; don't remember just when it was." This is important, because counsel for plaintiff contends his cross-examination was curtailed unduly in that a conspiracy existed between Haigh and Brinton under which Brinton took the club from Haigh's office some time previously for use in making this alleged malicious assault upon plaintiff; and that Haigh recovered it immediately after the fracas, to keep it from being used as evidence on this trial. For aught we can tell, this club might have been in Haigh's cellar, where that witness says he last saw it, and could have been produced by defendant upon demand had counsel requested it. And it is apparent that the trial court evidently had this in mind in his rulings upon the subject. Counsel's contention on this score cannot be upheld, being based upon matters without the record. Concerning the offers of proof made in this connection the court properly refused to rule upon blanket offers of proof, insisting that the offer be made by questions asked of witnesses. This disposes of three assignments of error. If trial courts generally would follow such precedent, and generally refuse to rule on the admission of testimony offered by blanket offers, much opportunity for getting reversible error in the record would be thus foreclosed. The court at first sustained objections to inquiries seeking to elicit statements made by Haigh some five minutes after the fracas and some distance from the scene of the altercation, as not a part of the *res gestæ,* and not binding upon the defendant. Several assignments of error are based upon this exclusion, but it is wholly unnecessary to review the correctness of the holding, because the court, later in the course of the trial, reversed its former ruling, and permitted full examination upon that subject, conclusively shown by the following testimony:

Haigh was asked by counsel for plaintiff, with reference to this event:

Q. Did you have any conversation after going back on the sidewalk with Mr. Murphy?

A. Yes.

Q. What did you say to Murphy when you got back on the sidewalk?

A. I said it was mine, I guess I said it was mine.

Q. You said it was yours?

A. Yes.

Q. Well, now, did you not state to Murphy something like this, "you said it was yours;" he said, that is, Murphy said, "If I had known that you wouldn't have got it," and did you not reply: "I and my friends intended to take it?"

A. No, sir, I didn't.

And the court also permitted counsel for plaintiff to show that the witness Haigh was convicted for assault and battery on Stockwell, because of this assault by Brinton and his complicity with Brinton therein.

Thereafter Murphy, who previously had been inquired of concerning the statements of Haigh to him regarding the club, after the *mêlée*, was called in rebuttal and testified fully upon the subject, as will appear from the following testimony of Murphy:

Q. Mr. Murphy, you may state if after Haigh had taken the billy away you had any conversation with him up on the sidewalk?

A. Yes, sir.

Q. Did he state in that conversation that the billy was his? And did Mr. Haigh state to you when you got back on the sidewalk that the billy was his, and you replied that, if you had known that, you would not have let him have it; and did he not, replying, say that his friends were there to take it away if it were necessary, or that in substance?

A. Yes. He said he had friends enough there to get it.

Any error in the exclusion of this testimony early in the trial must have thus been cured. Toward the close of the trial Haigh was recalled for further cross-examination, and testified that on his way home that evening he showed the billy to Lovell, a witness of plaintiff, and then was asked: "Did you make any statement to him at that time as to what had been done with that billy?" to which an objection was sustained. Thereupon counsel made the following offer: "The plaintiff offers to cross-examine the witness Haigh as to any statements that he made to Lovell on the stand, and to ask him directly as to whether or not he didn't state to Lovell, and at the same time exhibit to him the billy, and state in substance that that was the billy with which Brinton had beaten Stockwell up that night; and in the event that Haigh

denies that he made such a statement to Lovell to recall Lovell and ask Lovell if Haigh didn't state to him, while he was showing him the billy, that it was the billy with which Brinton had beaten Stockwell up a few minutes before." This was some minutes after the fracas and a block and a half distant from that occurrence. The court held the testimony incompetent, irrelevant, and immaterial for any purpose. No issue had been made or tendered on the matter embraced in the offer. On the contrary, Brinton and many witnesses had detailed the events, and it was an undisputed fact in the case that Brinton had used this billy, as he himself admits, upon Stockwell at the time in question. And had the witness Haigh been permitted to relate his hearsay statement to Lovell, it would have been but repetition of what he has testified to concerning the billy, and that Brinton had beaten Stockwell with it. This offer of hearsay testimony was properly excluded. Concerning the billy the witness Haigh was asked: "You did not produce it at the trial of the State against Haigh, did you?" And again: "Were you down to Mandan on the case of State against Brinton?" To both questions objections were sustained, and properly so, as the answer sought was wholly immaterial. From the entire record it does not appear but what counsel for the defendant, or the defendant himself, may have been ready on demand to produce the billy. After a careful examination of all the rulings on the admission and exclusion of evidence, no prejudicial error appears.

Counsel has challenged in ten particulars the sufficiency of the evidence to sustain the verdict, bearing upon the preponderance of the evidence and the right of Brinton to make self-defense with the weapon used or at all. There was a square conflict in the testimony, regarding all these matters. The testimony of the defendant and his witnesses, evidently accepted by the jury as the true version of the affray, laid ample foundation for the verdict rendered.

Appellant also has assigned as error the action of the trial court in announcing at the close of the testimony that counsel on each side would be limited in argument to forty-five minutes, to which statement or direction plaintiff excepted, and immediately, presumably because thereof, entered into an agreement with opposing counsel to submit the cause to the jury for their determination without argument by either side, both counsel waiving thereby their right of argument.

And the cause was forthwith submitted. By this act of waiver of right of argument to the jury, any error in the limit previously fixed upon the length of argument was waived. Before counsel can complain for not being permitted to make an extended argument, he should at least have used the time allowed him for that purpose, instead of failing to avail himself of even such limited right by waiving altogether his right of argument. The whole matter is one resting within the sound discretion of the trial judge, and the best proof of the necessity for more than forty-five minutes' argument would have been a good-faith attempt on the part of counsel to comply with the court's direction and sum up the case within that time. Had counsel then been unable to do his cause justice, we cannot assume but what the court would have granted further time if such fact became apparent. From the size of the typewritten statement of the case, containing 185 pages only as the record of the testimony, it would seem that such limitation upon argument imposed was a reasonable one. Much less time allowances have been sustained as granting a reasonable opportunity for argument, even in criminal cases, in the face of the objection that unduly limiting argument is in effect a denial of the constitutional right of counsel in criminal prosecutions. Seattle v. Erickson, 55 Wash. 675, 25 L.R.A. (N.S.) 1027, 104 Pac. 1128, where a fifteen-minute limit was held not unreasonable. See also extended note to the same case in 25 L.R.A. (N.S.) 1027. The right of the court to limit argument is similar to its right to limit too extended cross-examination, upon which see State v. Foster, 14 N. D. 561, 105 N. W. 938. The right of argument should not be unduly curtailed, nor unduly encroached upon by the court, as has been held where the instructions were given to disregard entirely statements made by counsel in argument. State v. Gutterman, 20 N. D. 432, 128 N. W. 307, Ann. Cas. 1912 C, 816; and Zilke v. Johnson, 22 N. D. 75, 132 N. W. 640. But counsel can here urge no error after his waiver of such right.

In its instructions upon exemplary damages the court distinguished between actual and implied malice, and in so doing may have erred under the holding of this court in Shoemaker v. Sonju, 15 N. D. 518, 108 N. W. 42, 11 Ann. Cas. 1173. But any error so committed in instructions concerning exemplary damages only is rendered nonprejudicial by the verdict finding no cause of action to have existed for com-

pensatory or actual damages. Under the issues joined to return such a verdict for defendant, the jury must have found either that the defendant did not assault the plaintiff, or, on the contrary, that plaintiff was the aggressor and assaulted defendant; or, the equivalent of the latter, that any injuries inflicted upon plaintiff by defendant were done in his necessary self-defense in repelling an unlawful assault made by plaintiff upon him, defendant. Under the authorities a right of action for punitive damages did not exist where a right of action as to actual damages is thus found never to have existed. 1 Sedgwick on Damages, § 361, from which we quote: "If the plaintiff has suffered no actual loss, he cannot maintain an action merely to recover exemplary damages. A plaintiff has no right, the courts say, to maintain an action merely to inflict punishment; exemplary damages are in no case a right of the plaintiff, and cannot therefore become a cause of action." To the same effect is 2 Sutherland on Damages, 3d ed. § 406, reading: "Bad motive by itself is not a tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. . . . Actual damage must be found as a predicate for the recovery of exemplary damages." See also 1 Joyce on Damages, § 123, reading: "A right of action cannot be maintained simply for the purpose of inflicting punishment upon some supposed wrongdoer, and therefore exemplary damages are not recoverable unless there has been some real or actual damage sustained. Exemplary damages are merely incidents of a cause of action to recover damages for some real or substantial loss, and can never constitute the basis of a cause of action independent of such elements, though the act of the defendant may have been wanton or malicious. It therefore follows that if no actual damage has been suffered, or if the damage has been merely nominal, the injury being purely technical, exemplary damages should not be allowed. And where the actual damages awarded by a verdict are remitted before judgment, the court is deprived of the power to render judgment for the exemplary damages awarded by such verdict." See also 13 Cyc. 109, that, "although the courts have not been uniform in awarding exemplary damages where the injury is purely nominal, yet where the law implies sufficient damages to sustain an action, it has been held sufficient ground to warrant the imposition of vindictive damages. But as a rule it must be shown by the evidence that actual damages are due."

Sondegard v. Martin, 83 Kan. 275, 111 Pac. 442; Adams v. St. Louis & S. F. R. Co. 149 Mo. App. 278, 130 S. W. 48; Malin v. McCutcheon, 33 Tex. Civ. App. 387, 76 S. W. 586; Rogers v. O'Barr, — Tex. Civ. App. —, 76 S. W. 593; Stewart v. Smallwood, 46 Tex. Civ. App. 467, 102 S. W. 159; Lightfoot v. Murphy, 47 Tex. Civ. App. 112, 104 S. W. 511; Seal v. Holcomb, 48 Tex. Civ. App. 330, 107 S. W. 916; Beckham v. Collins, 54 Tex. Civ. App. 241, 117 S. W. 431; Thowron v. Skirvin, 57 Tex. Civ. App. 105, 122 S. W. 55.

Contra: Vlasservitch v. Augusta & A. R. Co. 85 S. C. 291, 67 S. E. 306; and note in 29 L.R.A.(N.S.) 272 on page 279.

An exception seems to be made as to public-service corporations owing a public duty for wanton violation thereof. Recoveries for exemplary damages only have been there upheld. Webb v. Atlantic Coast Line R. Co. 9 L.R.A.(N.S.) 1218, and note, 76 S. C. 193, 56 S. E. 954, 11 Ann. Cas. 1134, and conclusion of notes in 10 L.R.A.(N.S.) 403; and 17 L.R.A.(N.S.) 1226–1231. This question is not here involved, however, and mention is made of possible exceptions thereto that it may not be understood as the invariable holding in all cases. Hence, any error in defining the circumstances under which exemplary damages might have been allowed, and not limiting the jury in the allowance of any compensatory damages, upon which the jury was properly instructed, must be harmless error.

Defendant has assigned generally as error the refusal of the court to give thirteen requested instructions. As counsel has not in his brief referred to each one in particular, we will treat them in the same manner, and not set them forth. We have examined them all carefully with reference to the instructions given, and considered them in connection with the scope of the testimony and the issues involved, and find no error, as the instructions given fully covered the matters embodied in the requests so far as the requests were pertinent and correctly stated the law. This covers so much of the sixty specifications of error as settled as is assigned and attempted to be discussed in the brief. And many we have covered in this opinion might have been passed by as abandoned, as not argued in the brief of appellant. We are satisfied no error was committed on trial warranting a reversal of this case, and it is therefore affirmed.

NELS BERGLUND v. STATE FARMERS' MUTUAL HAIL INSURANCE COMPANY OF WASECA, MINNESOTA, a Foreign Corporation.

(142 N. W. 941.)

Judgment was awarded on plaintiff's motion for judgment on the pleadings for want of a defense for the full amount of loss to growing crops sustained by hail, as adjusted by defendant company, and from the judgment so ordered defendant appeals. The answer alleges plaintiff's interest in the crop insured was not to exceed a one-half interest therein. *Held:*

Insurance — crops — interest — recovery — judgment— motion for.

1. Plaintiff's recovery cannot exceed his insurable interest in said crop, which under the answer, for the purposes of the motion, must be taken as a one-half interest only, and judgment was therefore entered for double the amount to which plaintiff was entitled.

Motion for judgment on pleadings — ruling — supreme court — final judgment — insurable interest.

2. This court will not, in reviewing this ruling on motion for judgment on the pleadings, direct the entry of a final judgment, as on the merits plaintiff may be able to establish a full insurable interest and a right to recover the full amount of the policy. The case is remanded for trial or further proceedings.

Opinion filed July 14, 1913.

From an order of the District Court for Ward County, *Leighton,* J., defendant appeals.

Reversed.

Turner & Murphy (*Edward Engerud* of counsel), for appellant.

The function of a motion for judgment on the pleadings is substantially the same as that of a demurrer. 23 Cyc. 769; Botto v. Vandament, 67 Cal. 332, 7 Pac. 753; Finley v. Tucson, 7 Ariz. 108, 60 Pac. 872.

Judgment on the pleadings cannot be given where defendant pleads a substantial and issuable defense. 23 Cyc. 769; Parker v. Des Moines Life Asso. 108 Iowa, 117, 78 N. W. 826; Lewis v. Foard, 112 N. C. 402, 17 S. E. 9; Alspaugh v. Reid, 6 Idaho, 223, 55 Pac. 300; Prost v. More, 40 Cal. 347.

Party must be given opportunity to request leave to amend, and to amend his pleading. Martin v. Luger Furniture Co. 8 N. D. 220, 77 N. W. 1003; Webb v. Wegley, 19 N. D. 606, 125 N. W. 562.

The breach or violation of any of the material and reasonable contract conditions, on the part of the insured, avoids the policy. Rev. Codes 1905, § 5960; Peet v. Dakota F. & M. Ins. Co. 7 S. D. 410, 64 N. W. 206.

Application for insurance, and statements therein made, are for the information and benefit of the company; and provisions that if any material statements are false the policy will be avoided, are reasonable conditions. Deming Invest. Co. v. Shawnee F. Ins. Co. 16 Okla. 1, 4 L.R.A.(N.S.) 607, 83 Pac. 918.

Plaintiff having been guilty of concealment and breach of warranty, the contract of insurance was broken in its inception. Rev. Codes 1905, §§ 5913–5917; Johnson v. Phœnix Ins. Co. 1 Wash. C. C. 378, Fed. Cas. No. 7,405; Marshall v. Union Ins. Co. 2 Wash. C. C. 357, Fed. Cas. No. 9,133; Moses v. Delaware Ins. Co. 1 Wash. C. C. 385, Fed. Cas. No. 9,872; Ocean Ins. Co. v. Sun Mut. Ins. Co. 8 Ben. 272, Fed. Cas. No. 10,407, affirmed in 107 U. S. 485, 27 L. ed. 337, 1 Sup. Ct. Rep. 582; Vale v. Phœnix Ins. Co. 1 Wash. C. C. 283, Fed. Cas. No. 16,811; Hardman v. Firemen's Ins. Co. (C. C.) 20 Fed. 594; Hamblet v. City Ins. Co. (D. C.) 36 Fed. 118; Columbia Ins. Co. v. Lawrence, 10 Pet. 507, 9 L. ed. 512; Hamburg-Bremen F. Ins. Co. v. Lewis, 4 App. D. C. 66; Hart v. British F. & M. Ins. Co. 80 Cal. 440, 22 Pac. 302; McCormick v. Orient Ins. Co. 86 Cal. 260, 24 Pac. 1003; Merchants' Ins. Co. v. Paige, 60 Ill. 448; Baldwin v. German Ins. Co. 105 Iowa, 379, 75 N. W. 326; Graham v. General Mut. Ins. Co. 6 La. Ann. 432; Oliver v. Greene, 3 Mass. 133, 3 Am. Dec. 96; Hoyt v. Gilman, 8 Mass. 336; Dickenson v. Commercial Ins. Co. Anthon, N. P. 92; Ely v. Hallett, 2 Caines, 57; New York Bowery F. Ins. Co. v. New York F. Ins. Co. 17 Wend. 359; Clarkson v. Western Assur. Co. 33 App. Div. 23, 52 N. Y. Supp. 508; Wilson v. Herkimer County Mut. Ins. Co. 6 N. Y. 53; Smith v. Columbia Ins. Co. 17 Pa. 253, 55 Am. Dec. 546; Fluch v. Lehigh Valley Ins. Co. 3 W. N. C. 433.

Material concealments or representations. Ely v. Hallett, 2 Caines, 57; Cooley, Ins. p. 1327; Columbia Ins. Co. v. Lawrence, 2 Pet. 25,

25 L. ed. 512; Capital City Ins. Co. v. Caldwell Bros. 95 Ala. 77, 10 So. 355; Germier v. Springfield F. & M. Ins. Co. 109 La. 341, 33 So. 361; Abbott v. Shawmut F. Ins. Co. 3 Allen, 213; Holloway v. Dwelling-House Ins. Co. 48 Mo. App. 1; Shoup v. Dwelling-House F. Ins. Co. 51 Mo. App. 286; Pierce v. Empire Ins. Co. 62 Barb. 636; Birmingham v. Empire Ins. Co. 42 Barb. 457; Phillips v. Knox County Mut. Ins. Co. 20 Ohio, 174; Columbia Ins. Co. v. Lawrence, 10 Pet. 507, 9 L. ed. 512; Planters' Mut. Ins. Co. v. Lloyd, 67 Ark. 590, 77 Am. St. Rep. 139, 56 S. W. 46.

Fraud vitiates all contracts. Rev. Codes 1905, §§ 5921–5956; Gettelman v. Commercial Union Assur. Co. 97 Wis. 237, 72 N. W. 627; Moore v. Virginia F. & M. Ins. Co. 28 Gratt. 508, 26 Am. Rep. 373; Welsh v. Union Cent. L. Ins. Co. 108 Iowa, 224, 50 L.R.A. 774, 78 N. W. 853; Firemans' Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 513; Mathews v. German Mut. Ins. Co. 9 La. Ann. 590; American Ins. Co. v. Barnett, 73 Mo. 364, 39 Am. Rep. 517; Remington v. Westchester F. Ins. Co. 14 R. I. 245; Cooley, Ins. p. 3588.

Noble, Blood, and *Adamson,* for respondent.

An action cannot be maintained by reason of fraud, unless the plaintiff can show that he has sustained loss or damage. 14 Am. & Eng. Enc. Law, 146; Thomas v. Dickinson, 65 Hun, 5, 19 N. Y. Supp. 600.

Misrepresentations by the insured must be made with actual intent to deceive, or to increase the risk of loss, to become material. Soules v. Brotherhood, A. Y. 19 N. D. 23, 120 N. W. 760; Rev. Codes 1905, Sec. 5934.

Plaintiff had an insurable interest in the property. Waterbury v. Dakota F. & M. Ins. Co. 6 Dak. 468, 43 N. W. 697.

Goss, J. This is an appeal from a judgment entered upon plaintiff's motion for judgment on the pleadings, on the ground that the answer failed to state or shadow forth a defense. The complaint recites that defendant insurance company issued to plaintiff a hail insurance policy, indemnifying him in the sum of $2,340, against loss by hail to the crop on certain land. That in July, 1910, a loss by hail occurred, by which damage to said crops in the sum of $1,500 was suffered by plaintiff. Three weeks later, defendant made an adjustment of said loss

at $1,500, and by said adjustment the defendant agreed to pay plaintiff therefor the sum of $1,500. That defendant has refused to pay the same or any part thereof; that plaintiff is the owner of said unpaid claim, and demands judgment for said sum of $1,500, with interest from July 21, 1910.

Defendant answers, admitting the issuance and delivery of the policy upon the crop, and alleges that without knowledge of the falsity of any statements made in the application for insurance it adjusted the loss at the sum of $1,500. That in the application for insurance were contained certain warranties which entered into and became a part of the policy of insurance thereafter delivered, the falsity of which avoids the policy, and rendered the contract of insurance void from its inception. The material parts of the application of plaintiff for insurance, aside from the description of the land and crop thereon, date of commencement, and termination of the policy, read as follows:

"I hereby certify that I am over twenty-one years of age and that I have a full interest in the crops above described. I further direct that, in the event of loss, insurance shall be payable to myself. . . . I guarantee the correctness of the above descriptions, and that all statements herein are true; and agree that any misrepresentations I make herein for the purpose of obtaining credit shall constitute and be an absolute bar to recovery for any loss that may be sustained under the policy issued by said company upon this application and contract. . . . For the purpose of obtaining credit I hereby certify that I am the owner of 160 acres of the above-described land, clear of encumbrances, except $1,200, and that I own personal property, exclusive of growing crops, worth $1,500, above encumbrances thereon and all exemptions." Two hundred and thirty-four acres of growing crop, upon 960 acres of land, is insured for the aggregate amount of $2,340, or $10 per acre for growing crops.

The answer also recites that after adjustment of said loss it discovered that the statements concerning the ownership of the crop and the financial or property interest of the defendant, made in the statements above quoted from the application for insurance, were wholly false in that "the plaintiff had only a partial interest, to wit, not to exceed a half interest in the crop raised upon the lands described in said application; that plaintiff was not the owner of 160 acres of land,

or any other amount of land whatever; and that the plaintiff was not the owner of $1,500 worth of personal property, exclusive of growing crops, and worth the sum of $1,500 above encumbrances thereon and exemptions allowed by law. That plaintiff was wholly insolvent; that he owned no real estate whatever, and that he had no personal property exceeding that exempt by law in the sum of $1,500. That the application for insurance, containing the warranties aforesaid, was received by the company at its office in Waseca, Minnesota; and that relying upon the representations and warranties contained in said application, and not otherwise, it was induced to and did deliver to plaintiff the policy of insurance. That said application was made and transmitted to the defendant by the plaintiff for the fraudulent purpose of inducing defendant to extend him the credit for the premium on said policy, and with the fraudulent purpose and intent to procure from the defendant a policy of insurance on property not owned by said plaintiff. That relying upon said application and the statements and warranties therein contained, defendant was induced to and did extend the credit for the premium to said plaintiff, and by reason thereof, and not otherwise, executed and delivered said policy of insurance to the plaintiff. That this defendant was induced to issue said policy by reason of the false and fraudulent representations and warranties so made to it by the plaintiff, and not otherwise, and had defendant known of the false character of the statements and warranties in said application, it would not have issued said policy. Such matters were learned by it after its adjustment of the loss, which adjustment had been made by defendant, relying wholly upon the representations and warranties made in the application and in the notice of loss. That in and by the terms and conditions of said policy the application therefor was made a part of said policy, and became and was a part of said policy at all times. And defendant asks that the policy be canceled and declared void and the action dismissed. Judgment for the full amount sued for was ordered and entered upon plaintiff's motion, the court adjudging that the answer did not, and the facts therein recited could not, constitute a defense in whole or in part. From the entry of judgment upon this motion defendant appeals.

Only one question presented is necessary to decide. Under the statement of the answer, uncontroverted by the complaint, that defendant

"had only a partial interest, to wit, not to exceed a one-half interest in the crops raised upon the lands described in said application," if true, as must be assumed for the purpose of passing upon this motion (Northern P. R. Co. v. Benson, 4 N. D. 506, 61 N. W. 1035; Storey v. Murphy, 9 N. D. 115, 81 N. W. 23) is plaintiff entitled to recover the full amount of $1,500, adjusted as the entire loss suffered to said crops covered by the policy? Other questions are raised that would be necessary to decide if this case were submitted upon the merits upon proven or stipulated facts, instead of upon plaintiff's motion for judgment assailing the answer. If the answer shadows forth a defense in whole or in part, the awarding of judgment upon the motion was error; and the answer must be construed liberally. Yerkes v. Crum, 2 N. D. 72, 49 N. W. 422. Every reasonable intendment or inference is to be taken in its favor. So construed it pleads that defendant was but the one-half owner of the crops insured, while he represented in the application for insurance that he possessed the entire ownership thereof. A one-half interest would clothe him with an insurable interest to that extent, and we may assume that the policy is enforceable, in spite of all the misrepresentations made, whether, accidentally, innocently, or intended, known or unknown to the insured. But the amount of recovery must be fixed by the measure of his insurable interest in the property, which must be taken as a one-half interest only in the entire loss adjusted at $1,500. Section 5903, Rev. Codes 1905, is controlling, to the extent that the utmost recovery to which plaintiff was entitled upon his motion, conceding without deciding that he was entitled to recover, would be $750 and interest thereon from the date of loss. This statute reads: "The measure of an insurable interest in property is the extent to which the insurer might be damnified, by loss or injury thereof." The utmost amount of his loss or injury could be not more than one half of $1,500, the total loss ascertained by the adjustment.

It is unnecessary to decide other questions presented. Upon trial, plaintiff may be able to prove his sole and entire ownership of the crop insured and his right to recover the full amount of the policy. A trial may also disclose a waiver or estoppel as to other questions presented. This court has already passed upon other questions that may be involved. Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799; J. P. Lamb & Co. v. Merchants' Nat. Mut. F. Ins. Co.

18 N. D. 253, 119 N. W. 1048, as modified by Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837. Consult also Waterbury v. Dakota F. & M. Ins. Co. 6 Dak. 468, 43 N. W. 697; Lyon v. Insurance Co. 6 Dak. 67, 50 N. W. 483; and Thompson v. Travelers' Ins. Co. 11 N. D. 274, 91 N. W. 75; and 13 N. D. 444, 101 N. W. 900; and Soules v. Brotherhood, A. Y. 19 N. D. 23, 120 N. W. 760. The Soules Case passes upon Section 5934 discussed in the briefs.

As the judgment must be reversed, and cannot be finally determined by a decision on this motion, it is ordered that the judgment appealed from be set aside, and the case is remanded for trial or further proceedings, appellant to recover upon the entry of final judgment herein for its costs and disbursements taxable on this appeal.

FLORA B. KNAPP v. C. H. TOLAN.

(49 L.R.A.(N.S.) 83, 142 N. W. 915.)

Habeas corpus — writ — res judicata — conflicting claimants — minor child.

1. Where the writ of habeas corpus is used not as a writ of liberty in the strict and original sense of the term, but only indirectly and theoretically as such and as a means for inquiring into and determining the rights of conflicting claimants to the care and custody of a minor child, the doctrine of *res judicata* will apply; and where no material change of circumstances is shown to have arisen since the determination of a prior proceeding in habeas corpus which has been adjudicated in a court of competent jurisdiction, the writ will not be granted by another court as a matter of right.

Court — power — custody.

2. Upon such a proceeding the court is not bound to deliver the child into the custody of any particular person or claimant, but may leave it in such custody as its welfare at the time may seem to require.

Note. — The above case seems to be in harmony with the weight of authority on the doctrine of *res judicata* as applied to a habeas corpus decree as to the custody of an infant. As shown by a note in 67 L.R.A. 783, a former adjudication on the question of the right to the custody of an infant child, brought up on habeas corpus, may be pleaded as *res judicata* and is conclusive upon the same parties upon the same state of facts.

Order — not final judgment — circumstances — new conditions — res judicata.

3. The order in such a case is not an unalterable final judgment, but will last only as long as no material change of circumstances requires a change of custody. Until some new fact, however, has occurred which has altered the state of the case or the relative claims of the parents or other claimants in some material respect, the decision of a court of competent jurisdiction on a former writ is conclusive upon a subsequent application.

4. In such cases the remedy is of an equitable nature.

Opinion filed August 19, 1913.

Application for writ of habeas corpus.
Writ denied.

Statement by BRUCE, J.

This is an application for a writ of habeas corpus. It is an attempt by means of this writ to retry in this court, and within two months, issues which have already been thoroughly tried and considered on a similar writ by the judge of the third judicial district. No new facts or change of circumstances are shown. Though the remedy of habeas corpus is resorted to, the proceeding is not in reality an application for "a writ of liberty," but an attempt on the part of a mother who, the record shows, has been grossly neglectful of her duties in the past, and whose career has been far from blameless, to regain possession of an illegitimate female child of eleven and a half years of age who, on account of such neglect, was intrusted by the county commissioners of Grand Forks county to the care of a well-to-do farmer and wife of Traill county, who have properly cared for such child, are anxious for her retention, and who appear to be in every way worthy of the trust. The only showing that the petitioner can now make, and that was made before the district court, is an attempt at reformation, perhaps real, and a present earning capacity as a cook in a boarding house at Seattle of $45 a month. The child was conceived out of wedlock, and was born four and a half months after petitioner's marriage to another man than the father and whom she deserted six years later. After such desertion the husband obtained a divorce and the custody of the child, but was himself soon sent to the penitentiary for a term of years for a bestial crime. After this event the child was intrusted to the care of the

defendant herein. In dismissing the former writ of habeas corpus, the district court, in its memorandum opinion, said among other things: "I have had a long talk with this child. I discover from my examination and conversation with her that she is an unusually intelligent child. . . . She told me all her present relations in her present home. . . . I began in her present home and then traveled back to her life at the county house, and then I easily gravitated back into the life which she had prior to going to that county house, and she told me, in substance, with reference to that life, that she didn't always get the best treatment; that her mother was away very frequently until midnight and later, and that men came to see her mother late, and that her mother finally went away with a man. . . . Then I put the question straight to her whether she would like to live with Mr. and Mrs. Tolan or go back to her mother, and promptly she said she preferred to stay with Mr. and Mrs. Tolan, and when I asked her her reasons she said she had a good bed to sleep in and plenty to eat, and that they were kind to her; she had a chance to go to school. Now, that is the state of mind of that child. With those conditions before me and with this record, which you yourself have put before the court, and which is signed by Mrs. Knapp, the mother of this child, she comes here now and asks me to take this child out of this home, with these surroundings, and chance sending her away off out there where the Lord only knows what will become of her. I can't do it. Now after hearing counsel, and due consideration thereof being given, and the court being moved by the considerations involved in § 4129, ¶ 1 thereof, by 'what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare,' and the court deeming that the child is of sufficient age to form an intelligent preference, and has formed such intelligent preference, and exhibited the same to the court as above indicated . . . the court now remands the custody of said child to the respondent herein, and this dismisses this writ."

N. C. Wegner, Grand Forks, for petitioner.

BRUCE, J. (after stating the facts as above). This is not a proper case for the issuance of the writ of habeas corpus. It may be the general rule, and the rule of this state, that the doctrine of *res judicata*

is not applicable to the decision of one court of justice on a writ of habeas corpus in a criminal case, or where the writ is in the true sense of the term "a writ of liberty" (see Church, Habeas Corpus, § 386; Carruth v. Taylor, 8 N. D. 166, 77 N. W. 617; State v. Beaverstad, 12 N. D. 527, 97 N. W. 548; Re Snell, 31 Minn. 110, 16 N. W. 692). The situation, however, is very different where the writ is used in a manner which was not contemplated at the time of its creation, and not as a writ of liberty, but as a means of obtaining the possession or control of one whose personal liberty is only in a remote and technical sense involved or endangered. In the case before us the question is not really whether the infant is restrained of its liberty, but who is entitled to its custody. It is true that the charge is that the child is unlawfully restrained, etc., but the gist of the complaint is not that the child is unlawfully deprived of its liberty, but that such restraint is in prejudice of the rights of the mother to its custody. The case is really one of private parties contesting private rights, under the form of proceedings on habeas corpus. In such cases both principle and considerations of public policy require the application of the doctrine of estoppel to judicial proceedings. It never has been, and never can be, the law that in such a case both the child and its custodians can be dragged from court to court and subjected to a ceaseless round of discomfort and litigation at the whim of the petitioner. See State ex rel. Lembke v. Bechdel, 37 Minn. 360, 5 Am. St. Rep. 854, 34 N. W. 334, 7 Am. Crim. Rep. 227; Mercein v. People, 25 Wend. 64, 35 Am. Dec. 653; People ex rel. Lawrence v. Brady, 56 N. Y. 182; Freeman, Judgm. § 329. The determination of a court on habeas corpus respecting the custody of children stands upon a different footing than a decision in a case where the writ is used as a writ of liberty. Here its decision is *res judicata,* and precludes the issuance of a second writ upon the same state of facts. 9 Enc. Pl. & Pr. 1070. The district court was not bound to deliver the child into the custody of either claimant, but had the power and the duty to leave it in such custody as its welfare seemed to require. Until some new fact or change of circumstances has occurred which has altered the state of the case or the relative claims of the parties in some material respect, the decision of the district court is conclusive upon a subsequent application for a writ of habeas corpus. Church, Habeas Corpus, § 387; 9 Enc. Pl. & Pr. 1070; State ex rel.

Lembke v. Bechdel, 37 Minn. 360, 5 Am. St. Rep. 854, 34 N. W. 334, 7 Am. Crim. Rep. 227; Mercein v. People, 25 Wend. 64, 35 Am. Dec. 653; People ex rel. Lawrence v. Brady, 56 N. Y. 182; Freeman, Judgm. § 324. In the case at bar no change of circumstances is shown. The district court not only dismissed the writ, but remanded the child to the custody of the respondent. This it had the power to do, and its action is not, in the absence of a material change of circumstances, subject to review in this or any other court in a subsequent habeas corpus proceeding. In such a class of cases, indeed, the remedy by habeas corpus is of an equitable nature. It is in the welfare of the child, and not in the desires of the claimants, that the law is chiefly interested.

The writ is denied.

FRED C. THORNHILL and Bob Willits, Copartners as Willits & Thornhill v. JOURGEN OLSON.

(142 N. W. 913.)

Appeal — dismissal — appellant — right to dismiss.

1. An appellant cannot, as a matter of right, dismiss his own appeal.

Dismissal — without prejudice — equity — mistake — inadvertence.

2. The supreme court will not, except upon a showing of inadvertence or mistake or some other reason which may entitle the petitioner to equitable consideration and to a special order, allow a dismissal of an appeal without prejudice.

Action — real property — possession — judgment — stay of proceedings — appeal — new trial — motion — laws — emergency clause.

3. Where, however, in an action to recover the possession of real property, judgment was rendered for the plaintiffs, but the district judge in open court, and on the 28th day of March, announced that an order would be entered staying all proceedings on the part of the plaintiffs except the entry of judgment, and on the 2d day of April, 1913, plaintiffs entered such judgment, and on the 3d day of April, 1913, such order staying the proceedings was entered, but on the 2d day of April, 1913, and one day prior to the formal entry of said stay order, the plaintiffs took possession of said premises, and on the 9th day of April, 1913, the defendant obtained an order restraining the plain-

tiffs from in any way interfering with the defendant's possession, but, prior to obtaining such order and in order to obtain the same, took an appeal to the supreme court from the judgment formerly entered during such proceedings, and at such time it being understood by counsel for the respective parties that such appeal could be taken under the provisions of chapter 131 of the Laws of 1913, and the evidence tends to show that on account of the necessity for the injunctional proceedings and the understanding that such appeal should be taken subject to such act of 1913, the defendant neglected to make a motion for a new trial, which under the former statutes and holdings of this state would have been necessary in order to review the evidence upon such appeal, and it also appearing that the act of 1913 was approved on March 13, 1913, but having no emergency clause thereto did not take effect until July 1, 1913, *held*, that the supreme court may issue an order dismissing such appeal without prejudice to a second appeal from the same judgment or to take advantage of whatever rights are secured by chapter 131 of the Laws of 1913.

Opinion filed August 19, 1913.

Application for an order dismissing an appeal from a judgment without prejudice to a second appeal from the same judgment or from an order overruling a motion for a new trial if such order shall be made.

Petition granted.

Statement by BRUCE, J.

This is an application for an order dismissing an appeal from a judgment without prejudice to a second appeal from the same judgment, or from an order overruling a motion for a new trial if such order shall be made.

From the evidence in the case it appears that the action was one to determine the title and right to the possession of real property in Ward county; that the cause was submitted to a jury on or about the 15th day of March, 1913, and a verdict rendered in favor of plaintiffs for the possession of the property and for $750 for the use thereof; that on the 28th day of March, 1913, the district court made and filed findings of fact, conclusions of law, and order for judgment; that at such time the court also announced in open court an order staying all proceedings on the part of plaintiffs except the entry of judgment for a period of sixty days; that thereafter and on the 2d day of April, 1913, plaintiffs' attorneys entered judgment upon said findings; that on April 3d, a written order embodying the stay of proceedings before

mentioned was formally made and entered; that on the 2d day of April, 1913, and one day prior to the formal entry of said stay of proceedings, the said plaintiffs took possession of said premises and insisted in keeping possession thereof, and on the 3d or 4th days of April, 1913, refused to recognize the order staying proceedings of said action, and were thereupon forcibly ejected from said dwelling by the defendant; that on the 9th day of April, 1913, the defendant obtained an order from the district court restraining the plaintiffs from in any way interfering with defendant's possession of said premises; the defendant, prior to the obtaining of such an order and in order to obtain the same, having first served on the plaintiffs' attorneys and filed in the office of the clerk of the district court an undertaking on appeal from the judgment in said action; that prior to the perfecting of such appeal the defendant ordered a transcript from the official reporter, and counsel for above plaintiffs and defendant understood that the preparation of such transcript and the record on appeal could and should be so made as to conform to the practice outlined by chapter 131 of the Laws of 1913; that said appeal was taken from said judgment without a motion for a new trial, with an idea on the part of the defendant, as defendant's counsel in his affidavit alleges, that all proceedings before the supreme court would be covered by the provisions of said new practice act, and that a motion for a new trial would be unnecessary in order to permit the supreme court to review the sufficiency of the evidence to sustain the verdict, decision, and judgment of the district court. Defendant's counsel also alleges in his affidavit that said appeal was taken in haste under the pressure of the action on the part of the plaintiffs in refusing to recognize the stay orders of the court, and without opportunity for due consideration of the nature and effect of the said new practice act. Plaintiffs' counsel, on the other hand, alleges that the said appeal was taken merely in order to obtain an injunction dispossessing his client of premises to the occupation of which he was entitled. The affidavits also show that on the 3d day of June, 1913, a stipulation was made between counsel, stating the time within which the defendant might serve notice of intention to move for a new trial, settle the statement of the case, prepare and make motions for a new trial, until the 15th day of July, 1913; that on the 1st day of July, 1913, the defendant served a certified transcript of the testimony in the

manner and form as required by chapter 131 of the Laws of 1913, and on the 9th day of July, 1913, a stipulation was also made that such transcript might be settled by the district judge on the 17th day of July, 1913, and that such settlement was delayed by the absence of the judge, but was settled on the 31st day of July, 1913. The petition of the defendant also contains a general affidavit of merits.

Palda, Aaker, & Greene, for appellant.
Greenleaf, Bradford, & Nash, for respondent.

BRUCE, J. (after stating the facts as above). The petition is based upon the theory that the judgment having been entered on the 2d day of April, 1913, and the appeal taken on or about the 9th day of April, 1913, and prior to the taking effect of chapter 131 of the Laws of 1913, which was on the 1st day of July, 1913, the appeal was in all particulars governed by the statutes in force prior to the enactment of said chapter 131 of the Laws of 1913, and that under said prior statutes a motion for a new trial was a prerequisite to a review by the supreme court of the sufficiency of the evidence to sustain the verdict, decision, and judgment of the district court. This motion, it is conceded, is not necessary under § 9, chapter 131 of the Laws of 1913. Counsel for defendant desires such review of the evidence, and relies upon § 7223 of the Rev. Codes of 1905, which provides that "the dismissal of an appeal by the appellant or by the court for want of prosecution, unless the court shall at the time otherwise expressly order, shall render the sureties upon the undertaking or bond given under this chapter liable in the same manner and to the same extent as if the judgment or order appealed from had been affirmed." He contends that under this section the supreme court may, on appellant's motion, dismiss an appeal and expressly order that the same may be without prejudice to a subsequent appeal and to the right of the appellant, before taking such appeal, to make a motion for a new trial which he has formerly neglected to do, and which is necessary to a review of the evidence under the law in force prior to 1913, but is not necessary under chapter 131 of such Laws of 1913. He contends that he has sufficient grounds for such order, both in the fact that he misunderstood the effect of chapter 131 of the Laws of 1913, and that he was forced to take his appeal prior to

the taking effect of said act (though not until after its passage, which was March 13, 1913), on account of the action of the plaintiffs in wrongfully, and in violation of the stay of proceedings, entering into possession of the premises in dispute.

It is well established that an appellant cannot as a matter of right dismiss his own appeal. United States v. Minnesota & N. W. R. Co. 18 How. 241, 242, 15 L. ed. 347, 348; Donallen v. Tannage Patent Co. 24 C. C. A. 647, 50 U. S. App. 1, 79 Fed. 385. It is also quite well established that a court will not usually allow a dismissal without prejudice, except upon a showing of inadvertence or mistake, or some other reason which may entitle the petitioner to equitable consideration and to a special order. Donallen v. Tannage Patent Co. supra; United States v. Minnesota & N. W. R. Co. 18 How. 241–243, 15 L. ed. 347, 348. Here, however, we believe that there is ground for such permission. The appeal by counsel for the appellant was taken on the 2d day of April, 1913. It was necessary at that time, in order to secure the rights of the appellant under the stay of proceedings ordered by the district court. When it was taken, both parties intended and believed that it was and could be taken under the provisions of chapter 131 of the Laws of 1913. It was a matter of common knowledge to the members of the bar, of which this court must take judicial notice, that the act of 1913 was before the legislature and had been passed by that body. It had, in fact, been approved March 13, 1913, and before the taking of the appeal. If said act had had attached to it the emergency clause which has come to be a very common part of our legislation, it would have taken effect on the 13th day of March, 1913, and not on July 1, 1913. It is a matter now of much dispute among the legal profession, and one which has not yet been decided by this court, whether such act applies to appeals from judgments which have been rendered prior to its enactment, at any rate in so far as matters of form are concerned. The act as a whole had not at the time of the appeal in question been generally published. It would be a strange construction of the law and of the equitable powers of this court to apply the doctrine of "ignorance of the law excuses no one," even if such doctrine universally prevails (and of that the writer of this opinion, speaking for himself alone, has some question), to a case such as this where the discretionary and equitable powers of the court may be

called upon, where the statutes of North Dakota, unlike those of the United States, expressly provide that the court may expressly order that a dismissal may be without prejudice without in any way limiting it as to the grounds of such order, and where the new act, though passed by the legislature, had not been published, and whether it contained an emergency clause or not was unknown to the public at large.

The appeal from the judgment in this action is therefore dismissed without prejudice to the defendant's right to take a second appeal therefrom or to take advantage of any rights that he may have under chapter 131 of the Laws of 1913.

BURKE, J., and GOSS, J., did not participate.

THE STATE OF NORTH DAKOTA EX REL. F. C. HEFFRON, Assistant Attorney General of State of North Dakota, v. THE DISTRICT COURT FOR THE COUNTY OF STARK in the Tenth Judicial District of the State of North Dakota, and the Hon. K. E. Leighton, Acting Judge for said District Court in the Action in Said District Court Entitled, "The State of North Dakota, Plaintiff, vs. Charles Nolan, Defendant."

(143 N. W. 143.)

Inferior court — jurisdiction — preliminary question — error — remedy — supreme court — review — Constitution.

1. Where an inferior court decides a jurisdictional question, or one preliminary to the main controversy submitted to it adversely to its jurisdiction, and refuses further action, such decision, although judicial in character, constitutes, if erroneous, a refusal to perform its duties with respect to the main controversy, and in the absence of other adequate and sufficient remedy the supreme court under the superintending control granted in § 86, article 4, of the Constitution, may review such decision, and consider whether or not it was the duty of the inferior court to entertain the controversy.

Note. — For an exhaustive treatment of the question of the superintending control and supervisory jurisdiction over inferior courts, see extensive note in 51 L.R.A. 33, and supplemental note thereto in 20 L.R.A.(N.S.) 942.

Inferior court — duty — jurisdiction — supreme court — mandamus.

2. In the exercise of its superintending control, and where the inferior court erroneously decides a jurisdictional question, or one preliminary to the main controversy submitted to it adversely to its jurisdiction, the supreme court may compel a performance of its duty by the inferior court and the taking of such jurisdiction by the writ of mandamus.

Action — dismissal — liquor nuisance — attachment — contempt — injunction.

3. The dismissal of the original action for an injunction to abate a liquor nuisance, brought under § 9374, Rev. Codes 1905, does not in itself operate to dismiss an attachment for a contempt of court committed by the unlawful sale of liquor in the premises affected during the life of the injunction.

District court — agreement — action — dismissal.

4. An agreement or promise on the part of the district court to dismiss an action does not constitute such a dismissal.

Opinion filed September 13, 1913.

Mandamus by the State on relation of F. C. Heffron, Assistant Attorney General of State of North Dakota, against The District Court for the County of Stark in the Tenth Judicial District of the State of North Dakota, and the *Hon. K. E. Leighton,* acting Judge for said District Court in the action in said District Court entitled, "The State of North Dakota, Plaintiff, vs. Charles Nolan, Defendant."

Writ allowed.

Statement by BRUCE, J.

This is an application for a writ which shall command the district court of the county of Stark to proceed and try one Charles Nolan upon a charge of contempt of court. It is an appeal to the supervisory powers of this court conferred by § 86 of article 4 of the Constitution of North Dakota. In November, 1907, an action was commenced in the district court for said Stark county entitled, "State of North Dakota, ex rel. T. F. McCue, Attorney General of North Dakota, Plaintiff, vs. Chas. Nolan and E. J. Berry, Defendants, "to abate a liquor nuisance on lot 15, block 4, town of Dickinson," and summons, complaint, and injunction therein were served on defendants. This action was dismissed on motion of plaintiff in August, 1909. On June 9, 1909, another action in equity was commenced in said district court

for the same purpose and between the same parties, and at the time of the issuance of the summons and complaint the Honorable W. C. Crawford, judge of said district court, made an order restraining said defendants from keeping said premises as a place where intoxicating liquors were sold, or kept for sale as a beverage, or where persons were permitted to resort for the purpose of drinking intoxicating liquors. Said injunctional order was served on the defendant, Charles Nolan, on June 9, 1909. On July 20, 1909, the Honorable W. C. Crawford duly transferred said action by written request to Honorable A. G. Burr, judge of the ninth judicial district. On or about July 21, 1909, Honorable A. G. Burr issued an attachment for said Charles Nolan, requiring him to appear before the court July 29, 1909, to answer to a charge of contempt of court for having violated such injunction. Before said proceedings were called for trial, and on August 6, 1909, said Charles Nolan procured a continuance on the ground of sickness, and on November 11, 1909, on motion of plaintiff, said proceedings were dismissed and defendant discharged, no hearing ever having been held thereunder. Immediately after said order of dismissal, the Honorable A. G. Burr issued another attachment for said Nolan, requiring defendant to appear before the court on December 7, 1909, to answer to the charge of contempt in having violated and disobeyed said injunction. The charge in the second attachment was the same as that in the former, except that in the former he was charged with having violated the injunction in having sold liquor from the 9th day of June, 1909, to the 19th day of July, 1909, while in the latter he was charged with having sold liquor from the 9th day of June, 1909, to the 9th day of November, 1909. Before there was any hearing upon this attachment, and on December 10, 1909, the Honorable A. G. Burr duly transferred the principal action by written request to Honorable W. H. Winchester, judge of the sixth judicial district. On December 13, 1909, Honorable W. H. Winchester duly transferred the principal action, by written request, to Honorable W. C. Crawford, judge of the tenth judicial district, and on the 11th day of October, A. D. 1909, the defendant E. J. Berry, who was the owner of the building in question, executed an undertaking and petition to abate said action, and on said matter being presented to the court, and some time during the year 1909, the Honorable W. C. Crawford fixed the amount of the undertaking, and stated

that, upon the filing of said undertaking and payment of the costs, he would order an abatement of the action. Said undertaking is now in the files, but the time of filing is not indorsed on said undertaking or petition, nor is there any record of the time of said filing, and no order of abatement has ever been made or signed. The affidavits in the record show, however, that some time during the year 1909 the court had fixed the value of the property and determined the amount of the bond, and that said bond had been duly approved, and that the costs, as fixed by the court, have been paid into the clerk's office. On November 6, 1912, the Honorable Frank E. Fisk, judge of the eleventh judicial district, was requested by the Honorable W. C. Crawford to try and determine all matters and issues in the said case. And on November 8, 1912, a motion was made by the defendants' attorneys to dismiss the contempt proceedings on the grounds that: "1. The affidavit upon which said warrant is based does not state or show by positive averment a prima facie case in behalf of the state in this that (a) the affidavit of F. C. Heffron is made entirely upon information and belief; in so far as a violation of the injunctional order is concerned; (b) the affidavits of J. C. Lemar, Gust Morberg, and H. L. Thompson do not state or show, by way of positive averment or at all, the sale or charge of sale of intoxicating liquors at the time referred to in the affidavit, by this defendant Charles Nolan, and that the affidavits of said Lemar, Morberg, and Thompson nowhere state or show the sale of intoxicating liquor or the violation of any injunctional order by the defendant Charles Nolan, personally. That at the time of the making of the affidavit herein, and upon which this warrant of attachment for contempt as made and sworn to, there was in this court, pending and undisposed of, another attachment based upon the same injunctional order and the same action specified in this warrant, and against the same defendant, Charles Nolan, for the identical contempt as charged herein. 2. That the original action upon this attachment is based, which action was begun under date of June 1, 1909, has, in all things and pursuant to the statutes of North Dakota in such case made and provided, been abated by the payment of the costs herein and the giving of a bond in the sum of $6,000 by the owner of the property, and was abated at the time of the commencement of these proceedings and the injunctional order thereby dissolved. 3. That prior to the issuance of

this said warrant of attachment under date of November 17, 1909, and to wit, on July 19, 1909, an attachment proceeding for contempt against the said defendant Charles Nolan, based upon the same action in equity, begun in said court under date of June 1, 1909, and involving the same property and the same injunction, the same defendant and the same violation, was issued and begun against this defendant; and the contempt in this proceeding charged is the same contempt as charged in the same case as was charged in the proceeding begun on July 19, 1909, and in this court such proceedings were had upon the said warrant of attachment for contempt issued under date of July 19, 1909; that the said proceedings were dismissed under date of November 11, 1909, and the said defendant Charles Nolan was in all things discharged, and his bond heretofore given was vacated and annulled, and said defendant and his sureties absolved from all liabilities thereunder. 4. That the said attachment proceedings and the action upon which the same are based has, in all things, been abated by operation of the law. 5. That the court has no jurisdiction to proceed herein. 6. That the Honorable W. C. Crawford, judge of the tenth judicial district, is in no manner disqualified to hear and determine the proceeding herein, and this defendant has in no manner and does not now demand or request another judge to try the case. 7. That the affidavits on which the warrant was issued did not, and do not, state facts sufficient to confer jurisdiction in this court or to charge the defendant guilty of contempt in said action, and that the said affidavits are not made or sworn to within the state of North Dakota, and the said affidavits fail to state or clearly show the offenses to have been committed." This motion was based upon all the records and files in said case. On the 5th day of February, 1913, the Honorable Frank E. Fisk denied said motion. His order denying the same being as follows: "The above-entitled action is an action for criminal contempt brought by the state of North Dakota against the above-named defendant, charging him with having violated an injunction duly served upon him. Defendant herein having moved the court to dismiss the action upon the grounds that said contempt proceedings were not instituted until after the abatement of the case in which the said injunction was duly issued, and the matter having been submitted to the court and the court been fully advised therein, now therefore it is ordered that said motion be and the same

is hereby denied." On May 15, 1913, pursuant to written request of Honorable W. C. Crawford, the case again came on for trial before Honorable K. E. Leighton, judge of the eighth judicial district, at which time defendant again moved to dismiss the proceedings on practically the same grounds as those denied by Honorable Judge Fisk, but in addition thereto upon the charge that the state had been guilty of laches in bringing said proceeding to trial, and upon a certificate of the Honorable W. C. Crawford, judge of the tenth judicial district, and dated May 13, 1913, which was not considered by the said Judge Fisk, and which was as follows: "The undersigned, W. C. Crawford, judge of the above said court, hereby certifies that during all the year 1909 and continuously since that and now, I have been the judge of said court; that during said year an action in equity under the provisions of the prohibition laws of the state of North Dakota was begun against said defendant Charles Nolan and E. J. Berry, and under date of June 9th of said year an injunctional order in said action was issued; that the main action thus instituted has never been brought to trial by the state; that during said year through his attorneys the defendant Berry, as the owner of the property involved in said action, namely, lot 15 in block 4, city of Dickinson, appeared in said action and made application for the abatement of said action, as appears by the files in such case, and presented to me as such judge a bond pursuant to the statute; that said bond bore date October 1, 1909, and was acknowledged October 11, 1909; that upon said appearance and at the request of the attorneys for the defendants, I designated to the said attorneys the amount of said bonds, and fixed the value of the property and fixed the amount of the attorneys' fees for the plaintiff's attorneys, and then stated to said attorneys and to the clerk of the said court, that upon the presenting said bond and filing same with the said clerk, and upon the payment of the costs in the case, that the said action, being an action in equity, would be abated, and that I would so order. At said time I fixed and designated the value of said property at $6,000, and ordered that the bond should be in said amount, and should, if the clerk approved the sureties thereon, be approved by him. That said bond was signed by E. J. Berry, as principal, and A. T. Crowl and R. E. Fuller, as sureties, and was in the form prescribed by statute." On May 15, 1913, the Honorable K. E. Leighton granted this motion to dismiss

the said contempt proceeding, and based his decision and order upon the records and files in the case, and upon the certificate of the Honorable W. C. Crawford, last referred to.

F. C. Heffron, Assistant Attorney General for State of North Dakota, for petitioner.

L. A. Simpson, W. F. Burnett, and *H. C. Berry,* of Dickinson, for defendants.

Andrew Miller, Attorney General, and *F. C. Heffron,* Assistant Attorney General, for petitioner.

An order of the district court, dismissing proceedings to punish the defendant for statutory criminal contempt, is not appealable. Rev. Codes 1905, § 9374; State ex rel. Morrill v. Massey, 10 N. D. 154, 86 N. W. 225.

Appeals lie only where defendant is found guilty. Rev. Codes 1905, § 7573.

The order not being appealable, and there being no other remedy, the extraordinary and supervising powers of the supreme court may be invoked. State Const. §§ 86, 87; State ex rel. Red River Brick Corp. v. District Ct. — N. D. —, 138 N. W. 988.

Where the district court, by an erroneous construction and decision of some preliminary question of law, or of practice, has dismissed the main action, and refused to go into its merits, mandamus will lie to compel it to proceed with the trial, on its merits. High, Extr. Legal Rem. § 151; Raleigh v. First Judicial Dist. Ct. 24 Mont. 306, 81 Am. St. Rep. 431, 61 Pac. 991; State ex rel. Sorrel v. Foster, 106 La. 428, 31 So. 57; State ex rel. Northern P. R. Co. v. Loud, 24 Mont. 428, 62 Pac. 497; State ex rel. Aldrach v. Morse, 31 Utah, 213, 7 L.R.A. (N.S.) 1127, 87 Pac. 705.

The right to mandamus in such cases is well established. People ex rel. Hamilton v. Barnes, 66 Cal. 594, 6 Pac. 698; Ex parte Bradstreet, 7 Pet. 634, 645, 8 L. ed. 810, 815; Re Parker, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708; State ex rel. Shannon v. Hunter, 3 Wash. 92, 27 Pac. 1076; State ex rel. Keane v. Murphy, 19 Nev. 89, 6 Pac. 840; Kimball v. Morris, 2 Met. 573; Merced Min. Co. v. Fremont, 7 Cal. 130, 7 Mor. Min. Rep. 309; Lindsay v. Wayne County Circuit Judge, 63 Mich. 735, 30 N. W. 590; People ex rel. Robinson v. Swift,

59 Mich. 529; Hoffman v. Allegan Circuit Judge, 150 Mich. 58, 113 N. W. 584; State ex rel. Chism v. Twenty-Sixth Dist. Judge, 34 La. Ann. 1177; People ex rel. Oelricks v. Superior Ct. 5 Wend. 114, 10 Wend. 285; Ex parte State, 115 Ala. 123, 22 So. 115; 2 Spelling, Extr. Relief, §§ 1398, 1404.

The supreme court has and may exercise supervisory powers in such cases. State ex rel. Red River Brick Corp. v. District Ct. — N. D. —, 138 N. W. 988; State ex rel. Sutton v. Dist. Ct. 27 Mont. 128, 69 Pac. 988; State ex rel. Fourth Nat. Bank v. Johnson, 51 L.R.A. 33, note; State ex rel. McGovern v. Williams, 20 L.R.A.(N.S.) 941, note.

The contempt charged in this case is based upon facts declared by statute to constitute contempt, and the district court has not discretion in the matter. Rev. Codes 1905, § 9374.

Even though the action to abate the nuisance, in which an injunction was issued, is dismissed, yet proceedings to punish for a contempt committed while the injunction was in force may still be heard. Gompers v. Buck's Stove & Range Co. 221 U. S. 418–451, 55 L. ed. 797–810, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492; State v. Gilpin, 1 Del. Ch. 25; Vertner v. Martin, 10 Smedes & M. 103; 9 Cyc. 33 M.

The plea of "former jeopardy" does not apply, and would not apply even in a strictly criminal proceeding. 12 Cyc. 261 B.

Bruce, J. (after stating the facts as above). Article 4, § 86, of the Constitution of North Dakota provides that "the supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law."

Section 7822 of the Code provides: "The writ of mandamus may be issued by the supreme and district courts to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." Section 9374, which relates to injunctions issued in cases of violation of the liquor laws, among other things, provides: "Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt, for the first offense by a fine of not less than two hundred nor more than one thousand dollars, and by

imprisonment in the county jail not less than ninety days nor more than one year," etc. This latter statute imposes duty upon the district judge in cases of contempt in injunctional proceedings in liquor cases which otherwise might be discretionary. The state of California has a statutory provision in relation to mandamus, which is similar to our own. See Civ. Code Proc. (Cal.) § 1085. In the case of People ex rel. Hamilton v. Barnes, 66 Cal. 594, 6 Pac. 698, it was held that a writ of mandamus lay to compel a justice of the peace to proceed with the preliminary examination of a person regularly charged with having committed a public offense, arrested and brought before him, and that a refusal to proceed with the examination was not justified by the mere statement of the counsel for the defendant that an examination for the same offense had been had before another magistrate, on which the defendant had been held to answer. The court, among other things, said: "The application here is for a writ of mandate, to compel the justice of the peace to proceed with the preliminary examination of Charles W. Finney. This writ may be issued by this court to any inferior tribunal or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station (Civ. Code Proc. § 1085). . . . Peremptory language is used in all these sections [sections relating to preliminary examinations before justices of the peace]. The mandate is expressed by the word 'must.' In § 858, 'the magistrate must immediately inform him of the charge against him,' etc. In § 859, 'he must allow the defendant a reasonable time to send for counsel,' etc. In § 860, 'the magistrate must, immediately after the appearance of counsel, or if, after waiting a reasonable time therefor, none appears, proceed to examine the case.' The duties of the magistrate are pointed out in clear and distinct terms, and especially enjoined by imperative words. It is difficult to employ language more mandatory in its character. As to the further duties of the magistrate, the same imperative words are used. . . . We are of opinion that the magistrate was commanded by the law to proceed with the examination of the case before us, and that on his failure to do so the writ asked for to compel him is appropriate. The magistrate had nothing to do with what had transpired before any other magistrate. It was not a matter for his consideration,—was entirely foreign to his duty in the premises. The discharge of the prisoners was

a failure to perform the duty which the law enjoined upon him." In the case of State ex rel. McGovern v. Williams, 136 Wis. 1, 20 L.R.A. (N.S.) 941, 116 N. W. 225, it was held that "where an inferior court decides a jurisdictional question, or one preliminary to the main controversy submitted to it adversely to its jurisdiction, and refuses further action, such decision, although judicial in character, constitutes, if erroneous, a refusal to perform its duty with respect to the main controversy; and in the absence of other adequate and sufficient remedy," the supreme court can, under the superintending control granted in § 3, art. 7, of the Constitution, review such decision and consider whether or not it was the duty of the inferior court to entertain the controversy, and that performance of its duty by the inferior court in such a case can be compelled by mandamus.

Nor does the fact that a charge of contempt embracing a shorter length of time than that stated in the subsequent charge had been dismissed prior to the institution of the subsequent proceedings in any way preclude a proceeding under the latter. Not merely did the second charge cover a longer period of time, but since the former proceeding was dismissed without any hearing on the merits or plea being filed, there was no former jeopardy, nor could the rule of *res judicata* apply. State v. Gilpin, 1 Del. Ch. 25; Vertner v. Martin, 10 Smedes & M. 103; 9 Cyc. 33 M; 12 Cyc. 261 B; State v. Winbauer, 21 N. D. 161, 129 N. W. 97.

The order of the district court dismissing the proceedings to punish the defendant Charles Nolan for statutory criminal contempt under § 9374 is not appealable, since § 7573 of the Rev. Codes of 1905 only allows appeals in contempt cases where the defendant has been found guilty; and we held in the case of State ex rel. Morrill v. Massey, 10 N. D. 154, 86 N. W. 225, that in the absence of a statute authorizing appeals in criminal contempt cases, no appeal will lie. There was, therefore, no other adequate remedy, and the case is one which clearly comes within the superintending control of the supreme court and one in which mandamus may and should issue. State ex rel. Northern P. R. Co. v. Loud, 24 Mont. 428, 62 Pac. 497; People ex rel. Hamilton v. Barnes, 66 Cal. 594, 6 Pac. 698; Merced Min. Co. v. Fremont, 7 Cal. 130, 7 Mor. Min. Rep. 309; State ex rel. Red River Brick Corp. v. District Ct. — N. D. —, 138 N. W. 988; State ex rel. Sutton v.

District Ct. 27 Mont. 128, 69 Pac. 988. This, of course, is not a case where it is sought by mandamus to control the decision of an inferior court upon the merits of a cause, but merely to proceed with a hearing when it has dismissed and refused to go into the merits of the same on account of an erroneous construction of a question of law and of practice preliminary to the final hearing. In such latter case mandamus will issue. High, Extr. Legal Rem. § 151; Raleigh v. First Judicial Dist. Ct. 24 Mont. 306, 81 Am. St. Rep. 431, 61 Pac. 991; State ex rel. Sorrel v. Foster, 106 La. 428, 31 So. 57; State ex rel. Northern P. R. Co. v. Loud, 24 Mont. 428, 62 Pac. 497; People ex rel. Hamilton v. Barnes, 66 Cal. 594, 6 Pac. 698; Ex parte Parker, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 128; State ex rel. Shannon v. Hunter, 3 Wash. 92, 27 Pac. 1076; State ex rel. Keane v. Murphy, 19 Nev. 89, 6 Pac. 840; Merced Min. Co. v. Fremont, 7 Cal. 130, 7 Mor. Min. Rep. 309; Lindsay v. Wayne County Circuit Judge, 63 Mich. 735, 30 N. W. 590; State ex rel. Chism v. Twenty-Sixth Dist. Judge, 34 La. Ann. 1177; Ex parte State, 115 Ala. 123, 22 So. 115; 2 Spelling, Extr. Relief, §§ 1398, 1404; State ex rel. Red River Brick Corp. v. District Ct. — N. D. —, 138 N. W. 988; State ex rel. Fourth Nat. Bank v. Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L.R.A. 33, note; State ex rel. McGovern v. Williams, 136 Wis. 1, 116 N. W. 225, 20 L.R.A.(N.S.) 941, note.

The trial court erred in holding that a dismissal or abatement of the original action in which the injunction was granted (if dismissal there was), abated and disposed of the attachment proceedings for a contempt of court charged to have been committed while the injunction was in force. When once the contempt, if any there was, had been committed, it became a public offense which was separable and distinct from the action in relation to which it might have been committed. See State v. Nathans, 49 S. C. 199, 27 S. E. 52, 55; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 451, 55 L. ed. 797, 810, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492. So, too, there is no evidence in the record of any such dismissal, but merely of a promise by the court to dismiss the action upon the doing of certain things which it was for the court by a subsequent order to determine had been done. A promise to make an order rendering a certain judgment is not in law the making of such order or the entering of such judgment.

The writ will issue as prayed for.

THE STATE OF NORTH DAKOTA
v.
JOSEPH WINBAUER.

(143 N. W. 387.)

Criminal action — trial — place of — changed — jurisdiction — conviction — sentence.

1. When the place of trial in a criminal action is changed to another judicial district, the court to which the action is removed for trial has jurisdiction and authority to hear, try, and determine the action, and, upon conviction, to impose punishment provided by law; and the trial shall be conducted the same in all respects as if the action had been commenced in said court. And on the trial of the action the judge of the district court to which the action has been transferred acts as the judge of said district, and not as the acting judge of the judicial district from which the action was transferred.

Action — trial judge — order.

2. *Held*, that as the trial judge was the judge of the fifth judicial district, and said action was in fact pending at said time in said judicial district, the order made by him was not in violation of § 6765, Rev. Codes of 1905.

Jurisdiction — person — subject-matter — error — judgment.

3. Jurisdiction being obtained over the person and over the subject-matter, no error or irregularity in its exercise can make the judgment void.

Judgment — order — judicial district — outside — validity.

4. *Held*, that as the trial judge had jurisdiction over the person of the defendant and the subject-matter of the action, a judgment rendered or ordered outside his judicial district, but within the state, is not void for want of jurisdiction.

Opinion filed September 30, 1913.

Appeal from the District Court of Barnes County, *Hon. J. A. Coffey,* Judge.

From an order vacating a judgment and sentence dated February 13, 1908, wherein the above-named defendant was sentenced to ninety days in jail and to pay a fine of $200.

Reversed and remanded.

Andrew Miller, Attorney General, *Alfred Zuger, C. L. Young,* and *F. C. Heffron,* Assistant Attorneys General, for appellant.

The judgment is regular upon its face, and the court had jurisdic-

tion of the person and subject-matter, and such judgment is valid. State v. Heiser, 20 N. D. 357, 127 N. W. 72.

The judgment cannot be attacked by matters outside the record. Exchange Bank v. Ault, 102 Ind. 322, 1 N. E. 562; Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007.

A judgment which is merely voidable for errors or irregularities must be attacked by due and timely motion to vacate, or by appeal. Einstein v. Davidson, 35 Fla. 342, 17 So. 563; 2 Freeman, Judgm. § 1002.

In any event, mere irregularities in the judgment will be considered waived, if timely attack is not made. 23 Cyc. 909; Sargent v. Kindred, 5 N. D. 472, 67 N. W. 826; Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; Frazier v. McWhirter, 121 Ala. 308, 25 So. 804; Buchanan v. Thomason, 70 Ala. 401; Bland v. Bowie, 53 Ala. 152; Bruce v. Strickland, 47 Ala. 192; Johnson v. Johnson, 40 Ala. 247; Kohn v. Haas, 95 Ala. 478, 12 So. 577; Pettus v. McClannahan, 52 Ala. 55; Ex parte Morris, 44 Ala. 361.

Prompt action must be taken against a judgment regular on its face, and not disclosing want of jurisdiction. People ex rel. Schwartz v. Temple, 103 Cal. 447, 37 Pac. 414, 416; Bell v. Thompson, 19 Cal. 706.

The defect of want of jurisdiction must appear on the face of the record. Drake v. Brown Mfg. Co. 121 Ga. 550, 49 S. E. 590; Regopoulas v. State, 116 Ga. 596, 42 S. E. 1014; Jones v. Killebrew, 55 Ga. 153; Parker v. Belcher, 87 Ga. 110, 13 S. E. 314; Freeman, Judgm. § 61, p. 830; Ninde v. Clark, 62 Mich. 124, 4 Am. St. Rep. 829, 28 N. W. 765; Fugua v. Carriel, Minor (Ala.) 170, 12 Am. Dec. 46; Allen v. Bradford, 3 Ala. 281, 37 Am. Dec. 689; Glass v. Glass, 24 Ala. 468; Nabers v. Meredith, 67 Ala. 333; Stokes v. Shannon, 55 Miss. 583; 23 Cyc. 840, 842.

In this state, judgment in criminal cases may be pronounced at any subsequent term than the one at which the trial was had. Laws 1907, Chap. 88.

A judgment so appearing is not open to collateral attack. Black, Judgm. § 177; Le Grange v. Ward, 11 Ohio, 257; Smith v. State, 9 Humph. 10; Herndon v. Hawkins, 65 Mo. 265.

The pronouncing of judgment at Bismarck was not a destructive

jurisdictional defect, so as to render it void. Walter v. Merced Academy Asso. 126 Cal. 582, 59 Pac. 136.

J. E. Campbell and *A. T. Nelson,* for respondent.

The sentence and judgment in this case were pronounced at Bismarck, in the sixth judicial district, by Judge Burke, who was then the judge of the fifth judicial district.

Such sentence and judgment are void. Rev. Codes 1905, § 6765.

Judgment that defendant must pay a fine or costs, or either, must be docketed, etc., and becomes a lien upon defendant's real estate, etc., and the clerk must enter same upon the minutes of the court. Rev. Codes 1905, §§ 10105, 10106.

There can be no effective judgment, until it is entered in the judgment book. Re Weber, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523; McTavish v. Great Northern R. Co. 8 N. D. 333, 79 N. W. 443.

The perfection of an appeal terminates the authority of the inferior court. The *ex parte* order of Judge Burke, made after appeal, is null and void. 2 Am. Dig. p. 2559, and cases cited.

KNEESHAW, Special Judge. The record discloses the fact that the defendant, Winbauer, was indicted by the grand jury of Morton county on the 3d day of December, 1907, for the crime of keeping and maintaining a common nuisance in a certain building on lot 11 in block 8 in the city of Mandan. To this indictment the defendant plead not guilty, and thereupon such proceedings were had that the case was transferred to Barnes county, in the fifth judicial district for trial.

On February 7, 1908, the case was brought on for trial in the district court of Barnes county before Honorable E. T. Burke, presiding judge, and a jury. The state being represented by T. F. McCue, attorney general, and B. W. Shaw, the state's attorney of Morton county, and the defendant by L. A. Simpson, James M. Hanley, and A. T. Faber; and on the 8th day of February, 1908, the case was concluded and the jury brought in a verdict of guilty as charged in the indictment. On February 13, 1908, judgment and sentence was pronounced against the defendant by the court for a term of ninety days' imprisonment and a fine of $200. On February 11, 1909, or just two days less than a year after the pronouncing of sentence and rendition of the judgment against the defendant as aforesaid, the defendant appealed

to the supreme court from said judgment rendered in said cause on the 13th day of February, 1908, and from the whole of said judgment. Such appeal was accompanied by an undertaking, which was a supersedeas, and a certificate of probable cause granted by the trial judge on December 24, 1909, and after the notice of appeal to the supreme court had been served, and while said appeal was pending in the supreme court, the Honorable E. T. Burke, judge of the fifth judicial district made and filed in said action an *ex parte* order, which order was in words and figures as follows:

"Whereas, this court did on the 13th day of February, 1908, duly pronounce and render a judgment and sentence against defendant upon his conviction of the crime of keeping and maintaining a common nuisance, and therein and thereby sentence the defendant to be imprisoned in the county jail of Morton county, North Dakota, for the period of ninety days, and that he pay a fine of $200, making a total judgment of $200, which said judgment was and is in the words and figures of the copy hereto attached and made a part hereof.

"Whereas it appears to the court that such judgment and sentence of the court was, by inadvertence and oversight, not entered in the office of the clerk of this court, as required by law, at the time of its rendition, as aforesaid,

"Now, therefore, it is ordered by the court that the clerk enter such judgment by filing the copy thereof hereto attached, and by entering the same upon the minutes of this court as required in and by § 10106, and by docketing such judgment as required by § 10105 of the Revised Codes.

"And it is further ordered by the court that such judgment be entered as of the 13th day of February, 1908, the date on which the same was pronounced by the court, and that all acts in relation thereto be had and done as of said date.

"Dated this 24th day of December, 1909.

Edward T. Burke, Judge."

On March 9, 1910, on application of the defendant, the supreme court ordered that the defendant be granted leave to withdraw the said appeal, and the supreme court then ordered that the cause be remanded to the district court for further proceedings according to law. After the remittitur was filed in the lower court, the defendant applied to

the district court of Barnes county, on motion, for an order declaring and adjudging that the purported and pretended judgment rendered as of date February 13, 1908, be declared void from the very time of its attempted inception. The matter was brought on for hearing on motion, and based upon a notice of motion to vacate judgment, which notice of motion was supported by the affidavits of the defendant, Winbauer, and of J. E. Campbell.

Upon the hearing of the motion to vacate judgment, before Judge Coffey, at Valley City, the state was represented by Alfred Zuger, assistant attorney general of North Dakota, and the defendant by J. E. Campbell. After the hearing of said motion and the argument of counsel, Judge Coffey made his order dated November 10, 1911, adjudging that said judgment and sentence as of date February 13, 1908, was void from the very time of its inception, and that the same be set aside, vacated, and annulled, and declared absolutely void. And from such order vacating the judgment and sentence of February 13, 1908, the state of North Dakota appeals to this court.

The record in this case is regular and valid on its face. It is, however, contended by the affidavit of the defendant, used upon the motion to vacate the judgment, that he was convicted on the 7th day of February, 1908, in the district court of Barnes county, and on the 8th day of February, 1908, that the term of court at which defendant was convicted was adjourned without the defendant being sentenced, and that the court announced that at Bismarck, on the 13th day of February, 1908, it would pass sentence on the defendant, and that on the 13th day of February, 1908, in the house of representatives chamber of the state capitol, the judge of said court, and in absence of court officials, sentenced the defendant to ninety days in jail, and to pay a fine of $200. The affidavit of the defendant has not been controverted or denied, and, therefore, for the purposes of this appeal this court will assume that judgment and sentence on the conviction of the defendant was pronounced at Bismarck, in the sixth judicial district, on the 13th day of February, 1908, by E. T. Burke, judge of the fifth judicial district.

The attack on this judgment by motion is a direct, and not a collateral, attack. Therefore, the only question involved is, Was the judgment and sentence pronounced at Bismarck in the sixth judicial dis-

trict, on the 13th day of February, 1908, void? If absolutely void, then the order appealed from must be affirmed; otherwise reversed. When the place of trial in a criminal action is changed to another judicial district, the court to which the action is removed for trial has full jurisdiction and authority to hear, try, and determine the action, and upon conviction to impose the punishment provided by law, and the trial shall be conducted the same in all respects as if the action had been commenced in said court; and on the trial of the action the judge of the district to which the action has been transferred acts as the judge of said district, and not as the acting judge of the judicial district from which the action was transferred, or at the written request of said judge.

It is contended by the respondent that the judgment is void by reason of § 6765 of the 1905 Code, which provides that no judge of the district court shall hear or determine any action, special proceedings, motion, or application, or make any order or give any judgment in any action or proceedings not pending in the judicial district for which he is elected,—except in certain cases therein enumerated. As Judge Burke was the judge of the fifth judicial district, and said action was in fact and at that time pending in his judicial district, the action of the court was not in violation of said section. And § 6766, Rev. Codes of 1905, expressly provides that no order or judgment given by the judge of any district contrary to the limitations of the preceding section shall for that reason be void, but such order or judgment may be vacated upon application, within thirty days from the time the same shall have been made or given, to the judge of the district in which the action or proceeding in which the same was made or given is pending, and if appealable, by the supreme court on appeal.

Section 6764 of the 1905 Code provides that all orders made, judgments given, or other acts done, by any judge of the district court in any action, special proceedings or other matter, civil or criminal, shall be deemed and held to be the orders, judgments, and acts of the court; and the several judges of the district court shall have jurisdiction throughout the *state* to exercise all the powers conferred by law upon the district court or judges thereof, subject to the limitations of this article provided; and in such article we can find no limitation to the authority of the judge of the district court rendering or pronouncing

judgment outside his judicial district in an action properly pending in his judicial district, in cases in which he has jurisdiction over the person and subject-matter of the action. Jurisdiction being obtained over the person and over the subject-matter, no error or irregularity in its exercise can make the judgment void. See Freeman, Judgm. 4th ed. § 135, and cases cited.

The record in this case clearly discloses the fact that the defendant was duly convicted in the district court of Barnes county, in the fifth judicial district, of the crime of keeping and maintaining a common nuisance, and the further fact that Judge E. T. Burke was the duly elected, qualified, and acting judge of said judicial district. Therefore, on the 13th day of February, 1908, said judge had jurisdiction over the person of the defendant and the subject-matter of the action. 23 Cyc., page 678, says this with reference to the place of trial: "It is an irregularity, but not a destructive jurisdictional defect, to try a case and render judgment at a place other than that fixed by law for the holding of the court, or in a county other than that declared by statute to be the proper county for its trial, or to render judgment in a county other than that in which the venue was laid or other than that in which the trial was had." Citing several cases.

In the case of Gould v. Duluth & D. Elevator Co. 3 N. D. 96, 54 N. W. 316, it was held that a judge of the district court of the district in which the action is pending has authority by an *ex parte* order, made while outside of such district, and within the state, to direct the entry of a judgment in such action, and where an outside judge has been requested to act in the place of the judge of the district where the action is pending, under chap. 61, Laws of 1890, such outside judge is, with respect to such cases or matters as come within the request to act, empowered to do and perform all such acts as might have been done and performed by the judge of such district. Accordingly, held that the judge of the fifth judicial district, who had been duly requested to act, had authority to sign an *ex parte* order for judgment while within the fifth district, the action being pending in the third district.

Mr. Justice Wallin, in said case, further says: "We think the act of signing an *ex parte* order for judgment, if done within the state, but outside of the district where the action is pending, and the signing is done by the judge of the district court in which the action is pending,

is not an irregularity in practice." See also State ex rel. Bockmeier v. Ely, 16 N. D. 569, 14 L.R.A.(N.S.) 638, 113 N. W. 711; State ex rel. Erickson v. Burr, 16 N. D. 581, 113 N. W. 705; State v. Bednar, 18 N. D. 484, 121 N. W. 614, 20 Ann. Cas. 458.

The respondent has not cited any cases in support of his contention or that would throw any light upon the question, and after a thorough search we are unable to find any law or authorities holding the judgment and sentence in this case to be void. And it appearing to this court that the defendant was duly convicted in the district court of Barnes county on the 7th day of February, 1908, that Judge E. T. Burke was then the duly elected, qualified, and acting judge of said district, and that said district judge had jurisdiction over the person and subject-matter of the action, and that said district judge on the 13th day of February, 1908, duly pronounced judgment and sentence upon said defendant on said counts as aforesaid, and it appearing to this court that the said judgment was and is a valid judgment, and was not and is not void for want of jurisdiction, it is therefore ordered that the order of the district court for Barnes county, made and entered the 10th day of November, 1911, vacating and setting aside the judgment of the district court for Barnes county of February 15, 1908, is reversed. And the case is remanded to the District Court of Barnes County to enforce the judgment on conviction and to take further proceedings according to law.

BURKE, J., being disqualified, not participating. At the request of the court, Honorable W. J. Kneeshaw, judge of the seventh judicial district, sat with the court in the hearing of the case.

FRED ACKERMAN v. C. J. MADDUX ET AL.

(143 N. W. 147.)

Offer — stipulation — time limit — released.

1. When an individual makes an offer by mail, stipulating for an answer by return of the mail, the person making such offer is released if the stipulation is not complied with.

Offer — real estate — sale — acceptance — return mail.

2. A letter offering to sell a piece of real estate for a certain sum, and ending with the request, "Let me know by return mail," demands an acceptance by such mail, and in the absence of such the offerer will be released.

Land contract — purchaser — taxes — condition precedent — specific performance — tender — default.

3. Where the payment of taxes is not made a condition precedent to the right of the purchaser under a land contract to rely upon the same, and prior to the bringing of an action for specific performance no attempt has been made to forfeit the contract on account of such failure, and upon the trial plaintiff tenders and offers to pay into court the amount of such taxes, such prior default will not defeat an action for specific performance.

Tender — amount — shortage — objection — when to make.

4. When in such a case the tender is lacking in a few cents of interest, the doctrine of *de minimis non curat lex* will apply. Under § 5260, Rev. Codes 1905 a shortage of 12 cents in a tender of payment under a land contract will not invalidate such tender where no objection is made at the time which is based upon such shortage.

Contract — sale — agreement — third person — valid — specific performance.

5. Where a contract provides that "no sale, transfer, assignment, or pledge of this contract or of any interest therein, or of or in the premises therein described, shall be in any manner binding upon the party of the first part, unless said party of the first part shall first consent thereto by writing hereon," an agreement by the purchaser to sell the property to a third person will not defeat his right to specific performance.

Independent covenant — breach — condition — material inducement — specific performance.

6. A breach of an independent covenant, as distinguished from a condition which is not a material inducement to the contract, is not a bar to specific performance.

Purchaser — contract — agreement — third person — title — vendee — parties.

7. Purchasers who have not assigned their contract of purchase, but who have agreed to sell to another on other and different terms, are still obligated to deliver good title to their vendee, and an action for specific performance against their vendors is properly brought in their names.

Investing agent — knowledge — principal.

8. Recently acquired knowledge of an investing agent will be imputed to his principal.

Opinion filed September 17, 1913.

Appeal from the District Court for Eddy County, *Coffey*, J.

Action to compel the specific performance of a contract for the purchase and sale of real estate, and to acquire the title to said property.

Judgment for plaintiff. Defendants appeal.

Affirmed.

Statement by BRUCE, J.

This is an action to compel the specific performance of a contract for the purchase and sale of lots 2, 3, and 4 of the original town plat of New Rockford, Eddy county, and to acquire the title to said property. The selling price was $600, of which all but $70 was paid by the plaintiff before the bringing of this action, this balance (lacking perhaps 12 cents) being tendered on September 14, 1910, and, on being refused, being immediately deposited to the credit of the defendants. The action was commenced on the 10th day of October, 1910. On November 8, 1910, the defendants, C. J. Maddux and Catherine Melrose, answered, admitting the making of the contract, but denying the other material allegations of the complaint. The answers admitted the tender of $71, but denied that the same was in full payment of the balance of the purchase price. They also further alleged that on September 1, 1910, and before the full purchase price of said lots was paid by the plaintiff, the plaintiff and the defendant Maddux entered into an agreement whereby the defendant Maddux was to pay plaintiff $230 for all of his right, title, and interest in the property, which said amount the defendant Maddux stated he was ready and able and willing to pay at any time, and which said amount he deposited in the district court for the use and benefit of the plaintiff. The answers further alleged that immediately after the making of said agreement, and on September 9, 1910, the defendant Maddux sold and transferred said property to the defendant Catherine Melrose for a valuable consideration; and that thereafter and on or about September 15, 1910, plaintiff attempted to convey said property to one E. M. Stitzel, and caused a warranty deed to said Stitzel to be placed on record, and then and there entered into a conspiracy for the purpose of cheating and defrauding the defendant Maddux out of the property, and for the purpose of clouding the title; that such attempt to transfer, without the consent of the defendant

Maddux, was a violation of the contract, and that the defendant Maddux "now elects and declares said contract forfeited." The answers further allege that prior to September 5, 1910, the "defendant C. J. Maddux entered into the possession of said property, and was and has been in possession of said property at all times since said date, and made valuable improvements upon said property by plowing and cultivating the same," and that the purchase by the said Catherine Melrose was "made in the ordinary course of business for value received, and without any notice of any rights, claims, or interest of the plaintiff." On November 1, 1911, and one day before the case was actually tried, the defendant Maddux also asked leave to file an amended answer, which set up the facts above stated, and in addition alleged that plaintiff had failed to pay the taxes for the years 1908, 1909, 1910, and 1911; that said lots were advertised for sale for delinquent taxes, and that the defendant Maddux was forced and compelled to pay and redeem said property from the said delinquent taxes and paid therefor the sum of $30.59 to protect said property, and alleged that the failure of plaintiff to pay such taxes constituted a default in the conditions of said contract, by reason whereof the said defendant (and in said amended answer) elected and declared said contract null and void. The evidence, however, discloses that the failure of the plaintiff to pay such taxes was not discovered by the defendant Maddux until November 10th, that is to say, thirty days after the bringing of the suit, twelve days before the trial, and eleven days before the attempt to file the amended answer, and that the same were not actually paid until November 18th. The record also shows that immediately upon the attempted filing of the said amended answer the plaintiff brought the said sum of $31, and deposited the same with the clerk for the benefit of the defendant. Leave to file this amended answer was denied. There is no evidence in the record of any notice or attempt at cancelation of said contract by the defendants or either of them prior to the filing of the answers in the case, either as provided by §§ 7494 and 7495, Rev. Codes 1905, or the terms of the contract, or in any other way. The trial court decreed "that said plaintiff have and recover judgment against said defendants and each of them; that all their right, title, and interest in and to said described real premises be decreed to be in said plaintiff,

Fred Ackerman; and that said plaintiff, Fred Ackerman, is entitled to the immediate possession of said described real premises and the whole thereof, free and clear of all right, interest, claim, and demand of said defendants, and each and both of them; and that as to them title be quieted in all things in the plaintiff herein." It further decreed that plaintiff, Fred Ackerman, should recover judgment against the said defendants for his costs and disbursements, and that the said C. J. Maddux be directed and required to make, execute, and deliver to the said plaintiff, Fred Ackerman, a good and sufficient warranty deed conveying title to said described premises to the said Fred Ackerman, and "that the judgment herein be of the same force and effect of a warranty deed of conveyance of title from said defendant C. J. Maddux, to said plaintiff, Fred Ackerman, and the same to contain the usual covenants of said defendant C. J. Maddux, to said plaintiff, Fred Ackerman; that the said C. J. Maddux, himself, and his heirs and assigns, are well seised in fee of the land and premises aforesaid, and that the said C. J. Maddux has good right to sell and convey the same to said plaintiff; that the said land and premises described are free from lien or encumbrance caused or permitted by any act of said C. J. Maddux; that the said plaintiff, Fred Ackerman, and his heirs and assigns, shall be and remain in the quiet and peaceable possession of said described premises; and that said C. J. Maddux will warrant and defend the title to said plaintiff, Fred Ackerman."

From such judgment this appeal was taken and a trial *de novo* is asked.

Maddux & Rinker, for appellants.

The plaintiff's offer and defendant's acceptance are well established. 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.

A purchaser in default, who tenders at time of trial, is too late. Partial payments upon a conditional sale contract, after default, cannot be recovered. Pfeiffer v. Norman, 22 N. D. 168, 38 L.R.A.(N.S.) 891, 133 N. W. 97.

Specific performance cannot be enforced against a party to the contract unless it is just and reasonable. Rev. Codes, § 6615, sub. 2.

R. G. McFarland, for respondent.

Specific performance will be compelled in any case where the terms of the contract are clear, mutual, and there is adequate consideration, and where the failure to perform cannot be adequately relieved by pecuniary compensation. Rev. Codes 1905, §§ 6609, et seq.; Plummer v. Kelly, 7 N. D. 88, 73 N. W. 70; Ross v. Page, 11 N. D. 458, 92 N. W. 822; Pederson v. Dibble, 12 N. D. 572, 98 N. W. 411; Block v. Donovan, 13 N. D. 1, 99 N. W. 72; Hunter v. Coe, 12 N. D. 505, 97 N. W. 869; 36 Cyc. 550, et seq.

Defendant cannot now be heard to complain, for he has never attempted to cancel or forfeit the contract. Rev. Codes 1905, § 7525, and cases cited; Rev. Codes 1905, §§ 7494, et seq.

The offer plaintiff made was for a cash consideration, and required acceptance by return mail. The offer has never been accepted or complied with, and there was consequently no contract. Weaver v. Gay, 31 W. Va. 736, 3 L.R.A. 94, 8 S. E. 743; Maclay v. Harvey, 90 Ill. 525, 32 Am. Rep. 35, and note; Mactier v. Frith, 6 Wend. 103, 21 Am. Dec. 262; Eliason v. Henshaw, 4 Wheat. 225, 4 L. ed. 556, and note; Haas v. Myers, 111 Ill. 421, 53 Am. Rep. 634; Lawson, Contr. § 18; 35 Cyc. 52, 53, note 47.

The plaintiff was released from such offer. Rev. Codes 1905, §§ 5237, 5264; 30 Cyc. 1207, 1208, note 99 and cases cited.

The law imputes to the principal knowledge of all material facts known to his agent, whether or not such agent actually informs his principal. Bierce v. Red Bluff Hotel Co. 31 Cal. 165; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 548; 31 Cyc. 1587, Div. (4) note 40, cases cited; 20 Cyc. 486, div. (VII) (II) d.

BRUCE, J. (after stating the facts as above). Defendants first seek to defeat the action of plaintiff by showing that after the execution of the real estate contract, plaintiff sold the premises in question to the defendant Maddux, and that thereby all rights under the contract were waived. We find, however, no support for this contention in the evidence. All we find, indeed, is an offer to sell which was not accepted

according to its terms, and which was therefore a nullity. The offer to sell was contained in the following letter:

Williston, N. D., Sept. 5, 1910.

Mr. C. J. Maddux,
New Rockford, N. Dak.

Dear Friend, Mr. Maddux:—

I want to sell them lots that you sold me. I am mighty hard up for money and if I could sell them back to you I would do so at a great discount. I have seven lots besides the four you sold me and I have to borrow money here to pay the taxes on them, and they are not bringing in anything and I need every dollar I made here this year to live on. I had in a little over 60 acres in crop. I have threshed and I have not any more than I seed, feed and other expenses from the whole crop.

The other lots I got is enough for me and this place. I will sell the four you sold me to you only for half price, $300. I will take $230 cash and you keep the balance of $65 or $70 dollars which I owe you. I will sell them anyway, and I want to sell them to you.

I kindly wish you would send me a statement of how we stand as the way it is in it worry me considerable. I want to straighten it up as soon as possible.

If I could sell them I would immediately build me a better house, and buy me a cow and live like a white man, and as I will have feed and seed it would put me in better shape for next year.

Let me know by return mail.

Yours very truly,

Fred Ackerman,
Williston, N. Dak.

This letter was dated September 5, 1910, and was received by the defendant Maddux on September 6 or 7, 1910. On September 9, 1910, the defendant Maddux wrote a letter accepting the offer. It will be noticed that by its terms the offer demanded an acceptance by return mail, and there is no pretense that such was forthcoming. There was therefore no acceptance, and the offer is eliminated in law from the record and is as if it had never been made. That this is the settled law there can, we believe, be no controversy. In the case of Maclay v. Har-

vey, 90 Ill. 525, 32 Am. Rep. 35, one John Harvey wrote to a Miss Maclay as follows: "I write to inquire if you intend to work at millinery this season and if you have made any arrangements or not. If you have not, can you take charge of my stock this season, and if you can agree I would want you for a permanent trimmer. Please notify me by return mail and terms and we can confer together." To this letter an answer was sent stating terms. On March 21st Harvey again wrote: "Your favor was received in due time, and contents noted. You spoke of wages at $15 per week and fare one way. . . . I will give you $15 per week, and pay your fare from Chicago to Monmouth, and pay you the above wages for your actual time here in the house at that rate per season. I presume that the wholesale men will allow you for your time in the house. *You will confer a favor by giving me your answer by return mail.*" This letter was received on the afternoon of March 22d, and an acceptance was written on a postal card on the following day, March 23d. The card, however, was given to a boy to mail, who delayed in the matter so that it was not received until two days after March 25th. The court, in holding that there was no acceptance and therefore no contract, said: " 'Where an individual makes an offer by post stipulating for, or by the nature of the business having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it.' . . . It is clear here that the nature of the business demanded a prompt answer; and the words, 'You will confer a favor by giving me your answer by return mail,' do in effect stipulate for an answer by return mail." This case follows the leading English case of Dunlop v. Higgins, 1 H. L. Cas. 387, 12 Jur. 295, and is supported by the great weight of authority both in England and in America. See 35 Cyc. 52, 53, and notes; Eliason v. Henshaw, 4 Wheat. 225, 4 L. ed. 556.

We next come to the question as to whether specific performance will lie in this case, and this also involves the question whether the court erred in refusing to permit the filing of the amended answer, which set up the nonpayment of the taxes and sought to declare the contract void on account thereof. Counsel argues in his brief that there is no offer

in the complaint to pay for improvements. He also asks the question: "Can a condition sale purchaser remove a building from the property, and fail to pay the taxes for four years, and then prevail in an action for specific performance?" On an examination of the record, however, we find no evidence of the removal of any building by the plaintiff, or of the making of any permanent improvements by the defendant. Defendant, it is true, testifies that he plowed and cultivated the lots, but we have yet to learn that plowing and cultivating town or village lots constitutes a permanent improvement. As far as the removal of the building is concerned, the only evidence to be found in the record is that "at the time of the sale of the lots by C. J. Maddux to the plaintiff there was a building, a storehouse, on said lots, worth and of the value of $100, and that said building, since the sale thereof, has been removed from said lots." The evidence shows that on or about September 9, 1910, the defendant, C. J. Maddux, himself went into possession of said premises and plowed and broke the same. There is no evidence as to who removed the building, and as to when it was removed, and whether since or before the occupation by the defendant Maddux. So, too, the value of the plowing and cultivating, even if it were a permanent improvement, is not given.

A point is also made that the tender of $71 was 12 cents short, also that the deposit of $31 for taxes did not include a few days' interest which would accrue from the time of the payment by Maddux to the time of the deposit. The rule of *de minimis non curat lex* applies in such cases. Kullman v. Greenebaum, 92 Cal. 405, 27 Am. St. Rep. 150, 28 Pac. 674. So, too, there is no evidence that these tenders were refused because of the shortage, or that the matter was considered at all. There is no testimony as to any refusal to accept the $31 taxes. As far as the $71 is concerned, the refusal was unqualified. The testimony of Mr. Maddux is as follows: "Q. At the time Exhibit C, the tender of $71, was made to you, you made no statement or any objection or reason why you did not accept that at that time? A. No, but I refused to do it." The defendants cannot now take advantage of the trifling shortages, if any there were. Sec. 5260, Rev. Codes 1905; Latimer v. Capay Valley Land Co. 137 Cal. 286, 70 Pac. 82 (construing § 1501, Civil Code of California, from which § 5260, Rev.

Codes 1905, N. D. is taken); Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115; Cleveland v. Rothwell, 54 App. Div. 14, 66 N. Y. Supp. 241.

As far as the refusal to permit the filing of the amended answer is concerned, we think that no prejudicial error was committed by the trial court. The plaintiff deposited in the trial court the sum paid by the defendant Maddux, perhaps lacking a few cents of interest. The payment of taxes was not, by the contract, made a condition precedent to the right of the plaintiff to a specific performance or to rely upon the contract, and it is usually only such breaches that will defeat a recovery. 36 Cyc. 700, 701. The nonpayment of taxes was, it is true, a ground for forfeiture, but in the case at bar the statutory notice of cancelation was not given (see §§ 7494, 7495, Rev. Codes), nor was the notice given which was provided for in the contract, nor any attempt at cancelation until after the suit was commenced.

There is also nothing in the point that the plaintiff sold his interest in the land to the witness Stitzel before the bringing of the suit. Such a sale was not prohibited by the contract, nor was the retention of the property made a condition precedent to its enforcement. All that the contract stated upon the point was that "it is further agreed that no sale, transfer, assignment, or pledge of this contract, or of any interest therein, or of or in the premises therein described, shall be in any manner binding upon the party of the first part, unless said party of the first part shall first consent thereto by writing hereon." The agreement, in short, merely sought to render such a sale void without the consent of the defendant Maddux, and not to make it the subject for a forfeiture of the contract. Even if such a sale had been directly forbidden, it would hardly have precluded a recovery in this case. "A breach of an independent covenant, as distinguished from a condition which is not a material inducement to the contract, is not a bar to specific performance." 36 Cyc. 700, 701; Grigg v. Landis, 21 N. J. Eq. 494; Hunt v. Spencer, 13 Grant, Ch. (U. C.) 225. "Purchasers who have not assigned their contract of sale, but who have agreed to sell to another on other and different terms, are still obligated to deliver good title to their vendee, and their interest in the subject-matter has not ceased, and an action for specific performance is properly brought in their names." 36 Cyc. 760; Bittrick v. Consolidated Improv. Co. 51 Wash. 469, 99 Pac. 303. In the case at bar, though there was a warranty

deed to Stitzel, there was an accompanying agreement or memorandum signed by the said Stitzel, which provided that Stitzel still owed the plaintiff "on account thereof the sum of $179.42, which amount is said to be paid by the giving of a promissory note to the said Fred Ackerman, with real estate security due on or about October 1, 1911, the same to be given by me as soon as deed to said lots are obtained from C. J. Maddux to said Fred Ackerman, transferring the title to said Ackerman."

Defendants also complain of the action of the court in decreeing the execution of a warranty deed and making the judgment operate as such. We can see no error in such action. It was simply requiring the defendant to live up to the terms and conditions of his contract.

There is no justification to be found in the evidence, for the statement that the defendant Catherine Melrose was an innocent purchaser of the property for value. Both she and the defendant Maddux testified positively that the defendant Maddux was her investing agent, and that she trusted entirely to his judgment. In such a case the recently acquired knowledge of her agent would be imputed to her.

The judgment of the District Court is affirmed.

GEORGE A. BISSEL v. OLAF A. OLSON.

(143 N. W. 340.)

Stream — navigable — meandered — proof — burden.

1. The burden is upon a party claiming a stream which has not been meandered, nor declared navigable by the legislature, to be navigable, to prove it to be navigable in fact.

Stream — tidewater — navigable — natural state — highway — transportation — commerce.

2. To constitute a stream, which is not tidewater, navigable, it must be navigable in fact in its natural state without aid of or reference to artificial

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Note.—For a collection of authorities on the question what waters are navigable, see note in 42 L.R.A. 305. See also notes in 19 Am. St. Rep. 227 and 22 Am. St. Rep. 201.

On the question of the right of a landowner to accelerate flow of stream, see note in 85 Am. St. Rep. 708.

means, and be of sufficient capacity to render it capable of being used as a highway of commerce either in the transportation of the products of the mines, forests, or of the soil of the country through which it runs, or of passengers.

Stream — public highway — volume of water — permanency.

3. To render a stream navigable it must be capable of being used for a public highway a considerable part of the year, and it is not sufficient that it have an adequate volume of water therefor only occasionally as a result of freshets for brief periods of uncertain occurrence and duration.

Public highway — stream — continuance — certainty — commercial value.

4. A stream which is capable of being navigated, unaided by artificial means, during freshets or stages of water occurring frequently and at times of reasonable certainty, and continuing long enough to make its use of commercial value, is a public highway for that purpose.

Navigable stream — capacity — increased — artificial means — injury — compensation — riparian proprietor.

5. The capacity of a navigable stream cannot be increased by artificial means to the injury of a riparian proprietor, without compensation.

Navigability — criterion — commerce — traffic — evidence — positive — negative — weight.

6. The criterion by which the navigability of a stream is determined is not that it is not used for purposes of commerce and traffic, but that it is not capable of such use in its natural state; and the value of evidence showing that it is used for navigation rests upon the proposition that that fact proves it navigable; while evidence that it never has been so used is not of equal weight, yet it is entitled to great weight as tending to show that it is not capable of being navigated to advantage, when it is shown that the river flows through an inhabited country, with towns on its banks and commerce transacted between them.

Evidence — burden of proof — navigable stream — conditions — times.

7. This action was brought to enjoin defendant from maintaining a footbridge across the Mouse river near Minot, in Ward county, between his buildings and a part of his land on the other side of the river, and the court granted a preliminary injunction, from which this appeal is taken. The order appealed from also commands the destruction of the bridge within twenty-four hours if not removed by the defendant. The river is not meandered. The testimony of plaintiff and his witnesses, aside from their conclusions that the river is navigable, rests upon statements that about the 1st of October, 1911, a 16-foot launch traversed a distance of 24 miles above Minot without difficulty; that about eighteen years ago some piles for bridges were floated down the river from Minot. No date of this is given. That in September, 1906, a boat which drew 10 inches of water went down the river about 25 miles without difficulty, and about ten years ago a building was rafted down the river from a point

about 25 miles above the city of Minot: and that on the 7th of April, 1912, a boat drawing 8 inches of water passed down the river from a point in Renville county to the city of Minot, and that the witness could go down the river between Greene and Minot in an 18-foot launch, without stating the time of year when he could do so. *Held*, that under the rules above stated this evidence does not sustain the burden of proof resting upon the plaintiff, and prove the river navigable in fact, and particularly so in view of the testimony given by numerous well-known residents of the vicinity who had lived there from twenty-five to twenty-nine years, setting forth the conditions of the river at different stages of water, and testifying that it could not be navigated.

Mistake of law — trial court — mandatory injunctional order — discretion — abuse.

8. A mistake in law committed by the trial court in deciding an application of this kind, in particular when it results in a mandatory injunctional order for the destruction of property pending the trial of an action on its merits, is, in a legal sense, an abuse of discretion.

Opinion filed September 20, 1913.

Appeal from an order of the District Court for Ward County, *Leighton*, J.

Reversed.

Statement of Facts.

This is an appeal from an order of the district court of Ward county, enjoining the defendant from maintaining a bridge across the Mouse river, a short distance northwest of the city of Minot, and directing the destruction of such bridge if not removed within twenty-four hours after the granting of the order. The order was made on a hearing, upon affidavits presented by both parties, immediately after the commencement of an action to permanently enjoin the maintenance of such bridge, and pending the trial of such action.

The Mouse river rises in the Dominion of Canada, and flows southeasterly through Ward county, North Dakota, and through the city of Minot to a point something like 30 miles southeast of said city, where it changes its course to northeasterly through McHenry county, and later northwesterly through a portion of McHenry county and across Bottineau county, back into Canada. At the point in question the

defendant owns land on both sides of the river. His residence is on one side, and, to reach his land on the other without the necessity of going some distance to a public bridge, he constructed a small suspension footbridge between his buildings and a 30-acre tract on the opposite side of the river. Some years ago the Great Northern and the Soo Railways constructed dams across the river below the point in question, to enable them to procure adequate supplies of water, and it is undisputed that one or both of those dams causes the water to set back some distance above defendant's bridge, and whatever the fact as to the navigability of the river may have been prior to the construction of these dams, it is now navigable above them for some distance, including the point in controversy. The river was not meandered when the adjoining lands were surveyed, but patents were issued to settlers, conveying the bed of the river.

Plaintiff had been engaged for some time in running launches on the river to carry parties from the city of Minot, through defendant's premises, to a pleasure park northwest of the city, and this bridge interferes with such business.

Noble, Blood, & Adamson for appellant.

Failure to prove that the stream obstructed, is navigable, deprives the plaintiff of right to injunctive relief or to damages. The stream must be navigable *in fact*. State ex rel. Guenther v. Charleston Light & Water Co. 68 S. C. 540, 47 S. E. 979; Smart v. Aroostook Lumber Co. 103 Me. 37, 14 L.R.A.(N.S.) 1083, 68 Atl. 527; Walker v. Allen, 72 Ala. 456; Sullivan v. Spotswood, 82 Ala. 163, 2 So. 716; Healy v. Joliet & C. R. Co. 2 Ill. App. 435; Com. v. Charlestown, 1 Pick. 180, 11 Am. Dec. 161; Rowe v. Granite Bridge Corp. 21 Pick. 344; Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209; Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584; State v. Narrows Island Club, 100 N. C. 477, 6 Am. St. Rep. 618, 5 S. E. 411; Farmers' Co-op. Mfg. Co. v. Albemarle & R. R. Co. 117 N. C. 579, 29 L.R.A. 700, 53 Am. St. Rep. 606, 23 S. E. 43; State v. Twiford, 136 N. C. 603, 48 S. E. 586; Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255; State v. Pacific Guano Co. 22 S. C. 50; Webster v. Harris, 111 Tenn. 668, 59 L.R.A. 324, 69 S. W. 782; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; The Montello, 11 Wall. 411, 20 L. ed. 191; Miller v. Enterprise

Canal & Land Co. 142 Cal. 208, 100 Am. St. Rep. 115, 75 Pac. 770; Goodwill v. Police Jury, 38 La. Ann. 752; Turner v. Holland, 65 Mich. 453, 33 N. W. 283; Southern R. Co. v. Ferguson, 105 Tenn. 552, 80 Am. St. Rep. 908, 59 S. W. 343; Dawson v. McMillan, 34 Wash. 269, 75 Pac. 807; Baldwin v. Erie Shooting Club, 127 Mich. 659, 87 N. W. 59; Schulte v. Warren, 218 Ill. 108, 13 L.R.A.(N.S.) 745, 75 N. E. 783; Bayzer v. McMillan Mill Co. 105 Ala. 395, 53 Am. St. Rep. 133, 16 So. 923; Lewis v. Coffee County, 77 Ala. 190, 54 Am. Rep. 55; Burroughs v. Whitwam, 59 Mich. 279, 26 N. W. 491; Morgan v. King, 35 N. Y. 453, 91 Am. Dec. 58; Groton v. Hurlburt, 22 Conn. 178; Munson v. Hungerford, 6 Barb. 270; Tuscaloosa County v. Foster, 132 Ala. 392, 31 So. 589; Neaderhouser v. State, 28 Ind. 270; Leovy v. United States, 177 U. S. 621, 44 L. ed. 914, 20 Sup. Ct. Rep. 797; Kamm v. Normand, 50 Or. 9, 11 L.R.A. (N.S.) 290, 126 Am. St. Rep. 698, 91 Pac. 448.

The burden is upon plaintiff to show that the stream is navigable. Morrison Bros. v. Coleman, 87 Ala. 655, 5 L.R.A. 384, 6 So. 374; Allaby v. Mauston Electric Service Co. 135 Wis. 345, 16 L.R.A. (N.S.) 420, 116 N. W. 4; Clute v. Briggs, 22 Wis. 607.

The water of stream, to be navigable, must be so in its natural state, without the aid of any artificial means. Bayzer v. McMillan Mill Co. 105 Ala. 395, 53 Am. St. Rep. 133, 16 So. 923; Little Rock, M. R. & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209; East Branch Sturgeon River Improv. Co. v. White & F. Lumber Co. 69 Mich. 207, 37 N. W. 192; Curtis v. Keesler, 14 Barb. 511; Ten Eyck v. Warwick, 75 Hun, 562, 27 N. Y. Supp. 536; De Camp v. Thomson, 16 App. Div. 528, 44 N. Y. Supp. 1014; Kamm v. Normand, 50 Or. 9, 11 L.R.A.(N.S.) 290, 126 Am. St. Rep. 698, 91 Pac. 448; Webster v. Harris, 111 Tenn. 668, 59 L.R.A. 324, 69 S. W. 782; Griffith v. Holman, 23 Wash. 347, 54 L.R.A. 178, 83 Am. St. Rep. 821, 63 Pac. 239; East Hoquiam Boom & Logging Co. v. Neeson, 20 Wash. 142, 54 Pac. 1001; Gaston v. Mace, 33 W. Va. 14, 5 L.R.A. 392, 25 Am. St. Rep. 848, 10 S. E. 60; The Montello, 20 Wall. 430, 22 L. ed. 391.

The stream, not being meandered, makes it prima facie non-navigable. Morrison Bros. v. Coleman, 87 Ala. 655, 5 L.R.A. 384, 6

So. 374; Allaby v. Mauston Electric Service Co. 135 Wis. 345, 16 L.R.A.(N.S.) 420, 116 N. W. 4.

Nor is it one declared by any act of the legislature to be a navigable stream. Clute v. Briggs, 22 Wis. 607.

An injunction issues during the litigation, usually, to keep the rights of the parties and the subject-matter *in statu quo*. An injunction which is in effect mandatory will not be granted *pendente lite*, except in rare cases. Way v. Hayes, 124 N. Y. Supp. 648; Maloney v. Katzenstein, 135 App. Div. 224, 120 N. Y. Supp. 418; Lehigh Valley R. Co. v. New York & N. J. Water Co. 76 N. J. Eq. 504, 74 Atl. 970; Gaslight Co. v. South River, 77 N. J. Eq. 487, 77 Atl. 473; Wright Co. v. Herring-Curtiss Co. 103 C. C. A. 31, 180 Fed. 110.

Even on final hearing, such an injunction will not be awarded unless it clearly appears that the stream obstructed is navigable. 29 Cyc. 323; State v. Carpenter, 68 Wis. 165, 60 Am. Rep. 848, 31 N. W. 730; Buffalo v. Delaware, L. & W. R. Co. 60 Misc. 584, 112 N. Y. Supp. 690.

Where the facts upon which the right to an injunction is based, are in dispute, one will not be granted. 16 Am. & Eng. Enc. Law 360; Post v. Young, 7 Kulp, 102; Roath v. Driscoll, 20 Conn. 539, 52 Am. Dec. 352; Chouteau v. Union R. & Transit Co. 22 Mo. App. 286; Swan v. Indianola, 142 Iowa, 731, 121 N. W. 547.

W. F. Doherty, for respondent.

Where an unauthorized obstruction has been erected in or over a navigable stream, a preliminary injunction may be granted before final determination. Kamm v. Normand, 50 Or. 9, 11 L.R.A.(N.S.) 290, 126 Am. St. Rep. 698, 91 Pac. 448; 29 Cyc. 322, note, 95.

Relief by mandatory injunction has been awarded *pendente lite*, in many cases involving questions similar to those here presented. 1 High, Inj. 4th ed. § 804; Dickson v. Dows, 11 N. D. 404, 92 N. W. 797; 2 High, Inj. 4th ed. § 1696.

If the injunction cannot prejudice defendant's rights, and its dissolution might seriously impair plaintiff's rights, the motion to dissolve should not prevail. 2 High, Inj. 4th ed. § 1511.

On motion to dissolve, if the evidence is evenly balanced, the injunction will be continued. 22 Cyc. 1000.

The finding of the court on the same question in another action may be considered on such motion. Barker v. Oswegatchie, 41 N. Y. S. R. 821, 16 N. Y. Supp. 727.

Matters occurring in the presence of the court, in a former action, may be considered on such motion. Howard v. Lowell Mach. Co. 75 Ga. 325.

Courts may take judicial notice of certain transactions and matters—and must do so in some cases. Rev. Codes, 1905, § 7318; Amundson v. Wilson, 11 N. D. 193, 91 N. W. 37.

But a criminal sentence is not evidence in civil cases. Black, Judgm. 2d ed. § 603.

SPALDING, Ch. J. Before considering the navigability of the stream, which is the question here involved, attention must be called to a few well-established principles.

1. When a stream claimed to be navigable is not meandered nor declared navigable by the legislature, it is presumed to be non-navigable, and the burden is upon the party claiming it to be navigable to show that it is so in fact. Morrison Bros. v. Coleman, 87 Ala. 655, 5 L.R.A. 384, 6 So. 374; Allaby v. Mauston Electric Service Co. 135 Wis. 345, 16 L.R.A.(N.S.) 420, 116 N. W. 4; Clute v. Briggs, 22 Wis. 607; Gaston v. Mace, 33 W. Va. 14, 5 L.R.A. 392, 25 Am. St. Rep. 848, 10 S. E. 60; Gwaltney v. Scottish Carolina Timber & Land Co. 111 N. C. 547, 16 S. E. 692; 1 Farnham, Waters, p. 126.

2. When a stream is not tide water (as in this case) it must be navigable in fact, in its natural state, without the aid of or reference to artificial means; and be of sufficient capacity to render it capable of being used as a highway of commerce, either in the transportation of the products of the mines, forests, or of the soil of the country through which it runs, or of passengers. Kamm v. Normand, 50 Or. 9, 11 L.R.A.(N.S.) 290, 126 Am. St. Rep. 698, 91 Pac. 448; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; The Montello, 11 Wall. 411, 20 L. ed. 191, 20 Wall. 430, 22 L. ed. 391; Lamprey v. State, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139; United States v. Rio Grande Dam & Irrig. Co. 9 N. M. 292, 51 Pac. 374; Harrison v. Fite, 78 C. C. A. 447, 148 Fed. 781; East Hoquiam Boom & Logging Co. v. Neeson, 20 Wash. 142, 54 Pac. 1001.

3. It must be capable of being used for such purpose, that is, for a public highway, a considerable part of the year, and it is not sufficient that it have an adequate volume of water therefor only occasionally, as the result of freshets, for brief periods of uncertain recurrence and duration. Morrison Bros. v. Coleman, 87 Ala. 655, 5 L.R.A. 384, 6 So. 374; Kamm v. Normand, 50 Or. 9, 11 L.R.A.(N.S.) 290, 126 Am. St. Rep. 698, 91 Pac. 448; Toledo Liberal Shooting Co. v. Erie Shooting Club, 33 C. C. A. 233, 62 U. S. App. 644, 90 Fed. 680; Griffith v. Holman, 23 Wash. 347, 54 L.R.A. 178, 83 Am. St. Rep. 821, 63 Pac. 239; Wethersfield v. Humphrey, 20 Conn. 218; Cardwell v. Sacramento County, 79 Cal. 347, 21 Pac. 763; Munson v. Hungerford, 6 Barb. 265; Rowe v. Granite Bridge Corp. 21 Pick. 344; People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co. 107 Cal. 221, 48 Am. St. Rep. 125, 40 Pac. 531; Cue v. Breeland, 78 Miss. 864, 29 So. 850; Farmers' Co-op. Mfg. Co. v. Albemarle & R. R. Co. 117 N. C. 579, 29 L.R.A. 700, 53 Am. St. Rep. 606, 23 S. E. 43; Little Rock, M. R. & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Hot Springs Lumber & Mfg. Co. v. Revercomb, 106 Va. 176, 9 L.R.A.(N.S.) 894, 55 S. E. 580; Bayzer v. McMillan Mill Co. 105 Ala. 395, 53 Am. St. Rep. 133, 16 So. 923.

4. A stream which is capable of being navigated, unaided by artificial means, during freshets or stages of water occurring frequently and at times of reasonable certainty, and continuing long enough to make its use of commercial value, is a public highway for that purpose. Kamm v. Normand, 50 Or. 9, 11 L.R.A.(N.S.) 290, 126 Am. St. Rep. 698, 91 Pac. 448.

5. As bearing on the subject before us, it may be asserted that the capacity of a navigable stream cannot be increased by artificial means to the injury of a riparian proprietor, without compensation. Ibid.; Morgan v. King, 35 N. Y. 460, 91 Am. Dec. 58; Monroe Mill Co. v. Menzel, 35 Wash. 487, 70 L.R.A. 272, 102 Am. St. Rep. 905, 77 Pac. 813; Thunder Bay River Boom. Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184; Koopman v. Blodgett, 70 Mich. 610, 14 Am. St. Rep. 527, 38 N. W. 649.

In the Thunder Bay Case, Judge Cooley, speaking for the supreme court of Michigan, says: "During that time the public right of floatage and the private right of the riparian proprietors must each be exercised

with due consideration for the other, and any injury which the latter receives in consequence of a proper use of the stream for floatage he must submit to as incident to his situation upon navigable waters. Middleton v. Flat River Boom Co. 27 Mich. 533. But at periods when there is no highway at all, there is no ground for asserting a right to create a highway by means which appropriate or destroy private rights. The doctrine that this may be done without compensation to parties injured is at war with all our ideas of property and of constitutional rights. The most that can be said of this stream during the seasons of low water is that it is capable of being made occasionally navigable by appropriating, for the purpose, the water to the natural flow of which the riparian proprietors are entitled. It is highly probable, in view of the large interests which are concerned in the floatage, that the general public good would be subserved by so doing; but this fact can have no bearing upon the legal question. It is often the case that the public good would be subserved by forcing a public way through private possessions; but it neither should be nor can be done under any circumstances without observing the only condition on which it can be permitted in constitutional government; namely, that the private proprietor be compensated for the value which he surrenders to the public. . . . As was remarked in Morgan v. King, 35 N. Y. 460, 91 Am. Dec. 58, the question of public right in a case like this is to be decided without reference to the effect which artificial improvements have had in the navigable capacity of the river; in other words, the public right is measured by the capacity of the stream for valuable public use in its natural condition, and any attempt to create capacity at other times at the expense of private interests can be justified only on an assessment and payment of compensation."

Those Maine, Minnesota, and Wisconsin authorities which rest upon statutes of those states authorizing the construction of dams to facilitate the floating of logs or the navigation of streams have no application to this case, as we have no such statute.

6. Having, from the authorities, reached the conclusion that the presumption is that the river is non-navigable, that the stream must be navigable in its natural state, that "navigable" means capable of being navigated during a considerable portion of the year, and not simply on the happening of floods at uncertain periods, we will now examine

the evidence to ascertain whether, under the law, the plaintiff, on the hearing and the entry of the order appealed from, overcame the presumption and made out a case which justified the court in holding the Mouse river navigable. In nearly all the affidavits submitted by the respective parties, it is stated as a conclusion, either that the river is navigable or non-navigable in its natural state at the point where defendant's bridge was maintained, and in that vicinity, but most of the witnesses further gave their reasons for their conclusions. Hence we attach but little weight to the conclusions of those witnesses whose testimony is not supported by the facts which they state. In support of the order the plaintiff submitted affidavits made by himself, stating that he had been engaged in operating gasolene motor boats upon the Mouse river for a distance of about 12 miles; that the obstruction complained of was about 5 miles from the lower end of his route, and prevented him going up the river past the same with his boats; that such obstruction existed during the month of July, 1912; an affidavit of Claude Sipple, who testified that about the 1st of October, 1911, he went up the Mouse river about 24 miles above the city of Minot, in a gasolene launch 16 feet in length and about 5 feet wide and which drew between 14 and 16 inches of water; that such launch on said trip carried two people and about a hundred pounds of freight, and that he experienced no difficulty or trouble in making such trip, or the return trip which he made, on account of the waters of said river being shallow; that he is acquainted with the Mouse river in the county of Ward, and knows that logs can be floated down the same, and that boats can navigate the same, and that it has been navigated by boats during the past five years; an affidavit of George Ehr, testifying that he had lived in Ward county twenty-three years; that about eighteen years ago the Soo Railway floated piles for bridges below Minot, down the river, some of them a distance of about 25 miles, having placed such piling in the river at about the point where one of the railroad dams is now constructed; that in the month of September, 1906, he went down said river in a boat to the city of Sawyer, about 25 miles; that such boat was loaded with about 800 pounds of freight, and drew 10 inches or more of water; that at no place did he encounter shallow water, or experience difficulty in making his trip by reason of shallow water, or remove the freight from his boat to enable it to go around

any place in the river; that about ten years ago a two-story building, 24 feet in width by 28 feet in length, was rafted down the river about 25 miles to a point in the city of Minot; that said river has been navigated in the past by boats and is being navigated by the plaintiff as alleged in his affidavit.

An affidavit of Clayton Younkins, stating that on the 7th of April, 1912, he went from the village of Greene, in Renville county, down the river to the city of Minot in a boat, 17 feet long and 4 feet wide, loaded with about 550 pounds of freight, and three people; that the boat drew, when loaded, about 8 inches of water; that the distance covered was about 125 miles via the river; and that he experienced no difficulty on account of the river being shallow, turbulent, or rough or on account of artificial obstructions; that at times when in the center of the channel he tried to reach the bottom of the river with a 6-foot oar, but was unable to do so; that the river between said points flows in a well-defined channel between natural banks; that he can go up and down the river between Minot and Greene in an 18-foot launch and intends to do so next year.

An affidavit of one McCutcheon, that gasolene launches run on the river about 40 miles east of Minot at the city of Towner; that near the city of Russell, in Bottineau county, there was a flat-bottomed boat which carried 12 horses and four loaded wagons across said river at one time for a distance of about three fourths of a mile; that at another time it carried 40 head of cattle for a distance of 6 miles on said river, and could have gone 50 miles up or down the river.

This is the extent of the showing made by the plaintiff as to the navigability of the river, other than the assertions in each of the affidavits that it is navigable. For the purposes of this case we may eliminate all reference to the condition of the river at points a considerable distance below Minot. It must be, by the river channel, 100 or 150 miles to Russell, probably more than that by reason of the tortuous course of the river; hence it may be easily navigable at that point, and totally incapable of navigation at Minot and above.

The defendant testified as to the location of his land with reference to his buildings and the bridge, and that he had resided in said place, a few rods from the bank of the river, twenty-nine years, and knew, of his own knowledge and observation, that said river was not suitable

for navigation of boats for any purpose at the ordinary stage of the water, and was not a navigable stream; that the only place where it could be navigated at that time was on the backwater from the temporary dam of the Great Northern Railway, in the city of Minot, and that said dam raised the water of said river about 7 feet; that if such dam were removed the portion of the river covered by the artificial pond formed by it would not be navigable; that during the past twenty-nine years said river has never been navigated by boats for any purpose whatsoever, except that part of it covered by the artificial pond referred to; that during that time the country adjoining the entire course of said river has been transformed from a wilderness to a well-settled farming community, with many towns and trading places along the river, including the city of Minot with a population of at least 7,000 people, and that during none of the time had any carrying of any description whatsoever, either of freight, the products of the farm or mines or of the country, or of passengers, been done on said river, and that it had been used as a highway of commerce in no way whatsoever; that the counties and townships along the line of the river have constructed various bridges across said river which would stop the passage of boats if said river were navigable; that the farmers along its course had constructed wire fences and dams, all of which had been maintained for years; that the dams of the two railway companies in the city of Minot rendered it impossible to pass up or down said river from such city with boats of any kind, and that said city had constructed sewers above the water line of said river, supported on concrete foundations, absolutely obstructing the passage of boats up or down the river; that said railway companies had constructed various bridges across said river, which would obstruct the passage of boats if the river were navigable; that such bridges and obstructions had been maintained for years and were being kept and maintained without objection on the part of any one; and that said river, to his own personal knowledge, never had been and could not be made useful as a highway of commerce; that the carrying of passengers by plaintiff had been made possible only by the construction of the dam of the Great Northern Railway at Minot; that plaintiff had been landing passengers upon defendant's land, and that such passengers have trespassed thereon, destroyed trees, caused damage to his lands, and had

been an annoyance and a nuisance to him. He also presented other affidavits.

John Wallin testified that he had resided twenty-nine years within 3 or 4 rods of the river, and had actual knowledge of the condition of water in said river during all that time; that he had seen it when it was very greatly swollen with freshets, and at other times when at places the water did not run; that during the summer of 1910 the river was practically dry in places; that the ordinary stage of water did not furnish sufficient depth and volume to enable boats of any description to pass over, not even a skiff operated by oars; that on his farm, across which the river flowed, were rapids and shallows across which he had passed without getting his feet wet, by stepping on the stones; that at the time of the trial the stage of water was as high or higher than its ordinary stage; that there was no regular rise and fall in said river, but that the height and volume of water was dependent upon and varied according to the rain and snow fall; that the river could not be depended upon in any portion of the year to furnish water in sufficient volume and depth for the passage of boats of any description; that there were rapids and shallows at various places, both above and below Minot, similar to the one on his premises, which obstructed the passage of boats of any kind in the ordinary stage of water; that it never had been used as a highway for commerce or for carrying passengers, and that were it not for the artificial pond before referred to plaintiff could not operate his boats; that he had kept and maintained wire fences across the river and that no complaint had ever been made as to them or the various obstructions placed by farmers, counties, towns, and railways along said river, with the exception of the complaint made by plaintiff against defendant; that he had seen the river prior to the construction of the dams referred to; that in its natural state it would, in places, be too shallow for plaintiff's boats.

Peter Ehr testified in the main to the same effect as John Wallin, and that he had been acquainted with the river for twenty-five years; that on it there were rapids and shallows where the water was so shallow as to render the passage of boats impossible, even a skiff operated by oars in the hands of an oarsman; that although at the time of the trial the stage of the water was rather above the average, it did not exceed 4 inches in depth over such shallows and rapids; that the natural

obstructions in the river rendered the passage of boats of any size up and down said river at the ordinary stage of the water an impossibility; that it could not be used, in an ordinary stage of the water, in any manner whatsoever as a highway of commerce; that there was no regular rise and fall of the water in said river with the seasons, but that the depth depended upon the rain fall in the portion of the country along the river.

James Johnson testified that he had lived along the river, west of the city of Minot, for a period of twenty-nine years, and testified as to dams, fences, bridges, sewers, and other obstructions constructed on the river preventing navigation; that in ordinary stages of the water the river is so shallow as to prevent the passage of boats of any kind; that the natural obstructions completely obstruct the passage of boats up and down the river; that the running of boats past defendant's premises is only made possible by reason of the artificial pond caused by the back water from the railroad dam; that the river does not have any particular rise and fall recurring with the seasons, but that the volume of water varies with the climatic conditions and is dependent upon the precipitation, and that such river could not be depended upon to furnish sufficient volume of water for navigation by boats in its natural state at any season of the year; that he had seen it dry, with no water in it at all, and that it was practically dry during the summer of 1911.

The affidavit of Edward Kittleson, another twenty-nine-year resident, was to the same effect, and that said river never had been and never would be, in its natural state, a highway of commerce for the communities living along its banks; that if the footbridge complained of were removed, the river could not be navigated above the backwater referred to, as obstructions both above and below would prevent the passage of boats up and down the river.

Joseph Roach was another witness, who testified that the river could not be navigated except for the artificial pond referred to; and that there was no periodical rise and fall of the river, recurring with the seasons; and that the river could not be depended upon, except for such artificial means, to furnish sufficient water for navigation for boats of any description at any time of the year.

John Ehr testified much to the same effect.

The authorities are not altogether agreed as to the exact extent to

which a stream must be navigable to make it navigable in fact and law. Some hold that the fact that it may be capable of use for hunting and pleasure boating is insufficient, while others hold that any substantial capacity for use in those respects renders it navigable. The criterion, at all events, is not that it is not used for purposes of commerce and traffic, but that it is capable of such use. United States v. The Montello, 20 Wall. 430, 22 L. ed. 391.

The value of evidence as to the fact of its being used rests on the proposition that such fact proves it navigable. Gaston v. Mace, 33 W. Va. 14, 5 L.R.A. 392, 25 Am. St. Rep. 848, 10 S. E. 60. While the fact that it has never been so used is not of equal weight in proving that it is not navigable, but in an inhabited country, with towns along the river, and commerce being transacted between such towns, the fact that it has never been used to any extent for navigation is entitled to great weight as evidence that it is not capable of being navigated to advantage. 1 Farnham, Waters, 125; Burroughs v. Whitwam, 59 Mich. 279, 26 N. W. 491.

We apprehend that each case must stand upon its own facts. It would be unjust to the riparian owners to hold a small brook, which, during the melting of the snow in the spring, may be capable of navigation by a skiff with oars for a few days, but which no one would ever consider using as a regular line of communication or transportation, as a navigable stream. The benefits to be derived from such brief and trifling use would be wholly incommensurate with the damage and detriment occasioned by so holding to the owners of the adjoining land and of the bed of the stream. Going a step further, it would work a hardship only in a less degree to hold a small stream navigable on which boats can be propelled only at times of heavy rain storms, occurring with great irregularity, and not at seasons which can be in any degree depended upon. People will not regard as navigable a stream on which no dependence can be placed. If it might be navigated to a slight extent in April one year and perhaps not until July the next year, and perhaps not until October the next, it is self-evident that it would be incapable of navigation in any dependable degree. Capacity for a few days at a time is not enough. East Branch Sturgeon River Improv. Co. v. White & F. Lumber Co. 69 Mich. 207, 37 N. W. 192.

The testimony of the plaintiff and of his witnesses amounts only to

a statement of the fact that about the 1st of October, 1911, one party navigated the river in a 16-foot launch for a distance of 24 miles above Minot without difficulty, and of another that about eighteen years ago the Soo Railway Company floated some piles for bridges down the river below Minot. He does not state the time of year when this was done, but it is stated that in the month of September, 1906, he went down the river in a boat which drew 10 inches of water, about 25 miles, without difficulty; and that about ten years ago a building was rafted down the river from a point 25 miles above the city of Minot. Another witness testifies that on the 7th of April, 1912, he went from the village of Greene, in Renville county, to the city of Minot, in a boat drawing 8 inches of water, without difficulty, and that the river runs between stated points in a well-defined channel; and that he can go down the river between Minot and Greene in an 18-foot launch. We do not know what time of year this applies to, but, if at the time of the hearing of this application, the record shows the river to be above the ordinary stage of water. His testimony as to the running of launches and ferries, etc., at Towner and in Bottineau county, is not material, as the distance below Minot and the increase in the volume of the river are too great to prove that it is navigable at Minot.

It will thus be seen that, after giving a most liberal construction to the evidence submitted by plaintiff, he has not overcome the presumption against him by showing the river navigable the greater part, or even a considerable part, of the year. He has only shown that it has been navigated in a sense at certain specified dates, without showing the condition of the river on those dates, although, when read in the light of the testimony of the witnesses for the defendant, it is apparent that on the dates mentioned the river must have been swollen by freshets of some origin far beyond its ordinary stage. Had he shown that it was navigable for periods of some days on the occasion of freshets which were reasonably certain of stated recurrence, or which could be depended on with any considerable degree of certainty, the case might be different. The witnesses of defendant are men who are among the oldest and best-known inhabitants of the county, and who have observed the river for many years, both before and since the artificial pond used by the plaintiff was constructed, and even though plaintiff had made out a prima facie case, in the light of the testimony of the defendant's

witnesses the evidence against the navigability of the stream preponderates over that in favor of its being navigable.

7. This appeal was only argued for plaintiff by counsel appearing *amicus curiæ,* and he submits no extended brief on the merits, but seems to rest his contention upon the lower court having exercised its discretion in granting this temporary restraining order, which also commands the destruction of the bridge. We should be disposed to go some ways to sustain the action of the lower court in a matter largely within its discretion, had it not entered a mandatory order destroying the property of the defendant before the trial of the action upon the merits, or in case of grave doubt on the showing made. It should be borne in mind that we determine this appeal upon the same evidence submitted in the district court. This evidence was all in the form of affidavits. The trial court had no greater opportunity to judge of the truthfulness of witnesses than has this court; and if that court made a mistake in law, then it abused its discretion in a legal sense, and, as indicated, we are satisfied, after a careful review of authorities, that the learned judge of the district court was mistaken in his application of the law to the facts shown on the hearing. It should be a strong case which warrants the trial court in granting a mandatory injunctional order for the destruction of property pending the trial of an action upon its merits. It should not be done when there is room for grave doubt on the merits of the action. High, Inj. §§ 732–734. Abuse of discretion in such case occurs when an error in law is committed by the trial court. 2 High, Inj. § 1696.

8. It appears that a few days before the commencement of this action the defendant was tried in the district court of Ward county on an information charging him with obstructing a navigable stream at the same place, and found guilty and sentence imposed. From a judgment entered in such criminal action an appeal is now pending in this court. The plaintiff asked the trial court, on the hearing in this case, to take judicial notice of the record and proceedings in the criminal case, and the defendant has joined in the request of the plaintiff that this court also take such notice. We shall not take the time to determine what our duties are in the premises. The rules of evidence in the two cases under our statute differ widely, and it would be a dangerous precedent to say that the evidence received in a criminal

case, where much evidence offered was excluded and numerous answers received over objection, and where exceptions were taken to various parts of the charge to the jury, should be read and considered by this court in a case where, on trial, all evidence offered is received and transmitted on appeal to this court. We content ourselves with saying that we have carefully read the record in the criminal case, and that in our opinion it does not strengthen the showing made by the respondent on the application for the order appealed from.

This suit was apparently commenced, and the hearing had, with no very clear conception of the legal rights of the parties, and perhaps with the belief, on the part of plaintiff, that the navigability of the river should be determined on its capacity as fixed by the artificial structures now existing, and as a result several points material to his case were overlooked in attempting to make proof. These may be supplied on a trial on the merits.

We may also explain that many authorities cited relate to the capacity of streams to float logs and lumber. The principles applicable in the cases involving navigability, and those relating to floatability, are the same; but we think that in fact it is possible for a non-navigable river to be floatable. Assuming this difference to exist does not, however, differentiate the rules applicable to a determination of either question. The floatability of the Mouse river is not likely to become a question for the courts, as it does not flow through a timbered country.

The order of the trial court is vacated, and appellant will recover his costs.

Goss, J., being disqualified, did not participate in the above decision.

EDWARD H. WILSON v. HENRY KRYGER.

(143 N. W. 764.)

Appeal — statement of errors — notice — specifications — not prerequisite.

1. Section 4, chap. 131, Laws 1913, requiring the service, with the notice of appeal, of a statement of the errors of law complained of and a specification of

insufficiency of the evidence, when such insufficiency is relied on, is construed, and *held* not to be a jurisdictional prerequisite to such appeal.

Motion to dismiss appeal — specifications — time of service — enlargement of time.

2. Upon respondent's motion to dismiss an appeal on the ground of appellant's failure to serve the statement and specifications with his notice of appeal as required by § 4, chap. 131, Laws 1913, the court will, upon good cause shown and in furtherance of justice, enlarge the time for the service thereof pursuant to the provisions of § 7224, Rev. Codes 1905, following the rule announced in Burger v. Sinclair, 24 N. D. 315, 140 N. W. 233, and also pursuant to the express provisions of § 7 of such new practice act.

Appeal — dismissal — delay in settling statement — not ground.

3. Mere delay in settling a statement of the case or in taking an appeal, where such appeal was taken within the statutory period allowed therefor, constitutes no ground for a dismissal of the appeal.

Appeal — time of — limitation — new statutes — application of — rule.

4. An amendatory act shortening the time for appeals from one year to six months will not, in the absence of express provisions to the contrary, apply to judgments rendered prior to the taking effect of the new act, further than to limit the right of appeal to not more than six months after the taking effect of such new act in such cases as still had a right of appeal under the old law.

Applying such a rule of construction, § 14, chap. 131, Laws 1913, is held to apply only to those judgments entered, or notice of entry of which was served, less than six months prior to July 1, 1913. From such judgments appeals must be taken within six months after the taking effect of the new act—July 1, 1913; as to all other judgments the old statute governs.

Opinion filed October 7, 1913.

Motion to dismiss an appeal from a judgment of the District Court, Kidder County; Winchester, J.

Motion denied.

Jesse Van Valkenberg and *R. L. Phelps,* Steele, North Dakota, for the motion.

Henry Kryger, Minneapolis, Minnesota, and *Newton, Dullam, & Young,* Bismarck, North Dakota, of counsel, *contra.*

FISK, J. Respondent moves for a dismissal of this appeal upon the following grounds:

"1st. That no statement of the errors of law complained of or specifi-

cation of insufficient evidence was served with the notice of appeal as required by paragraph 4, chapter 131, Session Laws of 1913.

"2d. There has been inexcusable delay on the part of appellant in causing a statement of the case to be settled, and in taking said appeal, more than two terms of this court having passed since the entry of judgment in the district court on July 9, 1912, and no statement having been proposed or submitted.

"3d. The said appeal was not taken within the time as required by statute."

Appellant resists such motion, and as to the first ground he makes a counter motion for leave at this time to supply the omission to serve the required statement of errors and specifications as required by § 4, chapter 131, Laws of 1913, being the new practice act which took effect on July 1st. Counsel for appellant bases such application upon § 7224, Rev. Codes 1905, which provides: "When a party shall in good faith give notice of appeal, and shall omit, through mistake or accident, to do any other act necessary to perfect the appeal to make it effectual or to stay proceedings, the court from which the appeal is taken, or the presiding judge thereof or the supreme court, or any one of the justices thereof, may permit an amendment or the proper act to be done on such terms as may be just."

We are satisfied of appellant's good faith in serving the notice of appeal, and that the omission to serve such statement of errors and specifications was purely an oversight due to the fact that the provision of the new statute aforesaid was overlooked, the notice of appeal having been served but a few days after the taking effect of the new statute.

The court clearly has the power and should permit such omissions to be supplied, unless the provisions of § 4, chapter 131, supra, are construed as mandatory and a compliance therewith jurisdictional. The section reads: "A party desiring to make a motion for new trial, or to appeal from a judgment or other determination of a district court or county court with increased jurisdiction, shall serve with the notice of motion or notice of appeal a concise statement of the errors of law he complains of; and if he claims the evidence is insufficient to support the verdict, or that the evidence is of that character that the verdict should be set aside as a matter of discretion, he shall so specify."

If a compliance with such statute is essential to confer jurisdiction

upon this court sufficient to enable it to permit amendments or other necessary acts to be done in order to make the appeal effectual, then it follows that respondent's motion should be granted, otherwise it should be denied, provided such amendment or other necessary act is made or taken by leave of court. The new practice act aforesaid does not purport to amend or change the existing statute prescribing the steps necessary to be taken to perfect an appeal, and we do not think a fair construction of § 4 of such new act evinces any legislative intent to require such statement of errors and specifications as a prerequisite to this court acquiring jurisdiction of the appeal, to the extent at least of authorizing it to permit amendments or other necessary acts to be done to make the appeal effectual. The statute is, no doubt, mandatory in the sense that this court, without such statement of errors and specifications (when necessary), will be unable to dispose of the appeal on the merits; but we are agreed that the service of the notice of appeal and undertaking for costs pursuant to §§ 7205 and 7208, Rev. Codes 1905, confers jurisdiction sufficient to authorize the court to permit appellants to supply the omissions above referred to. The recent case of Burger v. Sinclair, 24 N. D. 315, 140 N. W. 233, is authority for our conclusions as above announced.

A still more conclusive answer to respondent's contention in support of the first ground of the motion is found in § 7 of the new act. This section provides: "The court or judge may, upon good cause shown, in furtherance of justice, extend the time within which any of the acts mentioned in §§ 1–5 and 6 of this act, may be done, or may, after the time limited therefor has expired, fix another time within which any of such acts may be done." As the only act required to be done by § 4 is the service of such statement of errors of law and specification of the insufficiency of the evidence, it necessarily follows that the legislature, by the enactment of § 7, clearly evinced an intent not to make the service of such statement and specifications with the notice of appeal, a jurisdictional prerequisite.

Leave is hereby granted the appellant to supply such omissions within thirty days from the date of the filing of this opinion. Should he fail so to do, the appeal may be dismissed upon proper showing of such neglect.

The second ground of the motion is manifestly untenable, conceding

that appellant had the full period of one year in which to appeal from the date of notice of the entry of the judgment, which we will hereafter consider. It is no ground for moving to dismiss the appeal because not taken earlier, and it is perfectly plain that a delay or even an entire failure to cause a statement of the case to be settled, is no ground for such a motion, as the appellant may desire merely to have a review of errors appearing upon the judgment roll proper.

The third ground of motion presents a more complex question. The new practice act which took effect on July 1st reduces the time in which appeals may be taken from judgments from one year to six months after the entry thereof by default, or after written notice of the entry thereof, where there was an appearance in the action. Section 14, chapter 131, supra. Such new act is general, and applies to appeals from all judgments, whether entered before or after it became effective; and as we understand respondent's contention it is that such statute, relating as it does merely to the remedy, should be given not only a prospective but a retrospective operation, and as thus construed it operated *eo instanti* to cut off appellant's right of appeal from the judgment in question on July 1st. We cannot, however, agree with the conclusion thus drawn by respondent's counsel. While the act deals only with the remedy, and on its face applies to all judgments, whether rendered before or after its enactment, we think it is entirely clear that the legislature did not intend to give it a retroactive operation so as to cut off a right of appeal which existed at the time it took effect. While manifestly the legislative purpose was to shorten the time for appeal to six months as to all judgments, it no doubt intended to have such period computed from the date the new act should take effect, and where, under the old statute, more than six months would be left in which to take an appeal from an existing judgment, the new act would cut off the right of appeal at the expiration of six months from July 1st. But in cases of existing judgments where, on July 1st, a period of but six months or less remained in which to take an appeal under the old statute, the new act does not apply and the time prescribed under the old act governs. In other words, the new act will not be given an interpretation which would result in thwarting the legislative will which was to shorten—not lengthen—the time for prosecuting appeals.

In order to give effect to the evident legislative intent, we are re-

quired to hold that the new act applies only to those judgments the time for appealing from which, under the old statute, would extend more than six months after the taking effect of the new statute. In other words, the new statute is prospective in its operation, but applies to all judgments whether entered prior or subsequent to July 1st, which, but for such act, the period in which appeals might have been prosecuted therefrom would exceed six months from such date. As to other judgments, the period for appealing is governed by the old statute, and the new does not apply, for otherwise the new act would have the effect of enlarging rather than shortening the period for appealing therefrom, or else it would cut off all right to appeal on the date of the taking effect of such act, neither of which results was intended. The question is somewhat analogous to that presented by statutes shortening the limitation of time in which actions may be commenced after the cause of action accrues. Such statutes are generally held to apply to causes of action existing at the time of their taking effect, provided the new act affords a reasonable time after it takes effect in which suits may be commenced thereon. If a reasonable time is not thus afforded, the new act, for reasons which are palpably sound, is held not to apply to such causes of action. 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; State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112; Adams & F. Co. v. Kenoyer, 17 N. D. 302, 16 L.R.A.(N.S.) 681, 116 N. W. 98.

Of course, there is a marked distinction which should be noted between causes of action and the privilege of appealing. The former is a property right which is protected by the Constitution from confiscation, while the latter is a mere privilege which may be taken away at any time by the legislature. The question here is one of legislative intent rather than of legislative power. Did the legislature intend, by the act in question, to cut off the privilege of appeals from certain existing judgments, or did it intend by such new act to enlarge the period previously allowed for appealing therefrom? Clearly, neither result was intended. There is no sound reason why such new statute may not be held to apply to certain judgments existing on July 1st, and not to all. Manifestly, it should be held to apply to those judgments

where otherwise an appeal might be taken after six months have elapsed from July 1st; and it is equally manifest that it should not apply to any other existing judgments, because it fixes no time applicable to them. As before stated, the six months' period, which is the only time fixed in such act, if given a retroactive operation as to the latter class of judgments, would cut off all right of appeal on July 1st, and when given a prospective operation only it would enlarge the time for appealing therefrom.

This identical question has frequently been before the courts, and there is some conflict in the holdings. We will notice only a few of such decisions.

Beebe v. Birkett, 108 Mich. 234, 65 N. W. 970, involved a statute extending the time for settling cases in chancery. It was there held that, as the new statute dealt with procedure only, it applied to both pending and future cases. The court there, among other things, said: "The new act does not in express terms repeal the old, but it seems to cover the same ground as the old, with the exception mentioned. In our opinion, it was intended to supplant the other; and the only question here is whether it extends to pending cases, or whether they shall be governed by the former practice. It is certain that this act of 1895 should not be given retroactive effect, if vested rights were to be thereby affected; but a particular remedy is not necessarily a vested right. . . . It is a general rule that an act dealing with procedure, only, applies, unless the contrary intention is expressed, to all actions falling within its terms, whether commenced before or after the enactment. . . . An act giving appeals from certain enumerated judgments and orders applies to such judgments and orders made prior to its passage." Citing numerous cases.

In Odum v. Garner, 86 Tex. 374, 25 S. W. 18, this precise question was involved, and the court treats the question as analogous to cases involving statutes shortening the limitation period for the commencement of actions, and adheres to a rule announced in Gautier v. Franklin, 1 Tex. 732, holding that "upon the substitution of a new term of limitation the time which elapsed under the former law will be counted in the ratio that it bears to the whole period, and the time of the new law will be computed upon the basis of the ratio that the unexpired time under the old law bears to the whole time. That is, that if under

the old law two thirds of the time had expired, then one third of [the time prescribed under] the new law would be allowed in which to sue." No other court seems to have adopted such a rule, and it seems to us that the holding is unsound, and constitutes judicial legislation, rather than judicial construction.

In Ryan v. Waule, 63 N. Y. 57, it was held that a statute passed after an entry of a judgment, but before an appeal therefrom was taken, limiting appeals to cases involving an amount exclusive of interest less than $500, applied to such former judgment, the court saying: "The fact that this cause was pending, or the recovery had before the enactment of the law of 1874, does not take the case out of the operation of the statute. The right of appeal is not a vested right, but is one of the remedies at all times within the discretion of the legislature, and to be dealt with as that body shall deem wise. Retroactive effect is not given to the act in applying it to all appeals brought after it became a law. It did not affect appeals already brought; but was only operative as to future appeals, and the fact that it may have taken away the right to appeal in some cases in which it existed before does not render it any the less an act prospective in its operation."

The Constitution of Arkansas guarantees the right of appeal, and in Rankin v. Schofield, 70 Ark. 83, 66 S. W. 197, it was held that a statute shortening the time for appeal is unconstitutional in so far as it cuts off at once the right to appeal from judgments previously entered, following the prior decision of O'Bannon v. Ragan, 30 Ark. 181. The latter case presents a state of facts quite parallel to those in the case at bar, and the court held the new statute inoperative as to existing judgments, where, under the new statute, the remedy by appeal would be cut off entirely.

This precise question arose in California, and was decided in Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48, and we quote from the opinion as follows:

"At the time the judgment was entered, an appeal could be taken from a final judgment at any time within one year after its entry. March 3, 1897, § 939 of the Code of Civil Procedure was so amended as to give only six months after the entry of judgment within which an appeal can be taken. At the time of the amendment, the period of six months had already elapsed since the entry of the judgment; there

remained, however, five months of the time allowed for taking an appeal under the Code before the amendment. The act took effect sixty days after its passage, at which time nine months had elapsed since the entry of judgment. The appeal was taken after that time, but within the period of twelve months from the entry of judgment.

"If the amendment operated retrospectively, it cut off the right of appeal immediately upon the taking effect of the act, affording no opportunity whatever thereafter for the exercise of this privilege, and depriving this court, so far as the legislature can, of its jurisdiction in the cases upon which it would so operate.

"To make this statute applicable to judgments entered before it went into effect is to give it a retroactive effect. But it is no objection to the validity of a statute to say that it is retrospective in its operation. The question is, Is the amendment an *ex post facto* law, or does it impair the obligation of contracts? and also, perhaps, whether it deprives anyone of vested rights. If it does none of these things, it is no objection to it that it applies to pending cases or past transactions.

. . .

"It is quite obvious that great hardship is likely to result if a retroactive effect is given to this statute. One may be presumed to know the laws of the land, but the very instant this amendment took effect, if it be retroactive, the right of appeal was cut off at once. No time whatever was given to appeal in those cases in which judgments had been entered six months or more previously. Unless it is absolutely necessary, we should not impute such an intention to the legislature. In view of the construction which has almost invariably been given to statutes of this character, I feel sure that the legislature intended that its operation should be limited to judgments thereafter entered."

Bailey v. Kincaid, 57 Hun, 516, 11 N. Y. Supp. 294, is authority for holding the new statute to apply to cut off appeals from prior judgments after the expiration of the new period prescribed. The syllabus is as follows:

"Where, subsequent to the time that the right to appeal from a judgment accrued, and before the expiration of the time limited for such appeal, § 1341 of the Code of Civil Procedure was amended by striking out sixty days and inserting thirty days, and thereafter the notice of appeal was served more than thirty days from the time that

the right to appeal accrued, but less than sixty days thereafter, and also more than thirty days after the date at which the amendment took effect, the service of the notice is too late."

The Washington court in the recent case of Rogers v. Trumbull, 32 Wash. 211, 73 Pac. 381, announced a rule in harmony with our views as above expressed. The reasoning and conclusion of the court meets with our full approval, as we think it announces a sound rule of construction consistent with the evident intent of the legislature in enacting the new statute. At the time the judgment appealed from in that case was rendered, § 1757 of their Code gave the appellant six months within which to take his appeal, which it was held would expire on March 9, 1903, on which date the appeal was taken. On that day an act took effect amending the prior statute limiting the time for appeal to thirty days after the rendition of the judgment. The appeal was taken after the new act took effect, and it was contended that the amendatory act was retrospective, and since more than thirty days had elapsed after the judgment was rendered, the appeal was too late. After quoting from Sutherland on Statutory Construction, § 482, the court briefly sums up its conclusions in the following language: "There is no indication in the act of 1903 that it applied to judgments rendered prior to the time the act took effect, so that judgments rendered more than thirty days prior thereto were barred of the right of appeal. It, therefore, under the rule above announced, applied only to judgments rendered subsequently, *or to those where the right of appeal under the old law extended more than thirty days from the time the act took effect.*"

We conclude that the motion of respondents is untenable, and the same is accordingly denied.

THE STATE OF NORTH DAKOTA UPON THE RELATION OF H. W. BRAATELIEN, as State's Attorney within and for Williams County, North Dakota, v. GEORGE O. DRAKELEY et al., as County Commissioners within and for Williams County, North Dakota.

(143 N. W. 768.)

County auditor — fees — payment county treasurer — county commissioners — resident — citizen — taxpayer — relator.

1. When a county auditor retains fees which belong to the county, and fails to account for them and pay them to the county treasurer, and the board of county commissioners neglects and refuses on demand to adjust the acount of such fees and determine the amount thereof as required by § 2430, Revised Codes of 1905, a resident, taxpayer, and citizen of the county is qualified to act as a relator in proceedings in the name of the state to compel action by the county commissioners.

County commissioners — adjustment of fees — duty — ministerial — mandamus.

2. The adjustment of such fees by the county commissioners when not paid into the county treasury is a ministerial duty, and mandamus will lie to compel them to audit or adjust the same, but will not lie to compel a determination of any particular sum due or not due the county from the auditor.

County officials — criminal prosecutions — public duty — remedy — mandamus.

3. Neither the criminal prosecution, nor the removal of county officials who fail to perform their duties, furnishes an adequate remedy to the public or to taxpayers of the county to which funds unaccounted for belong, and hence are not the other adequate remedies which inhibit the maintenance of proceedings to mandamus the commissioners to adjust such accounts.

Action — state's attorney — fees — collection.

4. As to whether the state's attorney of a county can bring an action against the auditor, to collect fees retained by him which belong to the county, without being directed so to do by the board of county commissioners, is not decided.

County auditor — salary — property — valuation.

5. By chap. 70, Laws of 1907, fixing the salary of county auditors, the different counties are classified with reference to the assessed valuation of the property in the counties of each class, and this statute reads that no county auditor shall receive more than ——— dollars for his personal services in any one year, the amount depending on the valuation of the property in his county.

Held that this enactment fixes the salary of the county auditor at the sum named as applying to the class in which his county belongs.

Salaries — fees — auditors — accounting.

6. Chapter 70, supra, was enacted to fix the salaries of all the county auditors of the state, and relates to that subject alone, and provides that all moneys received as fees for certifying to abstracts or deeds in excess of the salary as thereby limited shall be paid by the county auditor, at the end of each month, into the revenue fund of the county. *Held* that this requires an accounting by the auditor, at the end of each month, of such fees, and that if the amount exceeds his salary for the month it is his duty to pay the excess into the revenue fund of the county.

Taxes — payment — real property — transfer — certificate.

7. Chapter 219, Laws of 1907, was enacted for the purpose of enforcing the payment of taxes before the transfer of real property, by requiring a certificate of the county auditor as to the facts, before deeds, with certain exceptions, are entitled to record, and as an incidental matter provided for the fee to be collected by the county auditor for such certificate, and that the auditor might retain such fee as compensation for making his certificate. *Held* that in view of the fact that chapter 70, supra, requiring such fees to be turned into the county treasury, was enacted by the legislature subsequent to the enactment of said chapter 219, the history of the legislation on the subject, and other considerations set forth in the opinion herewith, the requirements of chapter 70 control; and such fees belong to the county, and it is the duty of the county auditor to account for the same monthly and turn any sum in his hands received therefor in excess of his salary for the month into the county treasury.

Fees — auditors — salary.

8. The provision regarding turning such fees into the county treasury, found in chapter 70, is construed to require such fees received in excess of the salary fixed for the class of counties to which any particular county belongs to be turned into the county treasury, and not, as contended, that each auditor is entitled to retain such fees to an amount equaling the salary provided for the counties embraced in the maximum class.

Officers — custom — fees — not controlling.

9. While in some cases a course of conduct indicating a common understanding by administrative officers as to the meaning of a statute, when they have followed a usage which has been acquiesced in by all parties concerned for a long period of time, may be entitled to weight in determining its real meaning, it is *held*, in view of the legislation on the subject and the facts in this case, that such understanding and usage on the part of auditors on a subject in which they are personally interested, and in the face of the denial by appellant that there has been such a custom or construction of the statute on the part of at least some of the auditors, is not controlling and would not justify the court in so holding.

Legislature — policy — officers — salary — fees — legislative intent — doubts — public.

10. Where the policy of the legislature has been to place county officials on a salaried basis and to turn all fees into the county treasury, such fees belong to the county unless the statute shows a clear and plain legislative intent to grant them to the salaried officers; and doubts should be resolved in favor of the public.

Statutes — subject — conflict — other statutes.

11. A statute which deals with one subject only will ordinarily control in case of conflict between it and a statute dealing with the same subject only incidentally, and having some other main object.

County commissioners — auditor — fees — mandamus — premature.

12. The county commissioners having undoubtedly entertained in good faith the opinion that the fees in question belonged to the auditor, and for this reason having refused to order suit brought to recover anything due the county, this court will not assume that, when advised of the law and the duty of the board to make an adjustment with the auditor, that the auditor will refuse or fail, if anything is found due the county, to pay the same, or that in the event that he does so refuse the board will neglect to order the state's attorney to bring suit therefor; hence it is *held* that to mandamus the board to bring suit at this time would be premature, even if mandamus will lie against the board to compel such order.

Opinion filed October 9, 1913.

Appeal from an order of the District Court for Williams County, *Burr,* Special Judge.

Reversed.

Statement of Facts.

The relator as state's attorney of Williams county and also as a freeholder, taxpayer, resident, and elector of said county, on behalf of himself and other taxpayers similarly situated, procured an order to show cause addressed to George O. Drakeley, C. J. Helle, C. O. Houglum, and Frank Banks, as county commissioners of Williams county, why a writ of mandamus should not issue. His application set forth, among other things, that the respondents were commissioners of said county, that the assessed valuation of the county as returned by the State Board of Equalization for 1906 was $2,241,792; for 1907

was $3,323,029; for 1908 was $5,386,519; for 1909 was $7,699,807; and for the year 1910, $8,517,387; that the salary of the county auditor for said county by reason of the valuation aforesaid was, for 1907, $1,500; for 1908, not more than $1,600; for 1909, not more than $1,900; and for the year 1910, not more than $2,000; and not more than $2,200 for the year 1911; that the said auditor was in duty bound to pay into the revenue fund of the county, at the end of each month, all moneys received for certifying to abstracts and deeds in excess of such salary; that one E. M. Atterberry had been the county auditor of said county at all times since the 1st day of July, 1907, and had, during the time when he held such office and from the 1st day of July, 1907, to the commencement of these proceedings, received a large sum of money in the form of fees for certifying to abstracts and deeds; that he had been paid the salary allowed by law out of a salary fund of the county by warrants which were paid upon presentment at about the dates of their issue at or about the end of each month, and specifying the amount of salary paid him for each month during the time of his said incumbency in such office. It is further alleged that said Atterberry at no time accounted for the fees which he received in his official capacity for such services, but had neglected and refused to account therefor, and failed to pay or cause the same to be paid to the county of Williams as required by law at any time, but had converted to his own use and still retained the same, and that the amount thereof so collected and retained by said Atterberry aggregated about $1,500.

Facts are then recited showing that the board of county commissioners had failed, neglected, and refused, though demanded, to adjust the accounts of said Atterberry as to such fees, or to ascertain the balance due the county arising therefrom, and had refused to order suit brought against said Atterberry for the fees retained by him above the amount authorized by law. Facts are further pleaded, showing that the attention of the board had been called to the delinquency of the auditor, and their refusal to ascertain the amount of such excess of fees so collected and retained, and to order suit brought in the name of the county therefor, although they knew that the auditor had been paid the full amount of his salary and that such fees had been received in excess of his salary as limited by law. It is then alleged that relator has no plain, speedy, and adequate remedy at law to protect his rights

as a taxpayer and resident of the state of North Dakota and the county of Williams, or the rights of the other taxpayers of such county, unless such board of county commissioners performs its duty in the matter as required by law. A writ was prayed for requiring such county commissioners to adjust the accounts of said county auditor as to any and all amounts received by him in his official capacity for certifying to deeds and abstracts, and to ascertain the balance due the county, and to order suit to be brought in the name of the county therefor, and to do and perform all other things with reference thereto required by law. Other facts are alleged which are immaterial to an understanding of this appeal. The application was heard by Honorable A. G. Burr, special judge, when a demurrer was interposed to the order to show cause and the affidavit in support thereof, on the ground and for the reason that the affidavit did not state facts sufficient to constitute a cause of action, or sufficient upon which to base a writ of the court. The court, by order duly entered bearing date the 29th of June, 1911, sustained the demurrer. From this order an appeal was duly taken to this court.

Geo. A. Bangs and *Geo. R. Robbins* file brief of points and authorities on behalf of the state association of county auditors, and by permission of the court.

Mandamus is not the proper remedy. The relator is not a party beneficially interested. People ex rel. Bartlett v. Busse, 238 Ill. 593, 28 L.R.A.(N.S.) 246, 87 N. E. 840; State ex rel. Hawes v. Brewer, 39 Wash. 65, 109 Am. St. Rep. 858, 80 Pac. 1001, 4 Ann. Cas. 197; Lewright v. Love, 95 Tex. 157, 65 S. W. 1089; 26 Cyc. 402; Harrell v. Lynch, 65 Tex. 146; Sweet v. Smith, 153 Mich. 674, 117 N. W. 59; Van Horn v. State, 51 Neb. 232, 70 N. W. 941; Nickelson v. State, 62 Fla. 247, — L.R.A.(N.S.) —, 57 So. 194; Union P. R. Co. v. Hall, 91 U. S. 343, 355, 23 L. ed. 428, 432; Chicago & A. R. Co. v. Suffern, 129 Ill. 282, 21 N. E. 824.

The acts sought to be coerced are discretionary, and hence mandamus will not lie. Looscan v. Harris County, 58 Tex. 511; Kerby v. Clay County, 71 Kan. 683, 81 Pac. 503; People ex rel. Damron v. McCormick, 106 Ill. 184; Lewright v. Love, 95 Tex. 157, 65 S. W. 1089; Lewright v. Bell, 94 Tex. 556, 63 S. W. 623; Board of Education

v. Cherokee County, 150 N. C. 116, 63 S. E. 724; Ward v. Beaufort County, 146 N. C. 534, 125 Am. St. Rep. 489, 60 S. E. 418; Glenn v. Moore County, 139 N. C. 412, 52 S. E. 58; People ex rel. Bartlett v. Busse, 238 Ill. 593, 28 L.R.A.(N.S.) 246, 87 N. E. 840; State ex rel. Hawes v. Brewer, 39 Wash. 65, 109 Am. St. Rep. 858, 80 Pac. 1001, 4 Ann. Cas. 197; State ex rel. Rosbach v. Pratt, 68 Wash. 157, 122 Pac. 987; Boyne v. Ryan, 100 Cal. 265, 34 Pac. 707; Everding v. McGinn, 23 Or. 15, 35 Pac. 178; Lamb v. Webb, 151 Cal. 451, 91 Pac. 102, 646; State ex rel. Moody v. Barnes, 25 Fla. 298, 23 Am. St. Rep. 516, 5 So. 722; Wailes v. Smith, 76 Md. 469, 25 Atl. 922; Kerr v. Superior Ct. 130 Cal. 183, 62 Pac. 479; Fuller v. University & S. Lands, 21 N. D. 212, 129 N. W. 1029; 13 Enc. Pl. & Pr. 497; Huntington v. Nicoll, 3 Johns. 566; State ex rel. Ellis v. Board of Revenue, 172 Ala. 190, 55 So. 179; Jackson v. Cochran, 134 Ga. 396, 67 S. E. 825, 20 Ann. Cas. 219; State ex rel. Romano v. Yakey, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071; 19 Am. & Eng. Enc. Law, 724; State ex rel. Ellis v. Board of Revenue, 172 Ala. 190, 55 So. 179; Drew v. Madison, 146 Iowa, 721, 125 N. W. 815; Norris v. Cross, 25 Okla. 287, 105 Pac. 1000; McAlester-Edwards Coal Co. v. State, 31 Okla. 629, 39 L.R.A.(N.S.) 810, 122 Pac. 194.

The remedy, if any there be, is the prosecution or removal of the officers. Rev. Codes 1905, §§ 9101, 9104 & 9498; Ward v. Beaufort County, 146 N. C. 534, 125 Am. St. Rep. 489, 60 S. E. 418; Glenn v. Moore County, 139 N. C. 412, 52 S. E. 58.

The true interpretation of the 1907 enactment authorizes and permits the county auditors to retain the fees provided by law to be collected by them, up to the maximum of their compensation allowed by law as salary. Rev. Codes 1905, § 2592; Sess. Laws 1907, chap. 70; 34 Cyc. 1826; 7 Words & Phrases, 6287; 18 Cyc. 462; 3 Words & Phrases, 2712.

Repeals by implication are not favored. Reeves v. Bruening, 16 N. D. 398, 114 N. W. 313.

Where statutes are irreconcilable or wholly repugnant, the later enactment will prevail. State v. Cooper, 18 N. D. 583, 120 N. W. 878.

When two acts are passed by the same session of the legislature, touching the same subject-matter, there is a strong presumption against

implied repeal. 36 Cyc. 1086; 1 Lewis's Sutherland, Stat. Constr. § 268; State ex rel. Hay v. Hindson, 40 Mont. 353, 106 Pac. 362; Tampa v. Prince, 63 Fla. 387, 58 So. 542; State ex rel. Scholl v. Duncan, 162 Ala. 196, 50 So. 265; Southern P. Co. v. Sorey, 104 Tex. 476, 140 S. W. 334; State ex rel. Hendricks v. Marion County, 170 Ind. 621, 85 N. E. 513.

A general law will not impliedly repeal a special law, unless the terms of the two acts are absolutely repugnant and cannot be reconciled. 36 Cyc. 1087; Reeves v. Bruening, 16 N. D. 398, 114 N. W. 313; Birmingham v. Southern Exp. Co. 164 Ala. 529, 51 So. 159; State ex rel. Metcalf v. Baker, 114 Minn. 209, 130 N. W. 999; Wilson v. Edwards County, 85 Kan. 422, 116 Pac. 614; Greenbush Cemetery Asso. v. Van Natta, 49 Ind. App. 192, 94 N. E. 899.

The settled and contemporaneous construction placed upon a statute has great and persuasive weight, even though not controlling. 36 Cyc. 1136; Cooley, Const. Lim. 81, 86; Lewis's Sutherland, Stat. Constr. §§ 472 et seq.; State ex rel. Edgerly v. Currie, 3 N. D. 317, 55 N. W. 858; Garr, S. & Co. v. Sorum, 11 N. D. 174, 90 N. W. 799; United States v. Hill, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510; United States v. Finnell, 185 U. S. 236, 46 L. ed. 890, 22 Sup. Ct. Rep. 633; VanVeen v. Graham County, 13 Ariz. 167, 108 Pac. 252; Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 9 Ariz. 383, 84 Pac. 511; Douglas County v. Vinsonhaler, 82 Neb. 810, 118 N. W. 1058; State ex rel. Reardon v. Hooker, 26 Okla. 460, 109 Pac. 527; State ex rel. Bashford v. Frear, 138 Wis. 536, 120 N. W. 216, 16 Ann. Cas. 1019; Price v. Lancaster County, 189 Pa. 95, 41 Atl. 987; Auditor v. Cain, 22 Ky. L. Rep. 1888, 61 S. W. 1016; Harrison v. Com. 83 Ky. 162; Ewing v. Vernon County, 216 Mo. 681, 116 S. W. 518; State v. Brady, — Tex. Civ. App. —, 114 S. W. 895; Kelly v. Multnomah County, 18 Or. 356, 22 Pac. 1110; Brown v. Foster, 88 Me. 49, 31 L.R.A. 116, 33 Atl. 662; Bloxham v. Consumers' Electric Light & Street R. Co. 36 Fla. 519, 29 L.R.A. 507, 51 Am. St. Rep. 44, 18 So. 444; People v. Adelphi Club, 149 N. Y. 5, 31 L.R.A. 510, 52 Am. St. Rep. 700, 43 N. E. 410; Bernard v. Benson, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439; Com. ex rel. Lewis v. Paine, 207 Pa. 45, 56 Atl. 317; Smith v. Bryan, 100 Va. 199, 40 S. E. 652; Matz v. Chicago & A. R. Co. 85 Fed. 180; Collins

v. Henderson, 11 Bush, 74; State v. Rutland R. Co. 81 Vt. 508, 71 Atl. 197; State ex rel. Platte County v. Sheldon, 79 Neb. 455, 113 N. W. 208; State v. Davis, 62 W. Va. 500, 14 L.R.A.(N.S.) 1142, 60 S. E. 584; State v. Northern P. R. Co. 95 Minn. 43, 103 N. W. 731; Rohrer v. Hastings Brewing Co. 83 Neb. 111, 119 N. W. 27, 17 Ann. Cas. 998; Edwards v. Darby, 12 Wheat. 206, 6 L. ed. 603; United States v. Moore, 95 U. S. 760, 24 L. ed. 588; Hahn v. United States, 107 U. S. 402, 27 L. ed. 527, 2 Sup. Ct. Rep. 494; Brown v. United States, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; United States v. Philbrick, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; United States v. Johnston, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. Rep. 446; Robertson v. Downing, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1328; Schell v. Fauché, 138 U. S. 562, 34 L. ed. 1040, 11 Sup. Ct. Rep. 376; Pennoyer v. McConnaughy, 140 U. S. 23, 35 L. ed. 370, 11 Sup. Ct. Rep. 699; United States v. Alabama G. S. R. Co. 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306; 36 Cyc. 1151; 2 Lewis's Sutherland, Stat. Constr. p. 890; Harrington v. Smith, 28 Wis. 43.

H. W. Braatelien, for appellant.

The fees collected by county auditors, for certifying to abstracts, deeds, etc., belong to their respective counties. Rev. Codes 1905, § 2592; Sess. Laws 1907, chap. 70, p. 96; Rev. Codes 1905, § 1597; Sess. Laws 1907, p. 351.

Courts must construe a given statute with reference to and in connection with all other provisions of statute law bearing upon the same subject-matter. Wishek v. Becker, 10 N. D. 63, 84 N. W. 590; Finch v. Armstrong, 9 S. D. 255, 68 N. W. 741.

Repeals by implication are not favored. State ex rel. Berry v. Babcock, 21 Neb. 599, 33 N. W. 247.

Such statutes should not be construed in an antagonistic manner, unless such is the clear intent of the legislature. Sutherland, Stat. Constr. 287; 26 Am. & Eng. Enc. Law, 721; Reeves v. Bruening, 16 N. D. 402, 114 N. W. 313; People v. Thompson, 161 Mich. 391, 126 N. W. 466; State ex rel. Berry v. Babcock, 21 Neb. 599, 33 N. W. 247.

The intention of the legislature governs. State ex rel. Erickson v. Burr, 16 N. D. 591, 113 N. W. 705; Sutherland, Stat. Constr. 2d ed.

§ 623; Shellenberger v. Ransom, 41 Neb. 631, 25 L.R.A. 564, 59 N. W. 935.

Repeals by implication are, however, recognized as intended by the legislature, and its intention to repeal is ascertained in other respects, when not expressly declared, by construction. State ex rel. Flaherty v. Hanson, 16 N. D. 347, 113 N. W. 371; State v. Minneapolis & N. Elevator Co. 17 N. D. 23, 138 Am. St. Rep. 691, 114 N. W. 482; Atty. Gen. v. Railroad Comrs. 117 Mich. 477, 76 N. W. 69; State v. Cooper, 18 N. D. 583, 120 N. W. 878; Sutherland, Stat. Constr. 2d ed. 461.

Where statutes are wholly repugnant and cannot be harmonized, the last legislative expression governs. Iowa Sav. & L. Asso. v. Heidt, 107 Iowa, 297, 43 L.R.A. 689, 70 Am. St. Rep. 197, 77 N. W. 1050; Busby v. Riley, 6 S. D. 401, 61 N. W. 165; State ex rel. Excelsior v. District Ct. 107 Minn. 437, 120 N. W. 894; State v. Omaha Elevator Co. 75 Neb. 637, 106 N. W. 984, 110 N. W. 874, authorities cited; Ex parte Sohncke, 148 Cal. 262, 2 L.R.A.(N.S.) 817, 113 Am. St. Rep. 236, 82 Pac. 956, 7 Ann. Cas. 475; Rohrer v. Hastings Brewing Co. 83 Neb. 111, 119 N. W. 27, 17 Ann. Cas. 998; First Nat. Bank v. Lewis, 18 N. D. 390, 121 N. W. 836; State v. Cooper, 18 N. D. 583, 120 N. W. 878.

It is the duty of the county commissioners to audit and adjust the accounts of delinquent county officers, and they may be compelled to do so. Clay County v. Simonsen, 1 Dak. 403, 46 N. W. 593; Jerauld County v. Williams, 7 S. D. 196, 63 N. W. 906.

An action may be maintained for such purpose by the state's attorney. Kerby v. Clay County, 71 Kan. 683, 81 Pac. 503; Tehama County v. Sisson, 152 Cal. 167, 92 Pac. 68; Santa Cruz County v. McPherson, 133 Cal. 282, 65 Pac. 574.

Where a particular method of procedure is fixed by statute, it is exclusive. Hudson v. Jefferson County Ct. 28 Ark. 359; Sutherland, Stat. Constr. §§ 392, 393, 454; State ex rel. Hickory County v. Dent, 121 Mo. 162, 25 S. W. 924.

County commissioners, upon ascertaining delinquencies in other county officers, must report same to state's attorney. Rev. Codes 1905, § 2430; Marion County v. Phillips, 45 Mo. 75; State ex rel. Christian County v. Gideon, 158 Mo. 327, 59 S. W. 102, and cases cited.

SPALDING, Ch. J. The relator filed a brief and appeared in person on the argument in this court. The defendants neither appeared nor filed a brief, but Mr. George A. Bangs, an attorney of Grand Forks county, made application for leave to submit a brief on behalf of the state auditors' association, whatever that may be, and he was permitted to do so, and we refer to and consider his brief the same as though it had been filed in behalf of respondents. He makes certain preliminary objections to a consideration of the matter, which will be disposed of before we turn to the question of whether the county or the auditor is entitled to the fees in question.

1. He asserts that the relator is not a party beneficially interested as required by § 7823, Rev. Codes of 1905, and therefore cannot maintain this proceeding. He argues that the acts sought to be compelled are governmental functions in which no one citizen has any beneficial interest or is directly affected. We have carefully examined the authorities he cites, but this question has been passed upon repeatedly by this court, and the relator, as a resident, citizen, and taxpayer of the county is qualified to act as a relator in this proceeding.

If the duty enjoined by the statute upon the county commissioners to audit or adjust the accounts of the auditor includes auditing or adjusting the items composed of fees received for certifying to abstracts and deeds, it is a public duty and one in which all the taxpayers of the county are interested. State ex rel. McDonald v. Holmes, 19 N. D. 286, 123 N. W. 884; State ex rel. Davis v. Willis, 19 N. D. 209, 124 N. W. 706; State ex rel. Schilling v. Menzie, 17 S. D. 535, 97 S. W. 745; State ex rel. Dakota Hail Asso. v. Carey, 2 N. D. 36, 49 N. W. 164; 26 Cyc. 404 (II) and authorities cited; 26 Cyc. 407, note, as to taxation; Union P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428; State ex rel. Romano v. Yakey, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071.

2. It is urged that the acts sought to be coerced are discretionary and that hence mandamus will not lie. Sec. 2428, Rev. Codes of 1905, reads: "All treasurers, sheriffs, clerks, constables, and other officers chargeable with money belonging to any county, shall render their account to and settle with the county commissioners at the time required by law, and pay into the county treasury any balance which may be due the county. . . ."

Section 2430 reads: "If any person thus chargeable shall neglect or refuse to render true accounts or settle as aforesaid, the board of county commissioners shall adjust the accounts of such delinquent according to the best information it can obtain, and ascertain the balance due the county, and order suit to be brought in the name of the county therefor; and such delinquent shall not be entitled to any commission, and shall forfeit and pay to the county a penalty of 20 per cent on the amount of funds due the county."

We are now dealing with the act of adjusting the accounts of the auditor as they relate to the fees in question. It should be observed that the statute provides that if a person chargeable shall neglect or refuse to render true account, or settle, the board shall adjust the accounts of the delinquent. We are not concerned with how they shall be adjusted, that is, we are not permitted to determine that any specific sum is due, or that the commissioners shall find any sum due in case the facts alleged in the petition of the relator are found to be untrue; but on the facts as stated it is the ministerial duty of the board to examine and adjust those accounts, including the items in question, if the items belong to the county rather than to the auditor. The only thing required of the commissioners is the ministerial duty of acting upon the facts set forth in the petition and which are alleged to be within their knowledge, namely, that there are such items and that they have not been accounted for, and to proceed to make an accounting or an adjustment, and thereby determine, according to the best information they can obtain, the amount of such items unaccounted for and unpaid to the treasurer, if any.

While it is true that the subject of the controversy pertains to the fiscal affairs of the county, yet this does not alter the situation when the board refuses to perform its ministerial duty. The terms of the statute quoted above are mandatory. The taxpayers of the county are entitled to know, and the legislature contemplated that they should be informed, as to the amount of fees collected and unaccounted for, and while the courts cannot direct the findings of the board they can set the commissioners in motion by directing them to proceed and investigate and ascertain by computation whether anything is due, and if so how much of the county's property has been retained by the auditor.

Many authorities are cited by respondent on this subject, but not one of them sustains his argument. They go to the effect that the court cannot direct the board to find a specific or definite amount due. We think they are uniform to the effect that courts may set the board in motion. We shall not review the authorities cited, but will say that People ex rel. Damron v. McCormick, 106 Ill. 184, is illustrative. It rests on facts practically parallel with those in the instant case, but it was there sought to compel a specific result, while here, in so far as the accounting is concerned, it is only sought to set the board in motion by requiring it to perform the acts which may result in finding something or nothing due. See 26 Cyc. 161; State ex rel. Heffron v. District Ct. ante, 32, 143 N. W. 143; Stephens v. Jones, 24 S. D. 97, 123 N. W. 705. In fact this proposition is so elementary that citation of authorities is unnecessary.

3. It is next urged that the writ will not lie, because there are other adequate remedies provided by statute, *viz.*, those authorizing proceedings for the removal of officials who fail to perform their duties; and criminal prosecution. We think counsel labors under a misapprehension of what is meant by other adequate remedy. The provisions for the removal of officials and for criminal prosecution furnish no remedy whatever to the taxpayers or to the public for the diminution of the funds of the county. They simply serve as a warning, and tend to prevent a recurrence of the neglect or refusal, and to punish the officials for their dereliction. Such proceedings would not replenish the public treasury nor provide additional funds for conducting the public business, nor would they diminish the taxes assessable against the property of the taxpayers of the county. They furnish, in a measure, a remedy for the crime committed, if any, but no civil remedy. Hence we say they furnish no remedy in the statutory sense; and, if doubt exists, that doubt should be resolved in favor of the solution of the question which will afford a remedy. 19 Am. & Eng. Enc. Law, 747; State ex rel. Cutter v. Kamman, 151 Ind. 407, 51 N. E. 483; 26 Cyc. 173; Temple v. Superior Ct. 70 Cal. 211, 11 Pac. 699.

Kerr v. Superior Ct. 130 Cal. 183, 62 Pac. 479, is cited as an authority, but we deem the dissenting opinion of the chief justice and Judge Temple to state the better reasons. In any event, the reasons given in the majority opinion, if in point, are in conflict with

our conclusions in State ex rel. Heffron v. District Ct. ante, 32, 143 N. W. 143.

Both parties devote considerable space to attempting to establish that the state's attorney can only bring an action against the auditor on the facts alleged, when directed by the county commissioners so to do. They agree on this question; hence we do not examine it, and express no opinion thereon further than to say that this is apparently in accord with the statute and seems to be supported by authority. See §§ 2428 and 2430, Rev. Codes of 1905, supra; Kerby v. Clay County, 71 Kan. 683, 81 Pac. 503; Looscan v. Harris County, 58 Tex. 511; State ex rel. Rosbach v. Pratt, 68 Wash. 157, 122 Pac. 987.

We now approach the important question in this case, *viz.*, to whom do the fees collected by the auditor for certifying to deeds and abstracts belong? Are they the property of the county or of the auditor? The difficulty in determining this question arises largely from the apparent conflict between the provisions of chap. 70, Laws of 1907, and chap. 219, enacted at the same session of the legislature. While chapter 70 precedes chapter 219 in the published laws of that session, this is purely accidental, and in no manner indicates which was intended to take precedence. The chapters in the laws of that session are numbered and arranged alphabetically with reference to subject-matter, and chapter 70 is under the title, as arranged, of "County Officers," while chapter 219 is under the title of "Revenue and Taxation." In fact, chapter 219 was introduced and passed prior to the passage of chapter 70, and likewise was approved before the approval of chapter 70, the latter having been approved by the governor on the 14th of March, 1907, while chapter 70 was not approved until March 19, 1907. Neither chapter contains any emergency clause. Chapter 219 is entitled, "Requirements of Tax Deeds," and is an act to amend § 1597 of the Revised Codes of 1905 relative to the duties of county auditors, and requires such auditor, when any deed is presented to him for transfer, to ascertain from the books and records of his office whether there are any delinquent taxes, special assessments, or tax sales on the land covered by the deed, and prescribing the certificate which the auditor is required to make on such deed as applicable to the facts found, *viz.*, that he shall enter on every deed of real property so transferred over his official signature, "delinquent taxes and special assess-

ments or instalments of special assessments paid and transfer entered," or "paid by sale of the land described within," or "transfer entered," whichever may be applicable to the facts found. It also prescribes the duties of the register of deeds, requiring him to refuse to receive or record a deed unless the proper certificate is first obtained from the auditor. It also provides penalties for failure to comply with the law, and makes exceptions of United States patents and some other forms of transfer from these requirements. The last sentence reads: "The county auditor shall keep a record of such transfers in a book kept for that purpose, showing the names of the grantor and grantee, a description of the property and the date of transfer, *and shall receive 25 cents for each certificate, from the person or persons presenting the same for certification, and said auditor may retain such fee as compensation for making such certificate.*" The purpose of this statute, like others referred to, was to secure the payment of taxes, rather than to increase the compensation of the auditors. Section 1597, of which this is an amendment, contained the same provision relating to this fee and was enacted in 1903 by chapter 167 of the laws of that year: "To provide that all taxes and assessments shall be paid before transfer of property," which, when so enacted, was an amendment of § 1278 of the Revised Codes of 1899, relating to "deeds not to be recorded without auditor's certificate of taxes paid." And this act, which is chap. 144, Laws of 1901, contained the same provision permitting the auditor to retain such fee.

Sec. 1278, Rev. Codes of 1899, was enacted as chapter 135 of the Laws of 1899, the subject of which was, "Auditor's Certificate Required," and was an amendment to chapter 126 of the Laws of 1897. This chapter 135 concludes with this provision: "The county auditor shall keep a record . . . and shall receive 25 cents for each certificate from the person or persons presenting the same for certification, and shall cover the same into the county treasury for the credit of the county general fund; provided, in counties in which the auditor is not paid the maximum salary allowed by law, said auditor may retain such fee as compensation for making such certificate." Chap. 135, Laws of 1899, was enacted to amend § 95 of chapter 126 of the laws of 1897, which contained the unqualified requirement that the auditor should cover the fee into the treasury for the credit of the general fund, and

such section was contained in the general law relating to revenue and taxation enacted by that session of the legislature, and repealing all acts or parts of acts in conflict therewith. Prior to 1897, by chap. 113, Laws of 1893, the auditor had been permitted to collect and retain this fee, as he had been by § 91, chap. 132, Laws of 1890; but by chapter 52 of Laws of 1889 he had been required to turn all fees into the county treasury received in excess of the salary provided by that chapter, based on a percentage of the assessed valuation; and to the same effect was § 14 of chapter 10 of the Laws of 1887, which was the first general law providing for the compensation of county auditors. The law providing for certifying to abstracts was enacted as chap. 1, Laws of 1901, and provided a fee of 25 cents, but contained no provision permitting him to retain it. When that chapter was enacted chapter 56 of the Laws of 1899 was in effect, which chapter prescribed the salary of county auditors and contained no provision regarding fees. So much for the history of the legislation regarding fees for the certificates relating to deeds, to which we shall have occasion to refer later.

Chapter 70 of the Laws of 1907, heretofore referred to and here in question, is entitled "Salary of County Auditor," and provides that "the salary of the county auditor shall be regulated by the value of the property in his county as fixed by the state board of equalization for the preceding year, as follows: Provided that no county auditor shall receive more than $1,200 for his personal services in any one year in counties where the valuation of taxable property is less than $1,500,000, nor more than $1,400 in counties where the assessed valuation exceeds $1,400,000, but does not exceed $2,000,000."

Then follow provisions like the last, increasing the salary between certain valuations in counties of higher valuation until the last provision is reached, which is: "Nor more than $2,500 in counties where the assessed valuation exceeds $12,000,000; and all moneys received as fees for certifying to abstracts or deeds in excess of the salary as limited by this article shall be paid by the county auditor at the end of each month into the revenue fund of the county."

It thus appears that chapter 70 contains no positive declaration of the amount of salary that any auditor shall receive, the only statement on the subject being the one quoted, under the proviso providing

for a maximum only. A brief reference to the history of legislative provisions for the compensation of county auditors and the salaries provided will aid somewhat in ascertaining the meaning of this chapter and its relation to chapter 219, supra.

The Revised Codes of 1877 provided for no officer known as the county auditor, but by §§ 61 to 64 of chapter 21 of the Political Code it imposed upon the register of deeds the duties, *ex officio,* of county clerk, which duties were later transferred to the office of the county auditor, and are those now performed by that official. The compensation for the county clerk was fixed by § 8 of chapter 39 of the Political Code of 1877. That section, as far as material, reads: "For performing the duties of the clerk of the county commissioners and attending to the business of the county, the county clerk shall receive such salary per annum, to be paid by the county quarterly, as the commissioners of the county shall allow, not exceeding in any year the sum of $600." In 1883, by chap. 1, Special Laws of that year, the office of county auditor was created for Pembina, Walsh, Grand Forks, Lincoln, Traill, Cass, and Richland counties, and the duties formerly performed by the county clerk were transferred in those counties to the auditor. Sec. 14 fixes their salaries as follows: "The salary of the county auditors shall be regulated by the value of the property in their respective counties as fixed by the territorial board of equalization for the preceding year as follows: In counties where the amount of assessable property does not exceed the sum of one and one-half million dollars they shall be entitled to receive 5 mills, on each dollar of the first $100,000, and 1 mill on each dollar of all amounts in excess of said last-named sum, and less than $200,000, and one tenth of one mill on each dollar of all amounts in excess of said last-named sum; in counties where the value of taxable property for the preceding year, as fixed by the said board of equalization, exceeds the sum of one and one-half million dollars the county auditor shall be entitled to receive 5 mills on each dollar of the sum of the first $100,000, and ⅓ of 1 mill on each dollar in excess of such sum and less than $2,000,000, and ⅛ of 1 mill on each dollar of all sums in excess thereof; . . . provided that no county auditor shall receive more than $1,500 for his personal services in counties where the valuation does not exceed $4,000,000, nor more than $2,000 for his personal services in counties where the

valuation does exceed $4,000,000, and does not exceed $6,000,000; nor more than $2,500 in counties where such valuation exceeds $8,000,000, and does not exceed $10,000,000; nor more than $3,000, where such valuation exceeds $10,000,000; *and all moneys received as fees or percentage in excess of the amounts provided for in this act shall be paid by the auditor at the end of each year into the revenue fund of the county.*"

Section 16 provided that whenever the term "county clerk" occurred in any of the existing laws of the territory, it should be deemed and held synonymous with, and construed to mean, county auditor. Here we have the foundation for the phraseology of most of the enactments relative to the fees received by county auditors down to and including the session of 1907, and it is clear to the members of this court that the meaning of that statute was that the county auditors of the counties first mentioned constituted one class, namely those where taxable property did not exceed $4,000,000; the second class was all having property between $4,000,000 and $6,000,000. In the first class the county auditor received a salary not to exceed $1,500, and if the percentage on the valuation did not amount to $1,500, then he was entitled to retain moneys received as fees sufficient to make his salary $1,500, and any excess of fees over that sum was to be turned into the revenue fund of the county. In the last class he was entitled to retain such fees sufficient to bring his salary up to $3,000; if the percentage amounted to less than that sum. Above $3,000, it was to be turned into the revenue fund, but no auditor in the last class could receive, for himself, to exceed $3,000, regardless of valuation or amount of fees.

The next legislation on the subject is found in the Laws of 1885, when the legislature, by chapter 2 of Special Laws, provided for auditors of Brown and certain other counties; and by chap. 37, Special Laws of that year, auditors were provided for Spink, Stutsman, and other counties, and the law creating the office of county auditor for the counties of Pembina, etc., above referred to, was made to apply to the auditors of the counties of Spink, etc. Thus stood the law until 1887, certain counties having auditors and others being without them, with their duties performed by the register of deeds under the title of county clerk. By chap. 10, Laws of 1887, a general law, the office

of county auditor was created and his duties defined. Sec. 14 of the act fixed the salary, the language employed being the same as that in the act establishing the office in Pembina and other counties, but it reduced the maximum salary to $2,000, and contained the same proviso requiring the fees or percentage in excess of the amounts named as the maximum to be paid into the revenue fund of the county at the end of each year. It is likewise clear that this proviso applied to each class of counties established in the act, separately, that is to say, of one class no auditor could receive to exceed $1,500 per annum; in the other class he could not receive to exceed $2,000; and the excess of fees and percentages, after he retained enough to amount to the maximum for his class, was to be turned into the county revenue fund. The same phraseology and arrangement of the provisions on this subject were carried into the law of 1889. From a knowledge of contemporaneous history and conditions existing during the eighties, we may say with assurance that the reason for the provision that they turn into the revenue fund *the excess* of fees, and percentages received over their salary instead of being required to account for them monthly or otherwise, was to enable the auditor to receive a portion of his compensation in cash. During those years the warrants of most counties in the territory were considerably below par. The treasuries were empty, and generally warrants could not be paid until many months, and those of some counties several years, after issuance. By employing this phraseology the legislature permitted the auditors to receive the benefit of at least part cash for their services. This condition changed later, and a corresponding change was made requiring the accounting to be made monthly instead of yearly. By chap. 52, Laws of 1891, chap. 50, Laws of 1887, which had regulated the salaries of registers of deeds and treasurers of counties, and permitted the register of deeds to retain fees received for making and certifying to abstracts, was repealed, as was § 14 of chapter 10, relating to auditors. The phraseology of the provisions of § 1, fixing the salaries of county auditors, was similar to the preceding enactments on the subject, but here a change occurred in the proviso which we need not interpret here. It was provided that he should not be required to account for fees for certifying to deeds, and further that all fees received by such officer, "in excess of the above provisions in this act, shall be paid into the salary fund of

the county at the end of each month." By chap. 56, Laws of 1899, the salary of the county auditor was again changed. The phraseology was also changed and the section read, in part: "The salary of the county auditor shall be regulated by the value of the property in his county as fixed by the state board of equalization for the preceding year as follows: He shall be entitled to receive not to exceed $750 in counties where the assessed valuation does not exceed $500,000." Then followed increases in salary for counties with greater valuations, and last: "Two thousand dollars in counties where the assessed valuation exceeds $9,000,000, provided that no county auditor shall receive for his personal services an amount to exceed $2,000 in any one year."

At the same session, chapter 135, relating to the auditors' certificate to deeds, was enacted, to which we have heretofore made reference. The law fixing this salary seems not to have again been changed until the enactment of chap. 70, Laws of 1907, above referred to and here under consideration. After long consideration and careful investigation of the subject in an attempt to harmonize chapter 70 and chapter 219, supra, we have reached the conclusion that the peculiar phraseology of chapter 70 was undoubtedly employed by the legislature by reason of having overlooked some of the changes made previously in the method of computing the auditor's salary, and we conclude that the phrase: "No county auditor shall receive more than . . . dollars for his personal services in any one year in counties where," etc., can, as the correlated laws now stand, only be construed as fixing the salary of the auditor in each county of the valuation by which his county is classified at the sum named, no more and no less. For instance where the valuation is less than $1,500,000, his salary is $1,200 per annum, and the maximum salary of $2,500 is the salary fixed for counties in which the assessed valuation exceeds $12,000,000.

We have thus given a history of the legislation, perhaps at greater length than is necessary, but because when act is compared with act we think it throws some light on the meaning of chapter 70, supra. It will be seen that the duties of the office of auditor were first performed by the register of deeds. His salary was fixed by the board of county commissioners. Then the duty was transferred to the newly created office, and the salary was at first based on a percentage of the assessed valuation, and later the valuation was employed only for the purpose of classifying the counties with reference to salary, and an

arbitrary salary was fixed for the counties of each separate class. Legislation on the subject was undoubtedly enacted without any member having performed the burdensome task of tracing the origin of the phraseology of the statute which he was seeking to amend, or the application of such phraseology. They unquestionably assumed that it had a special and correct application in the law amended, and no retrospective examination was made.

Now what effect, if any, does chapter 219, supra, have upon the provision of chapter 70, requiring the fees mentioned to be paid into the revenue fund of the county at the end of each month? It is elementary that when two laws relating to the same subject-matter are passed at the same legislative session they are to be construed together, if possible, so as to give effect to each, but if the two laws are irreconcilable the one which is the later expression of the legislative will must prevail. The provisions in question clearly conflict, and as clearly cannot be harmonized within the limits of any rule of reason. This being apparent, which provision controls? Chapter 219, first enacted, as we have indicated, relates to the duties of the county auditor in certifying to the payment or nonpayment of taxes on deeds offered for record. The prime subject of the chapter is the requirement that there be such certificate. The object was to compel the payment of taxes. The permission given the auditor to retain the 25 cents fee is the last paragraph of the chapter, and is only incidental to the main purpose of the law. There is nothing in the chapter indicating that the object of its enactment was to either increase or diminish the compensation received by county auditors. It is a general law, dealing with a specific subject; namely, requiring the certificate of the auditor to deeds before they can be entitled to record. Chapter 70 is a general law fixing the salaries of county auditors. It is general in the sense that it applies to all county auditors, but it deals with only a specific subject. That subject is the salary of the county auditor. The purpose of its enactment was to readjust the salaries of county auditors, while the purpose of the legislature in enacting chapter 219 was to further regulate the requirements necessary to entitle a deed to record, by that means compelling the payment of taxes before the transfer of lands, and serving as an aid in the collection of taxes.

It is also elementary that a statute, special in the sense that it deals

with one subject only, will control over the terms of another conflicting statute in which the conflicting subject is only incidentally treated, and having some other main object. We think this has some bearing on the construction of these statutes, and tends to indicate that the provisions of chapter 70 govern as against those of chapter 219, but there are other reasons why this seems clear. That there is a conflict cannot be questioned. Chapter 70 was the later enactment. The body of this chapter increased the salaries of county auditors, and the last clause deprived them of the fees in question. To say nothing about the reasonable probability that the legislature did not intend to both increase their salaries and give them the fees, but rather figured that the increase was adequate, it is clear that the later enactment, in view of the conflict, must control, and repeals the repugnant provision of the earlier statute. This question has been so recently discussed and decided by this court that we need not make further reference to authorities. See State v. Cooper, 18 N. D. 583, 120 N. W. 878. The character of this legislation is such that this rule must overcome any presumption against an implied repeal. When chapter 219 was introduced and passed, the subject of an increase in the salaries of the auditors was not before the legislature, and it is reasonably certain, considering the history of the two bills, that when chapter 70 was considered, the legislature intended to make a flat raise of the salaries of the auditors, and pursue the policy followed by the legislature generally in recent years, of putting officers onto a flat salary and turning all fees over to the state or the county, as the case might be. This is the most reasonable interpretation to place upon the acts of the legislature, viewed in the light of the history of the two bills when before the legislature. Undoubtedly when chapter 70 was considered by the committee and reported, and later when it was passed, the two houses had under consideration the fact that chapter 219, previously passed, had given the auditors the fees. When chapter 219 was under consideration the subject of a flat increase in the salaries of auditors had not been considered; in fact the bill for chapter 70 was only introduced the day prior to the final passage of chapter 219, and was not reported by the committee for a week or more thereafter.

But it is urged that a proper construction of chapter 70, if repugnant to chapter 219, permits the auditor in any class of counties to retain the fees until they increase his salary to the amount allowed in the class

of counties having the highest valuation, or in other words, to collect the maximum salary provided in the chapter. While the language is not entirely clear standing by itself, yet, from a consideration of the whole act and the other legislation on the subject, we think it very clear that each class of counties is to be considered and treated by itself; that the maximum salary referred to means the salary of the class of counties fixed by the valuation to which that maximum is applied. In other words, the last phrase of the section is employed to limit the compensation of an auditor in any class of counties to the sum fixed in that class. It does not mean that each auditor in each class of counties except the last shall be entitled to retain fees until they raise his salary to the sum of $2,500, the amount fixed for counties of the highest valuation. Such a construction would be absurd. It might result in giving the auditor of the county having the smallest valuation, and in which the smallest salary is prescribed, the same compensation provided for the county having the largest valuation, even though the auditor of the latter county received as great or a greater amount in fees than did the auditor of the smallest county. The proper construction of the chapter is that it was intended to mean precisely the same as though a separate act or chapter had been enacted for each class of counties, each containing the provision regarding paying over the fees, instead of including the counties of all classes in one chapter, and not repeating the language of the paragraph relating to fees after each classification. While the language employed is not the most apt, and while the intent might have been made more plainly apparent, yet we are clearly of the opinion that this is the proper construction to place upon this law. No such conflict exists as to fees for certifying abstracts, and no attention need be given them. The fund collected by the auditor belongs to the county unless the statute shows a clear and plain legislative intent to grant it to a salaried officer. In other words, any doubt should, in case of a salaried officer, be resolved in favor of the public. If we were in doubt on the subject the rule announced in State v. Stockwell, 23 N. D. 70, 134 N. W. 767, would apply.

But it is next argued that all the auditors of the state have construed this statute as permitting them to retain the fees collected in addition to the salary prescribed, and that on the principle that a course of conduct indicating a common understanding by the administrative of-

ficers should have great weight in determining its real meaning, where such usage has been acquiesced in by all parties concerned and has extended over a long period of time; and a vast array of authorities is cited in support of this proposition. We need not consider them. Neither need we controvert the general principle enunciated. It has no application, however, in this case. Respondent says that all auditors have so construed the law. The appellant says that it has been construed by a large number of them in harmony with the conclusion of this court. We are not advised as to which is correct; but be the fact as it may be, the law had only been in force a relatively short time; the parties construing it were those interested, rather than other departments of government, and it appears that the legislature, by chap. 111, Laws of 1911, evinced its dissent from the construction placed upon the laws by those county auditors who had retained such fees. See also State v. Stockwell, supra.

6. Having determined that the relator is qualified to act in that capacity, that mandamus will lie to set the board of county commissioners in motion, that the fees belong to the county, there remains but one other question for consideration. It is sought, as we have shown, not only to direct the board to adjust the account, but also to instruct them to order the state's attorney to bring suit against the auditor. Some authorities are cited holding that this is a matter within the sound discretion of the board, on which its members must exercise their judgment and determine whether a suit is advisable. Without holding that these authorities are not in point under our statute, we will say that we do not feel justified in holding that the board should at this time be directed to order suit. The state of the law has been such that we cannot say that they have not acted in good faith, nor can we say that when advised by this court as to the ownership of the fees they will refuse to perform their duty in the premises. The refusal to order suit was undoubtedly grounded upon their opinion that there was nothing due the county by reason of the erroneous assumption that the fees belonged to the auditor, and it will be early enough to pass upon the power of the court to order the board to direct the state's attorney to bring suit when the necessity for doing so arises, if it ever does, by reason of a refusal or failure of the auditor to pay any sum found due the county after the adjustment, and the subsequent neglect of the board

to order suit. To pass upon it at the present time would be to assume that the board of county commissioners of Williams county, after being fully advised in the premises, will deliberately attempt to aid the auditor in retaining what does not belong to him but does belong to the county.

The order of the District Court is reversed, and this case is remanded for further proceedings in accordance with law.

MARTIN C. VOVES v. GREAT NORTHERN RAILWAY COMPANY, a Corporation, and Moses Giddings.

(48 L.R.A.(N.S.) 30, 143 N. W. 760.)

This is an action to recover damages for an assault and battery upon Voves, a passenger, committed by Giddings, a passenger conductor of defendant company. The jury were instructed that in their discretion they might allow exemplary damages, in addition to full compensatory damages, as against both Giddings and the railway company. From a recovery both defendants appeal. *Held:*

Punitive damages — railroads — employee — wrongful acts.

1. Punitive damages were not recoverable as against the defendant corporation, it not having participated in the wrongful act of its employee nor approved thereof either before or after its commission.

Damages — punitive — punishment — oppression — fraud — malice — master — servant — public policy.

2. Section 6562, Rev. Codes 1905, authorizing the recovery of punitive damages by way of punishment, and their inclusion in the verdict "when the defendant has been guilty of oppression, fraud, or malice," has no application

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Note.—In apparent harmony with the above case is the decision in Norfolk & P. Traction Co. v. Miller, 98 C. C. A. 453, 174 Fed. 607, which holds that a railroad company would not be liable for punitive damages for assault by a servant unless it authorized, participated in, or ratified his act. This case is referred to on page 1203 of the note in 32 L.R.A.(N.S.) 1201, on the question of a carrier's liability for assault by servant on passenger while on train. And upon the liability of a carrier for assaults by employees upon passengers, generally, see notes in 14 L.R.A. 738; 32 Am. St. Rep. 90; and 95 Am. St. Rep. 100.

On the question as to how far carrier's liability for assault is affected by misconduct of passenger, see note in 40 L.R.A.(N.S.) 1070.

under the facts in this case, that being a general statute applying to all defendants who have acted with malice; while here the act of the servant is not imputed to the corporate master under the doctrine of *respondeat superior*, except, because of grounds of public policy and necessity, to the extent only of holding such master for full compensatory damages for which the defendant company is concededly liable. Such doctrine is not extended to authorize punitive damages imposed solely as a punishment to the defendant, in the absence of proof that such principal has authorized, sanctioned, or ratified the malicious act of the employee.

Master — servant — assault — acts — ratification — question — jury — evidence — instructions — exemplary damages.

3. Defendant Giddings had been for more than eleven years in the employ of the defendant company as conductor prior to the alleged assault, and the testimony is undisputed to the effect that this was the first and only trouble he had ever had of a similar nature; that he was not intoxicated and never has used intoxicants; that complaint was made the next day after the occurrence to the company officials; but the company thereafter continued defendant in their employ, not discharging him. *Held:*

(a) Such facts do not constitute proof of any ratification by the company of the assault made by the conductor upon the plaintiff.

(b) Because of failure to discharge the employee, the company cannot be held to have ratified his act, nor is it sufficient evidence of itself to warrant the submission of the question of ratification to the jury.

Assignments of error.

4. Other assignments of error examined and overruled.

Evidence — findings — jury — malice — instructions.

5. As to defendant Giddings, the evidence was sufficient to sustain the finding of the jury that he had acted wrongfully and with malice toward plaintiff, and sufficient to support the instructions given as to exemplary damages; and the judgment as to him is affirmed.

Judgment — new trial.

6. The judgment entered as to the defendant company is set aside and a new trial granted.

Opinion filed October 11, 1913.

Appeal from a judgment of the District Court for Richland County, *Allen*, J.

Affirmed as to one appellant and reversed as to the other.

Murphy & Duggan, for appellants.

Punitive damages cannot be awarded against the defendant company, and only compensatory damages if any should be given against defend-

ant Giddings. Doerheofer v. Shewmaker, 123 Ky. 646, 97 S. W. 7; Georgia R. & Electric Co. v. Davis, 6 Ga. App. 645, 65 S. E. 785.

Punitive damages are not matter of right or compensation, but are allowed in proper cases as a punishment or deterrent. Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261.

Punitive damages cannot be inflicted on a master without his participation in or ratification of the tort, and *never* as a matter of right. Topolewski v. Plankington Packing Co. 143 Wis. 52, 126 N. W. 554; Robinson v. Superior Rapid Transit R. Co. 94 Wis. 345, 34 L.R.A. 205, 59 Am. St. Rep. 896, 68 N. W. 961; Patry v. Chicago, St. P. M. & O. R. Co. 77 Wis. 218, 46 N. W. 56; Cobb v. Simon, 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276.

There must be some authorization from the master, or participation in or ratification of the wrongful act of the servant, and ratification cannot be found from the mere fact of the retention of the servant after the act. Cobb v. Simon, 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276; Haehl v. Wabash R. Co. 119 Mo. 325, 24 S. W. 737; Smith v. Middleton, 112 Ky. 588, 56 L.R.A. 484, 99 Am. St. Rep. 308, 66 S. W. 388; Hagen v. Providence & W. R. Co. 3 R. I. 88, 62 Am. Dec. 377; Craker v. Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 504, 8 Am. Neg. Cas. 665; Robinson v. Superior Rapid Transit R. Co. 94 Wis. 345, 34 L.R.A. 205, 59 Am. St. Rep. 896, 68 N. W. 961; Topolewski v. Plankington Packing Co. 143 Wis. 52, 126 N. W. 554; International & G. N. R. Co. v. Garcia, 70 Tex. 207, 7 S. W. 802; Chicago, R. I. & P. R. Co. v. Newburn, 27 Okla. 9, 30 L.R.A.(N.S.) 432, 110 Pac. 1065; Moore v. Atchison, T. & S. F. R. Co. 26 Okla. 602, 110 Pac. 1059; Stuyvesant v. Wilcox, 92 Mich. 233, 31 Am. St. Rep. 580, 52 N. W. 617; Trabing v. California Nav. & Improv. Co. 121 Cal. 137, 53 Pac. 644; Redwood v. Metropolitan R. Co. 6 D. C. 302; Haines v. Schultz, 50 N. J. L. 481, 14 Atl. 488; Sullivan v. Oregon R. & Nav. Co. 12 Or. 392, 53 Am. Rep. 364, 7 Pac. 508, 8 Am. Neg. Cas. 578; Trinity & S. R. Co. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389; Cleghorn v. New York C. & H. R. R. Co. 56 N. Y. 47, 15 Am. Rep. 375; Ricketts v. Chesapeake & O. R. Co. 33 W. Va. 433, 7 L.R.A. 354, 25 Am. St. Rep. 901, 10 S. E. 801; Lake Shore & M. S. R. Co. v. Rosenzweig, 113 Pa. 519, 6 Atl. 545, 10 Am. Neg. Cas. 79; Louisville & N. R. Co. v. Whitman, 79 Ala. 328, 8 Am. Neg. Cas. 9;

Chicago, B. & Q. R. Co. v. Bryan, 90 Ill. 126, 8 Am. Neg. Cas. 175; Nashville & C. R. Co. v. Starnes, 9 Heisk. 52, 24 Am. Rep. 296; Maisenbacker v. Society Concordia, 71 Conn. 369, 71 Am. St. Rep. 213, 42 Atl. 67; Keene v. Lizardi, 8 La. 33; McCarthy v. De Armit, 99 Pa. 72.

Geo. W. Freerks, for respondent.

Punitive or exemplary damages are allowable against a corporation master for the wanton, wrongful, and malicious acts of the servant, committed while in and about the work of his employment. 1 Harris, Damages by Corp. 9.

Such damages may be given for gross or wanton negligence or malice. Southern Kansas R. Co. v. Rice, 38 Kan. 398, 5 Am. St. Rep. 766, 16 Pac. 817, 5 Am. Neg. Cas. 274; Philadelphia Traction Co. v. Orbann, 119 Pa. 37, 12 Atl. 816, 10 Am. Neg. Cas. 133.

In any case where such damages are recoverable against the servant in fault, they should be allowed against the master. Shearm. & Redf. Neg. 4th ed. § 749; 1 Harris, Damages by Corp. 9; Citing Maine, Missouri, and 2 Harris, Damages by Corp.; Lake Shore & M. S. R. Co. v. Prentice, 37 L. ed. 100, note; Fell v. Northern P. R. Co. 44 Fed. 248, 7 Am. Neg. Cas. 254; Singer Mfg. Co. v. Holdfodt, 86 Ill. 455, 29 Am. Rep. 43; St. Louis, A. & C. R. Co. v. Dalby, 19 Ill. 353; New Orleans, J. & G. N. R. Co. v. Hurst, 36 Miss. 660, 74 Am. Dec. 785; Atlanta & G. W. R. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Goddard v. Grand Trunk R. Co. 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316; Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475.

Corporations may be held liable for torts involving a wrongful intention, and exemplary damages may be recovered against them for the wrongful acts of their servants done in the course of their employment. Wheeler & W. Mfg. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609; Western News Co. v. Wilmarth, 33 Kan. 510, 6 Pac. 786; Times Pub. Co. v. Carlisle, 36 C. C. A. 475, 94 Fed. 762; Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. 530; Claiborne v. Chesapeake & O. R. Co. 46 W. Va. 363, 33 S. E. 262; Chesapeake & O. R. Co. v. Dodge, 23 Ky. L. Rep. 1959, 66 S. W. 606; Hart v. Charlotte, C. & A. R. Co. 33 S. C. 427, 10 L.R.A. 794, 12 S. E. 9; Hanson v. European & N. A. R. Co. 62 Me. 84, 16 Am. Rep. 409, 8 Am. Neg. Cas. 336.

This doctrine can be more beneficially applied to railroad corporations, in their capacity of carriers of passengers, than in any other class of cases. Louisville & N. R. Co. v. Garrett, 8 Lea, 438, 41 Am. Rep. 645; Cowen v. Winters, 37 C. C. A. 628, 96 Fed. 929 (C. C. A. 6th C.); New Orleans, J. & G. N. R. Co. v. Bailey, 40 Miss. 453; Canfield v. Chicago, R. I. & P. R. Co. 59 Mo. App. 354; Denver & R. G. R. Co. v. Harris, 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286; Rockford, R. I. & St. L. R. Co. v. Wells, 66 Ill. 321; Rucker v. Smoke, 37 S. C. 377, 34 Am. St. Rep. 758, 16 S. E. 40; Malloy v. Bennett, 15 Fed. 371; Chicago, B. & Q. R. Co. v. Bryan, 90 Ill. 126, 8 Am. Neg. Cas. 175.

Goss, J. This action is to recover damages resulting from an assault and battery by defendant Giddings, inflicted on the plaintiff, Voves, while the plaintiff was riding in a passenger coach of the defendant company from Breckenridge to Wahpeton. The plaintiff has made both the conductor and the company employing him defendants in a suit for $2,000 alleged damages. Plaintiff's version of the affair, as related in the testimony of himself and witnesses, is sufficient upon which the jury could have found an unprovoked, unwarranted, and malicious assault to have been made upon him by defendant Giddings. In justice to the defendants, their testimony tends to show an almost, if not quite, complete justification of whatever was done by the conductor, who admittedly, in an altercation, struck the plaintiff in the eye, causing a "black eye." No other personal injuries of much consequence were inflicted. Plaintiff was a young man of twenty-one, strong, vigorous, and athletic, and from his own testimony certainly did nothing to avoid trouble. He was employed as a clerk at Wahpeton. He lost no wages nor time as a result of the affray. The jury, evidently, discounted plaintiff's case considerably by returning a moderate verdict of $200 against the defendants, who appeal evidently more to test the principles of law involved than to avoid all liability.

Although several assignments of error are urged, we believe none of them can be seriously advanced, excepting one arising on the court's instructions, in which the jury were instructed that they might assess punitive damages against the defendant railway company. There can be no doubt, under the evidence, as to the propriety of such an instruc-

tion as to defendant Giddings. But the instruction given as to the company raises the vexing question as to whether a corporation common carrier is liable for punitive damages, because of the conduct of its ordinary employee who, while discharging his duties in the course of his employment, makes an unwarranted assault upon the passenger then in the safe-keeping and under the protection of the carrier.

That no confusion in application of principles may be brought in question, we will here state that defendant Giddings is shown by the proof to have been employed as a conductor of the Great Northern Railway Company prior to the incident in question for over eleven and one-half years, and preceding which employment he was a brakeman for a year and a half; that he has never been in any similar trouble before; never uses intoxicating liquors; had no ill-will against the plaintiff, never having known him, nor, to his knowledge, seen him until this occurrence; that the plaintiff, the next day after the alleged assault, reported his version of it to the managing officials of the defendant company, who, after examining into the merit of the affair, have retained Giddings in their employ; that this action was brought two days after the alleged assault took place. This is all the evidence bearing on the ratification by the company of what was done by the conductor.

This court has never declared the law of this jurisdiction upon the question of punitive damages. In a case from Dakota territory the Federal circuit court, in 1890, in Fell v. Northern P. R. Co. 44 Fed. 253, 7 Am. Neg. Cas. 254, announced a rule of corporate liability for exemplary damages based upon § 1946 of the Revised Codes of Dakota territory of 1877, identical with our Code, § 6562, Rev. Codes 1905, and in part upon the holding of the United States Supreme Court in Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 489, 23 L. ed. 374, decided in 1876, and to the effect that "exemplary damages may be awarded against a master though the wrong complained of was the act of his servant, not authorized nor ratified by him." The extent to which this Federal holding has been followed in this state is largely a matter of conjecture. Suffice it to say that the time has now come when the law as to the company's liability for exemplary damages for malicious, tortious acts of its employees must be declared. Volumes have been written on the respective sides of the question. A direct conflict exists between the various jurisdictions, part of the states permitting recovery of the

carrier for exemplary damages, part denying generally the carrier's liability for such damages, and still others giving importance to a varying extent to a theory of ratification by the master of the employee's acts, the practical effect of which often is to hold the carrier for liability as effectually as though the rule of liability for exemplary damages had been adopted in the beginning.

It is true that the law as declared by § 6562, Rev. Codes 1905, which we regard but declaratory of the common law on the subject, had, long prior to its codification in the territorial statutes, been the declared and, excepting in a few jurisdictions, the generally accepted common-law doctrine. For its growth and a general discussion of the law of damages in this connection, see chap. 16 of Sedgwick on Damages. Looking upon the statute as but declaratory of established common law upon exemplary damages, we can see no applicability of that statute to the question before us. It declares: "In any action for the breach of an obligation not arising from contract, when the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant."

Of course, in any action of the kind exemplary damages may be returned "when the defendant has been guilty of oppression, fraud, or malice, actual or presumed." Such is the conceded law applying to all defendants. But the troublesome question is, When should a corporation defendant be held to act and consequently be charged with malice? For what servants will a public service corporation, a common carrier, for the purpose of punitive damages assessed by way of punishment against it, be held to have acted, that malice may be established by imputation or presumption? And here arises the conflict, not in the general law as declared by the statute, but in its application to corporate masters.

As to defendant Giddings, he has acted, and his responsibility for both compensatory and punitive damages is well settled. He should be held to the full statutory or common-law limit of his responsibility for his malicious act. But should defendant company also be charged with imputed malice because of his conduct is the question we do not regard as settled by the statute, § 6562. Any act on its part is but the result of an inference or imputation cast by law from the act of its

employee. In fact it entertained no malice. Should its responsibility be held to extend beyond all actual damages suffered and recoverable under our liberal rules permitting recovery for all physical injuries, including mental pain, suffering, and humiliation, and it, in addition thereto, be penalized and punished equally with the real tort feasor, Giddings, for his actual malice, and thus allow the jury to arbitrarily declare a recovery in plaintiff's favor against the corporation, amounting to but the infliction of a fine under the guise of damages, and in addition to actual compensation for all damages suffered, is the question. Plaintiff urges that the statute, § 6562, Rev. Codes 1905, applies to every defendant who may be liable for compensatory damages. To this we cannot agree, unless the act of malice, fraud, or oppression be that of the defendant thus liable. A farmer sends his employee to market. In the course of his employment he runs over a child under circumstances from which malice may be inferred, and both master and servant are made defendants in an action at law to recover damages for the child's injury. No one would seriously contend that § 6562 would affect the master's liability, and render him responsible for exemplary damages. The distinction between the liability of such master and this corporate master, for the act of the employee, arises from the application of the doctrine of *respondeat superior*, created and adopted from necessity under considerations of public policy, under which doctrine the corporate master is held under a fiction in law to be acting as and when his servant acts, within the scope of the employment, as to the master's liability for compensatory damages; and the question before us is whether such liability, founded upon such doctrine, shall be extended to allow recovery of punitive damages, the allowance of which rests not upon the theory of compensation, but that of the infliction of punishment. Had the child been thus injured by the employee at the direction of the master, or had the plaintiff here been beaten by Giddings at the master's request or pursuant to some rule of the company directing it, the statute, § 6562, would apply in both cases, as in both instances the masters have acted and with malice. But because, in the first instance, the master has not acted, and is not responsible for the act of the servant; and because, in the second instance, the corporation, on grounds of public policy, has been held, by legal fiction, to have acted to the extent of responsibility for compensatory damages,

—is no valid reason why it should also be held for smart money, punitive damages, and the malice of the servant be imputed to the corporation for the purpose of punishment only. As between the private master and his servant, such an imputation would be contrary to the fact. It is equally so between the master and servant in this case. And the liability of the master in either case would be the same, except that necessity and public policy renders the corporate employer liable for compensatory damages, but does not apply to the other. The question, then, resolves to whether or not, for the same reasons for which compensatory damages against the carrier is allowed, such defendant should be held in punitive damages also. All question of the statute, § 6562, is eliminated, as that does not apply unless we say arbitrarily that the basis for its application exists, and therefore assume the malice of the employee to be that of the employer in this instance of corporate employment. Such assumption upon which to base an application of the statute, § 6562, assumes the very question for decision, and therefore, by *ipse dixit,* concludes the case against defendant company.

We will now consider what the courts have said on the real question, that of whether defendant corporation can be held for punitive damages for the unauthorized and unratified malicious acts of its employee. A classification of the courts that have held upon the question is made by Labatt on Master and Servant, vol. 7, §§ 2554–2556. According to that authority "a corporation may be held liable to exemplary or punitive damages for such acts done by its agents or servants, acting within the scope of their employment, as would, if done by an individual acting for himself, render him liable for such damages," in Alabama, Arkansas, Georgia, Illinois, Indiana, Kentucky, Maine, Maryland, Mississippi, Missouri, New Hampshire, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, West Virginia. See §§ 2554, 2555, and cases cited thereunder. Those holding the contrary doctrine, and that "the liability of railroad companies and other corporations, and of natural persons, sought to be charged with exemplary damages for wanton or oppressive acts of their agents or servants not participated in or ratified by the principal or master, has been denied in" California, Colorado, Connecticut, Hawaii, Louisiana, Michigan, New Jersey, New York, Oregon, Rhode Island, Texas, Vermont, Virginia, Wisconsin, and by the United States Supreme Court. See also Washington in

Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 11 L.R.A. 689, 26 Am. St. Rep. 842, 25 Pac. 1072. The citations in Thomp. Corp. 2d ed. §§ 5520 et seq.; Harris, Damages by Corp. § 250; 3 Sutherland, Damages, 3d ed. §§ 951 et seq.; Sedgw. Damages, §§ 357 et seq.; Joyce, Damages, §§ 135 et seq.; and Morawetz, Priv. Corp. 2d ed. §§ 728 et seq., verify such classification. The case in which the Supreme Court of the United States declared its rule arose in 1893, and is that of Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261, where a conductor of the defendant's train, "without cause, had the plaintiff seized, taken from the train, searched, publicly humiliated, and imprisoned." At the trial the defendant admitted its liability for full compensatory damages, but excepted to the court's instructions that the jury might "add something by way of punitive damages against the defendant, which is sometimes called smart money, if you are satisfied that the conductor's conduct was illegal (and it was illegal), wanton, and oppressive." And the appellate court, after carefully reviewing many authorities, announced a rule contrary to that pronounced in Fell v. Northern P. R. Co. 44 Fed. 253, 7 Am. Neg. Cas. 254, and exonerated defendant company from liability for punitive damages, adopting the Rhode Island rule that "punitive or vindictive damages, or smart money, were not to be allowed as against the principal unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it either before or after it was committed." Many Federal holdings are digested and cited in vol. 12, Rose's Notes (U. S.) 296, 297. The decisions leave nothing new to be said on this subject. A review of part of them would be useless. To discuss the many holdings as to each state would accomplish nothing except to show that states favoring the allowance of punitive damages are continually limiting its application as occasion requires, to avoid too frequent instances of injustice. We have decided to adopt the rule of nonliability for punitive damages under the circumstances in evidence, which rule, to our minds, has the support of the great weight of reason and precedent.

As to ratification by the company of the acts of the servant, because of its failure to discharge him, ratification from that fact alone cannot and should not be inferred. We are in accord with the rule announced in Dillingham v. Anthony, 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep.

753, 11 S. W. 139; Toledo, St. L. & W. R. Co. v. Gordon, 74 C. C. A. 289, 143 Fed. 95, and similar holdings, to the effect, quoting from the last case cited, that "it would . . . be a harsh rule—harsh in its effect on all employees—that would hold a railway company to have ratified the employee's act, merely because before trial the employee was not discharged. Such rule would put their continued employment in jeopardy every time an accident occurred, not because the employee was shown to have been guilty of wanton conduct, but because the railway company stood in danger that wantonness might be established."

Under the facts in evidence there is no proof sufficient to warrant a finding of ratification of Gidding's conduct by the defendant common carrier.

In this case both defendants have appealed. As before stated, we find no error in the trial except on instructions as to punitive damages as given concerning the company only, the instructions as to defendant Giddings being within the scope of the proof. The assignments urged as to the correction of the verdict by the jury has no merit. In the verdict as first reported by the jury, and before its reception, an ambiguity was discovered in that it was impossible to determine whether the verdict was for $100, against each defendant separately, making a $200 recovery, or a joint verdict, a $100 recovery. Upon ascertaining that a $200 joint and several recovery was intended, the court allowed the jury to return to their jury room, correct their verdict, and report the same accordingly, which was then received and the jury were discharged. We see nothing upon which prejudice could be predicated on the proceedings had on the return of the verdict.

As to the defendant Giddings the trial had is free from error. The judgment as to him should be affirmed. (Rev. Codes 1905, § 7227.) As to the defendant company we cannot say but that part, if not all, of the verdict was found as exemplary damages. Concededly the defendant company is liable for such damages only as would compensate for actual injury suffered by the plaintiff. Measured by this rule, compensatory damages only can be recovered of defendant company. The judgment entered against the Great Northern Railway Company, defendant, is ordered set aside and as to it a new trial is granted. The judgment as to defendant Giddings is affirmed. Respondent will recover judgment against Giddings for costs of printing his brief and

his disbursements on appeal. Appellant railway company will recover of plaintiff judgment for its abstract and brief and its disbursements on appeal. It is so ordered.

BRUCE, J., dissenting in part. I agree thoroughly with the supreme court of Washington (Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 11 L.R.A. 689, 26 Am. St. Rep. 842, 25 Pac. 1072) that the doctrine of punitive damages is an anomaly in the law, has no sound reason behind it, and should be abolished. It is nothing more nor less than "a hybrid between a display of ethical indignation and the imposition of a criminal fine." (Haines v. Schultz, 50 N. J. L. 481, 14 Atl. 488.) I am firmly convinced that all that a plaintiff should be allowed to show and to recover in a civil action are his actual damages, and that it is for the state, and not for the individual, to impose and collect a fine. I believe, in short, that § 6562 of the Revised Codes of 1905 should be repealed. The statute, however, is still to be found in our Code. It provides: "In any action for the breach of an obligation not arising from contract, when the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant." While it remains in the Code, I believe that corporations are liable in a case like the one at bar under its provisions, for the simple reason that "a corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; it has no hands with which to act but the hands of its servants." (Goddard v. Grand Trunk R. Co. 57 Me. 202, 2 Am. Rep. 39, 49.) The conductor was the sole representative of the company on the ground. He, to all intents and purposes, was the company. He was the officer in charge of the train. It is true that in the presence of a superior agent or officer his powers might dwindle into insignificance, but in the absence of such he was in command. The company had perforce to act and to express itself through living instrumentalities, as in itself it had no vitality, and it was acting through and in him. If a corporation cannot be held liable in punitive damages for the acts of such an officer, then it should not and cannot be held liable for punitive damages at all. See Shearm. & Redf. Neg. 6th ed. § 749.

A. J. GRONNA v. FRANK GOLDAMMER.

(143 N. W. 394.)

Cosureties — bonds — payment — voluntary — statute of limitations — contribution.

1. Payment by one of the cosureties on a bond, after the claim against him has been barred by the statute of limitations, is voluntary, and does not entitle him to contribution from his cosureties.

Action — limitation — guardian — order of court — removing.

2. Section 8284 of the Revised Codes of 1905, which provides that "no action can be maintained against the sureties on any bond given by a guardian unless commenced within three years from the discharge or removal of the guardian," etc., construed and *held*, that in order that the statute of limitations may begin to run it is necessary that a formal order of the court, discharging or removing the guardian, shall have been made.

Cause of action — right — implication — subject — person.

3. A cause of action implies a right to begin an action, and someone who has a right to sue and someone who may be lawfully sued. It involves both a subject of action and a person who is able and permitted to assert it.

Ward — majority — right of action — guardian — sureties — accounting — county court.

4. A ward, even after he has attained his majority, has no right of action against either his guardian or his sureties until an accounting has been had in the county court.

Statute of limitations — sureties — bond — guardian.

5. Section 6787, Rev. Codes 1905, which provides for a six-year statute of limitations in certain cases, has no application to a suit brought against the sureties upon a guardian's bond.

Remedy — laches — barred — prejudice.

6. Before a remedy will be barred because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed.

Note. — The question as to when limitations commence to run against action for contribution between cosureties is treated in notes in 18 L.R.A.(N.S.) 585; 42 L.R.A.(N.S.) 1131; and 98 Am. St. Rep. 43.

Guardian — duties — accounting — discharge — sureties — ward — action — right of.

7. Among the duties of a guardian the faithful performance of which his bond is given to secure are those of making timely and proper accountings. The sureties upon his bond have an equal right with the ward to institute proceedings for such. They are therefore not in a position to complain if the operation of § 8284, Rev. Codes 1905, which provides that no action can be maintained against such sureties unless commenced within three years from the discharge or removal of the guardian, is deferred by reason of the failure of the guardian to file his final account and obtain such discharge, even though the ward may have taken no steps to compel the same.

Opinion filed September 22, 1913. On petition for rehearing October 13, 1913.

Appeal from the District Court of Nelson County, *Templeton,* J.
Judgment for defendant. Plaintiff appeals.
Reversed.

Statement by BRUCE, J.

On August 6, 1900, plaintiff and defendant executed a statutory bond of one Frank Miller as guardian of Mary J. Miller, minor, under appointment of the county court of Nelson county, said bond being conditioned, among other things, that the said Miller should well and truly account for and pay over the property and estate of said ward when and as it should become his duty so to do, and when and as he should be directed and ordered by the county court. The ward married in April, 1903, and became of age on June 13, 1903. Miller failed to account for the property in his possession or to file the inventories required by law, and on January 20, 1910, the ward brought an action against the plaintiff and defendant, Frank Goldammer, who were sureties upon the bond of the guardian, Miller, to recover the full penalty thereof. In this action Goldammer interposed the defense of the statute of limitations (§ 8284, Rev. Codes 1905), and as to him the action was dismissed by the court on January 8, 1912, for lack of prosecution. The plaintiff, Gronna, however, defaulted, and a judgment was rendered against him for the sum of $550, the penalty of the bond and costs. This judgment he paid, and then brought this action against his cosurety, Goldammer, for contribution and for half of sum so paid by him. The defense of Goldammer in the action was that the statute of limitations had

run against the claim of the ward at the time of the bringing of the action against him and his cosurety, and that, as plaintiff had failed to avail himself of such defense, his payment of the judgment against him in that action was, so far as his cosurety was concerned, a voluntary payment, and that he therefore was not entitled to contribution. The trial court held in accordance with defendant's contention, and that § 8284, Rev. Codes 1905, was a complete defense to the original suit, and that as the defendant, Goldammer, had availed himself of it and that plaintiff had not, the latter was not entitled to contribution. It therefore dismissed the present action on its merits, and with costs. Plaintiff has appealed to this court.

Scott Rex, for appellant.

The mere coming of age of a ward does not *ipso facto* work a removal or discharge of the guardian, so as to start the statute of limitations running. Rev. Codes 1905, § 8284.

The coming of age of a ward operates to suspend—not to terminate—the power and authority of the guardian over the estate of the ward. Rev. Codes 1905, §§ 4139, 4140.

The *discharge* of a guardian can come only from the court. Rev. Codes 1905, § 4141.

Affirmative action by the county court is required to discharge a guardian. Rev. Codes 1905, §§ 8067, 8068.

There must be an adjudication of the county court over the settlement of the account of the guardian, and no action can be maintained on the guardian's bond until there had been such adjudication. Nickals v. Stanley, 146 Cal. 724, 81 Pac. 117; Kugler v. Prien, 62 Wis. 248, 22 N. W. 396; Re McPhee, 10 Cal. App. 162, 101 Pac. 530; Ball v. LaClair, 17 Neb. 39, 22 N. W. 118; Fidelity & D. Co. v. Schelper, 37 Tex. Civ. App. 393, 83 S. W. 871; Newton v. Hammond, 38 Ohio St. 430; Loring v. Alline, 9 Cush. 68; McKim v. Mann, 141 Mass. 507, 6 N. E. 740; Perkins v. Stimmel, 114 N. Y. 359, 11 Am. St. Rep. 659, 21 N. E. 729.

It is the *duty* of a guardian to account, and, failing to do so, it is the duty of the sureties to compel an accounting. Newton v. Hammond, 38 Ohio St. 430; Cook v. Ceas, 147 Cal. 614, 82 Pac. 370, 143 Cal. 221, 77 Pac. 65.

The law governing estates of decedents governs in guardianship cases. Rev. Codes 1905, § 8271.

Suit on an executor's bond cannot be maintained without first obtaining an order of the county court authorizing the same. Therefore, no suit could have been maintained by the ward, until an adjudication of the county court had been made. Rev. Codes 1905, § 8167.

Frich & Kelly, for respondent.

It is the general rule that "payment by one of the cosureties after the claims against them have been barred by the statute of limitations is voluntary, and does not entitle him to contribution from the other cosureties." 32 Cyc. 282; Cocke v. Hoffman, 5 Lea, 105, 40 Am. Rep. 23; Shelton v. Farmer, 9 Bush. 314; Cochran v. Walker, 82 Ky. 220, 56 Am. Rep. 891; Letcher v. Yantis, 3 Dana, 160; Wheatfield Twp. v. Brush Valley Twp. 25 Pa. 112; Bell v. Morrison, 1 Pet. 351, 7 L. ed. 174; Turner v. Thom, 89 Va. 745, 17 S. E. 323; Van Keuren v. Parmelee, 2 N. Y. 528, 51 Am. Dec. 322.

If a ward becomes of age or marries, the guardianship ceases by operation of law. Apart from either of these events, the guardian may be "legally discharged," even during the minority of the ward, or before marriage. Rev. Codes 1905, §§ 8236, 8242, et seq.

These events are disjunctively and separately stated in the statute, and are disconnected one from the other, by the use of the connective "or." Kuehner v. Freeport, 143 Ill. 92, 17 L.R.A. 774, 32 N. E. 372; Caster v. McClellan, 132 Iowa, 502, 109 N. W. 1020; 6 Words & Phrases, 5009.

A ward, after attaining majority, may settle accounts with his guardian and give a release. Such settlement, in the absence of fraud, is binding on the ward, with or without the sanction of the court. Re Curtis, 121 Cal. 468, 53 Pac. 936; Re Kincaid, 120 Cal. 203, 52 Pac. 492.

When the ward comes of age, the fiduciary relation of the guardian ceases. They stand as debtor and creditor, and any claim of the ward is subject to be barred by the statute of limitations. His cause of action accrues at his majority. Ackerman v. Hilpert, 108 Iowa, 247, 79 N. W. 90; Bull v. Towson, 4 Watts & S. 557; Blake v. Wolfe, 105 Ky. 380, 49 S. W. 19, 50 S. W. 2; State use of Henderson v. Henderson, 54 Md. 332; State use of Coleman v. Willi, 46 Mo. 236; State ex

rel. Harris v. Harris, 71 N. C. 174; Bone's Appeal, 27 Pa. 492; Re Miller, 26 Pittsb. L. J. N. S. 344; 21 Cyc. 247 (c) and notes 26 to 32; Paine v. Jones, 93 Wis. 70, 67 N. W. 31. See also cases cited infra.

The law prescribes a time in which the ward must act to fix liability on his guardian. Rev. Codes 1905, § 4141.

Section 8284, Revised Codes, is a special statute of limitations, for the benefit of sureties on a bond given by a guardian. Paine v. Jones, 93 Wis. 70, 67 N. W. 31; Levisu's Probate Code, 1877, § 387.

This statute does not place a limitation upon the ward's right of action against his guardian, but only against *the sureties* on the guardian's bond. Paine v. Jones, supra; Hudson v. Bishop, 32 Fed. 519; Berkin v. Marsh, 18 Mont. 152, 56 Am. St. Rep. 565, 44 Pac. 528.

The coming of age of the ward *terminated* the guardianship. The termination of the guardianship operated as a *discharge* of the guardian. Rev. Codes 1905, § 8284; Loring v. Alline, 9 Cush. 68; McKim v. Mann, 141 Mass. 507, 6 N. E. 740; Tate v. Stevenson, 55 Mich. 320, 21 N. W. 348; Hudson v. Bishop, 32 Fed. 519, affirmed in 35 Fed. 820; State use of Garesche v. Slevin, 93 Mo. 253, 3 Am. St. Rep. 526, 6 S. W. 68; Jones v. Jones, 91 Ind. 378; Harris v. Calvert, 2 Kan. App. 749, 44 Pac. 25; Mitchell v. Kelly, 82 Kan. 1, 136 Am. St. Rep. 97, 107 Pac. 782; Berkin v. Marsh, 18 Mont. 152, 56 Am. St. Rep. 565, 44 Pac. 528; Paine v. Jones, 93 Wis. 70, 67 N. W. 31; Ackerman v. Hilpert, 108 Iowa, 247, 79 N. W. 90; Goble v. Simeral, 67 Neb. 276, 93 N. W. 235; Wescott v. Upham, 127 Wis. 590, 107 N. W. 2; 21 Cyc. 248, 249, and notes.

BRUCE, J. (after stating the facts as above). It appears to be the general rule and to be conceded by both parties that "payment by one of the cosureties after the claim against him has been barred by the statute of limitations is voluntary, and does not entitle him to contribution from the other cosureties." 32 Cyc. 282; Cocke v. Hoffman, 5 Lea, 105, 40 Am. Rep. 23; Shelton v. Farmer, 9 Bush, 314; Cochran v. Walker, 82 Ky. 220, 56 Am. Rep. 891; Letcher v. Yantis, 3 Dana, 160; Wheatfield Twp. v. Brush Valley Twp. 25 Pa. 112; Bell v. Morrison, 1 Pet. 351, 7 L. ed. 174; Turner v. Thom, 89 Va. 745, 17 S. E. 323; Van Keuren v. Parmelee, 2 N. Y. 528, 51 Am. Dec. 322. Sec-

tion 8284 of the Revised Codes of 1905 provides, among other things, that "no action can be maintained against the sureties on any bond given by a guardian, unless commenced within three years from the discharge or removal of the guardian." The question for determination is: Did the coming of age or the marriage of the ward, *ipso facto,* work a removal or discharge of the guardian so as to put the statute of limitations in motion? The pertinent provisions of the Code of North Dakota upon the subject are as follows:

"Sec. 4139. The power of a guardian appointed by a court is suspended only: (1) By order of the court; or (2) if the appointment was made solely because of the ward's minority, by his attaining majority; or (3) the guardianship over the person of the ward, by the marriage of the ward."

"Sec. 4140. After the ward has come to his majority he may settle accounts with his guardian and give him a release, which is valid if obtained fairly and without undue influence."

"Sec. 4141. A guardian appointed by a court is not entitled to his discharge until one year after the ward's majority."

"Sec. 8067. An executor, administrator, or guardian may at any time present to the county court a petition praying that his account may be settled, and that a decree may thereupon be made revoking his letters and discharging him accordingly. The petitioner must set forth the facts upon which the application is founded; but the application shall not be entertained while a proceeding is pending for the removal of the executor, administrator, or guardian, or if in the opinion of the judge there is good cause for his removal or other sufficient cause for refusing to entertain the same."

"Sec. 8068. If the court entertains such application, a citation must issue to all parties interested in the estate. At the hearing any creditor or other person interested may allege cause for denying the application, or allege cause for his removal and pray relief accordingly. Upon a trial of the issue, if the court determines that sufficient cause exists for granting the application the petitioner must be allowed to account; and after he has fully accounted and paid over all money which is found to be due from him to the estate, and delivered over all books, papers, and other property of the estate in his hands as the court directs,

a decree shall be made, discharging him and revoking his letters, otherwise such decree shall be made as justice requires."

"Sec. 8242. Every guardian so appointed shall have the custody and care of the education of the minor, and the care and management of his estate until such minor arrives at the age of minority, or marries, or until the guardian is legally discharged."

"Sec. 8282. The marriage of a minor ward terminates the guardianship; and the guardian of an insane or other person may be discharged by the judge of the county court when it appears to him, on the application of the ward or otherwise, that the guardianship is no longer necessary."

"Sec. 8063. A petition alleging the facts, and praying for the removal of an executor, administrator, or guardian pursuant to the provisions of the preceding section, may be presented by a creditor or other person interested in the estate, and may contain a prayer for the appointment of a successor, and if the court deems the allegations sufficient, a citation shall issue to the executor, administrator, or guardian, and all other persons who, by the terms of a will or by law, are entitled to any portion of the estate."

"Sec. 8064. When the facts which authorize a removal come to the knowledge of the court, and no application is made as above provided, the court may make an order requiring the executor, administrator, or guardian to show cause why he should not be removed, upon which he shall be cited to appear; and at the hearing the court may revoke his letters as upon a petition, and upon the removal of any such executor, administrator, or guardian the court shall appoint a successor."

"Sec. 8284. No action can be maintained against the sureties on any bond given by a guardian, unless commenced within three years from the discharge or removal of the guardian; but if at the time of such discharge the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed."

"Sec. 8167. Before an action can be maintained on the bond of an executor whose letters have not been revoked, the party aggrieved must first obtain an order of the county court, authorizing him to bring the action; and before authority is given to bring an action upon the bond of a deceased executor or administrator whose account is unsettled, his

sureties must be cited and have an opportunity to apply for and obtain a settlement of such account."

"Sec. 8271. All proceedings under petitions of guardians for sales of property of their wards, giving notice and the hearing of such petitions, granting and refusing an order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale and application for confirmation thereof, notice and hearing of such application, making orders, rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts, must be had and made as provided and required by the provisions of law concerning the estates of decedents, unless otherwise specially provided in this chapter."

Sec. 6787 provides for a general six-years statute of limitations which would be applicable to an action brought by the ward after his majority, against the guardian, though not to an action brought against the sureties.

In speaking upon the subject the Cyclopedia of Law and Procedure (vol. 21, p. 248) says: "The statutes in a number of jurisdictions provide that no action shall be maintained against the sureties upon a guardian's bond, unless commenced within a designated period after his 'discharge.' The object of these statutes is to fix a time certain for the benefit of the sureties, so that they may know definitely when their obligations as sureties will terminate. These statutes, it has been held, are for the benefit of the sureties only, and not the principal, and the limitation therein provided enters into and forms a part of the surety's contract. These statutes apply, notwithstanding the discharge of the guardian before they go into effect, and they apply to sale bonds as well as to general guardianship bonds. Under these statutes the period of limitations does not date from the time when the right of action has accrued, but from the time of the 'discharge' of the guardian; and if no cause of action accrues within such time, by reason of failure to take the necessary steps to procure a settlement, the sureties are exonerated. While the decisions are not entirely harmonious, the weight of authority is that the word 'discharged,' as used in the statutes, means any mode by which the guardianship is effectually determined and brought to a close, either by removal, resignation, or death of the guardian, marriage of a female ward, or death or majority of the ward, and not from a final

settlement or any other period or transaction. There are, however, as already intimated, decisions under statutes of this character which are directly in conflict with the doctrine stated, and it has been held that limitations in actions against the guardian and his sureties on the bond do not commence to run from the date of the ward's death or majority, but only from his discharge by order of court. There is, however, no question that the statute commences to run from that period."

This quotation perhaps states the state of the law upon the subject correctly. An examination of the authorities, however, will disclose the fact that the majority rule is based upon the Massachusetts case of Loring v. Alline, 9 Cush. 68, which, though it construed a statute similar to § 8284, Rev. Codes 1905, and that now under discussion, construed such statute alone and unaccompanied by statutes similar to §§ 4139 and 4141, Rev. Codes 1905. In none of the states, also, which followed the Massachusetts case and the Massachusetts rule, with the exception of Montana in the case of § 4141, are there to be found similar statutes. An examination of the minority cases (Marlow v. Lacy, 68 Tex. 154, 2 S. W. 52; Allen v. Stovall, 94 Tex. 618, 63 S. W. 863, 64 S. W. 777; Fidelity & D. Co. v. Schelper, 37 Tex. Civ. App. 393, 83 S. W. 871; Cook v. Ceas, 143 Cal. 227, 77 Pac. 65, 147 Cal. 619, 82 Pac. 370) will, on the other hand, disclose that not only is an identical statute construed, but an identical statute which is part of a general Code, and is accompanied by statutes similar to the North Dakota statutes just enumerated. Many, if not all, of the so-called majority decisions, in short, construed the section standing alone, while the minority decisions construed it as a part of a Code, and not merely in its own light, but in the light of the general spirit and provisions of the Code of which it was merely a part. It is well, also, to remember that although § 8284, Rev. Codes 1905, perhaps originated in Massachusetts, and before it came to us was construed by the court of the state of its adoption, it was not taken by us from Massachusetts, but in 1877 from California and then as part of a completed Code. The other decisions which follow the Massachusetts rule were also not handed down prior to its adoption in this state. It was construed in Cook v. Ceas, 143 Cal. 227, 77 Pac. 65, and Cook v. Ceas, 147 Cal. 614, 82 Pac. 370, adversely to the Massachusetts decision and to the contention of respondents; and although that decision was subsequent to the adoption

of the statute in this state, it was a construction of the Code by the state from which we derived it, and of the section as part of a completed Code which we adopted as a whole. The only case, indeed, where the section is construed under a Code similar to ours, and in any way which may seem adverse to the contention of appellants, is in the Montana case of Berkin v. Marsh, 18 Mont. 152, 56 Am. St. Rep. 565, 44 Pac. 528. Even that case is not in fact adverse to the contention of appellants. There the ward was dead, and the court merely held that, on account of the fact of the lack of a subject-matter, that is to say, of a ward, there could be no guardian of the person at all, so that it was no use to talk either of a suspension or of a discharge. So, too, the statute (§ 3791) says that "the power of a guardian is *superseded* by the ward's attaining majority" while ours merely says that it is *suspended* (§ 4139). Sec. 4139, Rev. Codes 1905, provides that the power of a guardian appointed by a court is suspended only (1) by order of the court; or (2) if the appointment was made solely because of the ward's minority, by his attaining majority. Sec. 4141 provides: "A guardian appointed by a court is not entitled to his discharge until one year after the ward's majority." It seems quite clear from a perusal of these sections that the legislature intended that, upon the arrival of the ward at his majority, the control of the guardian over him should as between the guardian and the ward be suspended, but there should be no actual discharge without a formal order of the court and a determination by that court that the ward had in fact reached such majority, and that even that discharge could not be obtained as a matter of right until a year after majority. The pros and cons of the case are thoroughly argued in the cases of Goble v. Simeral, 67 Neb. 276, 93 N. W. 235, and Cook v. Ceas, 143 Cal. 227, 77 Pac. 65, 147 Cal. 619, 82 Pac. 370, and it would be useless for us to repeat the discussion here. The legislature, we believe, was in § 8284 dealing with the same kind of discharge that it had elsewhere made provision for in the Code; that is to say, a discharge by the court, one which was of record and could be read and understood, and which would disclose to the world the fact of its making. See §§ 8063, 8064, 8067, 8068, 8242, 4141, 4140, Rev. Codes 1905. The primary meaning of the word "discharge" certainly embraces the affirmative action of someone. The statute does not say "from the expiration or lapse of the guardianship," but uses the words,

"from the discharge or removal of the guardian." It would certainly seem that affirmative action on the part of the court was anticipated. Another reason for holding to this conclusion is that under the authorities, and probably under §§ 8167 and 8271, Rev. Codes 1905, no action can be maintained against the sureties prior to an adjudication by the probate court finding a liability. See Nickals v. Stanley, 146 Cal. 724, 81 Pac. 117; Kugler v. Prien, 62 Wis. 248, 22 N. W. 396; Re McPhee, 10 Cal. App. 162, 101 Pac. 530; Ball v. LaClair, 17 Neb. 39, 22 N. W. 118; Fidelity & D. Co. v. Schelper, 37 Tex. Civ. App. 393, 83 S. W. 871; Newton v. Hammond, 38 Ohio St. 430; McKim v. Mann, 141 Mass. 507, 6 N. E. 740; Perkins v. Stimmel, 114 N. Y. 359, 11 Am. St. Rep. 659, 21 N. E. 729; Loring v. Alline, 9 Cush. 68.

The judgment of the District Court is reversed and the cause remanded, with directions to enter judgment for the plaintiff and appellant as prayed for in this complaint.

On Petition for Rehearing.

BRUCE, J. In the petition for rehearing in this case, stress is laid upon the fact, which was not considered in our former opinion, that the ward came of age in June, 1903, and that no steps were taken to recover her estate from her guardian until January, 1910. The finding of the trial court was that "during such time the ward was prevented from such steps by frequent promises on the part of her guardian, though there is no evidence that this fact was communicated to the sureties." Counsel for Mr. Goldammer (the defendant and respondent) contend that even if the three-year statute of limitations did not begin to run until the formal discharge of the guardian, that the general six-year statute of limitations on the original demand had run both as against the principal and as against the sureties. In support of this proposition he cites us to the following sections of the Code: Sec. 6770. "Civil actions can only be commenced within the periods prescribed in this Code after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute." Sec. 6785. "The following actions must be commenced within the periods set forth in the following five sections after the cause of action has accrued." Sec. 6787. "Within six years. (1) An action upon a contract, obligation, or lia-

bility, express or implied, excepting those mentioned in § 6186." Sec. 4140. "After the ward has come to his majority he may settle accounts with his guardian and give him a release, which is valid if obtained fairly and without undue influence."

We think that counsel is in error in his contention. The six-year statute of limitations only begins to run after "a cause of action has accrued." We are quite satisfied that in the case before us, a cause of action had not accrued, either as against the principal or his sureties, until there had been a "settlement of the guardian's account in the probate court, and the amount due from him to the ward had been established and ascertained." Cook v. Ceas, 143 Cal. 221, 234, 77 Pac. 65; Cook v. Ceas, 147 Cal. 614, 82 Pac. 370. "A cause of action implies a right to begin an action and someone who has a right to sue and someone who may be lawfully sued." Patterson v. Patterson, 59 N. Y. 574, 17 Am. Rep. 384, 387. It involves both a subject of action and a person who is able and permitted to assert it. The ward had no such capacity or permission until an accounting had been had or required. Nickals v. Stanley, 146 Cal. 724, 81 Pac. 117; Kugler v. Prien, 62 Wis. 248, 22 N. W. 396; Re McPhee, 10 Cal. App. 162, 101 Pac. 530; Ball v. LaClair, 17 Neb. 39, 22 N. W. 118; Cook v. Ceas, 143 Cal. 221, 77 Pac. 65; Cook v. Ceas, 147 Cal. 614, 82 Pac. 370; Fidelity & D. Co. v. Schelper, 37 Tex. Civ. App. 393, 83 S. W. 871; Newton v. Hammond, 38 Ohio St. 430; Loring v. Alline, 9 Cush. 68; McKim v. Mann, 141 Mass. 507, 6 N. E. 740; Perkins v. Stimmel, 114 N. Y. 359, 11 Am. St. Rep. 659, 21 N. E. 729. It is true that when the ward came of age she could have settled with her guardian and have given him a release. Section 4140, Rev. Codes 1905. But it by no means follows that she could have then sued, or that she then had a cause of action against him.

So, too, we find in the North Dakota Code a clear and explicit statute of limitations in so far as sureties on guardians' bonds are concerned. It is to the effect (§ 8284), "no action can be maintained against the sureties on any bond given by a guardian, unless commenced within three years from the discharge or removal of the guardian; but if at the time of his discharge the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed." This statute

is clear and explicit. Sec. 6770, Rev. Codes 1905, provides: "Civil actions can only be commenced within the periods prescribed in this Code after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute."

In § 8284 we have a special limitation in regard to the sureties on guardian's bonds, and the provisions of § 6787 of the particular Code of Civil Procedure of which § 6770 is a part is clearly not applicable; § 8284 being a part of the statutes and a statute, but not a part of chapter 4 of the Code of Civil Procedure to which §§ 6770 and 6787 belong. We are, therefore, of the opinion that whether the 6-year statute would have run against an action if brought directly by the ward against her guardian is entirely immaterial, and need not be considered in this case.

There can be no hardship to the sureties in such a rule. It was the duty of the guardian to make a satisfactory accounting upon the coming of age of the ward. The bond was given to secure the faithful performance of this duty. It would be a strange doctrine that would permit the surety to complain that the running of the statute of limitations had been prevented by a delay in the filing of a formal accounting, the filing of which his bond was, among other things, given to secure. The sureties, indeed, had an equal right with the ward to institute proceedings for an accounting. The guardian's duty to render an accounting was, in a large measure, their own. Cook v. Ceas, 147 Cal. 614, 620, 82 Pac. 370. In order, indeed, that a remedy may become barred "because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed." Cahill v. Superior Ct. 145 Cal. 47, 78 Pac. 467; Cook v. Ceas, supra. There is no prejudice in this case for which sureties are not in law themselves responsible, and for which they can complain.

The petition for rehearing is denied.

JOSEPH DUFFY v. A. EGELAND, Charles A. Ballinger, and the First National Bank of Bisbee, a Corporation.

(143 N. W. 350.)

Defendant B. sold certain land to plaintiff on the crop contract plan. Plaintiff assigned his contract to the defendant bank as security for a $500 loan. Defendant B. sold the land to defendant E., subject to the said contract. E. served notice of forfeiture for failure to deliver one half of the crops and to pay the taxes according to said contract. Plaintiff brings this action for specific performance, alleging that he has paid both the bank and defendant E. all that he owes them. *Held:*—

Contract — evidence — payments — application — agreement — taxes — default.

1. That an examination of the evidence shows that certain credits due to plaintiff from defendant B. were applied by agreement of parties upon other indebtedness, and that plaintiff has paid upon this contract only the sum of $99.09. Further found that he had failed to deliver any part of the crop of 1908, and had failed to pay the 1907 and 1908 taxes upon the land. Under those circumstances he was in default.

Contract — crop — delivery — notice of cancelation — default — waiver.

2. Defendant B. had repeatedly urged plaintiff to deliver the half of said crop, but the plaintiff had, through promises and excuses, managed to delay the actual delivery of the grain until the following spring, at which time notice of cancelation of the contract was served. After the service of said notice, plaintiff did nothing to relieve the default for thirty days or at all, and has never deposited any sum whatever to cover said indebtedness. *Held,* that under the circumstances of this case, defendants have not as a matter of law waived their right to cancel the contract.

Opinion filed June 5, 1913. Rehearing denied October 13, 1913.

Appeal from the District Court for Rolette County, *Cowan,* J.

Affirmed.

M. A. Hildreth, for appellant.

The bank held the contract merely as security, and, upon payment of the amount due, the plaintiff would be entitled to a reassignment of the contract. Fifer v. Fifer, 13 N. D. 21, 99 N. W. 763.

Forfeitures are only sustained when the parties have contracted therefor. Bennett v. Glaspell, 15 N. D. 245, 107 N. W. 45.

The grounds upon which a contract may be forfeited must be contained in the contract: A contract will not be extended by construction to include other grounds than those specified in it. Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088.

The decree of the court in ordering a cancelation of the contract is without merit. Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207; Bucholz v. Leadbetter, 11 N. D. 473, 92 N. W. 830; Annis v. Burnham, 15 N. D. 577, 108 N. W. 549.

H. E. Pelymat, F. T. Cuthbert, and *A. R. Smythe,* for respondents.

The grounds upon which forfeiture is claimed must be provided for in the contract. Where time is made of the essence of the contract, the party seeking forfeiture must show diligence. Notice of cancelation or forfeiture must be given as by law provided. Williams v. Corey, 21 N. D. 509, 131 N. W. 457, Ann. Cas. 1913 B, 731; Golden Valley Land & Cattle Co. v. Johnstone, 21 N. D. 101, 128 N. W. 691, Ann. Cas. 1913 B, 631; Annis v. Burnham, 15 N. D. 577, 108 N. W. 549; Bennett v. Glaspell, 15 N. D. 239, 107 N. W. 45; Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088; Fifer v. Fifer, 13 N. D. 21, 99 N. W. 763; Bucholz v. Leadbetter, 11 N. D. 473, 92 N. W. 830; Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207.

The grantor or his assignee, under a contract like that in this case, cannot waive a default in the payment of taxes on the land. Rev. Codes 1905, § 1571.

Plaintiff's failure to pay or tender payment of taxes due devests him of all rights. Rev. Codes 1905, § 7479.

BURKE, J. On the 23d day of February, 1904, Charles Ballinger, one of the defendants, was the owner of a quarter section of land situated in Rolette county, North Dakota, and upon that date he entered into what is known as a crop contract for the sale thereof to the plaintiff Duffy for the sum of $3,000. This contract provided, among other things, that Duffy was to pay the purchase price by delivering one half of all the grain and hay to be grown on said premises in each and every year thereafter during the continuance of the contract, free from expense to the first party. It was further agreed that said Duffy would pay all the taxes levied or assessed on the said premises before the same became delinquent. Upon the full payment of the said $3,000 being

made, the said Ballinger agreed to convey the premises by good and sufficient deed of warranty. This contract was later modified in the following particular; A mortgage of $2,000 was placed upon the land of Ballinger, and it was agreed that when Duffy had paid $1,000 upon the purchase price, as well as the taxes and interest, said Ballinger would deliver a deed subject to the $2,000 mortgage. Ballinger concedes that Duffy had paid all of the interest upon the land and $100 upon the purchase price at the time of the service of the notice of cancelation of the contract, which will be hereinafter discussed. Duffy, on the other hand, contends that he has paid the entire amount of the purchase price, but we think after a full examination of the record that the proof does not substantiate this claim. In fact, we are agreed that the testimony of Mr. Egeland must be accepted as true, and that in the spring of 1909 Mr. Duffy had reduced the original indebtedness slightly less than $100. Under this view of the evidence we find that Mr. Duffy had failed to deliver one half of the crops raised for the years 1906, 7, and 8. It is also undisputed that he had failed to pay the taxes for the year 1908. In addition to those defaults, Duffy had hypothecated his contract with the First National Bank of Bisbee to secure the payment of $500 borrowed money. The defendant Egeland purchased the land of Ballinger in the spring of 1909, thereby succeeding to all interest in the contract. On April 19, Egeland caused notice of forfeiture of the contract to be served upon Duffy, alleging therein that default existed upon the part of said Duffy in that he had failed to deliver one half of the crop grown upon the land in the year 1908, and that he had failed to pay the taxes for said year, and that he had failed to pay the said purchase price in any other manner. This notice of cancelation was drawn and served under §§ 7494–7, Rev. Codes 1905 which sections have supplanted the common-law procedure upon this question. Section 7495 reads: "Whenever any default shall have been made in the terms or conditions of any such instrument hereinafter made, and the owner or vendor shall desire to cancel or terminate the same, he shall, within a reasonable time after such default, cause a written notice to be served upon the vendee or purchaser, or his assigns, stating that such default occurred and that said contract will be canceled or terminated, and shall recite in said notice the time when said cancelation or termination shall take effect, which shall

not be less than thirty days after the service of such notice." Section 7497 reads: "Such vendee or purchaser or his assigns shall have thirty days after the service of such notice upon him in which to perform the conditions or comply with the provisions upon which the default shall have occurred; and upon such performance, and upon making such payment, together with the costs of service of such notice, such contract or other instrument shall be reinstated and shall remain in force and effect the same as if no default had occurred therein. . . ." Upon the service of this notice of cancelation Duffy made no effort to relieve himself of any default, but on the contrary instituted this action against Ballinger, Egeland, and the First National Bank of Bisbee for specific performance, and in his complaint alleges that he has paid Ballinger in full down to the amount of the mortgage to be assumed, and that he owes the bank of Bisbee nothing, but he also asks that an accounting be had between himself and the defendants, and alleges that he is ready, willing, and able to pay any sum found to be due upon said contract, and that he is likewise willing and able to pay any amount that may be found due to the said bank upon such accounting, and prays that a deed be issued to him by said Egeland. The defendants Egeland and the bank answer, alleging that Duffy had paid the bank the sum of $22.65 only upon his $500 indebtedness, and that he had paid but the sum of $99.09 besides interest upon the said contract. They further deny that he is able to pay the balance due, but allege that there are many judgments outstanding against him on record unpaid. They further allege that they were willing to accept the amount due upon the contract, and issue a deed to Duffy when he should pay the same. This latter offer was made orally in this court upon the argument of this case. The trial court found in favor of the defendants on all of the issues, held that the contract had been canceled according to law, and decreed that title be quieted in Egeland. Appellant demands a trial *de novo* in this court.

(1) The first question presented is whether or not Duffy was in default at the time of the service upon him of the notice of cancelation. It is his contention that certain threshing done for Ballinger should have been credited upon this contract, and that if such credits had been entered the purchase price would be paid in full. Upon this point the evidence is much too voluminous to be set up here, but upon an exami-

nation of the whole record we are convinced that the facts are as follows: Ballinger was running a general store and machinery business, and Duffy traded with him. A store bill and machinery bill incurred by Duffy has never been paid unless by the threshing bill, which Duffy now seeks to credit upon the land contract. Ballinger testifies positively that the threshing bill was to be credited upon the store and machinery accounts, and that Mr. Duffy agreed that such application should be made. Duffy's testimony does not appeal to us as being probable. There seems no reason why Ballinger should apply the threshing accounts upon this land contract, which was amply secured, and carry Duffy upon the store and machinery accounts, which were entirely insecure. A perusal of Duffy's examination tends further to convince us that Ballinger's version is the true one. We thus conclude that at the time the contract was attempted to be canceled Duffy had not paid more than $100 of the $3,000 indebtedness. In addition to this it is agreed that he raised a crop of macaroni wheat upon the land during the year 1908, which he failed to divide and deliver to Ballinger. He also had failed to pay the 1907 and 1908 taxes upon the land. Under those circumstances there is no doubt that he was in default, and that Ballinger or his successor, Egeland, had the right to cancel the contract unless such right had been expressly waived.

(2) The appellant contends that this default had been waived because the notice of cancelation was not served until April 19, at which time he had prepared the land for crop and had seeded 30 acres thereof. We are cited to the cases of Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207, and Annis v. Burnham, 15 N. D. 577, 108 N. W. 549. An examination of those two cases shows the facts to be a great deal different than the facts in the case at bar. In the Fargusson Case the court finds that the service of the notice of cancelation was the first indication on the part of the vendor that he would insist strictly upon his rights. The defendants had requested an extension of time of one year on the contract, and the plaintiff had put them off without any definite answer. During this time the defendant had acted upon the assumption that this extension would be granted to him, and had expended time and money upon the place. This court said that under such circumstances the defendant had a right to infer that the extension had been granted. In the Annis Case this court said: "No fixed

rule can be laid down as to the time within which a person must rescind. What may be a prompt rescission in one case would not be so under the facts of another case." Other facts are given in the Annis Case which clearly distinguish it from this. In the case at bar it appears that Ballinger was all the time insisting that he be given one half of the 1908 crop, and that he would cancel the contract if it were not forthcoming. This is not denied by Duffy, and is an accepted fact in the case. It is contended that Duffy kept putting Egeland off with promises to deliver the grain from time to time, thus staying the service of the notice. Where the conduct of the vendor is such as this, it would be preposterous to hold that as a matter of law he had waived his right to cancel. On this ground alone we must hold the cancelation proper. In addition to this we have the question of the taxes which Duffy agreed to pay but which he neglected. The taxes for 1908 became delinquent on March 1, 1909, and were paid by Egeland in April shortly before the notice of cancelation. Duffy did not attempt to excuse this default either, and at the end of thirty days his right to do so had been foreclosed. We need not therefore pass upon the interesting question as to whether he could compel specific performance until he had redeemed his contract from the bank, and the other interesting question, whether he could compel specific performance without having tendered the amount which we have found to be due upon the contract. It is our conclusion that Duffy was in no shape to enforce this action, and that under all of the facts of the case the holding of the trial court that his rights under the contract had been duly and legally forfeited was correct, and the judgment is in all things affirmed.

S. F. KNIGHT v. L. R. WILLARD and G. H. Ruth, Copartners as Marshall Oil Company.

(143 N. W. 346.)

Plaintiff brings action for damages alleged to be caused by the use in his automobile of lubricating oil furnished by the defendants. Evidence examined and *held:*

Action — damages — automobile — defective oil — evidence.

1. That plaintiff has failed to show that the oil was defective, the only evidence of a defect in the oil being the presence in the cylinders and crank case of a carbon deposit which might have been occasioned by an overflow of the oil into the combustion chambers, due to wear in the cylinders; and there is no evidence that said wear was occasioned by the oil in question, rather than by ordinary use of the machine.

Evidence — hearsay.

2. A sample of the oil was submitted to the Agricultural College for analysis, but, the records being destroyed, plaintiff was unable to produce the person who made the analysis or the record of the same. A letter written by Professor Ladd, based upon hearsay evidence, was properly excluded by the trial court.

Damages — evidence — engine — condition.

3. Plaintiff's damages, if any, must have been confined to the condition of the engine at the time plaintiff ceased to use defendants' oil, and there is an entire absence of evidence of any damage existing in the car at that time.

Opinion filed June 14, 1913. Rehearing denied October 13, 1913.

Appeal from the District Court for Cass County, *Pollock,* Judge. Affirmed.

Pierce, Tenneson, & Cupler, for appellant.

When a party moves for nonsuit the grounds of the motion must be clearly stated, and no other grounds can be considered by the trial court in acting upon the motion, or by the appellate court in reviewing the order. Shain v. Forbes, 82 Cal. 577, 23 Pac. 198; First Nat. Bank v. Laughlin, 4 N. D. 402, 61 N. W. 473; Tanderup v. Hansen, 8 S. D. 365, 66 N. W. 1073.

The plaintiff is entitled to recover for all such damages as may reasonably be presumed to have been contemplated by the parties at the time of sale. 30 Am. & Eng. Enc. Law, 214, See also 24 Am. & Eng. Enc. Law, 1159; 35 Cyc. 472; 17 Decen. Dig. Sales, § 442 (2), (5), (6–9); 43 Century Dig. Sales, §§ 1288, 1291, 1292; Nye & S. Co. v. Snyder, 56 Neb. 754, 77 N. W. 118; Ellis v. Tips, 16 Tex. Civ. App. 82, 40 S. W. 524; Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons, 57 C. C. A. 498, 120 Fed. 906; Larson v. Calder, 16 N. D. 248, 113 N. W. 103; Needham v. Halverson, 22 N. D. 594, 135 N. W. 203.

Section 6575 of the Revised Codes of 1905 is the same as § 1853 of

the original Field's Code, and should be regarded as merely declaratory of the common law as understood by the commissioners when their report was made. Redwater Land & Canal Co. v. Reed, 26 S. D. 466, 128 N. W. 702.

The commissioners did not intend to declare a single rule of damages to be applied in all cases. Bowne v. Wolcott, 1 N. D. 421, 48 N. W. 336.

Special damages, when pleaded and proved, may be recovered, notwithstanding the language of § 6575, Revised Code, 1905. Larson v. Calder, 16 N. D. 248, 113 N. W. 103; Joy v. Bitzer, 77 Iowa, 73, 3 L.R.A. 184, 41 N. W. 575; Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 286; Love v. Ross, 89 Iowa, 400, 56 N. W. 528; Needham v. Halverson, 22 N. D. 594, 135 N. W. 203; Nye & S. Co. v. Snyder, 56 Neb. 754, 77 N. W. 118; Tyler v. Moody, 111 Ky. 191, 54 L.R.A. 417, 98 Am. St. Rep. 406, 63 S. W. 433; Leavitt v. Fiberloid Co. 196 Mass. 440, 15 L.R.A.(N.S.) 855, 82 N. E. 682.

To recover special damages it is not necessary to prove that defendant knew the oil contained improper materials, or that defendant was guilty of fraud or other wrong. Larson v. Calder, 16 N. D. 248, 113 N. W. 103; Brown v. Doyle, 69 Minn. 543, 72 N. W. 817; Gartner v. Corwine, 57 Ohio St. 246, 48 N. E. 945; Joy v. Bitzer, 77 Iowa, 73, 3 L.R.A. 184, 41 N. W. 575; Tyler v. Moody, 111 Ky. 191, 54 L.R.A. 417, 98 Am. St. Rep. 406, 63 S. W. 433; Needham v. Halverson, 22 N. D. 594, 135 N. W. 594; Bierman v. City Mills Co. 151 N. Y. 482, 37 L.R.A. 799, 56 Am. St. Rep. 636, 45 N. E. 856.

When the oil was delivered to plaintiff, defendants impliedly warranted, as a part of the contract of sale, that there were no latent defects or improper materials in it; that it was proper for the purpose for which it was sold and bought; that their statements, as to kind, quality, purpose and use, *were true.* 15 Am. & Eng. Enc. Law, 1231, 1232; Bierman v. City Mills Co. 151 N. Y. 482, 37 L.R.A. 799, 56 Am. St. Rep. 636, 45 N. E. 856; Leavitt v. Fiberloid Co. 196 Mass. 440, 15 L.R.A.(N.S.) 855, 82 N. E. 682.

There was an express warranty on the part of defendants, when they labeled the oil as, "a perfect lubricant, high fire test, and noncarbonizing." The defendants, sellers, asserted a material fact, of which the plaintiff, buyer, was ignorant. This constitutes an express warranty.

35 Cyc. 372–385; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Robson v. Miller, 12 S. C. 586, 32 Am. Rep. 518; Lyon v. Bertram, 20 How. 149, 15 L. ed. 847; Richmond Trading Mfg. Co. v. Farquar, 8 Blackf. 89; Hastings v. Lovering, 2 Pick. 214, 13 Am. Dec. 420.

There was a breach of warranty. Results attained by the use of a material may be compared with the results of like material, to prove a breach of warranty. Abbott, Trial Ev. 346; Tilton v. Miller, 66 Pa. 388, 5 Am. Rep. 373; McCormick Harvesting Mach. Co. v. Brower, 88 Iowa, 607, 55 N. W. 537; M. Forster Vinegar Mfg. Co. v. Guggemos, 98 Mo. 391, 11 S. W. 966; Wallace v. Wren, 32 Ill. 146; Blackmore v. Fairbanks, M. & Co. 79 Iowa, 282, 44 N. W. 548; Kornegay v. White, 10 Ala. 255; Schurtz v. Kleinmeyer, 36 Iowa, 392; McCormick Harvesting Mach. Co. v. Gray, 100 Ind. 290.

The question of whether there was a breach of warranty is a question of fact for the jury. Gardner v. Winter, 117 Ky. 382, 63 L.R.A. 647, 78 S. W. 143; Charter Gas Engine Co. v. Kellam, 79 App. Div. 231, 79 N. Y. Supp. 1019; Egbert v. Hanford Produce Co. 92 App. Div. 252, 86 N. Y. Supp. 1118; Ernster v. Christianson, 24 S. D. 103, 123 N. W. 713.

There was no variance between the complaint and the proof of the warranties, and of their breach. See Rev. Codes, 1905, § 6879; Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310; Robertson v. Moses, 15 N. D. 351, 108 N. W. 788.

Amendments to pleadings must show a substantial change in the *claim,* to warrant their disallowance. See Rev. Codes 1905, § 6883; Rae v. Chicago, M. & St. P. R. Co. 14 N. D. 507, 105 N. W. 721; Kerr v. Grand Forks, 15 N. D. 294, 107 N. W. 197; Martin v. Luger Furniture Co. 8 N. D. 220, 77 N. W. 1003; Anderson v. First Nat. Bank, 5 N. D. 80, 64 N. W. 114.

Barnett & Richardson, for respondents.

The warranties which seem to be relied upon by plaintiff have no application to this case. One who *manufactures* an article under an order for a particular purpose warrants it to be suitable for such purpose. Rev. Codes 1905, § 5424; Lukens v. Freiund, 27 Kan. 664, 41 Am. Rep. 429.

The defendants are not estopped to deny that they manufactured the oil, by reason of any statement made upon the oil can itself. An es-

toppel, to be relied upon, must be pleaded. Morris v. Ewing, 8 N. D. 99, 76 N. W. 1047; Abiline Nat. Bank v. Nodine, 26 Or. 53, 37 Pac. 47; Lincoln v. Ragsdale, 7 Ind. App. 354, 31 N. E. 581; Haugen v. Skjervheim, 13 N. D. 616, 102 N. W. 311.

Further, it must be pleaded and proved that the party claiming an estoppel *relied upon the representations,* as to which the estoppel is claimed. Lincoln v. Ragsdale and Haugen v. Skjervheim, supra.

And such representations must be shown to have induced the party to act. Lincoln v. Ragsdale, supra.

The oil sold was, in fact, cylinder oil, as represented. If there was an *express warranty* in this case, plaintiff cannot rely upon any *implied* warranties. Dowagiac Mfg. Co. v. Mahon, 13 N. D. 519, 101 N. W. 903; Tiedeman, Sales, § 182; Enger v. Dawley, 62 Vt. 164, 19 Atl. 478; Watson v. Roode, 30 Neb. 264, 46 N. W. 494; Halliday v. Briggs, 15 Neb. 219, 18 N. W. 55.

To properly permit an expert to testify as such, a foundation must be laid. Marsh v. Snyder, 14 Neb. 237, 15 N. W. 341; Osborne & Co. v. Bell, 62 Mich. 214, 28 N. W. 441.

The refusal of the court to permit an amendment, after the case had been at issue for one year and after the case had been tried, is not an abuse of judicial discretion. Webb v. Wegley, 19 N. D. 606, 125 N. W. 562.

BURKE, J. In the year 1908 plaintiff purchased a second-hand, two-cylinder Maxwell automobile. He ran the car during the year 1908, and in the spring of 1909 had the machine thoroughly cleaned and overhauled. About June 1, 1909, he started to run the car, using therein for lubricating purposes French auto oil purchased of the defendants. Upon the last-mentioned date the car stopped; and an expert was employed to repair it. The car was taken to a garage at Detroit, Minnesota, where it was discovered to be in a grossly overheated condition. The cylinders and crank case were found to contain a large deposit of carbon. After this cleaning at Detroit, plaintiff ceased to use defendants' oil, but his troubles did not cease; for upon arriving at his home in Fargo, fifty miles distant, he found the car again full of the carbon deposit. The car was thoroughly cleaned at Fargo, but upon the next trip, after covering a distance of 25 miles, the car ceased

to move under its own power, and another expert was employed, who again found the engine full of carbon. After a couple of weeks' trial the engine suddenly broke all to pieces, leaving nothing intact excepting the crank shaft. This suit was brought upon the theory that the oil furnished by defendants was defective, and had caused the damage to the car, and the sum of $780.40 and interest is demanded to reimburse plaintiff for his loss of time and repair bills. The trial was had to the jury, and at the close of the case a directed verdict for the defendant was entered.

(1) Plaintiff must recover, if at all, upon two propositions: First, that the oil was defective; and, second, that such defect caused him certain specific damages. Under the first heading we find an entire absence of proof, owing in part to the unfortunate destruction of evidence. Plaintiff himself testifies that he used the defendants' oil for a period of about thirty-four days and that finally the engine ceased to work through lack of compression, and that upon an examination the carbon deposit was discovered. However, the mere presence of the carbon deposit is no evidence that the oil was defective, because a different kind of oil which was used between Detroit and Fargo produced the same result as did the oil that was used on the subsequent trips out of Fargo. The evidence of all of the machinists is to the effect that the walls of the cylinder were scarred or fluted and that the rings of the piston head were stuck and defective. It is thus evident that the lubricating oil passed too freely up into the combustion chamber, where it was burned and left the carbon deposit. This would have happened regardless of the quality of the oil. The owner of the garage at Detroit, Minnesota, testified that he took out the valves and ground them and removed a great quantity of a gritty substance that appeared to be all over the pistons, valves, and cylinders. That this substance could be compared to black graphite or a sooty deposit of carbon, and that there was a liquid substance that could be compared to black strap molasses; that they removed the greater portion of the carbon and "did a thorough job of cleaning by scraping and using a decarbonizing liquid," having taken the pistons out of the cylinder to do so. He further testified that at that time there was nothing broken on the engine. We think this testimony important, as it is the last time that any of defendants' oil was used in plaintiff's engine, and it is all the

evidence there is to any damage which the engine had sustained at that time. In order to recover damages plaintiff must show that the engine was injured at that time, and that the injury was one that did not exist at the time he commenced to use defendants' oil. There is an entire absence of evidence upon those two points. If, however, we accept the presence of the carbon deposit as evidence of the existence of a defect in the engine when repaired at Detroit, July 4, we are confronted with the fact that there is no evidence that such defects had not existed when the engine was repaired June 1, 1909. The man who made the repairs at that time was not called as a witness. The evidence discloses that this was a second-hand, two-cylinder Maxwell car which had been cared for by plaintiff's porter, and which in the year 1909 was very much out of date. It is as fair to assume that the scarring of the cylinder wall resulted from the ravages of time and use as from the defective oil used during June. As plaintiff has the burden of proving that the damage was caused by the oil, he must show the same beyond mere conjecture.

(2) Another item of evidence relied upon by plaintiff to show that the oil was defective was properly excluded by the trial court. The plaintiff submitted a sample of oil to Professor Ladd for analysis. Professor Ladd turned the sample over to an assistant, whose name he could not remember at the time of the trial. A few days later this assistant made a report to Professor Ladd, who thereupon wrote to plaintiff that the "sample of oil contained quite a heavy precipitate of soap." Shortly thereafter the laboratory and records were destroyed by fire, and at the time of the trial Professor Ladd was unable to remember the incident at all. He had not made the analysis personally, and did not know who made it or that it had been made at all, excepting from the letter which he had written to plaintiff. At the trial an attempt was made to introduce into evidence the letter from Professor Ladd to the plaintiff, but it requires no argument to show that this was properly excluded. The defendants were entitled to know that the oil furnished by Mr. Knight had been actually examined, and to cross-examine the man who made the analysis.

Another matter which is relied upon by the plaintiff is as follows: That while the car was being cleaned in Fargo after the trip from Detroit, and after a large amount of carbon deposit had been cleaned

out of the cylinders, that the manager of the defendant company picked up a handful of the said substance, and told plaintiff that he was going to send it to the headquarters of the defendant; and that afterwards the treasurer of the defendant talked to the plaintiff and told him that he had heard that some other party in Texas and Missouri had had trouble with their oil, and that in that instance the trouble was traced to dirty barrels. We cannot see that this item of evidence can be warped into an admission by defendants that this oil was defective.

There is considerable evidence in the record as to the condition of the engine after July 4, but this evidence we think too remote to have any bearing on the question of the defendants' liability.

(3) While it is thus evident that there is an entire failure of competent evidence showing that the defendants are liable for any damages occasioned, it is also apparent that there is an entire absence of evidence upon the question of damages for which the defendants would have been liable had the oil caused such damage. When plaintiff had his car cleaned at Detroit all traces of the defendants' oil were removed. If the defendants were liable for any damages, they must be measured by the condition of the car at that time. It was the duty of the plaintiff to replace or repair the damaged parts at that time, and any subsequent damage resulted from the use of a defective engine. There is absolutely no evidence of the amount of the damage apparent when the car was examined at Detroit, although the man who made the examination was upon the stand. He testified that there was nothing broken, and that the cylinders were fluted and cut. There is no evidence of the cost of replacing those cylinders or repairing the damage. Besides this, it must be remembered that this was an old car, and that a part at least of the fluting and scarring of the cylinders might have been present at the time plaintiff began to use this oil. If the evidence of this case were sufficient to sustain a judgment, any owner of an old car could buy a gallon of oil of a responsible dealer, and, after it had been used, could produce his time-scarred engine in court and recover damages, whether the scars had been produced by the last gallon of oil or otherwise.

It is thus apparent that there was an entire failure of proof, and the trial court properly directed a verdict for the defendants.

MARGARET GARRAGHTY v. BERT HARTSTEIN.

(143 N. W. 390.)

Action — negligence — defendant's servants — jury — error.

1. Plaintiff was injured by a picket pin which was attached to one end of a rope used to picket a horse on certain vacant lots immediately east of her home. The end of the rope fastened to the picket pin was wound three times around a fence post, the other end being fastened to the halter of the horse. Between such post and the horse there was a public road or trail, and the injury happened while defendant's servants were driving his horse and vehicle along the side of such trail. The horse drawing such vehicle, being driven on a fast trot, came in contact with the picket rope, causing the same to unwind from the post, throwing the pin violently against plaintiff's arm. Evidence examined, and *held*, as a matter of law, that the question of the negligence of defendant's servants was erroneously submitted to the jury.

Jury — province — negligence — inference — court — duty — evidence.

2. Usually it is the province of the jury, under proper instructions, to say, from the facts and circumstances disclosed, whether due care was or was not exercised, or, in other words, whether negligence *ought* to be inferred; but it is always not only the province but the duty of the court, first, to determine, as a matter of law, whether, upon the facts most favorable to the plaintiff, negligence *can* properly be inferred. The jury cannot be permitted to arbitrarily, and without evidence, infer negligence. The evidence must affirmatively establish some circumstances from which the inference fairly arises that the injury resulted from the want of some precaution which the defendant ought to have taken.

Ordinary care — injury — acts — proximate cause.

3. If a person has no reasonable ground to anticipate that a particular act would or might result in injury to anybody, such act is not negligent. On the contrary, if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury approximately resulting from it, although he could not have anticipated the particular injury which did happen.

Opinion filed September 17, 1913. On petition for rehearing October 14, 1913.

Appeal from District Court, Cass County, *Charles A. Pollock*, J.

From a judgment in plaintiff's favor and from an order denying defendant's motion for judgment *non obstante*, or for a new trial, defendant appeals.

Reversed, with directions to dismiss the action.

Pollock & Pollock, for appellant.

It does not appear that the servants of the defendant were acting within the scope of their employment as such, at the time of the injury to plaintiff. They were acting as independent contractors, upon special work in their own interests. Thorpe v. Minor, 109 N. C. 152, 13 S. E. 702; Dells v. Stollenwerk, 78 Wis. 339, 47 N. W. 431; Curtiss v. Dinneen, 4 Dak. 245, 30 N. W. 148; Brenner v. Ford, 116 La. 550, 40 So. 894; Fiske v. Enders, 73 Conn. 338, 47 Atl. 681; Fish v. Coolidge, 47 App. Div. 159, 62 N. Y. Supp. 238; McCarthy v. Timmins, 178 Mass. 379, 86 Am. St. Rep. 490, 59 N. E. 1038; Long v. Richmond, 68 App. Div. 466, 73 N. Y. Supp. 912, affirmed in 175 N. Y. 495, 67 N. E. 1084; Goodman v. Kennell, 3 Car. & P. 168, 1 Moore & P. 241, 6 L. J. C. P. 61; Reaume v. Newcomb, 124 Mich. 137, 82 N. W. 806; Perlstein v. American Exp. Co. 177 Mass. 530, 52 L.R.A. 959, 59 N. E. 194; Stone v. Hills, 45 Conn. 44, 29 Am. Rep. 635; Note to Jordan v. Reynolds, 9 L.R.A.(N.S.) 1034; Note to Ritchie v. Waller, 27 L.R.A. 169; Civil Code, §§ 5788, 5789.

The injury of which plaintiff complains was the direct result of her own negligence. Broadstreet v. Hall, 10 L.R.A.(N.S.) 933 and note, 168 Ind. 192, 120 Am. St. Rep. 356, 80 N. E. 145; Hoverson v. Noker, 60 Wis. 511, 50 Am. Rep. 381, 19 N. W. 382; Johnson v. Glidden, (74 Am. St. Rep. 795 and note), 11 S. D. 237, 76 N. W. 933, 5 Am. Neg. Rep. 97; cf. Evers v. Krouse, 70 N. J. L. 653, 66 L.R.A. 592, 58 Atl. 181, 16 Am. Neg. Rep. 515; 29 Cyc. 1665; Teagarden v. McLaughlin, 86 Ind. 476, 44 Am. Rep. 332; Dunks v. Grey, 5 Bann. & Ard. 634, 3 Fed. 862; Andrus v. Howard, 36 Vt. 248, 84 Am. Dec. 680.

M. A. Hildreth, for respondent.

As a general rule the question of negligence is for the jury, and when it appears that there is a lack of ordinary care, then it becomes a question of fact for the jury to pass upon, and it is no answer to this proposition, that the injury was unusual. Doyle v. Chicago, St. P. & K. C. R. Co. 77 Iowa, 607, 4 L.R.A. 420, 42 N. W. 555; Hunt v. St. Paul City R. Co. 89 Minn. 448, 95 N. W. 312, 14 Am. Neg. Rep. 363.

The failure of defendant's servants, at the time of the accident, to exercise ordinary care, was the proximate cause of plaintiff's injury. Such servants were acting within the scope of their employment. Bar-

tons Hill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, 6 Week. Rep. 664, 19 Eng. Rul. Cas. 107; Pollock, Torts, 7th ed. 458, 459; Cooley, Torts, 2d ed. 812; Seybold v. Eisle, 154 Iowa, 128, 134 N. W. 579; Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326, 5 L. ed. 100; Wood, Mast. & S. 539; Smith v. Webster, 23 Mich. 298; Ramsden v. Boston & A. R. Co. 104 Mass. 117, 6 Am. Rep. 200, 8 Am. Neg. Cas. 372; Pollock, Torts, 7th ed. 82–84; Mullvehill v. Bates, 31 Minn. 364, 47 Am. Rep. 796, 17 N. W. 959; Rudd v. Fox, 112 Minn. 477, 128 N. W. 675; Ritchie v. Waller, 63 Conn. 155, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29; Collins v. Butler, 179 N. Y. 156, 71 N. E. 746, 17 Am. Neg. Rep. 106; Spaulding v. Chicago & N. W. R. Co. 33 Wis. 582; Pittsburgh, C. & St. L. R. Co. v. Kirk, 102 Ind. 399, 52 Am. Rep. 675, 1 N. E. 849; Phelon v. Stiles, 43 Conn. 426; Evans v. Davidson, 53 Md. 245, 36 Am. Rep. 400; Simons v. Monier, 29 Barb. 419; McDonald v. Snelling, 14 Allen, 290, 92 Am. Dec. 768; O'Neill v. Blase, 94 Mo. App. 648, 68 S. W. 764.

The plaintiff was not guilty of any affirmative act which was the proximate cause of her injury. 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; Elliott v. Chicago, M. & St. P. R. Co. 5 Dak. 523, 3 L.R.A. 363, 41 N. W. 758; Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367, 121 N. W. 830; Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Owen v. Cook, 9 N. D. 134, 47 L.R.A. 646, 81 N. W. 285; McTavish v. Great Northern R. Co. 8 N. D. 333, 79 N. W. 443; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972; McBride v. Wallace, 17 N. D. 495, 117 N. W. 857; Williams v. Northern P. R. Co. 3 Dak. 168, 14 N. W. 97; Thomp. Neg. § 365; Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; Johnson v. Fargo, 15 N. D. 525, 108 N. W. 243, 20 Am. Neg. Rep. 460; McKeever v. Homestake Min. Co. 10 S. D. 599, 74 N. W. 1053.

Yuster and Olson were defendant's servants, acting within the scope of their employment, at the time of the injury to plaintiff. Rev. Codes 1905, § 5571; Wood, Mast. & S. § 1, p. 2; 26 Cyc. pp. 699, 1546 and notes.

They were not independent contractors or draymen. Waters v.

Pioneer Fuel Co. 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52; Sadler v. Henlock, 4 El. & Bl. 570, 24 L. J. Q. B. N. S. 138, 1 Jur. N. S. 677, 3 Week. Rep. 181, 3 C. L. R. 760; 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; Lewis v. Detroit Vitrified Brick Co. 164 Mich. 489, 129 N. W. 726; Larsen 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; Brackett v. Lubke, 4 Allen, 138, 81 Am. Dec. 694.

FISK, J. Action to recover for personal injuries sustained by plaintiff, which, it is alleged, were caused by the negligence of defendant's servants. Plaintiff had judgment in the court below, and from such judgment, and also from an order denying defendant's motion for judgment *non obstante,* or, in the alternative, for a new trial, he has appealed to this court.

The facts necessary to an understanding of the questions involved are briefly the following:

At the time of the accident, plaintiff resided in the city of Fargo with her husband and children, their house facing north on 4th avenue. Just east of their residence there were several vacant lots, over which the public had, by long user, established a well-beaten road or trail for vehicles, which road or trail commenced near the northeast corner of the lot occupied by the residence of plaintiff and her husband, and ran thence south and in a southeasterly direction across such vacant lots. It does not appear who owned these lots, and presumably such travel across them was with the implied license or consent of such owner. It had been the custom of plaintiff's daughter Nellie to feed the family horse on these lots, tethering it by a rope, which she fastened to a fence post on the southeasterly line of the family lot, about 50 feet from the north line of such lot. Just prior to the plaintiff's injury, and about 7 o'clock in the evening, Nellie performed this usual act by using a rope about 45 feet in length, one end of which was fastened to the halter and the other end, to which was fastened a picket pin, was wrapped three times around such fence post about 1 foot from the top, leaving the picket pin suspended a short distance toward the ground. This post

was about 4 feet in height. The evidence discloses that the horse was left about 30 feet east of this fence post, being some distance east of such trail, the rope extending across the trail. The distance from this post to the trail was, according to the testimony, from about 10 to 15 feet. The proof discloses that the immediate cause of the injury was the driving of defendant's horse against this rope, causing the rope to suddenly unwind from the post with such rapidity and force as to violently throw the picket pin against the plaintiff, who, at the time, was wheeling a baby carriage a few feet west of such post, striking her right arm and causing a compound fracture of the radius. Defendant's horse was being driven at the time by one Yuster, who was accompanied by one Olson, both of whom were in the general employment of defendant. They had a short time previous to the accident passed over the trail *en route* to the dumping ground, where they took a load of dirt for defendant, and the accident happened on their return trip. Both Olson and Yuster swear that they were driving along such trail slowly at the time, and did not see the rope, while plaintiff's witnesses swear that they drove west of the beaten trail and within about 5 feet of this post, and were driving on a fast pace or trot. The speed with which they were driving is, of course, a matter of mere opinion, and the testimony on this point is not at all clear or satisfactory. It is the contention of defendant:

First, that plaintiff failed to prove that Yuster and Olson were acting within the scope of their employment as defendant's servants at the time of the injury to plaintiff.

Second, that plaintiff was guilty of the negligence which caused her injury, by knowingly permitting her daughter to picket their horse at the place and in the manner above stated, and that there is no negligence shown on the part of this defendant.

We shall assume, for the purposes of this case, that under the evidence the trial court properly submitted to the jury the question as to whether Yuster and Olson, at the time of the accident, were engaged within the scope of their employment as defendant's servants? In other words, we shall treat the case the same as though defendant was personally driving his horse at the time and place in question. We shall also consider the evidence bearing upon the alleged act of negligence in its most favorable light for plaintiff, with a view of determin-

ing whether the learned trial court was justified under the law in submitting to the jury the question of defendant's negligence, or that of his said servants as alleged in the complaint. The particular act of negligence charged is alleged in the complaint as follows:

"That on the 8th day of June, A. D., 1911, while her husband's horse was tied to a fence post with a rope, with one end attached to an iron bar or picket, as it is commonly called, and was thus secured and in the immediate vicinity of plaintiff's home, and while plaintiff was on or about the premises occupied by the plaintiff and her husband and children, engaged in wheeling a baby carriage with an infant child therein, the said defendant's servant and driver of defendant's horse and wagon drove into the vicinity of where said horse was tied in the manner heretofore set forth, in a careless and negligent manner, and that said defendant's servant was then and there engaged in and about the master's business, and that without due care ran into the rope which was attached to said horse and to said post, on one end of which there was attached the iron picket, as aforesaid, and by reason of such carelessness and negligence in driving in and about the said premises where the said plaintiff and her said child were, notwithstanding it was the duty of the defendant's servant while so engaged in and about the master's business to drive carefully so as not to injure the said plaintiff or her said child, or to collide with said horse then and there hitched as aforesaid, did, on the said 8th day of June, A. D., 1911, carelessly and negligently drive his horse into the rope attached to said horse as aforesaid, and with great force and violence jerking said rope so attached to said pole, which was at the time and then and there holding said horse, which was greatly frightened at the time, and throwing the iron bar or picket attached to said rope off from said post with great force and violence, striking the said plaintiff on her right forearm, breaking the same, and greatly injuring the said plaintiff in and about her said right forearm, crippling and injuring its usefulness."

How stands the proof in support of such alleged negligence? Before referring to the evidence adduced by plaintiff at the trial, it is proper to state that it is nowhere contended that defendant's servants were guilty of any intentional or wilful wrong, but it is merely contended that they failed to use such care as a reasonably prudent person

would be expected to use under like circumstances. The various witnesses for plaintiff, in describing the speed with which defendant's horse was being driven at the time it came in contact with this rope, used the following language respectively:

The witness Mrs. Ellen Swanson: "Well, he came on a trot, a pretty good trot. He drove about 5 feet from where the rope was tied to the post. There was a beaten track farther away from that. About 5 or 10 feet farther away from that."

On Cross-Examination.

"It is a fact that the horse was simply trotting along at an ordinary pace and it got mixed up with that rope."

The witness John Briggs: "They were going fast,—fast trot. They came about 5 feet from the post where this iron bar was over there. The horse's feet got caught in this here rope that slanted down like this, you see, and the force of how fast the horse was coming threw that rope this way, you see, made couple or three jumps, going pretty fast, it came right around and hit Mrs. Garraghty on the arm right here. . . . That was a pretty well-traveled road, people traveling past there continually. . . . The beaten trail upon which people drove along there was not away from the fence more than 10 or 12 feet I say. These men were not driving in the beaten trail. They were within the sod place; were in the grass about 5 feet from the post. . . . They were coming around the corner very rapidly. The road at that point where it comes around the corner is not so very close. I don't know how close it was to the post. A person driving around that corner would follow the beaten track. I have been there. I couldn't say how far it would be from there. Well, I would say about 5 feet."

The witness Albert Garraghty: "They drove about 5 feet from the post. It wasn't the beaten path. The beaten path from the post was 12 or 15 feet. They were going at a fast trot."

The witness Nellie Garraghty testified that she saw the defendant's rig as it came around the corner and go south, and says that "they were going south; going at a pretty fast trot. They came about 5 feet from the post."

The foregoing comprises practically all of the plaintiff's testimony

relative to the alleged acts of negligence complained of. Was it error, under such showing, to submit to the jury the question as to the negligence of defendant's servants? Usually it is the province of the jury, under proper instructions, to say from the facts and circumstances disclosed, whether due care was or was not exercised, or, in other words, whether negligence *ought* to be inferred; but it is always not only the province but the duty of the court, first to determine as a matter of law whether, upon the facts most favorable to the plaintiff, negligence *can* properly be inferred. The jury cannot be permitted to arbitrarily and without evidence infer negligence. As very clearly and accurately expressed by the supreme court of Indiana, " 'When the evidence fails to establish the defendant's duty, and its nonperformance,—that is, when the evidence is equally consistent with the existence or nonexistence of negligence,'—there is no evidence which justifies the jury in finding negligence. . . . The evidence must affirmatively establish circumstances from which the inference fairly arises that the accident resulted from the want of some precaution which the defendant ought to have taken." Wabash, St. L. & P. R. Co. v. Locke, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391, and cases cited.

The court in the above case quotes approvingly the following language of the Lord Chancellor in Metropolitan R. Co. v. Jackson, L. R. 3 App. Cas. 193, 18 Eng. Rul. Cas. 677: "The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever."

The rule thus stated is well settled and universally recognized in this country.

Applying such rule to the case before us, we are constrained to hold that the learned trial court erred in submitting to the jury the question of negligence as alleged. Viewing plaintiff's testimony in its most favorable light, it fails to disclose a failure on the part of defendant's servants to observe such precaution while driving along such trail as ordinarily regulates the conduct of reasonable men; nor can any such failure be reasonably inferred from the testimony as thus viewed. If we are correct in this conclusion, then it necessarily follows that there was no wrong, the defendant servants were not negligent, and consequently defendant is not liable in this action. The law is that if, in doing a lawful act, a casualty, purely accidental, arises, no action will lie for an injury resulting. A person thus accidentally injured cannot recover compensation therefor. As stated in the Wabash, St. L. & P. R. Co. v. Locke, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391: "Mischief, which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong." And the Indiana court quotes from Pollock on Torts, 36, the following: "Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things."

Judge Cooley in Sjogren v. Hall, 53 Mich. 274, 18 N. W. 812, said: "If the accident which occurred was one at all likely to happen,—if it was a probable consequence of a person working about the wheel that he would be caught in it as the plaintiff was,—there would be ground for pressing this argument. But the accident cannot be said to be one which even a prudent man would have been likely to anticipate. . . . So far as there is a duty resting upon the proprietor in any of these cases, it is a duty to guard against probable dangers; and it

does not go to the extent of requiring him to render accidental injuries impossible."

Judge Mitchell, in speaking for the Minnesota court in Christianson v. Chicago, St. P. M. & O. R. Co. 67 Minn. 94, 69 N. W. 640, 16 Am. Neg. Cas. 314, very accurately and lucidly defines the distinction between the definition of "negligent" and "proximate cause." We quote: "What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but it is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow."

If the defendant's servants were negligent in driving against this rope, we would have no difficulty in reaching the conclusion that such negligence was the proximate cause of plaintiff's injury, but we fail to discover from the testimony anything from which negligence may properly be inferred. The fact that they were driving along this trail on a "fast trot," and that they drove from 5 to 10 feet from the beaten path of said trail, forms no basis for finding that they were negligent. They did not see this rope, and it is entirely clear that a reasonably cautious person, under like circumstances, could not have anticipated that driving in the manner they were driving at the time of the accident would have resulted in injury to anyone.

We have examined the authorities called to our attention by respondent's counsel, but we find nothing therein in conflict with the

views above expressed. In Kommerstad v. Great Northern R. Co. 120 Minn. 376, 139 N. W. 713, cited by respondent's counsel, the plaintiff, a section man in the employ of the defendant, was injured as a result of the alleged negligence of the defendant in running against a stray horse upon the track, throwing such animal upon and against the plaintiff. The complaint, among other things, alleged that the train was running at an excessive speed, and that no warning signals were given of the approach of said train "to keep or frighten the said horse from said tracks." The court merely held such allegation of negligence sufficient as against a demurrer, and that while the injury was an unusual one the question whether the injury was the proximate consequence of the alleged negligent operation of the train was for the jury. Manifestly, this case sheds no light upon the crucial question in the case at bar, *viz.:* whether, under the facts, it discloses negligence on the part of defendant's employees.

While regretting the unfortunate accident which resulted in the injury complained of, we are forced to the conclusion that no liability attaches to the defendant, and as it is clear from the record that no different state of facts would be developed at another trial, we deem it a proper case for directing the entry of a judgment dismissing the action. It is accordingly ordered that the judgment and order appealed from be and the same are hereby reversed, and the District Court directed to enter a judgment dismissing the action.

On Petition for Rehearing.

Filed Oct. 14, 1913.

FISK, J. Plaintiff's counsel has filed a petition for rehearing, in which he apparently fails to grasp the distinction pointed out in the opinion between "negligence" and "proximate cause," and he wholly misinterprets the ground of the decision. He says: "The learned justice in writing the opinion reaches the conclusion that there was no breach of duty on the occasion in question, and therefore, though the plaintiff received a severe injury which appeals to the conscience of the court, nevertheless, she has no cause of action, *because the learned justice says that the act of the defendant in going into the rope was not the proximate cause of the injury.*" We said nothing of the kind. On the

contrary, we expressly stated that "if the defendant's servants were negligent in driving against this rope, we would have no difficulty in reaching the conclusion that such negligence was the proximate cause of plaintiff's injury."

Counsel in his petition cites numerous cases which he requests this court to carefully read and consider. One is the case of Costello v. Third Ave. R. Co. 161 N. Y. 317, 55 N. E. 897, and this case is a fair sample of the other cases cited. We have carefully examined the opinion in the above case, and we find this language: "As this record stands, the gross and well-nigh criminal negligence of the defendant's motorman is undisputed." Manifestly, the citation of such authorities is wholly useless. The difficulty with plaintiff's case, as held in the foregoing opinion, is the failure to prove any negligence on the part of defendant's servants, and not a failure to establish that the act of such servants in driving the horse against the rope was the proximate cause of plaintiff's injury.

Petition denied.

NORTHERN PACIFIC RAILWAY COMPANY v. HARRIET A. BARLOW.

(143 N. W. 903.)

Railway company — location of right-of-way — completion of grade for ties and rails — plat and profile — approved by secretary of interior.

A definite location of the right of way of a railway company which will entitle it to the benefits of the act of Congress of March 3, 1875, granting lands to railroads, is made by the completion of the grade ready for the ties and rails which has been preceded by the approval of a plat and profile of such road by the Secretary of the Interior, even though there is no proof that such plat was ever filed in the land office of the district in which the land is situated.

Opinion filed October 23, 1913.

Appeal from the District Court for Foster County, *Burke*, J.

Action to quiet title to real estate.

Judgment for plaintiff. Defendant appeals.

Affirmed.

Substituted opinion filed pursuant to rule 19, Revised Rules of Practice, after considering petition for rehearing.

Statement by BRUCE, J.

This is an action to determine adverse claims, and to quiet title in the plaintiff to a strip of land 200 feet in width used as a railroad right of way across the southwest quarter of section 16, township 147, range 66 in Foster county, North Dakota. In it a counterclaim is filed by the defendant, praying that the title to the land be quieted in her and that the action of plaintiff be dismissed. The trial court found the issues for the plaintiff and quieted the title in it. From this judgment this appeal is taken and a trial *de novo* is asked. The case came before this court on a prior appeal in the case of Northern P. R. Co. v. Barlow, 20 N. D. 197, 126 N. W. 233, Ann. Cas. 1912 C, 763, but nothing in that case was decided in relation to the merits; the only question decided being that a stipulation was and must be considered a part of the record. The claim of the railway company to the right of way in question is based upon an alleged compliance with the provisions of the act of Congress of March 3, 1875, granting to railroads the right of way over the public lands of the United States (18 Stat. at L. 482, chap. 152; U. S. Comp. Stat. 1901, p. 1568).

John Knauf and *S. E. Ellsworth,* for appellant.

It was necessary for plaintiff to have provided *fixity* of location upon the ground, as well as fixity of grantee. Dakota C. R. Co. v. Downey, 8 Land Dec. 115.

Defendant's devisor's title to the whole of the land became perfect by patent issued November 7, 1888. This title related back to July 22, 1883, the date of Barlow's settlement upon the land, and was sufficient to cut out and destroy any intervening right subsequent to July 22, 1883. Shepley v. Cowan, 91 U. S. 338, 23 L. ed. 427; Sturr v. Beck, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350.

The map or profile of plaintiff's right of way over Barlow's land was not filed in the local land office until August 6, 1883. Northern P. R. Co. v. Barlow, 20 N. D. 197, 126 N. W. 233, Ann. Cas. 1912 C, 763.

Definite location does not occur or is not established until map or

profile is filed, *and* until there is some work of *construction,* aside from the survey marked out by stakes. Doughty v. Minneapolis, St. P. & S. Ste. M. R. Co. 15 N. D. 290, 107 N. W. 971.

There is a difference between a mere location, movable at will, and the actual construction of the road, *fixing* its position, towards the consummation of the purpose for which the grant of a right of way was given. Minneapolis, St. P. & S. Ste. M. R. Co. v. Doughty, 208 U. S. 251, 52 L. ed. 474, 28 Sup. Ct. Rep. 291.

Watson & Young, for respondent.

The railroad company fully complied with the terms of the act when it presented to the Secretary of the Interior and secured his approval of its profile map of definite location. The railroad company's title to right of way so fixed cannot depend upon the entering of notations, either in the general or local land office. The roadbed was completed before Barlow entered upon the land. See Secretary Vilas' Opinion, Re Downey.

All acts necessary and requisite to establish *fixity* were done before Barlow made entry. Stalker v. Oregon Short Line R. Co. 225 U. S. 142, 56 L. ed. 1027, 32 Sup. Ct. Rep. 636.

BRUCE, J. (after stating the facts as above). The evidence is undisputed that a survey of the strip in question was made in September and October, 1881, was adopted by action of the board of directors of the Jamestown & Northern Railway Company (the plaintiff's assignors), on October 5, 1882, and was approved by the Secretary of the Interior on June 26, 1883. How long prior to the approval of the plat and profile the same were on file in the office of the Secretary of the Interior does not appear, nor does it appear how the same came into the possession of the Secretary. There is a stipulation, however, which, under the decision in Northern P. R. Co. v. Barlow, 20 N. D. 197, 126 N. W. 233, Ann. Cas. 1912 C, 763, we must recognize, to the effect that "on the said 22d day of July, A. D., 1883, intending to make entry of the said land herein described when the same was surveyed, and to acquire title to the same by virtue of compliance with the pre-emption laws of the United States, said Frederick G. Barlow settled upon said land and took up his residence thereon. At the time of such settlement there

was not a railroad track or line of railroad in operation across said land at any place, nor had plat or profile of the section of railroad extending across said land hereinbefore referred to been filed in the United States District Land Office at Fargo." We find from the evidence that, although Barlow entered upon the land upon the 22d day of July, A. D., 1883, the grading of the road across said land was completed prior to May 31, 1883; that is to say, nearly two months before his settlement. We also find that the rails were laid upon the grade between August 10 and 15, 1883, and that trains were operated on said road and across said land soon after. Under the stipulation we are constrained to hold that up to the time of said entry no plat had been filed in the local land office; and it is for us, therefore, to determine whether the surveying of a road across a quarter section of government land, the construction on said land of a grade ready for the ties and rails, and the approval of the map and profile of the road and survey by the Secretary of the Interior prior to the entry of the settler, gives to the railway company title to such right of way which is superior to that of the entryman. We are quite satisfied that it does.

The act of Congress of March 3, 1875, 18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568, provides among other things: "That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and such proofs of its organization under the same, to the extent of 100 feet on each side of the central line of said road. . . . Section 4. That any railroad company desiring to secure the benefits of this act shall within twelve months after the location of any section of 20 miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

The uniform construction of this act has been that it is a grant "*in*

præsenti of lands to be thereafter identified." Jamestown & N. R. Co. v. Jones, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568; Denver & R. G. R. Co. v. Alling, 99 U. S. 463, 25 L. ed. 438. In the case of Jamestown & N. R. Co. v. Jones, supra, it was held that such definite location was made and a prior right superior to that of subsequent settlers acquired, provided the road was actually constructed across the land in question prior to such entry, and even though no plat had been filed either in the local land office or with the Secretary of the Interior. In the case of Minneapolis, St. P. & S. Ste. M. R. Co. v. Doughty, 208 U. S. 251, 52 L. ed. 474, 28 Sup. Ct. Rep. 291, the court, though affirming the ruling in Jamestown & N. R. Co. v. Jones, supra, held that no such definite location was accomplished by the mere surveying of the line and the driving of stakes, as such location could be easily altered. In the case of Stalker v. Oregon Short Line R. Co. 225 U. S. 142, 56 L. ed. 1027, 32 Sup. Ct. Rep. 636, the court held that where the road had been physically located and the plats filed, the mere failure of the register of the land office to note the location upon the plats in his office did not affect the right of the railway company. In passing upon the question the court said: "The initiatory act to which the final act of approval relates *is the filing with the Secretary of the Interior of the map of definite location.* The mere surveying and staking of a route is the tentative act of the railroad. It might at will select a different route and move its stakes. But when it adopts a route definitely, and then causes a map of such route to be filed in the land office of the district, in duplicate, and then filed with the Secretary of the Interior, a right is thereby initiated which, until disposed of, rightly precludes the creation of a later right, and gives to the company, as prior in time, priority in right. . . . It is next said that the register did not, after a copy of the approved map of station grounds had been transmitted to him, mark the proper township plat and tract books, as required by the regulations of the Land Department, so as to show the station land selected. This notation on the books of the local land office is for the purpose of giving notice to future enterers. But this was not required to be done until the receipt in the land office of the approved plat of station grounds. That approval did not occur until December 15, 1888. Reed filed his right of pre-emption October 18, 1888, a date antecedent to any possible no-

tation. He could not, therefore, have been misled, but, on the other hand, *had the constructive notice which came from the then pending proceedings before the Secretary of the Interior.* But aside from this, there are two answers to the contention: First, if we are right in holding that the grant vested in the company when the plat was approved, as of the date when filed, the failure of the officer in the district land office to properly mark the plat could not operate to defeat the grant; and, secondly, the railway company, having done everything which it was required by law to do, should not be affected by the negligence of the register in not doing a duty upon which the vesting of title as against the United States did not depend. If the taking effect of the grant had been made to depend upon his properly marking the plat books, there would be no room for the doctrine of relation to the initiatory step of filing the plat of selection. As that is not the case, *his neglect to do something not vital to the vesting of title will not defeat the title so vested."*

We are quite satisfied from these decisions that what the act of Congress aimed at was a fixity of location; that is to say, a location which the railway company could not change at will in case it later found a route which was more advantageous to it. The Supreme Court of the United States held in the case of Jamestown & N. R. Co. v. Jones, supra, that the construction of the road, in the absence of the filing of and approval of a plat, constituted a location. It is held in the case of Stalker v. Oregon Short Line R. Co. supra, that a notation upon the plat in the local land office was not an initiatory step upon which the right depended. In the case at bar, the railroad company had not merely practically constructed the road at the time of the entry, but the plat had been approved at Washington. The facts of the case would come within those of Jamestown & N. R. Co. v. Jones, but for the fact that there is no proof that the ties and rails were laid at the time of the entry, though there is proof that this was the fact some eighteen days later. It is, however, stronger than the Jamestown Case on account of the fact that the plat had been approved at Washington and that the railway company was powerless to then change the location. There can be no doubt, indeed, that the route was fixed both on account of the physical construction and the difficulty of a subsequent removal, and on account of the fact that its offer of a permanent loca-

tion had been accepted by the Federal authorities. The entryman in this case can have no more ground for complaint than could the entryman in the case of Stalker v. Oregon Short Line R. Co. supra. It would be absurd to hold that one who enters upon land and sees upon it a railroad grade which is only eighteen days from physical completion, and, as we have a right to believe, but a link in miles of road stretching across the same prairie, was not aware of this prior railroad occupation. Added to this is the fact that there is no showing that the entryman himself ever asserted any claim against the road, and that a station was put in at or near the point and named after him, in the neighborhood of which he lived for some time. It is his widow devisee, merely, who is found to protest. No one would contend that, on account of the failure to file the plat in the local land office, he was induced to settle upon land which otherwise he would not have occupied, or that the location of the road did not increase the value of his land, nor is there any evidence to the effect. According to the case of Stalker v. Oregon Short Line R. Co. he must be imputed with constructive notice not merely of the construction of the grade, but of the proceedings at Washington. The fact is that much as we may clamor for damages when a railroad right of way is sought to be condemned across our lands when railroads are plentiful and near at hand, the proximity of a railroad in a new country is a thing which the intending settler most desires. The question is, after all, one for the Supreme Court of the United States, and not for us to ultimately decide, and all that we can do is to seek to interpret the prior decisions of that tribunal. This we have attempted to do, and our conclusion is that the judgment of the District Court should be affirmed, and it is so ordered.

Having passed upon the merits of this case and resolved the controversy in favor of the respondent, it is unnecessary for us to treat the motion to dismiss the appeal with any particularity. It is sufficient to say that a majority of the court is of the opinion that it lacks in merit.

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

ELY VANNATTA v. W. D. McCLINTOCK.

(144 N. W. 76.)

Head of family — Federal homestead — abandonment — mortgage by husband — wife not joining — subsequent mortgage by both — foreclosure — sheriff's deed — action — by purchaser — to quiet title — cannot be maintained.

One G., the head of a family including a wife, on August 20th, 1900, made a homestead filing and entry upon a quarter section of land in Pierce county and on the same day entered into possession thereof, and he, with his family, took up their residence thereon. Such residence continued until April, 1907, when G. and family voluntarily quit possession and removed their residence from such premises without any intent to return thereto. He made final proof thereon November 18th, 1905. December 17th, 1904, G. executed and delivered a mortgage on such premises without his wife joining therein, and which mortgage is now held by the respondent. December 15th, 1905, said G. and wife executed and delivered a mortgage on the same premises, which mortgage was subsequently foreclosed and at the expiration of the period for redemption sheriff's deed therefor issued. Under this foreclosure appellant holds title to said premises, and brought this action January 31st, 1911, among other things, to quiet title as against the mortgage held by respondent. It is *held* that, under the provisions of § 5054, Rev. Codes of 1905, quoted at length in the opinion, he cannot maintain such action.

Opinion filed October 23, 1913.

Appeal from a judgment of the District Court of Pierce County; *Burr*, J.

Affirmed.

F. J. Funke, for appellant.

The homestead law confers the right of possession upon the entryman when the entry is made. 32 Cyc. 833; Tiernan v. Miller, 69 Neb. 764, 96 N. W. 661; Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800.

One in undisputed possession of such land with intent to obtain title is deemed the owner as against everyone except the government. Earnhart v. Switzler, 105 C. C. A. 260, 179 Fed. 832; Miller v. Imperial Water Co. 156 Cal. 27, 24 L.R.A.(N.S.) 372, 103 Pac. 227;

Orrell v. Bay Mfg. Co. 83 Miss. 800, 70 L.R.A. 881, 36 So. 561; Reservation State Bank v. Holst, 17 S. D. 240, 70 L.R.A. 799, 95 N. W. 931; Red River & L. of W. R. Co. v. Sture, 32 Minn. 95, 20 N. W. 229; Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479.

Every species of title, inchoate or complete, is comprehended within the term "property" as applied to lands subject to homestead exemption rights which lie in contract; contracts executory or fully executed. Soulard v. United States, 4 Pet. 511, 7 L. ed. 938; King v. Gotz, 70 Cal. 236, 11 Pac. 656.

Whatever character of title to land held as homestead, or whatever may inure or grow out of such title, will be impressed with homestead quality. Alexander v. Jackson, 92 Cal. 514, 27 Am. St. Rep. 158, 28 Pac. 593; Perry v. Ross, 104 Cal. 15, 43 Am. St. Rep. 66, 37 Pac. 757; Stinson v. Richardson, 44 Iowa, 373; Moore v. Reaves, 15 Kan. 150; McCabe v. Mazzuchelli, 13 Wis. 478; Hoy v. Anderson, 39 Neb. 389, 42 Am. St. Rep. 591, 58 N. W. 125; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245; Oswald v. McCauley, 6 Dak. 289, 42 N. W. 769; First Nat. Bank v. Lamont, 5 N. D. 393, 67 N. W. 45.

A conveyance of a homestead by a married person which is not executed by both husband and wife is void. Roby v. Bismarck Nat. Bank, 4 N. D. 161, 50 Am. St. Rep. 633, 59 N. W. 719; Myrick v. Bill, 5 Dak. 167, 37 N. W. 370; Brokken v. Baumann, 10 N. D. 453, 88 N. W. 84; Roberts v. Roberts, 10 N. D. 531, 88 N. W. 289; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245; First Nat. Bank v. Lamont, 5 N. D. 393, 67 N. W. 145; Silander v. Gronna, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544; Gaar, S. & Co. v. Collin, 15 N. D. 622, 110 N. W. 81; Justice v. Souder, 19 N. D. 613, 125 N. W. 1029; Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35.

Where an acknowledgment is necessary to give effect to an instrument, such instrument becomes a completed one, and takes effect from the date of acknowledgment, and not from date of execution. 1 Cyc. 560; Doe ex dem. De Peyster v. Howland, 8 Cow. 277, 18 Am. Dec. 445.

Paul Campbell, for respondent.

Our statute is not limited in its application to homestead claimants, to the exclusion of grantees, mortgagees, etc. Rev. Codes, 1905, § 5054.

The constitutional enactment in so far as it creates the state homestead is plainly self-executing. 15 Am. & Eng. Enc. Law, 2d ed. 528, 529; 6 Am. & Eng. Enc. Law, 2d ed. 912–914; Calmer v. Calmer, 15 N. D. 120, 106 N. W. 684; Roesler v. Taylor, 3 N. D. 546, 58 N. W. 342.

The homestead is real property owned by the head of a family and occupied by the family as a home. 15 Am. & Eng. Enc. Law, 2d ed. 525, citing, Century Dict.; Bouvier's Law Dict.; Lyon v. Hardin, 129 Ala. 643, 29 So. 777; Re Owings, 140 Fed. 739.

Where the Constitution or statute exempts the homestead from levy or sale "under mesne or final process," it presupposes a title capable of a transfer by such sale, and does not exempt land unless the claimant has such a title. 15 Am. & Eng. Enc. Law, 2d ed. 557; Wisner v. Farnham, 2 Mich. 472; Brown v. Keller, 32 Ill. 151, 83 Am. Dec. 258; Ketchin v. McCarley, 26 S. C. 1, 4 Am. St. Rep. 674, 11 S. E. 1099; Helgebye v. Dammen, 13 N. D. 171, 100 N. W. 245; Roby v. Bismarck Nat. Bank, 4 N. D. 156, 50 Am. St. Rep. 633, 59 N. W. 719; Myrick v. Bill, 5 Dak. 167, 37 N. W. 369.

The law protects every estate which could be sold on execution. 21 Cyc. 502, note, 46; Jones v. Jones, 213 Ill. 228, 72 N. E. 695.

The mortgage in question was given before the mortgagor had acquired any estate in the land, his only right being a possessory interest. Adams v. McClintock, 21 N. D. 483, 131 N. W. 394.

The premises were not a state homestead. The entryman during the first five years has only a possessory or proprietary interest in the Federal homestead. After five years, and being still in possession, he becomes the equitable owner, and by compliance with the law, this right may be ripened into a perfect legal title. 32 Cyc. 786–787, note, 18–23, 788, note 26–29, 817, note, 46–51, 818, note, 52, 54–56, 819, 820, note, 69 and 70–72, 833, 834, 855, 1029, 1030; Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233; Bergstrom v. Svenson, 20 N. D. 55, 126 N. W. 497, Ann. Cas. 1912C, 694.

Appellant bought from Hublou with knowledge of the law, that the bar of the statute was against his grantors. 37 Cyc. 665; 25 Cyc. 1009, 1010, note, 23; 15 Cyc. 1001–1024.

The statute under consideration is a limitation law, and the time

between its passage and going into force is reasonable. Adams & F. Co. v. Kenoyer, 17 N. D. 302, 16 L.R.A.(N.S.) 681, 116 N. W. 98; Clark v. Beck, 14 N. D. 287, 103 N. W. 755.

This law was in effect before appellant or his grantors acquired any interest, and the propositions here involved have been passed by this court. Justice v. Souder, 19 N. D. 613, 125 N. W. 1029; Styles v. Theo. P. Scotland & Co. 22 N. D. 469, 134 N. W. 708.

The grantee's interest and estate are derived solely from the husband, owner; he claims under him; takes no greater rights than he possessed, and is estopped where his grantor is estopped. 21 Cyc. 460; Dun v. Dietrich, 3 N. D. 3, 53 N. W. 81; Kuhnert v. Conrad, 6 N. D. 215, 69 N. W. 185.

The deed or mortgage became valid and effective on abandonment of homestead. Rev. Codes, 1905, §§ 4974–5053, 5054; Robertson v. Hefley, 55 Tex. Civ. App. 368, 118 S. W. 1159; Kirby v. Blake, 53 Tex. Civ. App. 173, 115 S. W. 674; Note to Jerdee v. Furbush, 95 Am. St. Rep. 920; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245; Gee v. Moore, 14 Cal. 472; 21 Cyc. 460, 528, 535, 539–546, 547, 549, 616; 16 Cyc. 686–715; Vickers v. Peddy, 55 Tex. Civ. App. 259, 118 S. W. 1110; Keyes v. Scanlan, 63 Wis. 345, 23 N. W. 570; Bremseth v. Olson, 16 N. D. 242, 13 L.R.A.(N.S.) 170, 112 N. W. 1056, 14 Ann. Cas. 1155; Foogman v. Patterson, 9 N. D. 254, 83 N. W. 15.

The Constitution exempts the homestead only from foreclosure. Calmer v. Calmer, 15 N. D. 120, 106 N. W. 684; McCanna v. Anderson, 6 N. D. 482, 71 N. W. 769; Gaar, S. & Co. v. Collin, 15 N. D. 623, 110 N. W. 81; Roesler v. Taylor, 3 N. D. 546, 58 N. W. 342; 21 Cyc. 460–462, 527–529, 622, 623.

If an instrument is void, notice of it certainly cannot render it valid. If not void, then the record of it constitutes notice. Roby v. Bismarck Nat. Bank, 4 N. D. 156, 50 Am. St. Rep. 633, 59 N. W. 719; 1 Cyc. 516.

SPALDING, Ch. J. This is an appeal by the plaintiff, Ely Vannatta, from a judgment entered by the district court of Pierce county on the 3d of January, 1912, in an action to determine adverse claims to the north half of the southeast quarter of section two, and the northwest

quarter of the southwest quarter and the southwest quarter of the northwest quarter of section one, in township 153 north of range 74 west, in Pierce county, North Dakota. The judgment quieted title in the plaintiff and appellant, Vannatta, as against all the defendants except the respondent, W. D. McClintock. It was adjudged that he held a valid and subsisting lien by mortgage upon the premises, prior and paramount as an encumbrance thereon, to the right, title, estate, and interest of the plaintiff, Vannatta, and the judgment contained the usual provisions and directions for foreclosing such mortgage. None of the defendant lien holders appealed, and the contest lies between the plaintiff-appellant, Vannatta, and the defendant-respondent, W. D. McClintock, and only the judgment roll is before us, the question being whether the findings of fact sustain the judgment.

Without setting out such findings in detail, it is sufficient to say that it appears that one George Goetz was the head of a family dependent upon him for support, which family included his wife, Barbara Goetz, at all times material to a consideration of this case; that on the 20th of August, 1900, Goetz made a homestead filing and entry upon the premises in controversy, and on about the same day entered into possession thereof and took up his residence thereon with his family in a dwelling house situated upon said premises; and that such residence continued up to and until some time in the month of April, 1907, when they voluntarily quit possession thereof and removed their residence therefrom, and had no intent to return thereto, and voluntarily abandoned any homestead right or claim therein or thereto. No declaration of homestead in said premises was ever made or recorded; that on or about the 18th day of November, 1905, said Goetz made final proof upon said premises, and on that day received a final receiver's receipt from the receiver of the appropriate United States land office therefor, which receipt was recorded in the office of the register of deeds of Pierce county, North Dakota, on December 28th, 1905; and the United States patent therefor was delivered to Goetz on the 30th of June, 1906, and recorded on the 17th of November, 1910. On or about the 17th day of December, 1904, said Goetz executed and delivered a mortgage on said premises to the McHenry County State Bank, containing the usual covenants of warranty, and duly executed. This mortgage was duly recorded in the office of the register of deeds

of Pierce county on December 24th, 1904. Barbara Goetz, wife of the mortgagor, did not join in the execution of such mortgage, no part of it has ever been paid, and on or about the 19th of April, 1910, the defendant, W. D. McClintock, became and still remains the owner and holder of said mortgage through an assignment thereof duly executed and recorded in said register of deeds' office on the 16th of August, 1910. This is the mortgage held to be a valid lien on the premises described, and on which the decree of foreclosure was entered.

The other defendants are holders of liens of various and differing kinds and dates, claimed to be inferior to the title of appellant, and the lien of respondent's mortgage. No consideration need be given their claims as they have not appealed. On the 15th of December, 1905, said Goetz and his wife, Barbara, executed and delivered to the Merchants Bank of Rugby a mortgage on the same premises to secure the payment of a debt, and such mortgage was recorded in the office of the register of deeds of Pierce county on the 20th of December, 1905. On the 21st day of December, 1907, the last-mentioned mortgage was foreclosed by sale, duly advertised, and the premises sold to one J. G. McClintock, and recorded in the office of the register of deeds on the 28th of December, 1908.

On or about the 21st of December, 1908, one Hublou, a subsequent lien holder, regularly redeemed said premises from such foreclosure sale and received a certificate of redemption, which was recorded in said register of deeds' office on the 21st of December, 1908. No further redemption having been made from such sale, a sheriff's deed for the premises described was, on the 27th of February, 1909, executed and delivered to Hublou and duly recorded on the same day, and said Hublou thereafter, by warranty deed, conveyed said premises to the plaintiff, Vannatta, which deed was, on the 14th of August, 1910, duly recorded in the office of the register of deeds.

It is apparent from these findings that the question to be determined here is as between the two mortgages, the one first in point of time and of record being executed by the husband alone, and the subsequent one by both husband and wife, and both mortgages given while Goetz and wife were in possession of and residing upon the premises under the homestead laws of the United States. Many interesting questions are presented in the briefs. In support of the de-

cision of the trial court, it is contended that this was not a state homestead, mainly because Goetz had acquired, at the time respondent's mortgage was executed, no estate or interest in the premises constituting a foundation, under our state homestead law, for the homestead right of exemption; that it is only such an estate or interest as can be levied upon that the law is intended to protect, hence it was unnecessary in any event for the wife to join in the execution of a mortgage. It is further contended that in case it did constitute a homestead under the state law, and was therefore exempt, the subsequent abandonment of it as a homestead validated the mortgage, if invalid at the time it was given; and that such validation relates back to the execution and delivery of the mortgage. Most exhaustive and ingenious arguments are made in support of these propositions, but from our consideration of this appeal we deem it wholly unnecessary to determine these questions.

In support of the judgment it is contended, and we think correctly, that the appellant, as the successor in interest of Goetz, the mortgagor, cannot maintain this action as against the mortgage held by respondent. This contention rests upon the provisions of our statute, found in § 5054, Rev. Codes of 1905. For a complete understanding of it we quote §§ 5052, 5053, and 5054. Section 5052 provides that "the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed . . . by both husband and wife."

Section 5053 was enacted in 1895, and reads: "No action, defense, or counterclaim founded upon a right of homestead in property heretofore conveyed or encumbered, otherwise than as provided by the law in force at the time of the execution of such conveyance or encumbrance, and for which no declaration of homestead shall have been filed previous to the taking effect of this section, shall be effectual or maintainable, unless such action is commenced, or such defense or counterclaim interposed, on or before the 1st day of January, 1900; provided, nevertheless, that such limitation shall not apply if the homestead claimant was, at the time of the execution of such conveyance or encumbrance, in the actual possession of the property claimed, and had not quit such possession previous to the commencement of such action or the interposing of such defense or counterclaim."

It will be noticed that this section only placed a bar upon actions, defenses, and counterclaims brought or interposed on or before the 1st day of January, 1900, but in 1905 the legislature enacted § 5054, which reads as follows:

"No action, defense, or counterclaim founded upon a right of homestead in property conveyed or encumbered prior to the taking effect of this article, and since the taking effect of § 5053, otherwise than is provided by the law in force at the time of the execution of such conveyance or encumbrance, and for which no declaration of homestead shall have been filed previous to the taking effect of this article, shall be effectual or maintainable, unless such action is commenced, or such defense or counterclaim interposed, on or before the 1st day of January, 1906; and no action, defense, or counterclaim founded upon a right of homestead in property hereafter conveyed or encumbered, otherwise than as provided by the law in force at the time of the execution of such conveyance or encumbrance, and for which no declaration of homestead shall have been filed previous to the execution of such conveyance or encumbrance, shall be effectual or maintainable, unless such action is commenced, or such defense or counterclaim interposed, within two years after the execution of such conveyance or encumbrance; provided, nevertheless, that such limitation shall not apply, if the homestead claimant was, at the time of the execution of such conveyance or encumbrance, in the actual possession of the property claimed, and had not quit such possession previous to the commencement of such action, or the interposing of such defense or counterclaim; and provided, further, that this section shall not in any way affect claims to the homestead which may have become barred under the provisions of said § 5053."

This section took effect as a law July 1st, 1905, a little over six months after the recording of respondent's mortgage, and five and a half months prior to the giving of the mortgage under which appellant holds. Appellant's mortgage was given sixteen days prior to the 1st of January, 1906, when the limitation provided by § 5054 became operative. This is a statute of limitations on actions like the one in the case at bar. It was intended to meet just such cases as this, and to render it impossible for the owner of the premises or his successor in interest to maintain title, or sustain a defense or counterclaim,

against the holder of a mortgage or title under a conveyance or mortgage which the wife had not joined in executing. Let us examine this with relation to the statute. It applies to an action, defense, or counterclaim founded upon a right of homestead. The action brought by plaintiff is, as against the respondent, predicated or founded upon a claim of a right of homestead in Goetz and wife in the property to which the appellant is the successor in interest. Next, it was encumbered prior to the taking effect of the article; that is, prior to July 1st, 1905, and it was encumbered otherwise than as was provided by law in force at the time of the execution of the mortgage held by respondent. No declaration of homestead was filed previous to the taking effect of the law, or at all. The action was not commenced before the 1st day of January, 1906, and incidentally the action was not commenced within two years after the execution of respondent's mortgage; and, finally, while the party under whose homestead right appellant claims to be relieved from the mortgage was in possession when respondent's mortgage was executed and delivered, and had quit possession previous to the commencement of this action. How could the facts more nearly fit all the provisions of a statute? Every element essential to bar the defense is here found to exist, and we deem it unnecessary to discuss it further, and particularly because this court has only recently fully considered and passed upon the purpose and effect of this statute, and held it to be a statute of limitations applicable in such case. See Justice v. Souder, 19 N. D. 613, 125 N. W. 1029. See also Styles v. Theo. Scotland & Co. 22 N. D. 469, 134 N. W. 708. As to power of legislature to pass statutes of limitations, see Adams & F. Co. v. Kenoyer, 17 N. D. 302, 16 L.R.A.(N.S.) 681, 116 N. W. 98; Gilbert v. Ackerman, 159 N. Y. 118, 45 L.R.A. 118, 53 N. E. 753.

No question of notice of a change in the statute of limitations seems to us in the case. The law was in force five months and a half prior to the execution and delivery of the mortgage under which appellant holds, and the original holder was thereby informed that if it took the mortgage it would be barred from making any claim under it as against the respondent's mortgage, unless he asserted it by action, counterclaim, or defense before the 1st of January, 1906. It had five and

a half months' knowledge of the law before taking this mortgage, and it took subject to the limitation thereby imposed.

J. G. McClintock, who bought under the sheriff's sale on the foreclosure, purchased December 21st, 1907, and he had knowledge of the law from July 1st, 1905, until the date of his purchase; and Hublou, who redeemed December 21st, 1908, was possessed of the knowledge an additional year; and appellant, who took the deed under which he holds from Hublou August 14th, 1910, had almost ten months' longer notice of the law than had Hublou. This action was not commenced until January 31st, 1911. It is simply a case of parties acquiring property after a statute of limitations has been enacted, and does not involve any question of property rights existing prior to its enactment as to appellant. When the second mortgage was taken, and when appellant acquired title under it, the mortgagee and appellant took their chances on facts occurring which would make the statute operative against them.

The argument that § 5054 cannot be construed to give validity to a prior void mortgage is answered in Justice v. Souder, supra. The logical effect on the rights of appellant need not be analyzed or considered. His remedy, if any, was with the legislature. The application of this section is so patent to the case before us, and its construction by this court so recent that we deem it unnecessary to enter into any further discussion of the subject. Our conclusion is reached without reference to the question of any right of Goetz to a state homestead exemption in a homestead taken under the laws of the United States, on which he had not made final proof. It is assumed for the purposes of this decision that it was exempt under the state homestead laws. Neither have we investigated to determine whether the right to assert a claim as against a mortgage not executed by the wife, when the mortgaged property was a homestead, is personal to those claiming a homestead interest in it; as the homestead exemption has been construed by this court it is possible that such right is not transferred by conveyance, and that therefore the holder under a foreclosure sale of a subsequent mortgage is not in position to assert title as against a mortgage in which the wife did not join.

The judgment of the District Court is affirmed.

CHARLOTTE M. CARPENTER v. THE VILLAGE OF DICKEY, a Municipal Corporation.

(143 N. W. 964.)

Personal injury action — village — defective sidewalk — instructions — damages — future medical attention.

1. In an action for personal injuries alleged to have been caused by a defective sidewalk which defendant village negligently maintained, instructions examined, and *held* to state the law correctly, with the exception of one instruction which authorized the jury to include as an element of damages the sum of $75 for future medical attention, which latter instruction is held erroneous.

Evidence — defective sidewalk — knowledge thereof — village authorities — accident.

2. Evidence examined, and *held* sufficient to warrant a finding that the defective sidewalk had existed for a sufficient time prior to the accident to impute to the village authorities knowledge of its existence; also to warrant a finding that the accident happened in the manner alleged.

Evidence insufficient — recovery — future medical aid.

3. Evidence *held* insufficient to support the recovery of the item of $75 for future medical aid.

Award of damages — grossly excessive — passion — prejudice — jury — new trial — motion — discretion — abuse of — remittitur of part of recovery — power of court.

4. Plaintiff's left ankle was badly sprained, and there is some evidence that such injury will be permanent, but there is no allegation or proof that her earning capacity will be diminished by reason thereof. The jury awarded the full amount prayed for, $5,318.05.

Held, so grossly excessive as to shock the sense of justice and to show passion and prejudice of the jury. Under these circumstances, defendant's motion for a new trial upon the statutory ground of "excessive damages, appearing to have been given under the influence of passion or prejudice," should have been granted, and it was an abuse of discretion to deny the same. Where the verdict is thus tainted in actions involving unliquidated damages, and where it appears probable that such bias and prejudice also actuated the jury in the de-

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Note. — The general question of the liability of a municipality for defects in sidewalk is treated in a note in 20 L.R.A.(N.S.) 591. And for authorities on the question of constructive or implied notice to municipality of defects in sidewalk, see note in 20 L.R.A.(N.S.) 705.

cision of the other issues, the court has no power to authorize a remittitur as to a portion of the recovery in lieu of a new trial.

Opinion filed October 10, 1913. Rehearing denied November 4, 1913.

Appeal from District Court, La Moure County, *J. A. Coffey,* J.

From a judgment in plaintiff's favor, and from an order denying a motion for a new trial, defendant appeals.

Reversed and new trial ordered.

Jones & Hutchinson, for appellant.

The question of the *negligence* of the village in permitting the hole to remain in the sidewalk was one for the jury, and not for the court to assume, as a fact. The matter was in dispute, in the evidence. Bauer v. Dubuque, 122 Iowa, 500, 98 N. W. 355.

Negligence is not presumed from the mere fact that injury follows some act. Damages in cases like this one are compensatory only. Missouri, K. & T. R. Co. v. Hannig, 91 Tex. 347, 43 S. W. 508; Texas C. R. Co. v. Brock, 88 Tex. 310, 31 S. W. 500; St. Louis Southwestern R. Co. v. Smith, — Tex. Civ. App. —, 63 S. W. 1064.

Damages, by way of compensation for *future medical aid,* are not allowable. Nichols v. Dubuque & D. R. Co. 68 Iowa, 732, 28 N. W. 44, 3 Am. Neg. Cas. 370.

The damages awarded are so excessive as to clearly indicate that they were awarded under the influence of passion and prejudice. Damages, in such cases, should be awarded fairly and justly, to compensate for the loss and injury. Kennedy v. St. Paul City R. Co. 59 Minn. 45, 60 N. W. 810, 12 Am. Neg. Cas. 154; Orleans v. Perry, 24 Neb. 831, 40 N. W. 417; Johnson v. St. Paul City R. Co. 67 Minn. 260, 36 L.R.A. 586, 69 N. W. 900, 1 Am. Neg. Rep. 93; Bennett v. E. W. Backus Lumber Co. 77 Minn. 198, 79 N. W. 683; Evans v. Iowa City, 125 Iowa, 202, 100 N. W. 1112; Hoffman v. North Milwaukee, 118 Wis. 278, 95 N. W. 274; Fry v. Great Northern R. Co. 95 Minn. 87, 103 N. W. 733, 18 Am. Neg. Rep. 495; Northrup v. Haywood, 99 Minn. 299, 109 N. W. 241; South Omaha v. Fennell, 4 Neb. (Unof.) 427, 94 N. W. 632; Chicago, B. & Q. R. Co. v. Krayenbuhl, 70 Neb. 766, 98 N. W. 44.

M. C. Lasell and *Knauf & Knauf,* for respondent.

The evidence as to the necessity for future medical treatment, and as to the cost of same, is simple, and was a proper element of damages to submit to the jury, and the charge of the court upon such question stated the law correctly,—when read as a whole. McBride v. Wallace, 17 N. D. 495, 117 N. W. 857; Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335; Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841.

Contributory negligence, to avail the defendant, must be pleaded, and then proved. There is no allegation or proof of such negligence. Carr v. Minneapolis St. P. & S. Ste. M. R. Co. 12 N. D. 217, 112 N. W. 972.

The jury in its sound discretion may award damages for future pains, inconvenience, and future expenditures. Cole v. Seattle R. & S. R. Co. 42 Wash. 462, 85 Pac. 3; Illinois C. R. Co. v. Cole, 165 Ill. 334, 46 N. E. 275; Western U. Teleg. Co. v. Woods, 88 Ill. App. 375.

The damages awarded were not excessive. Quinn v. Long Island R. Co. 34 Hun, 331; Morrison v. Broadway & S. Ave. R. Co. 55 Hun, 608, 28 N. Y. S. R. 498, 8 N. Y. Supp. 436; Chicago v. Langlass, 66 Ill. 361; Galloway v. Chicago, M. & St. P. R. Co. 56 Minn. 346, 23 L.R.A. 442, 45 Am. St. Rep. 468, 57 N. W. 1058; Howe v. Minneapolis, St. P. & S. Ste. M. R. Co. 62 Minn. 71, 30 L.R.A. 684, 54 Am. St. Rep. 616, 64 N. W. 102; Furnish v. Missouri P. R. Co. 102 Mo. 438, 22 Am. St. Rep. 781, 13 S. W. 1044; Bitner v. Utah C. R. Co. 4 Utah, 502, 11 Pac. 620; International & G. N. R. Co. v. Mulliken, 10 Tex. Civ. App. 663, 32 S. W. 152, 6 Am. Neg. Cas. 718; Beltz v. Yonkers, 74 Hun, 73, 26 N. Y. Supp. 106.

A new trial will not be granted on merely cumulative evidence. State v. Brandner, 21 N. D. 310, 130 N. W. 941; Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762.

Fisk, J. Action to recover damages for personal injuries suffered by plaintiff as a result of the alleged negligence of defendant village in failing to maintain its sidewalks in a reasonably safe condition for pedestrians. The complaint alleges and the plaintiff's proof tends to show that she, a widow lady thirty-eight years of age and the mother of four children, while walking on one of the sidewalks in such village

after dark, stepped in a hole about 1 foot deep, and fell upon her left side, severely spraining her left ankle and otherwise injuring her person, and that such injury to her ankle is of a permanent nature, causing her much pain and suffering. Plaintiff offered testimony tending to show the dangerous character of such hole, and that it had existed a considerable time prior to the accident, while defendant sought to show that the hole was only a few inches deep, and furthermore, that it had not existed for a sufficient length of time to impute to defendant's officers knowledge of its existence. Upon these questions the testimony was, as usual in such cases, very conflicting, but we have no hesitancy in holding that the jury was fully warranted under the evidence in reaching a conclusion on the facts favorable to plaintiff's contentions. A review of the testimony in this opinion would serve no useful purpose, and would extend the opinion to an unwarranted length.

A verdict was returned in plaintiff's favor for the sum of $5,318.05, being the full amount prayed for in the complaint, pursuant to which a judgment was accordingly entered. Thereafter a motion for a new trial upon the statutory grounds of alleged newly discovered evidence, excessive damages, insufficiency of the evidence to justify the verdict, and errors of law occurring at the trial, was made and denied, and defendant appeals both from the judgment and from the order denying said motion.

The errors assigned and which are argued in the brief are predicated upon the giving of certain instructions, and upon the denial of defendant's motion for a new trial in so far as it is based upon the grounds of alleged insufficiency of the evidence, excessive damages, and newly discovered evidence. These assignments will be disposed of in the order above mentioned.

The portion of the instruction first complained of is as follows: "It is necessary for the plaintiff to prove, in order to recover, that on the 26th day of April, 1910, she was injured upon the said sidewalk within the village of Dickey; that at the time of said injury she was proceeding upon said street and sidewalk. It is also incumbent upon the plaintiff to prove that she had been damaged, and for you to determine from the evidence introduced under these instructions the amount of such damage, if any." It is argued that by such instruction the court attempts to set forth the facts necessary for the plaintiff to prove in

order to maintain her action, and the court failed to enumerate all the necessary elements, and in this way the jury was misled. Counsel do not challenge the correctness of the instruction so far as it goes, but they complain that the court did not incorporate therein other essential elements necessary to be proved, such as the fact that the sidewalk upon which she was proceeding was defective; that the village had actual knowledge of such defect, or, in the exercise of reasonable care, should have known thereof; and that plaintiff was proceeding with due care, and did not contribute to the injury received. There is no merit in counsel's criticism of such instruction. The portion above quoted is a mere excerpt taken from the charge, and does not purport to enumerate all the things necessary for the plaintiff to prove in order to recover. Immediately following such part of the charge, the court instructed the jury as follows: "Before the plaintiff can recover in this action she must satisfy you, by a fair preponderance of the evidence, that the defendant was guilty of negligence in its failure to keep and maintain the sidewalk upon said street, at the time and place described in the complaint, in a reasonably safe condition; and the burden of proof, as I have already stated, is upon the plaintiff to establish by a fair preponderance of the evidence the amount of damages which she has sustained.

"The law imposes upon incorporated municipalities the duty to exercise reasonable care to keep its streets and sidewalks in a reasonably safe condition for use by persons traveling thereon. The village corporation is not an insurer against injuries received by reason of defects in its streets or sidewalks; if it maintains them in a reasonably safe condition it is not liable; and in this case, if you believe from all the facts and circumstances shown in the evidence that the place where the plaintiff claims to have been injured was in such condition for travel thereon, or thereover, that a person while in the exercise of ordinary care for her own safety would have passed safely over, then the defendant is not liable in this case.

"The village of Dickey is held to the exercise of reasonable care in the construction and maintenance of the sidewalks upon its streets."

The court then proceeds to accurately define reasonable care, and thereafter instructs the jury as follows: "The plaintiff alleges a failure on the part of the defendant to exercise such a degree of care and

conduct, and this failure on the part of the defendant is called negligence; in other words, the plaintiff alleges that the defendant has been negligent in its failure to keep its sidewalks in a reasonable safe condition. The particular negligence of which the plaintiff complains is that there was a hole in the sidewalk, and that the same had existed in that condition for some time prior to the alleged accident; and that the defendant, its officers, and agents had actual notice for some time prior to the said accident. A village is bound to the exercise of reasonable prudence and diligence in the construction and maintenance of its sidewalks, and is not required to foresee and provide against every possible danger or accident that may occur. It is only required to keep its streets and sidewalks in a reasonable safe condition or in such condition that persons in the pursuit of business or in the common walks of life, while using due and reasonable care, may pass along with safety to themselves and their persons."

The defendant made no request for additional instructions, and furthermore, it is entirely clear that the instruction, when construed in connection with the other portions of the charge, states the law correctly and fully.

Appellant next complains of the following instruction: "If you find from the evidence that there was a hole in said sidewalk, and that the same was known, or in the exercise of due care ought to have been known, to the defendant at the time of the accident, then it is for you to say whether or not the defendant has exercised due and reasonable care in reference thereto; and if you further find that the defendant has not exercised reasonable care in reference thereto, and that the said hole in the sidewalk was the proximate cause of the injury, then your verdict should be for the plaintiff."

It is urged that this instruction is faulty in that it assumes the negligence of the defendant by permitting a hole to remain in the sidewalk, regardless of its dimensions, and that the jury should have been left to say whether the hole, which in fact existed, constituted negligence on defendant's part. Here, again, counsel have selected a portion of the charge, and ask that it be held erroneous when considered apart from the remainder of the instructions. It is well settled that this cannot be done. The portion of the instruction complained of must be considered in the light of all the instructions; and when thus considered

it will be upheld, even though defective or inaccurate when considered alone, if the same is supplemented by other instructions fully and correctly stating the law. When viewed in this light we find no merit in appellant's contention.

Counsel for appellant next complains of another fragmentary portion of the charge as follows: "Negligence is not presumed from the mere fact that a person has sustained an injury, as an injury may be occasioned where both parties are exercising reasonable care and caution, and in such case the injury would be an unavoidable accident, or an injury for which no recovery could be had. Therefore, in order that the plaintiff may recover in this action, she must establish to your satisfaction by a fair preponderance of the evidence, that the defendant was guilty of negligence."

It is said that this instruction embodies an incorrect statement of the law in that it assumes that the plaintiff may recover, even though she was guilty of negligence contributing to the injury. A sufficient answer to such contention is, First, that contributory negligence is not pleaded or relied upon as a defense; and, second, there is no intimation in the record that plaintiff was not exercising due care at the time of the injury. It goes without saying that contributory negligence is a matter of defense which must be pleaded in order to be availed of, unless the complaint or plaintiff's evidence discloses such negligence. The instruction is, therefore, not vulnerable to the criticism offered.

Appellant also complains of that portion of the instructions relating to the elements of damage which the jury may consider. We have examined the instruction thus complained of and find no merit in appellant's contention. The authorities cited by appellant are not in point. The only other instruction complained of is as follows: "You cannot in any event give the plaintiff more than five thousand three hundred eighteen and five-one-hundredths dollars ($5,318.05), the amount asked for in the complaint; you can, however, give a verdict for that amount or any amount less than that to which you believe under the evidence the plaintiff is entitled."

It is said that this instruction is erroneous because it permits the jury to include in their verdict an item of $75 for future medical attendance. An inspection of the complaint discloses that the plaintiff claims the sum of $5,000 as general damages, and as special damages

an item of $210 expenses which she had necessarily incurred for medical attendance and treatment, and the further sum of $75, which it is alleged she will be compelled to pay for further medical assistance; and also the sum of $43.05 expenses necessarily incurred by her in going to and returning from her physician.

We think counsel for appellant are correct in their contention as to this item of $75. There is no proof in the record justifying such an allowance, nor do we think the recovery therefor can be sustained. Such expenses to be incurred in the future are altogether too uncertain and speculative, and we find no authority justifying their recovery. It does not follow, however, that the giving of such instruction alone necessitates a new trial, for the appellant is injured thereby only to the extent of such item, and the judgment may be reduced to the extent thereof.

This brings us to a consideration of the errors assigned relating to the denial of defendant's motion for a new trial. There are three grounds urged as a basis for the contention that the evidence is insufficient to support the verdict. First, it is asserted that there is no evidence that the hole in the sidewalk had existed for a period longer than three or four days prior to the accident; second, that it was a physical impossibility to produce the injury in the manner complained of; and, third, that there is no evidence to support the item of $75 heretofore referred to. We are agreed that the first and second grounds are without support. There is ample evidence from which the jury could find that the hole in question had existed since the fall of 1909, and the accident did not take place until the following spring.

The witness, Mrs. Miekeljohn, testified: "The sidewalk at that place had been in that condition the fall before she received her injury. I know it was the fall before, because I stepped in it myself. It was in the same condition the next spring." And again she testified: "I am certain I saw it in the fall of 1909, and that the same hole was there in the spring of 1910, and that it hadn't been fixed. I tied my horse to that post that spring frequently. If it had been fixed I certainly would have noticed it."

And the witness Kusha testified: "The sidewalk was in a broken condition. There was a plank out there. I couldn't say how long it had been broken before Mrs. Carpenter received her injury; it might have been two or three weeks; I don't know; I had seen it there a

number of times before. I had probably seen it more than three times, but I would not say."

The second ground urged is manifestly untenable. The fact that plaintiff was injured in the manner claimed has ample support in the proof. That the injury was received, and the character thereof, is beyond question, and it was certainly for the jury to say under the evidence whether such injury was caused by the hole in the sidewalk or in some other manner. We are certainly unwilling to say from the proof that the injury could not have happened in the manner testified to by plaintiff and her witnesses.

The third ground urged is, we think, well taken. As before stated, there is no proof in support of the item of $75 for future services of a physician, and to such extent the verdict and judgment are without support in the proof, and the judgment must, in any event, be reduced, at least to the extent of this item.

Was it error to deny defendant's motion for a new trial upon the ground that the damages awarded are excessive? This, to our minds, is the most serious point urged by appellant's counsel. One of the statutory grounds for granting a new trial is "excessive damages appearing to have been given under the influence of passion or prejudice." Sec. 7063, subd. 5, Rev. Codes 1905. In cases like the one at bar the measure of damages is the amount which will reasonably and fairly compensate the injured person for the detriment suffered as a proximate result of the injuries. The damages are unliquidated, and the legislature has wisely left to the triers of the facts the determination of the amount of such damages, and has not attempted to fix any precise and definite rule. In other words, the assessment of damages in such cases is committed to the sound judgment and discretion of the jury in the light of the particular facts and circumstances surrounding the injury as disclosed by the testimony. The jury in assessing the damages should take into consideration the age and condition in life of the plaintiff, the physical injury inflicted, the pain suffered, and the expenses necessarily and reasonably incurred in the treatment of the case, and any and all damages which the evidence discloses have resulted or are reasonably certain to result from the injury. Also whether such injury is permanent or merely temporary. The jury having determined such damages, the court cannot order a new trial because it deems them

excessive, unless it can clearly be said that the verdict of the jury is so grossly excessive that it manifestly appears that it must have been given under the influence of passion or prejudice. Until the contrary clearly appears, it must be presumed that the jury were fair-minded men and that the verdict expresses their honest judgment. It must also be presumed that in arriving at the verdict they were not influenced either by passion or prejudice; but where the verdict is so grossly excessive as to shock the sense of justice of the court and to compel it to conclude that the jurors must have been improperly influenced in arriving at the verdict, either by passion or prejudice, then, of course, such presumption disappears. While we realize that the jury and the trial judge had superior advantages which we do not possess of considering and weighing the testimony of the various witnesses, and while we are loath to disturb the verdict on such ground, especially in view of the fact that the trial judge, after due reflection and consideration, declined to disturb the verdict as excessive, our sense of justice impels us to the conclusion that it is our plain duty to hold that the trial court clearly abused its discretion in denying a new trial on such ground. Some decisions no doubt may be found holding, under similar facts, that such a verdict is not so excessive as to necessitate a new trial, but we venture the assertion that such precedents are scarce, and that the courts generally have refused to sustain such a verdict. In the nature of things, each case must present its own particular and controlling facts. No two cases are exactly alike. Therefore precedents are of but slight value on the question here involved. Some courts do not hesitate, when convinced that a verdict is excessive, to reduce the damages to such sum as it thinks proper; or grant a new trial in the event the plaintiff will not consent to accept such reduced amount. Other courts take the position that this is an encroachment upon the right to a jury trial, holding that where the verdict is so excessive as to clearly indicate passion and prejudice of the jury, the entire verdict is tainted and a new trial must be ordered. Of course, this applies only to cases like the one at bar, where the damages are unliquidated.

A correct statement of the different rules promulgated by the various courts is contained in 29 Cyc. pages 1022–1024, from which we quote: "Where, however, the damages sought are unliquidated, as in actions

for personal injuries, or other cases sounding in tort, where there is no positive criterion for determining what the damages ought to be, a difference of opinion exists as to the right of the trial court to give plaintiff the option of remitting the excess of damages or suffering a new trial. Some decisions unequivocally deny the right in actions for unliquidated damages. On the other hand, other courts have expressly extended the application of the doctrine to this class of cases, while still other cases have recognized the practice of allowing a remittitur, although the question of its propriety is not discussed. In most jurisdictions a remittitur to prevent a new trial is proper or permissible only where the excessive damages do not appear to have been given under the influence of prejudice or passion, and not where they appear to have been so given. In some of these decisions, a distinction is made between cases in which prejudice and passion appear to have affected the damages recovered only, in which remittiturs are permissible, and cases in which they may have influenced the findings on other issues, in which new trials must be granted absolutely."

In addition to the many authorities cited in support of the text in Cyc., we call attention to the following recent cases: Tunnel Min. & Leasing Co. v. Cooper, 50 Colo. 390, 39 L.R.A.(N.S.) 1064, 115 Pac. 901, Ann. Cas. 1912C, 504; Chicago, R. I. & P. R. Co. v. Brandon, 77 Kan. 612, 95 Pac. 573; Kerling v. G. W. Van Dusen & Co. 113 Minn. 501, 129 N. W. 1048; Harrington v. Butte, A. & P. R. Co. 39 Mont. 22, 101 Pac. 149; Beller v. Levy, 68 Misc. 182, 124 N. Y. Supp. 411; Doyle v. Southern P. Co. 56 Or. 495, 108 Pac. 201; Southwestern Teleg. & Teleph. Co. v. Gehring, — Tex. Civ. App. —, 137 S. W. 754; Western U. Teleg. Co. v. Skinner, — Tex. Civ. App. —, 128 S. W. 715; Beach v. Bird & W. Lumber Co. 135 Wis. 550, 116 N. W. 245; Gila Valley, G. & N. R. Co. v. Hall, 13 Ariz. 270, 112 Pac. 845, 1 N. C. C. A. 362; Ewing v. Stickney, 107 Minn. 217, 119 N. W. 802; Hanson v. Henderson, 20 S. D. 456, 107 N. W. 670; Davis v. Holy Terror Min. Co. 20 S. D. 399, 107 N. W. 374.

In the case last cited the South Dakota court, while holding that it was unable to conclude that the amount of the verdict clearly indicated the influence of passion or prejudice, and therefore refused to disturb the verdict, it adhered to the rule previously announced in that court in Murray v. Leonard, 11 S. D. 22, 75 N. W. 272, to the effect that the

amount of damages assessed "must express the honest judgment of fair-minded men, and if the recovery is so excessive as to clearly indicate that it was given under the influence of passion or prejudice, a new trial should be granted in order that the estimation may be made by a competent tribunal. Rev. Code Civ. Proc. § 301, subd. 5; Murray v. Leonard, supra."

In Tunnel Min. & Leasing Co. v. Cooper, 50 Colo. 390, 39 L.R.A. (N.S.) 1064, 115 Pac. 901, Ann. Cas. 1912C 504, the supreme court of Colorado bases its decision upon a statute similar to our Code provision above cited, making it a ground for granting a new trial that the damages are excessive, appearing to have been given under the influence of passion or prejudice. We quote from the opinion: "Whatever the rule may be in other jurisdictions, in this state it is settled, in the case of F. M. Davis Iron Works Co. v. White, 31 Colo. 82, 71 Pac. 384, in a well and carefully considered opinion, upon a comprehensive review of all the decisions to this point, that where in an action for damages for personal injuries, and in other like actions, the verdict is excessive, and is returned as a result of passion or prejudice, it is beyond the power of the trial court to allow a remittitur of the excess, and enter a judgment for the residue, but that the verdict must be set aside and a new trial granted. The conclusion of the court in that case, in an opinion by Chief Justice Campbell, was stated in this emphatic and unmistakable language: 'The result of our conclusion is—and that is the only point which we decide—that, under our Code, where, in an action for personal injuries, and others standing on like grounds, a verdict is excessive, and was returned as the result of passion or prejudice upon the part of the jury, it should be set aside in its entirety and a new trial awarded, and that it is beyond the power of the trial court to order a remittitur as to the part which it deemed excessive and enter judgment for the residue, because the entire verdict is vitiated by the improper motive, and it is impossible for the court to determine that any particular part is free from objection and some other part is bad. The learned district judge, upon first impression, was of opinion that the verdict should be set aside in its entirety, but upon subsequent investigation concluded that the power to order a remittitur, though not strictly one that was inherent in the court, might nevertheless be exercised if the plaintiff consent, because the reduction

of the verdict is in favor of the defendant and therefore he is not in a position to complain. This reason, at first blush plausible, is the one often given. The injury to the defendant in such circumstances does not consist in the mere striking from a verdict of a portion of it, but in entering judgment against him for any part of a verdict the whole of which is vitiated by improper motives of a jury. The judgment should be reversed and the cause remanded, and it is so ordered.'

"So that, if it can be fairly seen and held that the jury here returned an excessive verdict, influenced by passion or prejudice, or from any wrongful motive, a new trial must be granted, as it is a just inference that a finding for the plaintiff at all may have been brought about by improper considerations.

"The legislature has given to a losing party an absolute right to a new trial, when he brings his cause within any of the seven stated grounds for which new trials are to be granted under the Code. The provision upon which the court acted in allowing the remittitur in this case, and which ground, among others, was relied upon by defendant for a new trial, reads thus:

" 'Fifth. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice.'

"It is apparent that trial courts here, under this provision, no longer have power to set aside verdicts because simply excessive, but can only do so when it is also found that the excess award is due to passion or prejudice. When the finding is that the verdict was so reached, a new trial must be granted, as it is then beyond the power of the court to permit a remittitur of a portion of the verdict and enter a judgment for such sum as in its judgment the jury should have returned."

The Kansas court holds to the rule that the court may require a remittitur unless it appears that the excessive amount was allowed through passion or prejudice, in which case a new trial must be granted.

The Minnesota court in Ewing v. Stickney, 107 Minn. 217, 119 N. W. 802, said: "Where the award of damages in any case is so excessive as to indicate that they were given under the influence of passion or prejudice, and the circumstances as disclosed by the evidence are such as to show a fair probability that the jury were influenced by the same passion or prejudice in determining other issues that induced them to give excessive damages, a new trial should be granted absolute-

ly, instead of reducing the damages. Goss v. Goss, 102 Minn. 346, 113 N. W. 690,"—thus recognizing the power of the court to reduce the plaintiff's recovery, even though passion or prejudice clearly appears to have actuated the jury in fixing the damages, provided it does not appear that in deciding the other issues they were actuated by either passion or prejudice.

The Wisconsin court in Beach v. Bird & W. Lumber Co. 135 Wis. 550, 116 N. W. 245, seems to extend the rule still farther, and holds that even in cases where an excessive verdict has been returned through prejudice or other cause, the court has the power to fix a minimum amount which the plaintiff may accept, and a maximum amount which the defendant may accept, in lieu of a new trial.

In Gila Valley, G. & N. R. Co. v. Hall, the Arizona court holds: "The trial court has undoubted power to determine whether the verdict is or is not excessive, and in considering the question usually determines in its own mind the maximum amount for which a verdict could with propriety be permitted to stand. Where there has been no error of law committed which would require a retrial, and it appears that the excessive verdict has resulted from too liberal views as to the damages sustained, rather than from prejudice or passion, to permit a remission of the excess, instead of putting the parties to the expense of a new trial, promotes justice and puts an end to the litigation. Of course, if it appears that the verdict is tainted by prejudice or passion, and does not represent the dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted. But we think that the trial court is in a better position to determine whether the verdict is so tainted than is this court, and that unless it clearly appears from the record that the excessive verdict resulted from prejudice or passion, rather than from that liberality which jurors sometimes exercise in cases which appeal to men's sympathies, we should accept the trial court's determination."

In the case at bar we are not called upon to announce a rule in cases such as the last case from which we quote, nor is it necessary to decide which of the above rules we should adopt for this jurisdiction in cases in which it does not appear probable that the jury, in arriving at the verdict, was influenced by passion or prejudice as to issues other than the assessment of damages; nor do we here intimate what such

rule should be. It will be time enough to announce a rule in such cases when they arise. We are agreed that the facts in the case at bar bring it squarely within the rule of most jurisdictions requiring a new trial absolutely, instead of a conditional order for a new trial in the event plaintiff will not remit a specified portion from the recovery. The record is such as convinces us that there is a fair probability that the jury, in arriving at the verdict, were influenced by the same passion or prejudice in determining other issues that induced them to give excessive damages. This being true, we have no alternative but to order a new trial, to the end that the issues may be decided by an unprejudiced and unbiased jury.

The amount of the verdict, in view of the facts, certainly shocks the sense of justice of this court. The record discloses that about a month after this accident the plaintiff filed with the board of trustees a claim for damages on account of her injuries in the sum of but $1,000. True, it does not appear that at that time she knew the full extent of her injuries or that they might prove to be permanent, but it is fair to assume that she did not at that time consider her injuries very severe. In such cases an important element of damages usually is a diminution in earning capacity. Yet in this case there is neither allegation nor proof that this plaintiff has suffered or will suffer any damages in this respect. In this connection we quote from an opinion of Judge Mitchell in Kennedy v. St. Paul City R. Co. 59 Minn. 45, 60 N. W. 810, 12 Am. Neg. Cas. 154, involving an injury quite similar to the one in the case at bar: "The jury awarded plaintiff $3,100, made up, as we assume, of $50 for damage to his wagon, $50 for his physician's bill, and $3,000 for the injury. Conceding that the evidence establishes the fact that the ankle will be permanently weaker than before, there is no evidence that this does or will diminish plaintiff's earning capacity, or at all interfere with his going about his business, or with his walking in any usual or ordinary way. If $3,000 is to be allowed for such an injury, at what sums shall the loss of a foot, a hand, a leg, or arm be estimated? At the same ratio such losses would warrant recoveries far beyond any precedent, and which would be liable to bankrupt any business in the country. The proper test is not what counsel for plaintiff suggested on the argument, *viz.*, for what sum would anyone be willing to suffer such an injury. Most

people would be unwilling to lose a limb for all the gold of the world. But the law does not assume to compensate injured persons on any such basis. There is a sense in which no amount of money will compensate a man for a serious, permanent personal injury. But all the law attempts to do is to compensate him as far as money will do it; and for manifest, practical considerations, there must be some reasonable limits to the amount of this compensation."

Having reached the conclusion that a new trial must be granted, we need not consider the action of the trial court in refusing to grant a new trial upon the ground of newly discovered evidence.

The judgment and order appealed from are reversed and a new trial ordered.

T. A. McCANN et al. v. JOHN CARLSON et al.

(144 N. W. 92.)

The voters of Mountrail county authorized the issuance of $50,000 in bonds to provide a courthouse for the county. The county commissioners advertised for bids and made a contract with one Bartleson at $49,660. All proceedings are conceded to be regular, unless it be the three specific objections raised by plaintiffs in this action.

Contract — bond — furnished after signing contract — mere irregularity — does not vitiate contract.

1. It is claimed that the contract with Bartleson is void because the bond given by said contractor was not furnished until after the signing of the contract. *Held*, that this is a mere irregularity which makes the members of the board liable personally for certain claims against the building, but does not vitiate the contract.

Contract — courthouse site — donation — title — presumption.

2. It is claimed that said contract is void because the title to the courthouse site had not been vested in the county prior to the signing of the contract. From the evidence, however, it appears that one Taylor has agreed to donate a site, and that his offer has been accepted by the board. In the absence of a showing to the contrary, it will be presumed that the board has an enforceable contract with Taylor, and is in a position to obtain title to the site when necessary.

Contract — courthouse — commissioners — have complete supervision.

3. The third reason for an attack upon the contract is that it contains no

provision for lighting, heating, and sewerage systems. Plaintiffs contend that the building without such appliances is useless for courthouse purposes, and that the commissioners intend to supply these additions from other funds not authorized by the voters to be so expended. *Held*, that under § 2566, Rev. Codes 1905, the county commissioners are given entire supervision of the construction of such courthouse, and the courts will not interfere with such supervision so long as the board is exercising its discretion in good faith. The board in this instance is not expending more than the $50,000 authorized. This court will not anticipate any illegal action upon their part. It is admitted that there is at the present time no electric light plant, no city waterworks, and no sewerage system, in the town where the said courthouse is to be erected, and it rests in the sound discretion of the board of county commissioners to say whether the said courthouse shall contain those appliances at the present time.

Opinion filed November 15, 1913.

Appeal from the District Court of Mountrail County, *Frank E. Fisk*, J.

Affirmed.

Palda, Aaker & Greene, for appellants.

The trial court should have granted a permanent injunction. There was no provision made for the safe, convenient, and sanitary equipment of the courthouse. Judicial power is exercised, not to give effect to the will of the judge, but to carry out the will of the law, and give it effect. Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204.

Boards of county commissioners have no power or discretion in the performance of a public duty in any other manner than as directed by law. McKinnon v. Robinson, 24 N. D. 367, 139 N. W. 580; Zerwekh v. Thornburg, 123 Iowa, 254, 98 N. W. 769; Rev. Codes 1905, §§ 2406, 2412, 2563, 2566, 2568.

F. F. Wyckoff, for respondents.

The statute requiring bond before execution of contract was substantially complied with. The intent of the statute is to protect materialmen and laborers, and provides a remedy in case of noncompliance. Such remedy is exclusive. Rev. Codes 1905, §§ 6252, 6255; Bassett v. Carleton, 32 Me. 553, 54 Am. Dec. 605; Calking v. Baldwin, 4 Wend. 667, 21 Am. Dec. 168.

When a contract is open to two or more constructions, courts will

seek to give to it such construction as will sustain, rather than destroy, it. Sarles v. Sharlow, 5 Dak. 100, 37 N. W. 751.

It was the duty of the commissioners to erect the courthouse within one year after the fund therefor became available. Rev. Codes 1905, § 2420.

The entire supervision of the building of the courthouse is left to the discretion of the county commissioners. Rev. Codes 1905, §§ 2566, 2568.

This is true of all fiscal affairs. Rev. Codes 1905, § 2401.

If the contract is valid, and if the commissioners have proceeded to exercise their power and discretion in a lawful manner thereunder, the court should not restrain its performance. Hanley v. County Ct. 50 W. Va. 439, 40 S. E. 389.

BURKE, J. At the general election held in Mountrail county in 1912, the voters authorized the issuance of $50,000 in bonds for the purpose of providing a courthouse for said county. The bonds were sold at par, and the county commissioners thereupon proceeded to advertise for bids for the construction of said building, which bids were receivable August 12, 1913. The defendant Bartleson was the lowest responsible bidder, and received the contract at $49,660. The 5th day of August, 1913, such contract was formally signed, and thereafter, and on the 3d day of September, 1913, said Bartleson executed and filed a bond for the faithful performance of his part of the contract. At the time of the execution of the said contract, one Taylor had offered to donate a site for the courthouse and his offer had been accepted by said county commissioners. It is contended that Mr. Taylor had not at that time any title to the property, but had made arrangements for condemning part thereof. The contract entered into with Bartleson contains no provisions for modern heating, lighting, or sewerage systems. On the 23d of September, 1913, this action was commenced, accompanied by the service of a temporary restraining order, and such restraining order was later, and after a hearing, dissolved by the trial court. This appeal is from such order.

Appellant assigns three propositions in support of such restraining order. It is conceded that the question of the erection of the courthouse and the issuance and sale of the bonds had been authorized by

a vote of the people, and that all steps leading up to the said contract were regular, excepting in the three aforesaid particulars.

(1) First, appellant insists that the contract was void because the bond furnished by the contractor under §§ 2421, 6252–6255, Rev. Codes 1905, was not furnished until after the signing of the contract. In this we cannot agree with appellant. The said sections could not have contemplated that a failure to give the bond prior to the actual signing of the contract should vitiate the contract, because § 6253 provides that "the members of any board who shall fail to take such a bond before entering into such a contract shall be personally liable for all such bills, claims, and demands which shall not be paid within thirty days after the completion of the work." In this instance the bond had been furnished, approved, and filed before this action was commenced, and we think it plain that the contract is not assailable by reason of the irregularity.

(2) It is next alleged that the contract is void because the title to the courthouse site had not been vested in the county at the time of the execution of the contract. From the minutes of the county commissioners it appears that one B. W. Taylor had offered to donate a tract of land 223′ x 432′, which was owned by him, and had also offered to pay all costs and damages that the county might incur in condemnation proceedings in acquiring an adjoining tract of the same area. This offer had been accepted by the board, and in the absence of a showing to the contrary, it will be presumed that the county commissioners have taken all due precautions in the premises, and that they can compel Mr. Taylor to fulfil his contract, and that they will obtain the title to the tract in due time.

(3) The third attack upon the contract, and in fact the principal one relied upon by the defendant, is that the contract itself makes no provision for lighting, heating, and sewerage systems. Appellant contends that the voters, in authorizing the commissioners to spend $50,000 in providing the county with a courthouse, had limited them to that amount, and that they were entitled to have a modern building costing that sum. They say that a building without those appliances would be absolutely of no use as a courthouse, and that the commissioners must intend to spend more money later on, to make those additions, at an increased cost to the taxpayers. They contend that it

is not within the power of the commissioners to go beyond the said sum of $50,000, and that if they are not restrained, the entire fund will be practically consumed in the erection of a building which contains no modern conveniences, and will therefore be useless as a courthouse. There are several reasons why we cannot accept this view of the proceedings. In the first place, the county commissioners are not trying to spend more than the $50,000. If they were, the situation would be entirely different. They are keeping within their expenditures, and those expenditures have been duly authorizd by the voters of that county. The question then narrows itself to this: Can the courts, in an equitable action such as this, supervise the county commissioners in the exercise of their discretion, and tell them the kind of a courthouse that they must erect? We do not think that the courts have that power. Supervision of this important work must be delegated to some responsible body of men, and the legislature has seen fit to repose that discretion in the board of county commissioners. Section 2566, Rev. Codes 1905, reads: "The board of county commissioners of any county, erecting county buildings under the provisions of this subdivision, shall have power to purchase grounds for a site if necessary, let contracts for the building and completion of such courthouse or jail, or both, and the buildings connected therewith, and shall have the entire supervision of its construction. . . ." So long as the commissioners are exercising this discretion in good faith, they should not be molested by the courts. Nor will we infer that they will later on violate their oaths of office by making expenditures unauthorized by a vote of the people, and we cannot anticipate such an action by an injunction in the present suit. There is nothing in this record to show that modern heating, lighting, and sewerage plants cannot be installed in this building at a later date without injury to the building or extraordinary costs. If the voters at a subsequent election authorize expenditures of such additional sums, we see no reason why the commissioners cannot have the two contracts so merged as to protect the interests of the taxpayers in the premises. And even should such expenditures be denied by the voters, we do not believe it an abuse of discretion upon the part of the county commissioners to heat the building with stoves and light it with kerosene lamps. It is admitted that

at the present time the county seat of Mountrail county has no electric light plant, no city waterworks, and no sewerage system.

Appellant has cited the case of McKinnon v. Robinson, 24 N. D. 367, 139 N. W. 580, as an authority for the granting of an injunction in this case. The cases are not at all similar. In the Richland county case the building fund had been wrongfully diverted from other funds of the county, and the proposition of erecting a new courthouse had never at any time been submitted to a vote of the people. The contract had not been let by competitive bidding, and the contract price was much greater than the total funds on hand from even the illegal sources. It is true that in the Richland county case the contract failed to provide for electric lights, steam heating, and other modern conveniences. But those are incidentals and of minor importance when compared with the glaring defects before enumerated.

The order of the trial court in dissolving the temporary injunction is in all things affirmed.

STATE OF NORTH DAKOTA EX REL. ANDREW MILLER, Attorney General of the State of North Dakota, v. BUTTZVILLE STATE BANK, a Corporation, and Dakota Trust Company.

(144 N. W. 105.)

A state bank failed in July, 1910, having $1,207.80 of money belonging to the state of North Dakota upon deposit therein. Upon that date § 7387, Rev. Codes 1905, gave the state a preference right in making distribution of the assets of said bank, but this preference was taken away by chapter 101, Sess. Laws 1911, which, however, only became effective July 1, 1911. Under these facts, *held:*

Repeal of preference right — effect of — banks — surety — subrogation.

That the repeal of the preference right in 1911 did not operate to defeat the claim of the state which had accrued at the time of the failure of the bank in 1910, and that the Dakota Trust Company, which had been surety upon the bond of the bank and had paid the state the amount of the deposit,

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Note.—On the question of the right of a surety to be subrogated to priority of state in payment from assets of debtor, see note in 29 L.R.A. 240, 248.

was subrogated to all the rights of the state, and should be paid under said chapter 7387, Rev. Codes 1905.

Opinion filed November 15, 1913.

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

Reversed.

Watson & Young, for appellant.

The appellant should be subrogated to all the rights of the state as a preferred creditor of the insolvent bank. Rev. Codes 1905, § 7387; Rev. Codes 1905, §§ 6109, 6110.

A change in legislation cannot operate to cut off or abridge substantial vested rights. Eaton v. Guarantee Co. 11 N. D. 79, 88 N. W. 1029; James River Lumber Co. v. Danner, 3 N. D. 475, 57 N. W. 343.

The rule is well settled that statutes are to be given only a prospective operation, unless a different legislative intent is manifest. Sutherland Stat. Constr. §§ 463 et seq.; Adams & F. Co. v. Kenoyer, 17 N. D. 302, 16 L.R.A.(N.S.) 681, 116 N. W. 98.

As between two possible constructions of a statute, the court must choose the one which upholds, rather than the one which would defeat, the statute. Erskine v. Nelson County, 4 N. D. 66, 27 L.R.A. 696, 58 N. W. 348.

It is plain that the act of 1911 was not intended to have a retrospective operation. Ryan v. Maxey, 14 Mont. 81, 35 Pac. 515.

The legislature cannot destroy or impair the obligations of contracts. Fisher v. Betts, 12 N. D. 197, 96 N. W. 132; Blakemore v. Cooper, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; Beggs v. Paine, 15 N. D. 436, 109 N. W. 322.

No appearance by respondent.

Burke, J. The Buttzville State Bank was incorporated in the year 1909 under the state law; on the 7th day of February, 1910, it applied to the board of auditors of the state of North Dakota to be named as a depositary of state funds, and the Dakota Trust Company became surety upon its bond for the faithful performance of its duties as such. Thereafter the state treasurer deposited various sums in the said bank in accordance with the state law upon that subject, and on the 18th

of July, 1910, had the sum of $1,207.80 in said depositary, when the bank closed its doors and suspended payment. The assets of the bank at that time consisted of $2,802.86 in cash and some bills discount, furniture, and other items, amounting in all to about $8,000. Its liabilities, including the amount due to the state of North Dakota, amounted to $8,146.89. At the time the Dakota Trust Company became surety upon the bond of the said bank for its faithful performance of its duties as a state depositary, § 7387, Rev. Codes 1905, gave the state the preference in making distribution of dividends of defunct banks, said section reading as follows: "If, in any such action, it shall be adjudged that a corporation has forfeited its corporate rights, privileges, and franchises, judgment shall be rendered that such corporation be excluded from such corporate rights, privileges, and franchises, and be dissolved; and thereupon the affairs of said corporation shall be wound up by and under the direction of a receiver to be appointed by the court, and its property sold and converted into money; and the proceeds after paying the costs and expenses shall be distributed in the following order:

"1. For the payment of taxes and debts due the United States, the state of North Dakota, and any county, town, or village therein.

"2. For the payment of the legal and equitable liens upon the property of such corporation in the order of their priority.

"3. The wages of laborers and employees accruing within six months previous to the commencement of the action.

"4. For the payment of the other just debts of the corporation.

"5. The residue of such money, if any, shall be distributed among the stockholders thereof."

However, this said section was expressly repealed by chapter 101, Sess. Laws 1911, which became effective July 1, 1911, and after said date the state enjoyed no preference right whatever, the said section being at that time re-enacted with the exception that the first subdivision was amended to read merely: "(1) For payment of taxes." The action for a receiver was commenced August 5, 1910, and suit was shortly thereafter begun against the Dakota Trust Company as surety upon the bond for the recovery of the amount of money due the state from such depositary, and such sums recovered from said Trust Company in the said action.

Under these facts the Dakota Trust Company served upon the receiver a notice claiming to be a preferred creditor, and asking that it be paid in preference to and before the payment of any dividend whatever to the general creditors of the said insolvent bank. The matter came up for hearing before the district court of Ransom county on the 12th day of April 1912, in the absence of the attorneys for the said Trust Company, and at that time an order was entered by the said court disallowing the preference of the Trust Company, and ordering the receiver to pay their claim in due course and *pro rata* with other general credit.

From this order the Trust Company has appealed to this court. Upon argument here the receiver makes no appearance, assuming, we presume, that he has no particular interest in the matter. The other creditors have likewise made no appearance, and no brief has been filed upon the behalf of the respondents by any person whomsoever.

(1) But one question is involved in this appeal, *viz.*, Did the repeal in 1911 of the law giving the state preference to the funds of the defunct bank operate to defeat the claim of the state, which in this case accrued at the time of the insolvency of the bank in 1910? Under § 6110, Rev. Codes 1905, the surety became entitled to the same remedies as the creditor. And under § 6111 it is entitled to the benefit of every security for the performance of the principal obligation held by the creditor. Therefore the Trust Company became subrogated to every right of the state of North Dakota in this action. We think it too clear for argument that the provisions of chapter 101, Sess. Laws 1911, were intended to operate only upon future transactions and were in no way intended to be retroactive, or to interfere with vested rights of contract. In this case the surety had signed the bond in 1910, more than a year prior to the repeal of said law. Had the state at that time enjoyed no preference, the surety company might not have assumed liability upon the bond, or at least would have insisted upon different compensation, and possibly would have protected itself by taking security from the bank. Moreover, the default occurred in July, 1910, almost a year before the repeal of the state's preference right. If the amendment of 1911 was intended to apply to this case, it would be in violation of § 16 of the Constitution of the state of North Dakota. James River Lumber Co. v. Danner, 3 N. D. 470, 57

N. W. 343; Erskine v. Nelson County, 4 N. D. 66, 27 L.R.A. 696, 58 N. W. 348; Craig v. Herzman, 9 N. D. 140, 81 N. W. 288; Eaton v. Guarantee Co. 11 N. D. 79, 88 N. W. 1029; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132; Blakemore v. Cooper, 15 N. D. 5, 4 L.R.A. (N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; Beggs v. Paine, 15 N. D. 436, 109 N. W. 322; Adams & F. Co. v. Kenoyer, 17 N. D. 302, 16 L.R.A.(N.S.) 681, 116 N. W. 98.

We think a perusal of these authorities will show conclusively that the 1911 Session Law does not affect the rights of the Trust Company herein, but that its claim should be paid under chapter 7387, Rev. Codes 1905, and it is so ordered.

The trial court will set aside its order herein made, and enter an order giving effect to this holding. Appellant will recover his costs upon this appeal, the same to be paid by the receiver as an expense of administrating the estate.

JAMES SEMPLE and W. W. McQueen v. R. T. BURKE.

(144 N. W. 103.)

Partners — cash sales — collections — accounting.

The defendant, with a partner named Allert, owned and operated a drug store for some ten years, at the end of which time said Allert sold his interest to the two plaintiffs, who were practising physicians. Defendant continued to have entire charge of the business, and at the end of twenty-six months, upon application of plaintiffs, the business was sold by a receiver. Defendant kept a cash book in which each day he entered the cash under the heading "Cash sales," "Collections," or "Cash sales and collections." He also kept other books in which were entered credit sales. Plaintiffs contend that the total amount of cash received by the defendant exceeds by some $4,000.65 the amount of cash disbursed by him. Defendant explains that he entered some of the collections as cash sales, and that in this way he is charged by the plaintiffs with said sums twice. Evidence is examined, and *held* for reasons fully set out in the opinion, that this explanation is not in accordance with the fact, and that the defendant is liable for the difference in cash as found by the trial court.

Opinion filed November 18, 1913.

Appeal from the District Court of Cavalier County, *Kneeshaw*, J. Affirmed.

Murphy & Duggan, for appellant.

Joseph Cleary and *Gray & Myers* for respondents.

BURKE, J. The defendant, with a partner named Allert, owned and operated a drug store at Langdon, North Dakota, from about 1894 up to the year 1904, at which time the plaintiffs, who are practising physicians, purchased the interest of said Allert. Thereafter, for a period of twenty-six months, the business was conducted under a partnership arrangement whereby the defendant owned a one-half interest therein, and the plaintiffs each a one-fourth interest. During the said time the defendant was in sole charge of the business, doing all of the purchasing, paying bills, and hiring help. For these services he was to receive from the firm the sum of $75 per month. The plaintiffs had no voice in the affairs of said business. The defendant kept the books of the firm, a cash book, a blotter, collection register, bills receivable, and other books. He testifies that he kept a cash register through which all items of cash received, including collections, were passed; that each night he took the cash from the register and placed it in the safe until morning, at which time it was counted and an entry made in the cash book of the amount found. He further testifies that whenever a collection was made, that the money was taken to the cash register and placed therein, and that the only way that the total amount of cash sales could be ascertained was by subtracting the total amount received upon collections, as shown by his collection register, from the total items of cash sales, as shown by the cash book.

After the business had been run the said period of twenty-six months, the plaintiffs became dissatisfied with the conduct thereof and began this action for a receivership and an accounting between the parties. An expert accountant named Higgins was hired by the plaintiffs to make an examination of the books of the firm and ascertain the condition of the business. This accountant prepared a very thorough and painstaking statement showing among other things the amount of cash received into said business from all sources whatever and the amount of cash expended for all purposes. As a result of this

calculation he found that the cash received exceeded the cash disbursed by some $4,000.65. In arriving at the sum total of the cash received, Higgins charged defendant with the amount of cash on hand at the commencement of business, which was $75, with $1,000 contributed by the partners during the course of the business, with moneys received from cash sales $23,550.77, with cash received from collections $4,041 and $1,137, with an overdraft at the bank of $383.81, and money borrowed of the bank $500. The books of the partnership were introduced in evidence and are before us. The expert Higgins was upon the stand and his testimony, covering some 200 pages of the abstract, is also before us for examination, as well as the testimony of the parties to the suit. All of this has been carefully read and reread in an effort to find corroboration of the theories of the different parties to this suit. We cannot, however, set out this testimony, or even any considerable part thereof, in this opinion, but will confine ourselves to an analysis of the principal point of dispute in the case. It will be noticed that the expert Higgins has charged the defendant with cash sales amounting to $23,550.77, and also with cash collected from bills receivable of $4,041 and $1,137. The defendant, on the other hand, claims that all collections were put through the cash register and then through the cash book, and that thus the cash sales taken by Higgins at $23,550.77 are in truth $4,041 too high, and that this accounts for the $4,000.65 shortage with which he is charged. Thus, we have the dispute of the parties reduced to a single issue, namely, were the cash sales of the goods over the counter $23,550.77, or were they $19,509.88? That this is the gist of the controversy appears from the original brief of the appellants, wherein they say: "He (Higgins) charged defendant for cash sales of merchandise all cash taken in as shown by the cash book, except where the entry showed that the cash was on account of collections; defendant explains that all cash taken in, whether on account of cash sales or collections, was put through the cash register without making any segregation or record of the amount of each item. At the end of the day's business, the cash was counted and entered in the cash book generally, without showing anything on account of collections. Defendant contends that the alleged shortage as claimed and figured out by the expert arises because of the fact that he is in many instances charged twice on account of collections. *This is really the only point of conflict in this lawsuit.*"

The defendant when on the stand made the following answers to questions:

Q. Then the difference between yourself, Mr. Burke, and Mr. Higgins as shown by his account, is the difference of $4,000.65, is it not?

A. Why, I guess that is the case, all right.

Q. Now, then, Mr. Burke, assuming that Mr. Higgins in this account, or to arrive at this result, has charged you with the collections to the amount of $5,178, and assuming also that the total amount of the debit side of the cash book, with the exception that he deducted $1,137 from the total of his collections,—now the amount of the deduction by reason of the total inclusion of the items of collections would be the amount of $5,100 less the $1,100, would it not?

A. I believe so.

Q. Now the $5,100 of collections less the $1,137 leaves how much?

A. $4,041.35.

Q. Now the amount is to a very close degree of approximation the amount which his statement of account shows due from you?

A. I believe so.

Q. So that outside of this matter of cash through the collections and daily sales, you and Mr. Higgins practically agree on the account?

A. I believe that is right.

As we have before stated, this lawsuit depends entirely upon whether or not we accept the defendant's explanation of his entries of cash sales. If we take his statement as true, it wipes out the balance against him shown by the books, and the judgment of the lower court must be reversed; on the other hand, if we hold defendant to the entries which he has made under the designation of cash sales, a simple calculation shows that he has failed to account for a large sum of money. The plaintiffs have accepted this challenge, and in a lengthy brief have pointed out their reasons for disbelieving the defendant. Among the strongest of those reasons is that upon many of the days where the collections are claimed by defendant to have been included in the item of cash sales, the collections made were larger than the said cash item. For example, upon June 2d, 1904, the cash book shows cash sales amounting to $10.80, and the collection register for that day shows a collection of $12.28. Evidently the collection made that day was not

included in the item of cash sales entered by the defendant. The defendant, however, in his brief, calls attention to the fact that this particular collection was a check received from a neighboring town, and that said check was not deposited in the Langdon bank for collection until June 10th. It is defendant's idea evidently that this check was not put through the cash register upon the day that it was entered in the collection register, but that it was probably run through the cash register upon some other day. Upon the whole, it appears to us that this instance shows that collections were not run through the cash register at the time of their receipt at least, and probably not at all. Again, on July 13, 1904, collections amounted to $17.95, and cash sales to $20.70. Defendant says that this item was a check which was also deposited at a later date. Also, on October 3, 1904, the collections entered in the collection register amounted to $67.15, whereas the cash sales of that date are only $35.40. The explanations made by the defendant in his brief do not clear up entirely this discrepancy. There are many other days pointed out by the plaintiffs wherein the collections exceeded the cash sales, or came so near to equaling them that the inference is strong that the collections upon those days were not run through the cash register at all. Upon the whole we think that those items are a strong corroboration of plaintiffs' theory of the case, and that they have not been satisfactorily explained by the defendant. As a second reason for disbelieving the defendant, plaintiffs point out that the total amount with which they had charged the defendant upon collections in dispute was $4,041, and that $1,500 of this was collected otherwise than in cash, and that it could not therefore have been included by the defendant in his cash sales. In this list they have included $1,029.15 worth of goods which were sold to the defendant himself and paid by him in salary, and $107 which were offset against the salary of other employees. There are also items of ice and board and other incidentals in the same category. It is pointed out by the plaintiffs that this $1,563.10 is part of the $4,041 which the defendant claims was charged against him both as collections and cash.

In addition to those reasons, it might be pointed out that the defendant was a man of considerable experience, having run this business for more than twelve years and having a partner all the time. During this time he kept the books, and it is very improbable that he would

have no independent method of showing the cash sales. To enter "collections" as "cash sales" is such an unusual procedure that it throws suspicion upon the defendant's statement. Again we find from an examination of the testimony that the business was apparently prosperous. The store seemed full of customers, and the margin of profits on the sales was satisfactory to the defendant. The store was well organized. The partnership owned their own real estate and the expenses were moderate. The invoices show that something over $20,000 worth of goods were purchased during the twenty-six months, and that the stock retained its value. It is thus apparent that goods costing $20,000 were sold over the counter, and presumably at customary drug store profits. Both of the plaintiffs are practising physicians enjoying a large practice, and they naturally threw most of their prescription work to the store. The defendant testified that the line of goods that he sold usually sold at a good profit, and among other things said "whisky is a pretty good line;" while the presence in the invoice sheet of certain well-known names, and the expense item of a government license to sell intoxicating liquors, are both suggestive of profits. It would seem that total cash sales and collections would exceed $23,550.77, especially when but $2,336.32 was uncollected on the books. Again, taking the matter of the monthly reports made by the defendant to his partners. These specifically stated the amount of the "cash sales" per month, which amounted in all to $23,818.24. This statement also contained the amount of credit sales, which amounted to $7,232.64, which showed a sum total of sales of $31,050.88. It is undisputed that at the close of the business there were outstanding but $2,336.32 in accounts receivable, which seems to indicate that defendant had received in cash at least $28,714.56, from which there should be subtracted all collections known to be made in cash, or about $5,000 according to defendant's statements. This would still indicate cash sales of over $23,000 as against $16,000 now claimed by the defendant. Again, the expert Higgins, when upon the stand, pointed out many instances in which it was doubtful whether certain cash received sprung from cash sales or from collections, and that he had in all instances gone through the books to ascertain the true source of the money; that in most instances a reference to the books disclosed positively the character of the funds, and he was able to place the item in the proper column, and that in the few

instances where doubt still remained he gave the benefit of the doubt to the defendant. Those instances are set forth in full in the record, and while too lengthy to be reproduced here, are very convincing in their nature. Without going further into the evidence, which is a matter of importance only in this one case, we content ourselves with saying that we adopt the figures found by the trial court, and such judgment is in all things affirmed.

STATE OF NORTH DAKOTA v. MINNIE PHILLIPS.

(49 L.R.A.(N.S.) 470, 144 N. W. 94.)

Female — house of illfame — fornication — hire — prostitute — married woman.

The word "female" as used in chapter 87 of the Laws of 1909, which provides that "any female who frequents or lives in houses of illfame, or who commits fornication for hire, shall be deemed a prostitute, and shall be guilty of a misdemeanor," is *held* to include a married as well as an unmarried woman.

Opinion filed November 18, 1913.

Appeal from County Court of Ward County, *Murray*, J.

Demurrer sustained to information for charging statutory offense of prostitution, and State appeals.

Reversed.

Statement by BRUCE, J.

This is an appeal from an order sustaining a demurrer to an information which charged "that heretofore, to wit, on and between January 1, 1912, and the 6th day of June in the year of our Lord one thousand nine hundred thirteen, and especially on or about the 6th day of June, one thousand nine hundred thirteen, in the county of Ward in the said state of North Dakota, one Minnie Phillips, late of said county of Ward and state aforesaid, did commit the crime of being a prostitute, committed as follows, to wit: That at said time and place the said Minnie Phillips, a female person, did then and there wilfully and un-

lawfully commit fornification for hire by submitting her body for sexual intercourse for hire to divers men to this informant unknown. This contrary to the statute in such cases made and provided, and against the peace and dignity of the state of North Dakota." The demurrer alleged that, "The facts stated did not constitute a public offense." It was argued, in short, that the information did not state that the woman was unmarried, and that this allegation was necessary. The state on the argument agreed that the evidence would have shown that the defendant was in fact a married woman.

R. A. Nestos, State's Attorney, and *Dorr H. Carroll,* Assistant State's Attorney, for appellant.

The word "fornication" as used under the common law means sexual intercourse between unmarried persons. It is, however, the constituent element of all sexual offenses. People v. Rouse, 2 Mich. N. P. 209; People v. Barnes, 2 Idaho, 161, 9 Pac. 532.

The essential fact which constitutes the crime charged in fornication. Dinkey v. Com. 17 Pa. 126, 55 Am. Dec. 542.

No appearance by respondent.

BRUCE, J. (after stating the facts as above). The sole question for us to determine is whether under chapter 87 of the Laws of 1909, a married woman can be convicted of the crime of being a prostitute. We are of the opinion that she can be convicted of such an offense, and that the information sufficiently charged its commission in the case before us. The statute involved provides: "Any female who frequents or lives in houses of illfame, or who commits fornication for hire, shall be deemed a prostitute, and shall be guilty of a misdemeanor," etc. We think that married women are included within the provisions of this act. The legislature used the words "any female," and not "any unmarried female." It said, "who commits fornication for hire," and not, "who commits the crime of fornication." It is true that the common-law crime of fornication has been generally distinguished from that of adultery, and involves illicit sexual intercourse between unmarried persons, while in the latter the marriage of one or both of the parties is necessary. Illicit sexual intercourse, however, is at the foundation of both offenses, and the word "fornicate" is quite generally

used to describe illicit sexual intercourse, whether between married or unmarried persons. The act of illicit sexual intercourse is one thing, and the common-law crime is another, and the fact that we use the word in a limited sense in speaking of the common-law crime does not take away from it its original and general meaning when it is used not in connection with that common-law crime, but with one of purely statutory creation. "Illicit carnal connection," says the supreme court of Pennsylvania in Dinkey v. Com. 17 Pa. 126, 129, 55 Am. Dec. 542, "is called by different names, according to the circumstances which attend it. Unaccompanied with any facts which tend to aggravate it, it is simple fornication. When it causes the birth of an illegitimate child, it is fornication and bastardy. Where the man who commits it is married, it is adultery. When parties by whom it is done are related to one another within certain degrees of consanguinity or affinity, it becomes incest. Where it is preceded by fraudulent arts, including a promise of marriage) to gain the consent of the female, who is under twenty-one years of age, and of good repute, it assumes another name, and by the statute of 1843 is called 'seduction.' But the body of all these offenses is the illicit connection. In each case, the essential fact which constitutes the crime is fornication." The meaning of the word "fornication" as used in the statute is, in short, illicit sexual intercourse as a prostitute. In the Bible the term has been used to describe illicit sexual intercourse generally, and the Bible has perhaps entered more into our literature and dictated the meaning of our words more than all of our other books put together. This meaning was the meaning ascribed to the term by the ancient church and the ecclesiastical law, and, we believe, is the sense in which the word is generally taken and used, except when we are speaking of the common-law crime. It is also to be remembered that the word was in use long before what is known as the common-law crime of fornication had been created. See Webster's Dict.; 19 Cyc. 1435. The word "fornication," indeed, came to the English language through the ancient church and brought with it its Roman meaning. It is derived from the Latin word *fornix*, which originally meant the forceps of a beetle, then an arch, then an underground vault or cavern, then a brothel, because in the Roman cities brothels were kept in underground caverns and vaults. A fornicator then was one who carried on illicit sexual intercourse in a brothel

or for hire, and these are the very persons whom our statute was intended to reach. As above stated, where the term is used in the Bible it is used indiscriminately and in the Roman sense. The translators of the Bible were ecclesiastics and men who were learned in the Latin tongue and perhaps in the Roman law. The word has been used more often in its general sense than in connection with the common-law criminal offense, which was limited to unmarried persons, but which described an offense, and not an act. Both the act and the offense punished in the statute before us is that of prostitution, which the word really describes. See Freund's Leverett's Latin Lexicon; Webster's Dict.; People v. Rouse, 2 Mich. N. P. 209; Respublica v. Roberts, 1 Yeates, 6; Revelations, chap. ii, 20–22; 1st Corinthians, chap. v, 1; Milton's Doctrine of Divorce, Bk. II. chap. 18; Richardson's English Dict.; Mercer v. State, 17 Tex. App. 452, 5 Am. Crim. Rep. 292.

The judgment of the County Court is reversed, and the cause is remanded for further proceedings according to law.

ELIZA WILLOUGHBY v. E. DELAFIELD SMITH.

WILSON WILLOUGHBY v. E. DELAFIELD SMITH.

DAN WILLOUGHBY v. E. DELAFIELD SMITH.

DAN AND WILSON WILLOUGHBY v. E. DELAFIELD SMITH.

(144 N. W. 79.)

Claim and delivery — four distinct actions — different plaintiffs — different issues — cannot be consolidated — trial court — supreme court.

1. Four distinct actions in claim and delivery brought by different parties and involving different issues, although against the same defendant, cannot properly be consolidated, under the provisions of § 7345, Rev. Codes 1905, either for the purposes of trial in the district court, or for the purposes of an appeal to this court, even though they involve similar questions of law and fact.

Consolidated by consent — order of trial court with consent — objections waived — prejudice must appear.

2. Where such consolidation is ordered, however, by the express or implied consent of counsel, they will not be heard to urge an objection thereto; nor will they be heard, on an appeal to the supreme court, to urge any objection on such ground, where no prejudice is shown to the party thus objecting.

Errors — assignments of — admission or rejection of evidence — prejudicial error must appear.

3. Assignments of error based upon rulings in the admission and exclusion of testimony will not be sustained, where from the whole record it is manifest that no prejudicial error was committed.

Evidence — admission — exclusion — prejudice.

4. Numerous rulings in the admission and exclusion of testimony, examined and *held* nonprejudicial.

Ruling of court — assignment of error — must be specific.

5. An assignment of error must, in order to be of any avail, challenge some specific ruling of the trial court. An alleged assignment that the evidence is insufficient, or that the verdict is contrary to law and was the result of prejudice and bias on the part of the jury, or that the entire record shows that the defendant did not get a fair trial, is not a proper assignment, and will be ignored.

Error — assignment — not supported in brief or argument — abandoned.

6. Assignments of error not supported in appellant's brief and argument are deemed abandoned.

Instructions — request — general instructions.

7. The refusal to give certain requested instructions when the same are substantially covered by the general instructions given, *held*, nonprejudicial.

Instructions — exceptions — entirety.

8. The instructions given, when considered in their entirety, are *held* to be correct and certain exceptions thereto are overruled as untenable.

On Rehearing.

Rehearing — cross-examination — prejudicial restriction.

9. Upon rehearing, *held*, that certain rulings were prejudicial in that they unduly restricted defendant's right of cross-examination.

Transfer of property — between near relatives — evidence — good faith — proof — clear and convincing — instructions — prejudice.

10. Where, as in the case at bar, transfers are claimed to have taken place between near relatives, it is prejudicial error to refuse a requested instruction to the effect that clearer and more convincing proof is required of the good faith and the bona fides of the transaction than where such transfers were between strangers.

Opinion filed June 5, 1913. Rehearing denied November 19, 1913.

Appeals from the District Court, Eddy County; *J. A. Coffey,* J.

Judgments were entered in four separate actions, and orders denying new trials were entered in each action. From such judgments and orders defendant appeals.

Affirmed.

T. F. McCue, for appellant.

It was for the jury to determine under the evidence, who was the owner of the property; and witnesses should not have been allowed to usurp this prerogative by stating mere conclusions. American Soda Fountain Co. v. Hogue, 17 N. D. 375, 17 L.R.A.(N.S.) 1113, 116 N. W. 339.

By reason of the rulings of the court permitting witnesses to testify to conclusions and mere opinions, the defendant was not accorded a fair trial. Kjolseth v. Kjolseth, 27 S. D. 80, 129 N. W. 752; J. F. Anderson Lumber Co. v. Spears, 25 S. D. 624, 127 N. W. 643; Olson v. O'Connor, 9 N. D. 504, 81 Am. St. Rep. 595, 84 N. W. 359; Tetrault v. O'Connor, 8 N. D. 15, 76 N. W. 225; Mead v. Hogue, 49 Iowa, 703.

One who qualifies as an expert witness has the right to testify whether a writing is in the same ink, or written with the same pen. Farmers' & M. Bank v. Young, 36 Iowa, 44; Vinton v. Peck, 14 Mich. 287; Fulton v. Hood, 34 Pa. 365, 75 Am. Dec. 664; Ellingwood v. Bragg, 52 N. H. 488.

The wife's claim to the mares is entirely a pretense to avoid defendant's claim, and is fraudulent on its face. Irish v. Bradford, 64 Iowa, 303, 20 N. W. 447.

The verdict is contrary to the law and to the evidence; and where a verdict is manifestly against the justice of the case, it is the duty of the trial court to at once set it aside. Smith v. Williams, 23 Iowa, 28.

Where it is clear that injustice will result if judgment is rendered, the trial court should grant a new trial; and where such condition is shown, a new trial will be granted by the supreme court. Jourdan v. Reed, 1 Iowa, 135; Fawcett v. Woods, 5 Iowa, 400; Byington v. Woodward, 9 Iowa, 360.

The instructions requested by defendant as to the family relations, and the claims of the wife and minor sons to the property, presented

the questions of pretense and fraud, and were highly proper and should have been given. Irish v. Bradford, 64 Iowa, 303, 20 N. W. 447; Brummond v. Krause, 8 N. D. 573, 80 N. W. 686; Byrne & H. Dry Goods Co. v. Willis-Dunn Co. 23 S. D. 221, 29 L.R.A.(N.S.) 589, 121 N. W. 620; Meighen v. Chandler, 20 N. D. 239, 126 N. W. 992; Williams v. Harris, 4 S. D. 22, 46 Am. St. Rep. 753, 54 N. W. 926; Hoxie v. Price, 31 Wis. 86.

Foreign and collateral issues were injected into the case to the great injury and prejudice of the defendant, by the manner in which witnesses were permitted, over objection, to give their testimony, and the incompetent nature of such testimony. Wigmore, Ev. §§ 42–45, 443; Koehler v. Wilson, 40 Iowa, 183.

Testimony by witnesses as to mere conclusions on points involving the merits of the case is not permissible, and allowing the same, over objection, is reversible error. Hollenbeck v. Marshalltown, 62 Iowa, 21, 17 N. W. 155; Jackson v. Boyles, 64 Iowa, 428, 20 N. W. 746; Richards v. Derrick, 17 N. Y. S. R. 963, 2 N. Y. Supp. 31; Smith v. Cohn, 170 Pa. 132, 32 Atl. 565; Conner v. Stanley, 67 Cal. 315, 7 Pac. 723; Ward v. Dickson, 96 Iowa, 708, 65 N. W. 997; Doty v. Stanton, 18 N. Y. S. R. 427, 2 N. Y. Supp. 417; Combs v. Agricultural Ditch Co. 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966.

The dealings between Willoughby and wife and sons, and the evidence, clearly show their claims to be sham and fraudulent. Western & A. R. Co. v. Evans, 96 Ga. 481, 23 S. E. 494; Bowen v. Bull, 35 N. Y. S. R. 480, 12 N. Y. Supp. 325; Finn v. Duffy, 15 Misc. 126, 36 N. Y. Supp. 490.

The transactions among these relatives furnish a badge of fraud. In all such cases, such acts and dealings are viewed by courts with suspicion, and where a relative is in failing circumstances, stronger and clearer proof is required to overcome such suspicion, or to establish a case, and to show good faith. Rev. Codes 1905, § 6638; Moore v. Gainer, 53 W. Va. 403, 44 S. E. 458; Lusk v. Riggs, 65 Neb. 258, 91 N. W. 243; Bank of Colfax v. Richardson, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359; Crary Bros. v. Hoffman, 115 Iowa, 332, 88 N. W. 833; Gable v. Columbus Cigar Co. 140 Ind. 563, 38 N. E. 474.

The father is entitled to the earnings of his minor son unless the son has been emancipated, and such earnings are liable for the father's

debts. The instructions ignored the law in this respect. Donegan v. Davis, 66 Ala. 362; Bullett v. Worthington, 3 Md. Ch. 99; Bell v Hallenback, Wright (Ohio) 751; Schuster v. L. Bauman Jewelry Co. 79 Tex. 179, 23 Am. St. Rep. 327, 15 S. W. 259; Rev. Codes 1905, § 4092.

Instructions should not emphasize any particular piece of evidence. People v. Clarke, 105 Mich. 169, 62 N. W. 1117.

W. O. Louden, and *Knauf & Knauf,* for respondents.

The appeal should be dismissed. There are four separate and distinct cases which could not be consolidated for trial, and there is no law permitting consolidation of statements of the case, assignments of error, and appeals. Rev. Codes 1905, § 7335; Western Assur. Co. v. Way, 98 Ga. 746, 27 S. E. 167; Dickey v. State, 101 Ga. 572, 28 S. E. 980; Hicks v. Walker, 105 Ga. 480, 30 S. E. 383; Haralson County v. Pittman, 105 Ga. 513, 31 S. E. 183; Walker v. Conn, 112 Ga. 314, 37 S. E. 403; Williams v. Turner Twp. 15 S. D. 182, 87 N. W. 968; Davison County v. Chicago, M. & St. P. R. Co. 26 S. D. 57, 127 N. W. 728; Wallace v. Eldredge, 27 Cal. 498.

Where a witness who has qualified, testifies as to the ownership of personal property, his testimony is not merely to a conclusion. DeWolf v. Williams, 69 N. Y. 621; Sweet v. Tuttle, 14 N. Y. 465; Knapp v. Smith, 27 N. Y. 277.

FISK, J. The record in this case is somewhat anomalous, as it brings before us for review the proceedings in four separate and distinct lawsuits, the appellant having appealed from four separate judgments, and from four separate orders denying motions for a new trial. Briefly stated the facts are as follows:

In May, 1908, the appellant in these appeals commenced an action against one Ellis Willoughby to recover the possession of certain horses, cattle, and farm machinery, for the purpose of foreclosing certain alleged mortgages thereon, executed and delivered by said Willoughby to appellant. Thereafter each of the four plaintiffs and respondents on these appeals, claiming to own certain portions of said personal property, commenced an action against the appellant herein to recover the possession of the specific portions thereof claimed to be owned by each of such plaintiffs. Issues were joined in each of such actions, and

when called for trial in the district court the trial judge made the following order: "It appearing to the court, from the statements of counsel and from the pleadings in the case, that the issues involved in the four cases of Eliza Willoughby v. E. Delafield Smith, Wilson Willoughby v. E. Delafield Smith, Dan Willoughby v. E. Delafield Smith, and Dan and Wilson Willoughby v. E. Delafield Smith are the same, it is hereby ordered that the said four causes be consolidated, and that the issues of fact in the same be tried and submitted to the same jury." None of the parties made any objection to such order, and the four actions were thereafter tried and submitted together, resulting in four verdicts and four judgments against this appellant and in favor of each of such plaintiffs. Motion for a new trial was submitted and overruled in each case, and appeals have been taken from each of such judgments and orders. But one statement of the case was settled, which statement is certified to as containing all of the evidence introduced and proceedings had upon the trial of said actions. Appellant has filed in this court but one abstract, which embraces the pleadings in all four actions, such statement of the case, and proceedings had subsequent to the verdicts.

We are first confronted with a question of practice. Respondents' counsel moves in this court to dismiss the appeals for the reason that a separate statement of the case was not settled in each action, and for the further reason that no abstracts and briefs have been filed on each separate appeal, their point being that no consolidation of the four actions has been ordered, or can be legally ordered, for the purposes of the appeals.

It is entirely clear that the attempted consolidation of the four actions was a gross irregularity, and the order of the district court in attempting to consolidate said actions, as well as the attempted consolidation thereof in this court for the purposes of the appeals, constitutes a gross irregularity, as is apparent from a reading of § 7345, Rev. Codes 1905: "When two or more actions are pending at one time between the *same parties* and in the same court *upon causes of action which might have been joined,* the court may order the actions to be consolidated." These four actions were not "between the same parties," nor could the causes of action have been properly joined. It is true this appellant was defendant in each of such actions, but the plaintiffs were different,

and the subject-matter of the suits related to different property. However, as no objection was interposed to such attempted consolidation, the parties, by their silence, are deemed to have consented thereto, and, having thus consented to the trial of all four actions together, they will not be heard to complain of the procedure pursued thereafter in settling one statement of the case for all the actions and prosecuting the appeals together, especially where, as in this case, no possible prejudice is claimed or can result to the respondents. Considerable of the testimony is relevant and material to each of the causes of action, and to require the appellant to settle a separate statement of the case in each of such actions, and to file separate abstracts and briefs in each of the four cases, would entail a large expense without any corresponding benefits to the several respondents. While the regular practice, if pursued, would have lightened the burdens of this court to some extent, we are unable to see how respondents are prejudiced in the least by the mode pursued, nor do we think they are in any position to complain. The motions to dismiss are therefore denied.

Appellant has assigned no less than fifty-seven alleged errors which he contends were prejudicial to his rights. Most of these assignments relate to rulings on the admission and exclusion of testimony. Seven of them relate to the court's refusal to give certain requested instructions, and the last one relates to certain portions of the instructions given by the court to the jury. We will notice these assignments in the order presented in appellant's brief.

Before discussing the assignments, appellant's counsel call our attention to the fact that Ellis Willoughby, whom appellant contends was the owner of all this personal property, and who mortgaged the same to him, is the father of the two plaintiffs, Wilson and Daniel Willoughby, and the husband of the plaintiff, Eliza Willoughby, and that Wilson and Daniel at the time of the trial had not reached the age of majority. At the trial the father and his said sons claimed that the latter had worked for the former for wages, commencing when they were but nine years of age, and counsel for appellant emphasizes the fact that while the boys lived with their parents as one family, no separate accounts were kept, and there was nothing to show to the outside world that these boys were claiming to be the owners of any of this property until after the father became involved, and until after appellant sought

to enforce payment of obligations claimed to be owing by Ellis Willoughby to him.

The foregoing facts, while very material for consideration by the jury in deciding the issues of fact, tending more or less to cast suspicion upon the claims of respondents as to their ownership of the property, are of no particular importance in this court in passing upon the various legal questions involved. There being a substantial conflict in the evidence, the findings of the jury will not be disturbed unless the record discloses that there was prejudicial error committed by the trial court.

Under the first assignment of error, appellant specifies four rulings claimed to be prejudicial.

Wilson Willoughby was a witness for his mother in her case, and testified to the fact of her ownership of two mares and certain colts, describing them. Among other things, he testified, without objection, that he understood they were bought from Bakken, whereupon he was asked, "Do you know in whose name?" (meaning in whose name they were purchased.) His answer was, "I understood they were my mother's; they were always called so." Appellant's counsel then moved to exclude such answer as not responsive and being a mere opinion, which motion was overruled, and this is the first ruling complained of in assignment of error number 1. While such ruling was technically incorrect, we do not consider it prejudicial when considered in the light of the prior testimony of such witness, to which no objection was offered.

This witness, in his case against appellant, testified to his ownership of certain portions of the personalty, and on cross-examination stated that he supposed all this property was assessed in his father's name; that "the first personal property tax I had assessed in my name was in 1908. I know it was. To the best of my recollection it is true. I believe my father paid the taxes." And on redirect examination he was asked if the assessor ever came and asked him for a list of his property prior to 1907, to which the following objection was made: "Objected to as immaterial and irrelevant; the law requires that the owners of property must list their property for taxes." Such objection was overruled, and the witness answered in the negative. We discover no error in such ruling. While the testimony thus elicited was not very

material one way or the other, we do not see how it could have prejudiced appellant. Such witness had testified, just previously, to the fact that he repaid his father for any such taxes paid for him.

Nor do we discover any error in permitting such witness to testify that he did certain chores in lieu of paying board to his parents. Such testimony was prompted by certain testimony brought out on the cross-examination of such witness. We see no merit in the appellant's objection. Nor do we perceive any merit to appellant's contention that this witness was improperly permitted to testify as to an existing agreement between himself and his father, relative to wages. He testified that his father said he would give him $25 per month. The question to which this was an answer did not call for a conclusion, but for the fact as to whether any agreement was entered into with reference to wages.

The other specifications of error under assignment number 1 are frivolous and wholly without merit. This is also true as to the 2d assignment. The father, as a witness for his son, Wilson, was asked, "Do you know to whom that property belonged that he described here?" to which he answered, "Yes, sir, I know," and thereafter he was asked to state to whom it belonged, and he answered, "It belonged to Wilson Willoughby, my son." The objection to this testimony was clearly untenable.

The rulings complained of under assignments numbered 3 and 4 are similar to those preceding, and we need not notice them further than to state that we perceive no error in such rulings.

Assignment number 5 is predicated upon a ruling denying defendant's motion to exclude an answer made by Ellis Willoughby to the following question propounded to him on redirect examination: "Q. Counsel on cross-examination asked you about the amount that you were worth, and if you were not at that time execution proof, and you stated that you would be able to pay your debts if you could get your own. Now, by that what did you mean? A. I mean if I can get pay for the property that Smith stole from me." Before the ruling was made the witness stated, "I didn't owe him a dollar; I paid him up every cent I owed him in February," whereupon the court denied the motion. The prejudice resulting from such answer and ruling is more imaginary than real. The jury could not have been impressed thereby with the

literal truth of such statement, as there was no claim that Smith had actually committed a larceny of such witness's property. The idea that the witness evidently intended to convey by such answer was that Smith had gotten some of the witness's property to which he was not legally entitled, and this no doubt is the way the jury construed it. Conceding that the trial court should have granted such motion, we do not think the denial thereof was of such a prejudicial character as to constitute reversible error.

Assignments numbered 6, 7, and 8 are not argued in the brief, and are therefore deemed abandoned, and need not be noticed.

The appellant, Smith, on his direct examination, testified, among other things, "that neither Dan nor Wilson Willoughby ever pointed out or claimed any of these animals they are now claiming in this suit belonging to them," and in rebuttal respondent, Dan Willoughby, was asked the question: "Q. I will ask you if during the spring of 1908, when he was attempting to seize some horses belonging to your father, you pointed out to him the horses which belonged to you?" This was objected to as incompetent, immaterial, irrelevant, and an attempt to introduce evidence that is self-serving. Such objection was overruled, and the witness answered, "Yes, sir." This ruling is complained of under assignment number 9. We perceive no merit in appellant's contention. Such testimony was clearly proper as rebuttal. Frivolous objections, such as this, do not deserve serious consideration. The rulings complained of under assignment number 10, when considered in the light of all the testimony of the witness Ellis Willoughby in his rebuttal testimony, are, we think, not subject to the criticism made by appellant's counsel.

Under the 12th assignment it is contended that the court erred in receiving in evidence exhibit "A-7." This exhibit consists of a memorandum containing certain words and figures which the witness Ellis Willoughby identified in his rebuttal testimony as a settlement sheet or memorandum claimed to have been made by such witness in the presence of defendant, Smith, the correctness of which figures Smith admitted, except a certain portion relating to two loads of grain. The witness testified regarding such exhibit as follows: "Exhibit A-7 is the paper on which the difference of this grain was figured; those marks were made in his presence, I showed them to him, he saw them. He agreed

that all was correct except he didn't like to estimate those two loads of grain; preferred to have it right. He knew he had it somewhere on paper." We perceive no error in the ruling complained of. Certainly a sufficient foundation had been laid for its introduction.

Under assignment number 13 appellant complains of the court's ruling in sustaining plaintiff's objection to the following question propounded to Ellis Willoughby on cross-examination after such witness had testified in rebuttal: "Q. How did you pay Smith for the note of $2,000 that you gave him on August 7, 1906?" Objected to as improper cross-examination, not having been gone into in the rebuttal testimony. We have read the testimony given by this witness on his direct examination in rebuttal, and find that no inquiry concerning such $2,000 note was made. The ruling was therefore correct.

The rulings complained of under assignment of error number 14 were likewise correct. Appellant's counsel sought to cross-examine the witness upon subjects which had not been touched upon in the direct examination of such witness in rebuttal, and the objections which were sustained were that it was not proper cross-examination.

Under assignment number 15 appellant complains because the lower court sustained objections to certain questions propounded by defendant to the witness Watkins, an alleged expert in handwriting. Defendant sought to show by this witness that exhibit "Q," a mortgage executed by one Armstrong and Ellis Willoughby to defendant, was not written with a fountain pen, but that the same was written by a steel pen. These questions were objected to, and the objections sustained upon the ground "that the same were incompetent, irrelevant, and immaterial, no foundation having been laid for the testimony, and improper rebuttal testimony." We think the rulings were proper. Ellis Willoughby had not claimed that such exhibit was written with a fountain pen; on the contrary, he testified: "I don't know who got it, Mr. Smith handed it to me. I don't remember what kind of a pen and holder it was; have no recollection." We discover no merit whatever in this assignment.

Under assignment number 16 appellant specifies 8 distinct separate rulings as error. He refers to but three of these in the body of his brief, but does not support even these three by any reasons whatever, and we shall treat all of such specifications as abandoned.

We have examined the numerous rulings complained of under the 17th assignment of error, and discover no substantial merit in appellant's contentions with reference thereto. Under such assignment there are about a dozen rulings therein specified as erroneous. It will serve no useful purpose to take the time necessary to a review of each of such rulings. They are discussed in the briefs only in a perfunctory manner. If any of such rulings constituted error we fail to see how the same was so prejudicial as to require a reversal.

Assignments numbered 18, 19, and 20 cannot be considered, as they are not proper assignments. By assignment number 18 counsel undertakes to assign as error the alleged insufficiency of the evidence to sustain the verdict, and by assignment number 19 he alleges that the entire record shows that the defendant did not get a fair trial, and he proceeds to point out wherein he was precluded by the trial court from giving the facts to the jury. By assignment number 20 he alleges that the verdict is contrary to law, contrary to the evidence, and the result of passion and prejudice on the part of the jury. Obviously, such assignments are improper. An assignment of error must be directed to some specific ruling of the trial court claimed to constitute error, and must challenge the correctness of such ruling.

Assignments numbered 21 to 27 inclusive are predicated upon the refusal of the trial court to give certain requested instructions relative to the presumption of fraud arising from sales of personal property not accompanied by an actual and continual change of possession, and also relating to the burden of proof of overcoming such presumption. We have carefully examined these requested instructions, and while some of them might properly have been given, still, after reading the entire instructions of the court to the jury we are agreed that no prejudicial error was committed in declining to give such requested instructions, as the charge given was very full and fair, and substantially and correctly covered the matters thus requested, as well as the law of the case generally.

The portion of the instructions given by the trial court, and which we think substantially covers the matters embraced in the requested instructions, is as follows:

"Our statutes provide that every sale made by a vendor of personal property in his possession or under his control, and every assignment

of personal property, unless the same is accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or assignor, or subsequent purchasers or encumbrancers in good faith and for value, unless those claiming under such sale or assignment make it appear that the same was made in good faith and without any intention to hinder, delay, or defraud such creditors, purchasers, or encumbrancers.

"This provision of the law places the burden upon the plaintiffs, under such circumstances, of proving that they were purchasers from their father of certain of this property in good faith and for value; and if you find by a preponderance of the evidence in this case that the property purchased by the plaintiffs Dan and Wilson Willoughby, from their father, Ellis Willoughby, was purchased in good faith and for value, without any intent to hinder, delay, or defraud creditors, purchasers, or encumbrancers, then you are instructed that the fact that the property so purchased was not separated from the property of their father, Ellis Willoughby, is immaterial.

"The circumstances surrounding the purchase of said property, the relationship of the parties, the manner of transacting the business, the manner and mode of paying for the property, the opportunity and ability of the plaintiffs in view of their circumstances and condition, their individual activity in business and farming operations, are circumstances for you to take into consideration in arriving at your determination as to the bona fides and good faith of the various transactions as shown by the evidence."

What we have above stated sufficiently answers appellant's contention under his last assignment, which is predicated upon certain exceptions to portions of the instructions given by the trial court.

We discover no prejudicial error in the instructions complained of.

In affirming these judgments, we, of course, are not called upon to express an opinion upon the merits of the cases. The fact that we may not agree with the findings of the jury upon the various issues involved is wholly immaterial. A jury of twelve men have passed upon the facts adversely to the appellant, and it is not the province of the court to disturb such findings, although seemingly erroneous, where, as in these

cases, such findings or verdicts have substantial support in the testimony, and where, as in these cases, we are unable to say that the trial court committed prejudicial error.

In conclusion we cannot refrain from criticizing the manner in which these cases have been presented to this court. The assignments of error are an exact duplicate of the specifications of error, and most of the so-called assignments are subdivided into numerous alleged assignments or specifications, and while there are nominally twenty-eight assignments of error there are, in fact, some fifty-seven in number. Such a method of presenting assignments of error is not to be commended, as it necessitates on the part of the court much needless labor,—especially where in the body of the brief, as in this case, many of such assignments are promiscuously thrown together without any logical arrangement, and many of them treated only in a perfunctory way.

The judgments and orders appealed from are affirmed.

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

On Rehearing.

FISK, J. A rehearing having been granted in these cases, counsel have again reargued many of the questions involved, both orally and in additional printed briefs.

After a careful reconsideration of such questions we have concluded to recede from our first conclusions, and to order a new trial in each of the cases. While we are very loath to send these cases back for retrials, in view of the large expense which necessarily will result, we think the interests of justice demand that we do so. A dispassionate consideration of the entire record serves to convince us that a fair trial was not accorded the appellant. While we are unable, with a few exceptions, to point to any specific ruling which we are willing to hold as necessarily constituting prejudicial error requiring a reversal, we cannot consider the entire record without reaching a firm conviction that defendant did not receive that fair and impartial trial to which he was entitled. We shall not attempt to again review each specific ruling complained of as error, but in view of new trials we will briefly refer in a general way to some of the more important ones.

While we realize that the truth of the various contentions of these plaintiffs, although apparently very improbable on their face, in the light of the relationship of such parties and all the other circumstances disclosed, is for the jury, and not the court, to determine, still we think that, owing to such apparent improbability of the truth of the various contentions of the plaintiffs, the court, in the interests of justice, should permit the fullest cross-examination of such plaintiffs and their witnesses. We think defendant's counsel was unduly curtailed in his exercise of the right to cross-examine, especially touching the question of alleged payments made by Ellis Willoughby to defendant. On more mature deliberation we think there is much merit in appellant's 13th assignment, predicated upon the ruling denying him the privilege of cross-examining Ellis Willoughby relative to how he claimed to have paid the $2,000 note. This witness had testified on rebuttal that a full settlement was had between him and appellant, evidently conveying, and intending to convey, the impression to the jury that the above note, as well as all of the other notes held by appellant against him, were talked over at and included in such settlement. In view of the vital and much disputed issue as to whether any sum was still due on any of these notes which appellant held and produced at the trial, we think prejudicial error was committed in refusing to permit such cross-examination. We also think the court should have permitted the cross-examination of such witness with reference to his knowledge concerning Exhibit A–2. This was proper cross-examination, and very material, for knowledge of the contents of such exhibit, if shown, was inconsistent with the prior testimony of such witness to the effect that the extent of his indebtedness to appellant was only about $217. Exhibit A–2 is a receipt delivered to Dan Willoughby by appellant, dated January 11, 1908, for $1,725, paid in cash and by certain personal property, to be credited on note held by appellant against Ellis Willoughby.

We also think that the trial court should have given appellant's third requested instruction, or at least have charged upon the law embraced therein. The charge as given does not cover this phase of the law. It is no doubt the law that where the parties to a transfer are near relatives, clearer and more convincing proof is required of the good faith and bona fides of the transaction than when they are strangers, and we think appellant was entitled to have the jury so

advised. See Martin v. Duncan, 156 Ill. 274, 41 N. E. 43, and cases therein cited.

In the interests of orderly procedure, we suggest that the order consolidating these cases be vacated and each case tried separately.

Reversed and new trials ordered.

THE STATE OF NORTH DAKOTA v. LUTHER J. BOYD.

(144 N. W. 232.)

Section 9919, Rev. Codes 1905, provides for a change of the place of trial of a criminal action, when the judge decides that such prejudice exists in the county where the offense was committed and on the part of certain officials, that a fair and impartial trial cannot be there had. Section 9920, Rev. Codes 1905, requires that the petition for a change of the place of trial be presented at the first term of court at which the action can be tried, and before the trial is begun, or if the action has been continued, at any time before the term to which it is continued, upon reasonable notice to the state's attorney or the attorney appointed to prosecute. Section 9929, Rev. Codes 1905, provides for the calling in of another judge to preside during the trial of a criminal action, when an affidavit alleging prejudice of the judge of the district in which the county is situated, and also for a change of the place of trial and of the judge, when a combined affidavit, alleging prejudice of the character described in § 9919 and of the judge, is presented.

Statute — construction — change of place of trial — petition and affidavit — application for change — time to make — jurisdiction.

It is *held* (a) that the terms of § 9929 are mandatory, and that, on the presentation of a petition alleging prejudice of the people, etc., and of the judge, the judge of that district has no further jurisdiction over the action, except to make the order of transfer and secure the attendance of another judge to preside at the trial; (b) that the provisions of § 9920 are not applicable to a petition filed in accordance with § 9929, and that a petition or affidavit filed which sets forth the grounds for a change of the place of trial and of the judge, in accordance with the terms of § 9929, is presented in time when filed before the trial has begun, even though a continuance has been had, and no notice has been served upon the prosecuting attorney of the application for such changes.

Opinion filed November 20, 1913.

Appeal from a judgment of the District Court of McKenzie County in a criminal action, *Hon. Frank E. Fisk,* J.

Reversed.

Aaron J. Bessie, for appellant.

The defendant was entitled to a change of the place of trial, and to a change of judges, as a matter of right under the law. Rev. Codes 1905, § 9919; State v. Palmer, 4 S. D. 543, 57 N. W. 490.

The petition and application must be made before the trial begins. The trial begins when the jury is impaneled. State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052.

The statute providing for such change is mandatory. State v. Johnson, 24 S. D. 590, 124 N. W. 847.

Chas. C. Converse, State's Attorney, and *Andrew Miller,* Attorney General, for respondent.

The petition and application for a change of the place of trial must be made at the first term at which the action can be tried. Rev. Codes 1905, § 9920.

SPALDING, Ch. J. On the 10th of June, 1913, an information was filed against the appellant in the office of the clerk of the district court of McKenzie county, charging him with the offense of keeping for sale intoxicating liquors as a beverage in said county. It would seem from the abstract that he had had a preliminary examination before a magistrate prior to the convening of the next preceding term of the district court, which was held in October, 1912, on this offense, and had been held to the district court by the magistrate, and that the cause had been placed upon the calendar of the October, 1912, term of that court, but that no information was filed until the June, 1913, term. Sometime during the October, 1912, term, he made an application for a continuance, on the ground of illness, which application was granted by the court. On the same day that the information was filed, counsel for appellant filed a motion and affidavit for change of the place of trial to some other county, upon the following grounds: 1. That the person appointed to prosecute had undue influence over the minds of the people of McKenzie county, and particularly over the minds of the jurors impaneled to try and determine said action; 2, that the sheriff of said county had similar undue influence; 3, that the state's attorney and the

sheriff of said county were prejudiced and biased against appellant; and, 4, that the people of McKenzie county, and particularly the jurors impaneled to try and determine the cause, were biased and prejudiced against the appellant, and against the offense with which he stood charged, and that, by reason of such prejudice and bias, it was impossible to obtain a jury in said county that had not formed and expressed an opinion as to the guilt or innocence of appellant, such as would disqualify them to sit and act as fair and impartial jurors in the trial of said action; and stating further that, by reason of such facts, he could not have a fair and impartial trial in said county. The state filed affidavits in opposition to the change. On the same day, and subsequent to the filing of such affidavit, he made a motion supported by affidavit of the defendant, for a change of the place of trial to another county, and to secure the attendance of some other judge to preside at such trial, by reason of the prejudice of the judge of the eleventh judicial district, in which McKenzie county is situated. The affidavit on which this motion was based, so far as it relates to the prejudice of the state's attorney and jurors and people, was substantially the same as the first affidavit filed, but to it was added the allegation that the judge of the judicial subdivision in which said action was pending was biased and prejudiced against said defendant. The court denied the motion for a change of venue and change of judges in these words: "I will deny the motion at this time on account of the fact that it comes too late," and entered its order denying such motion, which order recites that "on the second day of the term, the defendant, without first having given any notice to the state's attorney, presented to the court and filed a petition on oath," and concludes, "and it appearing to this court that the original petition herein, and the one later offered, were neither of them filed nor offered within the time required by the statute, particularly in that they were not filed nor presented within the time specified in § 9920, Rev. Codes of N. D. 1905, as this action was continued from the last term of the court, at the special instance of the defendant, and as the petition was not presented before this present term of this court, and as a reasonable notice thereof was not given to the state's attorney, it is ordered, adjudged, and decreed that the petitions of the defendant for a change of venue be, and hereby are, denied." Thereupon defendant objected to the jurisdiction of the court to call or impanel a jury to try

the action, and to the introduction of any testimony on the part of the state, in brief on the ground that, by the filing of the affidavit and motion last referred to, the court was devested of jurisdiction. Subsequent objections were made on the same ground to the impaneling of a jury and to the swearing of witnesses. These objections being overruled and exceptions taken, the court proceeded with the trial of the action, the defendant declining to participate therein. In due time, a verdict of guilty was returned by the jury, and judgment was pronounced and entered on the verdict. From this judgment the defendant appeals, assigning as error the denial of his motions for a change of venue and for a change of venue and of judges. To make the record correct, we may add that, at the time of the argument of the motion for a change of the place of trial and of the judge, the second affidavit had not actually been filed, but defendant had requested leave to file it, and it was filed that day and it is found in the record. Hence, we treat it as though it were on file at that time. We may further add that this appeal is discussed by both parties on the theory that § 9920, Rev. Codes 1905, applies to both an application for a change of the place of trial, and the combined application for a change of the place of trial and of the judge, by the defendant, it being contended on the one hand that, inasmuch as there had been a continuance, and that these applications were not made until the second day of the next term of court held after the continuance, and were made without notice to the state's attorney, they came too late. On the other hand, the defendant contends that, inasmuch as the continuance was had before any information was filed in the district court that the June, 1913, term was the first term at which the case could have been tried, and that therefore, under the provisions of § 9920, supra, the applications were both in time. We cannot decide this case on the narrow grounds argued without establishing a precedent which we think would conflict with the statute. For a correct understanding of the statutory provisions, we set them forth as far as necessary to a decision of this appeal. They are found in article 5 of chapter 9 of the Code of Criminal Procedure, 1905. This article is entitled, "Removal of the Action before Trial." Section 9919 reads: "The defendant in a criminal action prosecuted by information or indictment in any district court of this state may be awarded a change of the place of trial, upon his petition on oath, or upon the

oath of some credible person, setting forth that he has reason to believe and does believe, and the facts upon which such belief is based, that he cannot receive a fair and impartial trial in the county or judicial subdivision where said action is pending, upon any of the following grounds." Then follow the grounds, which are, in brief, that the prosecuting witness or the state's attorney or other person promoting the prosecution has undue influence over the minds of the people of the county or judicial subdivision where the action is pending; prejudice of the people of the county against the defendant or the offense of which he is accused; that it is impossible to obtain a jury in the county or judicial subdivision that has not formed an opinion such as would disqualify them as jurors to sit in the case; or that any other cause exists in the county or judicial subdivision where the action is pending, whereby he would probably be deprived of a fair and impartial trial. Section 9920 provides that "the petition must be presented at the first term of the court at which the action can be tried, and before the trial is begun, or if the action has been continued, at any time before the term to which it is continued, upon reasonable notice to the state's attorney, or the attorney appointed to prosecute. . . . " Section 9921 requires the court, on being satisfied that cause exists for a change of the place of trial as defined in § 9919, to order a change of the place of trial. Section 9922 prescribes the duties of the clerk in case of a change of the place of trial. Sections 9923, 9924, and 9925 provide for the disposition of the defendant, if in custody, for bail for witnesses, notice to witnesses, and undertakings, subpœnas, etc. Section 9926 relates to the proceedings of the court to which the action is removed, and the transmission of papers to such court. It is not necessary to notice the next two sections. Section 9929 reads: "Whenever the defendant, or a defendant in a criminal action, shall file his affidavit stating that he has good reason to believe, and does believe, that he cannot have a fair and impartial trial of such action on account of the prejudice of the judge of the district court in which said action is pending, the court shall thereafter proceed in said action as follows: 1. If the defendant or a defendant asks for a change of the place of trial of said action on any of the grounds specified in § 9919, and also for the cause mentioned in this section, it shall be the duty of the court to order said action removed for trial to some other county or judicial subdivision in

this state, as provided in this article, and to request, arrange for, and procure some other judge than the one objected to, to preside at the trial of said action." Paragraph 2 of § 9929 is immaterial, except that it provides that a change, upon the ground in this section provided for, must be asked before the trial is begun.

That the provisions of § 9929, supra, are mandatory, is not open to question. It was so held before the statute was amended, and when the word "may" was used instead of "shall" in "it shall be the duty of the court." State v. Kent, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631; State v. Barry, 14 N. D. 316, 103 N. W. 637.

The change in the language of the statute makes it more imperative than formerly, and was intended to leave no question of its construction open. It is made the absolute duty of the court when an affidavit setting forth the facts specified is presented before the trial is begun, to change the place of trial and secure another judge to preside. It is not left to the judge to try and determine the question of his own disqualification, and as the change in the place of trial is coupled with the change of the judge, the same language applies, and the two demands cannot be separated, and one denied and the other granted. They are equally mandatory. When the affidavit conforms to the requirements of the Code, and his affidavit is presented in time, no trial can be had in the county where the information is filed, and the judge of that district has no further jurisdiction or power, except to make the transfer and to secure another judge to preside.

Do the provisions of § 9920, which require the petition to be presented at the first term at which the action can be tried, or if it has been continued, before the term to which it is continued, and upon notice to the state's attorney, apply to an application under § 9929? It is argued by the state that, because the several sections to which we have made reference were orginally one enactment, and because of the phrase in § 9929 reading, "it shall be the duty of the court to order said action removed for trial to some other county or judicial subdivision in this state, *as provided in this article,* and to request, etc.," it reaches over and limits the provisions of § 9929, and when the application for a change of the place of trial and of the judge is not made at the first term at which the case could have been tried, or when it is not made until after the commencement of the second term, and then without

notice to the state's attorney, the defendant does not bring himself within the terms of § 9929, and the court is not deprived of jurisdiction. We think this an erroneous view. Standing alone, as we have shown § 9929, it is mandatory. Section 9920 immediately follows § 9919, which relates only to a change in the place of trial, and relates only to the application authorized by § 9919. In deciding the application for a change in the place of trial, the judge reaches a determination on the facts presented as ground for such change, and it is only proper that there should be some limit to the time within which the application should be made, and it should then only be upon notice to the state's attorney, if not made at the first term at which the trial might have taken place, thus enabling the state's attorney to meet the allegations of prejudice. Then, again, as to the reasons for not trying it in the county or subdivision, the defendant has as much reason to know the state of feeling toward him and the offense when the information is filed, as he is likely to have at a later date. As to the prejudice of the judge, different reasons apply. The defendant may be unaware of the mental attitude of the judge toward him until after something has occurred in the preliminary proceedings leading up to and prior to the beginning of the trial. He may not have the information as to the judge until the last minute before a jury is impaneled, and if he then learns of the bias of the judge, it is just as necessary to his protection that there be another judge called into the case, as though he had learned of it prior to the filing of the information. The judge may have become prejudiced in the meantime. We do not construe the words *"as provided in this article,"* as applying to the method or time of making the application, when it is made under the provisions of § 9929. This applies rather to the other sections of the article prescribing the duties of the clerk and others after an order of removal is made, that is, as to what shall be done to complete the removal of the action to another county or subdivision, so as to give the court in the new county possession of the pleadings and put it in position to proceed with the trial. The only requirement contained in § 9929 relating to the time when the affidavit shall be filed is that it be before the trial is begun. Had it been intended to make § 9920 applicable to § 9929, there would have been no reason for repeating the requirement that it shall be "before the trial is

begun." If our understanding of these provisions is correct, the application for a change for the combined reasons of local prejudice, etc., and prejudice of the judge, was seasonably made. It follows from these considerations that the learned trial court was in error in retaining jurisdiction and in proceeding with the trial of the case, and we are compelled to reverse the judgment appealed from, and remand the case for further proceedings in accordance with law.

THE STATE OF NORTH DAKOTA v. WILLIAM BUTLER and William Kimball.

(144 N. W. 238.)

Criminal information — prize fighting — charging clause — one offense stated.

1. A criminal information charging that the defendants, at a time and place named, "did wilfully, wrongfully, and unlawfully engage in a certain unlawful, premeditated fight and contention with each other in a ring, wherein the said B. and K. did then and there fight and contend with each other by striking and attempting to strike, and beating and attempting to beat each other," which information was drawn under § 9089, Rev. Codes 1905, which reads: "Every person who engages in, instigates, encourages, or promotes any ring or prize fight, or any other premeditated fight or contention, whether as principal, aid, second, umpire, surgeon, or otherwise, although no death or personal injury ensues, is guilty of a misdemeanor,"—does not charge two offenses.

Caption — information — title of court — omission — not prejudicial — form — substance.

2. The caption of the information, in addition to the venue and title of the action, contained the words, "In ———— court." On the back of the information was the statement that it was in the county court of Ward county, and the certificate of the clerk that it was filed in the county court of that county. *Held*, that the omission of the title of the court was only in form, and not in substance, and could not have mislead or prejudiced the defendant, and did not render the information bad on demurrer.

Information — motion to amend — denial — abuse of discretion.

3. The denial of a motion made before the commencement of the trial by the state's attorney, for leave to amend the information by inserting the omitted word "county," was an abuse of discretion.

Opinion filed November 20, 1913.

Appeal from an order of the County Court of Ward County, sustaining a demurrer to a criminal information, *Hon. William Murray,* J.

Reversed and remanded.

R. A. Nestos, State's Attorney, *Dorr H. Carroll,* Assistant State's Attorney, for appellant.

The information charges but one, distinct, specific offense,—that of prize fighting,—and is not duplicitous. Seville v. State, 49 Ohio St. 117, 15 L.R.A. 516, 30 N. E. 621; Rev. Codes 1905, § 9089; Rex v. Hargrave, 5 Car. & P. 170; Com. v. Barrett, 108 Mass. 302; Com. v. Welsh, 7 Gray, 324.

An information is not open to the objection of duplicity where the charge is the doing, and having caused to be done, the acts which constitute the offense. 22 Cyc. 386; People v. Martin, 77 App. Div. 396, 79 N. Y. Supp. 340; Rasnick v. Com. 2 Va. Cas. 356; People v. Gusti, 113 Cal. 177, 45 Pac. 263; Peacock Distilling Co. v. Com. 25 Ky. L. Rep. 1778, 78 S. W. 893.

Where assault is involved in the commission of a crime, both the assault and the completed crime may be charged. State v. Farley, 14 Ind. 23; 21 Cyc. 676; Com. v. Carson, 166 Pa. 179, 30 Atl. 985; State v. Ely, 35 La. Ann. 895; State v. Ryan, 15 Or. 572, 16 Pac. 417; State v. Phipps, 95 Iowa, 487, 64 N. W. 410.

An information may charge burglary, or the breaking and entering a building, and also the larceny of goods therefrom. State v. Hayden, 45 Iowa, 11; State v. Shaffer, 59 Iowa, 290, 13 N. W. 306, 4 Am. Crim. Rep. 83.

No appearance for respondents.

SPALDING, Ch. J. The information in this case, omitting names of witnesses indorsed, signature of assistant state's attorney, and the verification, reads as follows:

State of North Dakota } ss. In Court.
County of Ward }

State of North Dakota

vs.

William Butler and William Kimball, Defendants.

Dorr Carroll, assistant 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 21st day of February, in the year of our Lord one thousand nine hundred and thirteen, at the county of Ward, in said State of North Dakota, William Butler and William Kimball, late of said county of Ward, and state aforesaid, did commit the crime of engaging in ring fight and contention, committed as follows, to wit:

That at said time and place the said William Butler and William Kimball did wilfully, wrongfully, and unlawfully engage in certain unlawful premeditated fight and contention with each other in a ring, wherein the said William Butler and William Kimball did then and there fight and contend with each other by striking and attempting to strike, and beating and attempting to beat each other.

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.

Dated at Minot, N. D., this 8th day of April, A. D. 1913.

On the back the information was indorsed, "In county court, county of Ward," with the names of the parties, the offense, and the certificate of filing in the county court of Ward county, during a term of said court by the order of the court.

To this information, the defendants interposed a demurrer, stating in the caption that it was in the county court of Ward county, and alleging as the grounds of the demurrer, among others, that the same

is not entitled in a court having jurisdiction of the defendants, or the subject-matter of the action; that said information is duplicitous, and states more than one offense, and does not sufficiently apprise said defendants of the crime or public offense sought to be charged, and contains no plain statement of facts apprising said defendants of the nature of the offense sought to be charged, and in such manner as to enable said defendants to prepare a defense thereto. After argument the court sustained the demurrer, on what grounds we are not advised. The state's attorney then moved to amend the information by the insertion of the word "county" in the venue, between the words "in" and "court," so that it would read, "State of North Dakota, county of Ward, in county court." This motion was denied, and the court dismissed the action. An exception was allowed to the state on the ruling of the court. The case is before us on an appeal by the state, and the two errors assigned which must be considered are that the court erred in sustaining the demurrer to the information, and that the court erred in denying the defendant's motion to amend the information by inserting the word "county" in the venue, so that it might read, "State of North Dakota, county of Ward, in county court."

1. Does the information charge more than one offense? The information was drawn under § 9089, Rev. Codes 1905, which reads: "Every person who engages in, instigates, encourages, or promotes any ring or prize fight, or any other premeditated fight or contention, whether as principal, aid, second, umpire, surgeon, or otherwise, although no death or personal injury ensues, is guilty of a misdemeanor." It will be observed that the information is drawn in the language of the statute quoted, in so far as it is applicable to the principals in a ring fight. To it is added the allegation that they "did, then and there, fight and contend with each other, by striking and attempting to strike, and beating and attempting to beat." The respondents did not appear in this court on the hearing, and have filed no briefs. We gather from the brief of the state that the contention was that the allegation last quoted described a different offense from the one quoted in the language of the statute. We do not so construe this information. The last quotation is simply a description of the acts claimed to have been done by the defendants in engaging in a ring fight and contention. In many cases it is sufficient to allege the commission of the offense in the lan-

guage of the statute, but this rule has its exceptions. We need not determine whether the charging of the commission of this offense comes within the rule or the exceptions. It is clear that the latter part of the information contains only statements supporting the more general part, and that they are in complete harmony therewith. It was drawn in accordance with the holding of the Mississippi court in Sullivan v. State, 67 Miss. 346, 7 So. 275, 8 Am. Crim. Rep. 656. Under our system of procedure, and particularly under the provisions of § 9856, Rev. Codes 1905, an information is sufficiently definite if the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended, and it is sufficient if the act or omission is charged with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case. State v. Longstreth, 19 N. D. 268, 121 N. W. 1114, Ann. Cas. 1912D, 1317.

Does the fact that this information, in addition to the allegation that the defendants "did wilfully, wrongfully, and unlawfully engage in a certain unlawful, premeditated fight and contention with each other, in a ring," charges that they "did, then and there, fight and contend with each other, by striking, etc.," render the language of the information uncertain or indefinite? We think it adds certainty and definiteness to the allegations of the information. It states the acts in which the parties engaged, and which constituted or completed the commission of the offense. Had this allegation been omitted, the defendants would undoubtedly have been before the court asserting vigorously that the preceding allegation only constituted a conclusion, and that no acts had been set forth, as having been done, which constitute the offense of engaging in a ring or prize fight. The two allegations do not charge separate and distinct offenses when read together, as they must be. It is manifest, of course, that the "striking and attempting to strike" might be acts constituting some other offense, if these terms were employed without reference to the remainder of the information, but they are charged, not as a separate offense, but as the acts done, which constituted violation of the statute. Hence, as relates to this phase of the demurrer, it is not well taken.

2. The omission of the word "county" in describing the court was

not fatal to the information. The information was filed in the county court. The defendants were before the county court on a warrant issued by it upon the information complained of. The back of the information indorsed, as required by the statute, shows the court in which it was filed. No person possessed of a spark of intelligence could have been mislead or prejudiced by the omission. Besides these considerations, § 9856, Rev. Codes 1905, provides: "The information or indictment is sufficient if it can be understood therefrom: 1. That it is entitled in a court having authority to receive it, *though the name of the court is not stated.* . . ." The omission was in a merely formal part, and did not go to the substance of the information, and both under the authority of § 9856 quoted above and § 9857, this omission was immaterial. Section 9857 reads: "No information or indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of a defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits." This identical question has been passed upon by the supreme court of South Dakota in State v. Brennan, 2 S. D. 384, 50 N. W. 625, where the question is discussed at some length by Judge Bennett, and it was held that the omission was immaterial and nonprejudicial, and we so hold, and in any event it could be cured by amendment, and it was an abuse of discretion in the trial court to deny the application of the state to amend by inserting the word "county," under the provisions of § 9796, Rev. Codes, 1905. See also King v. State, 5 How. (Miss.) 730; Taylor v. Com. 2 Va. Cas. 94; Com. v. Mullen, 13 Allen, 551. The order of the County Court is reversed, and the cause remanded for further proceedings in accordance with law.

STATE OF NORTH DAKOTA v. NETTIE RILEY.

(144 N. W. 107.)

Criminal complaint — charging clause — continuous like offenses from day to day — different offenses — filing during court session.

1. A criminal complaint charging an offense as having been committed continuously since the 1st day of January, 1911, and at sundry and divers

times between that date and the 27th day of June, 1911, and an information charging the same defendant with having committed an offense of the same nature, from day to day continuously, from the 1st day of January, 1911, to the commencement of this action, which action was commenced by the filing of the information during a regular session of the district court, and on the 7th day of September, 1911, charge different offenses.

Common nuisance — information — filed during session — preliminary examination — conviction.

2. An information charging a defendant with keeping and maintaining a common nuisance continuously from day to day, from the 1st day of January, 1911, to the 7th day of September, 1911, and filed in district court during a regular session of such court, on the 7th day of September, will support a conviction without a preliminary examination having been held.

Common nuisance — information — charging continuing acts — not separate offenses.

3. A criminal information which states that, on the 27th day of June, 1911, and continuously from day to day, from the 1st day of January, 1911, to the commencement of this action, the defendant did commit the crime of keeping and maintaining a common nuisance, does not charge two separate and distinct offenses. The allegation as to the 27th day of June, which is a day included within the extreme dates, is surplusage.

Affidavit of prejudice — trial judge — jurisdiction.

4. A defendant charged with a criminal offense filed an affidavit of prejudice during a regular term of the district court wherein she was arraigned, against the presiding judge of that district, and demanded that a judge of another district be requested to preside at the trial. The presiding judge secured the attendance of the judge of another district within five days from the date of the filing of such affidavit of prejudice, and the proceedings against the defendant were then resumed by the nonresident judge. *Held*, that he had jurisdiction to try the defendant for the offense charged.

Resident judge — affidavit of prejudice — courts — holding session in another county — jurisdiction — validity of proceedings.

5. On the filing of an affidavit of prejudice against the resident judge of the district, he immediately secured the attendance of the judge of another district, who presided at the trial of the defendant, charged with the commission of a criminal offense. The term during which the affidavit was filed, and at which the trial took place, commenced in accordance with statute on the first Tuesday in February, 1913, and court continued in session until the 21st day of February, 1913. While the defendant was being tried, the resident judge conducted a trial in another county of the same district, pursuant to an adjournment of the regular term of such district, which commenced as fixed by law on the first Tuesday in January, 1913. Without passing upon

the validity of proceedings in the latter district, it is *held* that the first named court had jurisdiction to try the defendant, notwithstanding the absence of the resident judge of the district, and his being engaged in the trial of an action in another county in the same district.

Verdict — sentence — timely — adjournment of court — presumption — absence of objection or showing.

6. Sentence was pronounced upon the defendant in a criminal action the next day after the return of a verdict of guilty. *Held*, that, in the absence of any showing in the record on appeal that the judge did not intend to or did not adjourn court within two days, and no objection based on the judgment being prematurely pronounced, having been made in the trial court, on appeal it will be presumed in support of such judgment, that the judge intended to or did adjourn court, before the second day after the return of the verdict.

Opinion filed November 20, 1913.

Appeal from a judgment of the District Court of Sargent County, *Hon. Charles M. Cooley,* Special Judge.

Affirmed.

J. A. Dwyer, for appellant.

The complaint and the information charge two distinct, separate offenses, and the motion to set aside the information should have been granted. State v. Winbauer, 21 N. D. 161, 129 N. W. 97.

No order of the magistrate as to his finding upon the examination is indorsed on the complaint, or entered in his docket. One or the other is essential. State v. Rozum, 8 N. D. 556, 80 N. W. 477; State v. O'Neal, 19 N. D. 426, 124 N. W. 68.

Court for a given district composed of a number of counties cannot be held in two or more of such counties at the same time. Tippy v. State, 35 Neb. 368, 53 N. W. 208; Dunn v. State, 2 Ark. 229, 35 Am. Dec. 54; Re Millington, 24 Kan. 214; Garlick v. Dunn, 42 Ala. 404; Freeman, Judgm. § 121; Bates v. Gage, 40 Cal. 183; Smurr v. State, 105 Ind. 125, 4 N. E. 445, 7 Am. Crim. Rep. 545; Grable v. State, 2 G. Greene, 559; State v. Stevens, 67 Iowa, 557, 25 N. W. 777, 6 Am. Crim. Rep. 88; 11 Cyc. 735; Courts, 13 Century Dig. 243.

Andrew Miller, Attorney General, *Alfred Zuger,* and *John Carmody,* Assistant Attorneys General, for respondent.

This case was tried during the general term of court for Sargent county, and Judge Cooley, the now resident judge, who was called in

to try the case, had jurisdiction, even though Judge Allen, the judge of said court, was then holding court in another county in said district. Rev. Codes 1905, §§ 6765, 9929; State v. Stevens, 67 Iowa, 557, 25 N. W. 777, 6 Am. Crim. Rep. 88; Harris v. Gest, 4 Ohio St. 469.

SPALDING, Ch. J. An information against the appellant was filed in the district court of Sargent county on the 7th day of September, 1911, subscribed and sworn to by the state's attorney of that county, charging that appellant on the 27th day of June, in 1911, and continuously from day to day, from the 1st day of January, 1911, to the commencement of this action, . . . did commit the crime of keeping and maintaining a common nuisance, etc. On or about September 7, 1911, in the district court of such county, she entered a plea of not guilty. The case was continued from term to term until the February, 1913, term of that court, when, on the first day of the term, it was called and set for trial. No other information was ever filed against her. When the case was reached, she appeared specially by attorney and was permitted to withdraw her plea of not guilty, and, on February 10, 1913, she filed a motion to quash the information, upon the grounds, (1) that she never had nor waived a preliminary examination upon the charge contained in the information; (2) that she had never been adjudged or required or bound to appear at that court, to answer any charge whatever; (3) that the district court of Sargent county had never acquired nor had jurisdiction of the person of the defendant from the lower court, and that she never was committed to the jurisdiction or custody of the district court by the committing magistrate who pretended to hear her case; (4) that the information did not state facts sufficient to charge defendant with any public offense; (5) that said information was not made, drawn, and presented in substantial compliance to the statutes of the state relating thereto, and in particular, because it shows on its face that it never was presented to the court in open court, as is required by law. In support of this motion, her counsel asked the court to take judicial notice of all its records and files in said cause, including the return of the justice of the peace in a cause similarly entitled. The records of the magistrate to which reference was made show a criminal complaint made against her by the state's attorney, charging her with having maintained a common nuisance in said county since the 1st day of January,

1911, and previous to the 27th day of June, 1911, in that, at sundry and divers times between those dates, she sold, bartered, and gave away intoxicating liquors, etc. In construing the law relating to this case, for reasons which will appear later, it is not necessary to notice the record relating to the proceedings on that complaint in the magistrate's court, or the reference to its being filed with the return in the district court. The motion to quash was denied, and an exception taken to the order denying it. On February 13, 1913, the defendant presented and filed her affidavit of prejudice, as provided by § 9929, Rev. Codes 1909, and amendments thereto, and requested the judge to arrange and procure some other judge to preside at the trial in his place, and in pursuance of such affidavit, Hon. Charles M. Cooley, judge of the first judicial district, upon the written request of Hon. Frank P. Allen, judge of the fourth judicial district, in which Sargent county is located, was secured and the trial set for February 18, 1913. On that day, Judge Cooley being present and presiding, and it being a day of the regular February, 1913, term of the district court for Sargent county, which term is fixed by law to commence on the first Tuesday of February, the case was called for trial, whereupon defendant filed objections to the trial, or the taking of any proceedings whatever in said action at that time and place before Judge Cooley, for the following reasons: (1) That there is no session of said district court of said Sargent county now being held there; (2) that Hon. Charles M. Cooley is not the judge of said district court, and is not sitting or acting as the judge of said district court in any manner or upon any cause authorized by law; (3) that the Hon. Frank P. Allen is the sole judge of that court and district, and that he is now sitting as a judge of said district court at Wahpeton, in the county of Richland, holding a regular term of said court in Richland county, namely, the January, 1913, term, and is actually engaged in the trial of an action at law, with a jury; (4) that the trial at such time and place and before Judge Cooley would be a denial of the rights of the defendant guaranteed by the Constitution, and contrary to the provisions of § 1, article 14, of the Amendments of the Constitution of the United States; and in support thereof, she showed that the regular January, 1913, term of the district court for Richland county, commenced on the 7th day of January, 1913, and, about the 31st day of January, 1913, was adjourned to the 18th day of February, 1913;

that a petit jury was in attendance upon that court, and upon such adjournment the jurors were ordered to appear for service on the 18th day of February, 1913, at 9:30 o'clock in the forenoon; that they are now in attendance upon said court, and said court is actually engaged in the active discharge of its duties or functions at this time. The court was requested to take judicial notice of the fact that Richland county was within, and a part of, the fourth judicial district. This objection was overruled and an exception taken, whereupon the defendant demurred to the information on the ground that the court had no jurisdiction of the offense charged, and, in brief, because the record from the justice court, which pretended to hold a preliminary examination, shows on its face no such examination was held according to law; that no judgment was rendered by the justice committing the defendant to the jurisdiction of the district court; that the proceedings before the justice were irregular, as shown by the files and records transmitted to the district court, in a cause similarly entitled; that the information does not comply in form to the requirements of the Code, and more than one offense is charged therein; that it contains matter which would constitute a legal bar to the prosecution of this action; that the information is neither found, made, filed, or verified according to law. The demurrer was overruled. Defendant was placed on trial, and tried on the 18th, 19th, and 20th days of February, 1913. On the latter date, the jury returned a verdict of guilty as charged in the information. Thereafter a motion was made in arrest of judgment, on the same grounds covered by the demurrer, and, on the 21st of February, 1913, the court entered its order denying such motion and allowed an exception, and on the same day defendant was sentenced to imprisonment in the county jail of Sargent county for the term of ninety days, to pay a fine and costs, in all amounting to $306.90, and judgment entered, to which an exception was allowed. From such judgment an appeal was taken to this court.

We shall consider the six errors alleged and argued separately.

1. The complaint filed with the magistrate and the information filed in district court alleged two different offenses. State v. Winbauer, 21 N. D. 161, 129 N. W. 97.

2. The information on which the appellant was tried was filed during a regular term of the district court of Sargent county, the county in

which it was charged the offense was committed, and it charged the commission of an offense continuously from the 1st day of January to the commencement of the criminal action, hence it conformed to the requirements of § 9791, Rev. Codes 1905, which in effect provides that, when a crime or public offense is committed or triable, it shall not be necessary for the defendant to have had a preliminary examination, hence, appellant's objection to the information on the ground that there had been no preliminary examination is not well taken. It is argued that the facts are on "all fours" with the Winbauer case, supra. In this, appellant is mistaken. In that case, the information did not charge the continuance of the offense during the continuance of a term of the court. That offense was charged as having continued to and including the 2d day of May, 1910, while the term of court did not commence until May 3d, 1910. This appeal is from the judgment, and none of the evidence is before this court.

3. There is no merit in the contention that the information charges two separate and distinct offenses. It charges the offense to have continued from day to day, from the 1st day of January, 1911, to the commencement of this action. The 27th day of June, 1911, is a day included within the charge of the continuing offense, and its being stated neither adds to nor detracts from the charging part of the information, and is simply surplusage.

4. The objection that the judge of the first judicial district was without power to sit in the trial of said action in Sargent county in the fourth judicial district is devoid of merit. The defendant had filed an affidavit of prejudice, and demanded that the judge of the fourth district secure the attendance of the judge of some other district to preside at the trial. This the judge of the fourth district did speedily, a delay of only five days intervening between the filing of the affidavit and the resumption of proceedings before Hon. Charles M. Cooley, judge of the first district, and the proceedings were in accordance with the statute governing the same.

5. It is objected that the court was without jurisdiction and the proceedings void, because two courts were sitting in the fourth judicial district at the same time, that is, that while Judge Cooley was trying this case, Judge Allen, the duly elected judge of the fourth district, was also holding court and trying an action in Richland county, and it is con-

tended that there cannot be two district courts in session at the same time in the same district. It is not necessary to pass upon this question. It is sufficient to say that Judge Cooley had been called in regularly to preside on the trial of this action; that this was a regular unadjourned term of the district court for Sargent county, which commenced, in accordance with the law, on the first Tuesday in February, 1913, and appears to have been continuously in session from that time until the conclusion of the trial of the case at bar. It also appears that the term of the Richland county court was fixed for the first Tuesday in January, 1913, a date prior to the time fixed by law for the commencement of the Sargent county term, and a date prior to the commencement in fact of the Sargent county term. Hence, if there was any irregularity or any want of jurisdiction, they existed with reference to the proceedings in the Richland county court after the commencement and during the continuance of the sessions of the Sargent county court. Judge Cooley was the judge of the fourth judicial district for Sargent county as to the trial of this case, as fully as though he had been elected and had qualified as judge of that district, and he had authority in law for holding the Sargent county court at the time when this trial was held. The date of that term of court was fixed by the statute, and if any term ended by any act of Judge Allen, it was the term of the district court for Richland county, when the term for Sargent county commenced as required by law. This proposition is perfectly plain. We are not intimating that the court held by Judge Allen in Richland county during the sitting of Judge Cooley in Sargent county was irregular, or the proceedings therein without jurisdiction and void. Those questions are not before us, the only question being whether the proceedings before Judge Cooley in Sargent county were void.

6. The only remaining question to determine is whether the judgment is rendered void by the fact that sentence was passed upon the defendant less than two days after the verdict was returned. Section 10,088, Rev. Codes 1905, as amended by chapter 88, Laws of 1907, relating to the time for pronouncing judgment, provides: "The time appointed must be at least two days after the verdict, if the court intends to remain in session so long, or, if not, at as remote a time as can reasonably be allowed." The verdict in this case was returned on the 20th day of February, 1913; sentence was pronounced on the 21st day

of February, 1913. District courts are courts of record and have general jurisdiction, and on appeal all reasonable presumptions must be indulged in support of their judgments. Carr, S. & Co. v. Spaulding, 2 N. D. 414, 51 N. W. 867; Gould v. Duluth & D. Elevator Co. 3 N. D. 104, 54 N. W. 316; Gress v. Evans, 1 Dak. 387, 46 N. W. 1132; State v. Gerhart, 13 N. D. 663, 102 N. W. 880; State v. Scholfield, 13 N. D. 664, 102 N. W. 878. It must therefore be presumed in the absence of any showing, that, at the time sentence was pronounced on the defendant, the court did not intend to remain in session two days, and that, for this reason, it was pronounced on the day following the return of the verdict. If it did remain in session, or intended to remain in session, two days after the rendition of the verdict, it was incumbent on the appellant to show that fact on appeal. She did not do so. No objection was taken covering the time of pronouncing sentence, and the attention of the trial court was not called to the question here urged. Finding no prejudicial error in the record, the judgment of the District Court is affirmed.

C. D. MACLAREN, as Trustee for the Benefit of Creditors of Wellington I. Ginther, v. D. A. KRAMAR, Sheriff of McHenry County, North Dakota.

(— L.R.A.(N.S.) —, 144 N. W. 85.)

General assignment — benefit of creditors — proceeds of estate — distribution — provisions in deed — coercion of creditors — void — exemptions — surplus of estate.

1. A purported general assignment for the benefit of creditors, which contains a provision directing the assignee or trustee, after converting the property into cash, "to distribute the proceeds of said property ratably among the creditors of the party of the first part as shall consent to this trust agreement, *and shall agree in consideration of the benefits accruing to them thereunder, to absolve and discharge the party of the first part from any and all liability*," construed, and *held* void upon its face as an unlawful attempt by the debtor to coerce his creditors to surrender a portion of their just claims as a condition to receiving their just share of the estate, and tends directly to delay and hinder them in the collection of their claims.

Such purported assignment is also held to be void for the reason that it does not purport on its face to transfer all of the debtor's unexempt property and provides for the payment to the debtor of any surplus which may remain in the trustee's hands after satisfying the claims of the assenting creditors, thus operating to put such surplus beyond the reach of nonassenting creditors, and to hinder and delay them in the collection of their demand.

Judgment and execution — justification under — new matter — defense — must be pleaded.

2. The defense of justification under judgment and execution constitutes new matter, and must be pleaded in the answer in order to avail defendant as a defense.

Testimony — objection to same — timely made — exceptions — pleading — amendment to conform to proof — not timely made — amended answer after trial, not timely made.

3. Where testimony tending to show such justification under an answer amounting merely to a general denial is promptly objected to when offered and exceptions preserved, the pleadings cannot, after the trial, be amended to conform to the proof introduced under such objection; nor, does the allowance thereafter of the service and filing of an amended answer, pleading such justification, operate to avail defendant where no proof is thereafter offered in support of such amended answer.

Opinion filed October 7, 1913. Rehearing denied November 21, 1913.

Appeal from District Court, McHenry County; *A. G. Burr,* J. From a judgment in defendant's favor, plaintiff appeals.

Reversed and a new trial ordered.

Pierce, Tenneson, & Cupler, for appellant.

The deed of assignment is valid. In the absence of fraud, every contract of a debtor is valid against his creditors who have not a lien on the property affected. Rev. Codes 1905, § 6634.

A debtor may prefer one creditor to another. Rev. Codes 1905 § 6635.

The question as to whether a transfer is fraudulent is, in this state, one of fact, and not one of law. Rev. Codes 1905, § 6640.

Voluntary general assignments by failing debtors, unless prohibited by statute, are valid. 3 Pom. Eq. Jur. 3d ed. § 994, and note; 4 Cyc. 129, 163; 3 Am. & Eng. Enc. Law, 2d ed. 5.

Right to prefer creditors by paying the claims of some of them to the exclusion of others is a necessary result of the absolute dominion

and *jus disponendi* which a man has over his own property. 5 Enc. Law & Pr. 1157; Joas v. Jordan, 21 S. D. 379, 113 N. W. 73; McAvoy v. Jennings, 39 Wash. 109, 81 Pac. 77.

As against the assignee, in whom the title to the debtor's property had vested, a creditor cannot acquire title by subsequent execution sale of property as the property of the assignor. Thaxton v. Smith, — Tex. Civ. App. —, 38 S. W. 820, 90 Tex. 589, 40 S. W. 14; Taylor v. Mahoney, 94 Va. 508, 27 S. E. 107.

A trust assignment is not fraudulent on its face because of the length of time granted for its execution. Graham v. Weaver, 97 Tenn. 485, 37 S. W. 221.

Assignment providing for employment of the debtor at a stated salary is not void *per se*. Smith v. Craft, 123 U. S. 436, 31 L. ed. 267, 8 Sup. Ct. Rep. 196; Bamberger v. Schoolfield, 160 U. S. 149, 40 L. ed. 374, 16 Sup. Ct. Rep. 225; Hoppe Hardware Co. v. Bain, 21 Okla. 177, 17 L.R.A.(N.S.) 310, 95 Pac. 765; Hurst v. Leckie, 97 Va. 550, 75 Am. St. Rep. 798, 34 S. E. 464; Red River Valley Nat. Bank v. Barnes, 8 N. D. 432, 79 N. W. 880; F. Meyer Boot & Shoe Co. v. C. Shenkberg Co. 11 S. D. 620, 80 N. W. 126; 5 Enc. L. & P. 1509.

Does not require notice to creditors before sale. McAvoy v. Jennings, 44 Wash. 79, 87 Pac. 53; Peterson v. Doak, 43 Wash. 251, 86 Pac. 663.

Preference is the rule in this jurisdiction. Cutter v. Pollock, 4 N. D. 210, 25 L.R.A. 377, 50 Am. St. Rep. 644, 59 N. W. 1062.

The answer of the defendant is not sufficient to raise the defense of justification, or that the assignment was fraudulent and void. 20 Enc. Pl. & Pr. 151–153; 35 Cyc. 1747–1818.

The writ must identify the court which rendered the judgment; a defect in this respect is substantive and material. 8 Enc. Pl. & Pr. 406; Trotter v. Nelson, 1 Swan, 7.

It was not necessary to serve notice of his claim on the sheriff. The sheriff already had notice. Aber v. Twichell, 17 N. D. 229, 116 N. W. 95; Mariner v. Wasser, 17 N. D. 361, 138 Am. St. Rep. 714, 117 N. W. 343; Probstfield v. Hunt, 17 N. D. 572, 118 N. W. 226.

The issues cannot be changed or new ones introduced by amendment, after cause has been tried and submitted. 31 Cyc. 402, 403, note, 18.

Christianson & Weber, for respondent.

Specifications of error not argued or presented by briefs will be deemed as abandoned. Rule 14, Supreme Court Rules; Pendroy v. Great Northern R. Co. 17 N. D. 434, 117 N. W. 531; Nokken v. Avery Mfg. Co. 11 N. D. 404, 92 N. W. 487; Foster County Implement Co. v. Smith, 17 N. D. 178, 115 N. W. 663; Ulmer v. McDonnell, 11 N. D. 399, 92 N. W. 482; Kelly v. Pierce, 16 N. D. 235, 12 L.R.A.(N.S.) 180, 112 N. W. 995.

The particular wherein a ruling or decision is claimed as error must be pointed out and the reason given. 2 Cyc. 1016.

Where defendant takes property wrongfully and by trespass, the plaintiff, if he chooses to bring this form of action, waives the trespass and admits the possession to have been lawfully gotten. Lord Mansfield in Cooper v. Chitty, 1 Burr. 20, 1 W. Bl. 65.

On the other hand, replevin and detinue were the proper forms of action to regain possession of personal property, and damages. 34 Cyc. 1353.

Here, claim and delivery takes the place of the common-law action of replevin. Willis v. DeWitt, 3 S. D. 281, 52 N. W. 1090.

The complaint in this action puts in issue the two main propositions in claim and delivery,—ownership and possession; and the answer was sufficient. Swope v. Paul, 4 Ind. App. 463, 31 N. E. 42; Haynes v. Kettenbach Co. 11 Idaho, 73, 81 Pac. 114; Nichols & S. Co. v. Minnesota Thresher Co. 70 Minn. 528, 73 N. W. 415; Plano Mfg. Co. v. Daley, 6 N. D. 334, 70 N. W. 277; Bailey v. Swain, 45 Ohio St. 657, 16 N. E. 370; Conner v. Knott, 8 S. D. 304, 66 N. W. 461; Best v. Stewart, 48 Neb. 859, 67 N. W. 881; Pitts Agricultural Works v. Young, 6 S. D. 557, 62 N. W. 432.

Plaintiff must recover on strength of his own title, and not on weakness of that of the defendant. 38 Cyc. 2048.

Courts here may allow amendment to pleading even after judgment. Rev. Codes 1905, § 6883; Mills v. Howland, 2 N. D. 30, 49 N. W. 413.

Amendments are favored by the courts. Anderson v. First Nat. Bank, 5 N. D. 80, 64 N. W. 114; Moore v. Booker, 4 N. D. 543, 62 N. W. 607; Finnegan v. Ulmer, 31 Nev. 523, 104 Pac. 17.

The matter of allowing or refusing an amendment to the pleadings

rests in the sound discretion of the court. Omlie v. O'Toole, 16 N. D. 126, 112 N. W. 677; Barker v. More, 18 N. D. 82, 118 N. W. 823; Webb v. Wegley, 19 N. D. 606, 125 N. W. 562; State Finance Co. v. Halstenson, 17 N. D. 145, 114 N. W. 724; Babcock v. Ormsby, 18 S. D. 358, 100 N. W. 759; First Nat. Bank v. Red River Valley Nat. Bank, 9 N. D. 322, 83 N. W. 221; Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; 1 Enc. Pl. & Pr. 518; Murphy v. Plankinton Bank, 18 S. D. 317, 100 N. W. 614; Warder v. Patterson, 6 Dak. 83, 50 N. W. 484; Rev. Codes, §§ 6766, 7326.

Even if an order of the court is irregular, it is binding until vacated. Warder v. Patterson, supra; Rowe v. Blake, 112 Cal. 637, 44 Pac. 1084; 29 Cyc. 1521, 1522; Mahon v. Fansett, 17 N. D. 104, 115 N. W. 79; McLain v. Nurnberg, 16 N. D. 144, 112 N. W. 243.

Acquiescence in error takes away the right of objecting to it. Rev. Codes 1905, § 6663; Pyke v. Jamestown, 15 N. D. 163, 107 N. W. 359; Rev. Codes, § 7317, subd. 32; Clyde v. Johnson, 4 N. D. 92, 58 N. W. 512; Moore v. Ellis, 89 Wis. 108, 61 N. W. 291; Marengo Sav. Bank v. Kent, 135 Iowa, 386, 112 N. W. 767.

The complaint is insufficient in that it fails to set out facts showing the manner and validity of plaintiff's appointment as receiver. Wheeler v. Hawkins, 101 Ind. 486; Foster v. Brown, 65 Ind. 234; Cheadle v. Guittar, 68 Iowa, 680, 28 N. W. 14; Rev. Codes, § 6858.

Verified demand for goods should have been served upon defendant. West v. St. John, 63 Iowa, 287, 19 N. W. 238; Rev. Codes 1905, § 6951; Mariner v. Wasser, 17 N. D. 361, 138 Am. St. Rep. 714, 117 N. W. 343; Cheadle v. Guittar, 68 Iowa, 680, 28 N. W. 14.

Trust deeds under general assignments, excluding creditors who do not assent to terms, are void. Also, where it is provided that the surplus, after settling with assenting creditors, should be paid to debtor. Grimshaw v. Walker, 12 Ala. 101; Lill v. Brant, 6 Ill. App. 366; Bangs v. Fadden, 5 N. D. 94, 64 N. W. 78; May v. Walker, 35 Minn. 194, 28 N. W. 252; McConnell v. Rakness, 41 Minn. 3, 42 N. W. 539; Rev. Codes, § 6637; Re Courtenay Mercantile Co. 186 Fed. 352; Lookout Bank v. Noe, 86 Tenn. 21, 5 S. W. 433; Sweet, D. & Co. v. Neff, 102 Wis. 482, 78 N. W. 745; Session Laws 1907, chap. 221.

Sales of property in violation of the law are invalid. Young v. Lemieux, 79 Conn. 434, 20 L.R.A.(N.S.) 160, 129 Am. St. Rep.

193, 65 Atl. 436, 600, 8 Ann. Cas. 452, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; Spurr v. Travis, 145 Mich. 721, 116 Am. St. Rep. 330, 108 N. W. 1090, 9 Ann. Cas. 250; Pierson & H. Co. v. Noret, 154 Mich. 267, 117 N. W. 644; Hanna v. Hurley, 162 Mich. 601, 127 N. W. 710; People's Sav. Bank v. Van Allsburg, 165 Mich. 524, 131 N. W. 101; Interstate Shirt & Collar Co. v. Windham, 165 Mich. 648, 131 N. W. 102.

The identity of the court and of the judgment is amply sufficient. 17 Cyc. (XII. A 1) 1001; Ross v. Shurtleff, 55 Vt. 177; Wright v. Nostrand, 94 N. Y. 31.

An officer is justified in executing any order or process, regular on its face, and coming from proper authority. Rev. Codes 1905, § 2512.

It has been held that a valid execution may issue, even though judgment has not been entered. Hastings v. Cunningham, 39 Cal. 137; Los Angeles County Bank v. Raynor, 61 Cal. 145; Drake v. Harrison, 69 Wis. 99, 2 Am. St. Rep. 717, 33 N. W. 81; Weigley v. Matson, 125 Ill. 64, 8 Am. St. Rep. 335, 16 N. E. 881; Fontaine v. Husdon, 93 Mo. 62, 3 Am. St. Rep. 515, 5 S. W. 692; Lowenstein v. Caruth, 59 Ark. 588, 28 S. W. 421.

No exceptions to the findings were taken, nor was request made for different findings, and there is nothing here, properly, for review. Washtenaw County v. Rabbitt, 99 Mich. 60, 57 N. W. 1084; Saukville v. Grafton, 68 Wis. 192, 31 N. W. 719; Ironton Cross Tie Co. v. Evans, 146 Mich. 197, 109 N. W. 254; Richardson v. Dunne, 3 Cal. Unrep. 728, 31 Pac. 737; Merriman v. McCormick Harvesting Mach. Co. 101 Wis. 619, 77 N. W. 880; Van Cise v. Merchants' Nat. Bank, 4 Dak. 485, 33 N. W. 897; Carstens v. Leidigh & H. Lumber Co. 18 Wash. 450, 39 L.R.A. 548, 63 Am. St. Rep. 906, 51 Pac. 1051; Weist v. Morlock, 116 Mich. 606, 74 N. W. 1012; Simmons Hardware Co. v. Rose, 140 Mich. 123, 103 N. W. 529; State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co. 144 Wis. 386, 140 Am. St. Rep. 1025, 129 N. W. 623.

The waiver of a jury, in a case properly one for a jury, merely substitutes the court for the jury; the case still remains a jury case. First Nat. Bank v. Merchants' Nat. Bank, 5 N. D. 161, 64 N. W. 941; American Case & Register Co. v. Boyd, 22 N. D. 166, 133 N. W. 65; Ness v. Jones, 10 N. D. 587, 88 Am. St. Rep. 755, 88 N. W. 706;

McNab v. Northern P. R. Co. 12 N. D. 568, 98 N. W. 353; Landis Mach. Co. v. Konantz Saddlery Co. 17 N. D. 310, 116 N. W. 333; F. A. Patrick & Co. v. Nurnberg, 21 N. D. 377, 131 N. W. 254.

The findings will not be disturbed when supported by substantial evidence. State ex rel. McDonald v. Farrington, 86 Neb. 653, 126 N. W. 91; Manatee County State Bank v. Wade, 56 Fla. 492, 47 So. 927; Gill v. Haynes, 28 Okla. 656, 115 Pac. 790; State ex rel. Cook v. Langan, 32 Nev. 176, 105 Pac. 568; McNally v. Keplinger, 37 Kan. 556, 15 Pac. 534; Moses v. White, 6 Kan. App. 558, 51 Pac. 622; Alder Gulch Consol. Min. Co. v. Hayes, 6 Mont. 31, 9 Pac. 581; Putnam v. Putnam, 2 Ariz. 259, 14 Pac. 356; Turner v. Franklin, 10 Ariz. 188, 85 Pac. 1070; State v. Sadler, 21 Nev. 13, 23 Pac. 799; Rankin v. Newman, 107 Cal. 602, 40 Pac. 1024, 41 Pac. 304; Subera v. Jones, 20 S. D. 628, 108 N. W. 27; Griffith v. McPherrin, — Ark. —, 22 S. W. 29; Taylor v. Van Meter, 53 Ark. 204, 13 S. W. 699.

Error in the admission or rejection of evidence will be deemed waived unless proper objections and exceptions are made and a new trial requested. Pioneer Sav. & L. Co. v. Eyer, 62 Neb. 810, 87 N. W. 1058; Johnson v. Ghost, 11 Neb. 414, 8 N. W. 391; Alexander v. Humber, 86 Ky. 565, 6 S. W. 453; Territory v. Anderson, 4 N. M. 213, 13 Pac. 21; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Hartwell Bros. v. William E. Peck & Co. 163 Ind. 357, 71 N. E. 958; Glaser v. Glaser, 13 Okla. 389, 74 Pac. 944; Mobile v. Murphree, 96 Ala. 141, 11 So. 201.

Not all the evidence offered and received is before the court. The only question, therefore, is whether or not the judgment is sustained by the findings. Eakin v. Campbell, 10 N. D. 416, 87 N. W. 991; Collins v. Breen, 75 Wis. 606, 44 N. W. 769.

The omission from the record of documentary evidence is sufficient ground for the summary affirmance of the judgment. Kipp v. Angell, 10 N. D. 199, 86 N. W. 706; Littel v. Phinney, 10 N. D. 351, 87 N. W. 593; United States Sav. & L. Co. v. McLeod, 10 N. D. 111, 86 N. W. 110.

Whether a sale is valid or not is a question of fact for the jury (court in this case). McLaughlin v. Lange, 42 Mich. 81, 3 N. W. 267; Rosenbaum v. Hayes, 8 N. D. 461, 79 N. W. 987.

The provision in the deed for the payment of salary to the debtor or

assignor renders it void. Stephens v. Regenstein, 89 Ala. 561, 18 Am. St. Rep. 156, 8 So. 68; Robinson v. McKenna, 21 R. I. 117, 79 Am. St. Rep. 793, 42 Atl. 510; Hoppe Hardware Co. v. Bain, 21 Okla. 177, 95 Pac. 765; Means v. Dowd, 128 U. S. 273, 32 L. ed. 429, 9 Sup. Ct. Rep. 65; Lukins v. Aird, 6 Wall. 78, 18 L. ed. 750; Newell v. Wagness, 1 N. D. 62, 44 N. W. 1014.

The burden of proof was upon the plaintiff and remained with him during the trial. Rice v. Knostman, 45 Wash. 282, 88 Pac. 194; Berman v. Kling, 81 Conn. 403, 71 Atl. 507; H. C. Jaquith Co. v. Shumway, 80 Vt. 556, 69 Atl. 157; Dennis Bros. v. Strunk, 32 Ky. L. Rep. 1230, 108 S. W. 957.

Plaintiff must recover wholly on the strength of his own title. Van Zandt v. Shuyler, 2 Kan. App. 118, 43 Pac. 295; Moore v. Walker, 124 Ala. 199, 26 So. 984; Zunkle v. Cunningham, 10 Neb. 162, 4 N. W. 951; Holmes v. Bailey, 16 Neb. 300, 20 N. W. 304.

If title is fraudulent or void, plaintiff cannot recover. Swope v. Paul, 4 Ind. App. 463, 31 N. E. 42; Herman v. Northern P. R. Co. 43 Wash. 624, 86 Pac. 1068; Van Zandt v. Shuyler, 2 Kan. App. 118, 43 Pac. 295.

Fisk, J. This is an action to recover for the alleged conversion by defendant Kramar, who was sheriff of McHenry county, of certain personal property claimed to belong to plaintiff, and which such sheriff levied upon under an execution issued on a judgment against one Wellington I. Ginther, wherein the First National Bank of Waterloo, Iowa, is the judgment creditor. Pursuant to such levy the defendant took the property into his possession, and subsequently sold the same at public auction to satisfy the amount called for by the execution. The property consisted of a portion of a general stock of merchandise and one new Cary safe located in a store building at Drake, in this state, and formerly owned and conducted by the execution debtor, Ginther. Plaintiff bases his claim to ownership of the property upon a certain so-called trust deed or assignment for the benefit of creditors, executed and delivered by Ginther to the plaintiff, as trustee, some time prior to the levy of such execution by defendant. The complaint is in the usual form, and the answer, as originally interposed, amounts to a general denial.

By stipulation of the parties a jury was waived and the cause tried

to the court, resulting in findings of fact and conclusions of law in defendant's favor, pursuant to which judgment was ordered and entered, dismissing the action, with costs. The appeal is from such judgment.

Appellant's brief contains a large number of assignments of error based upon alleged erroneous rulings in the admission and exclusion of testimony, also in permitting defendant to file an amended answer after the trial, and in making certain findings of fact; but in the body of the brief counsel present and argue but two propositions. First, they contend that the assignment or trust deed is valid, and cannot be attacked or avoided by a nonassenting creditor; and, second, that in any event it is necessary for the defendant to place himself in the position of a nonassenting creditor before he can question the validity of the trust deed, and that he failed so to do by not properly pleading justification. It is argued that in not having pleaded justification under the judgment and execution, permitting the introduction of the judgment roll, transcript, and docket entries constituted reversible error, and that this was not cured by thereafter permitting an amended answer to be filed, wherein such justification is pleaded.

We shall accordingly confine ourselves to the points thus argued in the brief, treating as abandoned all assignments not thus argued, in accordance with the well-settled practice of this court. The case being one properly triable to a jury, the findings of fact have the force of the verdict of a jury, and no motion for a new trial having been made, the sufficiency of the evidence to support the findings is not in question. The cause is here on appeal, therefore, for the review only of alleged errors of law occurring at the trial (Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276), and, as before stated, only those alleged errors will be noticed which are argued in the brief.

This brings us to appellant's first contention. The so-called trust deed, and which appellant contends is valid and operated to transfer title to the plaintiff, is as follows:

This agreement, made and entered into in duplicate this 13th day of August, 1909, by and between Wellington I. Ginther, of Drake, North Dakota, party of the first part, and C. D. MacLaren, of St. Paul, Minnesota, party of the second part, Witnesseth:

Whereas, The party of the first part is indebted to sundry and divers persons in large amounts, and is unable to pay and discharge said

indebtedness as the same becomes due, and desires to place his property in the hands of the party of the second part, to be realized upon in the best manner possible and the proceeds therefrom distributed ratable among his creditors.

Now, Therefore, In consideration of the premises and the sum of one dollar to him in hand paid, the party of the first part does hereby grant, convey, assign, transfer, and deliver unto the party of the second part, as trustee, all of that stock of hardware, tinware, leather and other findings, harness, tinner's tools, machinery, and other personal property belonging to him and contained in and about that certain store building located in the village of Drake, North Dakota, and situated upon the south half of lot 11, and all of lot 12, in Block 2, of the village of Drake, in the county of McHenry, and state of North Dakota, including book accounts and books of account, bills receivable, choses in action. Also to convey by proper deed of conveyance all his interest in the above-described lots and the building situated thereon, to have and to hold the same and all thereof, as trustee for the use and purpose following: To convert said personal property into cash in such manner as in his judgment will be for the best interest of all parties concerned, and for that purpose party of the second part is hereby authorized to continue the business of the party of the first part at said village of Drake, so long as it shall seem profitable so to do, and for that purpose may use proceeds from sales and collections to buy new goods to replenish the stock, and out of the proceeds of the sales of the property and collection of accounts to pay, first, the reasonable charges and expenses for creating and administering the trust hereby created. Second, to pay in full the debts and liabilities of the party of the first part, if sufficient shall be realized from the property so to do, and, if not, to distribute the proceeds of said property ratably among the creditors of the party of the first part as shall consent to this trust agreement, and shall agree, in consideration of the benefits accruing to them thereunder, to absolve and discharge the party of the first part from any and all liability. Third, if there should be any residue of the property after making the disbursements and payments aforesaid, to repay or return to the party of the first part all property then remaining in the hands of the party of the second part.

The party of the first part in consideration of the premises and the

benefits to be derived under this trust agreement further agrees to and with the party of the second part, that as soon and whenever the order of the district court of Ransom county, North Dakota, dated August 5th, 1909, entered in the action of Ginther v. Ginther, restraining the party of the first part from disposing of his real property, shall be vacated, the party of the first part will, by proper conveyance, convey to the party of second part all his right, title, and interest in and to the real estate now owned by him, or in which he has any interest, except the family homestead.

In witness whereof, the parties have hereunto set their hands the day and year first above written.

Wellington I. Ginther,
C. D. MacLaren.

It will be noticed that such alleged assignment or trust deed does not purport on its face to transfer to the trustee all of the property owned by the said Ginther, but merely "all of that stock of hardware, tinware, leather and other findings, harness, tinner's tools, machinery, and other personal property belonging to him and contained in and about that certain store building located in the village of Drake, and situated upon the south half of lot 11, and all of lot 12, in block 2, in the village of Drake, . . . including accounts and books of account, bills receivable, choses in action." And the said Ginther therein agrees to convey by proper deed of conveyance all his interest in the above-described lots and the building situated thereon. The trustee is therein authorized to convert said property into cash "in such manner as in his judgment will be for the best interest of all parties concerned, and for that purpose the party of the second part is hereby authorized to continue the business of the party of the first part . . . so long as it shall seem profitable so to do, and for that purpose may use proceeds from sales and collections to buy new goods to replenish the stock, and out of the proceeds of the sales of the property and collection of accounts to pay, first, the reasonable charges and expenses for creating and administering the trust hereby created. Second, to pay in full the debts and liabilities of the party of the first part, if sufficient shall be realized from the property so to do, and, if not, to distribute the proceeds of said property ratably among the creditors of the party of the first part

as shall consent to this trust agreement, *and shall agree, in consideration of the benefits accruing to them thereunder, to absolve and discharge the party of the first part from any and all liability.* Third, if there should be any residue of the property after making the disbursements and payments aforesaid, to repay or return to the party of the first part all property then remaining in the hands of the party of the second part."

Counsel for appellant contend that these various conditions or stipulations in the trust deed do not affect its validity as a general assignment for the benefit of creditors, citing and relying upon certain provisions of our Code, and also upon certain cases decided in other states. Their contention is of a dual nature, as we understand their brief. They assert, first, that under the common law, which must control in the absence of any statutory provisions regulating the form and provisions of assignments for the benefit of creditors, the instrument is valid upon its face; and, second, that such instrument is in any event not a general assignment for the benefit of creditors, but a mere security transaction, wherein the debtor exercised his legal right to prefer certain of his creditors, citing and relying upon the case of Joas v. Jordan, 21 S. D. 379, 113 N. W. 73, and McAvoy v. Jennings, 44 Wash. 79, 87 Pac. 53.

After due consideration we find ourselves unable to concur in either of such contentions. By the overwhelming weight of authority such instrument is void upon its face as a general assignment for the benefit of creditors. This court, construing a like instrument, so held in Bangs v. Fadden, 5 N. D. 92, 64 N. W. 78, using the following language: "It is urged that the assignment is void for the reason that it requires all creditors who desire to receive any benefit from the trust to release their claims as a condition of receiving any dividend. If the instrument must be necessarily so construed, then its invalidity cannot be doubted. Both under the settled rule of law and under the express provisions of our Code, such an assignment is void."

See also May v. Walker, 35 Minn. 194, 28 N. W. 252; McConnell v. Rakness, 41 Minn. 3, 42 N. W. 539; Moore v. Bettingen, 116 Minn. 142, 133 N. W. 561, Ann. Cas. 1913A, 816.

Even the cases which uphold trust deeds requiring releases as a condition to participating in the benefits thereof seem to require that such

instrument on its face must purport to transfer all of the debtor's property (except such as is exempt) to the trustee or assignee. May v. Walker, supra. The reasons underlying the common-law rule are clearly and succinctly stated by the Minnesota court in the above case, as follows: "Though there is some conflict of opinion, every consideration of honesty and good sense supports the proposition that an assignment by an insolvent debtor of his property, providing, as in the present case, that the proceeds shall be applied towards the payment of his indebtedness to such of his creditors only as shall release their claims against him, is, in the absence of express statute to the contrary, as by a bankrupt law, or something in the nature of one, fraudulent and invalid; and this, for the reason that it is the duty of an insolvent debtor to apply his property to the payment of his debts, as far as it will go, without conditions, and without coercing his creditors to surrender any part of their just claims against him as the price of receiving their just share of his estate. Bennett v. Ellison, 23 Minn. 242; Grover v. Wakeman, 11 Wend. 188, 25 Am. Dec. 624; Burrill, Assign. § 195. Even where a common-law assignment, with such provisions for release, is tolerated, the rule is that it must be general, and not, as in the case at bar, partial.

"The fraud and gross injustice of permitting an insolvent debtor, without a surrender of all his unexempt property, to coerce his creditors to a compromise, is apparent. In contemplation of law, all his unexempt property belongs to his creditors, . . . and to permit him to put a part of it out of their reach, unless they will submit to his terms and take less than they are entitled to, is to permit him to hinder and delay them in the collection of their demands out of property justly and legally liable for the same, even if a common-law assignment, with such provisions for release, be tolerated at all."

We entertain no doubt that as to nonassenting creditors the instrument is void upon its face, not only upon the ground that it operates to coerce creditors to consent thereto and to release their claims as a condition to participation in the trust fund, or else be delayed and hindered in the collection of their claims, but also for the reason that it does not purport to transfer all of the debtor's property not exempt, and for the additional reason that it provides for the payment of any surplus to the debtor, thus operating to put such surplus beyond the reach of nonassent-

ing creditors, and to hinder and delay them in the collection of their demands.

This question is ably treated and the authorities collated in 5 Enc. Law & Pr., in the article on Assignments for the Benefit of Creditors. We quote from the text at pages 1028 and 1029 as follows:

"There can be no doubt that a person who gives credit to another takes into consideration not only the property which he has at the time, but also the probability of his acquiring property in the future; and it would seem unjust and contrary to public policy to allow a debtor to make an assignment on such terms as to compel a creditor to surrender the right to resort to future acquisitions in case the property of the debtor is insufficient to satisfy the claim in full, and thus acquire a benefit for himself at the expense of his creditors. On this point, however, there is a direct conflict of opinion.

"Many of the courts have taken the view that a debtor cannot thus coerce his creditors into accepting less than the full amount of their claims, and have held that an assignment for the benefit of creditors is rendered fraudulent and void on its face by a stipulation that the debtor shall not be liable to any creditor who assents to the same, for any deficiency that may remain unsatisfied after execution of the trust by a distribution of the assigned property. . . .

"To uphold the validity of such stipulations would, it has been held, enable every insolvent debtor to enact a bankrupt law in his own behalf; to appropriate as surplus the *pro rata* shares of the nonreleasing creditors; to reserve the right and power to prefer favored creditors at a future time, and compel the others to accept any terms offered to them; to dictate terms to his creditors which would make him independent of his legal obligation to devote his unexempted property unreservedly to the payment of his creditors, and enable him practically to reserve a trust for his own benefit; and, finally, would compel the creditors to come in under any scheme of settlement devised by the combined ingenuity of the assignor and the assignee selected by him."

Appellant's contention that the instrument should be construed as a security transaction, and upheld under our Code provisions permitting a debtor to prefer his creditors, seems to have the support of numerous courts, including the South Dakota and Washington courts. In Joas v. Jordan, 21 S. D. 379, 113 N. W. 73, the supreme court of South Da-

kota in passing upon a similar instrument, among other things, said: "We are clearly of the opinion that in the case at bar that the purported deed of trust was in the nature of a security for the benefit of the creditors assenting thereto, and did not constitute a general assignment under the provisions of our Code, and that it was competent, therefore, for the debtor to prefer the creditors who assented to the assignment, and agreed to accept their *pro rata* share of the proceeds of the property assigned, and release the debtor from all further liability, and that the purported trust deed or agreement entered into by the debtor with Jordan as trustee and the creditors accepting the conditions was a complete disposition of his property under the provisions of our Code above quoted, and the construction given to the same in the case of Sandwich Mfg. Co. v. Max, 5 S. D. 125, 24 L.R.A. 524, 58 N. W. 14. While the trust deed may not technically be denominated a mortgage, it constituted in effect a mortgage, and the plaintiff, before he could levy upon the same, was, by the terms of § 2099, Rev. Civ. Codes, required to pay or tender the amount due those several creditors before he could legally levy upon the property. Jewett v. Sundback, 5 S. D. 111, 58 N. W. 20 [citing cases]. The question of the right of a debtor to prefer certain of his creditors is so fully discussed by this court in the case of Sandwich Mfg. Co. v. Max, supra, that a further discussion does not seem to us necessary, as we are clearly of the opinion that the purported trust deed was legal and valid as against the creditors of the debtor. Not assenting to become a party thereto, the plaintiff acquired no rights to said property under and by virtue of the execution issued upon his judgment."

And in McAvoy v. Jennings, 44 Wash. 79, 87 Pac. 53, the Washington court gives similar reasons to those of the South Dakota court for upholding the agreement upon the theory that it was a security transaction, and that the insolvent debtor had a right to prefer one class of creditors to the exclusion of others. With due respect for these courts, we are unable to concur in the conclusion or reasoning adopted in either of such cases. Obviously, it was the intention of the debtor, in executing the instrument in question, not to secure certain of his creditors, but, on the contrary, his intention clearly was to make a general assignment of the property therein described for the benefit of such of his creditors as would consent to release their claims in full.

An instrument, the same in all essential particulars as the one in the case at bar, was construed by Judge Amidon, of the United States district court for this district, in a recent case, Re Courtenay Mercantile Co. 186 Fed. 352, and in disposing of a like contention it was said: "Counsel for the Mercantile Company contends that the restriction above quoted, limiting the creditors who shall receive the benefits of the deed to those who shall become parties to it and release their claims in full, destroys the character of the instrument as a general assignment, and converts it into a mere security for those creditors who shall decide to accept its benefits. I cannot adopt that interpretation. As to the effect of such a restrictive clause upon a deed of assignment for the benefit of creditors, there is great conflict in the authorities. In some jurisdictions, it is held to render the instrument void; in others, it is considered valid. These authorities are collected in the last edition of the American & English Encyclopædia of Law & Practice, vol. 5, at page 1028. In the present proceeding I do not deem it necessary to decide which class of decisions represents the sounder view of the law. In all jurisdictions it is held that the deed is valid as between the parties, and can only be assailed by creditors who do not consent to its provisions and whose rights are thereby prejudiced. As against the assignor, it is uniformly treated as a general assignment. The only exception that I have found is the case of Joas v. Jordan, 21 S. D. 379, 113 N. W. 73. If that decision can be sustained at all, it must receive its support from the local statute.

"On the face of the instrument here involved, it was a disposition of all the property of the assignor for the benefit of his creditors. All the creditors had a right to accept its benefits. The assignor could in no way control this discretion. Their right to do this would continue until the estate had been distributed. The character of the instrument should be judged as of the time of its execution and delivery. Otherwise the whole estate could be converted into cash and administered under the deed, without its being possible to ascertain whether it was an assignment for the benefit of creditors, or a security for a part of the creditors. Such a construction of the instrument would make it possible for any creditor to escape the provisions of the Federal bankruptcy act by the mere phrasing of a general assignment of his property."

The instrument in the case at bar differs from that involved in the

South Dakota case, supra, in that it does not purport to convey to the trustee *all* of the debtor's property. This fact serves to differentiate the cases to some extent. We choose, however, to place our decision of this point squarely upon the reasons above given, believing, as we do, that the authorities in support of such holding are sounder on principle and announce a rule more conducive to justice and a sound public policy.

This brings us to a consideration of appellant's second point, which is that defendant is not in the position of a nonassenting creditor, and therefore cannot question the validity of the trust deed. It is first insisted by counsel that, no justification having been pleaded in the original answer, it was error to admit the introduction of testimony to prove such justification, and, second, that in any event no justification was properly shown. In reply, counsel contend that justification may be shown under a general denial; but in any event, the allowance of the amended answer pleading justification was proper. Also that such justification was properly shown.

That justification under process is new matter which must be specially pleaded in order to avail as a defense is too firmly settled to be now open to question. 35 Cyc. 1816 and cases cited; 20 Enc. Pl. & Pr. 151–154 and cases cited; Pom. Rem. & Rem. Rights, § 704; Jacobs v. Remsen, 12 Abb. Pr. 390; Graham v. Harrower, 18 How. Pr. 144; Banning v. Marleau, 121 Cal. 240, 53 Pac. 692.

Under the issues as framed by the pleadings it was therefore clearly error to receive evidence, over plaintiff's objection, tending to show justification. Whether the evidence offered and received for such purpose was competent, we need not determine, for the same was clearly irrelevant.

Respondent's counsel earnestly contend that, even though it be held that justification must be pleaded in order to be available as a defense, the allowance of the amended answer after the trial in which such justification is alleged renders plaintiff's point in this respect of no avail. In other words, it is contended that by the allowance of such amended answer defendant is in as advantageous a position as he would have been in had he pleaded such new matter in the original answer. We are unable to uphold respondent's contention in this respect. Had the testimony showing justification been introduced without objection, a different situation would arise, but as we understand the settled rule,

while amendments to pleadings to conform to the proof will, in furtherance of justice, be liberally granted, they will never be granted where the admission of evidence was promptly objected to when it was offered, upon the ground that it did not tend to support the allegations in the pleadings. 1 Enc. Pl. & Pr. 585 and cases cited. As said in Beard v. Tilghman, 66 Hun, 12, 20 N. Y. Supp. 736: "The court had no power at the close of the case to conform the affirmative allegations in the answer to the proof, for the reason that the evidence at the time it was offered, to which the allegations in the answer were made to conform, was objected to, and admitted under exceptions. Under these circumstances, the court had no power to conform the pleadings to the proof, because the party whose objection had been overruled had a right to rely upon his exception, and the rights which such exceptions gave to him could not be taken away by the device of conforming the allegations of the pleadings to the proof offered, such exception having been well taken at the time the proof was offered. If any amendment to the pleadings was necessary, it should have been made prior to the introduction of the evidence if the evidence was objected to; and, for the reasons stated, it is apparent that such a motion could not be made under such circumstances at the close of the case."

In the case at bar, what the learned trial court did was not to conform the pleading to the proof, but it granted defendant leave to file and serve an amended answer. While such order was no doubt made within the exercise of a sound discretion, the service and filing of such amended answer merely operated to change and enlarge the issues as of the date the same was served and filed. The new issue thus brought into the case cannot avail the defendant in the absence of evidence properly introduced in its support. Defendant's counsel should have applied for leave to reopen the case and submit such evidence. The fact that plaintiff's counsel, by retaining the amended answer without objection, may have foreclosed their right to question the validity of the order allowing the same, does not alter the situation in the least. The fact remains that there is no competent evidence in the case proving or tending to prove justification; hence, the judgment in defendant's favor is erroneous, and the same is accordingly ordered to be vacated and a new trial had, and it is so ordered.

On Petition for Rehearing (Filed November 21, 1913).

FISK, J. Counsel for respondent have filed an elaborate petition for rehearing wherein they challenge the correctness of the foregoing opinion in certain particulars. Such petition contains thirty-six pages of typewritten matter, consisting of a reargument and citation of numerous authorities claimed to be in point, but nothing new is presented, and the same amounts to a rehash of the matters contained in the original brief, with the addition of the citation of many authorities.

Notwithstanding a failure of counsel to observe the rules regarding the matters which may be properly set forth in a petition for rehearing, we have devoted considerable time to a consideration thereof, and have examined most of the authorities therein collated. After such consideration we see no reason to change our conclusions as above announced.

It is not our purpose at this time to answer in detail the various propositions advanced by counsel in such petition, but will briefly notice some of them. The fact must not be overlooked that this is not an action in claim and delivery, but one brought to recover damages for the alleged conversion by defendant of certain personal property claimed to belong to plaintiff. Defendant, by his original answer, merely puts in issue the allegations of the complaint by what amounted to a general denial; no attempt to plead justification was made. The issues thus framed were therefore clearly defined. In order to recover, plaintiff had the burden of proving, first, ownership in him as alleged; second, wrongful conversion of the property by defendant as alleged; and, third, the damages occasioned thereby. In their petition, counsel for respondent argue that because plaintiff in his complaint alleged that defendant unlawfully took said property from the plaintiff's possession, and that because plaintiff's counsel in proving their case offered testimony showing that defendant, as sheriff, claimed to act under a certain execution issued in an action wherein the First National Bank of Waterloo was plaintiff and W. I. Ginther was defendant, that this opened the door to defendant to prove and rely upon justification. Such contention is far-fetched and unsound. The fact that plaintiff went to the trouble of proving the unnecessary particulars regarding the method of the alleged conversion by defendant of this property did not have the effect of broadening the issues in the case as framed by the pleadings. The

sole purpose of such testimony was to prove the allegation in the complaint that defendant took and converted the property. Nor does the fact that plaintiff had knowledge of the capacity in which and the process under which defendant seized this property thus operate to broaden the issues and to permit a defense of justification under the pleadings. It is no hardship upon litigants to confine them to the issues which they have framed by the pleadings, and not to do so would result in endless confusion in our practice. It is no answer to this to say that plaintiff could not possibly have been prejudiced by permitting defendant to prove and rely upon a defense which he did not see fit to allege. When proof of such defense was offered and objected to, proper and orderly practice required defendant to move to amend his answer by alleging such new matter by way of defense; and if such a motion had been made, it no doubt would have been granted, for, under the facts, it would have constituted an abuse of discretion to have denied such application; but, as before stated, such fact in no way obviates the necessity for such an amendment in order to permit of the defense of justification. The logical effect of counsel's reasoning, it seems to us, would be to do away with the necessity of pleading defenses where it can be shown that the plaintiff had knowledge of their existence. The mere statement of the proposition is enough to show the fallacy of such contention.

What we have here said does not in the least conflict with the well-settled rule that courts should be liberal in allowing amendments, and that a variance between the allegations in a pleading and the proof shall not be deemed material unless it has actually misled the adverse party to his prejudice, etc. The fact that a party has not been misled to his prejudice, nor in any manner taken by surprise, is a very good reason why his objection to a proposed amendment should be ignored; but it is no reason for dispensing with the necessity of any amendment at all; nor is it any justification for permitting an amendment after the trial, materially changing the issues, nor of permitting an amendment of the pleadings after the trial to conform to the proof where such proof was improperly received over objection. Counsel have devoted much space in their petition in an attempt to convince us that the above opinion is erroneous in asserting that an amendment, after the trial, to conform the pleadings to the proof, cannot be made where such proof was im-

properly received over objection, and they cite a large number of cases which they claim to be in point, and among them is Barker v. More, 18 N. D. 85, 118 N. W. 823. Most of the cases cited and relied upon are from California. The cases from other states do not seem to support counsel's contention. An examination of the opinion in Barker v. More discloses that it was an action in equity, tried under the so-called Newman law, where all evidence offered must be received on trial, in which cases rulings are not made on the objections to evidence, and the portion of the opinion relied upon by counsel was purely *dictum,* as the following quotation from the opinion shows: "In reference to the action of the trial court in permitting an amended answer to be served, we think there was no abuse of discretion, and that the plaintiff was in no way prejudiced by the amendment. The complaint alleged that the assignment to Cooper was for security purposes only. *The original answer expressly denied that there was any trust relation created by that assignment, and under that allegation and denial it would not have been error to admit proof that the assignment of November 7, 1902, was not a conditional one.* However, disregarding entirely the question of the sufficiency of the original answer, we discover no reason why it was prejudicial or erroneous to permit the amendment to be filed to conform to the proof. It was not a different or new defense from that which was foreshadowed by the general denial or answer, wherein there was an express denial of any trust relation growing out of the assignment. The amended answer alleged that fact in more specific terms." It will be seen from the foregoing that what was said hardly reached to the dignity even of a *dictum,* in favor of the respondent's contention, as the amendment brought no new issue into the case, and we certainly do not consider it as in any way controlling in the case at bar.

In view of counsel's very urgent contention upon the proposition that the court has power to conform the pleadings to the proof, even though such proof was introduced over the objection that it was not within the issues, we desire to cite in support of our holding the following authorities in addition to those cited in the main opinion: 31 Cyc. 452, and the numerous cases cited in note 85, from the states of Indiana, Kansas, Massachusetts, Minnesota, Nebraska, New York, and Oregon. Also the following more recent cases: Audley v. Townsend, 126 App. Div. 431, 110 N. Y. Supp. 575; Leggat v. Palmer, 39 Mont. 302, 102 Pac.

327. And we call special attention to the cases of Guerin v. St. Paul F. & M. Ins. Co. 44 Minn. 20, 46 N. W. 138; Walker v. O'Connell, 59 Kan. 306, 52 Pac. 894; and Mendenhall v. Harrisburg Water Power Co. 27 Or. 38, 39 Pac. 399.

We quote from the latter opinion as follows: " 'When,' says Lord, J., in Cook v. Croisan, 25 Or. 475, 36 Pac. 532, 'the parties proceed with a trial, and evidence is received without objection, supporting material matters which are not set out in the pleadings, the court may permit the pleadings to be amended to conform with the proofs.' The right to amend a pleading so as to make it conform to the proof proceeds upon the theory that it presented the issues sought to be established by the evidence introduced and admitted without objection, but that some material allegation had been inadvertently omitted therefrom. In such cases it is the duty of the court, after the evidence upon the supposed issue has been introduced without objection, to permit the amendment; but when objection has been made to its introduction, the court has no authority to allow such an amendment, as this would have a tendency to invert the orderly mode of trial prescribed by statute, and lead to the practice of settling issues after, instead of before, trial, thereby returning to primitive methods. The plaintiff having made objection to the introduction of this evidence, there was no abuse of discretion in denying leave to the defendant to file its amended answer."

In Walker v. O'Connell, the Kansas court, speaking upon this question, said: "After successfully resisting all the defendant's attempts to secure recognition of the rule, the plaintiff finally moved for leave to amend her petition to conform to the facts proved, by alleging the nonappointment of an administrator of the decedent's estate. This motion was allowed and the amendment made. However, it was not made, nor the motion therefor filed, until five days after the close of the trial, the return of the verdict, and the discharge of the jury, and two days after the motion for new trial was filed. It was made, however, before the rendition and entry of judgment on the verdict and findings.

"While the statute (Civil Code, § 139) allows amendments to be made, either before or after judgment, to conform to the proof of facts, and while this statute should be liberally construed and a liberal exercise of the right of amendment allowed, we are clear that the amendment in question should not have been permitted at the time and under the

circumstances disclosed in this case. It will be observed that, at every proper and available opportunity, the attention of the court was called to the vital defect in the plaintiff's petition, and a challenge made to her right to proceed because of such defect. In particular, the court had been requested to instruct the jury to find for the defendants, because of the lack of the necessary allegation in plaintiff's petition to entitle her to recover. Exceptions to the court's rulings were made as each successive phase of the question arose and was disposed of. These rulings and exceptions showed substantial and reversible error, within the previous decisions of this court.

"At no time after verdict and before the amendment was made could any question exist as to the right of the defendants to an order setting aside the verdict and findings and awarding a new trial. We think it was not within the power of the court, at the late time this amendment was proposed, to allow it to be made, and through its retroactive effect to cure the substantial errors which had been committed through lack of its earlier making. To such effect are the authorities. 'A motion, after the close of the evidence, to conform the pleadings to the proof, can never be granted where the admission of the evidence was promptly objected to when it was offered, upon the ground that it did not tend to support the allegations in the pleadings.' 1 Enc. Pl. & Pr. 585. We have examined many of the authorities cited under the above quotation, and find that they fully support the text.

"We cannot conjecture whether an administrator of the estate of John O'Connell had been in fact appointed, and we have no way of ascertaining the fact except by the record before us; and that was silent upon the question until the amendment was made, long after all opportunity for the defense to be heard upon it had passed. Had an issue been made upon this question in proper time and form, it might have been that the defendants could have proved the making of an appointment. We cannot assume a lack of good faith on their part in insisting that such issue be framed and that they be heard upon it. We cannot assume that their contention is a technical and vexatious insistence upon a mere matter of form, readily ascertainable against them. As shown in Eureka v. Merrifield, 53 Kan. 794, 37 Pac. 113, it is matter of substance, and not of form, and what the fact may be is impossible for us to know."

In Guerin v. St. Paul F. & M. Ins. Co. the Minnesota court said: "The court also erred in permitting the amendment. The defendant properly and seasonably objected to the reception of testimony inadmissible under the pleadings, but which, as the court charged the jury, was essential to a recovery by the plaintiffs, and was thereafter entitled to the benefit of its objection and exception. It is true that under the statute . . . much discretion is properly given to the trial court in the way of amendments, before and after judgment, in furtherance of justice. But in this instance the manifest purpose and the inevitable effect of the amendment was to deprive the defendant of a legal right it had secured during the trial, by means of its exception to the ruling. This was a clear abuse of discretion upon the part of the court. The plaintiffs should have applied for the amendment when, through the objection made on the trial, its necessity became strikingly apparent."

And Mr. Sunderland in his able article on Pleading, 31 Cyc. 452, states what undoubtedly is the sound rule as follows: "The right to amend pleadings so as to conform to proof proceeds upon the theory that this presents the issues sought to be established by the evidence introduced and admitted without objection; but it is quite generally held that, where the evidence offered has been promptly objected to on the ground that such evidence offered has been promptly objected to on the ground that such evidence does not tend to support the allegations of the pleadings, a motion to amend after admission of the evidence, so as to conform to proof, should not be granted, and if under such circumstances it is granted, it is an abuse of discretion, and the amendment will not be considered on appeal. If evidence is objected to on the ground of variance, the motion to amend should be made before it is admitted."

In the light of counsel's citation of the many authorities which they assert support their contention, it is interesting to observe that in the note to Cyc. above cited the only cases collated as holding contrary to the general rule are four California decisions, as follows: Firebaugh v. Burbank, 121 Cal. 186, 53 Pac. 560; Guidery v. Green, 95 Cal. 630, 30 Pac. 786; Clark v. Phœnix Ins. Co. 36 Cal. 168; and Stringer v. Davis, 30 Cal. 318. The reason for the rule is stated in such note as follows: "To allow an amendment under such circumstances would

have a tendency to invert the ordinary mode of trial, and lead to the settling of issues after, instead of before, trial."

We deem it unnecessary to extend this opinion further in answer to the various contentions in the petition. While we regret the necessity of ordering a new trial, and thus subjecting the defendant to added expense, we see no other alternative. The fact that a like result may and probably will be reached on a new trial does not, under the record, justify us in affirming the judgment. Although the plaintiff's so-called trust deed, upon which his title to the property in controversy rests, is void as to nonassenting creditors of Mr. Ginther, it is valid and enforceable as to all other persons, and therefore it is incumbent upon defendant, in order to defeat plaintiff's recovery, to allege and prove justification. This he failed to do.

Petition denied.

MAYNARD CRANE v. THE FIRST NATIONAL BANK OF McHENRY.

(144 N. W. 36.)

Trial was had of this action in equity before Honorable E. T. Burke, then district judge, who on December 29, 1910, signed written findings of fact, conclusions of law, and order for judgment in plaintiff's favor, and transmitted the same to plaintiff's attorneys, that they might prepare and cause the entry of the formal judgment by the clerk as directed in the order therefor and required by §§ 7078, 7079, Rev. Codes 1905. Judge Burke's term of office as district judge expired, and his successor qualified January 7, 1911. On January 24, 1911, the findings, conclusions, and order for judgment signed by Judge Burke during his term were filed and formal judgment thereon entered the day following. On defendant's application this judgment was subsequently vacated because of failure to comply with §§ 7039, 7040, Rev. Codes 1905. *Held:*

Finding — conclusions — judgment — must be in writing — must be filed.

1. Said statutes constitute the findings, conclusions, and order for judgment the final decision, and require the same to be in writing and filed.

Findings — conclusions — judgment — revocation — court — unfiled — final decision — filed with clerk — statutes — mandatory.

2. The unfiled findings and conclusions and order for judgment are sub-

ject to revocation by the court at any time before the same are filed, and do not become a final decision until deposited with the clerk of court for filing; and where not so filed during the term of office of the trial judge the decision is incomplete, and not made in law as required by the mandatory provisions of §§ 7039, 7040, Rev. Codes 1905.

Filing — findings — conclusions — order — final decision.

3. It is the filing of signed findings and conclusions and order for judgment that constitutes the final decision, which is effective only from the date of filing, and which is not made until deposited with the clerk for filing. The judgment entered was properly set aside on the application to vacate the judgment.

Defendant — judgment — acquiescence — invalidity.

4. The record examined and defendant *held* not to have acquiesced in the judgment, and not barred from urging its invalidity.

Opinion filed October 24, 1913. Rehearing denied November 21, 1913.

An appeal from an order of the District Court for Foster County, *Coffey,* J., vacating a judgment and granting retrial.

Affirmed.

Pollock & Pollock, for appellant.

There is no provision of statute in this state requiring the judge himself to file his decisions. Comp. Laws 1893, § 5066, as amended; Roblin v. Palmer, 9 S. D. 36, 67 N. W. 949.

The provision requiring the findings to be filed within thirty days is directory. Edmonds v. Riley, 15 S. D. 470, 90 N. W. 139.

The judgment in this case is not void because of failure of the judge to file findings, conclusions, and order for judgment, before the expiration of his term. When they were presented to the clerk of court, plaintiff was entitled to have his judgment entered. Code, § 7070; 23 Cyc. 839–c; Babcock v. Wolf, 70 Iowa, 676, 28 N. W. 490; Shenandoah Nat. Bank v. Read, 86 Iowa, 136, 53 N. W. 96; Carli v. Rhener, 27 Minn. 292, 7 N. W. 139.

The action of the clerk of court is purely ministerial, and not essential to the validity of the judgment. 1 Black, Judgm. 1891 ed. § 110; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1017, 5 Am. Neg. Rep. 454; Mace v. O'Reilley, 70 Cal. 231, 11 Pac. 721; Connolly v. Ashworth, 98 Cal. 205, 33 Pac. 60.

It is the duty of a party knowing that a judgment has been entered

against him to exercise reasonable diligence to have it set aside. Relief will not be granted where he has knowingly acquiesced in the judgment, or been guilty of laches or unreasonable delay in seeking his remedy. Kemp v. Cook, 18 Md. 130, 79 Am. Dec. 681; Seibert v. Minneapolis & St. L. R. Co. 58 Minn. 72, 59 N. W. 828; 23 Cyc. 909–4.

If the proceedings under which the judgment was entered were irregular, such irregularity should be disregarded. Braithwaite v. Aikin, 1 N. D. 455, 48 N. W. 354; Green v. Hughitt School Twp. 5 S. D. 452, 59 N. W. 225; Hulst v. Benevolent Hall Asso. 9 S. D. 144, 68 N. W. 200; Wyman v. Werner, 14 S. D. 300, 85 N. W. 584; Ward v. Gradin, 15 N. D. 649, 109 N. W. 57; Dring v. St. Lawrence Twp. 23 S. D. 624, 122 N. W. 664.

Watson & Young, for respondents.

Findings, conclusions, and order for judgment signed by the judge do not become a valid judgment, unless filed and entered in the judgment book by the clerk of court, during the term of the judge who signed the same. Code Civ. Proc. 1905, §§ 7038–7045; Dowd v. Clarke, 51 Cal. 263; Garr, S. & Co. v. Spaulding, 2 N. D. 416, 51 N. W. 867.

A final judgment does not become such, until entered by the clerk in the judgment book. Re Weber, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523; Brown v. Hathaway, 10 Minn. 303, Gil. 238; Washburn v. Sharpe, 15 Minn. 63, Gil. 43; Williams v. McGrade, 13 Minn. 46, Gil. 39; Hodgins v. Heaney, 15 Minn. 185, Gil. 142; Thompson v. Bickford, 19 Minn. 17, Gil. 1; Hunter v. Cleveland Co-op. Stove Co. 31 Minn. 505, 18 N. W. 645; Bowman v. Tallman, 28 How. Pr. 482; Knapp v. Roche, 82 N. Y. 366; Dibble v. Hanson, 17 N. D. 21, 114 N. W. 371, 16 Ann. Cas. 1210.

The judgment is *void* because of failure to file during term of office of the judge. Ludlow v. Johnson, 3 Ohio, 553, 17 Am. Dec. 609; Broder v. Conklin, 98 Cal. 360, 33 Pac. 211; Condee v. Barton, 62 Cal. 1; Pitman v. Thornton, 65 Me. 95; 11 Enc. Pl. & Pr. 828; Newbould v. Stewart, 15 Mich. 155; Cain v. Libby, 32 Minn. 491, 21 N. W. 739; Brady v. Burkee, 90 Cal. 1, 27 Pac. 52.

A court cannot correct an error after jurisdiction over the matter has passed from it. Ludlow v. Johnson, 3 Ohio, 553, 17 Am. Dec. 609.

Findings in themselves are not the judgment of the court. 18 Enc. Pl. & Pr. 450; Andrews v. Welch, 47 Wis. 134, 2 N. E. 98; Seibert v. Minneapolis & St. L. R. Co. 58 Minn. 72, 58 N. W. 828.

A judgment is of no effect until filed with the clerk, and is of no effect if filed after the expiration of the judge's term. Broder v. Conklin, 98 Cal. 360, 33 Pac. 211; Hastings v. Hastings, 31 Cal. 95; Connolly v. Ashworth, 98 Cal. 205, 33 Pac. 60; 23 Enc. Pl. & Pr. 839.

Where judgments are void for want of jurisdiction, the statutory time limit of one year is no bar to the remedy. Freeman v. Wood, 11 N. D. 1, 88 N. W. 721, 14 N. D. 95, 103 N. W. 392; Skjelbred v. Schafer, 15 N. D. 539, 125 Am. St. Rep. 614, 108 N. W. 487; Williams v. Fairmount School Dist. 21 N. D. 198, 129 N. W. 1027; 1 Black, Judgm. § 307, pp. 383–388; Feikert v. Wilson, 38 Minn. 341, 37 N. W. 585.

Goss, J. This is an action in equity tried in the district court of Foster county before the Honorable E. T. Burke, presiding judge. Findings, conclusions, and order for judgment were signed by said district judge on December 29, 1910, during his term of office, and forthwith transmitted to the attorneys for plaintiff and appellant for filing and preparation of judgment to be entered, and who caused the same to be filed with the clerk of the district court of Foster county on January 24, 1911, some two weeks after said former district judge had qualified as and assumed the duties of justice of this court. On January 25, 1911, the clerk entered judgment in the name of the former district judge pursuant to the findings, conclusions, and order for judgment as filed on January 24th, Judge Coffey, meanwhile, having qualified as judge of said district on January 7th. An appeal from said judgment was taken to this court and supersedeas bond filed. Pending the appeal a motion for vacation of the judgment was noticed but abandoned, but later another motion to vacate was heard September 1, 1911, and denied because of the pendency of the appeal. On November 14, 1911, said appellant procured its dismissal without prejudice to an appeal upon the merits. Subsequently, and on March 29, 1912, the defendant again moved to vacate the judgment from which the appeal had formerly been pending, which motion was granted and plaintiff appeals.

The findings, conclusions, and order for judgment were signed, and had they been filed before the expiration of the term of office of the

trial judge no question as to their validity could have arisen. Does the omission to file them before the expiration of the term of office of the judge authorized to find the same invalidate the unfiled but executed findings, conclusions, and order is the first question for decision.

Secs. 7039 and 7040, Rev. Codes 1905, make the findings, conclusions, and order for judgment thereon the decision of the court. That findings and conclusions are necessary, and that the statutes requiring them are mandatory, see Gull River Lumber Co. v. School Dist. 1 N. D. 500, 48 N. W. 427; Gaar, S. & Co. v. Spaulding, 2 N. D. 414, 51 N. W. 867; Prondzinski v. Garbutt, 9 N. D. 239, 83 N. W. 23; and a late decision in South Dakota to the same effect in Kierbow v. Young, 21 S. D. 180, 110 N. W. 116.

But appellant contends that though findings, conclusions, and order for judgment are necessary, yet the statute does not require that the same necessarily be filed in order to be valid; and that the statute requiring the filing within sixty days after the cause has been submitted for decision is a directory provision, aimed more particularly at the expediting of court business in compelling judges to do their duty, and should not be interpreted so as to invalidate findings and conclusions properly found but filed as here after the termination of the office of the particular judge.

Time periods within which acts are required to be done are usually, in the absence of plain statutory commands to the contrary, construed as directory, and such undoubtedly is the construction to be given the time limit within which our statute requires a decision to be made. 8 Enc. Pl. & Pr. 949; Hayne, New Trials & App. § 246 and cases there cited. But the requirement of §§ 7039 and 7040, as to filing, concerns the manner of the pronouncing of the final decision of the court. Every judgment embodies two essentials: (1) The rendition of the judgment, and (2) the entry thereof after rendition. The first is the judicial act of the judge, the latter the clerical act of a ministerial officer, the clerk. Sec. 7040 explicitly provides that "in giving the decision the facts found and the conclusions must be separately stated. Judgment upon the decision must be entered accordingly." The statute here has reference to these separate acts of rendition and entry of judgment, as does § 7039, more particularly under investigation, reading: "And upon the trial of any question or issue of fact by the court, its decision

thereon and conclusions of law upon such decision, and direction for entry of judgment in accordance with such conclusions, must be given in writing and filed with the clerk within sixty days after the cause has been submitted for decision, unless such decision is prevented for the reason hereinbefore stated, and judgment shall be entered by the clerk in accordance with such direction upon the application of the party entitled thereto and the filing of such decision and conclusions of law." The decision must be in writing and filed with the clerk in advance of and as a basis for the clerical duty of entering judgment. The filing is made by statute a necessary step or requisite in the decision, as much so as it is that it shall be in writing and shall consist of findings and conclusions. We are dealing with necessities for a valid judgment of record. The statute contemplates that the judgment entered shall rest upon a record basis, to secure which under the statute findings and conclusions must be filed. Until so filed no final decision has been made. In the language of Comstock Quicksilver Min. Co. v. Superior Ct. 57 Cal. 625: "It was not the signing but filing of the findings and order for judgment that determined the action." And again: "The cause was not determined until the findings and order for judgment were filed with the clerk." The contention there was that, because the findings and order for judgment were signed at a place without the jurisdiction of the court within which they were subsequently filed, they were void.

And an examination of our statutes is convincing that this statutory provision as to filing is a necessary requisite to a decision, inasmuch as it was intended to be a limitation upon the power of the trial court, and was never intended to be other than mandatory. Secs. 267–269 of the Code of Civil Procedure of 1877 of Dakota territory are substantially our present Code provisions, §§ 7041, 7040, and 7039, respectively, and appear there logically in reverse order to their statement in art. 6 of the Code of Civil Procedure of 1905. Sec. 267 of the Code of Civil Procedure of 1877 is identical with § 7040, Code of 1905, and § 268 of that early Code is identical with § 7041, Code of 1905, except that the third method provided in § 268, that findings might be waived "by oral consent in open court entered in the minutes," was repealed by chap. 25 of the Session Laws of 1887, which also made an important amendment to § 266, which before amendment read, "Upon

the trial of a question of fact by the court its decision must be in writing and filed with the clerk within thirty days after the cause is submitted for decision," by adding thereto the following words: "And no judgment shall be rendered or entered until after the filing of such decision." See § 5066, Comp. Laws 1887, changed to substantially its present form by chap. 89, S. L. 1893. The legislature thereby emphasized the necessity of the filing of the decision. And the same amendatory act took from the court its power to cause its own record, its minutes, to show a waiver of findings, leaving as the only method for waiving of findings by parties appearing to be "by consent in writing filed with the clerk," and which remains our present statute, § 7041. Certainly the legislative intent in enacting these early statutes was not to do other than limit the powers of the court, and, in order to do so, to declare requirements to compel the filing of the court decision and in advance of the entry of judgment thereon.

And our conclusions are but those of California under §§ 632–634 of its Code of Civil Procedure of 1877, that were identical, even to sectional division and punctuation, with §§ 266–268, respectively, of the Revised Codes of Dakota territory of 1877. Such early statutory provisions of California, we assume, came from still earlier practice provisions. See Russell v. Armador, 2 Cal. 305, purporting to be based upon "§ 180, chap. 5, of the practice act, (which) prescribes, that 'upon the trial of an issue of fact by the court its decisions shall be given in writing and filed with the clerk within ten days after the trial took place. In giving the decision the facts found and the conclusions of law shall be separately stated.'" And "we are of opinion that this law is not merely directory, and we have no right to destroy or impair its efficacy; it is intended by it, that the decision of the court shall be the basis of the judgment in the same manner as the verdict of a jury. And it follows that without such decision the judgment cannot stand." "Upon the trial of an issue of fact by the court the statement of facts must be made out and filed as required by the 180th section of the practice act." This decision was in 1852. See also Vermule v. Shaw, 4 Cal. 214; Hastings v. Hastings, 31 Cal. 95; Warring v. Freear, 64 Cal. 54, 28 Pac. 115; Polhemus v. Carpenter, 42 Cal. 375; Broder v. Conklin, 98 Cal. 360, 33 Pac. 211; and Connolly v. Ashworth, 98 Cal. 205, 33 Pac. 60. If the statute was taken from California, as this

court in Gaar, S. & Co. v. Spalding, 2 N. D. 416, 51 N. W. 867, at page 419, has held, with the construction there given, before its adoption here, we must hold it to be adopted here with such construction entering into its interpretation, and the filing to be mandatory as a necessary part of the rendition of the decision. But independently of its source the California cases are persuasive as precedent. We briefly review some of them. Comstock Quicksilver Min. Co. v. Superior Ct. 57 Cal. 625: "It is not the signing, but the filing of the findings, that determines the action." Hastings v. Hastings, 31 Cal. 95: "Until a decision of the court has been entered in the minutes or reduced to writing by the judge, and signed by him and filed with the clerk, a case has not been tried." Measured by this rule the trial of this case has never been completed. The court there declares: "This statute mode of deciding or evidencing the decision of cases is exclusive." And Broder v. Conklin, 98 Cal. 360, 33 Pac. 211, though distinguishable on facts from the case before us, in the syllabus declares: "A judgment does not become effective until filed with the clerk, and is of no effect if filed after the expiration of the judge's term, no matter when prepared and signed." This holding harmonizes with the many decisions of that court upon the subject. Connolly v. Ashworth, 98 Cal. 205, 33 Pac. 60, is to the same effect, that "the trial of a cause by the court is not concluded until the decision is filed with the clerk. And when the term of office of the judge who tried the case expires before such decision is filed, the fact that it was signed by him and ordered by his successor in office to be filed with the clerk, and was so filed, is not sufficient to sustain the judgment entered thereon;" citing and following Mace v. O'Reilley, 70 Cal. 231, 11 Pac. 721. Another strong precedent is Anglo-Californian Bank v. Mahoney Min. Co. 5 Sawy. 255, also reported in Fed. Cas. No. 392, where the controlling question was whether the findings became effective as the decision of the court on the 21st of June, 1877, when prepared, dated, and signed, and notice thereof announced to a board of bank directors, or whether they became effective on the following day on which they were filed, said board having authorized, between the two dates, the issuance and delivery of notes in suit for $7,500 to the plaintiff, and the judgment being for the removal of said directors from office. The case turned upon when the decision was actually made. The court, by Justice Field, says: "It

seems to us clear that the decree did not take effect until it was regularly filed, or entered of record. Until it left the possession of the judge of the court, he could change it in any and all particulars; he could add to it or limit or reverse it. By the oral decision he had only announced his opinion; that opinion did not take the form of an authoritative decree until it had been filed with the clerk and thus became a matter of record. Until then it was not binding upon anyone. The case was tried by the court without the intervention of a jury, and in such a case its findings must precede the entry of the decree, and the statute requires that they shall be filed with the clerk." Citing California Code of Civil Procedure, § 632. And this opinion, by affirmance, became that of the United States Supreme Court on the appeal in the same case, reported in 104 U. S. 192, 26 L. ed. 707, the opinion by Justice Harlan reading: "The decree of ouster against the persons who passed the resolution of June 21, 1877, did not take effect until the succeeding day, when it was actually filed with the clerk and entered on the record." In Warring v. Freear, 64 Cal. 54, 28 Pac. 115, we find: "Until such a decision has been made and filed, the case cannot be considered as tried;" citing Hastings v. Hastings, 31 Cal. 95. Again, in Polhemus v. Carpenter, 42 Cal. 375, that "the court had no power to render an oral decision, and the trial therefore was not ended until written findings were filed;" quoted with approval and followed in § 246, of Hayne on New Trial & Appeal, where that author states: "The cause, therefore, is not decided until written findings are filed;" and "the mere signing of the findings does not amount to a decision." Michigan, under similar statutory requirements, in People ex rel. O'Bluskie v. Circuit Judge, 34 Mich. 62, holds: "Where, on a trial by the court without a jury, written findings are requested, a judgment entered up before the findings are finally entered and filed is premature." See Ellis v. Rector, 32 Mich. 379. To the same effect, see Sturdevant v. Stanton, 47 Conn. 579. And in 23 Cyc. 776b: "It is essential to follow closely the directions of the statute, as, for instance, that the decision shall be given in writing and filed with the clerk, and that it shall contain a finding of the facts or statement of the grounds of the decision, although it seems that a direction that the decision shall be filed within a limited number of days after the submission of the case is only directory," notwithstanding an apparently contrary con-

clusion at 23 Cyc. 839c, based upon decisions mainly from states having no statutes regulative of the matter. And the New York holdings are the same as California on this question under a similar statute. See § 1010, Bliss, Anno. New York Code. Adams v. Fox, 59 How. Pr. 385. We quote from the opinion: "In determining this motion it becomes necessary to decide what is intended to be a 'decision' as used in these sections. Sec. 1010 provides that upon a trial by the court upon an issue of fact or of law its decision in writing must be filed in the clerk's office within twenty days after the final adjournment of the term where the issue was tried. . . . Sec. 1022 provides: 'That the decision of the court or the report of the referee upon the trial of the whole issue or fact must state separately the facts found and the conclusions of law, and it must direct the judgment to be entered thereupon.' The decision intended by these sections is the written findings of facts and the conclusions of law, and the direction, which is the authority for the final judgment to be entered, and must constitute part of the judgment roll. . . . Such findings and conclusions, when signed and filed, would constitute the decision of the cause, and when so made would have removed the cause from the authority of the trial court. Until such decision the case was within its authority and control, notwithstanding the signing and delivery of the instrument of January 10, 1879." (An opinion of court upon facts, and directing that findings and conclusions in accordance therewith be drawn up for signature.) See also Putnam v. Crombie, 34 Barb. 232; Burger v. Baker, 4 Abb. Pr. 11; Lewis v. Jones, 13 Abb. Pr. 427; Weyman v. National Broadway Bank, 59 How. Pr. 331; Benjamin v. Allen, 35 Hun, 115; Hodecker v. Hodecker, 39 App. Div. 353, 56 N. Y. Supp. 954, holding a provision as to filing mandatory, as well as all other portions of the present § 1010 of the New York Code. For similar holdings in other jurisdictions, see Wilson v. Rodewald, 61 Miss. 228; Russell v. Sargent, 7 Ill. App. 98; State ex rel. Chandler v. Allen, 235 Mo. 298, 138 S. W. 339 and for similar facts and holding see Cain v. Libby, 32 Minn. 491, 21 N. W. 739.

We conclude that the filing of findings, conclusions, and order for judgment is a necessary part, and the final act in the rendition of a decision. By filing we do not mean the affixing of filing marks by the clerk, a ministerial duty, but the delivery of the decision to the clerk

for filing and record, and constituting the same a part of the judgment roll. In this case the trial judge had gone out of office, and had been succeeded in office by another, without any final step in the rendition of judgment, the filing of the papers, or the delivery of the same to the clerk, for filing, having been taken; and for a period of weeks the signed but unfiled findings, conclusions, and order must have been as to filing subject to the order of the successor in office, and therefore dependent upon that official, a stranger to the trial, as to whether they should ever become the decision and a part of the record in the case. During such period such unfiled papers were subject to the control of the successor in office in other particulars and subject to amendment by him, they never having been placed in the proper repository, and never having become a final decision. Under such circumstances we cannot say that any final decision has ever been rendered by the trial judge during his term of office or at all without emasculating the statute, ignoring its history and probable sources, and refusing to follow the great weight of precedent. If the rule announced causes a needless retrial, it is only because the legislature has, by plain and mandatory statute, so required and the remedy is with it. To hold otherwise is to judicially legislate.

But it may be well to here briefly analyze the cases that at first blush might seem to support the contention of the appellant. It is noticeable that these citations are from states having no statute purporting to make the filing a part of the rendition of a decision. We observe, also, that most of these decisions turn upon a construction given to the stipulation governing the submission of the cause for decision; and that the leading Iowa case, Babcock v. Wolf, 70 Iowa, 676, 28 N. W. 490, cited as supporting appellants' contentions, and also cited in 23 Cyc. 839, to the same effect, actually recognizes the contrary to be the general rule. The following from 70 Iowa, at page 679, 28 N. W. at page 491, is all of the majority opinion of the court on the question:

"It is urged that the decision was void because it was made after the expiration of the term of office of the judge. The argument is that the decision made and reduced to writing at Afton before the expiration of the term of office was not complete, and no decision could be made until the writing was actually filed and deposited in the clerk's office. In determining this question, regard must be had to

the fact that the case was to be decided in vacation. The judge had all of the testimony and papers in the case at his home at Afton. As we understand it they were sent to the clerk in the same package with his decision. It was not to be expected that he would make his decision at Clarinda [the county seat] in vacation, and with his own hands deposit it with the clerk. The expectation must have been that he would make his decision at his own home, where the evidence and files in the case were. But wherever made, there must be some means of transmitting it to the clerk at Clarinda. Now we think the decision *was made when it was deposited in the express office at Afton.* Under the agreement of the parties, it was as complete then as if there had been no agreement and the judge had entered a decision in his minutes in open court, because the parties agreed that the decision was not to be made at Clarinda. . . . It is argued *that the decision was subject to recall at any time until it was filed, and for this reason the filing or depositing with the clerk was necessary to a complete decision.* But it was not recalled, and this fact shows, beyond question, that it was a deliberate decision *made and completed before the expiration of the term of office.* A court has power to correct its records during the term; but because this power exists, and because its exercise may materially change decisions made during the term, is no reason why judgments are not final and binding upon the parties from the day in the term on which they are rendered."

In the opinion of the two justices dissenting, we find the following:

"In my judgment the decision made by a judge in a cause which has been submitted to be determined in vacation is of no force or effect until it is deposited in the office of the clerk. Until that is done, it is subject to recall by the judge. But in this case the decision was not filed until after the expiration of Judge Gregory's term of office. It is a judgment from that date; but at the time he was not a judge, and his decision is of no more force and effect than that of any other citizen would have been. The majority say that it is binding as a judgment *from the time it was deposited with the express company* to be transmitted to the clerk. I think that position is not sound. . . . It was forwarded by the express company after the term of office of Judge Gregory had expired; but the majority say that the presumption should be indulged that he did not assume to perform the duties of the office

after the expiration of his term had expired. But I do not see upon what ground such presumption should be indulged. If we are to indulge in presumptions, it seems to me that we should presume, from our knowledge of the manner in which business is transacted, that the express company forwarded the package on the day on which it received it."

And as bearing on the above opinions of the court we quote the facts of the case as given in the opinion, as follows:

"The term of Judge Gregory expired on the 31st day of December, 1884. On the 29th of that month he prepared a written decision of the case at his home at Afton, by which he ordered that the petition be dismissed. This decision *was deposited in the office of the American Express Company at Afton, directed to the clerk of the circuit court at Clarinda.* The package was billed from the office at Afton on the 1st day of January, 1885, and was received by the clerk of the court and filed on the next day. At what time it was delivered to the express company at Afton does not appear. *We think it is fair to presume, however, that it was deposited in the express office at Afton before the expiration of the term of office of the judge.* Any other presumption would, in effect, be holding that the act of making the decision was a wrongful usurpation of judicial power, and the law does not presume that persons do wrongful acts." (The italics in the foregoing are ours.)

The above quotations emphasize the importance placed upon the presumed fact, that the judge delivered his decision to the express company for transmission to the clerk for filing before the expiration of his term of office. In effect the court makes such delivery to the express company a filing with the clerk, as though the express company was the agent of the clerk in the transmission of the record and decision to the clerk. This appears from the statement in the opinion, that "now we think the decision was made when it was deposited in the express office at Afton. Under the agreement of the parties it was as *complete* then as if there had been no agreement and the judge *had entered a decision in his minutes in open court,* because the parties *agreed that the decision was not to be made at Clarinda.*" Thus, the decision is made to turn upon the effect of the stipulation for submission of the cause, and the fact of the delivery to the express office under the presumption

indulged that such delivery was during the term of office of the judge. And the court recognizes as the law what we deem to be the controlling principle in this case on trial, by the following: "It is argued that the decision was subject to recall at any time until it was filed, and for this reason the filing or depositing with the clerk was necessary to a complete decision." This is all respondents contend for, and, to that extent at least, Babcock v. Wolf supports our holding.

In Shenandoah Nat. Bank v. Read, 86 Iowa, 136, 53 N. W. 96, between different parties, an attempt was made to collaterally assail the holding in Babcock v. Wolf, the court adhering to its former decision, and stating: "For the reasons given in that opinion we hold the decree to be valid." The earlier case of Tracy v. Beeson, 47 Iowa, 155, would be authority had these findings, conclusions, and order, during the tenure of office of the trial judge, been transmitted to the clerk, who had on their receipt, during term time, made a notation on his minutes of the decision but failed to file the decision, and turned the same over to his successor without the indorsement of filing thereon. The court held that the succeeding trial judge could make an order directing the filing *nunc pro tunc* to supply the omission of the ministerial duty of the clerk of placing the filing marks upon the papers. And in considering the Iowa cases we must remember that under Houston v. Trimble, 3 G. Greene, 574, a decision entered in the minutes constitutes a sufficient decision of a cause, and that written findings are unnecessary unless requested; which on the contrary, under our statute, written findings, conclusions, and order for judgment have been held, since Gull River Lumber Co. v. School Dist. 1 N. D. 500, 48 N. W. 427, and Gaar, S. & Co. v. Spaulding, 2 N. D. 414, 51 N. W. 867, and Prondzinski v. Garbutt, 9 N. D. 239, 83 N. W. 23, to be mandatory. McDowell v. McDowell, 92 N. C. 227, is in facts and law parallel to the case of Tracy v. Beeson, and to the effect that an order *nunc pro tunc* may be issued to cure the record concerning the performance of a ministerial act, when the act itself has in proper season been actually performed, that the record may truthfully reflect the fact that the decision was rendered in time. Hamill v. Gibson, 61 Ala. 261, is scarcely authority for appellant's contention, inasmuch as that decision is made to turn upon the force given to a stipulation, in effect, that the "decision be made in eight weeks and entered up as of the

present term of this court;" and that as "within eight weeks from the submission" the judgment was reduced to writing, but not filed until the succeeding term of court after the expiration of the official term, the decision was made in time under the terms of the stipulation, and valid. The court says:

"The limitation of time [by stipulation] within which the decision was to be made was doubtless introduced for the purpose of obtaining a judgment at as early a period as was supposed practicable, and quieting the litigation; but it extends only to the time within which judicial power could be exercised, and does not impose as a condition to the validity of its exercise that the judgment should be filed with the clerk of the court to be entered of record within the time mentioned. The terms of the submission were satisfied when the judge, within eight weeks, reduced his decision and judgment to writing, so that it could at a future date be entered of record." This was apparently under the common-law practice concerning the rendition of judgments during the term, and was not said with reference to any statute such as ours, the construction of which is the all-important question. Without this mandatory statute, the case at bar might assume an entirely different aspect. A review of authorities will not be complete without mention of Storrie v. Shaw, — Tex. —, 75 S. W. 20, 76 S. W. 596, wherein it is held that, after the submission of a cause to a court during the term of office of the trial judge, the right to formulate and file a decision in the cause survives the expiration of his term, as does, under one set of conflicting authorities, the right of the trial judge to settle a statement of the case after the expiration of his term of office. The court there calls attention to the conflict of authority on the latter question, but concludes that, inasmuch as in that state it is held that at common law the right to so settle a statement after the expiration of the term survives in the trial judge, it would hold, as it did, that the right to render a decision after the expiration of the term was analogous thereto, and hence validated such a decision. But we can find no further authority so holding, and the reason for the holding wholly disappears when we find the analogous right to settle a statement to be one here conferred by statute, without which statute the right would not exist, otherwise the legislature must be convicted of an idle act in the legislation granting the right. Especially is this so when we find that a square conflict

of authority existed in common law as to whether such right to settle a statement so survives, and that the legislature has, by § 7061, Rev. Codes 1905, declared in favor of its survival, and authorized a judge to "settle and sign a statement of the case after as well as before he ceases to be such judge." The source of this statute is, like the provisions concerning the findings, conclusions, and order for judgment, in the Revised Codes of Dakota territory of 1877, to be found therein as § 284 of the Code of Civil Procedure. Hence Storrie v. Shaw cannot be considered authority, as the basic grounds for that decision are negatived by the existence of § 7061, Rev. Codes 1905. At 23 Cyc. 839, it is stated that "if a judgment or decree was actually rendered or settled before the expiration of the term of office of the judge trying the case, it is generally held to be immaterial that it was not filed or entered of record until afterwards; the judicial act being the rendition of the judgment, and its entry being merely ministerial." But the cases cited to sustain the conclusion drawn are those above analyzed, and cited as *contra* the California, Illinois, and Mississippi decisions. And the general statement of the learned author was evidently made without reference to statutory requirements concerning filing, as appears from the fact that the cases cited are decisions in which statutes prescribing filing were not under consideration.

We may add that our conclusions are but in harmony with our holdings upon analogous statutes, §§ 7078, 7079, Rev. Codes 1905, held mandatory, and requiring the entry of record of the judgment by the clerk to constitute, for all purposes, a judgment. Re Weber, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; McTavish v. Great Northern R. Co. 8 N. D. 333, 79 N. W. 443; Amundson v. Wilson, 11 N. D. 193–195, 91 N. W. 37; Hagler v. Kelly, 14 N. D. 218, 103 N. W. 629; Re Lemery, 15 N. D. 312, 107 N. W. 365; Dibble v. Hanson, 17 N. D. 21, 114 N. W. 371, 16 Ann. Cas. 1210; Ottow v. Friese, 20 N. D. 86, 126 N. W. 503; Movius v. Propper, 23 N. D. 457, 136 N. W. 942. In the above cases latitude will be found as to the form of the instrument constituting the judgment entered, but none as to the mandatory requirement of the statute that it shall be entered of record to constitute a judgment. The legislative scheme provides for absolute verity in judgments and the record proof thereof by mandatory

requirements. We can see no sound reason for holding the statute requiring the filing of findings and conclusions to be regarded differently from that portion of the same statute requiring them to be given in writing. They shall be both found and filed to constitute the decision of the court. Nor can such statutory requirements concerning the rendition of the decision be distinguished in principle from those governing the ministerial duties of the clerk in the entry of the judgment rendered. This court has repeatedly held the statute mandatory as to the necessity for written findings, conclusions, and order for judgment, as it has the necessity for the entry of the formal judgment of record in the judgment book. And this is precedent if we would be consistent in the interpretation of these statutes, that they be held mandatory as to the requirement for filing of the findings, conclusions, and order for judgment as a part of the decision, and without which it is incomplete.

Appellant also invokes § 6886, Rev. Codes 1905, to the effect that the court shall disregard errors not affecting the substantial rights of the parties. This on the theory that the failure to file was a mere technicality or trivial defect. To this we cannot agree without holding mandatory statutes to be technical, trivial, and unnecessary. This was for legislative determination, and their mandate is not for us to ignore.

The order vacating the judgment should be, and it is accordingly, affirmed, respondent to recover costs on appeal.

BURKE, J., disqualified, and not participating.

BRUCE, J., dissenting. I am unable to concur in the above opinion. *There was an order for judgment, and there were findings of fact and conclusions of law, which were signed by the district judge* during his term of office. There is no charge or intimation that the findings and conclusions and order for judgment which were filed, were tampered with in any way. During the term of office of the judge they were delivered to counsel for the purpose of being filed. There was no intimation or hint that the acts of the judge were not final, or that he desired to retain any further control of the findings, conclusions, and order. The presence of all of these facts clearly takes the case out of the

authority of Connolly v. Ashworth, 98 Cal. 205, 33 Pac. 60; Macnevin v. Macnevin, 63 Cal. 186; Broder v. Conklin, 98 Cal. 360, 33 Pac. 211; Mace v. O'Reilley, 70 Cal. 231, 11 Pac. 721; and I believe of all of the cases cited in the principal opinion except that of Russell v. Sargent, 7 Ill. App. 98, which was handed down by an intermediate appellate court whose decisions are only controlling in a limited district.

In 23 Cyc. 839-C, we find the following: "If a judgment or decree was actually rendered or settled before the expiration of the term of office of the judge trying the case, it is generally held to be immaterial that it was not filed or entered of record until afterward, the judicial act being the rendition of the judgment, and its entry being merely ministerial." In Babcock v. Wolf, 70 Iowa, 676, 28 N. W. 490, we find the following: "It is argued that the decision was subject to recall at any time until it was filed, *and for this reason the filing or depositing with the clerk was necessary to a complete decision; but it was not recalled, and this fact shows beyond question that it was a deliberate decision made and completed before the expiration of the term of office.* A court has power to correct its records during the term, but because this power exists and because its exercise may materially change decisions made during the term, is no reason why judgments are not final and binding upon the parties from the day in the term on which they are rendered." This decision was affirmed in Shenandoah Nat. Bank v. Read, 86 Iowa, 136, 53 N. W. 96.

It does not appear to me that our statute changes the general law in any way, nor can I understand the fear expressed in the principal opinion that, by sustaining the judgment and saving the delay and expense of a new trial, we would be guilty of the offense of judicial legislation. If this, which to me would merely be sane judicial construction, would be judicial legislation, then it appears to me that by refusing to do so we will further judicially legislate in relation to a statute concerning which, on a parity of reasoning, this court has already been guilty of the offense charged. This court has already held, and the opinion in chief affirms the holding, that the legislature, in enacting the statute in question, did not intend the strict meaning of the words therein used, and that the clause "must be given in writing and filed with the clerk within sixty days after the case has been submitted for decision," was directory, and not mandatory, in relation to

the sixty days. We are now asked to technically construe the word "filed" when we have shown the greatest laxity in relation to the words "sixty days." The statute does not provide that the decision must be filed by the judge himself or within the term, and the opinion in effect adds thereto the words, "personally by the judge," and "during his term of office." The majority decision may state the correct law and the correct conclusion, but it certainly cannot be based upon the wording of the statute, especially after that statute has already been emasculated by judicial construction. I am perfectly willing to concede that no judgment can be effective until it is filed and entered, but I cannot believe that a wise and economical administration of the law justifies the vacation of a judgment which, beyond question, expresses the deliberate decision and complete act of the trial judge under circumstances such as those before us. Even the supreme court of California has conclusively held that the continued existence of the judge is not necessary to the act of the clerk in entering the judgment. In other words, that in such a case the clerk acts for the court and for the law, and not as an agent of the trial judge. See Holt v. Holt, 107 Cal. 258, 40 Pac. 390; Re Cook, 77 Cal. 220, 1 L.R.A. 567, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431; Baker v. Brickell, 102 Cal. 620, 36 Pac. 950. See also 18 Enc. Pl. & Pr. p. 447; Roberts v. White, 7 Jones & S. 272; Storrie v. Shaw, — Tex. —, 75 S. W. 220; Hamill v. Gibson, 61 Ala. 261; Edmonds v. Riley, 15 S. D. 470, 90 N. W. 139. So, too, although the matter was raised by motion to vacate a judgment, the proceeding was, to all intents and purposes, an equitable one. The motion was not made until fourteen months after the entry of the judgment, and is purely technical. There is no showing of any loss or injury suffered, nor of any injustice arising from the alleged irregularity. Either I totally misunderstand the cases of Halverson v. Bennett, 22 N. D. 67, 132 N. W. 434, and Murphy v. Minot Foundry & Mach. Co. 24 N. D. 185, 139 N. W. 518, or the motion should have been denied.

GOULD BALANCE VALVE COMPANY, Consisting of M. H. Meigs, J. A. Gunn, S. B. Bowers, J. B. Burton, and L. C. Deets, Copartners, v. J. H. HEROLD.

(144 N. W. 74.)

Warranty — conditions — breach of warranty — defendant must give notice — warranty in effect after settlement.

1. Defendant purchased a valve, to attach to his engine, from the plaintiffs. The contract made by him provided that settlement by note or cash should be made on delivery. This was followed by the provision that the valve was sold subject to the warranty following, which should be in effect only after the above conditions were complied with. Then followed the warranty; then a requirement that if it did not perform in accordance with the warranty, written notice should be given plaintiffs, stating wherein it failed, and that the defendant should give complete information by answering all questions asked, and other conditions to be complied with by defendant, unnecessary here to note. *Held* that the taking effect of the warranty contained in the contract was conditioned upon settlement being made by cash or note. *Held*, further, that such settlement having been made, such warranty went into effect. *Held*, further, that before defendant could take any advantage of a breach of the warranty, he was required to give the notice and complete information by substantially answering pertinent questions asked.

Warranty — use of machinery — notice — questions — substantially answered —proof of compliance.

2. Defendant used the valve two days, and found that it did not fulfil the warranty. He then notified the plaintiffs, giving them the particulars wherein it failed. Plaintiffs sent defendant a list of questions to answer, at least some of which related to the manner in which he had installed the valve. Instead of answering the questions in detail, he answered that he had installed it in exact accordance with the directions which came with it. The questions and answer were received in evidence, and, upon an intimation by the court, an offer was made to prove that defendant's reply to the questions answered them substantially. He had lost the directions, but offered to prove that he and his engineer compared the questions with the directions for the installation, and that they referred solely and specifically to the manner of installing the valve. He also offered to prove that the plaintiffs made no effort, after receiving his answer, to remedy the defects. The court, on objection, excluded evidence on these subjects, evidently on the theory that the questions had not been an-

Note. — For authorities on the question of waiver of stipulated notice of failure of machine to work properly, see note in 1 L.R.A.(N.S.) 142.

swered. *Held* that defendant was only required to substantially answer appropriate questions submitted, and that in view of the state of the record when this offer was made defendant should have been permitted to attempt to show that the questions were substantially answered.

Opinion filed October 16, 1913. Rehearing denied November 21, 1913.

Appeal from a judgment and order of the District Court for Cass County, *Pollock,* J.

Reversed.

Barnett & Richardson and *Pollock & Pollock,* for appellant.

The defendant substantially answered all pertinent questions submitted by plaintiff under the contract, and a settlement having been made, the warranty became effective and in force. Substantial compliance with the terms of the contract was all that was required of defendant. Sandwich Mfg. Co. v. Trindle, 71 Iowa, 600, 33 N. W. 79, 30 Am. & Eng. Enc. Law, 206.

Notice of defects in machinery purchased with warranty need not be given in some specific, prescribed way, when all has been done by the person entitled to such notice that could have been done had the notice been given in strict compliance with the requirement. Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335; J. I. Case Threshing Mach. Co. v. Balke, 15 N. D. 206, 107 N. W. 57.

Where no injury resulted from the manner in which the notice was given, there is no ground for the claim that the contract was not literally complied with, when the results following would have been the same, or when the *object* in giving notice has been *attained.* Badgett v. Frick & Co. 28 S. C. 176, 5 S. E. 355; Aultman & T. Co. v. Frazier, 5 Kan. App. 202, 47 Pac. 156; Peter v. Plano Mfg. Co. 21 S. D. 198, 110 N. W. 783.

The list of questions submitted to defendant to be answered by him, and the answers thereto, have nothing to do with the liability arising under the contract of warranty. A warranty is strictly construed against the party making it. McCormick Harvesting Mach. Co. v. Fields, 90 Minn. 161, 95 N. W. 886.

The contract went into effect at once upon settlement for the value, either by cash or note, and thereafter the warranty became operative. 2 Parsons, Contr. 6th ed. §§ 515, 516.

W. J. Courtney, for respondent.

The defendant was required to give complete information, and to answer all questions as provided by the contract. No warranty can arise or exist until the contract and the conditions thereof have been substantially complied with. Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145; James v. Bekkedahl, 10 N. D. 120, 86 N. W. 226.

Where an express warranty is upon conditions, the conditions must be fulfilled before advantage can be taken of the warranty. Minnesota Thresher Mfg. Co. v. Hanson, 3 N. D. 81, 54 N. W. 311.

SPALDING, Ch. J. This action was brought in justice court upon a promissory note for $75, executed and delivered by defendant to plaintiffs. The answer admits the giving of the note, but alleges that it was for the purchase price of a valve sold defendant by plaintiffs for use on his farm engine; that there had been a breach of the warranty of such valve, and demands that the note be canceled. There was a reply, to which reference need not be made. Plaintiffs had judgment, and defendant appealed to the district court therefrom. In the latter court a trial was had, and after the submission of the evidence of both parties plaintiffs moved for a directed verdict. This motion was granted, and from the judgment entered thereon, and from an order denying a new trial, an appeal has been taken to this court.

Plaintiffs' place of business is in Iowa. Defendant resides in Cass county, North Dakota. The sale of the valve was consummated by means of a written order from defendant and the acceptance thereof by the plaintiffs. Such order directs the shipment immediately of one Gould Balance Slide valve for a certain described engine, "for which I authorize you to send settlement to be completed on arrival at destination as follows: Note for $75, due October 1, 1909, with interest at 8 per cent per annum from September 1, 1909; in case I desire to pay cash either on delivery or before September 1, 1909, 10 per cent discount will be allowed." The order then contains the following provisions: "Sold subject to the following warranty, which is in effect only after above conditions are complied with; the Gould balance valve is warranted to be made with good material, durable, with good care, and when properly seated and fitted in an engine, to develop from 18

to 30 per cent additional power. If, after a test of ten days, it shall be found defective, or proven not capable of complying with the above warranty, written notice shall at once be given to the Gould Balance Valve Company, Kellogg, Iowa, stating wherein it fails, giving complete information by answering all questions asked, and permitting the manufacturer to replace the valve or furnish written or personal assistance, the purchaser rendering the usual and necessary help; when (if) it cannot be made to comply with the above warranty, the valve, together with the affected contact parts, shall be returned to the factory at the manufacturers' expense, and another valve and parts substituted that shall fill the warranty, or the money or note refunded and no further claim made on the company. Failure to give above notice within the required time shall be conclusive evidence of fulfilment of above warranty. We further agree to replace, free of charge at the factory, all worn or defective parts of the Gould Balance valve for a term of five years from the date of sale."

August 31, 1909, defendant wrote plaintiffs that the valve did not fill the warranty, by reason of its taking more water and steaming harder, and not developing as much power as did the engine with the old valve on it, and that he had tried the valve two days and by reason of its failure to work had been compelled to remove it. In reply to this letter, plaintiffs sent defendant some questions for answer. Instead of answering these questions in detail, he wrote across the top of the blank containing them that he had put the valve on exactly according to the directions given with it. At the time these questions were received the valve was not in use. Plaintiffs made no response to this report, and, as far as appears by the record, made no attempt to correct the working of the valve. The original directions for applying or installing it were not produced at the trial, the appellant testifying that he had lost them. Appellant offered to prove that he, with his engineer, examined the questions asked in connection with the original directions for the installation of the valve, and that the questions referred solely and specifically to whether or not the original directions for the installation of the valve had been followed, and that he made the notation above recited upon the blank as a full and complete answer to the questions asked, and that thereafter plaintiffs made no offer to send any new valve or any person to fix the valve, and offered no di-

rections further than the original printed directions for the installation, and that in November thereafter he returned such valve with the affected contact parts to the plaintiffs; and that they received them and retained them in their possession, and that there had been no further dealings of any kind between them. Objection was made to this offer on the ground that it called for conclusions of the witness, was incompetent, irrelevant, and immaterial, the written directions for the installation of the valve not being before the court, and for the reason that until all questions were answered as required by the contract of warranty there was no duty or obligation resting upon the plaintiffs to send a man or make any offer to repair the same, or to correct the same, until defendant had complied with the terms of the warranty. This objection was sustained. No further evidence was offered and a motion for a directed verdict was granted upon the ground that the defendant had failed to prove any defense, having failed to comply with the terms of the warranty.

Appellant predicates error in the order directing the verdict upon two grounds, one of which was that under the provisions of the contract liability upon the warranty on the part of the plaintiffs was not predicated upon the answering or failure to answer the questions submitted. In this appellant is mistaken, notwithstanding the fact that such warranty should be construed most strictly against the party making it. The body of the contract first describes the valve, and the engine to which it is to be applied, and the manner in which settlement is to be made. It then provides that the valve is sold subject to the warranty following, but that such warranty shall not take effect unless the precedent conditions are complied with. The precedent conditions are the settlement referred to by means of a note or cash. Thus far we have the contract providing that there is to be a warranty if the valve is taken and settled for either in cash or by note. Now what follows? First, the body of the warranty, that is, its terms; second, how the plaintiff shall be notified if the purchaser claims the warranty is broken, and the information required in such preliminary notice; that is to say, he is to notify the plaintiff wherein the valve fails to comply with the warranty. The punctuation of the contract is somewhat inartistic and crude, but, notwithstanding this, it appears clear to us that the subsequent provisions of the warranty require of the defendant

that after having given such notice he shall give complete information by answering all questions asked, and shall permit the manufacturer to replace the valve or to furnish written or personal assistance to the purchaser in remedying the difficulty, and that if, by means or employment of any or all of such methods as the manufacturer elects to adopt, the valve cannot be made to comply with the warranty, it, with the affected contact parts, shall be returned to the factory, when the money or note, as the case may be, shall be refunded, and that no further claim shall be made on the manufacturer.

It is clear that the warranty became effective when defendant settled by note for the valve. There then existed a warranty of the valve, but before defendant could make the warranty available the contract required him to do certain things. All that we need here consider are that he must, first, notify the manufacturer that the valve did not work, and, second, give complete information by answering all questions asked. These requirements are conditions precedent to his right to enforce any liability of the plaintiffs under the warranty. It is well settled in this state that where a warranty contains conditions concurrent or precedent, making it necessary for the purchaser to do some preliminary act before he can avail himself of the warranty, such acts must be done. Courts do not make contracts for parties. The parties make their own contract, and it is perfectly competent for them to make a contract of the character of the one here in question; and, having entered into such a contract, it was incumbent upon appellant to comply with the conditions precedent. It has been repeatedly so held by this court. J. I. Case Threshing Mach. Co. v. Vennum, 4 Dak. 92, 23 N. W. 563; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145; James v. Bekkedahl, 10 N. D. 120, 86 N. W. 226; Minnesota Thresher Mfg. Co. v. Hanson, 3 N. D. 81, 83, 54 N. W. 311; Fahey v. Esterley Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924.

The second and remaining question presented is whether the court, in view of the state of the record at the time the offer of proof was made by defendant, should have permitted him to attempt to show that the single answer, that he had installed the valve exactly in accordance with directions, was a substantial answer to all the questions submitted by plaintiff. Substantial answers were all that was requisite, and such

only when the questions were material and framed to elicit answers tending to give plaintiffs information necessary to guide their future action. While it must be confessed that the offer was of such a nature as to render it not altogether certain what the duty of the court was in the premises, yet we are disposed to think, in view of the circumstances, that it was error not to permit the plaintiff to make an attempt to show that the questions were substantially answered. It is clear that a considerable portion of the questions only related to the manner of installing the valve. The record shows that it had been in use only two days when, by reason of its failure to work properly, it was removed by defendant and his old valve reinstalled. The good faith of the defendant in his attempt to answer the questions is not impugned, and there was no delay in his making the attempt. If the valve was installed in accordance with the directions, the court cannot assume that in two days' use it had become so disarranged by wear as to justify the court in saying as a matter of law that the questions were not answered. Until the directions for installing the valve were produced or proven, it was rather a question to be determined by evidence, which might have been produced, whether the questions were answered or not, and whether the conditions were such that the answers were adequate or inadequate. Had the court permitted a further showing on the subject it might have developed that in this respect the contract had not been complied with, but we think at the time the ruling was made the subject had not become solely a question of law, and that therefore the court erred in denying the offer, and directing a verdict, and in denying the motion for a new trial. Defendant's notice to plaintiffs was coupled with a demand for the payment of damages, and plaintiffs did not notify him that the answer was not a compliance with the contract, or that they desired more specific answers. But as neither of these questions has been briefed, they are not before us.

The writer desires to say that he disapproves of the practice which has prevailed in this court from the start, of reversing cases on supposed errors committed by trial courts in refusing offers of proof. It opens the door for great delay and unnecessary expense in the conduct of litigation. He is not of the opinion that attorneys consciously include in their offers things which they do not intend to, or knowingly cannot, prove, but when acting in the best of faith, they naturally include

everything which they think relevant to the issue and expect to be able to prove. If such an offer is taken at its face and denied, and this court holds that the evidence should have been received, the case goes back for a new trial when it is by no means certain that the proof will conform to the offer; and if it does not do so in any material respect the result of the second trial may, and generally will, be the same as of the first. It would be far better for the trial court to adopt any of several methods available to enable it to ascertain whether the proof will conform to the offer, and this without the possible prejudice occasioned by receiving it and later striking it out. A rule that a reversal will not be granted on a naked denial of an offer of proof should not be arbitrarily adopted by this court without the different trial courts and the attorneys of the state being advised in the premises; but the writer is of the opinion that, after due notice, and in harmony with the holdings of the courts of some states, a rule of this nature should be adopted and followed, and a majority of this court agrees with this view.

The judgment is reversed and a new trial granted.

STATE OF NORTH DAKOTA v. ELMER GUNDERSON.

(144 N. W. 659.)

Rape — prosecution for — reputation of defendant — reputation of complaining witness — testimony — statements of prosecuting attorney to jury.

1. In a prosecution for rape where the defendant's previous good reputation is thoroughly established, and where the state relies for a conviction upon the practically uncorroborated testimony of the complaining witness, whose reputation for general morality is seriously questioned, and who herself admits a previous act of sexual intercourse with another person, added to which it is actually shown that she was found lying on a bed with still another man, and in which the testimony of the complaining witness even is in many respects unsatisfactory and inconclusive, and in which the prosecuting attorney states to the jury in his argument, "I do not come here to try a case unless the defendant is guilty," it is *held*, that the interests of justice require a new trial and a resubmission of the case to the jury.

Note.—For authorities on the question of the reversal of a conviction because of unfair or irrelevant argument or statements of facts by prosecuting attorney, see note in 46 L.R.A. 641.

Prosecuting attorney — statements of, to jury — improper remarks.

2. It is improper and professionally unethical for the prosecuting attorney to state to the jury in his argument that he would not be before them unless the defendant was guilty.

Opinion filed November 22, 1913.

Appeal from the District Court of Steele County, *Pollock*, J.

Defendant was convicted of the crime of rape, and appeals.

Reversed.

Chas. A. Lyche, for appellant.

The order of the court excluding persons from the court room during the trial was too restrictive, and it deprived the defendant of a *public trial*. People v. Murray, 89 Mich. 276, 14 L.R.A. 809, 28 Am. St. Rep. 294, 50 N. W. 995, 9 Am. Crim. Rep. 719.

A public trial is one held in the presence of the public, or in a place accessible and open to the public. Black's Law Dict. p. 964.

This is a constitutional right of the defendant. Cooley, Const. Lim. 6th ed. 379; People v. Hartman, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153; People v. Yeager, 113 Mich. 228, 71 N. W. 491; State v. Hensley, 75 Ohio St. 255, 9 L.R.A.(N.S.) 277, 116 Am. St. Rep. 734, 79 N. E. 462, 9 Ann. Cas. 108.

The evidence is wholly insufficient to sustain the verdict. Rev. Codes 1905, § 10080, subdiv. 6; State v. Young, 119 Mo. 495, 24 S. W. 1038; State v. Rhoads, 17 N. D. 579, 118 N. W. 233.

Greater latitude is allowed on motions for new trials on ground of insufficiency of the evidence in criminal cases, than in civil cases. Williams v. State, 85 Ga. 535, 11 S. E. 859; Gibbons v. People, 23 Ill. 518.

Where the evidence, taken together being contradictory, preponderates against the verdict, a new trial should be granted. Fann v. State, 112 Ga. 230, 37 S. E. 378; Reynolds v. State, 24 Ga. 427; Rafferty v. People, 72 Ill. 37; Stout v. State, 78 Ind. 492; State v. Hilton, 22 Iowa, 241; State v. Prendible, 165 Mo. 329, 65 S. W. 559; Territory v. Reuss, 5 Mont. 605, 5 Pac. 885; Crandall v. State, 28 Ohio St. 479; Owens v. State, 35 Tex. 361; Fuller v. Northern P. Elevator Co. 2 N. D. 220, 50 N. W. 359.

The remarks made by the prosecuting attorney in his argument to the jury, where he stated, "I do not come here to try a case unless the defendant is guilty," were improper and prejudicial to defendant, and entitled him to a new trial. People v. Quick, 58 Mich. 321, 25 N. W. 302; Raggio v. People, 135 Ill. 533, 26 N. E. 377; People v. Dane, 59 Mich. 550, 26 N. W. 781; People v. Kahler, 93 Mich. 625, 53 N. W. 826.

The prosecuting attorney cannot make damaging statements about the defendant, when there is no proof to sustain them. Coleman v. State, 87 Ala. 14, 6 So. 290; Hanawalt v. State, 64 Wis. 84, 54 Am. Rep. 588, 24 N. W. 489, 6 Am. Crim. Rep. 65; Brown v. State, 103 Ind. 133, 2 N. E. 296; People v. Mitchell, 62 Cal. 411; State v. Ulrich, 110 Mo. 350, 19 S. W. 656; Stone v. State, 22 Tex. App. 185, 2 S. W. 585.

Prejudicial statements of counsel cannot be cured by general remarks of caution and admonition by the court. State v. Nyhus, 19 N. D. 326, 27 L.R.A.(N.S.) 487, 124 N. W. 71; 12 Cyc. 579; Mason v. State, — Tex. Crim. Rep. —, 81 S. W. 718; People v. Payne, 131 Mich. 474, 91 N. W. 739; People v. Smith, 162 N. Y. 520, 56 N. E. 1001; Bradburn v. United States, 3 Ind. Terr. 604, 64 S. W. 550; State v. Dunning, 14 S. D. 316, 85 N. W. 589; State v. Greenleaf, 71 N. H. 606, 54 Atl. 38; State v. Gillespie, 104 Mo. App. 400, 79 S. W. 477; Johnson v. State, 46 Tex. Crim. Rep. 291, 81 S. W. 945; Tyler v. State, 46 Tex. Crim. Rep. 10, 79 S. W. 558; Wilson v. State, 41 Tex. Crim. Rep. 179, 54 S. W. 122; Long v. State, 81 Miss. 448, 33 So. 224; White v. State, 136 Ala. 58, 34 So. 177, 15 Am. Crim. Rep. 696; Chapman v. State, 43 Tex. Crim. Rep. 328, 65 S. W. 1098; State v. Trueman, 34 Mont. 249, 85 Pac. 1024; State v. Rose, 178 Mo. 25, 76 S. W. 1003; Oldham v. Com. 22 Ky. L. Rep. 520, 58 S. W. 418, 13 Am. Crim. Rep. 615; King v. State, 91 Tenn. 617, 20 S. W. 169; Holder v. State, 58 Ark. 473, 25 S. W. 279; People v. Treat, 77 Mich. 348, 43 N. W. 983; State v. Balch, 31 Kan. 465, 2 Pac. 609, 4 Am. Crim. Rep. 516; Sasse v. State, 68 Wis. 530, 32 N. W. 849; People v. Barker, 10 N. Y. Crim. Rep. 112, 17 N. Y. Supp. 16; People v. Evans, 72 Mich. 367, 40 N. W. 473; People v. Ah Len, 92 Cal. 282, 27 Am. St. Rep. 103, 28 Pac. 286; State v. Jones, 21 S. D. 469, 113 N. W. 716.

J. M. Johnson and *P. O. Sathre,* State's Attorney, and *John Carmody,* Assistant Attorney General, for respondent.

The order of the court excluding the general public from the trial was in this case highly proper, and the defendant was deprived of none of his rights. Rev. Codes 1905, § 6749; State v. Nyhus, 19 N. D. 326, 27 L.R.A.(N.S.) 487, 124 N. W. 71.

BRUCE, J. This is a case where a young man whom the evidence shows to have been of a previously unblemished character and reputation has been convicted of the crime of rape on the practically uncorroborated testimony of a fifteen-year-old girl whose character is shown by her own testimony to have been of the lowest. She freely admits that ever since she had been ten years of age she had attended dances, and that she stayed out at one, testified to in the evidence, till 4 o'clock in the morning; that she drank beer, whisky, and whisky and alcohol punches, and that she had been drunk. She admits that prior to the occasion in controversy she had had sexual intercourse with one man other than the defendant. One witness positively testifies as to having seen her lying on a bed with another man. The evidence shows that she was irregular in her habits, was accustomed to be out at night, and to mingle freely with men. It is a case in which the defendant has denied the charges against him in a clear, straightforward, and emphatic way, and in which the testimony of the complaining witness has in many respects been on the whole inconsistent and vacillating, and in many instances opposed to all human probabilities. It is a case, too, in which the complaining witness, having become the mother of an illegitimate child, would naturally seek to place the parentage upon someone. It is shown that she had attempted to induce the defendant to marry her, and that she preferred him to her previous paramours. In such a case, and one which is supported by really no satisfactory corroborative evidence, counsel for the state said to the jury in his closing argument, "I do not come here to try a case unless the defendant is guilty," and the only notice that was taken by the court of this remark was to be found in the following words: "The court now admonishes the state's attorney that the remark is improper, and suggests that he in no manner refers to his opinions in his further address to the jury." No one who is at all conversant with jury trials can fail to see the possible prejudice of this remark. The scales were hang-

ing in the balance. On one side is the positive denial of the defendant; on the other is the practically uncorroborated testimony of the complaining witness, that testimony even being more or less contradictory and inconclusive. In such a juncture, the state's attorney himself testifies and seeks to force into the issue his own personality and his own standing and influence. He practically tells the jury that the defendant is guilty when he knows that he cannot be cross-examined as to his statement. It is universally held that such remarks are not merely a breach of professional propriety and professional ethics, but constitute legal error. See 12 Cyc. 579, and cases cited. See also State v. Nyhus, 19 N. D. 326, 27 L.R.A.(N.S.) 487, 124 N. W. 71; Mason v. State, — Tex. Crim. Rep. —, 81 S. W. 718; People v. Payne, 131 Mich. 474, 91 N. W. 739; People v. Smith, 162 N. Y. 520, 56 N. E. 1001; Bradburn v. United States, 3 Ind. Terr. 604, 64 S. W. 550; State v. Dunning, 14 S. D. 316, 85 N. W. 589; State v. Gillespie, 104 Mo. App. 400, 79 S. W. 477; Johnson v. State, 46 Tex. Crim. Rep. 291, 81 S. W. 945; Tyler v. State, 46 Tex. Crim. Rep. 10, 79 S. W. 558; Wilson v. State, 41 Tex. Crim. Rep. 179, 54 S. W. 122; Long v. State, 81 Miss. 448, 33 So. 224; White v. State, 136 Ala. 58, 34 So. 177, 15 Am. Crim. Rep. 696; Chapman v. State, 43 Tex. Crim. Rep. 328, 96 Am. St. Rep. 874, 65 S. W. 1098; State v. Trueman, 34 Mont. 249, 85 Pac. 1024; State v. Rose, 178 Mo. 25, 76 S. W. 1003; Oldham v. Com. 22 Ky. L. Rep. 520, 58 S. W. 418, 13 Am. Crim. Rep. 615. See also Code of Ethics of American Bar Association, § 15; 1 Bishop, New Crim. Proc. § 293. Some courts, indeed, hold that the error is such as cannot be cured by an instruction or admonition of the court. See King v. State, 91 Tenn. 617, 20 S. W. 169; Holder v. State, 58 Ark. 473, 25 S. W. 279; People v. Bowers, 79 Cal. 415, 21 Pac. 752; People v. Treat, 77 Mich. 348, 43 N. W. 983; State v. Balch, 31 Kan. 465, 2 Pac. 609, 4 Am. Crim. Rep. 516; Sasse v. State, 68 Wis. 530, 32 N. W. 849; People v. Barker, 10 N. Y. Crim. Rep. 112, 17 N. Y. Supp. 16; People v. Evans, 72 Misc. 367, 40 N. W. 473; People v. Ah Len, 92 Cal. 282, 27 Am. St. Rep. 103, 28 Pac. 286; State v. Jones, 21 S. D. 469, 113 N. W. 716. We are not required to express an opinion upon the latter proposition. All we have to say is that the case at bar is one in which the evidence is of such a nature that not a few of the courts of the country would refuse to sustain a verdict of

guilty at all. See 33 Cyc. 1491–i; People v. Tarbox, 115 Cal. 57, 46 Pac. 896; State v. Huff, 161 Mo. 459, 61 S. W. 900, 1104; State v. McMillan, 20 Mont. 407, 51 Pac. 827; Hardtke v. State, 67 Wis. 552, 30 N. W. 723, 7 Am. Crim. Rep. 577; Maxfield v. State, 54 Neb. 44, 74 N. W. 401; Duckworth v. State, 42 Tex. Crim. Rep. 74, 57 S. W. 665. In a close case such as this, the slightest error may be fraught with the most injurious of consequences, and we believe that justice requires that a new trial be had.

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

BURKE, J. I concur in the result, but solely on the ground that the evidence is not sufficient to support a verdict of guilty.

JOHN JOHNSON v. JACOB SEEL.

(144 N. W. 237.)

Impeachment of verdict — affidavits of jurors — when proper — misconduct of jury — resort to chance in reaching verdict.

1. Section 7063, Rev. Codes 1905, construed, and *held* that affidavits of jurors are inadmissible to impeach their verdict upon the ground of misconduct of the jury, except where such misconduct consists of a resort by the jury to chance in determining the issues.

Misconduct of jury — statements by juror to attorney — affidavit of attorney — not admissible to impeach verdict.

2. An affidavit of an attorney merely narrating admissions made by jurors in a conversation had with him is inadmissible as proof of alleged misconduct of such jurors during the trial in visiting the office of defendant's attorney as invited guests, where they were treated to beer. Such affidavit is also inadmissible for the purpose of showing other alleged misconduct mentioned in the opinion.

Opinion filed November 26, 1913.

Note.—The question of treating jurors by attorney as ground for new trial or reversal is treated in a note in 19 L.R.A.(N.S.) 733.

Appeal from District Court, Williams County, *John F. Cowan,* Special J.

From a judgment and order in defendant's favor, plaintiff appeals. Affirmed.

Geo. A. Gilmore, for appellant.

Misconduct of jurors may be proved by the affidavit of one of the jury. Rev. Codes 1905, art. 2, § 7063.

During the trial, where a juror makes statements about the case or about the evidence, showing a fixed, settled opinion adverse to the losing party, it is ground for a new trial. 20 Cyc. 799, 802; Wightman v. Butler County, 83 Iowa, 691, 49 N. W. 1041.

Even where the facts stated in the affidavits of the moving party are controverted by the juror, still a new trial may be granted. In this case the showing is not disputed. Mix v. North American Co. 209 Pa. 636, 59 Atl. 272.

Where a juror talks to other jurors about the case during the trial, such act does not give ground for a new trial, *unless his statements and comments show bias and ill-will.* 29 Cyc. 801 (11).

If such remarks prejudice or bias other jurors, they constitute ground for new trial. Albin Co. v. Demorest Mfg. Co. 22 Ky. L. Rep. 245, 56 S. W. 982; Blackfoot Stock Co. v. Delamue, 3 Idaho, 291, 29 Pac. 98; Hydinger v. Chicago, B. & Q. R. Co. 126 Iowa, 222, 101 N. W. 746; 29 Cyc. 798 (11); Welch v. Taverner, 78 Iowa, 207, 42 N. W. 650; Svenson v. Chicago G. W. R. Co. 68 Minn. 14, 70 N. W. 795, 2 Am. Neg. Rep. 183; Woodbury v. Anoka, 52 Minn. 329, 54 N. W. 187; Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50.

It need not be shown that such remarks actually influenced any of the jury. 29 Cyc. 803–805; Vose v. Muller, 23 Neb. 171, 36 N. W. 583; Baker v. Jacobs, 64 Vt. 197, 23 Atl. 588; Wright v. Eastlick, 125 Cal. 517, 58 Pac. 87; Stafford v. Oskaloosa, 57 Iowa, 748, 11 N. W. 668; McGill Bros. v. Seaboard Air Line R. Co. 75 S. C. 177, 55 S. E. 216; Bradshaw v. Degenhart, 15 Mont. 267, 48 Am. St. Rep. 677, 39 Pac. 90.

The proceedings were irregular and this includes misconduct of attorney. Lindsay v. Pettigrew, 3 S. D. 199, 52 N. W. 873; Morris v. Hubbard, 14 N. D. 525, 86 N. W. 25.

Aaron J. Bessie, for respondent.

The complete record upon which the order from which appeal is taken was made, must be before this court, or no review can be had. State v. Gerhart, 13 N. D. 663, 102 N. W. 880.

Matters shown by affidavits or other evidence not in the record will not be considered. Fisher v. Betts, 12 N. D. 197, 96 N. W. 132; Palmer v. Hurst, 22 S. D. 68, 115 N. W. 516; French v. Chicago, B. & Q. R. Co. 26 S. D. 125, 128 N. W. 498; Maag v. Stuverad, 23 S. D. 423, 122 N. W. 350; Brown v. Skotland, 12 N. D. 445, 97 N. W. 543; Johns v. Ruff, 12 N. D. 74, 95 N. W. 440; Spaulding v. Pitts, 26 S. D. 78, 127 N. W. 610; McAndrews v. Security State Bank, 25 S. D. 590, 127 N. W. 536; Sternberg v. Larson, 20 N. D. 635, 127 N. W. 993; State v. Johns, 25 S. D. 451, 127 N. W. 470; McLaughlin v. Thompson, 19 N. D. 34, 120 N. W. 554; Kephart v. Continental Casualty Co. 17 N. D. 380, 116 N. W. 349; Sucker State Drill Co. v. Brock, 18 N. D. 532, 123 N. W. 667; Marck v. Minneapolis, St. P. & S. Ste. M. R. Co. 15 N. D. 86, 105 N. W. 1106.

Errors must be specified in a settled statement of the case. Rev. Codes 1905, §§ 7058, 7063; Jackson v. Ellerson, 15 N. D. 533, 108 N. W. 241; Bertelson v. Ehr, 17 N. D. 339, 116 N. W. 335.

Affidavits of jurors to impeach verdict are not admissible, except for the purpose specified in the statute. 1 Greenl. Ev. 252; People v. Azoff, 105 Cal. 635, 39 Pac. 59; People v. Findley, 132 Cal. 308, 64 Pac. 472; Saltzman v. Sunset Teleph. & Teleg. Co. 125 Cal. 508, 58 Pac. 169; Sanitary Dist. v. Cullerton, 147 Ill. 385, 35 N. E. 723; Ewing v. Lunn, 22 S. D. 95, 115 N. W. 527; Gaines v. White, 1 S. D. 434, 47 N. W. 524; Boyce v. California Stage Co. 25 Cal. 474, 9 Am. Neg. Cas. 66; Murphy v. Murphy, 1 S. D. 316, 9 L.R.A. 820, 47 N. W. 142; 11 L.R.A. 706, note; Re Merriman, 108 Mich. 454, 66 N. W. 373; Baylies, New Trials, p. 543; Turner v. Tuolumne County Water Co. 25 Cal. 402, 1 Mor. Min. Rep. 107.

Affidavits of jurors showing undue influence, or of damaging statements made by member of jury to fellow jurors during the trial, concerning a party to the case or about the case, are not admissible. 4 Wigmore, Ev. §§ 2345, 2348, 2349, p. 3275.

Affidavit of a third person showing admissions and statements of jurors is not admissible. 3 Kerr's Anno. Code Civ. Proc. p. 1077, note

44; Siemsen v. Oakland, S. L. & H. Electric R. Co. 134 Cal. 494, 66 Pac. 672; People v. Ritchie, 12 Utah, 180, 42 Pac. 209; Ewing v. Lunn, 22 S. D. 95, 115 N. W. 527.

Applications for new trials are addressed to the sound discretion of the trial court, and its finding will not be disturbed, unless there is clear abuse of such discretion. Soules v. Brotherhood A. Y. 19 N. D. 23, 120 N. W. 760.

FISK, J. This cause was tried to a jury and resulted in a verdict and judgment for defendant. A motion for a new trial was made solely upon the grounds of the alleged misconduct of the jury, of the defendant, and of his attorney, which motion was supported merely by the affidavits of two of the jurors, and of plaintiff's attorney. The affidavits of the two jurors are to the effect that a third juror, one Mesler, in a conversation had with them during the trial of the case, made certain statements to them of and concerning the plaintiff of a very derogatory nature, and tending to, and which in fact did, influence and prejudice them against the plaintiff, and which statements disclosed, on the part of Mesler, strong bias and hostility toward plaintiff. Such affidavits also contain statements of a hearsay character, tending to show that juror Mesler, during the time the case was on trial, visited the office of defendant's attorney, where he was treated to beer, and that two other of the jurors admitted having visited such attorney's office during the term of court for the purpose of drinking beer, although whether this occurred while the case at bar was being tried is not shown. The affidavit of plaintiff's attorney sets forth conversations had by such attorney with Mesler and certain other jurors, wherein they admitted to him that they had thus visited the office of defendant's attorney at various times during the term of court at which this cause was tried, and there drank beer as invited guests. Such conduct on the part of defendant's counsel and the members of the jury, if established to be true by proper evidence, would be most reprehensible, and would justly deserve the severest condemnation, and no doubt would be good ground for vacating the verdict and granting a new trial. But we are clear that the misconduct thus attempted to be shown was not properly established, and that the trial court therefore did not err in declining to consider

such affidavits, as he must have done in denying the motion for a new trial.

Appellant's contention that § 7063, Rev. Codes 1905, expressly authorizes such misconduct to be proved by the affidavits of jurors, is clearly untenable. Subdivision 2 of this section in unmistakable language limits the use of such affidavits to misconduct consisting of a resort by the jury to a determination of the issues by chance, and there is no warrant in the statute for the use of such affidavits to impeach the verdict upon other grounds of misconduct, such as is here attempted. The authorities, in construing a like statute, are, we think, unanimous in support of our views as above expressed. We will content ourselves by the citation of a few. People v. Azoff, 105 Cal. 632, 39 Pac. 59; People v. Findley, 132 Cal. 301, 64 Pac. 472; Saltzman v. Sunset Teleph. & Teleg. Co. 125 Cal. 501, 58 Pac. 169; Turner v. Tuolumne County Water Co. 25 Cal. 398, 1 Mor. Min. Rep. 107; Ewing v. Lunn, 22 S. D. 95, 115 N. W. 527; Murphy v. Murphy, 1 S. D. 316, 9 L.R.A. 820, 47 N. W. 142; State v. Andre, 14 S. D. 215, 84 N. W. 783.

In support of the general proposition that affidavits of jurors are inadmissible to impeach their verdict, see in addition to the foregoing authorities, Sanitary Dist. v. Cullerton, 147 Ill. 385, 35 N. E. 723; Re Merriman, 108 Mich. 454, 66 N. W. 372; Jones, Ev. 2d ed. ¶¶ 766, 767; 4 Wigmore, Ev. §§ 2345, 2348, 2349, p. 3271.

Nor was the affidavit of plaintiff's counsel admissible. Such affidavit merely recites admissions made to the attorney by certain members of the jury. Manifestly, if the affidavits of the jurors were inadmissible, the affidavit of a third person merely narrating admissions made by such jurors is likewise inadmissible. If authorities are desired in support of this, see Siemsen v. Oakland, S. L. & H. Electric Co. 134 Cal. 494, 66 Pac. 672; People v. Ritchie, 12 Utah, 180, 42 Pac. 209.

The judgment and order appealed from are affirmed.

STATE OF NORTH DAKOTA v. C. J. OLSON.

(— L.R.A.(N.S.) —, 144 N. W. 661.)

Statutes — snuff — substitute — construction — constitutional — property — depriving of — without due process.

1. Chapter 271 of the Laws of 1913, which makes it unlawful "for any person, firm, or corporation to import, manufacture, distribute, or give away any snuff or substitute therefor, under whatever name called, and as defined in this act," and which defines snuff as "any tobacco that has been fermented or dried or flavored or pulverized or cut or scented or otherwise treated, or any substitute therefor or imitation thereof, intended to be taken by the mouth or nose," and which further provides that "ordinary plug, fine cut, or long cut chewing tobacco, as now commonly known to the trade of this state, shall not be included in such definition," is constitutional, and cannot be assailed upon the ground that it deprives any person of life, liberty, or property without due process of law, or denies to any person the equal protection of the laws.

Courts — judicial notice — tobacco — use of, uncleanly and injurious.

2. The courts can take judicial notice that the use of tobacco in any form is uncleanly, and that its excessive use is injurious.

Judicial notice — use of tobacco by the young — effects.

3. The courts may take judicial notice that the use of tobacco in any form by the young is injurious, and that the use of snuff is especially so.

Police statutes — right to liberty — property — relation to public health — morality — public welfare — unreasonable interferences.

4. Police statutes can only be set aside as unreasonable interferences with the right to liberty and property if it can be said that they cannot possibly have any reasonable relation to the public health, morality, or to the real public welfare.

Courts — snuff — manner of use — cognizance.

5. The courts may take cognizance of the fact that snuff in North Dakota is generally used by holding it between the lip and the gums without mastication, or by plastering it upon the gums, and that it is absorbed rather than chewed.

Courts — judicial notice — tobacco — use of — snuff — use of, by young — manner of use.

6. The courts may take judicial notice that tobacco held between the lip and the gums, or plastered upon the gums, and absorbed rather than chewed, can be used by the schoolboy with less possibility of detection than tobacco which is masticated.

Judicial notice — drugs — opium — mingled with snuff — use of.

7. The courts can take judicial notice of the general fear in the community that drugs and opium are and can be more easily mingled with snuff, and be less readily detected, than in other forms of tobacco.

Police laws — omnibus in character — need not be.

8. Police laws need not necessarily be omnibus in their character, and it is permissible to legislate against one form of evil even though many other and similar evils have not been condemned.

Vice — general — condemnation — specific — prohibited.

9. It is not necessary to condemn all forms of vice in order that any particular form may be prohibited.

Criminal — punishment — comparative crimes — immaterial — injurious products — regulation of use.

10. No criminal should be allowed to complain or escape punishment because someone else is more of a criminal or more dangerous to society than he; nor should any product which is injurious to the community escape regulation and condemnation because there are others equally injurious which are not regulated or forbidden.

Property — inalienable right — nuisance.

11. There is no vested and inalienable right of property in that which is a nuisance.

Statutes — construction — exemptions — class legislation.

12. The fact that chapter 271 of the Laws of 1913, familiarly known as the anti snuff act, exempts from its provisions "ordinary plug, fine cut, or long cut chewing tobacco as now commonly known to the trade of North Dakota," does not render such statute invalid or subject to the charge of class legislation.

Words — use of — dictionaries.

13. Dictionaries do not give to words their meaning; they only chronicle that which has been done, and the use must precede the chronicling.

Snuff — has defined meaning — manner of use.

14. In North Dakota the word "snuff" has a well-established meaning in the popular mind, and includes any tobacco, whether fermented or not, which is finely cut or ground and dried in order that the same can be taken into the mouth and absorbed without the necessity of mastication, and is naturally adapted to such use, even though it is not usually taken in the nose.

Courts — notice of words and their use — jurisdiction.

15. The courts of North Dakota can take judicial notice of the meaning generally given to words and terms within their jurisdiction, even though such meaning is not the one generally given in the world at large.

Title of act — prohibits make or sale of articles — substitute — validity.

16. A title which prohibits the manufacture or sale of an article is broad enough to include substitutes therefor.

Opinion filed November 26, 1913.

Appeal from the District Court of Stark County, *Crawford, J.*

Defendant was convicted of violating the provisions of chapter 271 of the Laws of 1913, relating to the sale of snuff, and appeals.

Affirmed.

Statement by BRUCE, J. The defendant appeals from a judgment of the district court of Stark county, finding him guilty of violating chapter 271 of the Laws of 1913, which is familiarly known as the "anti snuff act." The statute under which the defendant was prosecuted and convicted reads in part as follows: "An Act to Prohibit the Importation, Manufacture, Distribution, Transportation, or Sale of Snuff, or Any Substitute Therefor, and Providing a Penalty Therefor, and to Repeal Chapter 277 of the Session Laws of North Dakota of 1911. Be it enacted by the legislative assembly of the state of North Dakota: Sec. 1. (Sale of snuff prohibited.) It shall be unlawful for any person, firm, or corporation to import, manufacture, distribute, or to give away any snuff or any substitute therefor, under whatever name called, and as defined in this act. Sec. 2. (Snuff defined.) For the purpose of this act, snuff is defined as any tobacco that has been fermented or dried or flavored or pulverized or cut or scented or otherwise treated, or any substitute therefor or imitation thereof, intended to be taken by the mouth or nose; Provided, however, that ordinary plug, fine cut, or long cut chewing tobacco, as now commonly known to the trade of this state, shall not be included in such definition." The specific offense charged in the information was that the defendant sold "Four 1-oz. packages or boxes labeled 'Right Cut Chewing Tobacco,' and containing, as said Olson then and there knew, tobacco that had been fermented, flavored, pulverized, cut, scented, or otherwise treated, and intended to be taken by the nose or mouth, said tobacco so prepared and so sold as aforesaid being then and there snuff, and intended to be used as snuff, the same not being ordinary plug, fine cut, or long cut chewing tobacco, as commonly known to the trade of this state."

The points on which a reversal is sought are summarized as follows:

(1) The act as a whole is unconstitutional as unwarranted discrimination.

(2) The act, when properly construed, applies to snuff, and snuff only, and does not apply to substitutes for snuff.

(3) "Right Cut" is not a snuff, or a substitute for a snuff.

(4) To exclude "Right Cut" from the markets of North Dakota, while permitting the sale of other chewing tobaccos, would be a denial of the equal protection of the law, and would therefore be unconstitutional.

(5) If the act be construed without reference to the title, and free rein given to the language of the definition, then we have a case of class legislation, which can be cured only by avoiding the act as a whole.

One witness, a merchant, testifies that he has handled snuff until January or February, 1913; that the acceptation and meaning of the word "snuff" as used in his trade is a chewing tobacco in little round boxes; that they would take a pinch of it and chew it, put in their mouth, sometimes rub it in their gums; that it requires no mastication, and that other tobaccos require some chewing, as he understands it; that he handled, previous to July 1st, 1913, a large amount of Copenhagen snuff; that he had customers show him what they said was Right Cut chewing tobacco, that looked like Copenhagen, and ask him to get it for them; that they wanted him to get it in the place of the snuff that he had been selling them, Copenhagen; said that they could use it in place of snuff; that his manager ordered some Right Cut; that he was familiar with Copenhagen; that his familiarity with snuff and tobacco would lead him to think that Right Cut was a good substitute for Copenhagen; that when he used the word "snuff" he meant Copenhagen as sold in these little round boxes, dark heavy snuff used for chewing; that he didn't mean nasal snuff; that he wasn't an expert, and testified from his general knowledge as a merchant in handling tobacco for some fifteen years; that several of his customers got Right Cut chewing tobacco right there in town; that he didn't recollect whether they ordered a second time from him; that the ones who bothered him the most were the men working on his building; that he was putting up a building in addition to the store, and they were snuff users, and he

guessed they ran out of snuff; his brother said he ordered it for them; that it would seem that a user of snuff could get along with Lorillard's Dark Shorts, that he couldn't tell whether it could be substituted for snuff; that it smelled as though it might be used as a substitute for snuff; that it didn't appear to be as fine; it don't seem powdered as Right Cut; that his reason for thinking that Right Cut could be used as a substitute for snuff was what his customers told him; that about a dozen customers told him that, a dozen out of about four hundred; that they were men that he was well acquainted with; that he thinks the rest of the snuff users went without snuff, took other forms of tobacco; that externally Right Cut and Copenhagen looked alike; that he could not distinguish very much difference in the odor; that to him they smelled alike.

Another witness testified that he was a physician and surgeon of about fourteen years' standing; that he was not a tobacco user himself; that in his opinion the use of tobacco was in some degree injurious to the human system; that the regular school of medicine so recognized it; that Exhibit A–1 (the package of Right Cut) was snuff; that he had seen snuff a great many times, but was not a user of tobacco himself or a user of snuff; that in North Dakota snuff is used in two ways, the form that is drawn in the nose, and the form that is inserted in the mouth, might say chewed, although they did not masticate it, he guessed, when they used it, commonly called "chewing snuff;" that he would distinguish between chewing tobacco and snuff taken in the mouth in the manner of its use; that in the users that he had seen, the snuff user took and inserted it in the cavity of the lip and held it there, while a user of tobacco took a piece of tobacco and at intervals masticated it, whereas the snuff user practically did not masticate it at all, seemed to hold it in his buccal cavity; that snuff, or tobacco that is used as snuff, when taken in the mouth, is finer than ordinary chewing tobacco; that a man using the ordinary plug or long cut or fine cut chewing tobacco would expectorate more than a man using snuff; that the snuff user would expectorate considerably less, a great deal less; that the most injurious ingredient of tobacco was alkaloid nicotine, though there are other things that are quite as injurious; that it is chiefly harmful because of the nicotine; that a person would get more nicotine from fine tobacco than from coarse tobacco; that all of the tobacco that he had seen which

had been as fine as Exhibit A–1 (Right Cut) had been called "snuff;" that he had examined Exhibit A–1 and tasted it and smelled it and spread it on paper so as to get an idea of the size of the particles; that it was tobacco, that he would say it was snuff; that he had seen snuff a good many times; when he said that it was snuff, he meant that it was finely pulverized and might be either used in the nose or mouth; that from its appearance and moisture he should judge that it was what is used in chewing, used in the mouth; that the strength could be gotten out of it without mastication and with little manipulation, as distinguished from the ordinary fine cut or long cut chewing tobacco; that the harmful effects of tobacco are in proportion to the amount of the strength which you get out of it; that finely cut tobacco soaked in saliva would give off a quicker and stronger infusion of nicotine than other forms; that his experience with snuff users was so limited that he didn't think he would be able to express an opinion as to whether snuff users were more addicted to drug habits than other forms of tobacco users, but that one particular friend of his that used snuff became a marked user of drugs; that he didn't know anything about the manufacture of tobacco; that his conclusion that the product was snuff was based purely upon observation, his sense of sight and smell and other things; that he had never observed the relative effects between Right Cut and Copenhagen.

Another witness testified that he was a graduate of the University of Michigan and a professor in the Agricultural College at Fargo; that he had made an analysis of Right Cut and of Copenhagen snuff; that in Copenhagen snuff the tobacco has lost about 50 per cent of its moisture, and the same was practically true of Right Cut; that in one sample of Right Cut he got 3.49 per cent and in another 3.75 per cent nicotine, and in one sample of Copenhagen snuff 3.27 per cent and that the other ingredients were essentially the same; that in external appearance Copenhagen snuff and Right Cut are apparently the same; that they have a characteristic odor which is different from ordinary tobacco; that they have almost identically the same taste and, as near as he could tell, the same effect; that he did not know of any tobacco that contained as large a percentage of nicotine, outside of Copenhagen, as was contained in Right Cut; that Right Cut can be used in the same way as

Copenhagen snuff; that he did not know of any tobacco that was put on the market in as fine a form as Right Cut.

Another witness testified that he had used snuff for about ten years, Copenhagen mostly; that he had seen Right Cut; that it is a ground tobacco; that it is a good substitute for snuff; that he tried it, however, and did not like it, and did not buy any more of it; that in appearance it is like Copenhagen, except that it is a little coarser; that you cannot chew Right Cut any more than Copenhagen, because it would go all over one's mouth and down his throat and make him sick; that the way to handle it is to take a pinch and put it between the lip and the gum; that Right Cut can be handled in the mouth the same as Copenhagen; that the first he ever saw of Right Cut was in the latter part of June; that he tried and did not like it, and did not buy any; that when he took too much Copenhagen it made him dizzy and sick.

Still another witness testified that he had used Copenhagen snuff for about five years; that he got a box of Right Cut the latter part of June; that that answered the same as Copenhagen, to his notion; that it could be used the same way; that no person could chew it, it was too fine; that he saw no other kind of tobacco as fine as Right Cut; that it smelled and tasted quite a little like Copenhagen, almost the same; that Right Cut was stronger than Copenhagen to a certain extent; that he liked it pretty well, but not as good as Copenhagen; that he has used tobacco once in a while since the snuff law went into effect; that since that he has mostly smoked, in a way as a substitute for Copenhagen.

A witness for the defense testified that Copenhagen is cut twice, and Right Cut only once; that Copenhagen is subjected to a process of fermentation, and that Right Cut is not; that the period of fermentation of Copenhagen is several months; that Right Cut is made from the same stock as Copenhagen; that the leaves for Copenhagen went into one machine and for Right Cut into another; that the first cutting of Right Cut was similar to the first cutting of Copenhagen; that he never saw any tobacco in any form except snuff that was put up as fine as Right Cut; that after the cutting and before the sifting, it was dried by going through a rotary drier at about 150 or 160 degrees of heat; that it was then thoroughly dry to the touch; that after it was dried it was put into a large sieve and shaken through the mesh into a box below; that it was then flavored and water added in connection with the flavor; that

then it was allowed to dry until the flavor had penetrated, and then it was packed; that as far as he knew, there was no distinction between snuff taken by the nose and by the mouth, as far as the amount of nicotine contained was concerned; that he did not know whether a person could masticate it, probably not, he was not a chewer; that the flavoring in Right Cut and Copenhagen was of the same general character; that Copenhagen is really a chewing tobacco and that snuff is a misnomer; that he had never seen it used in the nose; that he should say that Right Cut was less closely related to snuff than Copenhagen, on account of its not being fermented; that it is similar to Copenhagen as a chewing tobacco; that there was a fairly close resemblance between the two; that the general flavoring was the same; that it would be held the same way; that a pinch of it would be inserted between the lip and the gums and allowed to lie there; that after they were placed in the mouth they would both be used the same; that one would be a substitute for the other, from the point of view that they were not masticated; that he could not tell whether a user of Copenhagen would be fairly well satisfied with Right Cut; that Right Cut is nearer ordinary fine cut than it is to Copenhagen; that if snuff is a misnomer for Copenhagen, it has been a misnomer for nearly eighty years; that he had been told that only a small proportion was used for the nose; that he had never seen it used that way; that Copenhagen was not a nasal snuff; that Right Cut had some resemblance to Copenhagen, and many differences; that it was a short cut; that it resembled Copenhagen more in appearance than any tobacco he had seen, but not in character; that he did not know of any form of chewing tobacco that so closely resembled Copenhagen as Right Cut; that there wasn't any; that Right Cut came nearer Copenhagen than any form of chewing tobacco that he knew of, because it was cut uniformly and the character of the leaf was the same, but that the treatment was entirely different; that the flavoring was practically the same; that Right Cut was nearer ordinary fine cut than it was Copenhagen; that he had heard the statement that the use of snuff led to drug forming habits, but that he would not call it a wide-spread feeling; that he had frequently investigated the rumors about snuff and cigarettes, and found them to be without any foundation, but nevertheless the idea was never downed.

The defendant himself testified that he was the division manager of

the Weyman-Bruton Company; that he handled Right Cut and Copenhagen; that at first Right Cut was sold mostly to Copenhagen users, but as a rule the men that used Copenhagen would buy one or two boxes of Right Cut and go back to Copenhagen; that he used a good many kinds of fine cut, but none of them as fine as Right Cut; that he did not know of any fine cut that was as fine as either Right Cut or Copenhagen; that Copenhagen was the biggest part of the snuff sold in his territory, probably 85 per cent of it; that in North Dakota when people spoke of snuff, he knew they meant Copenhagen; that Right Cut looked more like Copenhagen than any tobacco that he knew of, and smelled more like it; that a user of Copenhagen would not expectorate; that a user of Right Cut would expectorate a little more, but not as much as he would chewing plug or long cut or fine cut; that Right Cut was put on the market about the first of the year; that in North Dakota, if people spoke of snuff, it would convey to him the meaning Copenhagen; that when we speak of snuff without putting any other words with it, we mean tobacco in fine form that can be placed in the mouth and the juice gotten out of it without biting; that you can do that with Copenhagen and with Right Cut; that he did not think that Copenhagen and Right Cut looked alike; that Right Cut looked more like Copenhagen than any other tobacco, and smelled more like Copenhagen than any other tobacco; that in his opinion there was no similarity in taste.

One of the vice presidents of the manufacturing company testified that he had been chewing Copenhagen for seven or eight years; that Right Cut could be used without mastication, but that a person can get a good, satisfactory chew of Right Cut without biting; that that was one of its virtues; that a tobacco user might experience some difficulty in masticating Right Cut; that the principal virtue of Right Cut was that the user did not have to manipulate it to get the taste out of it; that it could be carried in the mouth without a lump; that Right Cut was a tobacco that had been dried, cut, flavored, and sieved; that Right Cut was not ordinary long cut, nor ordinary fine cut, nor scraps nor twist nor cigar clippings, nor a by-product of tobacco manufacturers, nor shorts; that it was sifted through a very fine screen; that you cut Right Cut with a knife operated by machinery; that the

knives made a good many revolutions a minute; that they are in a cylinder.

The president of the manufacturing company testified that he first conceived the idea of manufacturing Right Cut about seven years ago; that immediately after the dissolution of the American Snuff Company he was made president of the Weyman-Bruton Company, and started in with his experiments, and Right Cut is the result; that the cut or shred of long cut was a little coarser than fine cut; that he can never understand why the orginal George Weyman, in 1835, called Copenhagen "snuff;" that it was a fine cut tobacco; that the difference between Copenhagen and Right Cut was that Right Cut was cut only once, and Copenhagen was cut twice; that Right Cut was not fermented, Copenhagen was fermented; that Right Cut tobacco was made for a chew, and was advertised for a chew, and not to be snuff; that Right Cut was made from the leaf into the finished product in a day, while it takes from nine to nineteen weeks to manufacture Copenhagen; that the reason why Right Cut was as fine as it is, being only cut once, is that it is not as fine as it appears to be; the shreds are long in comparison with their width, but being cut very thin in the process of manufacture, after it is cut and dried it breaks very quickly and easily; however, in this broken state we are enabled to take out of it the stems; Right Cut tobacco, though only cut once, is broken in handling it until it is reduced to its present fineness; that Right Cut chewing tobacco is packed in the same kind of boxes as Copenhagen; that snuff is used both in the mouth and the nose; that Copenhagen has been used as snuff, but that it should be called tobacco; that it has been held by the nostrils, but most of it chewed; that a part of the Mayflower Shorts are as fine as Right Cut, but that the same care has not been used to have it as fine a fiber as has been used in Right Cut; that all shorts contain a large percentage of tobacco that is as fine as Right Cut, but none of them are as uniformly fine as Right Cut; that they are not as uniform in every respect; that the grain or shred of Right Cut, however, is not uniform; it simply does not contain any very long shreds; that Right Cut, before being finished, was screened to take out the stems; that Right Cut tobacco is fine enough so that it could be inhaled the same as broken cigarettes are inhaled; that it is fine enough as it comes from the can

without further breaking; that it would not, however, have the same effect as snuff.

One Brown, who appears to have been in the tobacco business for thirty-three years, testified, among other things, that the thing that distinguished snuff from other tobacco was the fact that snuff was powdered, pulverized, and fermented. He, however, testified that he never saw any tobacco as fine as Right Cut, not as uniformly fine; that Right Cut could be readily used for snuff.

The testimony of J. W. Snead and George G. Dibel, both tobacconists, is to the effect that Right Cut is more uniformly fine than any fine cut. The same is true of the testimony of one Bernard Dunn, who also testifies that Right Cut could be easily and readily drawn into the nose; that he never saw any tobacco so uniformly fine. One F. P. Jack testified that the only purpose of sweating or fermentation is to take the rankness and greenness out of the leaves. He defined snuff as tobacco which has been ground, cased, and sweated.

John M. Devoe testified that he was manager of the Chicago branch of Weyman-Bruton Company; that all tobaccos were fermented before they came to the manufacturer; that snuff was tobacco finely ground, more or less fermented, and intended strictly for the nostrils; that Right Cut is not placed on the market until it is dried and sieved; that sieving removes the stems; that it breaks up in the course of sieving; that Copenhagen is a fine cut, did not know why it was called "snuff;" that Right Cut and Copenhagen were both cut with a machine, Right Cut once and Copenhagen twice, but that Right Cut is cut with a finer machine, Copenhagen is a coarser cut; that the finished product of Copenhagen, however, has been fermented, whereas Right Cut has not, that makes a wide difference; that no tobacco has the same uniformness or evenness of grain as Right Cut; that some tobaccos that were not snuff were fermented in the process of manufacture, and that extra fermentation was not necessarily peculiar to snuff; that the sieve used in the manufacture of Right Cut might be deemed a flat bed sieve, having a reciprocating motion of perhaps four to five hundred per minute; that the dry material for Right Cut, being placed on the sieve, is more or less broken, and the particles fall through; that there are sixteen meshes to the inch; that he does not consider Copenhagen snuff; that all

tobacco is fermented more or less in the process of manufacture; that Right Cut is dried and flavored and cut, but not pulverized.

One John Dahner testified that he would class Copenhagen as fine cut tobacco; that it took from eleven to thirteen weeks to manufacture Copenhagen snuff; that Right Cut and Copenhagen are made from identically the same stock, and by the same process down to the cutting; that there is a difference in the cutting; that Copenhagen is cut twice, and cut coarser; that Right Cut is cut once, and cut in a finer cog; that Right Cut could not be cut any finer; that they could not make it any finer if they wanted to; that he knew of no machine that would cut it finer; that they cut Copenhagen coarser and then crosscut it; that Right Cut is first dried and then sifted; that the drying makes it very brittle; and in that condition it goes into the sieving machine, the opening of which is sixteen meshes to the inch; that you could put the head of a pin through it; that Right Cut is rubbed so as to break it up, and that all of the tobacco goes through excepting the stems; that it has to be broken up small enough to go through the mesh; never saw any other kind of tobacco submitted to the sieving process; that they did not grind either Right Cut or Copenhagen; that they manufacture a great many other varieties of snuff, all manufactured by a different process from Copenhagen and Right Cut.

E. N. Skinner testified that it took forty-eight hours from the time the product was taken from the hogshead until it was ready to pack into boxes for the consumer, to manufacture Right Cut tobacco; that Right Cut was not fermented in the course of manufacture, and that Copenhagen was; that granulated smoking tobacco was not dried as much as Right Cut before being sieved; that all the difference between Copenhagen and Right Cut was that Copenhagen has the coarse cut followed by a second cut, and it is fermented, whereas Right Cut has but one very fine cut, and is not fermented; that they are made from the same leaf and the same casing; that Copenhagen was not snuff; that he knew that snuff was chewed by a great many people, taken into the mouth and painting their teeth.

D. E. Rice testified that the uniformity and shortness of thread is much greater in Right Cut than in shorts; that he never had seen any chewing tobacco so uniformly fine and short shredded as Right Cut; that his company was still selling snuffs in North Dakota, in spite of

the law against them; that in his judgment Polish was the only snuff which came within the real definition of snuff; that he felt quite certain that his company had sold more Copenhagen snuff in North Dakota during the last year than ever before, and that Copenhagen was the only brand that they had extensively sold; that the reason his company had manufactured Right Cut was that they thought it would be taken as a chew, and all the pleasure of tobacco chewing experienced without mastication; that it required a good deal of mastication with most other chewing tobaccos.

There was also evidence that Bootjack was made of the same leaf as Right Cut; also of a copy of a booklet issued by the company, in which, though the manufacturers advertised Right Cut as chewing tobacco, they over and over again emphasized the fact that it did not require mastication; in fact, counsel for appellant in his brief states that he has no objections to the court's taking judicial notice of the fact that Copenhagen is chewed in a different manner than plug, but insists that the court should at the same time take judicial notice of the fact that the manner of chewing Copenhagen is not different from the manner of chewing the ordinary fine cut chewing, and Right Cut, and that the evidence so shows. With the exception of the evidence of Rice and Olson, however, we do not think that this is the fact.

Engerud, Holt, & Frame, for appellant.

The provisions of § 61 of the North Dakota Constitution are mandatory, and an act of the legislature is valid only to the extent that it is confined to the scope of its title. Divet v. Richland County, 8 N. D. 65, 76 N. W. 993; Richard v. Stark County, 8 N. D. 392, 79 N. W. 863; Folsom v. Kilbourne, 5 N. D. 405, 67 N. W. 291; Northwestern Mfg. Co. v. Chambers, 58 Mich. 381, 55 Am. Rep. 693, 25 N. W. 372; Fidelity Ins. Trust & S. D. Co. v. Shenandoah Valley R. Co. 86 Va. 1, 19 Am. St. Rep. 858, 9 S. E. 759; Lacey v. Palmer, 93 Va. 163, 31 L.R.A. 822, 57 Am. St. Rep. 795, 24 S. E. 930.

The use of the word "substitute" (for snuff) in the title to the act is too vague and indefinite for application or enforcement. It means no more than, "and so forth," and is not sufficiently and specifically *related* to the subject to render its meaning, and make its application, clear. Lacey v. Palmer, supra; State v. Arnold, 140 Ind. 628, 38 N. E.

820; Glenn v. Lynn, 89 Ala. 608, 7 So. 924; Fishkill v. Fishkill & B. Pl. Road Co. 22 Barb. 634; Ryerson v. Utley, 16 Mich. 269; St. Louis v. Tiefel, 42 Mo. 578; Johnston v. Spicer, 107 N. Y. 185, 13 N. E. 753; 26 Am. & Eng. Enc. Law, 2d ed. 656; Bishop, Statutory Crimes, §§ 3, 41; Hilburn v. St. Paul, M. & M. R. Co. 23 Mont. 241, 58 Pac. 551, 811; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; State v. Excelsior Springs Light, Power, Heat & Water Co. 212 Mo. 101, 126 Am. St. Rep. 563, 110 S. W. 1079.

The statements of the witnesses as to what snuff is are in accord with the dictionaries and *word* authorities. Webster's Dict.; Century Dict.; Standard Dict.; 14 Enc. American; 26 Enc. Britannica, 11th ed. 1040; Werner, Tobacco, pp. 68, 69.

These various articles mentioned in the statute are made the same way, of the same substance, used for the same purpose, and with like effect. Therefore the exclusion of "Right Cut" is an unwarranted discrimination. Edmunds v. Herbrandson, 2 N. D. 271, 14 L.R.A. 725, 50 N. W. 970; State ex rel. Richards v. Hammer, 42 N. J. L. 439; Re Connolly, 17 N. D. 546, 117 N. W. 946; Plummer v. Borsheim, 8 N. D. 565, 80 N. W. 690; Vermont Loan & T. Co. v. Whithed, 2 N. D. 82, 49 N. W. 318; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The act is unconstitutional as denying the equal protection of the law, and as class legislation. Connolly v. Union Sewer Pipe Co. 184 U. S. 556, 46 L. ed. 688, 22 Sup. Ct. Rep. 431; State v. Santee, 111 Iowa, 1, 53 L.R.A. 763, 82 Am. St. Rep. 489, 82 N. W. 445; Janesville v. Carpenter, 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; State v. Hinman, 65 N. H. 103, 23 Am. St. Rep. 22, 18 Atl. 194.

No arbitrary distinction between different kinds or classes of business can be sustained, the condition being otherwise similar. State ex rel. McCue v. Ramsay County, 48 Minn. 236, 31 Am. St. Rep. 651, 51 N. W. 112; Beleal v. Northern P. R. Co. 15 N. D. 318, 108 N. W. 33, 20 Am. Neg. Rep. 453; State ex rel. Mitchell v. Mayo, 15 N. D. 327, 108 N. W. 36; Re Connolly, 17 N. D. 546, 117 N. W. 946; State v. Mitchell, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887; State v.

Cudahy Packing Co. 33 Mont. 179, 114 Am. St. Rep. 804, 82 Pac. 833, 8 Ann. Cas. 717; Chicago, M. & St. P. R. Co. v. Westby, 47 L.R.A. (N.S.) 97, 102 C. C. A. 65, 178 Fed. 619; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Spraigue v. Thompson, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

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

The numerous pure food and health laws passed by the legislatures of other states have been universally sustained by the courts. Austin v. State, 101 Tenn. 563, 50 L.R.A. 478, 70 Am. St. Rep. 703, 48 S. W. 305, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132.

The prohibition law of this state against the sale of intoxicating liquors, *or "substitutes"* therefor, has been sustained. State v. Fargo Bottling Works, 19 N. D. 396, 26 L.R.A.(N.S.) 872, 124 N. W. 387; Pennell v. State, 141 Wis. 35, 123 N. W. 115; Sawyer v. Botti, 147 Iowa, 453, 27 L.R.A.(N.S.) 1007, 124 N. W. 787.

The act in question is no broader than is its title, and violates no provision of our Constitution. State ex rel. Kol v. North Dakota Children's Home Soc. 10 N. D. 493, 88 N. W. 273.

BRUCE, J. (after stating the facts as above). The first contention of appellant is that the information "does not show the commission of any offense in this, that the statute under which the information is drawn is void because it violates the section of the North Dakota Constitution, and also the provision of the 14th Amendment of the Federal Constitution, inhibiting unequal legislation by the state in this, that it arbitrarily excludes from the markets of this state, and prohibits the importation, manufacture, sale, and use of, tobacco in some forms, and permits it in others, there being no reasonable grounds for the discrimination between the forms prohibited and those permitted." It is claimed that police regulations must reach and affect equally all persons and objects in the class to which they apply, and that there is no sound basis for a classification in which snuff is placed separate and

apart from tobacco in other forms. It is argued, and the evidence no doubt tends to show, that the effect of snuff is communicated to the system through the mucous membranes, and that the same is true of chewing tobaccos generally, and of those excluded from the provisions of the act. It is also claimed, and the evidence no doubt tends to show, that fermentation tends to destroy the nicotine, and that snuff which has been thoroughly fermented contains less of that commodity than ordinary tobacco, and that on this account it is less harmful.

There is a wide difference in the attitude of the courts toward statutes which restrict that which is harmful and those which restrict that which is harmless. The courts can certainly take judicial notice that the use of tobacco in any form is uncleanly, and that its excessive use is injurious. They can take judicial notice of the fact that its use by the young is especially so. Tobacco, in short, is under the ban. We realize, of course, that the Supreme Court of the United States refused in the case of Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132, to hold that tobacco was so much a nuisance as not to be a legitimate subject of interstate commerce. In the case, however, if fully upheld, the supreme court of Tennessee, in holding that it was within the power of the state to absolutely prohibit the sale of cigarettes within its borders when once the original package had been broken, even though the Supreme Court of the nation itself refused to take judicial notice that tobacco in the form of cigarettes was more noxious than in any other form. "Cigarettes," the court said, "do not seem until recently to have attracted the attention of the public as more injurious than other forms of tobacco; nor are we now prepared to take judicial notice of any special injury resulting from their use, or to indorse the opinion of the supreme court of Tennessee, 'that they are inherently bad and bad only.' At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a belief in their deleterious effects, particularly upon young people, has become very general, and that communications are constantly finding their way into the public press denouncing their use as fraught with great danger to the youth of both sexes. Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely after they have been taken from the original packages, or have

left the hands of the importer, provided no discrimination be used as against such as are imported from other states, and there be no reason to doubt that the act in question is designed for the protection of the public health. . . . There is doubtless fair ground for dispute as to whether the use of cigarettes is not hurtful to the community, and therefore it would be competent for a state, with reference to its own people, to declare, under penalties, that cigarettes should not be manufactured within its limits. No one could say that such legislation trenched upon the liberty of the citizen by preventing him from pursuing a lawful business." We do not believe that we have to inquire strictly into the motives or reasons which actuated the legislature. We can only set aside a statute of this kind if we cannot possibly see any reasonable necessity for its enactment; that is to say, no possible and reasonable reference to the public health or morality or to the real public good. Is not the very fact that snuff is generally used by holding it between the lip and the gum without mastication, or by plastering it upon the gums, a valid reason for the legislature condemning it, while leaving ordinary chewing tobacco alone? We believe that we can take judicial notice of the fact that many contend that the use of snuff between the lip and the gum has a tendency to paralyze the nerves of that portion of the face. We certainly can take cognizance of the fact that the schoolboy can secretly use tobacco in the form of snuff, when he would be liable to be detected in any other form of use. One who chews or masticates tobacco can be easily detected in the process. One of the strongest arguments, indeed, in favor of the crusade against the cigarette, is that cigarettes are easily and cheaply obtained, and that the boy is liable to be tempted by that fact, and that the use of tobacco will thus be increased. The same argument is certainly applicable in the case of snuff which is used, not in the nose, but upon the gums or between the lip and the gum. So, too, we cannot be blind to the general fear that drugs and opium are, and that drugs and opium certainly can be, easily mingled with snuff, and perhaps less readily detected than in other forms of tobacco.

Nor does the fact that the legislature made an exception in favor of "that ordinary plug, fine cut, or long cut chewing tobacco, as now commonly known to the trade of this state," render the statute unconstitutional. The modern trend of authority is certainly in favor

of the proposition that police laws need not necessarily be omnibus in their character, and that it is permissible to legislate against one form of evil even though many other and similar evils have not been condemned. "It may often happen," says the Supreme Court of the United States in Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 111, 46 L. ed. 109, 22 Sup. Ct. Rep. 43, "that some classes are subjected to regulations, and some individuals are burdened with obligations, which do not rest upon other classes or other individuals not similarly situated. License taxes are imposed upon certain classes of business while others are exempt. It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope, or subject all to the same burdens. It would strip the legislature of its inherent power to determine generally what is for the general interests, which interests may often be promoted by certain regulations affecting one class which do not affect another, certain burdens imposed on one which do not rest upon another." A beginning must be made somewhere. It is not necessary that we should condemn all vice in order that any reformation shall be made. Would anyone say that a statute would be void for class legislation which should prohibit the use of whisky, but at the same time contain no prohibition against the use of beer? No criminal should be allowed to complain or to escape punishment because someone else is more of a criminal or more dangerous to society than he; nor should any product which is injurious to the community escape regulation and condemnation because there are others equally injurious which are not at the same time regulated or forbidden. There is, in fact, no vested right or interest in that which is a nuisance, or the use of which is injurious to the public weal. Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed 878, 18 Sup. Ct. Rep. 488; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; 23 Cyc. 77. So, too, is it not perfectly reasonable for the legislature to say that in its opinion it is better to make a beginning and to enact a law which can be uniformly enforced, rather than a more sweeping one which could not be; for it to say, in short, that it will begin with snuff, and then later on, if it chooses, extend the condemnation throughout the whole range of

tobacco? It can and has done this in the case of cigarettes. See State v. Austin, 101 Tenn. 563, 50 L.R.A. 478, 70 Am. St. Rep. 703, 48 S. W. 305; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132. Why can it not do it in the case of snuff? It is true that "ordinary plug, fine cut, or long cut chewing tobacco, as now commonly known to the trade of this state," has many characteristics in common with snuff and with Right Cut. It may, however, also be that the legislature may have said that they knew these products and could watch them, but that they did not desire the entry of any more similar products into the state which would add to the common vice or require further supervision, especially a product which, on account of its fineness, could be more easily drugged and more easily concealed, and whose intended use was absorption, and not mastication.

We do not think that there is any merit in the contention that the title of the act refers merely to snuff, and that Right Cut is, at the most, merely a substitute for snuff; that the contention of the appellant is largely that it is a substitute for Copenhagen, and that even Copenhagen is not snuff. The brief of counsel for appellant contains a long and extremely interesting history of snuff and of its manufacture, and from this we may deduce the fact that for a long time, in order that an article might be deemed snuff, it was necessary that it should have been powdered or pulverized and fermented, and intended to be taken in the nose. We have before us, however, a definition of snuff in the statute, and though the word "snuff" alone is used in the title, and not snuff "as defined by this statute," we believe that any court, in construing the meaning of words in a statute, should give to those words the meaning that is given to them in its own jurisdiction, even though their meaning in the world at large may be different. The Englishman, for instance, would never give to the word "tugs" the meaning that we give, but would call them "traces." When we speak of "lines" in connection with harness, we use the word in the place of the English word "reins." The words, it is true, are now to be found in the dictionaries, but they did not appear in the dictionaries in the sense in which we use them until quite recently. Dictionaries do not give to words their meaning. The meaning of most of our words were given by usage long before dictionaries were ever heard of. All that the dictionary does is to chronicle that which has been done. They are added

to and different meanings are given to the same word as the word comes to be used in a different sense. This is true even of the word "snuff." Webster and Worcester, it is true, speak only of its use in the nose, but the Standard Dictionary also speaks of the use upon the gums. Though, too, counsel for appellant also insists upon the prerequisite of fermentation, no mention is made of this element in Worcester's, Webster's, or the Century Dictionaries, but in the Standard alone. There even only "slight fermentation" is spoken of. We realize, of course, that the Encyclopedia Americana, the Encyclopedia Britannica, and Werner's Text-Book in Tobacco speak of this fermentation, but what we seek to emphasize is that the dictionaries and encyclopedias do not create words or processes or give to them their meaning. They chronicle merely, and must of necessity be constantly corrected and added to. The use, however, must precede the chronicling. In North Dakota the word "snuff" has a well-established meaning in the popular mind, and is used in the sense of the definition that is given in the statute. The manufacturers of the tobacco in the case at bar must have been aware of the fact, for it is a matter not merely of proof in the record before us, but of common notoriety, that for many years they put upon the market a product called "Copenhagen" and labeled it "snuff," though it was intended to be used, and the overwhelming majority of its users used it, upon the gums and between the lips and the gums, and not in the nose. We hold, therefore, and we believe, that there is enough of state sovereignty still left in America for us to hold that no matter how the word "snuff" may be limited in its meaning in other jurisdictions, in North Dakota it embraces tobacco which is intended to be used upon the gums as well as tobacco that is intended to be used in the nose.

Nor is there any merit in the contention that Right Cut is a substitute for snuff or Copenhagen, and that the title of the act only uses the word "snuff." We believe that it is just as much a snuff as is Copenhagen; but even if it were a substitute, that the title of the act is broad enough to include it. A title which evinces the intention to prohibit the sale of an article is, we believe, broad enough to prohibit the sale of a substitute for that article, when that substitute is open to the same objection as the principal article itself. Section 2 does nothing more than to exclude from its provisions *chewing* tobacco as

commonly known to the trade. We are quite satisfied that Right Cut was not chewing tobacco, but snuff.

In answer to the proposition that "if the act be construed without reference to its title, and it should be accordingly held that it is operative to all tobaccos except those named in the provisions, then it is unconstitutional in its entirety, and the whole act must fail," we hold, in short, that the title of the act should be used in the construction thereof, not as adding to the act, but as a means of determining the legislative intent, and that the act is an anti-snuff act. We hold that as the term is used in North Dakota, both Copenhagen and Right Cut are snuffs, while the tobaccos excepted from the provisions of the act are not. Some of them, it is true, come close to the line, but that line is and must be drawn largely upon the basis of fineness and dryness, and it must be drawn somewhere. It is undisputed that both Right Cut and Copenhagen are drier and finer than the tobaccos excepted. It is also undisputed, and the evidence tends to show, that they were both intended to be used in the same way, that is to say, upon the gums and between the lip and the gums, and that such use is not the ordinary, and we might say necessary, use of even the finest of the other tobaccos mentioned. We can take judicial notice of the fact that it was the use upon the gums and between the lip and the gums that was condemned by popular sentiment in North Dakota. We are not prepared to say, therefore, that the legislature drew the line at the wrong place; neither can we agree with counsel for appellant in his statement that "if Right Cut be construed as being under the ban of the act, that the court by such a construction would in effect make the proviso read thus: 'Provided, however, that Right Cut chewing tobacco, manufactured by Weyman-Bruton Company, shall be included in this definition, but ordinary plug, fine cuts, and long cuts shall not be so included.'" This court knows nothing of the firm of Weyman-Bruton Company, nor did the legislature. It does know, however, of the pernicious effects of the use of snuff. What we hold is not that all other fine cuts shall be excluded, but only those fine cuts which are not cut so fine or otherwise manufactured so that their natural use is upon the gums and between the lip and the gums, and which use involves not mastication, but absorption. When any manufactured tobacco comes physically and chemically within the class of Copenhagen or Right

Cut, it is condemned by the statute, no matter by whom manufactured. We hold, in short, that fine cut "chewing" tobacco is generally excluded, but that fine cut "snuff" is not. Counsel does not quote the language of the exception correctly in his illustration. It is "ordinary plug, fine cut, or long cut *chewing* tobacco," and not "ordinary plug, fine cuts, and long cuts." In the statute the words "snuff" and "chewing tobacco" are both used and antithesised. They must have been intended to have had different meanings.

We are quite satisfied that the evidence in the case at bar justifies the conclusion at which we have arrived. When passing upon the validity of the statute as a whole, however, and in seeking to determine what does or does not come within the meaning of the word "snuff," and in considering the necessity of prohibiting the sale of tobacco which is finely cut or ground and dried in order that the same may be taken into the mouth and absorbed, even if not into the nose, or its adaptation to either or both uses, we are not necessarily confined to the evidence in the case, or to the verdict of the jury thereon. The courts can and should take judicial notice of those facts which may be judicially noticed, that is, facts of common notoriety and knowledge, and above all they should recognize the prerogatives of the legislature as well as their own. "The constitutional right to use property without regulation is plain," says the supreme court of Michigan in People v. Smith, 108 Mich. 527, 532, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382, "unless the public welfare requires its regulation. If the public welfare does require it, the right must yield to the public exigency. And it is upon this question of necessity that the third question depends. All, then, seems to be embraced in the question of necessity. Unless the emery wheel is dangerous to health, there is no necessity, and consequently no power, to regulate it. Unless the blower is a reasonable and proper regulation, it is not a necessary one. Who shall decide the question, and by what rule? Shall it be the legislature or the courts? And if the latter, is it to be determined by the evidence in the case that happens to be first brought, or by some other rule? Does it become a question of fact to be submitted to the jury or decided by the court? Of all the devices known to human tribunals, the jury stands pre-eminent in its ability to determine cases in direct violation of and contrary to law, without impairing the bind-

ing force of the law as a rule of future action. We have known of instances where the question of the constitutionality of acts, as applied to the particular case on trial, has been made to depend upon the finding of the jury upon the facts in the case. But there is a manifest absurdity in allowing any tribunal, either court or jury, to determine from testimony in the case the question of the constitutionality of the law. Whether this law invades the rights of all the persons using emery wheels in the state is a serious question. If it is a necessary regulation, the law should be sustained, but if an unjust law, it should be annulled. The first case presented might show by the opinions of many witnesses that the use of the dry emery wheel is almost necessarily fatal to the operative, while the next might show exactly the opposite state of facts. Manifestly, then, the decision could not settle the question for other parties, or the fate of the law would depend upon the character of the case first presented to the court of last resort, which would have no means of ascertaining whether it was a collusive case or not, or whether the weight of evidence was in accord with the truth. It would seem, then, that the questions of danger and reasonableness must be determined in another way. The legislature, in determining upon the passage of the law, may make investigations which the courts cannot. As a rule, the members (collectively) may be expected to acquire more technical and experimental knowledge of such matters than any court can be supposed to possess, both as to the dangers to be guarded against and the means of prevention of injury to be applied; and hence, while under our institutions the validity of laws must be finally passed upon by the courts, all presumptions should be in favor of the validity of legislative action. If the courts find the plain provisions of the Constitution violated, or if it can be said that the act is not within the rule of necessity in view of facts of which judicial notice may be taken, then the act must fall; otherwise it should stand. Applying this test, we think the law constitutional, and the judgment is therefore affirmed." See also Wenham v. State, 65 Neb. 394, 58 L.R.A. 825, 91 N. W. 421.

So, too, conceding, as we must concede, that the use of tobacco in any form is to a greater or less degree harmful, can this court interpose its judgment and discretion and theory on an ultimate question of fact and public policy against that of the legislative body, which comes di-

rectly from the people, is in close touch with industry and the ordinary activities of life, and has the opportunity of a thorough investigation by means of committees and research? See Wenham v. State, supra. The testimony produced upon the trial shows conclusively that the percentage of moisture in Right Cut and in what is called Copenhagen snuff is almost the same, in fact, that there is about 7 per cent less moisture in Right Cut than in Copenhagen, and that the amount of nicotine is about the same. It is shown also that the moisture in ordinary tobacco is much greater and that the nicotine is less. The argument is made by counsel for appellant that snuff, if properly prepared, is fermented, and that the fermentation destroys much of the nicotine. It is argued that there was no process of fermentation to any extent used in relation to the Right Cut, and a two-horned argument is made that in the first place neither Copenhagen nor Right Cut are snuff, as they are not intended to be used in the nose, and in the second place that fermentation to a greater or less extent neutralizes the injurious effect of the nicotine. The real fact of the case is that whether Copenhagen is snuff or not in the technical sense of the word, it has been labeled as snuff by its manufacturers for many years, and is universally spoken of as such throughout the Northwest. Both Copenhagen and Right Cut are fully covered by the definition of snuff in the statute, being "intended to be taken by the *mouth* or nose." As compared with other forms of tobacco, they contain but little moisture. They are the finest cut or ground of all of the brands of tobacco covered by the statute and in use in North Dakota. They are capable of being used in the nose, being cut fine and being dried. Their natural and ordinary and intended use is that they shall be used in the mouth, but not masticated. Tobacco made in, and intended to be used in, such form is, both under the definition of the statute and in universal acceptation in the Northwest, snuff. The manufacturers, in short, have through many years called such tobacco snuff, and now solemnly come before us and tell us that through such years they have been defrauding and misleading the people.

Nor can we say that the legislature created a purely fictitious classification in distinguishing forms of tobacco such as Copenhagen and Right Cut from "that ordinary plug, fine cut, or long cut chewing tobacco as now commonly known to the trade of this state." It is ad-

mitted by all parties that Right Cut and Copenhagen were and are the finest cut of all the tobaccos and the driest; that as such they were not intended to be chewed as the term is ordinarily used. They were to be retained in the mouth merely, and gradually absorbed, and were not intended to be masticated. Aside from the question of secrecy and the possibility of stimulating a wide-spread habit among minors which would be difficult of detection by their parents, there is much in the evidence to show, and the legislature may reasonably have inferred, that such use of tobacco and such forms of tobacco were more injurious than those connected with the kinds excluded from the operation of the act. There is evidence, in short, and common experience reinforces the evidence, that he who masticates tobacco expectorates a large portion of it, and that his expectoration is freest when the nicotine is the strongest; in other words, that he expectorates the most freely when the tobacco is moist and is first placed in his mouth, and that when he has drawn from it the nicotine and the residue is a mere pulp, he expectorates but little. In such a process, therefore, much of the nicotine is expelled. In the case of the use of snuff, however, under the lip or smeared upon the gums, there is little or no expectoration, and practically all of the nicotine ultimately enters the system. It is argued, of course, that saliva is necessary for digestion, and that a habit is injurious which causes much expectoration. It is therefore argued that chewing tobacco is more injurious than the use as snuff. The argument, however, works both ways, and is not conclusive. It is admitted that a flow of saliva is necessary to digestion, and that such does not arise without mastication. Even, therefore, if it be true that in chewing saliva is expelled, it is also true that it is mingled with the tobacco that is swallowed and in a measure neutralizes it. In the case of snuff, however, where there is little or no mastication, and therefore little or no saliva, the tobacco is absorbed without being neutralized by the saliva. The proof, as we have before shown, also tends to show that the nicotine absorbed is greater in the case of snuff than in that of chewing tobacco. At any rate, all of these matters were for the legislature to pass upon. There were two methods of using tobacco before them. They evidently seemed to think that one was more injurious to the general public than the other. We are not prepared to oppose our judgment to theirs, nor are we prepared to say that the classification made is not a reasonable one.

Austin v. State, 101 Tenn. 563, 50 L.R.A. 478, 70 Am. St. Rep. 703, 48 S. W. 305; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Wenham v. State, 65 Neb. 394, 58 L.R.A. 825, 91 N. W. 421; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 44; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; 60 Cent. L. J. 428; People v. Lochner, 73 App. Div. 120, 76 N. Y. Supp. 396, 177 N. Y. 145, 101 Am. St. Rep. 773, 69 N. E. 373; People v. Bellet, 99 Mich. 151, 22 L.R.A. 696, 41 Am. St. Rep. 589, 57 N. W. 1009; People v. Smith, 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382; State v. Nichols, 28 Wash. 628, 69 Pac. 372; People v. Havnor, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; Ex parte Northrup, 41 Or. 489, 69 Pac. 445.

The judgment of the District Court is affirmed.

STATE OF NORTH DAKOTA v. HENRY E. OWENS.

(144 N. W. 439.)

Crime — attempt to commit rape — assault — proof — prosecution — defense.

1. In the case of a prosecution for the crime of an attempt to commit rape, there need merely be proof of an assault, and of an intent to overcome resistance if made. If such intent has existed at any time during the assault, it is no defense that the assailant later became tired of his efforts or afraid of the probable consequences of his acts, and for this or any other reason desisted without accomplishing his purpose or putting forth his full strength.

Evidence — sufficiency — conviction.

2. Evidence examined, and *held* to justify a conviction of the crime of an attempt to commit rape.

Opinion filed December 1, 1913.

Appeal from the District Court of Traill County, *Pollock*, J.

Defendant convicted of the crime of an attempt to commit rape, and appeals.

Affirmed.

Statement of facts by BRUCE, J. The defendant was convicted of an attempt to commit rape, and relies for a reversal on the insufficiency of the evidence to sustain the verdict. The complaining witness and the defendant lived on neighboring farms near Cummings, North Dakota. The assaults occurred in the home of the complaining witness, and while her husband was away. The complaining witness in effect testified:

I first saw him as he rapped at the door. When I opened the door I saw the defendant. He asked if I had a fire in the stove. I said, "Yes." He said, "It was terrible cold." After that remark he came in and sat down by the stove in the kitchen. When he sat down I started to sweep the floor. During this time nothing was said between me and the defendant. I stayed out in the summer kitchen a long time washing myself and the baby. I went into the house from the summer kitchen into the kitchen with the baby, who was crying. The baby held my hand and I led him. The defendant take hold of me and wants to kiss me. I told him to quit and leave me alone, and I went up and went away from him over to the chair.

Q. Did he try to hold you?

A. Not so hard. I went over to the chair and hold the baby in my lap, and he takes his chair and move over to my chair. It was over where he took hold of me and pull me into his lap and tried to kiss me. Then I go away from him and sat down in another chair. The baby was crying yet. The defendant said, "Let him go out and play." I said, "No, it is too cold for him." And he wants to kiss me again and sort of pinched me on the hip. And he says, "Come, let's go into the other room." And I said, "No," and went from that chair over to the other chair. I says, "Why don't you keep your wife home?" I says, "What you let your wife go for, and don't run after somebody else's?" And he says, "That is what I am trying to do." And I says, "Why don't you get yourself a wife, and don't run after somebody else's wife?" He said, "That is what I am trying to do. I will marry you." And I says, "I am married and you are married, you know it can't go." And the baby went down and the defendant came over and wanted to sit in my lap; he hold the arm around my neck and I push him down. I pushed him from my lap. I went up and started to

wash dishes, and he came there and wants to get hold of me and I went behind the stove. And he says, "Don't run behind the stove, don't get scared of me." And he says, "I won't going to hurt you." And I stand there until he went over to the chair and sat down, and I got done with the dishes. And he came and wants to get hold of me again, and I run out in the summer kitchen, standing in the door there holding the papers in my hand. And he came there and got hold of me and pushed me up against the wall of the coal room, the north side. It was outside in the summer kitchen. It was the south wall of the coal shed. He took hold of me and pushed me against the wall. He held my arms down against here. He hold around the back; hold around the arms here, and I was working to get loose, but I couldn't. Well, I was sweat, and then he says, "You are warmed up some now," and I says, "That is your fault." He want to kiss me. Try to hold his hands,—both my hands with one of his. Then he put his hand under my dress. He was able to hold both of my hands with one of his. He got his hand under my dress, had hold of my person, had hold of my body. He had hold of my privates. He says, "What matter with you." He asked me what was the matter with me, if I was flagged. I said, "Yes." He says, "You ain't tightened up any." I says, "That don't make any difference." When he had his hand on my privites he want me to go with him upstairs. He said I wasn't tightened up any. He says, "Look at this." He was holding his privates in his hand. They were not out of his pants. He said, "What should I do with this?" I said, "Keep it." He says, "I can't keep it. I got to put it up in something." He was not holding me so tight when this was going on. He stood close to me. I got away from him at that time. He let me go. I struggled with him; I worked all I could so I couldn't work any more. I was clear sweat and tired, and could not hardly stand up. I didn't cry; I couldn't. No, I don't cry so easy. I got so nervous I didn't know what to do. When I got away from him he says I got to promise him one. I said, "No." I was sweating, working to get away from him. He says, "I got you warmed up some." I was scared of him at that time. I told him, "If you don't quit, I tell my husband about this." And he says, "You won't do that, I was stuck on you for the first time I seen you." And I says, "Well, nothing to get stuck on," and he says, "I did." And he

says, "I am going to go," and I says, "I wish you would," and he says, "Come, follow me out. I am going to go." And I went out, I think maybe I can get him start to go.

Q. What did you go out for?

A. I thought maybe I could get him to go home. I went out to the fence. I was standing there, and he says, "Oh, I bet you would be good." He was holding on my back. He was holding on my back (indicating buttocks). I tried to get away from him then. Well, I want to go into the house. I went away from the fence and want to, and he says, "Don't run, don't go." He was not holding me so tight; I couldn't get away from him. I stood there at the gate about five minutes.

Q. Why did you not get away from him?

A. I was sweat and thought it was good to be out. I didn't permit him to stand there and hold his hand over my person. He got his hand on my back and I got away from him. I got away from him right away. He did not hold his hand on my back all the time I was standing there. The minute he put his hand on my back I got away from him. My husband was not home then, he was threshing. I got so nervous. I went in the house and got ready and went down where he was. About a mile, down to my sister's. I took the children with me. I was in a state of excitement, I couldn't eat, sleep, work, or do anything for a long time. I was struggling to get away from him when I was standing in the summer kitchen backed up against the south wall of the coal house, about ten minutes. My clothes were not torn. I did not have my monthlies at that time. He held his hands on my privates for about four or five minutes. I crossed my legs for about five minutes. This was the 25th, I think. He came back the second time Saturday of the same week. He knocked. I heard him knock and I went out to the door. I was standing on the porch and heard him come walking into the house. I did not hear anything more of him and I was busy,—have to wash the floor and I think maybe he was gone. I went in the house and he was standing in the kitchen door. I saw him and two other men on a load of grain. He got off on the north side. I was scared of him at that time. I saw him come towards the house. Didn't see the door he was going to.

I saw him start north. Heard him rap. When I heard it I ran out on the south side. I was in the kitchen when I heard him rap, and ran from the kitchen and sitting room out in the door at the south side of the sitting room. I was standing out there about ten or fifteen minutes. Didn't hear him in the house. Didn't go into the house while I heard him walking. When it was quiet I went in. I did not know for sure that he was there. I thought maybe he was gone. When I returned into the house he was standing right in the door there that goes into the summer kitchen. He asked me where I had been. I said, "I was outside." He came in and sat down on a chair, and I started to wash the floor. He said, "Come, let's go into the other room." I said, "No." He says, "Don't you make up your mind yet?" I said, "No, I never make up my mind." "Well, you promised me once," he said. I said, "No. I did not." And I wash,—got the table away there and I washes. He was not in the room when I started to wash. He was sitting there. He was sitting in the kitchen. I said, "If you don't quit running after me, I put you fast,—I put you in jail." And he says, "You ain't mean enough to do that." I said, "Yes." And he says, "I was stuck on you from the first time I seen you." And I says, "You musn't do that. And you wait until my husband coming after you," I says. "What will he do," he says. "Will he shoot me?" I said, "I don't know." And he says, "I want to kiss you." I said, "No, I never kiss you." I wants to run outside and he said, "Don't run outside, the men seen you." "I don't care," I said, "I tell the men to come in." He says, "You musn't do that." I was running all the way I could from him. He wants to catch me, and he grabbed me there on the floor and hold tight across my neck. I pushed my head good and got away from him; I take his coat and tear one or two buttons off his coat. He had hold of me hard there. He said he wanted to kiss me. He said nothing else. He went out of the door and went away. I got loose away from him. I tell him, "If you don't quit I holler for the men." They were in the granary then. I told him I will holler for the men, and he went. When Mr. Owens left the place the second time I went in the house and sat down. I was so nervous; I didn't do anything. My husband came home about five.

On cross-examination the witness practically testified to the same facts, saying among other things:

He held me tight and I could not get away from him. He had his arms around me. I told him to leave me alone. I was working till I sweat. I was working to get loose. I got sweat. I got warm when I was up there, and he said, "I got you warmed up some." I said, "That's your fault." He tried to hold both my arms with one of his and his body. He got my arms like this and then he got his whole body holding me up to the wall. He did not have both arms around me then. He was holding me with one of his arms. He put his hand under my dress. I crossed my legs, worked one of my arms loose and got his hand away. I pushed his hand away. Then he said, "What is the matter with you." He asked me if I was flagged, and I said, "Yes." He says, "You ain't tightened up any." I says, "That don't make any difference, I told my husband about you." And he says, "You wouldn't do that." He was holding his own thing in his hand like this. I testified to this in justice court; am sure of that. I said he was holding his thing in his hand. I swore to that in justice court. He was standing there holding me yet. I got his hand away. I kept my legs crossed all the time he was there when he got his hand under my dress. He got his hand under my dress; was that way about five minutes. I was not doing anything. He was standing there talking. He say, "Look at this."

Q. How did you get away from this position?

A. Went away from there. He let me go. When he let me go, I said, "I am going to tell my husband about it." That was before he let me go. Then he let me go. I was so nervous and I could hardly stand up. I don't know why he let me go. I went over to the door for I was so warm. He let me go over. I walked away from there. I went from the wall over to the door. He let me go and I walked over around to the open door. I was standing there. He wants we to go with him upstairs, and I said "No, I won't." I stood there talking with him about five minutes or so. He said, "I am going to go. Follow me out." I went over to the fence and he said he was going away and wants me to go with him out. I told him to go. He didn't go, he wants me to follow him up. I went out with him. I followed him to the fence. It is about across the street from the sum-

mer kitchen door. I walked with him out to the fence. I did not stand there very long. He did not have his hand on me when we walked out there. Had his hand on me after we got there. He was holding on my back. Right here (indicating buttocks). Did not stand that way very long. Stood at the fence about five minutes. He wants me to go over to the barn with him. He went to the barn. I went in the house.

F. W. Ames and *P. S. Swenson,* for appellant.

The conviction in this case must be sustained, if at all, upon the uncorroborated testimony of the prosecutrix. If this is sufficient, and the jury believed it, this court would sustain the verdict. State v. Rhoades, 17 N. D. 579, 118 N. W. 233; People v. Mayes, 66 Cal. 597, 6 Pac. 691.

The jury must be satisfied beyond a reasonable doubt that defendant *intended* to accomplish his purpose, notwithstanding resistance of prosecutrix. Rex v. Lloyd, 7 Car. & P. 318; State v. Hagerman, 47 Iowa, 152.

The assault must be with the specific intention to commit the act by force, and without the consent of the woman. People v. Fleming, 94 Cal. 308, 29 Pac. 647; Bawcom v. State, 49 Tex. Crim. Rep. 417, 94 S. W. 462.

Beseeching the woman to do the act, coaxing, and even assault are insufficient, unless accompanied by an *intent* on defendant's part to accomplish his purpose without her consent. Franey v. People, 210 Ill. 206, 71 N. E. 443; State v. Scholl, 130 Mo. 396, 32 S. W. 968.

The crime can only be committed by the attempt to use necessary force to accomplish the purpose, and with the present intent to do so. Warren v. State, 51 Tex. Crim. Rep. 598, 103 S. W. 888; Douglass v. State, 105 Ark. 218, 42 L.R.A.(N.S.) 524, 150 S. W. 860; Franey v. People, supra; Skinner v. State, 28 Neb. 814, 45 N. W. 53; Dina v. State, 46 Tex. Crim. Rep. 402, 78 S. W. 230; People v. Kirwin, 10 N. Y. Crim. Rep. 338, 22 N. Y. Supp. 164; Moore v. State, 79 Wis. 546, 48 N. W. 653; 23 Am. & Eng. Enc. Law, 2d ed. 864, 33 Cyc. 1494, note 74, etc.

The law with reference to "attempts" and "assault with intent" is the

same. 12 Cyc. 179; 33 Cyc. 1429–1493; Rookey v. State, 70 Conn. 104, 38 Atl. 911.

Chas. A. Lyche, for respondent.

Intent is the gravamen of this offense, and no particular degree of force is necessary. Evidence of force is offered to prove the offense. Rev. Codes 1905, § 9501; People v. Kuches, 120 Cal. 566, 52 Pac. 1002; People v. Bowman, 6 Cal. App. 749, 93 Pac. 198; People v. Collins, 5 Cal. App. 654, 91 Pac. 158; State v. Barkley, 129 Iowa, 484, 105 N. W. 506; State v. Miller, 124 Iowa, 429, 100 N. W. 334; State v. Urie, 101 Iowa, 411, 70 N. W. 603; State v. Rudd, 97 Iowa, 389, 66 N. W. 748; State v. Delong, 96 Iowa, 471, 65 N. W. 402; State v. Grossheim, 79 Iowa, 75, 44 N. W. 541; People v. Toutant, 133 Mich. 520, 95 N. W. 541; Strong v. State, 63 Neb. 440, 88 N. W. 772; Bannen v. State, 115 Wis. 317, 91 N. W. 107, 965; Tuttle v. State, 83 Ark. 379, 104 S. W. 135; Territory v. Keyes, 5 Dak. 244, 38 N. W. 440; Boyd v. State, 74 Ga. 356; Hanes v. State, 155 Ind. 112, 57 N. E. 704; State v. Jerome, 82 Iowa, 749, 48 N. W. 722; State v. Prather, 136 Mo. 20, 37 S. W. 805; Head v. State, 43 Neb. 30, 61 N. W. 494; Wilson v. State, — Tex. Crim. Rep. —, 73 S. W. 16; Glover v. Com. 86 Va. 382, 10 S. E. 420.

The appellate court will not reverse the findings of the jury as to the existence of an *intent* to rape, unless there is *no evidence* thereof in the case. If there is substantial evidence, or evidence upon which the jury could reasonably act, their verdict will not be disturbed. Brown v. State, 121 Ala. 9, 25 So. 744; Smith v. State, 129 Ala. 89, 87 Am. St. Rep. 47, 29 So. 699; Pleasant v. State, 13 Ark. 360; People v. Cesena, 90 Cal. 381, 27 Pac. 300; People v. Stewart, 97 Cal. 238, 32 Pac. 8; People v. Johnson, 131 Cal. 511, 63 Pac. 842; Dunn v. State, 56 Ga. 401; State v. Whitsett, 111 Mo. 202, 19 S. W. 1097; State v. Prather, 136 Mo. 20, 37 S. W. 805; State v. Edie, 147 Mo. 535, 49 S. W. 563; State v. Alcorn, 137 Mo. 121, 38 S. W. 548; Reynolds v. People, 41 How. Pr. 179; Fitzpatrick v. People, 98 Ill. 269; Lathrop v. People, 197 Ill. 169, 64 N. E. 385; State v. Kendall, 56 Kan. 238, 42 Pac. 711; State v. Sullivan, 68 Vt. 540, 35 Atl. 479; State v. Hanlon, 62 Vt. 334, 19 Atl. 773; State v. McCune, 16 Utah, 170, 51 Pac. 818; State v. Courtemarch, 11 Wash. 446, 39 Pac. 955; Dockery v. State, 35 Tex. Crim. Rep. 487, 34 S. W. 281; Farmer

v. State, — Tex. Crim. Rep. —, 45 S. W. 701; State v. Page, 127 N. C. 512, 37 S. E. 66; State v. Williams, 121 N. C. 628, 28 S. E. 405; State v. Deberry, 123 N. C. 703, 31 S. E. 272; DeBerry v. State, 99 Tenn. 207, 42 S. W. 31; McAvoy v. State, 41 Tex. Crim. Rep. 56, 51 S. W. 928; Norris v. State, 87 Ala. 85, 6 So. 371.

No corroboration in this case is necessary, for there is no law requiring it. 33 Cyc. 1512, and cases cited; State v. Rhoades, 17 N. D. 580, 118 N. W. 233.

A new trial will not be granted for newly discovered evidence which is merely impeaching. 29 Cyc. 918.

BRUCE, J. (after stating the facts as above). Defendant seeks for a reversal on the ground that the testimony was insufficient to sustain the verdict. It is argued that the verdict rests upon the uncorroborated evidence of the prosecutrix; that she is flatly contradicted by the defendant, and that the testimony fails to show that the assault was made with intent to commit rape notwithstanding all possible resistance that should be made; and fails to show that the intent was to perpetrate the crime at all events regardless of what the prosecutrix might or could do to prevent it. It is stated that the testimony shows that the defendant was a man weighing 230 pounds at the time of the alleged offense, and that he had been a man used to and capable of lifting great weights; was a strong and powerful person; and that the prosecutrix was a married woman and the mother of children, and weighed only 130 pounds. It is claimed that the place where the acts occurred was at least one-half a mile from any residence, and the testimony shows that no one was at hand to interpose. The testimony, in short, it is claimed, at its most and if uncontradicted, would show nothing more than persistent, continued, and vehement solicitation for voluntary sexual intercourse with the defendant.

We do not so understand the law or the evidence. It is true that the defendant weighed 230 pounds. It is also true, however, that there is evidence to the effect that he was fat, was only 5 feet 6 inches tall, and was far from being normal as to physique. There is a wide distinction between the crime of rape and the crime of an attempt to commit rape. In the crime of rape there must be proof of both the intent and the fact of overcoming all reasonable resistance. In the

case of the crime of an attempt to commit rape there need merely be proof of the assault and of the intent to overcome resistance if made, and that the prosecutrix finally desisted from her struggles and yielded does not necessarily negative the fact that during the struggles, and until the acquiescence, the defendant intended to use the force necessary to overcome it. Nor, if he started with, or at any time during the struggle had, the intention to overcome such resistance with force, is it a defense that he became tired of his efforts, and for this or any other reason desisted without accomplishing his purpose or putting forth his full strength. Whether he had such an intention at any time during the struggle was for the jury to determine from the facts. It seems to us that the jury was perfectly justified in concluding from the evidence before them that at some time during the assaults the defendant intended to overcome all reasonable resistance. It is true that the evidence in this case is uncorroborated, but it appears to us to be credible and consistent throughout, and there appear to have been no errors committed by the court during the trial of the case. In such a case corroboration is not necessary. See 33 Cyc. 1512, and cases cited. State v. Rhoades, 17 N. D. 579, 594, 118 N. W. 233. It has been held, and properly, that "the use of force in an endeavor to have carnal knowledge of a woman tends to show an intent to commit rape, and such intent may exist consistently with the fact of a subsequent consent. A person, then, may be indicted for rape, and if the conviction for that offense is prevented by reason of evidence of the woman's consent, yet if, before the consent was given, it appears that the defendant used such force as to evince an intention to commit rape, the defendant may be convicted of an assault with an intent to commit rape." State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134; 33 Cyc. 1495; State v. Cross, 12 Iowa, 66, 79 Am. Dec. 519; State v. Bagan, 41 Minn. 285, 43 N. W. 5. The same must, of course, be true in cases where a man makes an assault with intent to commit rape, but desists before the consummation of his purpose on account of the struggles of the woman, the discovery of the fact that she is in the midst of her period of menstruation, or on account of a sudden fear of the consequences. In the case of State v. De Long, 96 Iowa, 471, 65 N. W. 402, we have facts very similar to those in the case at bar. In it the court said: "The statements of Mrs. Gracey are not

in all respects reasonable, and in several important particulars they conflict with her testimony given on a former trial of the case. She made no attempt to alarm her neighbors, although one lived only 40 or 50 rods away, and another was nearer. The defendant insists that if she was alarmed at anything he said or did, she could easily have passed out of the front door to the road, where she would have been safe, and that the fact that she went into the kitchen instead is an indication that she did not desire to avoid him, but rather to encourage his advances, and that if she had resisted him, as she claims to have done, her person and clothing would have shown marks of a struggle. What a woman should do in the situation in which Mrs. Gracey was placed cannot be determined by any fixed rules. Perhaps no two women would do the same thing. With many, the desire to avoid publicity would influence their attempt to resist assault or flee from danger. The dread of being found in a situation most loathsome to every modest and virtuous woman might induce some to rely on other means to protect their virtue than public outcry. Others, stupified by shame or fear, might fail to make use of the means of escape which would be most apparent and promising to a person free from excitement. What Mrs. Gracey did in this case, when alarmed, was most natural. To have gone towards the front door would have been to approach nearer to the defendant, and to have made an outcry would have been to court publicity. Moreover, she did not know that any third person was within hearing. Instead of doing these things, which, with all the facts before us, we can see would have been best for her to do, she went away from the defendant to the kitchen and toward the outside kitchen door and her husband. That she did this for the purpose of avoiding the defendant and preventing his embraces, and that he pursued her and seized her, with the intention of accomplishing his purpose notwithstanding her resistance and against her will, the jury may well have found from the evidence. . . . If the occurrences prior to the time she ascended the stairway were as she claims, and as the jury was authorized to find, the crime of which the defendant was convicted was complete, even though everything done thereafter was with the consent and according to the desires of the prosecutrix."

"It cannot be seriously controverted," says the supreme court of

Alabama in Brown v. State, 121 Ala. 9, 25 So. 744, "that the evidence to sustain a conviction for an assault upon a girl with an intent forcibly to ravish her must establish the intent of the defendant to ravish beyond a reasonable doubt. That such an intent existed in the mind of the defendant at the time of an assault with force must oftentimes be gathered solely from his conduct, acts of violence perpetrated upon the female, the age of the female, previous relations existing between them if any existed, time and place of the assault, and other circumstances attendant upon the occurrence. It is seldom that a case can be found where the court can, as a matter of law, determine from the evidence that the intent to ravish did or did not exist. Where the intent rests in inference to be deduced from the facts proven, its existence or nonexistence must be submitted to the jury for their determination." See also Lathrop v. People, 197 Ill. 169, 64 N. E. 385. In the case of State v. Page, 127 N. C. 512, 37 S. E. 66, the prosecutrix testified that the defendant opened the door of her room, where she was lying down on a pallet with her baby, and asked where her husband was. Being told that he was absent, the defendant expressed his intention to put his hands on her. She said, "No, you are not," whereupon he started into the room, when she jumped up and ran to the back door, which was in an adjoining room, leaving her baby upon the floor. The defendant pursued her, and, as she caught hold of the knob of the back door, he caught hold of her and also put his other arm between her and the door. After a struggle, she got loose, and, opening the door, she escaped into the back yard. He did not follow her further, it seems, and, being told by her that she would tell her husband, asked her not to do so, and said he had only felt of her breast. The court, in its opinion, said: "Upon the above testimony, we cannot declare, as a matter of law, that there was no evidence of an assault 'with felonious intent to have carnal knowledge of the person of the prosecutrix, forcibly and against her will.' . . . The intent of the defendant is solely for the jury. The judge and jury see the bearing of the witnesses under examination and many other things incident to a trial which throw a vivid light in the investigation of the truth, but which cannot be transmitted in the cold words of a transcript sent to this court. One great advantage of a trial by jury is that they can see and hear and judge from their knowledge

of human nature and of everyday things of life in coming to a correct conclusion upon matters which are too intangible to be passed up to an appellate court in the transcript. But, at all events, the prosecutrix testified that the defendant invaded her house, threatening to lay hands upon her, pursued her to the back door, took hold of her, and attempted to prevent her escape, and that she got loose from him only after a struggle, and the defendant confessed the truth of her statement, and added that he stopped because he feared her husband would return. In submitting the evidence of his intent to the jury, there was no error."

Counsel, it is true, states that in the case at bar the female was an adult, and that in most of the cases cited by the state, the prosecutrix was under the age of consent, and that in such cases an assault with intention to have intercourse would necessarily mean attempt to commit rape, whether there was an intention to overcome resistance or not. We need not here, however, decide the question whether there can be an assault with an intent to commit rape on a nonconsenting female, when she is under the age of consent, but refer merely to the cases and discussion in 33 Cyc. 1434. All we have to say is that in the following long list of cases, the woman was either an adult and above the age when failure to consent would be implied, or no age of consent had been prescribed by statute: Brown v. State, 121 Ala. 9, 25 So. 744; Smith v. State, 129 Ala. 89, 87 Am. St. Rep. 47, 29 So. 699; State v. Whitsett, 111 Mo. 202, 19 S. W. 1097; State v. Edie, 147 Mo. 535, 49 S. W. 563; Lathrop v. People, 197 Ill. 169, 64 N. E. 385; Fitzpatrick v. People, 98 Ill. 269; State v. McCune, 16 Utah, 170, 51 Pac. 818; State v. Hanlon, 62 Vt. 334, 19 Atl. 773; State v. Williams, 121 N. C. 628, 28 S. E. 405; Norris v. State, 87 Ala. 85, 6 So. 371; Farmer v. State, — Tex. Crim. Rep. —, 45 S. W. 701; People v. Kuches, 120 Cal. 566, 52 Pac. 1002; State v. Barkley, 129 Iowa, 484, 105 N. W. 506; State v. Miller, 124 Iowa, 429, 100 N. W. 334; State v. Urie, 101 Iowa, 411, 70 N. W. 603; State v. Rudd, 97 Iowa, 389, 66 N. W. 748; Bannen v. State, 115 Wis. 317, 91 N. W. 107, 965; People v. Bowman, 6 Cal. App. 749, 93 Pac. 198.

The judgment of the District Court is affirmed.

P. P. PERSONS v. THE CITY OF VALLEY CITY, a Municipal Corporation.

(144 N. W. 675.)

Cities — claim for damages against — verified and presented — when required — claim based on trespass.

1. Following Gaustad v. Enderlin, 23 N. D. 526, §§ 2703 and 2704, Rev. Codes 1905, requiring verified claims for damages resulting from certain injuries to person or property to be presented to the city council as a prerequisite to the institution and maintenance of a suit against a city, are construed and held not to apply to a claim based upon a trespass to plaintiff's real property.

City council — sidewalks — trespass on private property — damages.

2. Where a city council, acting in its official capacity, authorizes the city's agents and officers to construct a sidewalk adjacent to plaintiff's property, and, through a mistaken belief that a portion of plaintiff's building extends into the street and is an unlawful obstruction thereon, authorizes such agents or officers to remove the same by going upon such private property and cutting off the portion of the building claimed to thus form an obstruction, and committing other acts of trespass thereon, the municipality is liable and must respond in damages for such wrongful trespass.

Opinion filed December 6, 1913.

Appeal from District Court, Barnes County, *J. A. Coffey*, J.

From an order sustaining a demurrer to the complaint, plaintiff appeals.

Reversed.

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

If the building in question, or any part thereof, was an obstruction upon the street of the city, the council had the right to remove same. Rev. Codes 1905, § 2678, subd. 10; Ludlow v. Fargo, 3 N. D. 485, 57 N. W. 506.

Note. — As to the liability of a municipal corporation for trespass, see note in 34 Am. St. Rep. 27.

The question of the validity of requirement of notice of injury as a condition of municipal liability is treated in a note in 36 L.R.A.(N.S.) 1136. And on the question when notice is essential to the liability of municipal corporation, see note in 103 Am. St. Rep. 280.

If the act of the city council was in itself lawful, but the work of carrying it out was done in an unlawful and improper manner and resulted in damage to plaintiff's property, the city is liable. Chicago v. Norton Mill Co. 196 Ill. 580, 63 N. E. 1043; Boye v. Albert Lea, 74 Minn. 230, 76 N. W. 1131.

A city, in laying out, opening, and caring for its streets, is acting in its municipal capacity. Durkee v. Kenosha, 59 Wis. 123, 48 Am. Rep. 480, 17 N. W. 677.

In such sense, cities are answerable for wrongs and injuries done to private persons or property. Alberts v. Muskegon, 146 Mich. 210, 6 L.R.A.(N.S.) 1094, 117 Am. St. Rep. 633, 109 N. W. 262; Sheldon v. Kalamazoo, 24 Mich. 383.

A city is primarily liable for the acts of its agents, when such agents are doing acts directed to be done by the council, or city acting in its municipal capacity. Bunker v. Hudson, 122 Wis. 43, 99 N. W. 448.

The city is liable, notwithstanding the acts of which complaint is made, were done by its agents. Adams v. Milwaukee, 144 Wis. 371, 43 L.R.A.(N.S.) 1066, 129 N. W. 518; Potter v. Spokane, 63 Wash. 267, 115 Pac. 176; Hughes v. Fond du Lac, 73 Wis. 380, 41 N. W. 407; Johnson v. Somerville, 195 Mass. 370, 10 L.R.A.(N.S.) 715, 81 N. E. 268; Naumburg v. Milwaukee, 77 C. C. A. 67, 146 Fed. 641; Alberts v. Muskegon, 146 Mich. 210, 6 L.R.A.(N.S.) 1094, 117 Am. St. Rep. 633, 109 N. W. 262; East Rome v. Lloyd, 124 Ga. 852, 53 S. E. 103; Gerst v. St. Louis, 185 Mo. 191, 105 Am. St. Rep. 580, 84 S. W. 24; Hathaway v. Osborne, 25 R. I. 249, 55 Atl. 700; Hunt v. Boston, 183 Mass. 303, 67 N. E. 244; Chicago v. Selz, S. & Co. 202 Ill. 545, 67 N. E. 386, 14 Am. Neg. Rep. 23; Tegeler v. Kansas City, 95 Mo. App. 162, 68 S. W. 953; Chicago v. Spoor, 190 Ill. 540, 60 N. E. 540; Butman v. Newton, 179 Mass. 1, 88 Am. St. Rep. 346, 60 N. E. 401; Brown v. Webster City, 115 Iowa, 511, 88 N. W. 1070; Millard v. Webster City, 113 Iowa, 220, 84 N. W. 1044; O'Donnell v. White, 23 R. I. 318, 50 Atl. 333; Larrabee v. Cloverdale, 131 Cal. 96, 63 Pac. 143; Ludlow v. Mackintosh, 21 Ky. L. Rep. 924, 53 S. W. 524; Norman v. Ince, 8 Okla. 412, 58 Pac. 632, 6 Am. Neg. Rep. 681; Kane v. Indianapolis, 82 Fed. 770; Powell v. Wytheville, 95 Va. 73, 27 S. E. 805; Scott v. New York, 27 App. Div. 240, 50 N. Y. Supp. 191, 4 Am. Neg. Rep. 534; Donahoe v. Kansas City, 136 Mo.

657, 38 S. W. 571, 1 Am. Neg. Rep. 105; Oklahoma v. Hill Bros. 6 Okla. 114, 50 Pac. 242; Bunker v. Hudson, 122 Wis. 43, 99 N. W. 448; D'Amico v. Boston, 176 Mass. 599, 58 N. E. 158; Larson v. Grand Forks, 3 Dak. 307, 19 N. W. 414.

Sections 2703 and 2704 of the Revised Codes of North Dakota do not include, nor have they reference to, matters of injury to adjacent property caused by trespass. Notice of claim for damages against a city is not necessary unless made so by statute. 28 Cyc. 1447–1450, and cases cited; Giuricevic v. Tacoma, 57 Wash. 329, 28 L.R.A.(N.S.) 533, 106 Pac. 908; Tattan v. Detroit, 128 Mich. 650, 87 N. W. 894; MacDonald v. New York, 42 App. Div. 263, 59 N. Y. Supp. 16.

The *subject-matter* of a statute limits its usage and application. Warren v. Davie, 43 Ohio St. 447, 3 N. E. 301; Sommers v. Marshfield, 90 Wis. 59, 62 N. W. 937; Bradley v. Eau Claire, 56 Wis. 168, 14 N. W. 10; Jung v. Stevens Point, 74 Wis. 547, 43 N. W. 513; Dawes v. Great Falls, 31 Mont. 9, 77 Pac. 309; Gallamore v. Olympia, 34 Wash. 379, 75 Pac. 978; Giuricevic v. Tacoma, 57 Wash. 329, 28 L.R.A.(N.S.) 533, 106 Pac. 908; Hughes v. Fond du Lac, 73 Wis. 380, 41 N. W. 407; Moran v. St. Paul, 54 Minn. 279, 56 N. W. 501; Pye v. Mankato, 38 Minn. 536, 38 N. W. 621; Dovey v. Plattsmouth, 52 Neb. 642, 73 N. W. 11; Fugere v. Cook, 27 R. I. 134, 60 Atl. 1067; Megins v. Duluth, 97 Minn. 23, 106 N. W. 89; McIntee v. Middletown, 80 App. Div. 434, 81 N. Y. Supp. 124; Kelly v. Faribault, 95 Minn. 293, 104 N. W. 231; Postel v. Seattle, 41 Wash. 432, 83 Pac. 1025.

Lee Combs, L. S. B. Ritchie, and *M. J. Englert,* for respondent.

It is a prerequisite to the right to begin an action against a city to recover damages for injury to property, that the notice of the claim must be filed with the city auditor, and such fact must be pleaded and proved. O'Donnell v. New London, 113 Wis. 292, 89 N. W. 511.

Our statute relates to and covers *all claims* for damages against a city, and requires notice thereof, before suit. Foxworthy v. Hastings, 25 Neb. 133, 41 N. W. 132; Rev. Codes 1905, §§ 2703, 2704; 28 Cyc. 1470.

Failure to comply with the mandate of the statute as to notice is fatal to plaintiff's cause of action. 3 Abbott, Mun. Corp. pp. 2369 et seq.; 28 Cyc. 1472, and cases cited; Sharp v. Mauston, 92 Wis. 629, 66

N. W. 803; Flieth v. Wausau, 93 Wis. 446, 67 N. W. 731; Daniels v. Racine, 98 Wis. 649, 74 N. W. 553; Ziegler v. West Bend, 102 Wis. 17, 78 N. W. 164; Starling v. Bedford, 94 Iowa, 194, 62 N. W. 674; O'Donnell v. New London, 113 Wis. 292, 89 N. W. 511; McCue v. Waupun, 96 Wis. 625, 71 N. W. 1054; Van Frachen v. Ft. Howard, 88 Wis. 570, 60 N. W. 1062; Pollard v. Cadillac, 133 Mich. 503, 95 N. W. 536; Trost v. Casselton, 8 N. D. 534, 79 N. W. 1071; Coleman v. Fargo, 8 N. D. 69, 76 N. W. 1051; Barrett v. Mobile, 129 Ala. 179, 87 Am. St. Rep. 54, 30 So. 36; Bancroft v. San Diego, 120 Cal. 432, 52 Pac. 712; Adams v. Modesto, 6 Cal. Unrep. 486, 61 Pac. 957.

FISK, J. This is an appeal from an order of the district court of Barnes county, sustaining a demurrer to the plaintiff's complaint. The plaintiff seeks to recover damages from the defendant city for the alleged trespass by it, through its authorized agents and servants, upon his property, and committing injuries thereto.

It will not be necessary to set out the complaint in full, and we merely state the substance thereof, except as to the important paragraphs which we copy in full.

Plaintiff first alleges his ownership and possession of lots 6 to 12 inclusive of block 16 of the original plat of the city of Valley City; also the fact that defendant is and was a municipal corporation duly organized and existing under and by virtue of the laws of this state. It is next alleged that at all times herein mentioned there was situated upon lots 10, 11, and 12 aforesaid, a grain elevator owned and used by the plaintiff and his tenants for the purpose of buying and storing grain. Then follow paragraphs 4 to 6, inclusive, which we quote in full as follows:

IV.

"That on the 11th day of May, A. D. 1908, at a meeting of the city council of the said defendant city, held at its council rooms in said city, the said city council of said city of Valley City, for and on behalf of said defendant, did authorize its agents and officers to construct a sidewalk along the south line of the above-described premises, and thereafter and on the 2d day of August, A. D. 1909, the said coun-

cil did authorize its agents and officers to remove a part of the premises of said plaintiff herein, claiming and setting forth that the same was an obstruction, and was constructed upon the street of said defendant."

V.

"That on or about the 15th day of October, A. D. 1909, defendant, through its duly appointed agent, unlawfully and wrongfully entered upon the premises of the said plaintiff, and did then and there destroy the property of the said plaintiff, to wit, the said grain elevator, in this that the defendant then and there caused to have torn down, cut off, detached, and removed from the said building a part thereof, and did cut off, remove, detach, and take away from the said building a part thereof; that said action on the part of the said defendant was without due authority of law, and to this plaintiff's damage in this that it destroyed the said building situated upon the said premises for all uses and purposes, and destroyed the same as a structure to his damage in the sum of $1,000."

VI.

"Plaintiff further alleges that said defendant entered upon his said premises, and committed the said damage to his said building solely upon the premises of this plaintiff, and that the building of the said plaintiff was built, constructed, erected, and maintained solely upon the premises of the plaintiff, but that, notwithstanding this, the defendant wrongfully and unlawfully entered upon his said premises and committed the damage hereinbefore set forth."

Paragraphs 7, 8, and 9 relate to special damages alleged to have been suffered on account of such alleged unlawful acts, and need not be set out herein.

Paragraph 10 is as follows:

"Plaintiff further alleges that all of said acts have been committed by the defendant, through its authorized agents and officials, by reason of the express authority given to the said agents and officials by the city council of the said city, and that the said agents and officials

did act in full conformity to, and not in excess of, the said instructions given; and alleges that by reason of the said acts so authorized, that this plaintiff has been damaged as hereinbefore set forth; and in this behalf the plaintiff further alleges that all of the acts and steps were so taken by the said city without notice to said plaintiff."

In his prayer for judgment, plaintiff demands the sum of $5,790 and costs.

The ground of the demurrer is that it fails to state facts sufficient to constitute a cause of action in the following particulars:

"(a) Because it appears upon the face of said complaint that the acts complained of were and are *ultra vires,* and beyond and without the authority and power of said defendant city, a municipal corporation, to do or commit:

"(b) Because it appears upon the face of said complaint that the acts complained of, if they were within the corporate power and might have been lawfully accomplished by the said city, through its municipal authorities, were nevertheless committed by the alleged agents of said city without proceedings according to law, and that no ratification of such unauthorized acts was had or made by said city, and because it appears from the face of said complaint that the acts and omissions complained of were done and suffered by said alleged agents and servants without the scope of their employment, and not on behalf of said city.

"(c) Because said complaint failed to show or allege that the claim or claims set forth in plaintiff's complaint, for injury and damages alleged to have arisen by reason of the acts and omissions set forth in said complaint on the part of the city authorities and servants, and in respect to its said streets referred to in said complaint, were filed in the office of the city auditor, and signed by the plaintiff as claimant, or by someone on his behalf, duly verified by him, within thirty days from the happening of such injury or damage; or that said claim or claims, upon which said plaintiff's action is brought as shown by his complaint, were in no manner or at any time filed in the office of the city auditor of said city, or considered or acted upon by said city's mayor or council as provided and required by §§ 2703 and 2704 of the Revised Codes of the state of North Dakota for the year 1909.

"(d) Because there is another action pending between the same parties for the same cause."

We are clear that none of the grounds of the demurrer are tenable, and that the order sustaining such demurrer was therefore erroneous.

Respondent's counsel rely chiefly upon the ground stated under subdivision "c" of the demurrer. They state in their brief that they do not waive the other grounds, but their entire printed brief and argument is directed to the ground stated in subdivision "c," and, in view of this, we will first dispose of this ground.

The action being one to recover damages for injuries to plaintiff's real property, is it necessary, in order to state a cause of action, that the complaint should allege the presentation by him to the city council, prior to the commencement of his action, of a verified claim for such damages pursuant to §§ 2703 and 2704 of the Revised Codes of 1905? Respondent's counsel earnestly contend for an affirmative answer to the above question. These sections are as follows:

"Sec. 2703. 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; and upon the trial of an action for the recovery of damages by reason of such injury, the claimant shall not be permitted to prove any different time, place, cause, or manner or extent of the injury complained of, or any greater amount of damages. In case it appears by the affidavit of a reputable physician, which shall be prima facie evidence of the fact, that the person injured was, by the injury complained of, rendered mentally incapable of making such statement during the time herein provided, such statement may be made within thirty days after such complainant becomes competent to make the same, but such affidavit may be controverted on the trial of an action for such damages, and in case of the death of the person injured prior to his becoming competent to make such statement, the same may be made within thirty days after his death, by any person having knowl-

edge of the facts; and the person making such statement shall set forth therein specifically the facts relating to such injury as aforesaid, of which he has personal knowledge, and shall positively verify such statement, and shall verify the facts therein stated of which he has no personal knowledge, to the best of his knowledge, information, and belief.

"Sec. 2704. 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 such abstract of facts must be signed and verified as provided in the preceding section, and all provisions of such section with reference to such verification shall be applicable to such abstract of facts, and no action shall be maintained unless the plaintiff therein shall plead and prove the filing of such claim and abstract as hereinbefore provided."

In commenting upon these sections, respondent's counsel say: "To our minds this language is clear and unmistakable. No one can doubt that when the legislature adopted the words, 'for injury to person or property,' it meant just what it said, and that such language includes property injured, or alleged to have been injured, which abuts a city street, when the injury was the result of an act or omission, with respect to such street, which, as we have seen, is exactly the claim of the plaintiff in the case at bar."

Counsel then devote considerable space in an attempt to differentiate certain authorities cited and relied upon by appellant's counsel, upon the ground that they were decided under statutes differing radically from those of this state above quoted.

We find it unnecessary to examine these authorities, for the question is set at rest in this state by the recent decision of this court in the case of Gaustad v. Enderlin, 23 N. D. 526, 137 N. W. 613. While respondent's counsel challenge the correctness of such decision and urge a reversal of the construction there placed upon said statutes, we are entirely satisfied with the correctness of the holding there made, as well as with the reasoning contained in the opinion.

The language employed in §§ 2703 and 2704 is so clear in limiting the operation thereof to claims for damages or injuries founded upon

alleged defective, unsafe, dangerous, or obstructed condition of a street, sidewalk, crosswalk, culvert, or bridge, or from the negligence of the city authorities in respect thereto, as to leave no room for doubt as to the legislative intent, such intention clearly being to require only those claims to be presented which are based upon injuries to person or property arising from the actual or implied negligence of the city in constructing or maintaining its streets, sidewalks, crosswalks, culverts, or bridges. The damages sought to be recovered in the case at bar are clearly not founded upon claims thus arising; and the authorities cited and relied upon by respondent's counsel may, we think, be easily differentiated from the case at bar on account of a difference in the statutes. It would serve no useful purpose, however, to review these cases in this opinion, and we shall not take the time nor the space necessary to do so.

The other grounds of the demurrer will now be considered. As we understand the contention of respondent's counsel made in oral argument before this court, they assert that the defendant, being a municipal corporation, cannot be held liable to respond in damages for the alleged wrongful acts charged against it, for the reason that such acts, if authorized by it, were and are *ultra vires,* and that plaintiff's sole redress for such acts is a proceeding against the individuals who were instrumental in behalf of the city in doing, or causing to be done, the acts aforesaid. In others words, that the city, under the law, could not and did not in any way authorize or ratify the said acts of its officers and servants.

Does the doctrine of *respondeat superior* apply to a municipal corporation under the facts alleged in the complaint? We are compelled to answer in the affirmative, for reasons hereinafter stated.

There can be no doubt regarding the full authority and control of a municipality over its streets, and its power to remove any obstructions or encroachments thereon, for it is expressly so provided by statute. See § 2678, Rev. Codes 1905, subd. 7 to 10 inclusive. The defendant city, through its officers, no doubt in good faith but mistakably, believed that a portion of plaintiff's elevator extended over the property line, into the street, thereby constituting an unlawful encroachment thereon, and the acts complained of were no doubt done for the purpose of removing what was deemed such an unlawful encroachment upon the

street. In thus attempting to exercise a lawful power expressly conferred by statute, can the city escape liability when it happens that its officers in fact were mistaken as to the existence of the encroachment? We think not. The acts complained of were expressly authorized by the city council, and to hold the city exempt from all liability under the facts pleaded in the complaint would, we think, be manifestly unjust. Such a rule might, in many cases, work a rank injustice to persons whose property rights have been flagrantly invaded. The doctrine contended for by respondent's counsel is, under the facts pleaded, clearly untenable, on principle, and, as we shall show, is opposed to the adjudicated cases. The leading case on this subject is Thayer v. Boston, 19 Pick. 511, 31 Am. Dec. 157. The facts there were that the officers of the defendant city had obstructed plaintiff's access to the street by the erection therein of stalls along the front of his premises. He brought his action on the case against the city, and in behalf of the defendant it was argued that if the officers of the corporation, within their respective spheres, act lawfully and within the scope of their authority, their acts are justifiable, and nobody is liable for damages, and if an individual sustains loss by the exercise of such lawful authority it is *damnum absque injuria*. But if they do not act within the scope of their authority, they act in a manner which the corporation has not authorized, and in such case the officers are personally liable for such unauthorized acts. In replying to such argument Chief Justice Shaw said: "But the court are of opinion that this argument, if pressed to all its consequences and made the foundation of an inflexible practical rule, would often lead to very unjust results. There is a large class of cases in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done whether it is lawful or not. The event of a legal inquiry in a court of justice may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged by their offices, to act upon the general subject-matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate

capacity, should be liable to make good the damage sustained by an individual in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party injured no means of redress except against agents employed, and by what at the time appeared to be competent authority, to do the acts complained of, but which are proved to be unauthorized by law. And it may be added that it would be injurious to the city itself in its corporate capacity, by paralyzing the energies of those charged with the duty of taking care of its most important rights, inasmuch as all agents, officers, and subordinate persons might well refuse to act under the direction of its government in all cases, where the act should be merely complained of, and resisted by any individual as unlawful, on whatever weak pretense; and conformably to the principle relied on, no obligation of indemnity could avail them. The court are therefore of opinion that the city of Boston may be liable in an action of the case, where acts are done by its authority which would warrant a like action against an individual, provided such act is done by the authority and order of the city government, or of those branches of the city government, invested with jurisdiction to act for the corporation, upon the subject to which the particular act relates, or where, after the act has been done, it has been ratified, by the corporation, by any similar act of its officers."

Another leading case holding to the same effect is Lee v. Sandy Hill, 40 N. Y. 442. There the municipality was sued for trespass to land in unlawfully, wrongfully, and forcibly entering upon plaintiff's premises and removing fences and digging up soil, etc., preparatory to the making of a highway over plaintiff's premises. It will thus be seen that the case is directly in point in the case at bar. The court, among other things, there said: "The doctrine is too well settled in this court to admit of discussion, that municipal corporations, like the defendant, are liable in trespass for the illegal acts of its officers." Citing numerous authorities, and among them the case of Thayer v. Boston, supra. The distinction is there clearly drawn between acts performed in a governmental capacity, for which the municipality is not liable, and acts performed for the municipality as such.

Another case directly in point is that of Weed v. Greenwich, 45

Conn. 170. In the opinion which was written by Pardee, J., we find the following language: "The court of warden and burgesses constitutes the borough legislature; to this court the accepted charter granted power to take action for the corporation upon the general subject of encroachments, to which the particular act complained of relates; they exercised all the powers of the borough in this behalf, and in respect to all external relations must be considered as identical with the corporation; although the grant is in form to the warden and burgesses, it is in reality to the borough, to be exercised for its benefit; acting at their pleasure, presumably they acted only when the special interests of the borough were to be promoted; they were not elected by the corporation in obedience to any statute, for the purpose of performing a governmental duty. Thus representing and acting for the borough they ordered the removal of the fence, and the borough should redress the wrong occasioned by the performance of an act in its particular interest, for municipal immunity does not reach beyond governmental duty. It is contrary to all principles of natural justice that the residents within certain territorial limits should seek for and obtain corporate powers for the more ready accomplishment of undertakings specially advantageous to themselves, but not at all necessary for the public, and in such powers find relief for responsibility for wrongs upon private rights.

"In the case before us, the warden and burgesses believed that the fence stood upon the highway, and that they had the right to remove it; apparently the warden came to the execution of their mandate clothed with official authority and power, not intending any injury. In all like cases it is best for those concerned that the individual should respect that authority and submit to the exercise of it, having knowledge that if he can prove that he has suffered any wrong he can look to a responsible corporation, rather than to an irresponsible individual, for damages." Numerous authorities are therein cited and quoted from with approval, including Hildreth v. Lowell, 11 Gray, 349; Hawks v. Charlemont, 107 Mass. 414; Buffalo & H. Turnp. Co. v. Buffalo, 58 N. Y. 639; Sheldon v. Kalamazoo, 24 Mich. 383; Crossett v. Janesville, 28 Wis. 421; Soulard v. St. Louis, 36 Mo. 546; Allen v. Decatur, 23 Ill. 332, 76 Am. Dec. 692; Woodcock v. Calais, 66 Me. 234; Inman v. Tripp, 11 R. I. 520, 23 Am. Rep. 520; Ashley v. Port Huron, 35

Mich. 296, 24 Am. Rep. 552; Chicago v. McGraw, 75 Ill. 566. All of these cases appear to be directly in point, announcing a rule contrary to that contended for by respondent's counsel in the case at bar. To quote from each of these authorities would extend this opinion to an unwarranted length, and we shall content ourselves by brief quotations from a few of them.

In Sheldon v. Kalamazoo, the marshal removed a fence which it was claimed encroached upon the highway. The lower court refused to hear evidence offered by plaintiff to show that the fence was not an encroachment, giving as his reason that the president and trustees acted in the capacity of public officers, and not municipal agents, and that the corporation was therefore not liable for their acts; but the supreme court of Michigan in granting a new trial said: "The doctrine is entirely untenable that there can be no municipal liability for unlawful acts done by municipal authorities to the prejudice of private parties. In this respect, public corporations are as distinctly legal persons as private corporations. There are officers who are corporation agents, and there are municipal officers whose duties are independent of agency and with distinct liabilities. But when the act done is in law a corporate act, there is no ground, upon reason or authority, for holding that if there is any legal liability at all arising out of it, the corporation may not be answerable. There is no conflict whatever in the authorities on this head. . . . There is no authority that we can find which holds such an invasion of private lands not to be an act of the corporation, and none which would exempt the corporation from liability to an action for the wrong."

In Allen v. Decatur, the supreme court of Illinois many years ago said: "We shall, in this opinion, devote our attention to the principal question which has been argued in the case, which is, whether a municipal corporation can be sued in an action of trespass, for acts done in obedience to an order of the corporation. The law is now so well settled that it is nowhere controverted that such corporations may be sued, in case, for tortious acts done under the instructions of such corporations."

In Woodcock v. Calais, the city government passed an order "that the street commissioner be directed to cause all fences now on the public streets to be removed." Pursuant thereto such commissioner employed

a surveyor to run a line between the plaintiff's land and the street. The line, as run, proved to be outside of the street limits and upon the plaintiff's land. Believing the line to be correctly run, the commissioner moved the plaintiff's fence to conform to such new line, and removed from plaintiff's land earth and rocks, and built a sidewalk thereon. In holding that the principles of *respondeat superior* applied, and that the city was liable to the plaintiff for trespass in damages, the supreme court of Michigan held that the fact that the street commissioner "was expressly 'directed' by the city government to cause all fences on the street to be removed, and that while attempting to follow these directions he committed the trespass which is the foundation of this action, withdraws this case from the application of the principle applicable to cases of public officers. For, while he was a public officer, and had lawful authority to act in the premises without any directions from the city, still the city was responsible for the safe condition of the streets, and chose by positive, formal vote to direct the commissioner. Whether he was obliged to follow the direction or not, is immaterial. He did act; and in his action he became *quoad hoc* the city's agent; and we are of the opinion that the superior must respond."

In Ashley v. Port Huron, Cooley, Ch. J., in speaking for the court, said: "It is very manifest from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort."

The Minnesota court, in speaking through Mitchell, J., in Boye v. Albert Lea, 74 Minn. 230, 76 N. W. 1131, held the city liable for causing a dam to be constructed in an unnavigable stream, resulting in forcing water to overflow plaintiff's land. In reversing the trial court's order sustaining a demurrer to the complaint, Judge Mitchell said: "The contention of its counsel is that the tort alleged is not one which the city as a municipality could commit under any circumstances; in other words, that it was wholly *ultra vires,* and hence

that the city was not liable. Municipal corporations, in the execution of their corporate powers, fall within the rule of *respondeat superior* when the requisite elements of liability coexist. To create such liability it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers as prescribed by the charter; in other words, it must not be *ultra vires* in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances. If the act complained of lies wholly outside of the general or special powers of the corporation as conferred by its charter, the corporation can, in no event, be liable for the acts of its officers, for a corporation cannot be impliedly liable to a greater extent than it could make itself liable by express corporate vote or action. But if the wrongful act be not, in this sense, *ultra vires,* but is within the general scope of the powers of the municipality, and was so done in the execution of corporate powers of a ministerial nature, but in an improper and unlawful manner, as to injure others, it may be the foundation of an action in tort against the corporation. 2 Dill. Mun. Corp. § 968. In this case it not only does not appear that the act complained of was *ultra vires,* in the sense above stated, but, on the contrary, it affirmatively appears from the complaint, read in connection with the city charter, that the act was done by the city in the execution of its corporate powers, to wit, the regulation and control of the flowage of the waters of Fountain Lake, but in such a negligent or unlawful way as to injure the plaintiff by overflowing his land. We use the term 'corporate powers' to distinguish them from those public services, not peculiarly local or corporate, imposed by statute on municipal officers, but in which the corporation, as such, has no interest except as a part of the general public. Our conclusion is that the complaint states a cause of action."

To cite further authorities seems wholly unnecessary, but we call attention to the interesting opinions in Naumburg v. Milwaukee, 77 C. C. A. 67, 146 Fed. 641, and to the numerous authorities therein cited. Also the recent case of Bunker v. Hudson, 122 Wis. 43, 99 N. W. 448. In the latter case we quote from the opinion as follows: "In grading the street the city was doing one of the things which, as a municipal corporation, it was authorized to do. That work was done in an improper or negligent manner, so as to invade the rights of the plaintiffs,

not as members of the public, but as adjoining proprietors. Toward them the city's act was not governmental, but proprietary. For proximate damage thus caused, liability results according to principle, and without conflict of authority." Citing numerous cases.

In concluding this opinion we cannot refrain from quoting from Judge Dillon's valuable works on Municipal Corporations, 5th ed. vol. 4, § 1651: "Cases such as those just mentioned are to be distinguished from others which resemble them in the circumstance of relating to wrongful acts, but which arise out of matters or transactions within the general powers of the corporation, and in respect of which there may be a corporate liability. Thus, if in exercising its power to open or improve streets, or to make drains and sewers, the agents or officers of a municipal corporation, under its authority or direction, commit a trespass upon, or take possession of, private property, without complying with the charter or statute, the corporation is liable in damages therefor. In such cases, also, an action will lie against a city corporation by the owner of land through which its agents have unlawfully made a sewer, or for trees destroyed and injuries done by them. A case in Louisiana, which was several times before the courts in that state, was decided upon the same principle. The mayor of a city tortiously, and in defiance of an injunction, proceeded at the head of a force of laborers and demolished a portion of the plaintiff's house, for the supposed reason that it was on public ground. The city corporation ratified the act by defending it. On the first appeal the court doubted whether the corporation could be made liable for the wrongful acts charged against its officers, especially as these were alleged to have been done by them wilfully and maliciously. On the second appeal it was held that, although the acts of the mayor were done without the previous order of the city council, yet the corporation, by reason of its subsequent ratification, was liable, and the plaintiff recovered."

It follows from what we have above said that the order appealed from was erroneous, and the same is accordingly reversed.

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

MARY E. KELLER v. JOHN SOUTHER.

(— L.R.A.(N.S.) —, 144 N. W. 671.)

Equity — mortgage — unpaid — statute of limitation — action to foreclose barred — land holden for debt secured.

The maxim that "he who seeks equity must do equity" is *held* applicable to the plaintiff who, in her action to determine adverse claims, seeks relief against a mortgagee whose mortgage has never been paid nor satisfied, but the cause of action to foreclose which is barred by the statute of limitations. Although the plaintiff is a remote grantee of the mortgaged premises, and neither she nor the mortgagor are personally liable for the payment of the indebtedness, the mortgage having been executed to secure the debt of a third person, nevertheless she stands in the shoes of the mortgagor, and in equity and good conscience the land which was thus hypothecated as security for the payment of the debt is holden therefor.

Opinion filed December 11, 1913.

Appeal from District Court, Morton County, *W. C. Crawford,* Special J.

From an order sustaining a demurrer to the complaint, plaintiff appeals.

Affirmed.

W. H. Stutsman, for appellant.

On demurrer to a replication plaintiff may take advantage of any defects in the plea. Townsend v. Jemison, 7 How. 706, 12 L. ed. 880.

A bad reply to a bad answer will be held good on demurrer. State ex rel. Metsker v. Mills, 82 Ind. 126; Ashley v. Foreman, 85 Ind. 55; Peden v. Cavins, 134 Ind. 494, 39 Am. St. Rep. 276, 34 N. E. 7; Puntenny v. Paddock, 1 Blackf. 415; Wile v. Matherson, 2 G. Greene, 184; Murdock v. Winter, 1 Harr. & G. 471.

The mortgage is barred by limitation. 25 Cyc. 1237; Fowler v. Wood, 150 N. Y. 584, 44 N. E. 1124; Low v. Allen, 26 Cal. 141.

Only he in whose favor the statute operates can waive or deprive himself of its benefits. Colonial & U. S. Mortg. Co. v. Northwest

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Note.—On the question of bar of statute of limitations as ground for quieting title as against encumbrances, see note in 6 L.R.A.(N.S.) 516.

Thresher Co. 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 Ann. Cas. 1160.

The statute of limitations is suspended by the death of the debtor only during the time until a creditor can apply for administration, or for a reasonable time. Kulp v. Kulp, 51 Kan. 341, 21 L.R.A. 550, 32 Pac. 1118; Bauserman v. Blunt, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466.

Hanley & Sullivan, for respondent John Souther.

He who seeks equity must do equity. The supreme court of this state is not alone in amplifying this equitable rule. Tracy v. Wheeler, 6 L.R.A.(N.S.) 517; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; De Cazara v. Orena, 80 Cal. 132, 22 Pac. 74; Burns v. Hiatt, 149 Cal. 617, 117 Am. St. Rep. 157, 87 Pac. 196; Michigan Trust Co. v. Red Cloud, 76 Neb. 634, 107 N. W. 760.

The statute of limitations is a shield, and not a sword; it will save from an attack, but cannot be used for the purpose of making the attack itself effectual. 16 Cyc. 140; Marshutz v. Seltzor, 5 Cal. App. 140, 89 Pac. 877.

Neither the mortgagor, nor his successor in interest with notice of the mortgage, can obtain a decree quieting title without paying the mortgage debt, even though outlawed. De Cazara v. Orena, 80 Cal. 132, 22 Pac. 74; Brandt v. Thompson, 91 Cal. 458, 27 Pac. 763; Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473; Hall v. Arnott, 80 Cal. 348, 22 Pac. 200; Spect v. Spect, 88 Cal. 437, 13 L.R.A. 137, 22 Am. St. Rep. 314, 26 Pac. 203; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; Mahoney v. Bostwick, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. 1020; Jones, Mortg. 1083, and 1 Pom. Eq. Jur. 385–387.

Fisk, J. This is an appeal from an order sustaining a demurrer interposed to plaintiff's reply. The action is a statutory one to determine adverse claims to real property, the complaint being in the usual form. The defendant Souther alone made answer, and he alleges therein the execution and delivery to him of a mortgage upon the premises in controversy, by one Charles E. Meech, on May 31, 1887, containing covenants against encumbrances and of general warranty, and securing the promissory note of one Tilden R. Selmes for $800 payable to such defendant, and dated May 20, 1887. Such answer alleges

that such note is still unpaid and such mortgage unsatisfied, and that the same are still owned by this defendant. No affirmative relief is prayed for, but the facts, as above alleged, are thus alleged by way of defense merely. Notwithstanding this, plaintiff served a reply wherein she alleges that Meech did not sign such note, and was in no wise personally liable for the debt represented thereby, and that he executed the mortgage solely to secure the debt of Selmes; that Selmes alone executed the note, and had no interest in the property in controversy and did not join in the execution of such mortgage, and that he removed permanently from this state about the year 1894, becoming a resident of Minnesota, where he died about August 1, 1895. Then follow allegations showing that the cause of action on such note and mortgage was long since barred by the statute of limitations, and that defendant Souther at no time made any effort to collect such note against Selmes or his estate. That in August, 1890, Charles E. Meech died intestate, and his estate was duly probated, Pauline C. and Robert Meech being declared his only heirs, and that no attempt was made by defendant to collect such indebtedness or to foreclose such mortgage, and that by lapse of time he is barred from asserting any claim or lien against said land. Then follows an allegation to the effect that on October 23, 1909, such heirs of Charles E. Meech conveyed the land in controversy to the plaintiff, who has ever since been the owner thereof.

The defendant Souther demurred to such reply upon the ground that it does not state facts sufficient to constitute a defense to the answer, nor are such facts sufficient to entitle plaintiff to the relief demanded in the complaint.

The procedure adopted is somewhat novel under our practice, and we discover no warrant therefor. In view of the fact that the answer contains no counterclaim, but merely defensive matter, a reply was neither necessary nor proper, but counsel for both parties, as well as the trial court, treated the pleadings as raising an issue of law as to the sufficiency as a defense of the matters alleged in the answer, and we shall dispose of the appeal on this theory, and we shall assume, for the purposes of this decision, that the matters alleged in the so-called reply are a part of the plaintiff's complaint. Do the facts alleged in the answer constitute any defense to plaintiff's alleged cause

of action? We think the learned trial judge answered this question correctly, and his order sustaining the demurrer must be affirmed. Although the cause of action for the collection of the note by foreclosure of the mortgage or otherwise is effectually barred by the statute of limitations, still, we think the maxim that "he who seeks equity must do equity" is applicable and forms a barrier to plaintiff's right of recovery without paying or offering to pay the indebtedness secured by such mortgage. This court had occasion to apply this maxim in the case of Tracy v. Wheeler, 15 N. D. 248, 6 L.R.A.(N.S.) 516, 107 N. W. 68. In that case the grantee of a mortgagor sought to have the mortgage canceled as a cloud upon her title, but the majority of the court held that, although the mortgage was barred by the statute of limitations, equity would not afford relief by canceling the same, except upon condition that the indebtedness be first paid.

Appellant's counsel does not question the soundness of this decision, but he seeks to differentiate it from the case at bar upon the theory that because neither Charles E. Meech nor his heirs personally owed the debt, and that the mortgage was given to secure the debt of another, in equity and good conscience plaintiff ought not to be required to pay the same as a condition to quieting her title as against such mortgage, and that therefore the equitable maxim aforesaid is not applicable. In this we cannot concur, nor do we think that the case of Tracy v. Wheeler can be differentiated upon such ground, for in that case, as in the case at bar, the plaintiff did not owe the indebtedness secured by the mortgage, but was a mere grantee of the premises from the mortgagor. We fail to perceive the force of the argument that because the mortgage was given by Meech to secure the debt of another, instead of his own debt, that there is therefore no rule of equity or good conscience which would require him to pay it, even as a surety. To the extent of the security thus given he stands in no different light from a surety or guarantor, and it seems to us that, as between him and the mortgagee, there is both a moral and equitable duty resting upon him to satisfy the indebtedness, and, concededly, his heirs and their grantee, the plaintiff, stand in no different light. Of course, if plaintiff, in a proper proceeding, can show facts disclosing that, on account of the conduct of the mortgagee or holder of the mortgage, such as laches or other acts resulting to the plaintiff's

detriment, in equity and good conscience the land should not be thus held as security for the payment of the indebtedness, she would no doubt be entitled to relief. Otherwise, we think her sole remedy is an action to redeem, in which she must allege her willingness and ability to pay whatever sum is justly found to be due on an accounting.

The whole fallacy, as we view it, of appellant's contention, consists in the unwarranted assumption that, by hypothecating this land as security for the payment of Selmes's note, Meech in no manner obligated himself in equity and good conscience to pay such indebtedness, even to the extent of permitting a resort to such security. True, the Michigan court in Kingman v. Sinclair, 80 Mich. 427, 20 Am. St. Rep. 522, 45 N. W. 187, seems to lend some support to appellant's contention, but, as stated in the opinion in Tracy v. Wheeler, supra, there were peculiar facts which serve to differentiate it from the Wheeler Case, and we think it also is to be differentiated for like reasons from the case at bar. We deem the Wheeler decision sound and the principle announced controlling in this case.

The order appealed from is accordingly affirmed.

PRICE E. MORRIS v. E. R. BRADLEY.

(144 N. W. 711.)

Assignments of error — rulings and admission of evidence — specifications of error — statement of case.

1. Assignments of error relating to rulings in the admission and exclusion of testimony cannot be considered where they are not predicated upon specifications of error as settled by the trial court in the statement of case.

Assignments of error — must conform to rules — disregarded if they do not.

2. Appellant's assignments of error do not conform to rule 14 (old rules), in that they do not "refer to the page of the abstract where the particular specification of error is found, and also to the page or pages of the abstract in which the matter is found upon which the error is assigned;" hence, appellant's assignments numbered 1 to 4 inclusive, which not only offend against this rule, but are not predicated upon any specifications of error, are disregarded.

Objection to evidence — assignments of error — merit.

3. Assignment number 5, which is based upon the ruling sustaining an objection to the introduction of exhibit "A," considered and *held*, for reasons stated in the opinion, without merit.

Opinion filed December 13, 1913.

Appeal from District Court, Barnes County, *J. A. Coffey*, J.

From a judgment in plaintiff's favor, and from an order denying a motion for a new trial, defendant appeals.

Affirmed.

Herman Winterer, D. S. Ritchie, and *Page & Englert,* for appellant.

An executory oral agreement cannot change, modify, or vary the terms of a written contract. Rev. Codes 1905, § 5328; Mettel v. Gales, 12 S. D. 632, 82 N. W. 181; 11 Am. & Eng. Enc. Law, 582; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162.

Evidence of plaintiff, as to value of the property, incompetent and too remote. Minneapolis Threshing Mach. Co. v. McDonald, 10 N. D. 408, 87 N. W. 993; First Nat. Bank v. Coffin, 162 Mass. 180, 38 N. E. 444; Sanford v. Shepard, 14 Kan. 228; Kansas City N. & Ft. S. R. Co. v. Dawley, 50 Mo. App. 480; Burke v. Beveridge, 15 Minn. 205, Gil. 160.

Oral evidence to establish the contents of public records and documents improper, without first laying a proper foundation. Sykes v. Beck, 12 N. D. 242, 96 N. W. 884.

Mortgaged property may be transferred to mortgagee through bill of sale. Taugher v. Northern P. R. Co. 21 N. D. 111, 129 N. W. 747; Bangs v. Friezen, 46 Minn. 423, 32 N. W. 173; Lovejoy v. Merchants' State Bank, 5 N. D. 624, 67 N. W. 956.

T. F. McCue, for respondent.

An assignment of error must be sufficient to point out the error relied upon, and call the attention of the court and counsel to the same in a specific way. Hostetter v. Brooks Elevator Co. 4 N. D. 357, 61 N. W. 49; O'Brien v. Miller, 4 N. D. 309, 60 N. W. 841.

The alleged errors are assigned so generally that they do not comply with the rules of court, do not amount to assignments of error, and cannot be considered. Globe Invest. Co. v. Boyum, 3 N. D. 538, 58 N. W. 339; Henry v. Maher, 6 N. D. 413, 71 N. W. 127; Marck v.

Minneapolis, St. P. & S. Ste. M. R. Co. 15 N. D. 86, 105 N. W. 1106.

The court should not suspend such rule and explore the record to ascertain whether or not errors have been committed, only in very rare cases. Morris v. Bradley, 20 N. D. 646, 128 N. W. 118; Besides the judgment is right and it ought to be affirmed. Felker v. Grant, 10 S. D. 141, 72 N. W. 81.

The abstract on appeal should be a true, concise abridgment of the evidence, sufficient to admit of a clear understanding of the case. Fargo v. Palmer, 4 Dak. 232, 29 N. W. 463.

FISK, J. This case was before this court on a former appeal. See Morris v. Bradley, 20 N. D. 646, 128 N. W. 118. The nature of the litigation and the essential facts are there fully disclosed, and it is unnecessary to restate them here. On the first trial a verdict was directed for the defendant, and on such former appeal we reversed this ruling and ordered a new trial, holding the proof amply sufficient, in the absence of evidence to the contrary, to entitle plaintiff to recover. The last trial resulted in a verdict and judgment in plaintiff's favor, and from such judgment, and from the order denying defendant's motion for a new trial, this appeal is prosecuted.

For reasons which we will briefly state, the judgment and order must be affirmed. Appellant's so-called assignment of errors does not conform in any respect to rule 14 of this court. Such assignment is as follows:

"1. The court erred in permitting the plaintiff to establish a subsequent oral agreement differing from the written one.

"2. The court erred in permitting the plaintiff to vary the terms of a written agreement, over the objection of the defendant.

"3. The court erred in the admission of evidence against the objection of the defendant.

"4. The court erred in rejecting evidence upon motion of the plaintiff.

"5. The court erred in sustaining the plaintiff's objection to the offer in evidence of exhibit 'A.'"

No reference whatever is made to the place in the abstract where the particular specification of error may be found, nor to the place

therein where the matter may be found upon which the error is assigned as required by such rule. Not only has appellant signally failed to substantially comply with such rule in this respect, but an examination of the specifications incorporated in the settled statement of case discloses that, with but one exception, none of such assignments of error have any support in, or are they based upon, the specifications. In other words, the so-called assignments do not relate to the errors thus specified. This being true, we are asked to reverse the lower court for alleged errors not urged before that court on the motion for a new trial, nor specified in the settled statement upon which the motion was made. Obviously, this cannot be done. Although the appeal is both from the judgment, and from the order denying the motion for a new trial, the making of such order is not assigned as error; but if it were, it would not avail appellant for the reason, as before stated, that the matters specified in the statement, and relied upon in the lower court, are not the alleged errors relied upon in this court, with one exception, and that is specification number 6. Hence, the only assignment requiring notice is the 5th, which is based upon the above specification and challenges the correctness of the ruling sustaining plaintiff's objection to the introduction in evidence of exhibit "A."

We have examined the entire evidence as contained in the printed abstract, and are satisfied that the ruling here complained of did not constitute prejudicial error, even if error at all. Exhibit "A" is a written document signed by J. E. and Daniel P. Show, reciting the fact that they were indebted to the plaintiff in the sum of $1,000 and interest, as shown by three promissory notes therein described; and also reciting the fact that they gave to the plaintiff a chattel mortgage on September 11, 1902, to secure the payment of said notes, giving in detail the personal property included in such mortgage. Thereafter such document contains the following recitals:

Whereas the first parties cannot pay said indebtedness and desire to close up the indebtedness as speedily and as easily as possible:

Now, therefore, it is hereby agreed that first parties shall, and they hereby do, waive the foreclosure of said mortgage, and agree to turn over to second party the property covered by said mortgage as above

stated, and agree that second party may sell and dispose of all the same in such manner as he may see fit, whether by regular foreclosure or by private sale, on time or for cash, and that the proceeds thereof, as fast as realized, less the cost and disbursements of sale and collection, shall be indorsed on said notes, and when said notes are fully paid the said mortgage shall be surrendered to said parties.

It is further agreed, that first party shall care for and protect said property for such time as he is stopping on the farm, and if he can sell any of the same, to notify second party, and if satisfactory to second party, to sell the same, the second party to release his lien when the money is paid to him, but no sale to be made to anyone till second party confirms such sale and receives the money, said sale to be for such price as second party may elect.

In witness whereof, the first parties have set their hands the day first above written.

D. P. Show.
J. E. Show.

There is no evidence in the record showing or tending to show that any property was turned over to the plaintiff by the Shows pursuant to such instrument, nor that plaintiff ever realized a cent on his indebtedness thereunder. The plaintiff's testimony, on the contrary, tended to show that a great deal of the property covered in the chattel mortgage had died or was disposed of, and that the remainder was of very little value and was covered by prior encumbrances, and that the only amount he was ever able to collect from the Shows on such indebtedness was the sum of $188.26. The action being one to recover damages from the defendant for alleged misconduct in the performance of his duties as plaintiff's agent, it was, no doubt, proper for the defendant to prove any facts tending to mitigate such damages, but the introduction of exhibit "A" without further proof, or an offer to prove, that plaintiff received or might have received something of value thereunder, would be of no avail to the defendant, as showing such mitigation of damages.

It follows that the judgment and order appealed from should be affirmed, and it is so ordered.

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

HENRY JACKSON v. GEORGE H. CHASE, W. A. Rutledge, and Levi Lewis, Copartners, Doing Business as Kenmare Brick & Coal Company.

(144 N. W. 235.)

Plaintiff was injured in a lignite coal mine near Kenmare, North Dakota, through the falling of a mass of clay from the roof of the room where he was working. He was a man forty-two years of age, of fair intelligence, and who had worked for about a year in that one mine. He sues for damages, claiming that the injury was occasioned through the incompetency of the pit boss or foreman of the mine. Defendants deny negligence upon their part that contributed to the injury, and allege that the plaintiff was himself guilty of contributory negligence. Evidence examined, and *held*:

Evidence — sufficiency — findings of jury.

1. That there was sufficient evidence showing the incompetency of the pit boss to support the findings of the jury in that particular.

Evidence — uncertainty of — jury — accident.

2. That, owing to the uncertainty of the evidence regarding the position of plaintiff at the time he was injured, it was impossible for the jury to say whether or not the accident was occasioned as the result of any act of the pit boss, and that a new trial would be necessary for this reason alone, were it not that the third holding disposed of the case.

Plaintiff — duty to examine premises and remedy defects — negligence — judgment notwithstanding verdict.

3. It is argued for the first time in this court that the trial court instructed he worked and discover and remedy any defects in the same. According to plaintiff's own testimony he took no such precaution upon the morning of the accident, but entered the room and went to work, although he had fired a blast of powder in the same room when he left upon the previous evening. Under those circumstances, this constituted such negligence upon his part as will preclude his recovering in the action. Trial court directed to enter an order for judgment in favor of the defendants notwithstanding the verdict.

Opinion filed November 15, 1913. Rehearing denied December 15, 1913.

Note.—As to the qualification of the liability of an employer by servant's duty to acquaint himself with his environment, see note in 41 L.R.A. 125. And on the contributory negligence of a servant in failing to remember dangerous conditions, see note in 41 L.R.A.(N.S.) 79.

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

Palda, Aaker, & Greene, for appellants.

The only vital question on this appeal is the negligence of the plaintiff. This question is determined by a consideration of the facts and conditions existing at the time of the accident, of which the plaintiff knew or ought to have known when he acted or omitted to act. Pittsburgh & W. Coal Co. v. Estievenard, 53 Ohio St. 43, 40 N. E. 725; Rush v. Coal Bluff Min. Co. 131 Ind. 135, 30 N. E. 904; 26 Cyc. 1252–1254, and note 42; Petaja v. Aurora Iron Min. Co. 106 Mich. 463, 32 L.R.A. 435, 58 Am. St. Rep. 505, 64 N. W. 335, 66 N. W. 951; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 501, 96 Fed. 298; Lammey v. Center Coal Min. Co. 144 Iowa, 640, 123 N. W. 356; Williams v. Norwood-White Coal Co. 146 Iowa, 489, 125 N. W. 232; Oleson v. Maple Grove Coal & Min. Co. 115 Iowa, 74, 87 N. W. 736; Butte v. Pleasant Valley Coal Co. 14 Utah, 282, 47 Pac. 77; Coal & Min. Co. v. Clay (Consolidated Coal & Min. Co. v. Floyd) 51 Ohio St. 542, 25 L.R.A. 848, 38 N. E. 613.

The court's instructions to the jury as to the qualifications of the pit boss were wholly improper, because they related to a matter wholly immaterial. It is the duty of the court to instruct as to the law upon every material issue in the case. Moline Plow Co. v. Gilbert, 3 Dak. 252, 15 N. W. 1; Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224.

Where there is no probability from the record, that needed corrections in the proof can be made or supplied on another trial, judgment should be ordered for defendants. Meehan v. Great Northern R. Co. 13 N. D. 432, 101 N. W. 183; Richmire v. Andrews & G. Elevator Co. 11 N. D. 453, 92 N. W. 819.

Francis J. Murphy, G. S. Wooledge, George A. McGee, for respondent.

A duty which the master can never delegate nor escape is that of selecting competent servants and employees. Rev. Codes 1905, § 5544; Labatt, Mast. & S. p. 193a; 26 Cyc. 1294, and cases cited.

The competency or incompetency of the pit boss may best be measured by considering the nature of his duties. Following this method, the master should use a degree of care in the selection of an overseer or boss commensurate with his duties. 26 Cyc. 1297, and case cited;

Robbins v. Lewiston, A. & W. Street R. Co. 107 Me. 42, 30 L.R.A. (N.S.) 109, 77 Atl. 537, Ann. Cas. 1912C, 96, and note; Pfudl v. F. J. Romer Sons, 107 Minn. 353, 120 N. W. 303.

Plaintiff had the right to assume that Fry, the pit boss, was a capable man for his work, and to act on such assumption. Rev. Codes 1905, § 5552.

The plaintiff was acting wholly and under the immediate direction of his superior, and with expressed assurance of safety. Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 393; Choctaw, O. & G. R. Co. v. Jones, 77 Ark. 367, 4 L.R.A.(N.S.) 837, 92 S. W. 244, 7 Ann. Cas. 435; Houston, E. & W. T. R. Co. v. De Walt, 96 Tex. 121, 97 Am. St. Rep. 884, 70 S. W. 531.

BURKE, J. During the time hereinafter mentioned, defendants owned and operated a lignite coal mine near Kenmare in this state, and plaintiff was in their employ as a common miner. This mine was operated through rooms located parallel to each other, 30 feet apart, and all opening into a main hall way or shaft. When it was found necessary to open a new room a tunnel was made off of the main shaft and at right angles thereto, 30 feet beyond the last room, which tunnel was usually something over 30 feet in length. The vein of coal was about 3 feet in thickness, but in order to accommodate the car or truck the tunnel was dug somewhat deeper than the layer of coal. After the tunnel was completed and a track laid therein, the miner would commence at the right-hand side and about 8 feet from the entrance and extract the coal, thus creating a room upon his right-hand side. As the coal was extracted, timber props would be placed in this room to support the roof. This right-hand side of the room was known as the "gob" side, while the left-hand side, which was not disturbed, was known as the "pillar," and the further end of the room was called the "face." After the gob side of the room had been worked as close to the adjoining room as it was considered safe, the miner was supposed to work at the face end of the pillar side of his room, and rob the pillar by extracting as much of the coal as he safely could while retreating towards the entry of his room. It was also his duty to remove the timbers from the gob side as he retreated, and it was expected that the roof of the mine would then settle and fill up the room. During

this process it was the duty of the miner to protect himself as best he could and at the same time extract as much as possible of the wall of coal between the several rooms. Plaintiff had been employed in this mine for a period of about a year, and had mined something less than 600 tons of coal at the time of his injury. He was a man forty-two years of age, who had had considerable experience as a machinist, and seems of fair intelligence. He was working under the direction of a pit boss or foreman, whose duty it was to look after the work of all the miners, see to the laying of the tracks, watch the proper supporting of the roof, and see that the coal loaded was clean. It was the duty of each miner to so timber his own room while working towards the face, so that the roof would be supported, and to protect himself while robbing the pillar and extracting the timbers. Just prior to the injury the pit boss directed plaintiff to begin robbing the pillar in the reverse manner to that usually employed, *i. e.,* by beginning at the entry of the mine and working towards the face. Plaintiff started to extract a "v" shaped portion of the pillar or left-hand side of his room, beginning at the entry of the mine and widening to reach the face of the mine. After he had extracted coal to about 10 feet of the face, he prepared a blast of powder and caused the same to be exploded about 5:30 in the evening, and left the mine until the next morning about 8:30. At that time he entered the mine, pushed his car to the far end of the track, and was standing a few feet from the face of the mine on the car track, or between the car track and the rib side of the room, shoveling coal into the car, when a piece of clay broke loose from the roof, struck him upon the back, and caused his injury. He alleges that the defendants were negligent in employing an incompetent pit boss, and that it was on account of the erroneous method of robbing the pillar that he was injured. The defendants insist that the pit boss had nothing whatever to do with the plaintiff's injury, but that the injury was occasioned through plaintiff's own negligence, or at least that plaintiff's negligence contributed thereto to such an extent as to prevent recovering.

(1) The first question under consideration is whether or not the pit boss was incompetent. Upon this question we think that there is sufficient evidence to justify the jury in holding that person incompetent.

(2) The next question arising is whether the plaintiff's injury was occasioned through any act of the pit boss. The evidence is not as clear as we would wish upon the question of the exact location of plaintiff at the time of his injury. After careful consideration of all the evidence, the different members of this court have been unable to agree upon this important point. The plaintiff himself has testified that he was loading coal that had been knocked down by the blast made the evening before. He has also testified that he was at the face of the room shoveling some loose coal into the car. He has also testified that the portion of the rib which remained unrobbed was about 10 feet in length. It is thus impossible to locate the distance of the falling clay from the unsupported roof at the place where the pillar had already been robbed. It is plain that plaintiff must show not only that the pit boss was incompetent, but that the robbing of the pillar in this erroneous manner caused the clay to fall from the roof. As the evidence stands, there is as much reason to believe that the clay fell on account of the explosion of the powder or from some inherent weakness of the roof, as from the presence of the room created by plaintiff while robbing the pillar. Thus, the verdict of the jury must have been upon conjecture merely, and not upon evidence. For this reason alone it was the duty of the trial court to order a new trial. In view of the fact that this evidence might be supplied at a new trial, we might possibly allow the plaintiff another chance were it not for the next assignment of error, which we believe entirely disposes of the case.

(3) This brings us to the third and last contention of the defendants, that the negligence of the plaintiff has contributed to his injury in such a way as to prevent his recovering. For this purpose we shall consider only the evidence of the plaintiff and his witnesses. The plaintiff testified: "It was the business of the man who mined the coal in these separate rooms, each man to do his own timbering or propping." He testified that he had put in all of the timbers that he considered necessary. That he had put in and exploded the charge of powder the evening before, and that when he went to work the following morning he did not make any inspection of the walls or the roof to see that they were all right before he started to work. He testified that he did sometimes tap around to see that everything was all solid, but that he had not done it upon this occasion.

He was also asked this question:

Q. Now, you knew that it was your business to keep the roof protected by props, didn't you?

A. Yes, sir.

Q. How would you know when to put them up if you did not examine the roof?

A. After you would go such a distance you would have to put them up. We put them up for safety, I suppose.

Q. You say sometimes you did tap the roof to see if it was all right?

A. Once in a great while.

Q. If there was to be any jar or injury . . . it would be pretty likely to happen shortly after the shot, wouldn't it?

A. Not always, no.

Q. What else would start it?

A. The heft of the roof coming down, I suppose. I don't know.

Again he was asked:

Q. Why didn't you put the timbers up there after you had fired that shot and cleaned out the coal?

A. There was no need of timbers. I did not have any to put up either.

Q. What do you mean by testifying yesterday that three or four days before, when Mr. Fry was in this room and directed you where to work, that you told him that it was dangerous to do that?

A. That is when he put me to pull the pillar off.

One Egge, a witness for plaintiff, testified that he was in plaintiff's room just before the accident and saw two timbers lying on the clay in the gob side of the room, and that he had a conversation with plaintiff as follows: "I spoke a few words to him concerning the timber; I said to him, you had better put up a timber. I was probably talking with him a minute, maybe half a minute, I could not say how long, but it is a fact that I said to him, you had better put up a timber; he said he was going to as soon as he got around to it; it was about five or ten minutes after that that I heard him call or cry. . . . When I went in there before he was hurt that particular place was not in proper shape to put up the timber; it would be necessary to dig a

little clay so that the timber could be put in; that would take about fifteen or twenty minutes to do that." There is considerable evidence in the case which we are unable to set out in this opinion, but from a careful reading of the same we have reached the conclusion that plaintiff was negligent regardless of the incompetency of the pit boss. He was negligent in going into this room without sounding the roof to ascertain whether or not the same was dangerous, and he was clearly negligent in not investigating the roof at the time his witness Egge called his attention to the necessity for the timber. Plaintiff has entered a sort of denial to Egge's testimony in this particular, but it is not an emphatic denial, and not sufficient, we think, to overcome the testimony of his own witness. Being himself guilty of negligence which contributed to his injury, it is impossible, of course, for the jury to proportion the damage between the plaintiff and the defendants, and under the well-established rules of law plaintiff cannot recover. For this reason the trial court should have ordered judgment for the defendants notwithstanding the verdict, as asked by the defendants, and for this reason the judgment of the lower court is reversed with instructions to grant such motion at this time.

FRED C. STOLL v. J. R. DAVIS.

(144 N. W. 443.)

Plaintiff is real estate agent; defendant owner of a tract of land containing 2,560 acres situated in Emmons county, North Dakota. Defendant caused to be circulated a poster offering to pay $1 an acre commission to any person who first closed a satisfactory deal. Plaintiff found a purchaser and the sale was made satisfactory to defendant. This suit is for commission of $1 per acre, and defendant claims that sale was not made under the terms of the circular, but upon a subsequent agreement between himself and plaintiff, whereby plaintiff agreed to receive nothing whatever for his services. Trial was had to a

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Note.—The authorities on the question of the performance of a contract by a real estate broker to find a purchaser or effect an exchange of his principal's property are collated in a note in 44 L.R.A. 593. And as to when a real estate broker has earned his commission, generally, see note in 139 Am. St. Rep. 225.

jury and judgment was had by plaintiff. Defendant appeals and excepts to the charge given by the court to the jury.

Jury trial — charge of court — must be taken as a whole — mere excerpts not sufficient for reversal.

1. The court charged the jury, among other things, as follows: "Did the defendant agree to pay the plaintiff $2,560, or a dollar an acre, for selling the land in question? If you are satisfied that there was such an agreement made, then it is your duty to bring in a verdict in favor of the plaintiff." Elsewhere in the charge the court went fully into the question of contracts in general, and this contract in particular, and, we think, fully covered that subject. The case will not therefore be reversed upon a mere excerpt from the charge.

Charge of court — reversal — mere excerpts.

2. The court instructed the jury as follows: "For it is for you to say whether or not in this case the plaintiff has established his case, or convinced you jurymen by a preponderance of testimony that there was a binding contract entered into between these parties whereby the defendant agreed to pay the plaintiff $2,560 as commission for the sale of the land in question. If you are satisfied, as I intimated a moment ago, that the plaintiff has proved to your satisfaction that there was such a contract, then it is your duty under your oath to bring in a verdict in favor of the plaintiff." This instruction was excepted to, that they failed to present to the jury the necessity of the contract being performed by the plaintiff, in that it fails to state that before the plaintiff will be entitled to recover he must first sell the land according to the terms of said contract. This also was a mere excerpt from the charge, and this court will not reverse the judgment when the whole charge fully covers the subject as it does in this case.

Charge of court — interest on amount — objection — first made in supreme court — will not be considered.

3. It is argued for the first time in this court that the trial court instructed the jury to find interest due to the plaintiff in case he recovered, and that this is error because interest rests in the discretion of the jury. This objection was not incorporated in the exception to the charge, and was not called to the attention of the trial court at the time of the motion for a new trial. Therefore it will not be considered upon this appeal.

Opinion filed November 15, 1913. Rehearing denied December 15, 1913.

Appeal from the District Court of Emmons County, *Winchester*, J.

Affirmed.

Armstrong & Cameron (*Newton, Dullan, & Young,* of counsel), for appellant.

Every claim of defense must be recognized; and where material evidence, or issues, theories, or defenses are ignored by the court, the instructions are erroneous. Walter A. Wood Mowing & Reaping Mach. Co. v. Bobbst, 56 Mo. App. 427; Fiore v. Ladd, 25 Or. 423, 36 Pac. 572.

The case should be submitted to the jury on the theory of both parties. Swope v. Schafer, 9 Ky. L. Rep. 160, 4 S. W. 300; State v. Williams, 94 Minn. 319, 102 N. W. 722; Blashfield, Instructions to Juries, § 100.

All phases of the case, under the evidence, should be covered by the charge, in a complete and impartial manner. 11 Enc. Pl. & Pr. 190, 191; 38 Cyc. 1626–1629, and cases cited; First Nat. Bank v. Currie, 44 Mo. 91; Chicago Consol. Traction Co. v. Schritter, 222 Ill. 364, 78 N. E. 820; Steele v. Crabtree, 130 Iowa, 313, 106 N. W. 753; Logan v. Lake Shore & M. S. R. Co. 148 Mich. 603, 112 N. W. 506; Illinois Terra Cotta Lumber Co. v. Hanley, 214 Ill. 246, 73 N. E. 373; Craig v. Miller, 133 Ill. 300, 24 N. E. 431; Thompson v. Boden, 81 Ind. 179; Cushman v. Cogswell, 86 Ill. 65; State v. Meshek, 51 Iowa, 311, 1 N. W. 685; Gallagher v. Williamson, 23 Cal. 332, 83 Am. Dec. 114; Remy v. Olds, 4 Cal. Unrep. 240, 34 Pac. 216; Everett v. Richmond & D. R. Co. 121 N. C. 519, 27 S. E. 991; Bering Mfg. Co. v. Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869; Gilmore v. Courtney, 158 Ill. 440, 41 N. E. 1023; Kearney v. Snodgrass, 10 Or. 183; McClory v. Lancaster, 44 Ill. App. 214; Ludwig v. Petrie, 32 Ind. App. 553, 70 N. E. 280; Carruthers v. Towne, 86 Iowa, 325, 53 N. W. 240; Terry v. Shively, 64 Ind. 112; Burnham v. Stone, 101 Cal. 173, 35 Pac. 627; Weiss v. Bethlehem Iron Co. 31 C. C. A. 363, 59 U. S. App. 627, 88 Fed. 30, 5 Am. Neg. Rep. 537; Edgar v. McArn, 22 Ala. 796; Beale v. Hall, 22 Ga. 431; Dignan v. Spurr, 3 Wash. 309, 28 Pac. 529; Gamble v. Mullin, 74 Iowa, 99, 36 N. W. 909; Dikeman v. Arnold, 71 Mich. 656, 40 N. W. 42; Chicago, R. I. & P. R. Co. v. Buckstaff, 65 Neb. 337, 91 N. W. 426.

The trial judge should not omit instructions upon any material point covered by the evidence in the case, however slightly, merely because counsel has not requested same. The charge of the court is for

the guidance of the jury. Capital City Brick & Pipe Co. v. Des Moines, 136 Iowa, 254, 113 N. W. 835; Chattanooga & D. R. Co. v. Voils, 113 Ga. 361, 38 S. E. 819; York Park Bldg. Asso. v. Barnes, 39 Neb. 834, 58 N. W. 440; Rowell v. Vershire, 62 Vt. 405, 8 L.R.A. 708, 19 Atl. 990; Buck v. Squiers, 23 Vt. 498; Haigler v. Adams, 5 Ga. App. 637, 63 S. E. 715; Gowdey v. Robbins, 3 App. Div. 353, 38 N. Y. Supp. 280; Low v. Hall, 47 N. Y. 104; Central R. Co. v. Harris, 76 Ga. 501; Garrett v. Gonter, 42 Pa. 143; Hice v. Woodard, 34 N. C. (12 Ired. L.) 293; Boon v. Murphy, 108 N. C. 187, 12 S. E. 1032; State v. Pennell, 56 Iowa, 31, 8 N. W. 686; Wilson v. Commercial Union Ins. Co. 15 S. D. 322, 89 N. W. 649.

The theory of each party to the case, under the evidence, should be so covered and presented to the jury by the charge as will enable the jury to recognize it, and to know precisely what they are told to decide. 38 Cyc. 1629; McNulta v. Jenkins, 91 Ill. App. 309; Pardridge v. Cutler, 168 Ill. 513, 48 N. E. 125; Linn v. Massillon Bridge Co. 78 Mo. App. 118.

Charles S. Lane and *Sutherland & Payne,* for respondent.

There must be a foundation laid for assignment of error by proper and timely exceptions, or same cannot be reviewed. Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276; Pease v. Magill, 17 N. D. 166, 115 N. W. 260; Paulsen v. Modern Woodmen, 21 N. D. 235, 130 N. W. 231.

Points must be saved by clear and explicit exceptions. Galloway v. McLean, 2 Dak. 372, 9 N. W. 98; Kennedy v. Falde, 4 Dak. 326, 29 N. W. 667; State v. Campbell, 7 N. D. 58, 72 N. W. 935.

Where a party considers the instructions of the court incomplete, or where they fail, in his opinion, to cover any material point, it is his duty to call the court's attention to same, and request further instructions. Landis v. Fyles, 18 N. D. 587, 120 N. W. 566; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972; 38 Cyc. 1693; Garrigan v. Kennedy, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 Ann. Cas. 1125; Belknap v. Belknap, 20 S. D. 482, 107 N. W. 692; Connell v. Canton, 24 S. D. 572, 124 N. W. 839; Lunschen v. Ullom, 25 S. D. 454, 127 N. W. 463; 38 Cyc. 1693.

It is the duty of counsel to call the court's attention to any material

omission or oversight in its charge to the jury. "If he is silent when he should speak, he ought not to be heard when he should be silent." McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685; Boon v. Murphy, 108 N. C. 187, 12 S. E. 1032.

BURKE, J. During the year 1909 plaintiff was engaged as a real estate agent in Wisconsin and South Dakota. At the same time defendant was the owner of a tract of land containing 2,560 acres situated in Emmons county, North Dakota. During that year the defendant circulated a poster offering the said tract for sale at $15 per acre, and also wrote to the plaintiff inclosing a circular and containing the following language: "Am now offering it for sale on the ten year or crop payment plan, as per circular inclosed, for good reasons as set forth in my circular. I am anxious to sell, and with that end in view would be willing to consider a limited amount of wild land or even a small farm that would not tie me down too much, on the deal, and as an inducement am willing to pay a commission of $1 per acre to the party who first closes a satisfactory deal." After some further correspondence the plaintiff produced a purchaser named Green, who finally bought the Emmons county tract, paying therefor partly in an Illinois farm. So far the facts are not in dispute, but regarding the negotiations that led up to the sale there is a sharp dispute. The defendant testified that while the negotiations were under way, and when it seemed that the trade would fall through on account of disagreement between principals as to the price of the Illinois land, that plaintiff and defendant agreed that if the deal should be made on the terms proposed at that time by the man Green that plaintiff should not receive any commission from the defendant whatever. The plaintiff, however, denies such conversation and insists that he is entitled to $1 an acre because he furnished a purchaser who bought the land on terms satisfactory to the defendant. It was thus apparent that, at the close of the trial, there was but one issue of fact to be submitted to the jury, namely, whether or not the offer of $1 an acre mentioned in defendant's letter to plaintiff was withdrawn prior to the consummation of the sale. Upon this question the trial court instructed the jury in the language set forth later in the opinion, and the jury found

for the plaintiff. The defendant appeals and assigns two errors predicated upon instructions of the trial court.

(1) The instructions were given orally by agreement of parties, and two exceptions were filed within twenty days after filing thereof. The defendant made no request for instructions, nor did he intimate to the trial court any objections to those given while the jury was still in the court room. The exceptions are, first, the defendant excepts to the following instructions given by the judge to the jury: "Did the defendant agree to pay the plaintiff $2,560, or a dollar an acre, for selling the land in question? If you are satisfied that there was such an agreement made, then it is your duty to bring in a verdict in favor of the plaintiff for $2,560 and interest thereon at the rate of 7 per cent per annum from the time that the deal was completed, from the time you find, if you do find, that the plaintiff was entitled to commission." Which instruction was excepted to for the reason, as alleged, that it failed to present to the jury the necessity of the contract being performed by the plaintiff, in that it fails to state that before the plaintiff will be entitled to recover, he must first sell the said land according to the terms of the said contract. In disposing of this exception we deem it proper to say that, even if given alone, this instruction was proper and commendable. It is the duty of the trial court to simplify for the jury as much as possible; lengthy and confusing instructions upon issues not involved tend to confuse rather than enlighten the jury. In the case at bar, both parties had testified that the plaintiff had sold the land according to the contract, and had furnished a buyer who was satisfactory to the defendant. No issue was therefore left thereon for the jury. Besides, the appellant has taken a mere excerpt from the charge of the judge upon the point. The trial court, in his instructions to the jury, went fully and fairly into the question of contracts in general and in this particular case, and says: "In determining whether there was a contract between these two parties, you will bear in mind what the requisites are to a contract, and what is necessary in order that you may find that there was a contract. It must be free, it must be mutual, it must be communicated by each to the other. In determining whether these requisites were present in the land contract, you will call to mind the testimony in the case and determine whether or not they did exist with reference to the alleged contract between the

parties. . . . Now, under the law which I have read to you, it becomes necessary for you, gentlemen of the jury, to call to mind the testimony to which you have listened, and determine therefrom whether or not there was a complete contract between these parties as to the payment by the defendant to the plaintiff of a commission of $2,560. Did the minds of the two parties meet? Was the consent mutual? To put it into a little plainer language, did the defendant agree to pay the plaintiff $2,560, or a dollar an acre, for selling the land in question? If you are satisfied that there was such an agreement made, then it is your duty to bring in a verdict in favor of the plaintiff. . . . If, on the other hand, you are satisfied that the minds of the parties did not meet, . . . then, in that case, your verdict will be in favor of the defendant and against the plaintiff, and with reference to this matter let me charge you further that the plaintiff is bound under the law in such a case to make out his case by preponderance of testimony. . . ." There is much more of the judge's charge relating to this matter which cannot be given in this opinion through lack of space. What we have quoted amply justifies the rule adopted by this court that exceptions to small parts of the judge's charge will not be considered alone, but that the entire charge must be read together in determining whether or not the appellant has been prejudiced.

(2) The second exception filed was as follows: Defendant excepts to that part of the instructions which states the law as follows: "For it is for you to say whether or not in this case the plaintiff has established his case, or convinced you jurymen by a preponderance of testimony that there was a binding contract entered into between these parties whereby the defendant agreed to pay the plaintiff $2,560 as commission for the sale of the land in question. If you are satisfied, as I intimated a moment ago, that the plaintiff has proved to your satisfaction that there was such a contract, then it is your duty under your oath to bring in a verdict in favor of the plaintiff for $2,560 and interest, as I have hereinbefore stated." Which instructions are excepted to for the same reasons and on the same grounds as those set out in the first exception herein. And in disposing of the second exception we have nothing more to say than we have said in answer to the first exception, as the issues are practically the same. The extract from the judge's charge correctly states the issue before the jury,

and in the absence of specific objection is full enough. Besides, we cannot assume that it has not been fully covered by the trial court.

(3) Upon the argument in this court appellant for the first time calls attention to the question of interest, and insists that the jury should not have been instructed positively to include interest in the verdict, but that it was their privilege to allow interest if they so desired. This objection was not incorporated in the exception to the charge, and was not called to the attention of the trial court when he was asked to pass upon the motion for a new trial, and therefore it will not be considered by us. Supporting the principles that we have followed are Brickwood's Sackett, Instructions to Juries, vol. 1, § 165; Landis v. Fyles, 18 N. D. 587, 120 N. W. 566; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972; State ex rel. Pepple v. Banik, 21 N. D. 417, 131 N. W. 262; 38 Cyc. 1693.

The objections of the appellant being without merit, the judgment of the trial court is affirmed.

IN THE MATTER OF THE APPLICATION FOR WRIT OF HABEAS CORPUS IN BEHALF OF PETER SCHANTZ.

(144 N. W. 445.)

Criminal action — appeal — within one year after rendition of judgment — computation of time — from rendition of judgment — not from entry.

1. Under § 10139, Rev. Codes 1905, an appeal in a criminal case must be taken within one year after the rendition of the judgment, and an appeal which is not taken within such time, but within one year after the entry thereof, is too late.

Rendition of original judgment — act of pronouncing sentence — does not involve entry of judgment.

2. The rendition of a criminal judgment, as the term is used in § 10139, Rev. Codes 1905, is the judicial act of a court in pronouncing the sentence of the law upon the facts in controversy, and ascertained by the pleadings and the verdict, and does not involve the entry of the judgment upon the record.

Note.—As to what entry or record is necessary to complete judgment, see note in 28 L.R.A. 621.

Judgment — rendition — certificate of probable cause — appeal — notice of — bail — release from imprisonment — time not computed as part of term.

3. One who, after the rendition of a judgment in a criminal case, obtains a certificate of probable cause, and furnishes bail on an appeal from said judgment to the supreme court, and serves his notice of appeal, obtains a temporary release from imprisonment by legal means, and the time that he is thus at large will not be computed as a part of his term of imprisonment. He will also be considered to be at large under such appeal and supersedeas bond until he delivers himself up to the proper officers for incarceration, even though he may have dismissed his appeal before such time.

Sentence — suspension of — by illegal act of court — defendant — voluntary act.

4. The case of Re Markuson, 5 N. D. 180, 64 N. W. 939, distinguished, and *held* to apply only to cases in which the sentence has been suspended by an illegal and unauthorized act on the part of the court, and not to cases where it has been suspended by the voluntary and legal act of the defendant himself.

Opinion filed December 15, 1913.

Original writ of habeas corpus.
Writ quashed.

Statement by BRUCE, J. This is an original petition for the issuance of a writ of habeas corpus, and for an order discharging the petitioner from the custody of the sheriff of Morton county, by whom he alleges that he is illegally detained. The defendant was duly indicted by the grand jury of Morton county on the 3d day of December, 1907. A change of venue was taken to Barnes county, North Dakota. The Hon. E. T. Burke, Judge of the fifth judicial district, presided at the trial. The defendant was convicted by a jury on or about February 5, 1908, two other verdicts of guilty as against Joseph Winbauer and Alex Froelich for the same offense (a violation of the liquor laws) being returned at the same time. After the return of the verdicts, and before the sentences of the court were announced, an adjournment was taken, and thereafter in Bismarck, in Burleigh county, on or about the 13th day of February, 1908, sentences were orally pronounced by the court, and the three parties mentioned were sentenced to be confined in the Morton county jail for a period of ninety days, and to pay a fine of $200, and in default of said fine to be confined in said jail for one ad-

ditional day. On the same day that these oral sentences were pronounced, each of said defendants gave a supersedeas bond on an appeal to the supreme court, and on the same day obtained from the presiding judge certificates of probable cause. Notices of these appeals, however, were not served until one year after, namely February 11, 1909. After still another year, that is to say, on the 19th day of March, 1910, a motion was made by the state to dismiss the appeals, and counter-motions being made by the defendants for leave to withdraw the same, these motions were granted, and on the same day remittiturs were sent down by the supreme court to the district court of Barnes county, wherein and whereby said causes were remanded to such district court for further proceedings according to law. By the terms of the supersedeas bonds each of the defendants had, as in other cases, held himself amenable to the process of the court. Neither of the defendants, however, has at any time complied with the conditions of his bond, nor presented himself to the court for imprisonment or for its further action. On the 31st day of October, 1913, and after an interim of over three years, orders for commitments on sentences with certified copies of the judgments entered in said actions were issued to the sheriff of Morton county, and in pursuance thereof the defendants were arrested. On the 4th day of November they applied to the district court of Morton county for a writ of habeas corpus, and said writ being returnable before the Hon. W. L. Nuessle, who was called in for the purpose, and on hearing the writs were denied. The present proceeding is based upon the same facts as those which were presented to the Hon. W. L. Nuessle. On both hearings it was shown that, although sentence was orally pronounced on the defendants by Hon. E. T. Burke on the 13th day of February, 1908, and although said appeals were taken from such judgment, certificates issued and supersedeas bonds given, such judgments were not actually entered in Barnes county, North Dakota, or elsewhere, until December 24th, 1909, and even then that the orders were *nunc pro tunc* orders obtained without notice to or the presence of the defendants, and which orders expressly provided that such judgments should be entered as of the 13th day of February, 1908, the date on which the same were pronounced by the court, and further provided that "all acts in relation thereto be had and shown as of that date."

John F. Sullivan and *L. A. Simpson,* for petitioner.

Our statute on appeals in criminal cases provides that appeal must be taken within one year from the time of sentence of defendant. Rev. Codes 1905, § 9513.

The term of imprisonment begins on the date of sentence. Re Markuson, 5 N. D. 180, 64 N. W. 939; Tuttle v. Lang, 100 Me. 125, 60 Atl. 892; Re Webb, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, 62 N. W. 177, 9 Am. Crim. Rep. 702; State v. Voss, 80 Iowa, 467, 8 L.R.A. 767, 45 N. W. 898; Weaver v. People, 33 Mich. 296, 1 Am. Crim. Rep. 552; Com. v. Foster, 122 Mass. 317, 23 Am. Rep. 326, 2 Am. Crim. Rep. 499; Ex parte Glendenning, 22 Okla. 108, 19 L.R.A. (N.S.) 1041, 132 Am. St. Rep. 628, 97 Pac. 650.

H. R. Bitzing, State's Attorney, *William Langer,* Assistant State's Attorney, and *Andrew Miller,* Attorney General, *Alfred Zuger* and *John Carmody,* Assistant Attorneys General, and *F. C. Hefron,* of counsel, attorneys for respondent.

Where the orders of a court staying judgment are illegal, and the defendant is released on account of such orders, the time of such release from imprisonment shall be regarded as part of the term of sentence. Re Markuson, 5 N. D. 180, 64 N. W. 939.

Even this case has been expressly overruled. It is too technical. State v. Sanders, 14 N. D. 203, 103 N. W. 419; Miller v. Evans, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198.

A convict ought not to be allowed to profit by a delay occasioned by his own act, by mistakes of the courts, or by his assent or acquiescence. Re Webb, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, 62 N. W. 177, 9 Am. Crim. Rep. 702; Miller v. Evans, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198; State v. Cockerham, 24 N. C. (2 Ired. L.) 204; 19 Enc. Pl. & Pr. 480; Ex parte Bell, 56 Miss. 282; Dolan's Case, 101 Mass. 219; Hollon v. Hopkins, 21 Kan. 638.

Expiration of time without imprisonment is in no case an execution of the sentence. Dolan's Case, 101 Mass. 219; Sylvester v. State, 65 N. H. 195, 20 Atl. 954; McKay v. Woodruff, 77 Iowa, 413, 43 N. W. 429; Ex parte Vance, 90 Cal. 208, 13 L.R.A. 574, 27 Pac. 209; State ex rel. Cary v. Langum, 112 Minn. 121, 127 N. W. 465; State v. Abbott, 87 S. C. 466, 33 L.R.A.(N.S.) 112, 70 S. E. 6, Ann. Cas.

1912B, 1189; People v. Felker, 61 Mich. 110, 27 N. W. 869; Scott v. State, 26 Tex. 116; 3 Enc. Pl. & Pr. 914; Zinn v. District Ct. 17 N. D. 128, 114 N. W. 475; Zinn v. District Ct. 17 N. D. 135, 114 N. W. 472.

BRUCE, J. (after stating the facts). In the case of State v. Winbauer, ante, 43, 143 N. W. 387, this court held that the judgment rendered by the Hon. E. T. Burke at Bismarck on the 13th day of February, A. D., 1908, was a valid judgment. Section 9513 of the Rev. Codes of 1905 provides that "the term of imprisonment fixed by the judgment in a criminal action commences to run only *from the time of sentence of the defendant;* but if thereafter, during such term, the defendant escapes, or *by any legal means* is temporarily released, from such imprisonment, and subsequently returned thereto, the time during which he was at large *must not be computed* as part of such term." It is true that no judgment was ever actually entered in the records of the court in Barnes county until December 24, 1909. It is also true, however, that on the 13th day of February, 1908, and on the same day that sentence was orally pronounced by the court at Bismarck, the petitioner obtained a certificate of probable cause, and furnished bail in the sum of $500 on an appeal from said judgment to the supreme court, and thereafter, and within the time prescribed, duly served and filed his notice of appeal. This appeal was then an appeal taken by the defendant, and a valid appeal, and the defendant was thereby temporarily and by "legal means" released from imprisonment. A motion to dismiss the appeal on the ground that the judgment had not been entered of record in Barnes county, and that therefore there was no judgment to appeal from, would not have been sustained by this court. See State v. Winbauer, supra. Section 10139 of the Rev. Codes of 1905, which relates to appeals in *criminal cases,* provides that such an appeal may be taken not *within one year,* or "within one year *after the entry* thereof by default, or after *written notice of the entry thereof* in case the party against whom it is entered has appeared in the action," as is the case under § 7204 of the Rev. Codes of 1905, in civil actions; but "within one year after its *rendition*" It seems to be generally held that the "rendition of a criminal judgment is the judicial act of a court in pronouncing the sentence of the law upon the facts in con-

troversy, and ascertained by the pleadings and the verdict," and does not involve the entry of the judgment upon the record, and that the time for appeal or the suing out of a writ of error begins to run from the time of such pronouncing, and not from the time of the filing. See 7 Words & Phrases, p. 6082; Fleet v. Youngs, 11 Wend. 522, 527, 528; Columbus Waterworks Co. v. Columbus, 46 Kan. 666, 26 Pac. 1046, 1049; Winstead v. Evans, — Tex. Civ. App. —, 33 S. W. 580; Burns v. Skelton, 29 Tex. Civ. App. 453, 68 S. W. 527; Ryals v. McArthur, 92 Ga. 378, 17 S. E. 350; State ex rel. Green v. Henderson, 164 Mo. 347, 86 Am. St. Rep. 618, 64 S. W. 138, 141; Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657; Farmers' State Bank v. Bales, 64 Neb. 870, 90 N. W. 945; Craig v. Craig, 66 Hun, 452, 21 N. Y. Supp. 241, 242; Dieffenbach v. Roch, 112 N. Y. 621, 2 L.R.A. 829, 20 N. E. 560, 561; Re Rose, 3 Cal. Unrep. 50, 20 Pac. 712, 713; Re Cook, 77 Cal. 220, 1 L.R.A. 567, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 433; State ex rel. Brown v. Brown, 31 Wash. 397, 62 L.R.A. 974, 72 Pac. 86, 87; Winstead v. Evans, — Tex. Civ. App. —, 33 S. W. 580 (citing 1 Black, Judgm. § 106); Gray v. Palmer, 28 Cal. 416, 418; McLaughlin v. Doherty, 24 Cal. 519; Martin v. Pifer, 96 Ind. 245, 248; Vigo County v. Terre Haute, 147 Ind. 134, 46 N. E. 350, 351 (quoting Smith v. State, 71 Ind. 250; citing also Chamberlain v. Evansville, 77 Ind. 542, 548; and following Chissom v. Barbour, 100 Ind. 1; and Mayer v. Haggerty, 138 Ind. 628, 38 N. E. 42); Coe v. Erb, 59 Ohio St. 259, 69 Am. St. Rep. 764, 52 N. E. 640; State v. Biesman, 12 Mont. 11, 29 Pac. 534, 536; Harmon v. Comstock Horse & Cattle Co. 9 Mont. 243, 23 Pac. 470, 471. Contra, Ætna L. Ins. Co. v. Hesser, 77 Iowa, 381, 4 L.R.A. 122, 14 Am. St. Rep. 297, 42 N. W. 325, 328; Wood v. Etiwanda Water Co. 122 Cal. 152, 54 Pac. 726, 728.

In the case of Mayer v. Haggerty, 138 Ind. 628, 38 N. E. 42, the court, on the 4th day of February, 1890, made its special findings, in which it fully settled all the issues as to the rights of the parties. The entry of the findings was prepared for the clerk, but the latter, in entering the finding and judgment in the order book, made a mistake and omitted to enter the judgment directed by the court. On March 16th, 1892, and more than two years thereafter, Haggerty filed his motion for an entry of the judgment *nunc pro tunc* as of February 4th, 1890. This motion was granted and the entry made. An appeal

was prayed April 16th, 1892, more than two years after the rendition of the judgment, and was not perfected until January 14th, 1893. The court, among other things, said: "Appellee insists that the record presents the fact that the appeal was taken too late. The original finding and judgment were given on February 4, 1890. The appeal was prayed April 16, 1892, more than two years after the final judgment, and not perfected until January 14, 1893. The *nunc pro tunc* judgment relates back to the time when it was rendered. It is defined: 'Now for then; that a thing is done at one time as of another time when it should have been done.' 16 Am. & Eng. Enc. Law, 1005. 'The effect of this record was to enter judgment as of the former date, and when entered it stood as a judgment of that date, and had the same effect as if it had been properly entered of record and signed by the judge' on the 4th day of February, 1890. Leonard v. Broughton, 120 Ind. 536, at pages 544, 545, 16 Am. St. Rep. 347, 22 N. E. 731. The time within which an appeal must be taken begins to run from the date of the rendition of the judgment, and not from the date of its entry by the clerk in the order book. In this case the court rendered his judgment when he read and filed its finding on the 4th day of February 1890, and ordered judgment to follow the finding. Anderson v. Mitchell, 58 Ind. 592; Chamberlain v. Evansville, 77 Ind. 542, 548; Chissom v. Barbour, 100 Ind. 5; Gray v. Palmer, 28 Cal. 416; Peck v. Courtis, 31 Cal. 207; Genella v. Relyea, 32 Cal. 159; 1 Black, Judgm. §§ 130, 131. It is clear from these authorities that the appeal comes too late to bring before this court the proceedings prior to and in the trial on the merits." The appeal in the case at bar was a valid appeal. Under the decisions, and under § 9513, Rev. Codes 1905, it can hardly be controverted that when a defendant by his own act postpones the putting in effect of a sentence, he cannot take advantage thereof, and the case of Re Markuson, 5 N. D. 180, 64 N. W. 939, on which petitioner seems to chiefly rely, does not hold to any other rule. It is true that in that case the court held that the defendant's term had elapsed, and he could no longer be imprisoned. It was held, however, in that particular case, that the carrying out of the sentence had never been *legally postponed.* In that case, indeed, the postponement was not effected by the actions of the defendant, but by the illegal and unwarranted actions of the court. In the case at bar, on the other hand,

a certificate of probable cause was obtained by the defendant, an appeal prayed, and a supersedeas bond given.

Under defendant's bond, it was his duty to deliver himself up to the court for its action. Miller v. Evans, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198; State v. Banks, 24 N. D. 21, 138 N. W. 973. He can hardly, also, be held ignorant of the *nunc pro tunc* order, as, after its entry, he himself prayed for a dismissal of his appeal. He must be charged with notice of the condition of the record at that time, and at that time the *nunc pro tunc* order of judgment was of record. In the case of Miller v. Evans, supra, the Iowa court, in passing upon a somewhat similar case, said: "But if petitioner's contention be accepted, the officers of the court may accomplish by delay that which the court itself is powerless to do. Aye, more; for, while the court could not postpone the penalty of the law denounced against the offender, its officers might by procrastination wholly obviate and prevent punishment. Re Webb, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, 62 N. W. 177, 9 Am. Crim. Rep. 702, relied on by appellant, is not precisely like the case at bar in its facts, for there the prisoner was actually in custody, and when, at his request, the sentence was suspended, he was allowed his liberty. The order of suspense was adjudged to be in excess of the court's authority, and the term of imprisonment held to have begun *eo instante* upon the entry of judgment, and to have terminated at the end of the period fixed therein, although the prisoner had not been incarcerated an instant of that time. *A like conclusion was reached in* Re Markuson, 5 N. D. 180, 64 N. W. 939. In both cases, however, this conclusion seems to have been treated *as a necessary result of declaring the order suspending the sentence illegal.* We are unable to discover any reason for allowing the convict to thus profit by a delay to which he has assented, or in which he has acquiesced without objection. The time at which the sentence is to be carried out is ordinarily directory only, and forms no part of the judgment of the court. State v. Cockerham, 24 N. C. (2 Ired. L.) 204; 19 Enc. Pl. & Pr. 480; Ex parte Bell, 56 Miss. 282; Dolan's Case, 101 Mass. 219; Hollon v. Hopkins, 21 Kan. 638. In the last case it was said that 'the time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and, strictly speaking, it is not a part of the sentence at all.

The essential portion of the sentence is the punishment, including the kind of punishment and the amount thereof, without reference to the time when it is to be inflicted.' It was also observed that 'the only way of satisfying a judgment judicially is by fulfilling its requirements;' and, in Dolan's Case, that 'expiration of time without imprisonment is in no case an execution of the sentence.' This cannot be waived, as here claimed, by the officers of the court whose duties with respect to its judgments are purely ministerial. The time for its execution was not of the essence of the judgment, *unless the prisoner, by demanding that it be immediately carried out, made it such. It was his duty to surrender himself and submit to the penalty of the law,* as well as that of the sheriff to inflict it; and, by taking advantage of the neglect of the latter and of the clerk, he cannot avoid the punishment which his wrongdoing will be assumed to have justly required."

We thoroughly agree with this interpretation of the case of Re Markuson, supra. The controlling fact in the case at bar, and which distinguishes it from the case of Re Markuson, is that the defendant himself suspended the execution of the sentence, while in the Markuson Case the sentence was suspended by an illegal and unauthorized act on the part of the court. In the case at bar, also, the defendant furnished a supersedeas bond, under the terms of which he was required to submit himself to the action of the court.

The writ is quashed.

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

W. F. STROBEL v. THORSTEN THORSTENSEN.

(144 N. W. 673.)

Defendant went to the plaintiff's place of business and asked to be shown a buggy. After inspection, he told plaintiff that he would give him $30 in cash and a colt which he valued at $100 for one of the buggies. Plaintiff said: "All right, I will go out and look at the colt in a day or two," whereupon he took the $30 in cash and delivered the buggy to the defendant. About six weeks thereafter he went to the farm of the defendant to examine the colt, but no agreement was reached regarding its value. Upon the facts which are set forth in full in the opinion, it is *held:*

Pleading — sale — trade or exchange — directed verdict — express agreement — estoppel — burden of proof.

That the allegations of the complaint to the effect that defendant had agreed to pay $130 for the buggy are not substantiated by the evidence, and that the court should have allowed the motion of defendant for a directed verdict. The plaintiff had brought about the misunderstanding himself, and it was his duty to promptly return the $30 and take back his buggy when the same was tendered to him by the defendant at the time when he first learned that an agreement could not be reached. Having left the buggy with defendant, and misled him by his conduct, he cannot now claim any express agreement upon the part of the defendant to pay cash instead of payment by delivery of the colt. Having the burden of proof, he must substantiate the allegations of his complaint in this action.

Opinion filed November 25, 1913. Rehearing denied December 18, 1913.

Appeal from the County Court of Wells County, *Jansonius,* J. Reversed.

Youngblood & Whipple, for appellant.

The verdict was substantially insufficient under the statute, in that no amount of money was therein stated or found, and, on defendant's objection made upon the return thereof by the jury, the court should have refused to accept same as the verdict of the jury. Rev. Codes 1905, § 7035; Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026; Van Benthuysen v. DeWitt, 4 Johns. 213; Cates v. Nickell, 42 Mo. 169; Burghart v. Brown, 60 Mo. 24; Gerhab v. White, 40 N. J. L. 242; Gaither v. Wilmer, 71 Md. 361, 5 L.R.A. 756, 17 Am. St. Rep. 542, 18 Atl. 590; Louisville & N. R. Co. v. Hartwell, 99 Ky. 436, 36 S. W. 183, 38 S. W. 1041; Bartle v. Plane, 68 Iowa, 227, 26 N. W. 88; Fryberger v. Carney, 26 Minn. 84, 1 N. W. 807; Washington v. Calhoun, 103 Ga. 675, 30 S. E. 434; Watson v. Damon, 54 Cal. 278; Taylor v. Hathaway, 29 Ark. 597.

The newly discovered evidence proposed on motion for new trial was not cumulative, and the rule applying to cumulative evidence does not apply where the party to the action is the principal witness. Sluman v. Dolan, 24 S. D. 32, 123 N. W. 72.

The mere fact that the proposed new evidence is in a sense cumulative is not sufficient reason for refusing a new trial. The *test* is whether or not the newly discovered evidence probably would or ought

to change the result on another trial. St. Paul Harvester Co. v. Faulhaber, 77 Neb. 477, 109 N. W. 762; Hanson v. Bailey, 96 Minn. 274, 104 N. W. 969; Goldsworthy v. Linden, 75 Wis. 24, 43 N. W. 656; Whereatt v. Ellis, 70 Wis. 215, 5 Am. St. Rep. 164, 35 N. W. 314; Cleveland v. Hopkins, 55 Wis. 387, 13 N. W. 225; State v. Laper, 26 S. D. 151, 128 N. W. 476.

John A. Layne, for respondent.

The *sale* of the buggy was absolutely made when the price was fixed and plaintiff agreed to sell and defendant agreed to buy it. Rev. Codes 1905, § 5394.

Where the verdict is supported by substantial evidence, even though disputed, the higher court will not disturb it, unless there has been prejudicial error or abuse of discretion. F. A. Patrick & Co. v. Austin, 20 N. D. 261, 127 N. W. 109; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225.

Objections to a verdict must be made at time of rendition, so that the court may have opportunity to have specified errors corrected. Nichols & S. Co. v. Steinkraus, 83 Neb. 1, 119 N. W. 23.

The verdict is sufficient both as to form and substance, because the *amount was not in issue.* In determining the sufficiency of a verdict, the court will view it in the light of the pleadings, the proof, and the instructions given. 13 Cyc. 249; English v. Goodman, 3 N. D. 129, 54 N. W. 540; Fryberger v. Carney, 26 Minn. 84, 1 N. W. 807.

Where the amount is not in issue, a verdict generally in favor of either party is sufficient without assessing damages, even where the statute requires such assessment. 38 Cyc. 1880; Jones v. King, 30 Minn. 368, 15 N. W. 670; Leftwich v. Day, 32 Minn. 512, 21 N. W. 731; Cohues v. Finholt, 101 Minn. 180, 112 N. W. 12; Hodgkins v. Mead, 119 N. Y. 166, 23 N. E. 559.

Newly discovered evidence, as a ground for new trial, is generally looked upon with disfavor. Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762.

Diligence should be clearly shown. Rev. Codes 1905, § 7063.

Such a motion is addressed to the sound judicial discretion of the court, and its action will not be disturbed unless clear abuse appears. State v. Albertson, 20 N. D. 512, 128 N. W. 1122; Breeden v. Mertens, 21 S. D. 357, 112 N. W. 960; Rev. Codes 1905, § 7065.

On such motion, counter affidavits may be used in this class of cases. Libby v. Barry, 15 N. D. 286, 107 N. W. 972.

BURKE, J. In April, 1910, plaintiff was conducting a farm machinery business in Fessenden, North Dakota, and defendant operated a farm near town. About that time defendant went to the business place of the plaintiff looking for a buggy. In view of our conclusion that a verdict should have been directed for the defendant, we will give the statement of facts in plaintiff's own language: "He came in and asked me for a buggy. I showed him all on the floor, and he picked out a buggy and asked me the price. I told him what the price of that buggy was, and he says, Well I like this buggy, I got a colt I want to trade in for this buggy. I said, All right, we will do that; then I said, How much do you want for this colt, and he says, $100. I said all right, if it is what you say it is. I couldn't go out that day as my partner wasn't here, but in a couple of days we will go out. I says we have no pasture, and he says he will keep the colt until fall. I says, All right, in that way we can make the trade all right; so we closed the deal, and he offered me $30 in cash, and was to come in in a couple of days and see if the colt was worth the money. . . . So, in a couple of days we went out to the place and asked him where the colt was, . . . and we looked at the colt, and when we saw the colt I wouldn't say anything right away, but Mr. Albus, my partner, said it was very small, and we couldn't give more than $80, and Thorstensen said, No, he couldn't let the colt go less than $100, so we stood there for maybe two hours, and Mr. Thorstensen wouldn't take less than $100, and we wouldn't give that, because the colt wasn't worth it. So, after standing there awhile finally my partner says we must do something. We offered Mr. Thorstensen $90, and if he will take that we will take the colt; so I says to Mr. Thorstensen, if you will keep the colt as you agreed in the first place, that is that you will pasture it until fall, we will take the colt for $90, but he said, No, no less than $100. We went then towards his place on the south side of his house; we couldn't make any bargain with him, he wanted $100, and we wouldn't give him more than $90, so we went over to the automobile. I said before we left, you had better take us up on that deal, we will give you $90, and you give that colt a little oats and if any-

thing happens let us know. No, he said, I won't take anything less than $100. I said we couldn't give that, so that was all there was to it."

This conversation is corroborated by Mr. Albus, who was a partner of the plaintiff at that time, and is substantially the same version of the transaction given by the defendant himself. In addition to this testimony the defendant testifies, and he is not contradicted by the plaintiff in so testifying, that he had kept the colt until the fall and had then taken it into Fessenden and tendered it to plaintiff, and upon his refusal to accept the same placed the colt in the livery barn and notified plaintiff, and he had not seen the colt since. He further testifies that when the two partners visited his farm for the purpose of examining the colt, that he had offered to return the buggy to the plaintiff if he would return to him the $30 in cash which he had paid, and this conversation is not denied by either of the partners. Defendant further testifies that when they went away from his place that he understood that they had acceded to his demands and agreed to take the colt as a $100 payment upon the buggy. At the close of the plaintiff's case, and again at the close of the entire evidence, defendant moved for a directed verdict in his favor, which motions were denied by the trial court and the verdict returned for the plaintiff, which verdict failed to state any definite sum as damages. The view, however, that we take of the case, renders it unnecessary to pass upon this question. In due time the defendant served notice of intention to move for a new trial.

(1) The first error assigned, and the only one which we need consider in this case, is the failure of the trial court to direct a verdict for defendant as requested. We are satisfied that this motion should have been allowed.

The complaint of the plaintiff alleges that he "sold and delivered to the defendant a buggy at the agreed price of $130. That the defendant has not paid the same or any part thereof except the sum of $30, and that there is now due and owing to this plaintiff the sum of $100 together with interest." It is upon this complaint that he must stand at this time. From his own evidence, however, it appears that the defendant never agreed to pay the $100 in cash, but that at all times he insisted that this part of the purchase price should be repre-

sented by this particular colt. The plaintiff allowed him to take the buggy to his farm with the express understanding that they would take the colt if it were as represented. They claim that the colt was smaller than they had expected, but that fact would not give them the authority to charge the defendant up with $100 cash. If he did not like the situation which he himself had created, it was his duty to take immediate steps to place the parties *in statu quo* and promptly notify the defendant that negotiations had ceased. He had at that time $30 in cash paid upon this deal by the defendant, and it was his duty to return this amount and take his buggy when it was tendered. Not having done this, and having in fact misled the defendant into keeping and using the buggy and caring for the colt, he has prejudiced him in his substantial rights. According to the evidence in this case, the defendant has paid the $30 in cash and delivered the colt to the plaintiff after keeping him all summer according to his offer. It would be very unjust to force him now to pay plaintiff $100 in addition. Of course, on the other hand, the plaintiff probably has not received the colt, which is his own fault, as it was tendered to him, and, of course, he never agreed to receive the colt, but his dilemma is the result of his own carelessness in leaving the negotiations in the condition in which he left them. We are aware of the fact that plaintiff was recalled after he had rested his case, and testified as follows: "The day that Mr. Thorstensen came in to look at the buggy, he agreed to take it at $130 before anything was said about the colt. He first looked at the buggy and then he asked me for the price, and I said $130, and after that he told me about the colt, and I told him I would look at the colt." This was nothing more than an opinion of the plaintiff, and does not amount to a statement of an ultimate fact. He had already given the conversation in full, and this conversation shows that the defendant did not agree to take the buggy for $130 cash. The attorneys for plaintiff recognized this in their brief when they said that there was no express contract, but that they must rely for recovery upon an implied contract. In view of this admission of the attorneys, and the plain fact that this conclusion of the plaintiff is utterly inconsistent with his detailed testimony, we must disregard it entirely.

Being the plaintiff in this action, upon whom the burden of proof

rests, he must prove the allegations of his complaint in a legal manner. Were conditions reversed, and the defendant asking relief in court, it might be that his conduct might preclude him from receiving the aid of the law, but that question, of course, is not before us.

Respondent in his brief concedes that there was no express agreement to pay $100, but says the defendant is liable upon an implied promise to pay. This implied promise to pay arises when, for example, a purchaser enters a store or other place of business and takes therefrom goods without any express promise to pay. In those cases the law implies a promise upon his part to pay the price of the goods, but conditions would be altogether different if the purchaser made an agreement with the keeper of the store that the goods were to be paid for in, say, potatoes, and the potatoes were actually tendered to the storekeeper. In that case it would hardly be claimed that the storekeeper could refuse to accept the potatoes and insist that the purchaser pay him his full price in cash.

The appellant has not asked for judgment notwithstanding the verdict, so all we can now do is to order a new trial of the action.

Fisk, J. I am for affirmance. I can discover no merit in any of appellant's contentions. The action was tried both in the justice and county courts, each trial resulting in plaintiff's favor. The jury was justified, under the evidence, in finding that a sale of the buggy was made to defendant at the agreed price of $130, with an additional or collateral understanding or agreement had later that a portion of such purchase price ($100) was to be paid by transferring to Strobel & Company a certain colt, provided the latter, upon inspection, should find such colt to be as represented by defendant. The sale of the buggy was not conditional upon the acceptance of the colt in part payment, but the acceptance of such colt in part payment was conditional upon its proving to be as represented. The jury had a right to believe, and no doubt did believe, the following testimony given by plaintiff:

"The day that Mr. Thorstensen came in to look at the buggy he agreed to take it at $130 before anything was said about the colt."

Such testimony was not objected to in any way, and I think the same amply justifies the verdict of the jury.

Spalding, J. I concur in the above.

THE CHAMBERLAIN-WALLACE CO. v. JOSEPH AKERS.

(144 N. W. 715.)

Justice court — pleading — summons — statement of cause — demurrer.

1. A pleading in a justice court need not be in any particular form so long as it enables a person of ordinary understanding to know what is intended. Pleadings may be either oral or written. Section 8378, Rev. Codes 1905. In the case at bar the complaint was oral, but a summons contained a complete statement of the facts relied upon. The justice's docket made mention of the fact that the said pleading was oral and referred to the summons and its contents. *Held*, that a demurrer to the complaint on the grounds that it was not in writing was properly overruled.

Appeal — new trial — default.

2. An appeal to the district court was taken upon questions of law and fact and a new trial demanded. The district court overruled the demurrer and ordered the case for trial. Defendant defaulted and judgment was entered against him.

The entry of judgment against the defendant was proper. It is incumbent upon litigants to attend the court and be present when their cases are called for trial.

Judgment — application to reopen — denial of — discretion.

3. An application was made to the trial court to reopen such judgment upon a showing by defendant that his attorney had advised him that the case was not at issue and would not be tried at said term of court. *Held*, a mistake of law, and not of fact, and not an abuse of discretion in trial court to refuse to reopen the case.

Opinion filed December 18, 1913.

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

Affirmed.

O. S. Sem, for appellant.

There was *no complaint* in this case. The complaint in justice court must be sufficient to advise one sued of the nature of the claim, and definite enough to bar another action. McCrary v. Good, 74 Mo. App. 425; Rev. Codes 1905, § 8383.

Consent of parties cannot create jurisdiction in the court over a *subject-matter* not vested in the jurisdiction of the court by the law.

Aneta Mercantile Co. v. Groseth, 20 N. D. 137, 127 N. W. 718; Hilliard v. Loeb, — S. D. —, 140 N. W. 703; Moore v. Jordan, 67 Tex. 394, 3 S. W. 317.

The demurrer is an objection in itself, and raises the legal issue that there is no complaint. Busboom v. Schmidt, 94 Neb. 30, 142 N. W. 290.

C. G. Bangert, for respondent.

In justice court no particular form of pleading is required. Rev. Codes 1905, § 8378.

Mere absence of defendant and counsel from the court is wholly insufficient as ground for reopening a judgment. Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 252; 23 Cyc. 945.

A judgment cannot be vacated upon motion for a mistake of law. Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151; Breed v. Ketchum, 51 Wis. 164, 7 N. W. 550.

BURKE, J. This action originated in justice court by the filing of a summons in which was contained plaintiff's complaint, as follows:

You are hereby summoned and required to appear before me at my office in the city of Enderlin, county of Ransom, state of North Dakota, on the 4th day of May, 1912, at the hour of 9 o'clock on the forenoon of said day, then and there to answer to the complaint of the above-named plaintiff, who claims and alleges to recover of you the sum of $33.91 with interest thereon at the rate of 7 per cent per annum from and since the 6th day of December, A. D. 1911; said amount the plaintiff alleges is due from you for goods, wares, and merchandise sold and delivered to you at your special instance and request by the plaintiff between the 3d day of November and the 6th day of December, 1911, both inclusive, and which said merchandise, goods, and wares you have failed to pay for, or any part thereof. And you are hereby notified that unless you so appear and answer the said complaint, the plaintiff will take judgment against you by default for said sum of $33.91 and interest, together with the costs and disbursements in the action.

Dated this 22d day of April, 1912.

Signed, Fred Underwood,
Justice of the Peace.

This summons was served upon the defendant, and duly filed in the office of the justice.

The docket of the justice shows the following:

On this 22d day of April, 1912, on application of C. G. Bangert, attorney for the plaintiff, I issue a summons in the above-titled action, and direct the same to the above-named defendant, Joseph Akers, wherein and whereby the plaintiff claims and seeks to recover of the defendant the sum of $33.91 with interest thereon at the rate of 7 per cent per annum from and since the 6th day of December, 1911, the same being the alleged balance due for goods, wares, and merchandise sold and delivered to the defendant by the plaintiff between the 3d day of November, 1911, and the 6th day of December, 1911, said summons being returnable at my office on the 4th day of May, 1912, at the hour of 9 o'clock A. M. On this 4th day of May at the said hour of 9 o'clock, this action came up for trial. Plaintiff appeared by F. C. Williams, its vice president, and C. G. Bangert, its attorney; defendant appeared in person and by its attorney, O. S. Sem. On this said date, and at the hour of 8 A. M., the defendant by his said attorney filed an order of judgment in writing, offering judgment to the plaintiff for the sum of $15 and accrued costs of this action to the date of such filing. Plaintiff, by its attorney, made a verbal complaint herein, which, in addition to alleging that the plaintiff is a corporation, alleges substantially as shown by the summons herein. Defendant moves to dismiss this action for want of a written complaint filed herein, and that if the complaint is oral, it has not been taken down on the docket. Motion denied and defendant excepts. Plaintiff now files his demurrer herein as follows, to wit: Comes now the defendant and demurs to plaintiff's complaint herein, on the grounds that the complaint is not in writing and is oral, or has not been taken down in writing, and if oral it has not been taken down in the docket. That the complaint does not state facts constituting a cause of action against the defendant. Demurrer overruled by the court. Defendant's written answer then filed. Plaintiff called defendant to witness stand for cross-examination under the statutes. F. C. Williams sworn and testified on behalf of the plaintiff. Plaintiff now rests. Joseph Akers testified on behalf of the defendant. Defendant now rests. After hearing the argument by counsel

both for the plaintiff and defendant, and being fully advised herein, it is by this court considered, adjudged, and ordered, that the plaintiff does hereby have and recover judgment against the defendant for the sum of $34.85 debt and damage, together with the further sum of $18.80 accrued costs herein, and thus making a total judgment against the defendant, and in favor of the plaintiff, in the total sum of $53.65.

Given under my hand this 4th day of May, A. D. 1912.

Signed, Fred Underwood,
Justice of the Peace.

The defendant felt aggrieved at the outcome of the suit in the justice court and appealed to the district court. This appeal was from the whole of said judgment and upon questions of both law and fact, accompanied by a demand for a new trial in the district court of said county. The case appeared upon the calendar of the district court at the term commencing on the 3d day of December, 1912. About a week before the first day of said term the defendant by his attorney filed in said court the following document: "Comes now the defendant, Joseph Akers, by his attorney, O. S. Sem, appearing in writing, at the time said case is reached upon the calendar on the 3d day of December, 1912, or as soon thereafter as counsel can be heard, and said defendant hereby demands that the questions of law raised by said defendant's appeal herein be tried in the following order: First. Said defendant, Joseph Akers, demands a hearing on his demurrer to plaintiff's complaint herein filed in the justice court on June 6th, 1912. Second. In the event that the court sustains the demurrer with leave to plaintiff to file and serve a complaint, the defendant demands the statutory time of thirty days from date of service in which to answer or demur to such complaint. In the event that the court should overrule the demurrer, the said defendant asks for an exception to such ruling. Third. Said defendant offered objections to the case coming to trial at the December, 1912, term of said court, on the ground that the case is not at issue; no complaint in writing was filed in the court below; neither was an oral complaint, if any, taken down on the docket of the justice who tried the case; nor the substance thereof taken down on the docket. Said defendant demands a ruling on his said objections. In the event the

court should sustain the objections of the defendant with leave to file and serve a complaint, the defendant demands the statutory time of thirty days in which to answer or demur to such complaint. And in the event the court should overrule the objection, the defendant asks for an exception to such ruling. Said defendant further demands that all of the foregoing, in proper form, be embodied into a statement of case in the event the defendant should be so advised."

Further than filing the above instrument the defendant made no appearance whatever at the December, 1912, term of court, and when the case was reached for trial, the following proceedings were had as shown by the records of said district court.

This matter coming on before the court upon the written appearance, demands, and objections filed on the part of the defendant, at the hour of 2 o'clock in the afternoon of the 3d day of December, A. D. 1912, that being the first day of the regular December term of the district court in and for Ransom county, North Dakota, the plaintiff appeared through its attorney, C. G. Bangert, and the defendant having made and filed a written appearance through its attorney, O. S. Sem, the matter having been presented to the court in due form, and the court being now fully advised in the premises, it is ordered and determined: First. That the demurrer of the defendant, Joseph Akers, to the plaintiff's complaint filed in the police magistrate court is overruled. Second. That the objection of the defendant to the trial of said action at this term of court is overruled, and that the said action will stand for trial in its regular order.

By the Court. Frank P. Allen, Judge.

It is further shown by the records of said district court that the case was reached in its regular order on the 9th day of December, 1912, plaintiff appearing through its attorney, and the defendant made no further appearance, a trial by jury was waived by the plaintiff in open court, and a trial was had by the court. Plaintiff offered its proof in support of its cause of action, and the defendant failed to offer proof of any kind, and the court ordered judgment in favor of the plaintiff against defendant in the sum of $33.91 with interest and costs.

Defendant thereafter moved the district court to vacate and set aside

the judgment entered as aforesaid for the following reasons: "First. Irregularities in the proceedings of the court and adverse party, and in the abuse of discretion of the court in denying a hearing on his demurrer herein, and in ordering such case tried without a complaint, and in denying defendant's objection to coming to trial at said time, whereupon the defendant was prevented from having a fair trial. Second. Accident and surprise, which ordinary prudence could not have guarded against. Third. Excessive judgment or damages appearing to have been given under a misapprehension of the facts and the state of the record to the prejudice of said defendant. Fourth. That the said judgment is against law. Fifth. Errors in law occurring at the trial and proceedings had before the court and excepted to by the defendant." This order being denied by the trial court, appeal was taken to this court assigning the same errors, and in addition predicates error upon the order of the trial court in entering judgment without the questions of law involved in the case being first tried.

We think the contention of the appellant can be disposed of under three propositions. First. Was it error of the district court to overrule the demurrer interposed before the justice of the peace? Second. Was it error of the district court to order the case for trial at the December, 1912, term thereof? Third. Was it error for the said district court to refuse to open up the judgment upon the application made for that purpose?

(1) Section 8378, Rev. Codes 1905, reads as follows: "A pleading in a justice's court is not required to be in any particular form, but must be so expressed as to enable a person of common understanding to know what is intended. The pleadings may be oral or written, and need not be verified unless otherwise specially prescribed." We think it too plain for argument that the record of the justice shows a complete compliance with the requirements of this section. The justice courts are intended for the use of laymen, and this court has repeatedly held that the strict rules applicable to pleadings in courts of record cannot be applied to the pleadings in justice court. Hanson v. Gronlie, 17 N. D. 191, 115 N. W. 666; Jerome v. Rust, 19 S. D. 263, 103 N. W. 26. In the case of Hanson v. Gronlie, supra, it is held that all that is necessary is that the pleadings be either oral or written and such that a person of ordinary understanding can compre-

hend them. Kelsey v. Chicago & N. W. R. Co. 1 S. D. 80, 45 N. W. 204; Sinkling v. Illinois C. R. Co. 10 S. D. 562, 74 N. W. 1029; Berry v. Bingaman, 1 S. D. 525, 47 N. W. 825. In the Hanson v. Gronlie Case, 17 N. D. supra, it was held that a demurrer to a complaint in justice court is properly overruled where the complaint is sufficient to apprise a person of common understanding of the exact nature of the plaintiff's demand.

The justice of the peace, by inserting upon his docket the notation that the complaint was oral, and giving reference thereafter to the summons, which itself was very complete, supplied everything that was needed in the line of a complaint, so far as the justice court was concerned. When the case reached the district court the plaintiff had ample time to supply a written complaint if it were necessary. The defendant, by his objection filed a week before the term, took the ground that no complaint would be filed in the district court. The record is silent upon this question, and it is not necessary for us to pass upon the question whether a written complaint would be necessary when the trial was reached. The complete default of the defendant precludes him from making any objection to the procedure in the district court after his demand for delay was overruled.

It is thus plain that the action of the trial court in overruling the demurrer which had been interposed in the justice court was proper.

(2) Was it proper for the trial court under those circumstances to deny the demand of the defendant that this case go over the term? The conduct of litigation must be left largely to the discretion of the trial court. It is desirable that all litigation be expedited when the same can be done without injury to the rights of the litigant. Although the demurrer was overruled on the 3d day of December, and the case was not reached for trial before the 9th, defendant made no appearance, and evidently made no effort to ascertain the result of his contentions. The rules for obtaining a continuance of a case which has been set for trial, and is upon the calendar, were completely ignored by the defendant, and the action of the trial court in ordering the case for trial was correct, and to be commended.

(3) Was it error of the trial court to refuse to reopen the judgment upon application of the defendant? We think not. While in the affidavit of merits filed in the case it is stated that defendant was surprised

by the entering of judgment against him, yet he gives no facts substantiating this conclusion excepting that "before the December, 1912, term of said district court he was informed by his attorney that his case was not at issue, and would not be tried at said term." This is no excuse.

There are other questions of minor importance, but nothing that would even remotely support a reversal in this case, and we will not further dwell upon the subject. The order of the trial court is in all things affirmed.

THE STATE OF NORTH DAKOTA v. OLAF A. OLSON.

(144 N. W. 1135.)

Opinion filed December 20, 1913.

Appeal from the District Court for Ward County.

Reversed.

Noble, Blood, and *Adamson,* of Minot, North Dakota, for appellant.

R. A. Nestos, of Minot, North Dakota, for respondent.

PER CURIAM. The defendant was convicted of obstructing a navigable stream near the city of Minot in Ward county. The stream is the Mouse river, and the place and act and time of the alleged obstruction are identical with those involved in the civil action of Bissel v. Olson, ante, 60, 143 N. W. 340. In the civil case, it was held that the Mouse river was not at that point navigable, or at least that the plaintiff failed in his proof.

Counsel for the state has stipulated that this judgment be reversed on the authority of Bissel v. Olson, supra. While that stipulation is not binding on the court, the record in the case at bar has been examined, and from such examination we are satisfied that, on the authority of the civil action referred to, the conviction cannot be sustained, and accordingly, the stipulation is approved and the judgment is reversed.

EVAN YETTER v. JOHN GOOLSBY.

(144 N. W. 1075.)

Contracts — meeting of minds — statute of frauds.

Evidence examined, and *held*, that no contract has been shown between plaintiff and defendant, the minds of the parties not having met. It is therefore immaterial whether or not the contract was barred by the statute of frauds.

Opinion filed December 27, 1913.

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

Reversed.

A. L. Parsons and *Wolfe & Schneller*, for appellant.

It is an essential ingredient in the complete execution of a mortgage that it be acknowledged. Ayres v. Probasco, 14 Kan. 190; Revalk v. Kræmer, 8 Cal. 66, 68 Am. Dec. 304; Barber v. Babel, 36 Cal. 11; Williams v. Starr, 5 Wis. 550; Hait v. Houle, 19 Wis. 472; Sears v. Dixon, 33 Cal. 326; Rogers v. Renshaw, 37 Tex. 625; Dye v. Mann, 10 Mich. 291; Amphlett v. Hibbard, 29 Mich. 298; Alley v. Bay, 9 Iowa, 509; Larson v. Reynolds, 13 Iowa, 579, 81 Am. Dec. 444; Kennedy v. Stacey, 1 Baxt. 220.

Purcell & Diver, for respondent.

The action is one for damages for deceit, as well as on the promise to pay the debt of another. Rev. Codes 1905, § 5316.

A party to an action, having pleaded certain facts, cannot complain because such facts were not proved by his adversary. Satham v. Muffle, 23 N. D. 63, 135 N. W. 797.

BURKE, J. The facts of this case are substantially as follows: One Warren Goolsby was indebted to plaintiff for wages as a laborer in a sum exceeding $500, which sum he was unable to pay, but promised to secure plaintiff by mortgage upon his home in the sum of $500 to be signed by himself and wife. In accordance with this agreement he caused his wife to sign the note and mortgage, and after signing the same himself, delivered the same to an attorney in the presence of the plaintiff. This mortgage was never acknowledged by Mrs. Goolsby,

but the attorney, who was also a notary public, was instructed to interview her and secure such acknowledgment. This, for reasons hereinafter stated, he never did. Plaintiff instructed the attorney to complete and record such mortgage, and left the office. A few hours later he met the defendant, who is a brother to Warren Goolsby, upon the street, and told him that he had a mortgage upon Warren's home and offered to sell the same to him. This conversation is given by plaintiff as follows: "Shortly after I left the note and mortgage with Irvine, I saw John Goolsby down at Movius's store and I had a talk with him about this note and mortgage. I asked him about whether he didn't want to take these papers against Warren, and he said that he would see; that he would telephone down and get an abstract or find out how the record was, and if everything was all right he would take the papers and pay me the money and take the papers himself. . . . Afterwards, he said, 'You better go down to Irvine (the lawyer), and if the papers ain't sent out yet not have them sent.' He says when an abstract comes back we will make them out new. He told me to go down to Irvine and tell him not to send this paper in. . . . The next day . . . he told me, then, he says, 'I will take it and handle it myself.'" In accordance with this request, plaintiff told his attorney not to record the papers, and said attorney did nothing further in the matter. Shortly thereafter this defendant obtained from Warren Goolsby and wife a deed, which is in effect a mortgage, to secure an indebtedness due to himself in the sum of some $1,600. The plaintiff has never been paid the $500 due to him, nor has he been able to obtain a mortgage upon Warren Goolsby's home to secure the same, and the makers of the note are insolvent. This action was brought upon the alleged promise of the defendant, John Goolsby, to pay to plaintiff said sum of $500. After a trial to a jury, in which the evidence disclosed the facts aforesaid, the defendant moved for a directed verdict in his favor upon the grounds "that the evidence was insufficient to make out any cause of action in favor of the plaintiff, and against the defendant. . . . That this action is brought and based upon an oral promise alleged to have been made by the defendant, John Goolsby, to the plaintiff herein, . . . which promise was void under the statute of frauds in this state, unless at the time the same was made the plaintiff delivered to the defendant . . . property, . . . or the

plaintiff herein parted with value to the defendant, . . . or entered into an obligation in consideration of the . . . promise, . . . or under circumstances as to render the defendant the principal debtor. . . ." This motion was much fuller than we have given it, but is abbreviated to save space. For the reasons hereinafter given we think this motion should have been granted.

(1) The plaintiff maintains that a promise was made by John Goolsby, the defendant, to pay to plaintiff the sum of $500, and that this promise is an independent contract upon his part, and not a promise to pay the debt of another, thus escaping the bar of the statute of frauds. Conceding, for the purposes of this opinion, that this is correct, it nevertheless remains to be proven that such contract in fact existed. In other words, there must have been a meeting of the minds, a sufficient consideration, and all other elements of a legal contract between the plaintiff and defendant, before recovery can be had in this action. This case differs from most of the authorities given upon the statute of frauds in the dispute here as to the existence of any promise whatever. Had John Goolsby made an unconditional promise to pay plaintiff $500 in consideration of plaintiff's refraining from completing and recording his mortgage, an altogether different state of facts would obtain. Referring to the evidence of plaintiff himself, we find that Goolsby promised to "see, that he would telephone down and get an abstract, or find out how the record was, and, if everything was all right, he would take the papers and pay him for them." Plaintiff did not prove at the trial that everything was all right, on the contrary it appears that there were back taxes due upon the property. In a subsequent conversation, plaintiff claims that defendant agreed "to take the deal on himself, and sell some wheat and get some money." This, however, was before he had investigated the title, and should be taken in connection with the former proposition. Still further than this, plaintiff represented that he had a mortgage upon Warren's house and lot, when (because not acknowledged by his wife), as a matter of fact, he had nothing of the kind. This alone would be enough to negative any possibility of a contract between the plaintiff and defendant. The premises belonged to Mrs. Goolsby and were occupied by the family as a homestead. Mrs. Goolsby testified that, had she known and understood the nature of the papers, she would not have signed

them, and that she had always intended to maintain this homestead unencumbered. It thus follows that the minds of plaintiff and defendant never met in any contract, and recovery upon the theory of a contract cannot be had. This action is not in tort for deceit. The trial court is directed to vacate its judgment and enter an order dismissing the action.

L. O. LARSON and Robert Walker v. ALBERT HANSON and Julius Frederickson.

(— L.R.A.(N.S.) —, 144 N. W. 681.)

Claim and delivery — redelivery undertaking — substitute for the property — security for money judgment.

1. The redelivery undertaking in claim and delivery is not only a substitute for the possession of the property by the plaintiff, but is security for any money judgment recovered.

Redelivery undertaking — legislature — intent — purpose.

2. The redelivery undertaking in claim and delivery must be construed with reference to the intent of the legislature in providing for it, and the purpose for which it is given.

Claim and delivery — two defendants — action mutually dismissed as to one — judgment for plaintiff — sureties not released.

3. An action in claim and delivery was brought against two defendants; they furnished a statutory redelivery undertaking, which recited that the defendants were desirous of having the property to which the action related returned to them. They each signed the undertaking. H. and F. at their request executed such undertaking as sureties. At the conclusion of the taking of the evidence on the trial, counsel for the two defendants moved a dismissal as to one defendant. This was not resisted by the plaintiffs; the record indicates that it was assented to; a verdict was rendered and judgment entered in favor of the plaintiffs, and against the other defendant; *held*, that the dismissal of the one defendant did not release the sureties from liability upon the undertaking.

Claim and delivery — evidence — record — property cannot be returned — judgment for value.

4. Where on the record of the trial of an action in claim and delivery, it appears that the property which is the subject of the action cannot be returned, judgment need not be entered for its return or possession.

Property sold to others — scattered — cannot be redelivered — money judgment good — sureties liable.

5. Where the record in an action in claim and delivery shows that the defendants sold the property, which consisted of about forty head of live stock, at auction to ten or twelve different purchasers; that some of them resold it to others, and that it was scattered over a wide territory a year before the trial of the action in claim and delivery,—the plaintiff has made out a case sustaining a judgment for money only in such action, and the sureties on the redelivery undertaking are liable on such undertaking, unless they show clearly and explicitly that the property could have been returned to plaintiffs, and opinions of the principals on the undertaking that they could have returned such property at such time are inadequate to overcome the showing made by the plaintiffs, that the property had been sold and scattered, and much of it resold.

Redelivery undertaking — judgment — money — sureties — knowledge of sale — sale prior to trial.

6. Evidence examined, and it is *held* that it was sufficient to support a judgment in claim and delivery for money only, as against the sureties on the redelivery undertaking, and this is especially so when it is shown that the sureties executed the undertaking on the day of the advertised sale, and knew that it was to be sold, were present at the sale, saw it sold, and made no objection thereto, such sale occurring prior to the trial of the action in claim and delivery.

Opinion filed November 20, 1913. Rehearing denied December 29, 1913.

Appeal from a judgment of the District Court of Stutsman County, *Burr,* Special Judge.

Reversed.

Statement by SPALDING, Ch. J. The story of the litigation leading to this appeal may be epitomized as follows. In November, 1906, appellant Larson brought an action in claim and delivery against one Foley, and process was placed in the hands of the appellant Walker, as an officer, for service. Walker took into his possession under the process ten horses, three cows, three calves, thirty-five hogs, and some other property, at the village of Kensal, in Stutsman county. Not having means for caring for the live stock, he intrusted it as he supposed to the keeping of William Caven and W. L. Caven. December 1st, 1906, judgment against Foley awarding the possession of the property to the plaintiff Larson was rendered, whereupon Walker applied to the Cavens

for possession, in order that the property might be sold to satisfy the lien adjudged thereon in favor of Larson. William Caven, who was in fact the proprietor of the livery barn in which the property was held, refused to deliver the property, or any of it, unless a feed bill amounting to $523.50 should first be paid. It would appear that this amount was tendered, but refused, whereupon it was deposited in a bank to the credit of William Caven. The Cavens, however, still refused to deliver possession of the property, and action was commenced by Larson and Walker against them to recover possession, on or about the 7th of February, 1907. Process was issued and served by the sheriff of Stutsman county, who took possession of all property mentioned, whereupon William and W. L. Caven procured the execution of an undertaking, in the sum of $2,000, for the redelivery to them of the property in question, under the statute relating to the action of claim and delivery. This redelivery undertaking was signed by William Caven and W. L. Caven, and by the defendants herein, Albert Hanson and Julius Frederickson, and was conditioned for the delivery of such property to the plaintiffs, if delivery should be adjudged, and for payment to them of such sum as might for any cause be recovered against the defendants in the action. The sheriff approved the sureties and returned the property to the possession of the defendants in the action, the two Cavens. The undertaking recited that the property had been taken from the defendants, and that the defendants were desirous of having it returned to them.

On the same day on which the property was returned, W. L. Caven, acting as agent for William Caven, sold it under an agister's lien, claimed at that time to amount to $952.50, it being claimed for the keeping of said property from the time it was delivered to them by the officer, about the 26th day of November, 1906, to the date of sale, about the 9th of February, 1907. The horses were purchased by six different buyers, the cows and calves by four others, and the hogs by still another. The sale aggregated $1,085.25, of which sum William Caven retained $1,028.50, and paid the balance of $56.75 to Foley, the party from whom the property had been originally taken. The action in claim and delivery brought by Larson and Walker against the two Cavens was tried at the January, 1908, term of the district court, in Stutsman county. The defendants Caven filed a joint answer, resisting the rights

of the plaintiffs to possession, and defended the action. At the conclusion of the trial, the attorney for the defendants moved the dismissal of the action as to W. L. Caven, for the reason that it appeared that, throughout the transaction, he had acted only as the agent for William Caven. Counsel for the plaintiffs said that the motion was not resisted, or words to that effect, whereupon the motion was granted. The case was submitted to the jury, which found plaintiffs entitled to possession of all the personal property described, or the value thereof in case delivery could not be had, and that the value of the property was $1,000; and it also assessed $200 damages for the detention and for money spent in recovery of the property. On January 23, 1908, the court rendered judgment in favor of the plaintiffs, Larson and Walker, against the defendant William Caven, for the sum of $1,200 and costs. A few days thereafter, execution was issued against William Caven, and returned wholly unsatisfied. Subsequently, in April, 1909, this action was commenced upon the redelivery undertaking against the sureties thereon, Hanson and Frederickson. On trial, a verdict was rendered in favor of the plaintiffs for $1,742.80 and costs, and judgment was entered accordingly. An appeal was taken to this court from such judgment, and a reversal secured, on the ground that the judgment was not entered in the alternative for the return and delivery of the property, or for its value in case a delivery could not be had, and that the sureties could not be holden on such judgment in the absence of evidence in the record before this court to show that the property had been destroyed or dispersed, or could not be returned to the plaintiffs. It was held that, when the evidence was not before this court, no presumption could be indulged that such a showing was made as against the sureties, and that in order to recover against them, plaintiff must allege and prove that they were entitled to judgment in the form in which it was entered. See Larson v. Hanson, 21 N. D. 411, 131 N. W. 229. The record was returned to the district court; plaintiffs amended their complaint by inserting an allegation with reference to the showing made in the district court in the trial of the case of Larson and Walker against W. L. Caven and William Caven. It alleged that it appeared that after the return and redelivery to said William Caven and W. L. Caven of said personal property, and before the trial of said action, said personal property and all of the same had been by said

William Caven and W. L. Caven, or with their permission and consent, and by their procurement, lost, destroyed, removed from the state, or otherwise disposed of, so that none of the same could be found or recovered or returned to the possession of these plaintiffs, and that the court, taking into consideration such evidence of the disposal of the property, and that none of it could be returned to plaintiffs, and that it had been disposed of and removed with the consent and procurement of these defendants herein, entered a judgment for money only. A retrial was had at the December, 1911, term of the district court, and at the conclusion of the testimony, counsel for both sides moved for a directed verdict in favor of their respective clients. The court discharged the jury, made findings of fact and conclusions of law, and directed a judgment in favor of the defendants upon the ground that the failure of the court to find in the case of Larson and Walker against the Cavens, that the property sought to be recovered in said action could not be returned, and by its failure to adjudge a return of the property to the plaintiffs in that case, and by the voluntary acceptance by plaintiffs of a money judgment against one of the defendants, the plaintiffs waived any right or claim against the sureties on the redelivery bond, and because, by the voluntary agreement of the plaintiffs in the former action to discharge W. L. Caven as a defendant, they canceled the obligation of the sureties. Judgment was entered in accordance with the findings. From such judgment, this appeal is taken.

Preliminary to a consideration of the two points around which all the assignments of error made by appellant revolve, we may note that respondents raised certain objections to the sufficiency of the complaint, which were overruled by the court. We have carefully examined these objections, and find them without merit. They are of such a nature, and of such length, that it would serve no purpose to treat them more specifically. Further reference to facts will be made in consideration of the two law points involved, as suggested by the reasons above given by the trial court in its conclusions of law, for the judgment entered.

S. E. Ellsworth, for appellants.

The judgment in the claim and delivery action not being in the alternative form, the plaintiff, in order to recover from these sureties,

must allege and prove facts showing that they were entitled to judgment in the form entered. Larson v. Hanson, 21 N. D. 411, 131 N. W. 229.

Failure to render an alternative judgment in replevin is no defense to an action on an appeal bond given in behalf of plaintiff, where the property cannot be returned. Selby v. McQuillan, 59 Neb. 158, 80 N. W. 504.

A judgment in an action of replevin under the act of 1873 must be in the alternative, *unless it is shown by the record that a return could not have been had.* Lee v. Hastings, 13 Neb. 508, 14 N. W. 476; Eisenhart v. McGarry, 15 Colo. App. 1, 61 Pac. 56; Mason v. Richards, 12 Iowa, 73; Boswell v. First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661; Clark v. Dreyer, 9 Colo. App. 453, 48 Pac. 818.

Plaintiff may, upon proper showing, proceed against the sureties upon a money judgment for the value of the property, the same as though an alternative judgment had been entered. New England Furniture & Carpet Co. v. Bryant, 64 Minn. 256, 66 N. W. 974.

Judicial bonds of this character should be construed in the light of the purpose and intent of the statute providing for them. Inbusch v. Farwell, 1 Black, 566, 17 L. ed. 188; Sutro v. Bigelow, 31 Wis. 527; Wells, Replevin, §§ 405, 436, 437, 439; Cobbey, Replevin, § 1329.

Even though the court in which a replevin action is pending is at fault in dismissing same, the surety is liable on the bond. Siebolt v. Konatz Saddlery Co. 15 N. D. 87, 104 N. W. 564.

If the principal waive the form, the surety is bound by the result of the case. Pilger v. Marder, 55 Neb. 113, 75 N. W. 559; Clark v. Dreyer, 9 Colo. App. 453, 48 Pac. 818.

If suit against two defendants is dismissed as to one, still the surety is liable. Goodwin v. Bunzl, 102 N. Y. 224, 6 N. E. 399, 28 Jones & S. 441; Auerbach v. Marks, 10 Daly, 171; Inbusch v. Farwell, 1 Black, 566, 17 L. ed. 188.

The undertaking is a substitute for the property. The defendant and his sureties say, "We will return the property or pay its value," as adjudged. Sutro v. Bigelow, 31 Wis. 527; McCormick v. National Surety Co. 134 Cal. 510, 66 Pac. 741; McMillan v. Dana, 18 Cal. 339; Heynemann v. Eder, 17 Cal. 434; McCutcheon v. Weston, 65 Cal. 37, 2 Pac. 727; Gilmore v. Crowell, 67 Barb. 62.

The bond is an enforceable obligation even though the action as to one of two defendants is dismissed. Leonard v. Speidel, 104 Mass. 356; Poole v. Dyer, 123 Mass. 363; Dalton v. Barnard, 150 Mass. 472, 23 N. E. 218; Prior v. Pye, 164 Mass. 316, 41 N. E. 353.

The obligation of the sureties on such a bond impliedly includes an agreement that they are bound by all judicial acts of the court done with authority. Clark v. Dreyer, 9 Colo. App. 453, 48 Pac. 818.

The recitals of the order for judgment are prima facie evidence only of the facts necessary to give court jurisdiction, and are subject to explanation or even contradiction. 17 Cyc. 332, and cases cited under notes 77–79; Kammann v. Barton, 23 S. D. 442, 122 N. W. 416.

Knauf & Knauf, for respondents.

The dismissal of an action in claim and delivery, as to one of two defendants (principals), operates as a dismissal of the sureties, unless the sureties consent to the dismissal. Crook v. Lipscomb, 30 Tex. Civ. App. 567, 70 S. W. 993; Brandt, Surety & Guaranty, 569; Crane Co. v. Specht, 39 Neb. 123, 42 Am. St. Rep. 562, 57 N. W. 1015; Wandelohr v. Grayson County Nat. Bank, 102 Tex. 20, 108 S. W. 1154, 112 S. W. 1046; Nickerson v. Chatterton, 7 Cal. 572; White Sewing Mach. Co. v. Hines, 61 Mich. 423, 28 N. W. 157; Standard Oil Co. v. Arnestad, 6 N. D. 255, 34 L.R.A. 862, 66 Am. St. Rep. 604, 69 N. W. 197; Friendly v. National Surety Co. 46 Wash. 71, 10 L.R.A. (N.S.) 1160, 89 Pac. 177; Woodburn v. Driver, 81 Ark. 333, 99 S. W. 384.

The exceptional facts warranting a money judgment in lieu of an alternative judgment must be alleged and proved against the sureties, in an action on the undertaking. Larson v. Hanson, 41 N. D. 411, 131 N. W. 229; New England Furniture & Carpet Co. v. Bryant, 64 Minn. 256, 66 N. W. 976.

Judgment in claim and delivery *must* be in the alternative, that is, for the property or its value if the property cannot be returned. New England Furniture & Carpet Co. v. Bryant, 64 Minn. 256, 66 N. W. 974; Gallarati v. Orser, 27 N. Y. 326; Fitzhugh v. Wiman, 9 N. Y. 562; 2 Rev. Stat. 536, § 49.

It is the law that a surety cannot be charged beyond the fair import of his undertaking, nor where the contract has been substantially changed. Nickerson v. Chatterton, 7 Cal. 572; Field v. Lumbard,

53 Neb. 397, 73 N. W. 703; Clary v. Rolland, 24 Cal. 148; Mitchum v. Stanton, 49 Cal. 302; Gerlaugh v. Ryan, 127 Iowa, 226, 103 N. W. 128.

By election to take judgment for the value of the property held from the plaintiff, he *waives* right to a redelivery, and thereby releases the sureties from their obligation to deliver, "if so adjudged." Gerlaugh v. Ryan, supra.

There is no breach of the condition to redeliver the property to plaintiffs until a redelivery thereof is adjudged. Colorado Springs Co. v. Hopkins, 5 Colo. 206; Lewin v. Stein, 7 Colo. App. 65, 42 Pac. 185.

The amended complaint failed to allege a redelivery of the property to the Cavens and the objection to evidence along this line, and motion for directed verdict should have been sustained. Nickerson v. Chatterton, 7 Cal. 568.

SPALDING, Ch. J. (after stating the facts). Did the order of the court and judgment entered thereon, on motion of the attorney for the two Cavens, made either with the consent of the plaintiff's attorneys in the replevin action, or without objection on their part, dismissing W. L. Caven, one of the defendants therein, "from said cause of action," discharge the sureties from liability upon the redelivery undertaking executed by the two Cavens as principals, and the respondents herein as sureties?

The action of claim and delivery is to secure the possession of personal property belonging to the plaintiff. The Code makes provision for the process, and for the giving of an undertaking by the plaintiff, to entitle him to take possession of the property, pending the determination of the case. If the defendants desire to retain possession of the property during such time, they are permitted to do so by furnishing a statutory undertaking executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery is adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. Rev. Codes 1905, § 6922. The plaintiff is entitled to the property on commencing his action and furnishing his undertaking and the

service of process, unless a redelivery undertaking is furnished by the defendant. It is clear that the statute contemplates such an undertaking as will render the plaintiff secure, if the property is redelivered and retained in the possession of the defendant. It provides for a return of the property if the plaintiff is adjudged to be entitled to it, and for the payment to him of such sum as, for any cause, may be recovered against the defendant. The undertaking is not only a substitute for the possession of the property by the plaintiff, but is security for any money judgment recovered. The defendant has his option whether to permit the property to remain with the plaintiff, or to furnish the undertaking in lieu thereof, and covering also the money part of any judgment recovered, and retain possession himself.

Now, if the language of this provision is to be taken with the narrow literalness contended for by the respondents herein, the word "defendant" being in the singular, the provision is not applicable to an action in claim and delivery where there is more than one defendant. The respondent contends that, because the undertaking follows the language of the statute, but uses the word "defendant" in the plural, and because judgment was recovered against only one of the two defendants, the proceedings have effected a change in the contract of the sureties without their knowledge or consent, and that thereby they are released or discharged.

We are of the opinion that the terms of the statute must be taken in a much broader sense or meaning, and that they apply to the recovery by the plaintiff as against any or all of the defendants named in the process on which the undertaking was given. To hold otherwise would be to emasculate the law relating to claim and delivery. It would render it extremely hazardous to take possession in any action in which more than one party is made defendant. This case serves to illustrate such danger. It appears from the record that the defendant William Caven was the proprietor of a livery barn, but it was managed by his agent, W. L. Caven. Under such circumstances and governed by appearances, the plaintiff naturally brought his action against the two parties who appeared to be in possession. When it later developed on the trial that the proprietorship was in one only, and the other was simply his agent, counsel for the Cavens moved to dismiss as to the agent. This motion was not resisted, and we may assume the

order dismissing him was made with the consent of the plaintiffs herein.

Can it be possible that, in order to protect their rights and hold the sureties on the undertaking, the case should have been tried through and submitted to the jury, and that the plaintiffs should have protested at all times against the court entering a judgment of dismissal as to one defendant, when there may have been not a *scintilla* of proof to show liability as to him? If not, where can the line be drawn between the degree of assent or opposition to the order of dismissal on the part of the plaintiffs, necessary to hold the sureties? We think the word "defendant" is used in the statute, and the word "defendants" in the undertaking, as a general term, applying to one or more, as the case may be, and according as the judgment may be rendered, so long as the parties against whom judgment is rendered were defendants when the redelivery undertaking was executed and delivered.

But other considerations enter into this question, which it appears to this court are not only persuasive, but conclusive. As we have observed, the undertaking was executed by both Cavens as well as the sureties. It recites that the defendants, that is, William Caven and W. L. Caven, are desirous of having said personal property returned to them, and when the defendant W. L. Caven was dismissed from the action, he was not relieved from liability on the undertaking. He was a party executing that undertaking, and was held therein, notwithstanding the order of dismissal, and even if, as was contended on the trial, he was the only one of the principals who was responsible financially, the sureties were not prejudiced, for they still retained, so far as appears, their remedy against him. Had the undertaking only been executed by the sureties, as is done in some instances, or in the case of undertakings in some forms of action, there might be some question, but no such case is before us. W. L. Caven contracted himself for a return of the property, or for the payment of any judgment obtained, and the sureties have lost none of their rights by the action of the court. This is not a case when plaintiffs and the original defendants by agreement between themselves released one defendant from liability or perpetrated a fraud on the sureties. It is the action of the court in the regular proceedings of the trial, and which all parties must have contemplated might occur, and the sureties contracted with reference to

it. Many authorities are cited by both parties on this proposition; we think we have examined each one of them, at least all those cited by the respondents. If we were to concede that one or two of those relied upon by respondents were in point, which we doubt, the greater number are in no manner applicable to this case, and those holding the sureties still liable preponderate overwhelmingly. We shall not take the space to review all those cited by respondents, but refer to a few as illustrative of practically all.

Harris v. Taylor, 3 Sneed, 536, simply holds that the sureties on a replevin bond in behalf of all the defendants are discharged when the plaintiff voluntarily discharges one of the defendants. The question is not discussed further than for the court to say the undertaking of the sureties is in joint behalf of the two defendants, and the discharge of one of the latter by the voluntary act of the plaintiff operated as a discharge of the sureties from the obligation of their bond; but in Kelly v. Gordon, 3 Head, 683, the Tennessee court holds that the undertaking of the surety in an injunction bond, where there are several complainants, is in law for the principal severally, as well as jointly; that the surety is in effect bound that each and all of his principals shall perform and fulfil whatever decree may be rendered against all, or either of them, and that therefore abatement as to one of several joint defendants, or the discharge of one upon some ground applicable to him alone, cannot affect the liability of the surety for the surviving party or parties, against whom a decree is rendered.

The court distinguishes the Harris Case, supra, on the ground that in that case, the plaintiff, by his voluntary act, discharged one of the defendants, while here, the act of the plaintiff was failure to revive the suit against the personal representative of the deceased party, and holds that, inasmuch as the law did not impose any active duty or obligation upon the plaintiffs to do so, it was not equivalent to a voluntary discharge of one party; that it was an omission to do what they might have done, but which they were not required to do, and that the discharge of one of the defendants upon some ground applicable to him alone cannot affect the liability of the surety for the surviving party or parties, against whom a final decree may be properly rendered. This, therefore, becomes an authority supporting appellants' contention in the instant case.

Shimer v. Hightshue, 7 Blackf. 238, was decided in 1844, and the facts differentiate it from the case at bar. In that case, two suits were brought, each by three plaintiffs, two of the plaintiffs being the same in each case, but the third a different person. By consent of the parties, the two suits were consolidated without the knowledge or consent of the surety, one of the plaintiffs, who was not a party to one of the suits, was discharged, and it was held that his release might be assimilated to a release of the principal debtor by the payee of a note or bond, which discharged the surety from his liability.

Standard Oil Co. v. Arnestad, 6 N. D. 255, 34 L.R.A. 861, 66 Am. St. Rep. 604, 69 N. W. 197, is not in point. It relates to a bond for the fidelity of a firm, and holds that the sureties are not liable for funds misappropriated by one member of the firm after the dissolution and the retirement of the other partner. Crane Co. v. Specht, 39 Neb. 123, 42 Am. St. Rep. 562, 57 N. W. 1015, is not in point except as it deals with the construction of the contract of guaranty, and holds that it will be strictly construed, and not extended by implication. It holds that sureties are not liable for goods furnished after a change in the firm for which they had become guarantors.

Woodburn v. Driver, 81 Ark. 333, 99 S. W. 384, is not in point. Summary judgment was rendered in that case against the sureties on defendants' retaining bond for the amount of the debt due plaintiffs from defendants, when, under the statute in force, no provision was made for summary judgment for the debt; hence the court held the judgment erroneous. Friendly v. National Surety Co. 46 Wash. 71, 10 L.R.A.(N.S.) 1160, 89 Pac. 177, simply holds that where one member of a firm of contractors assigns his interest to his partner, and is released from liability on the contract without consent of the sureties on the contractor's bond, such sureties are released.

Crook v. Lipscomb, 30 Tex. Civ. App. 567, 70 S. W. 993, is not in point. In that case there were several defendants, and the plaintiff entered into an agreement with a portion of the defendants whereby judgment was to be taken against such defendants without opposition, but no execution was to be issued against them. The sureties and the other defendants were not informed of such agreement, and it seems to have been a fraud upon the other defendants.

In Wandelohr v. Grayson County Nat. Bank, 102 Tex. 20, 108 S.

W. 1154, 112 S. W. 1046, the court expressly declines to decide the question whether a separate action could be maintained on a joint and several bond, against one of the defendants and the sureties; and that case is not in point for other reasons, especially because it rests upon a peculiar statute.

See also Sartain v. Hamilton, 14 Tex. 348, and Wandelohr v. Grayson County Nat. Bank, supra.

So much for illustrations of the authorities cited by respondent. On the other hand, we find numerous authorities to the effect that the sureties are not relieved from liability by the dismissal or discharge of one defendant. In Sutro v. Bigelow, 31 Wis. 527, an undertaking was given to procure the discharge of certain garnishees in an action. The language of the undertaking was identical in all material respects with that in the case at bar. It was: "To pay unto said plaintiffs the amount of the judgment, if any, which said plaintiffs may recover in the action against *said defendants,*" not exceeding a sum named. There were two defendants. Subsequent to the giving of the undertaking, it was discontinued as to one, and judgment was taken against the other only. The reported case is the action against the sureties on the undertaking, who, as in the case at bar, claimed to be released by the discontinuance as to one defendant. The court held that it was the obvious intent of the statute that the persons executing such undertaking should be bound to the same extent as the garnishees discharged from liability by virtue of it, or the property of the principal debtor in the hands of such garnishees would have been bound, and that the undertaking must be liberally construed with reference to such intent, and that therefore the sureties were still liable on the undertaking.

In Heynemann v. Eder, 17 Cal. 434, the identical question involved in the instant case was passed upon. The bond was to pay whatever judgment might be rendered against "said defendants." Judgment was obtained against one only of the defendants. The court held that the security required by the statute was a security for the satisfaction of any judgment that might be obtained, and that the bond was such a security, and that failure to obtain judgment against one defendant did not discharge the sureties. In Poole v. Dyer, 123 Mass. 363, it is held that the result, so far as the sureties are concerned, is the same, whether the plaintiff discontinues against one defendant, or fails to re-

cover against him upon the trial. The action was brought against the sureties on the undertaking after the original action had been discontinued as to one defendant.

Pilger v. Marder, 55 Neb. 113, 75 N. W. 559, was replevin brought against three defendants; property was taken under the writ; trial was had, with the result that judgment was entered in favor of one of the defendants; action was instituted on the undertaking given by the plaintiffs, to recover of the sureties the value of the property, etc. It was urged that, inasmuch as the bond was given in favor of three obligees, they should all have been parties to the suit. The court says: "In an action of replevin in which there are two or more defendants, each may recover a part of the property, or one may be adjudged the owner and entitled to the possession of all of the property, and to have a return of it, or to recover its value. . . . It is also true that all of the parties to a case in replevin are bound by the adjudication of the rights involved and put in issue therein. It seems a correct conclusion that the sureties of a replevin undertaking are liable to the party or parties to whom the final determination of the issue may accord a recovery."

In Goodwin v. Bunzl, 102 N. Y. 224, it is held that where final judgment was rendered in replevin against two defendants only, and in favor of a third, the sureties on the bond were not released.

Auerbach v. Marks, 10 Daly, 171, is also directly in point. In that case, on the trial of the replevin suit, the complaint was dismissed as to one defendant; a verdict rendered for the plaintiff against the other two defendants, and judgment entered thereon. On the failure to deliver the property and return of execution unsatisfied, action was brought against the sureties. The defense was that when the suit was commenced, the property replevied was in the sole possession of one of the defendants, at whose request and in whose behalf they executed the undertaking; that the property was thereupon returned to that defendant; that the other two defendants had no interest in, or possession of, the property, and it was claimed that, no judgment having been rendered against the one defendant, their liability ceased. Evidence was excluded to show these facts, and the verdict directed for the plaintiff, and it was held that the defendants were not entitled to show the facts recited above; that when the undertaking given by the defendants was executed and delivered, the property was in the hands

of the sheriff, and that the sureties bound themselves for the delivery to the plaintiff, if the delivery should be adjudged, etc. The court says that the fact that no cause of action was established against the defendant Goodman, and that the complaint was dismissed as to him, does not discharge the defendants from their obligation; that they became bound for the delivery of the property to the plaintiff, and in case a delivery could not be had for its value; that, in consequence of the undertaking, the property was returned to all the defendants in the replevin action. This conclusion is based upon the language of the undertaking, to the effect that the three defendants were desirous of having it returned to them, and that, in consideration of the return of it to them, the defendants became bound, etc.; that the sureties became bound for the delivery of the property by each and all of the defendants, if a delivery of it to the plaintiff was adjudged; and it was held that they were not discharged of their liability when the defendant Goodman was released from any obligation to deliver it. by a judgment in his favor, if they still remained bound for the delivery by the other defendants; that the dismissal as to one defendant in no way affected the plaintiff's right to the property; that the effect of the judgment was that the one defendant did not wrongfully detain it, and that such a judgment does not entitle a defendant to the return of the property, for it in no way affects the ownership or title of the property; that where there are several defendants, the court may adjudge the return of it to one of them, and refuse it to others, or may award to all of them, or part to one and part to another, or to the plaintiff, as the rights of the parties shall appear, or for other relief not necessary here to state. The court remarks that "the action of replevin is founded upon a tort; it is brought by a party entitled to property against those in possession of it, who have wrongfully taken, or wrongfully withhold it, or who wrongfully conceal or put it out of their possession, to defeat the suit. Where there are several defendants sued as wrongdoers, each may set up a separate defense; each may claim exclusive title to the property, or set up any matter in defense, without reference to the pleading or defense of the other, and judgment may be given in favor of one and against the others, or judgment may be for both parties. . . . Thus, a defendant may succeed, and not be entitled to a return, if a return of the property is ordered only when it appears just." The

court further says: "What the sureties undertook was to be bound for the delivery of the property, if delivery of it should be adjudged to the plaintiff, and the payment of such sum as might be awarded against the defendants. The argument is that the sureties agreed to be bound if all the defendants failed to deliver it. The answer is that one of the defendants was relieved from delivering it by the judgment of the court. In the language of the undertaking, a delivery of it by him was not adjudged, but it was adjudged that it should be delivered to the plaintiff by the other two defendants, and it is for their failure to deliver or pay the sum recovered, if the property was not delivered, that the defendants are answerable."

The language of the undertaking was identical with the case at bar,—that the defendants were desirous of having the property returned to them. We commend the reading of the opinion to counsel. It is exactly apropos to the case at bar and is most persuasive. We have only quoted a small portion.

We conclude that the sureties were not released from liability on the undertaking by the fact that the action of claim and delivery was dismissed at the close of the evidence, on motion of counsel for the principals, either with the consent of, or simply without opposition by, counsel for the plaintiffs therein.

2. Were the respondents relieved from liability by the form of the judgment taken against one of their principals, namely, not in the alternative, but only for money, the value of the property and damages? It is true that, in the usual method of practice under the Code, a judgment in claim and delivery is taken in the alternative for return or the possession of the property, or its value, if a return cannot be had, and undoubtedly, in many cases, the fact that judgment was not so entered would be fatal, in the absence of a motion on the part of the judgment creditor to correct it, but the law does not require idle acts, and it is well established that where on the record it appears that the property cannot be returned, judgment need not be entered for its return or possession.

What is the record in the case at bar on which the money judgment was entered? C. H. Olson was a witness. He was the official stenographer who took the testimony in shorthand in the claim and delivery action. He testified in the case before us that he heard the testimony

of W. L. Caven, as a witness in the claim and delivery action, with reference to the property that was taken, and turned back to the defendants. With his transcript of such evidence before him, he testified that said Caven testified that he sold the property in question for a feed bill incurred in the livery barn, for $950 or $951, on the 7th of February, 1908, and that he was not in position to reproduce the property and turn it over to the plaintiff therein, because the property was gone; that the sale was made under notice and publication. Olson did not have the minutes of all the testimony taken in the case, as a portion of such minutes seem to have been lost between the clerk of the court and counsel for the respondents, which, however, is immaterial. One Bouer testified that he was present at the trial and heard testimony relating to the property having been sold at auction, and regarding the report of such sale, and that it was brought out that the Cavens had sold the property under the lien claimed by them, and filed a report of such sale at Jamestown. In the case at bar, the report of the sale was received in evidence. It showed the process, and the persons to whom the different items were sold, and was made by W. L. Caven under oath as agent for William Caven. This report also showed that the property had been sold to some ten or twelve different people. Bouer also testified that he was present at the sale. William Caven testified that he was not asked a certain question contained in the record to which Olson, the stenographer, testified, and did not make the answer given.

So much for the record relating to the disposition of the property in the claim and delivery action. It is this record that the court had before it when it rendered the judgment for money only. There is certainly enough in it to sustain the action of the court in rendering such judgment, even if it be conceded that there is a conflict in the evidence by reason of the testimony of William Caven, to which reference has been made. On the facts shown by the record, it was for the trial court to determine what kind of a judgment to enter, and that court must have found, in its consideration of the subject and from the record, that the property could not be returned. No appeal is before us from that judgment. It has become final and the evidence was sufficient to sustain it. See last two sentences of the opinion in Larson v. Hanson, 21 N. D. 411, 131 N. W. 229.

We refer to one other phase of the record in the case at bar. It appears that evidence was received to support the judgment in the claim and delivery action, and it was conclusively shown that the Cavens sold the property involved at auction to a number of persons more than a year before the trial; that some of it had been removed to the northwestern part of the state by the purchasers, the hogs sold to a butcher, and the horses to several farmers, and considerable of them were resold by the purchasers. The respondents undertook to show that it was within the power of William Caven to collect and return each item of such property to appellants. We are not determining whether it was proper to receive evidence in this case to support that judgment. We are inclined to doubt its admissibility, and to think that the record made in the claim and delivery action is the record on which it must be determined whether the form of judgment is justified. See Larson v. Hanson, supra. It, however, seems to have been assumed by both parties on the trial of the instant case that it was then proper and competent to show that the property could, or could not, have been returned when the former judgment was rendered. As to the new proof on this subject, when the holders of the judgment in the former case had shown that the defendants had sold the property to ten or twelve different purchasers more than a year prior to the trial of the action; that it had been scattered over a wide territory, and some resold to other parties; that the plaintiffs had made out a case showing the inability of the defendants to return the property, which, in the absence of a further showing by the defendants, would support the judgment for money only, in view of the circumstances, and particularly in view of the fact that the means of knowledge regarding the ability to return the different pieces of property was necessarily with the defendants in that case, who were witnesses for the defendants in the case at bar,—something more devolved upon them than to testify in effect to the opinion that at all times after the auction sale, they could have gathered together the property and returned it to its owners. It would seem but reasonable to require them to testify as to each specific item, and disclose the sources of their knowledge, and its extent, and to make clear their ability to return the property, before it should be held to overcome the case made by the evidence uncontradicted, of its sale at auction and dispersion. We are impressed by the record with

the belief that the Cavens went as far as they could go towards showing their ability to return the property, and that this showing amounted to nothing more than the naked statement of their opinions that they were able so to do, and that that statement was rendered highly improbable by all the surrounding circumstances, at least so improbable that it was incumbent upon them to overcome by specific and persuasive evidence such improbabilities. In that connection, and as bearing on these questions, we may say that both of the defendant sureties testified in the case at bar; that they were present at the auction sale referred to, saw the property sold, and knew that it was distributed among numerous purchasers; that the sale was on the same day that they executed the redelivery undertaking, and that they made no objection to the sale, and were willing that it should be sold and distributed around among different persons in that community or elsewhere. They appear to have executed the undertaking with knowledge that the property was to be sold and scattered, and for the sole purpose of enabling Caven to sell and scatter it.

In Burke v. Koch, 75 Cal. 356, 17 Pac. 228, the court found that the defendants had sold and disposed of a large portion of the property replevined, and had appropriated the proceeds thereof, and that fact appearing at the trial, it was held that the trial court was not bound to find the character or value of the articles which should be returned, or enter a judgment in the alternative.

Gallarati v. Orser, 27 N. Y. 324, disclosed a record that failed to show that the property could not be returned; hence it was held that it would not support a judgment for money only. In Lee v. Hastings, 13 Neb. 508, 14 N. W. 476, it is held that the judgment in an action of replevin must be in the alternative, unless it is shown by the record that a return of the property could not have been had. In Field v. Lumbard, 53 Neb. 397, 73 N. W. 703, it is held that the judgment should have been in the alternative, and that, as it was not so entered, the sureties were not liable; but the opinion does not disclose, as we read it, whether the record showed the possibility of a return of the property, and if any inference is to be drawn on the subject, it would seem to be that it either showed that it could have been returned, or failed to show anything, hence it is not in point.

See also Ingersoll v. Bostwick, 22 N. Y. 425; Johnson v. Carnley,

10 N. Y. 570, 61 Am. Dec. 762; Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727; Cheatham v. Morrison, 37 S. C. 187, 15 S. E. 924; Kennedy v. Brown, 21 Kan. 171; Atkinson v. Foxworth, 53 Miss. 733; Campbell v. Brown, 122 Mass. 516; McCarthy v. Strait, 7 Colo. App. 59, 42 Pac. 189; Wells, Replevin, §§ 428–431; Davis v. Gray, — Okla. —, 134 Pac. 1100.

The above authorities have more or less bearing on this question. We are satisfied that a sufficient showing was made to sustain the action of the appellants against the sureties on the undertaking in question. It is clearly so when giving proper weight to evidence adduced by the party against whom the order was directed on the motion for a directed verdict. One or two other assignments of error may be noticed.

Appellants contend that it was error to exclude proof offered to show that William Caven withdrew from the bank in which appellants had deposited the amount of their claim for the keeping of the property, and appropriated such fund to their own use, and also because evidence was admitted tending to show that respondents became sureties on the redelivery bond in reliance upon the solvency of W. L. Caven. It is not necessary, in view of our conclusion on the two main questions, to pass upon these assignments. In conclusion, we may add that, in so far as the respondents were aware of the facts and participated in or assented to the sale of the property, they are not in position to criticize too closely the regularity or irregularity of the legal proceedings by means of which appellants attempted to regain or recover for their property. They stood by and saw the property dispersed after they signed the undertaking,—they made no objection and are in much the same position that Caven occupies. We have made no reference to the findings of fact made by the court, because they in no manner conflict with our conclusions, and in fact sustain them. Among other things, the court expressly found that the property was sold by the two Cavens, and that they, by such sale, devested themselves of all title in and to such property, or any part thereof, and in and to the possession thereof, and never again became its owners or possessors. The conclusions of law found by the court render it unnecessary to further consider the findings. The judgment of the District Court is reversed, and the District Court will enter judgment for plaintiffs with costs.

BURKE, J., disqualified.

MARTIN LARSON v. E. W. BUTLER and George W. Swords, Copartners as Butler & Swords.

(144 N. W. 1077.)

Appeal — judgment — commission notes — consideration — agency — loans —payment.

Defendants appeal from a judgment canceling commission notes and commission mortgage for failure of consideration. Testimony reviewed, and it is *held:*

The intermediary, one Dahl, who acted in the loan negotiations, was not plaintiff's agent in procuring his loan of defendants; defendants were not authorized to make payment to Dahl, who embezzled the proceeds of the loan, and to whom Butler & Swords had made full payment.

Opinion filed December 29, 1913.

An appeal from a judgment of the District Court of Ward County, *Leighton,* J.

Affirmed.

E. R. Sinkler, for appellants.

Dahl was Larson's agent, and had the right to receive payment, and his acts were ratified. If an act is wrong, he who consents to it is not wronged by it. Rev. Codes 1905, § 6662.

Acquiescence in error takes away the right of objecting to it. Rev. Codes 1905, § 6663.

One who can, but does not, forbid an act in his behalf, is deemed to have bidden it. Rev. Codes 1905, § 6666.

One who has knowledge of payment being made, or about to be made, in his behalf, and makes no objection, and the position and rights of others are changed by such acts, is estopped to make any claim as against other interested parties. 16 Cyc. 742; Clark v. McGraw, 14 Mich. 139.

The borrower's agent to make loan is his agent also to receive the money from the lender. National Mortg. & Debenture Co. v. Lash, 5 Kan. App. 633, 47 Pac. 548; Murphy v. Becker, 101 Minn. 329, 112 N. W. 264; Land Mortg. Invest. & Agency Co. v. Vinson, 105 Ala. 389, 17 So. 23; Edinburgh American Land Mortg. Co. v. Peoples,

102 Ala. 241, 14 So. 656; Florida C. & P. R. Co. v. Ragan, 104 Ga. 353, 30 S. E. 745.

Payment to an authorized agent is equivalent to payment to the creditor himself. Bicknell v. Buck, 58 Ind. 354; Indiana Trust Co. v. International Bldg. & L. Asso. 165 Ind. 597, 76 N. E. 304; Gavigan v. Evans, 45 Mich. 597, 8 N. W. 545.

An agent authorized to receive payment on a mortgage may bind his principal though payments made to him are not indorsed. Ellis v. Maurer, 125 Mich. 400, 84 N. W. 1114.

Money paid on a note which has reached the hands of an agent authorized to collect for the holder constitutes satisfaction of the debt. John Stuart & Co. v. Stonebraker, 63 Neb. 554, 88 N. W. 653; Pochin v. Knoebel, 63 Neb. 768, 89 N. W. 264; Boyd v. Pape, 2 Neb. (Unof.) 859, 90 N. W. 646.

One cannot make a claim, or speak when he wishes to do so, when he ought to have spoken before, but remained silent. Rev. Codes 1905, §§ 6662, 6663, 6666.

If a principal fails to disavow promptly an unauthorized act, he will be deemed to have ratified it. Clay v. Spratt, 7 Bush, 334.

When a principal is informed of what has been done, he must dissent and give notice within a reasonable time, or he will be presumed to have ratified the action. 2 Kent, Com. 616; 1 Am. & Eng. Enc. Law, 1203, and cases cited.

Dorr H. Carroll, for respondent.

Much weight must be given to the findings of fact by the trial court, who has had opportunity to see and observe the witnesses upon the stand. Pillsbury v. J. B. Streeter, Jr. Co. 15 N. D. 174, 107 N. W. 40; James River Nat. Bank v. Weber, 19 N. D. 702, 124 N. W. 952; Ruettell v. Greenwich Ins. Co. 16 N. D. 546, 113 N. W. 1029; Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 N. W. 717; First Nat. Bank v. McCarthy, 18 S. D. 218, 100 N. W. 14.

An agent cannot act for two parties when their interests are adverse. New York Central Ins. Co. v. National Protection Ins. Co. 20 Barb. 468; Price v. Keyes, 62 N. Y. 378; Levy v. Loeb, 85 N. Y. 365; Meyer v. Hanchett, 39 Wis. 419; Walworth County Bank v. Farmers' Loan & T. Co. 16 Wis. 629; Walker v. Osgood, 98 Mass. 348, 93 Am. Dec. 168; Mercantile Mut. Ins. Co. v. Hope Ins. Co. 8 Mo. App. 408;

Bollman v. Loomis, 41 Conn. 581; Fitzsimmons v. Southern Exp. Co. 40 Ga. 330, 2 Am. Rep. 577.

Goss, J. Plaintiff brings this action in equity to quiet title against certain mortgages held by the defendants M. L. Davenport and Butler & Swords, who by answer respectively aver the ownership of an $870 first mortgage in Davenport, and an $87 commission mortgage in Butler & Swords. On trial it was stipulated that the mortgages in question were executed by the plaintiff and wife to Butler & Swords, a copartnership consisting of E. W. Butler and G. W. Swords, securing promissory notes of $870 and $87, respectively, dated April 12, 1909, and duly recorded; and that the principal mortgage of $870 had been assigned to defendant Davenport, who took the same as a purchaser in good faith and without notice of any defect in title or consideration, or of any of the facts hereinafter recited concerned in the negotiations between plaintiff and Butler & Swords. Defendants Davenport, Due, and the Carpio State Bank, so far as the trial was concerned, were eliminated as parties, and the action proceeded against Butler & Swords in whose name the second mortgage stood of record, and which mortgage was canceled by the trial court for failure of consideration of the note secured thereby. These defendants appeal and demand a trial *de novo*.

The question involved is a mixed one of law and fact, and depends principally upon whose agent was one O. G. Dahl, an intermediary, through whom the loan was negotiated with defendants Butler & Swords, and who embezzled the proceeds from the loan received from them. It is apparent that both the plaintiff and these defendants, in dealing with each other and with Dahl, have exercised the utmost of good faith, plaintiff supposing Dahl to be a loan broker with connections with Butler & Swords, who in turn supposed Dahl was fully authorized to act for plaintiff, as his actions had led them to believe, and that they, when dealing with Dahl, were dealing with the plaintiff, as he was not their agent in securing and negotiating loans generally, but instead acted in this instance on his own initiative.

Plaintiff negotiated with Dahl and gave him the usual application for loan, taken on the printed applications of Butler & Swords, which was evidently submitted to them and approved. In the application

is an appointment of Butler & Swords as the agents of the applicant in procuring a loan for him, and authorizing them to procure abstract of title, record mortgages, and satisfy prior encumbrances on the land to be mortgaged. After approval of the application plaintiff and his wife appeared before Dahl and signed the mortgages and notes in question, and left them with Dahl, who plaintiff testified was "the one that drew them up, I suppose," who evidently transmitted them to the mortgagee partnership. Plaintiff Larson's purpose in mortgaging his farm, apparently known to all parties, was that he might procure the cash to use in attending a sale of school lands a day or two after April 20th, on which date mentioned Swords had wired Butler, in Chicago, to forward to O. G. Dahl, of Carpio, "$870, Larson loan, at once without fail," in compliance with which a draft for that amount, dated April 20, 1907, was sent to O. G. Dahl, which was cashed May 3d following by the bank on which it was drawn, and which draft purports to bear the indorsement of Dahl. This telegram was sent pursuant to Dahl's telephonic request therefor, and it appears was with the knowledge of Larson so far as the procuring of the money was concerned, but who testifies he expected the draft to come to him or in his name. The day of the sale arrived, and both Dahl and Larson appeared in Minot, and both called at the office of Butler & Swords, whether together or separately is in conflict, the plaintiff denying that he was with Dahl at Sword's office or at the sale, while the recollection of Swords is that they were together, which is probably the fact. Plaintiff admits that he came to Minot with Dahl for the purpose of attending the sale, and with the intention of using the loan money to buy land if he had gotten it; and that Dahl had told him that "my security was all right and my money would be here if I needed it." And again, "He (Dahl) said it was not here that morning, but that it would be here before night." Swords testifies that it was his understanding from conversing with Dahl and Larson, that Dahl had received a telegram from Butler that the money was on the way, and that Dahl had made arrangements with the Carpio bank "that they were to telephone down or send down the draft" if it came during the day of the sale; and relying on such arrangement Swords informed the county treasurer of the facts, and to accept Larson's bid for school lands, as he, Swords, "would see that the money was there; that the money was

on the road already." It appears from Larson's testimony that he was fully cognizant of this arrangement, and that the reason he did not bid at the auction sale was because the land sold at too high prices. Plaintiff and Dahl returned home without buying land, and without the money, Larson evidently relying on getting it from Dahl when it should come, and a week later went to Carpio admittedly to get his money of Dahl, who was not to be located. Plaintiff then repeatedly visited Dahl's office to get his money, seeing him, but being told by Dahl that he had not received the money, and that there were some errors in the papers, and that "he (Dahl) would come down to Butler & Swords and get the money or the papers," to which plaintiff did not object, and matters remained in the same condition until July 13th, when plaintiff wrote the following letter to Butler & Swords: "On or about April 22d I made a loan through O. G. Dahl, of Carpio, North Dakota, and gave over good papers as security, and up to date Mr. Dahl has made me various excuses in not turning over the money to me. What I would like to know, if said party made a loan of you, did he receive the money? He claims that you are holding back the money. If you will kindly give me any information in regard to this inquiry, I would consider the same a favor. Awaiting an early reply," etc. Soon after this plaintiff learned the truth, that from his testimony he had evidently begun to surmise, that Dahl had received and embezzled the proceeds of the loan. However, on July 19th, following, plaintiff received from Coon Valley, Wisconsin, a letter from Dahl, stating: "I am getting the loan straightened out nicely, and expect to send you draft for $870 the last of next week." Matters remained in this condition until this suit was brought in October following. It seems that Dahl attempted to settle his defalcation by giving security or deeds to lands, which, however, the plaintiff would not accept, but which were by plaintiff tendered to defendant mortgagee, who likewise refused to consider any security from Dahl in the matter, claiming that their payment to Dahl was a payment to plaintiff. What pecuniary interest the parties contemplated Dahl would have had in the transaction, or from what source or from whom he would have received his compensation, but for his embezzlement, does not appear. The details of the transaction had by Butler & Swords with Dahl, other than those above related, were had with Butler, who has not testified, and this fact is more or less

significant, inasmuch as had he testified we might know how this loan came to be made with them, and know whether Butler was paying Dahl a commission for procuring it. Swords testified that he did not know how Dahl came to be doing business with Butler & Swords; that he never knew of the preliminary negotiations. "The first I knew was when they asked for the money, and the next I knew was the arrangements for the school lands."

Q. This mortgage then just came in unsolicited?
A. I could not tell you anything about it.

It was well said in Merriam v. Haas, 154 U. S. 542, and 18 L. ed. 29, 14 Sup. Ct. Rep. 1159, that to determine in a given case whether a person is the agent of the lender or of the borrower is a question of the weight of testimony rather than of the application of legal principles. Again, the principle is restated in 31 Cyc. 1222 et seq., that "in the negotiation of loans it is often difficult to determine whether an intermediary is the agent of the borrower or of the lender. Each case must be decided upon its own particular circumstances. If a person desiring a loan makes known that desire to one who applies to a money lender and consummates the loan, the intermediary is the agent of the borrower, not of the lender. So, if the borrower, in a written application or otherwise, expressly makes the intermediary his agent, if he pays the agent's commission for negotiating the loan, or if he employs the intermediary to examine the title to the property offered as security, or to discharge prior encumbrances thereon, these facts taken collectively or in various lesser combinations justify an inference that the intermediary is the agent of the borrower. On the other hand, if a money lender employs the intermediary to negotiate loans, to examine the title to property offered as security, to see that the property is discharged from prior encumbrances, to prepare the papers and see to the execution thereof, to pay over the money to the borrower, or to perform other services in regard to the loan, these facts taken collectively or in various lesser combinations justify an inference that the intermediary is the agent of the lender. If the lender pays the intermediary's commission, it tends to establish an agency in the lender's behalf, and if the service is performed at the request and by the direction of the

lender, presumptively the agent is his agent, even though the borrower is required to pay for the service. However, none of the foregoing facts is conclusive on the question of agency, and will not preclude the alleged principal from showing that the intermediary was actually acting as the agent of the other party, or as agent of each, but for different purposes. And the fact that the application for the loan recites that the intermediary is the agent of the borrower is not controlling if the facts and circumstances are such as to create an agency in behalf of the lender as a matter of law." Several pages of citations sustain this text.

We conclude that it sufficiently appears that Larson did not employ Dahl as his agent, but instead dealt with him supposing him to be either a money lender or an agent for the defendants. He says the application for loan was read to him, and he must have then understood from his understanding of the transactions that he was dealing with Butler & Swords through Dahl as their agent. And so viewed this harmonizes entirely his subsequent actions in going with him to Minot to procure the money to use at the sale. Nothing would be more natural on his part than that he would accept assistance from Dahl, supposing that Dahl could render him assistance with Dahl's principals, the mortgagees. Larson naturally concluded that when Butler was sending the draft or money to Dahl he was placing it in the hands of Butler's agent; hence Larson had nothing to worry about. And, likewise, his expectation that he would at some time receive the money from Dahl was but a natural one, not tending to estop him from relying upon the defendant mortgagee for final payment either direct to him or through Dahl, their supposed agent for payment. And from this standpoint his courteous letter of July 13th was nothing more than calling to the attention of the mortgagee the fact that he had not received the money from their supposed agent.

On the contrary, the defendants contend they dealt with Dahl assuming him to be the agent of the mortgagor, plaintiff; and that when Dahl instructed them to forward the draft to him at Carpio in payment of the mortgage loan, Dahl had either express authority from his principal to so direct and to receive the money, or that such order was one reasonably to be inferred as within Dahl's implied powers as agent, and within the ostensible scope of such assumed express or implied agency;

further, that the acts of Dahl and plaintiff, occurring on the day of sale and afterward, either ratified and sanctioned the manner of sending the money, or created by estoppel a relation of principal and agent between Larson and Dahl.

While the former contention of the plaintiff is in harmony with the facts, that of the defendants is defective in two particulars: (1) in the assumption that Dahl was the agent of the mortgagor in the absence of any proof of actual agency, or of the holding out by plaintiff of Dahl as his agent in the matter; and (2) the payment to Dahl of the mortgage proceeds upon a mere presumption of agency unsupported by facts amounting to a holding out or proof of an ostensible agency or of an actual agency. At this point the defendants by law were charged with knowledge of the powers of the agent, as there had been no ostensible agency shown to exist, and acted at their peril when paying him the proceeds of this mortgage. It would seem that reasonable precaution should have dictated either that the proceeds be sent to the mortgagor, or at least that the draft be drawn in the name of the mortgagor. In doing otherwise they were relying upon the statements either of their own agent or that of a third person, with whom, in the latter instance, they must act at their peril. The events of the Minot trip are important only as bearing upon the relations of the parties. They might have significance if the record established that Larson knew the draft sent was drawn to Dahl, and further proof that in so doing defendants supposed they were dealing with Dahl under the assumption known to Larson that Dahl was supposed to be Larson's agent in receiving such money. But of these two essentials there is no proof; the defense is based upon assumptions instead of upon facts. It is a hardship that they should forfeit their security and likewise their debt under these circumstances, but it would be equally unjust to compel the mortgagor to pay something for which he has received no consideration, and in law the mortgagee under these circumstances, for retribution, must look to the party whom he has under error of fact enriched through his own negligence. In the final analysis both the facts and law seem plain and conclusive.

The judgment of the trial court is therefore affirmed.

C. B. KENNEY v. VIN D. CUNNINGHAM and Clara M. Cunningham.

(144 N. W. 1076.)

Promissory notes — payment — evidence — foreclosure — sheriff's deed.

Evidence examined, and *held*, that the notes given by one B. to the J. I. Case Company were collateral to the debt of the defendant C., and not accepted by the company as payment. Therefore the foreclosure proceedings which were based upon the debt of C. to the J. I. Case Company are regular, and title to the land passed to plaintiff upon receiving a sheriff's deed.

Opinion filed December 30, 1913.

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

Affirmed.

Davis & Warren, for appellants.

The attempted foreclosure of the chattel mortgage was illegal and void. A mortgagee waives his lien by consenting to a sale of the mortgaged property by the mortgagor. Jones, Chat. Mortg. 5th ed. § 465; 7 Cyc. 47.

A mortgagee who sells the mortgaged property without foreclosure is guilty of a conversion of the property, and the lien of the mortgage is extinguished. Force v. Peterson Mach. Co. 17 N. D. 220, 116 N. W. 84; Rev. Codes 1905, § 6145.

Sale of chattels by mortgagee renders him accountable to the mortgagor on the same basis as though he had received the cash. Croze v. St. Mary's Canal Mineral Land Co. 143 Mich. 514, 114 Am. St. Rep. 677, 107 N. W. 92, 313.

Sale by first mortgagee of personal property, without foreclosure, extinguishes the mortgage. Lovejoy v. Merchants' State Bank, 5 N. D. 623, 67 N. W. 956.

Default in chattel mortgage must exist before foreclosure, in order to render power of sale in mortgage operative. Rev. Codes 1905, § 7457.

If mortgage debt has been paid, equity will set aside sale made thereafter. 8 Ballard, Real Prop. § 578.

A foreclosure by advertisement before there is any sum due under the mortgage is void. Pratt v. Beiseker, 17 N. D. 243, 115 N. W. 835; 27 Cyc. 1451–1465.

An illegal foreclosure confers no title. Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855; Kirby v. Howie, 9 S. D. 471, 70 N. W. 640; 27 Cyc. 1496.

The burden of proof is upon the plaintiff to establish his title by competent evidence. Hebden v. Bina, 17 N. D. 235, 138 Am. St. Rep. 700, 116 N. W. 85; Ottow v. Friese, 20 N. D. 86, 126 N. W. 503.

Wolfe & Schneller, for respondent.

The defendants are estopped to make claim that the debt had been paid. Payment is an affirmative defense, and the burden is upon the party asserting it. Robertson Lumber Co. v. State Bank, 14 N. D. 511, 105 N. W. 719.

BURKE, J. In May, 1906, V. D. Cunningham, one of the defendants, purchased a threshing engine from the J. I. Case Threshing Machine Company, and executed and delivered therefor his promissory notes in the sum of $2,000, secured upon the engine itself, and further secured by a third mortgage upon the quarter section of land involved in this action. The following year Cunningham became involved financially, and had an understanding with the Case Company through its agent that the engine should be sold to one Blanchard.

Regarding the terms of this sale to Blanchard, there is no controversy. There is, however, a dispute as to the effect of this sale upon Cunningham's notes to the Threshing Machine Company. Cunningham claims that he was to receive credit for the amount charged Blanchard for the engine, some $1,810, while it is the contention of the company that those notes were to be taken merely as collateral, and that Cunningham should receive credit only when Blanchard made payments upon the note. This controversy we will discuss later. Under this agreement, Blanchard took the engine, but shortly thereafter discovered that Cunningham had executed a chattel mortgage upon the engine during the time that it had been in his possession, which mortgage was subject to the original mortgage to the Case Company, but prior to the sale to Blanchard. To meet this situation, the

Case Company proceeded to foreclose the mortgage which it held from Cunningham upon the engine, bidding the same in themselves as a mortgage sale and crediting the proceeds, some $969, upon Cunningham's note. Shortly thereafter the said company resold the engine to Blanchard. It is also in evidence that Blanchard had not paid for the engine at the time when this action was commenced. At the time of the foreclosure of the chattel mortgage upon the engine, the Case Company also started foreclosure upon the real estate, and bid in the same themselves at the sum of $1,340, and a sheriff's certificate was delivered to them. This certificate was duly assigned to the plaintiff, Kenney, who later obtained a sheriff's deed to the premises, paid some of the prior mortgages upon the land, which amounted to something over $2,000, and ever since such time has paid the taxes thereon. Cunningham knew of the foreclosure aforesaid, but made no effort to prevent or redeem from the proceedings. After the sheriff's deed had been issued to plaintiff, Cunningham made a pretended conveyance of such premises to his sister-in-law, who in turn conveyed it to Cunningham's wife. The deed from Cunningham to his sister-in-law contains the provision that the same is subject to all encumbrances of record. This action is brought to quiet title to the real estate hereinbefore mentioned.

(1) The crucial point for decision is whether or not Cunningham's notes were paid by the acceptance by the Case Company of the Blanchard notes. If the notes given by Blanchard were accepted by the company as so much cash, Cunningham's notes would have been materially reduced, and the chattel mortgage upon the engine at least wiped out, though how this would vitiate the sale of the land is not so apparent. On the other hand, if the Blanchard notes were taken merely as collateral, the company would be under no obligation to refrain from the real estate foreclosure until they might eventually collect the debt from Blanchard. The printed abstract contains about 130 pages of more or less relevancy bearing upon this question. Its length forbids our setting it forth in this opinion, but after a careful examination of the whole of it, we have reached the conclusion that the claim of Cunningham is not supported by a preponderance of the evidence. We will mention but a few of the reasons that occur to us, supporting this conclusion. First, at about the time of the first transaction with

Blanchard, the agent of the Case Company gave to Cunningham a receipt for the Blanchard notes, which reads as follows:

Brittin, S. D., Aug. 10, 1907.

Received of V. D. Cunningham notes of M. P. Blanchard amounting to eighteen hundred and ten dollars ($1,810) which are taken as collateral to my notes due J. I. Case Threshing Machine Company, to be indorsed on the same as fast as collected.

(Signed) J. I. Case Threshing Machine Company.
Per C. J. Phelps.

This receipt was kept by Mr. Cunningham until the time of trial. Second, at the said time, Cunningham did not demand nor receive his notes from the Case Company, nor did he ask to have the sum of $1,810 indorsed thereon. As the Cunningham indebtedness of $2,000 consisted of five notes of $400 each, he should have received four of the notes at this time, if his version of the transaction is correct. Third, Cunningham testifies that he repeatedly wrote to the company asking about the collections of money from Blanchard, and whether or not the proceeds of said collections had been indorsed upon his own notes. Fourth, from 1908 until the time of trial, Cunningham ceased to pay the interest upon the first mortgage upon this land, and also ceased to pay the taxes thereon. All of those four propositions show conduct so inconsistent with Cunningham's present claim that we are satisfied that the testimony of Phelps, the Case agent, is the true account of what occurred. This being so, it follows that Cunningham's notes aggregating $2,000 have in no manner been paid, excepting upon sale of the engine for some $960 and a very small payment by himself. The company had a valid and subsisting debt against Cunningham secured by the mortgage upon the land, which was duly foreclosed, and after the year for redemption had expired, title passed to plaintiff, Kenney. Neither did the surrender of first notes to Blanchard cancel any part of Cunningham's debt.

This is the view taken by the trial court, and is correct, and said judgment is in all things affirmed.

STATE OF NORTH DAKOTA EX REL. T. F. McCUE, Attorney General, v. NORTHERN PACIFIC RAILWAY COMPANY and Great Northern Railway Company and Minneapolis, St. Paul, & Sault Ste. Marie Railway Company.

(145 N. W. 135.)

Three separate actions against the above-named defendants severally were consolidated as to proof, and are decided by this opinion. These actions were begun by the state to compel observance by defendants of chapter 51 of the Session Laws of 1907, prescribing a maximum intrastate freight rate for transportation of lignite coal, and requiring that when a shipment is over more than one railroad, the entire distance shall be considered as one haul and the freight rate prorated between said carriers.

The granting of the writs compelling observance of the statutory rate was opposed under the defense that the statute was void because so low as to be confiscatory of the property of the carriers, and hence violative of the 14th Amendment to the Federal Constitution. This contention was overruled by this court in the opinion at 19 N. D. 45, filed in 1909, and writs as asked by the state were ordered to issue. The defendants appealed to the United States Supreme Court, which affirmed said decision without prejudice, but granted defendants permission to "reopen the case by appropriate proceedings, if, after adequate trial" with the rates in force, they should see fit to again present the results under the rates as proof of the confiscatory character of the statutory coal rate. The statutory rate was put in effect, and the railroads are still operating under it. In 1912 they again submitted proof to this court of the receipts for the fiscal year next preceding June 30, 1911, together with proof of expenses chargeable against the lignite coal traffic. Each road has submitted its separate proof and contention that the statutory rate does not yield sufficient revenue to defray the expenses of carriage of this coal, to the effect that the state is compelling its common carriers to transport this commodity for less than cost, and therefore confiscating their property. The proof was taken,

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Note.—The authorities on the question of the valuation upon which return or income from intrastate railway rates prescribed by law is to be computed are collated in a note in 57 L. ed. U. S. 1511.

As to the reasonableness of state limitation of railroad rates, see note in 44 L. ed. U. S. 417. And for the elements entering into determination of reasonableness of railroad rates prescribed by the state for local traffic, see notes in 15 L.R.A.(N.S.) 108, and 25 L.R.A.(N.S.) 1001. And on the question of unconstitutional inequality or discrimination in state regulation of rates, see note in 46 L. ed. U. S. 92.

as in the original proceedings before this court, by a referee, who has reported all the testimony offered, but who was not authorized to make, and who has not made, findings of fact or conclusions of law. This court has made separate and full findings of fact, under the proof submitted, as to the effect of the rate upon each road. It finds: (1) That, as to the Great Northern Railway Company, owing to conditions peculiar to the country traversed by it, the statutory rate yields it a reasonably fair compensation over and above all charges and expenses against the lignite traffic, and that as to it the statutory rate is reasonably compensatory. (2) That, as to the Northern Pacific Railway Company, out of total freight receipts for lignite coal, amounting to $58,953, the total cost of transportation, or out-of-pocket costs, together with all fixed or overhead expenses apportionable to said lignite traffic, consumed all of said receipts excepting $847, its net profit in the handling of the lignite business for the twelve months in question. That such rate is slightly remunerative, but in fact noncompensatory, considering the volume of freight carried and the property of the railroad devoted thereto. (3) That the total Soo line freight receipts from lignite coal hauled during said fiscal year amounted to $83,670. That nearly one half of its entire lignite coal tonnage originated at Wilton, 2,532 carloads of which were hauled only 28 miles to Bismarck and delivered to the Northern Pacific carrier for an average haul by it of 105 miles, upon which the freight rate when prorated as to distance, as required by the statute, has reduced what the Soo carrier would otherwise receive under the statute from 40 cents per ton to 24.5 cents per ton for the 2,532 carloads thus delivered to the Northern Pacific during the year. Under similar connections with the Great Northern at Minot, it has there hauled approximately 500 carloads of lignite coal for an average of 12 miles, realizing therefrom 8.5 cents per ton only, or $1.83 per carload for such haul, delivered to the Great Northern road for an average haul and charge based thereon of 65 miles, from which the Great Northern received $7.53 per carload. These and many other conditions have placed the Soo line at a disadvantage in this traffic. The prorating feature of the statute alone has reduced its freight receipts on lignite approximately $13,000 below what it otherwise would have received, and nearly that amount under what the same freight carriage would have yielded the Northern Pacific or the Great Northern under usual conditions on their lines. Its total receipts amount to more than its actual out-of-pocket costs, or actual costs of transportation, but are from $9,000 to $12,000 less than the total costs including fixed and overhead expenses properly chargeable to the carriage of this commodity and against the earnings therefrom. That the carriage of lignite coal by the Soo line within this state during said fiscal year was not only nonprofitable, but occasioned a loss to it when its fixed expenses apportionable to all traffic are in proper proportion and amount assigned to and charged against the earnings from this commodity.

From the foregoing epitomized findings of fact it is *held:*

Freight rate — presumed reasonable — contrary must be shown beyond reasonable doubt.

(a) The statutory freight rate is presumed to be reasonable, which presumption continues until the contrary appears, and the rate is shown beyond a reasonable doubt to be confiscatory.

Proof — noncompensatory rate — transportation of commodity — insufficiency of proof that rate is confiscatory.

(b) Proof that a rate is noncompensatory—that is, while producing more revenue than sufficient to pay the actual expenses occasioned by the transportation of the commodity, but insufficient to also reimburse for that proportion of the railroad's fixed or overhead costs properly apportionable to such commodity carried—is not sufficient to establish that the rate is confiscatory in law.

Nonconfiscatory rate — established how — deficit — interstate freight earnings — profit — reasonable — railroad property — value of.

(c) In order to establish such a noncompensatory rate to be confiscatory, it must further appear that any deficit under the rate affects the net intrastate freight earnings materially, and reduces them to a point where they are insufficient to amount to a reasonable rate of profit on the amount of the value of the railroad property within the state contributing to produce such net earnings.

Intrastate freight earnings — confiscatory — value of property devoted to such traffic — proportion.

(d) To ascertain whether such net intrastate freight earnings are thus confiscatory because unreasonably low, the railroad attacking the legislative rate on such grounds must by proof establish the total value of its property devoted to railroad use and within the state, and then by proof establish the proportion thereof equitably apportionable as producing such net intrastate or domestic freight earnings, after which the reasonableness of the gross net return from intrastate business upon the railroad investment producing it can be determined.

Proof of confiscation — intrastate freight earnings — fair profit — valuation of property so used.

(e) For the next and final step in the proof of confiscation under the rate, it must further appear either (1) that the net total intrastate freight earnings are insufficient to yield a fair and reasonable return on the fair valuation of the railroad property used to produce such net earnings, and that the commodity in question is carried for less than sufficient to meet all expenses, including out-of-pocket costs and fixed charges; or (2) it must be reasonably certain that the loss on the commodity under the commodity rate attacked reduces the balance of the net intrastate freight earnings to a point where such total net intrastate earnings, including the loss on the commodity

rate, fail to yield a fair and reasonable return on the investment, measured under the above rules, upon making of which proof the confiscatory nature of the rate is established.

Value of railroad property — fair actual value — reasonableness of rates — computed on actual value.

(f) In determining the value of railroad properties, proof of the so-called railroad value is insufficient to establish the fair actual value upon which, as a basis, apportionment of values and reasonableness of rates may be computed.

Failure of such proof — value — proportion of property used in such traffic.

(g) Measured by the foregoing rules, which seem to be the law as applicable to the facts in this case, there is a failure of proof on the part of all the carrier defendants, in that the Northern Pacific and Great Northern railroads have offered no proof of the value of their property, or the approximate proportion thereof utilized to produce its domestic earnings; and the Soo, while attempting such proof, has failed to make the proof required by the Minnesota, Missouri, Arkansas, and Oregon Rate Cases, 230 U. S. 352–560, and other Federal decisions.

Failure of proof — presumption — reasonableness of rate — continues — statute valid — intrastate transportation of coal.

(h) Under such failure of proof the presumption of reasonableness of the rate attacked continues, and the statute must be held to prescribe a reasonable charge for the intrastate transportation of coal.

Opinion filed January 2, 1914.

Proceedings on application on behalf of the State for an original writ directing the observance of the freight rates in question, and enjoining the collection of higher than the maximum statutory rate.

Writs granted. Costs and disbursements of State ordered taxed by the Clerk.

Andrew Miller, C. L. Young, Alfred Zuger, for plaintiff.

The opinions of railway officials are not proper evidence. They are too hazy and indefinite to receive serious consideration. Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 548, 56 L. ed. 312, 32 Sup. Ct. Rep. 108; Ames v. Union P. R. Co. 64 Fed. 188; F. Schumacher Mill. Co. v. Chicago, R. I. & P. R. R. Co. 6 Inters. Com. Rep. 66.

The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of the common law. Kansas City Southern R. Co. v. Carl, 227 U. S. 639,

57 L. ed. 683, 33 Sup. Ct. Rep. 391; 2 Wyman, Pub. Service Corp. § 1232; Beale & W. R. Rate Regulation, § 554.

Brief consideration of the characteristics of lignite coal will show the injustice of allotting to it a cost determined without regard to such characteristics. The expense of handling it is low. The carrier neither loads nor unloads the cars. The *rate* should be fixed in the light of these facts. Tift v. Southern R. Co. 10 Inters. Com. Rep. 548, 138 Fed. 764; Louisville, E. & St. L. Consol. R. Co. v. Wilson, 132 Ind. 517, 18 L.R.A. 105, 32 N. E. 311; Trades League v. Philadelphia, W. & B. R. Co. 8 Inters. Com. Rep. 368; American Cent. Ins. Co. v. Chicago & A. R. Co. 74 Mo. App. 89; Hays v. Pennsylvania Co. 12 Fed. 309; 2 Wyman, Pub. Service Corp. § 1348; Denison Light & P. Co. v. Missouri, K. & T. R. Co. 10 Inters. Com. Rep. 337; F. Schumacher Mill. Co. v. Chicago, R. I. & P. R. Co. 6 Inters. Com. Rep. 66; Coxe Bros. & Co. v. Lehigh Valley R. Co. 3 Inters. Com. Rep. 460, 4 I. C. C. Rep. 535; Interstate Commerce Commission v. Chicago, G. W. R. Co. 141 Fed. 1015; Re Advances on Coal, 22 Inters. Com. Rep. 604.

Circumstances may exist under which rates are reasonable which do not afford a net income above the cost of operation and taxes, or the cost of operation, taxes, and fixed charges. State ex rel. State R. Comrs. v. Seaboard Air Line R. Co. 48 Fla. 129, 37 So. 314; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Wyman, Pub. Service Corp. § 1201; 3 Enc. U. S. Sup. Ct. Rep. 632; Freund, Pol. Power, § 551; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 115, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; Willcox v. Consolidated Gas Co. 212 U. S. 19, 52, 53 L. ed. 382, 400, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

To determine whether rates are confiscatory or not, all sources of revenue must be considered. Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; State ex rel. State R. Comrs. v. Seaboard Air Line R. Co. 48 Fla. 129, 37 So. 314.

If the *net* earnings from *all sources* are *compensatory,* this is sufficient, and a given rate on a certain commodity cannot be said to be confiscatory. Matthews v. Corporation Comrs. 106 Fed. 10; Southern R. Co. v. McNeill, 155 Fed. 787; Re Arkansas Rate Cases, 187 Fed. 307; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 549, 56 L. ed. 308, 312, 32 Sup. Ct. Rep. 108; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Seaboard Air Line R. Co. v. Florida, 203 U. S. 269, 51 L. ed. 178, 27 Sup. Ct. Rep. 108; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 596, 41 L. ed. 566, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 467, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; People v. Budd, 117 N. Y. 1, 5 L.R.A. 559, 22 N. E. 670.

The power of states to regulate within their limits matters of internal police includes, under that general designation, whatever will promote the peace, comfort, convenience, and prosperity of the people, and is not limited to health, morals, or safety of the public. Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 297, 43 L. ed. 706, 19 Sup. Ct. Rep. 465; Noble State Bank v. Haskell, 219 U. S. 112, 55 L. ed. 117, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864; Gladson v. Minnesota, 166 U. S. 427–430, 41 L. ed. 1064, 1065, 17 Sup. Ct. Rep. 627; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

In the proper application and enforcement of these losses for the general welfare of the whole people, relatively small individual losses may occur. But this is not an argument against such law. Martin v. District of Columbia, 205 U. S. 135, 139, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440; Camfield v. United States, 167 U. S. 518, 524, 42 L. ed. 260, 262, 17 Sup. Ct. Rep. 864; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 92, 95, 45 L. ed. 102, 103, 105, 21 Sup. Ct. Rep. 43; Williams v. Fears, 179 U. S. 270, 276, 45 L. ed. 186, 189, 21 Sup. Ct. Rep. 128; W. W. Cargill Co. v. Minnesota, 180 U. S. 452,

469, 45 L. ed. 619, 627, 21 Sup. Ct. Rep. 423; Quong Wing v. Kirkendall, 223 U. S. 62, 56 L. ed. 351, 32 Sup. Ct. Rep. 192; Cobb v. Northern P. R. Co. 20 Inters. Com. Rep. 100; Great Northern R. Co. v. Chicago, M. & St. P. R. Co. 5 I. C. C. Rep. 571.

The burden of proving that the constitutional guaranty of protection to property is infringed is upon the defendant. Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 173, 44 L. ed. 420, 20 Sup. Ct. Rep. 336; Re Arkansas Rate Cases, 187 Fed. 290; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 344, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 399, 38 L. ed. 1014, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 467, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 614, 615, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553.

It is the settled doctrine that if a railroad, as an entirety, does a business that is compensatory, it has no legal right to complain that an act of the legislature may deprive it of revenue over a portion of its line, or injuriously affect its business as to a part thereof. St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co. 176 Ill. 512, 35 L.R.A. 656, 52 N. E. 292.

Watson & Young (*Charles W. Bunn* and *Charles Donnelly,* of counsel), for Northern Pacific Railway Company.

In determining the reasonableness of a rate, if the entire intrastate business is to be taken as a basis of reasoning, why not take the business of the company *in all states?* Smyth v. Ames, 169 U. S. 540–543, 42 L. ed. 847, 848, 18 Sup. Ct. Rep. 418.

The Supreme Court of the United States never meant to affirm any such holding. If it had so intended, no leave would have been granted to improve the character of the proof. Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 549, 56 L. ed. 308, 312, 32 Sup. Ct. Rep. 108; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 25, 26, 51 L. ed. 933, 944, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 645.

A. H. Bright, John L. Erdall, and *Cobb, Wheelwright, & Dille,* for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

E. C. Lindley, Sanford H. E. Freund and *C. J. Murphy,* for Great Northern Railway Company.

Goss, J. Three separate actions are decided by this one opinion. Each was begun by the state of North Dakota, ex rel. attorney general, against the common carriers involved, the Northern Pacific, Minneapolis, St. Paul, & Sault Ste. Marie, and Great Northern Railway Companies. In 1907, Attorney General McCue petitioned this court for its prerogative writ of injunction to restrain the defendants from further noncompliance with chapter 51 of the Session Laws of 1907, that had been in effect since July 1st of that year, and had been ignored by these common carriers. On hearing the writs were issued as prayed for. See opinion of this court, 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869. The railroads appealed to the United States Supreme Court, where the cases were affirmed in 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423, without prejudice, but permission was granted the carriers to reopen the cases after the rates had been put in force for a sufficient time so that a test of the reasonableness of the rate attacked could be had from the results of operating under the rate, and, accordingly, the carriers have reopened the cases, after the rate had been put in effect for over a year, and they have offered testimony touching the reasonableness of the maximum statutory rate, contending it to be so low as to be confiscatory of their property, and void under the 14th Amendment to the United States Constitution. The cases were tried as one action under the stipulation that any evidence in the case might be considered as proof as to any or all of the defendants. Each carrier, however, has submitted its proof following its own theory.

Separate findings are made as to each carrier. Instead of formulating the usual ultimate findings of fact, we have made them evidentiary as well. This that our position, and conclusions may be fully understood on facts as well as law, and also as an aid to the United States Supreme Court, so far as the determination of the facts is concerned, assuming, of course, that this case will again reach that tribunal for final determination. As requested by counsel, we have made our

findings so full and complete that we trust, if an appeal is taken, the review may be had almost, if not entirely, upon the facts found. We may here state that we believe the prorating feature of chap. 51 of the Session Laws of 1907, to be the particularly objectionable feature of that legislation, and that the same works injustice to the Soo line; and if we were to pass judgment on the merit of the measure, we would unhesitatingly say that at least the last paragraph of the statute in question should be repealed or amended to omit the prorating feature thereof, governing the rate of coal shipments between connecting carriers where the shipment is over the line of more than one carrier. This, however, is beside the case.

Statement of Facts as to the Northern Pacific Railway Company.

The total revenue received by the Northern Pacific Railway Company from the commodity in question, lignite coal, for the entire fiscal year, or twelve months prior to June 30, 1911, was $58,953.07, as shown by the freight receipts of the company for that period. To ascertain the amount of expense incurred and properly chargeable against this particular commodity, in the earning of such gross revenue, by the carriage of that commodity, is the question of fact.

As a result of the painstaking work of the accounting department of this railway company, and its endeavors to render all the assistance possible in determining the matter of the apportionment of expense to this commodity, as is evidenced by the care and detail in the accounting, the information furnished by the exhibits, and that the books of the company have been thrown open to the experts of the state, we are enabled to arrive, with a reasonable degree of certainty, at the proper proportion of expense that should be chargeable against the revenue received from the carriage of this commodity.

From the statistics furnished we may ascertain such result by either of two methods, or by a combination of both. We refer to the division of expense as summarized under seven divisions, as calculated by the railway company, know as the railway method, or as divided into the 114 separate items of expense, classified into five grand divisions, under the method of the state's expert accountant, Mr. C. W. Hillman. To

contrast the two, the railroad has classified the expense into seven general items, as shown by N. P. Exhibit 24, as follows:

Train operation expense	$ 31,146.77
Switching	4,971.00
Station service	4,182.58
Repairs to freight cars	8,674.04
Maintenance of way and structures	7,119.93
Loss and damage, traffic, and general expenses	2,688.26
Total operating expenses	$ 58,782.57

Taxes 4.112 per cent of revenue, $58,953.07, $2,424.15, making a total charge of $61,206.72 in earning the freight revenue from the commodity of $58,953.07, leaving a deficit according to the railroad figures of $2,253.65, upon which they urge tne rate fixed by legislative enactment to be confiscatory, and therefore unconstitutional.

On the other hand, according to the method used by the state's expert, Mr. Hillman, there would appear to be a net profit over all expenses and taxes of $1,493.71, which is further increased by claims made by the state on page 20 of the brief, that a net profit of $2,391.63 is shown from the lignite traffic over and above total operation expenses inclusive of taxes. Of the seven classifications of expense under the railway method, two of them, that is, taxes in the sum of $2,424.15, and maintenance of way and structures at $7,119.93 (see page 18 of plaintiff's brief), are conceded by the state to be properly chargeable against the revenue from this commodity. The other charges are questioned, the state maintaining that train operation expenses should be charged at $30,611.38, instead of $31,146.76, a difference of $535.38; for switching, the state contends that the charge should be $4,611.25 on a total of 18,455 car movements chargeable to lignite traffic (see page 14 plaintiff's brief), instead of a charge based on 19,884 car movements, amounting to $4,971.00, or a difference of $359.75. As to the third subdivision, that of station service, the state, at pages 14 and 15 of its brief, contends the 4,412 cars of lignite receiving services should be charged for at 36 cents per service received per car, each car concededly receiv-

ing double service, that is, on a basis of service to 8,824 cars at 36 cents, instead of at 47.4 cents per car for station service, or an apportionment as contended for by the state of $3,176.64 for station service to lignite traffic, instead of $4,182.58 as allowed therefor by the company, or a difference of $1,005.94. The fourth item of repairs, renewals, and depreciation of freight cars is charged to the lignite traffic by the railway company at $8,674.04, the proper charge for which is contended by the state (pages 17 and 18 of its brief) to be $7,121.54, a difference of $1,552.50. The one remaining disputed item is that including three general items, namely, loss and damage, traffic expenses, and general expenses, which the railroad in this accounting has apportioned on a revenue proportion of 4.56 per cent of gross earnings, which, when applied to $58,953.07, produces a charge made against the lignite traffic of $2,688.26. In such apportionment there is included, as the amount allowed for loss and damage charged to lignite freight, the sum of $1,232.40. The state contends that this item of loss and damage, in amount $1,232.40, is not chargeable to this traffic. We will now consider each classification in which the apportionment thereto of expense is disputed.

Train Operation Expense.

This involves a computation from classification of freight with reference to (1) relative cost to all other freight of transportation of lignite; (2) the average tonnage per car; (3) the average haul; (4) the train movement, whether (a) main line through service, (b) main line way service, or (c) branch line service; in the consideration of all of which enters the proportion of empty car mileage to loaded car mileage. The computation which will take into account all the foregoing factors and yield the proportionate share of expense to be borne by this commodity as apportioned to the whole traffic is, by the use of equated ton, car, and train mileage, producing a relative cost from which, from known factors, the cost per ton mile of lignite coal can be determined, as tables in evidence show the manner of its carriage as to through, way, and branch line freight, the number of cars handled, where received and where delivered, the mileage and tonnage of each, the relative train loads and the empty car haul charged against the

traffic, as well as the exact amount of wages paid and cost of fuel and supplies in all freight movement within the state.

From N. P. Exhibit 18, for the fiscal year ending June 30, 1911, a summary of previous exhibits, we ascertain that 4,412 carloads of lignite coal, containing 118,550 tons of coal, were hauled an average of 79.13 miles, amounting to the equivalent of hauling 1 ton of coal 9,380,678 miles, or that number of ton miles, for which it was paid the total revenue of $58,953.07, which computed per car of approximately 27.1 tons gave $13.36 freight per car, or 6.28 mills as the average freight rate per ton mile, for carriage of lignite coal.

We then ascertain from N. P. Exhibit 19 that during said fiscal year there was moved within the state of North Dakota 3,081,552 tons of freight for an average haul of 227.7 miles, the equivalent of 701,732,022 tons moved 1 mile, or ton miles, yielding a total revenue, collected in this state, of $6,368,277.67. But this freight movement is divided into three classes, *viz.*, (1) Through freight, which constituted 63.5 per cent of the entire tonnage; (2) freight originating in or terminating within the state, constituting 32.7 of the entire tonnage; (3) freight entirely local to the state, which constituted 3.8 per cent of the entire tonnage; from which tonnage, at approximately 19¼ tons per car, for all freight, we find 36,450,279 loaded cars have been moved 1 mile. To produce every 100 miles of load as for all traffic, the average shows the additional necessary movement of an empty car 18.43 miles, and to produce the total loaded car miles, we find in addition an empty car mileage of 6,717,556, making a total car movement, loaded and empty, the equivalent of 43,168,035 car miles, of which lignite coal amounted to 346,201 loaded car miles, with 71.42 per cent thereof, or 247,261 miles, to be added for empty car mileage necessary in moving said loaded car mileage.

Considering now the relative expense incident to the movement of a ton of coal, as compared with the movement of the average ton of all freight, taking into account the fact that the average car of lignite contains approximately 27.1 tons, while the average car of all freight handled contains but approximately 19 tons, we find that this difference is equalized by the fact that for every 100 loaded car miles there is an empty car haul chargeable against the lignite freight of approximately 72 per cent, or 72 miles, while as to all freight the average

empty car haul is approximately 18 per cent only, which reduced to tonnage per mile haul, on a basis of 100 miles, gives the proportion approximately of 202 to 198. Or, in other words, that it takes 202 gross ton miles to produce 100 miles of live or revenue haul in the transportation of lignite as to 198 gross ton miles to produce 100 revenue ton miles of other freight, demonstrating that there is practically little difference between the cost of hauling 1 ton of lignite coal and the cost of hauling the average ton of all freight in the same class of train service, and that therefore the relative cost of transportation of lignite coal to the cost of other freight depends upon the class of train service furnished, that is, whether the commodity is carried as (1) main line through freight, (2) main line way freight, or (3) branch line freight.

We may here properly comment upon the large proportion of empty to loaded car miles in the lignite traffic. The above percentage of approximately 72 per cent is that given by the railway company as the computation from the actual miles of empty car haul computed as to each car, as appears from tables in evidence and from the testimony of the accountants. Thus, it would seem that each car hauling lignite is charged with an empty mileage of more than one half of one freight division. At first glance it would appear that each car was charged with approximately 175 miles empty car haul, in view of the fact that, as shown by Table 6 of N. P. Exhibit 21, 2,532 of the 4,412 cars hauling lignite were received loaded by this carrier from the Soo line at Bismarck; but we assume that for each one of these 2,532 cars so received necessarily an empty return trip for a great portion of the entire loaded distance, or the percentage of nearly 100 of the loaded distance, is charged for empty mileage, as necessarily all Soo freight cars must be returned to Bismarck for delivery to the Soo road. This probably increased rather than diminished the empty car haul properly chargeable. In this connection, too, no empty car mileage without the state has been added in charging the empty car mileage from the place where the car had last delivered its load back to the mine, because the total return trips of the empty cars received from the Soo at Bismarck, figured as empty for 100 per cent of the loaded haul for such cars alone, amount to 265,394 car miles of empty haul, or

18,133 miles more than is charged for all empty haul. See N. P. Exhibit 18.

For comparison we here state that the empty car mileage of the Soo amounts to approximately 20 per cent more than that figured as the empty car mileage of the Northern Pacific, but the average loaded car haul of the Soo is but 41.76 miles (plaintiff's Soo Exhibit 1C) as against an average of 80 miles for the Northern Pacific. The Great Northern road, which makes no charge until the empty car reaches the division upon which it is to be used, has an empty car mileage of 30.9 per cent to a loaded car mileage of 69.1; figured on total car miles empty and loaded of 100 per cent, or figured on a basis of empty to loaded car haul, with a basis of 100 for the loaded car haul, the empty car mileage would be about 43 per cent of the loaded car haul, and with an average loaded car haul for lignite coal of 63 miles. This difference in the empty car haul between the Great Northern and the other two roads is due in the main to different conditions prevailing along its road, rather than due to any difference in system of computing empty car mileage against the lignite traffic. We take judicial notice that the population along the Great Northern lignite market would average three times as dense as along the Northern Pacific or Soo lines. Accordingly, the Great Northern has the advantage in freight consumed, leaving more empty cars ready for local loading. Besides, eastern coal is used on the Great Northern in greater proportion than in the Northern Pacific or Soo lignite territory, leaving empty coal cars for use. The same is true as to lumber shipments. We conclude the difference in empty car mileage is actual, and arises from conditions favoring the traffic in such respect on the Great Northern.

Having shown, then, that the empty car haul overcomes the advantage in favor of lignite coal arising from the half greater load in tons per lignite car than average freight, so that lignite is carried on an average relative cost per ton on an equality with all other kinds of freight, leaving out the question of the kind of train on which the same is carried, we now consider the effect of the train service rendered to lignite upon the cost, compared to the average cost of service to all other freight. And to determine this, reference is had to N. P. Exhibit 20, showing the comparative cost of transporting freight in main

line way, main line through, and branch line freight trains, also operating expenses within or touching North Dakota for train service and engine service expenses, including repairs of engines, wages of trainmen, fuel, and all supplies used in such transportation. Consulting said table we find an entire mileage within the state for the months of November, 1910, and April, 1911, conceded by all parties to be representative months reflecting a fair average of traffic conditions for the year, of, for main line through freight, 182,694, train miles conducted at an actual computed (not estimated) cost of $139,831.74, or at an average cost per train mile of 76.5 cents, which reduced to ton miles by multiplying the train mileage by the average gross train load in tons, 1,476, produces 259,787,614 tons as carried 1 mile, on ton miles, of main line through freight, yielding the result of a carriage of 100 tons 1 mile for an actual cost of 5.18 cents.

Treating main line way freight in the same manner, and from the same table, we find 38,910 train miles carried for $35,982.94, or an average cost per train mile of 92.5 cents. But the average load per main line way freight is but 669 tons as compared with 1,476 tons of main line through freight. So that the ton miles produced by multiplying the train miles by the average train load of 669 tons produces but 25,313,590 ton miles, or tons carried 1 mile, at an average actual cost per 100 ton miles of 13.83 cents.

Treating branch line freight in the same manner, and from the same exhibit, we ascertain a train mileage of 72,143 was conducted at an expense of $45,129.62, or an average actual cost per train mile of 62.6 cents. But here again the average tonnage is much less than the main line through, it being but 404 tons per branch freight line train as against 1,476 of main line through, and 669 of main line way freight, which produces an actual cost for carriage of 100 tons 1 mile, or 100 ton miles, of 15.5 cents on branch line freight service.

The actual cost per 100 ton miles having been found at 5.18, 13.83, and 15.50 cents respectively, of the three classes of service, we find they compare as follows, using 100 per cent as the cost of main line through freight, *viz.*, 100 for main line freight, 266 for main line way freight, and 299 for branch line freight; and that the relation in loads as to ton miles between main line through and main line way freight is as 1,476 tons is to 669 tons, or as 221 is to 100. The foregoing is

without reference to lignite traffic, but merely to obtain the equated expense and relation between all freight.

It is in the application of the foregoing figures to the actual car mileage of lignite freight, classified with reference to main line through, main line way, and branch line freight, that the difference arises between the state and the defendant company. The latter had taken the proportions arrived at as to all freight for the representative months of November and April and applied the same to the entire haul of lignite for the entire fifteen months, using in the application the actual car mileage of lignite for said entire period. It produces the following figures: For main line through actual car miles 132,346, at a relative cost of 100 equals an equated car mileage of 132,346 main line way actual car miles 192,246 at a relative cost of 267 as compared with main line through yields in equated car miles 513,297. In branch line actual car mileage, 39,892, at a relative proportion of 299 to main line through, yields 119,277 in equated miles, all equated as on the proportion of main line through freight. Totaling we find the actual car miles, 364,484, when equated, to yield a total of 764,920 equated car miles, which amounts to 210 per cent of the actual total car mileage. All of which, being the actual and equated mileage in the transportation of lignite coal for the fifteen-months period, is the equivalent of saying that the transportation of lignite costs 210 per cent of the equated ton mile cost of all freight.

Turning now to the third subdivision of Northern Pacific Exhibit 22, we find the actual ton mile of all freight moved in North Dakota during the fiscal year in question (see page 206 abs., state's witness Johnson's testimony) to be 701,732,022 ton miles, of which, as appears from N. P. Exhibit 20, 91.121 per cent of 635,843,835 tons carried on the main line at a relative cost of 1 or 100 per cent equals 579,387,280 as the equated revenue ton miles; and of said total actual ton mileage on the main line, 8.879 per cent was carried on main line way trains at a relative cost of 267 per cent of the cost of main line through trains, or 267 times 56,456,575 tons of main line way freight actually carried, equaling 150,739,055 equated revenue ton miles on the basis of main line through freight; and that on branch lines 65,888,167 ton miles were actually carried at a relative cost of 299 per cent of the cost of main line through, yielding 197,005,619 equated revenue ton miles

on the basis of main line through. A total of which equated revenue ton miles produces 927,131,954 equated revenue ton miles, carried at a total actual train operation expense for North Dakota for the fiscal year ending June 30, 1911, of $1,465,908.88 (see N. P. Exhibit 23), the cost of which calculated per 100 ton miles amounts to 15.811 cents, which, applied to the total ton miles of lignite carried for the fiscal year, to wit, 9,380,678, multiplied by 2.1 or 210 per cent, the ascertained ratio of expense that transportation of lignite coal bears to the equated cost of all freight (N. P. Exhibit 22), assigns the total relative cost of $31,146.75 as the approximate amount of the total train operation expense of $1,465,908.88 properly chargeable to the lignite traffic for that year according to the railroad computation.

But in the foregoing computation the railroad company has used, as appears from Exhibits 17 and the second subdivision of the first page of Exhibit 22, the actual lignite car mileage, classified to main line through, main line way, and branch lines, for a period beginning April 11, 1910, and running to June 30, 1911, or for more than one fiscal year by two and two-thirds months, and that, instead of the figures equated on the second subdivision on the first page of Exhibit 22, we should take the loaded car mileage divided in the main line way and through and branch line trains for the twelve months commencing July 1, 1910, and running to June 30, 1911, which carried forth produces the following as the equated car miles: Main line through actual car mileage, 129,648, at a relative cost of 100 per cent, yields 129,648 in equated car miles; 178,166 main line way car miles at 267 per cent yields 475,693 equated car miles; and actual car miles of branch lines, 38,387, at 299 per cent, yields 114,777 equated car miles, or a total of 346,201 actual car miles for main line through, main line way, and branch lines, for an equated car mileage of 720,118, or the relationship of 100 to 208, equivalent to a finding that the transportation of lignite coal costs 208 per cent of the equated ton mile cost of all freight. Turning again to N. P. Exhibit 20, we find the total ton mileage carried on main line through trains was 269,656,344, procured by multiplying 182,694 train miles by 1,476 tons, the average gross train load in tons on main line through freights. Treating main line way freight in the same way, we find it amounts to 26,030,790, procured by multiplying 38,910 train miles by 669, the average tonnage per train.

Treating branch line freight the same way, we find 29,165,972 as the ton mileage on branch lines, obtained by multiplying 72,143, branch line freight train mileage, by 404, the average branch line train tonnage, which, reduced to per cent, treating 100 per cent as the total of the three, resolves to 83.01 per cent for main line through trains, 8.01 per cent for way freight main line, and 8.98 per cent for branch lines, as the proportionate carriage of ton miles for the respective services. But we find that, although there is an error in Exhibit 20 of nearly 10,000,000 tons in the ton mileage, the correct figures were used in ascertaining the cost per 100 ton miles at 5.18 cents. And the same is true of the relative cost per 100 miles of way and branch line freight. And the proportions arrived at on Exhibit 20 are approximately correct at 100 per cent, 267 per cent, and 299 per cent, leaving, as the only correction, the application of 208 instead of 210 per cent to the equated ton miles of 9,380,728, the total lignite ton miles (see N. P. Exhibit 18), to the total cost as ascertained by equated miles of 100 ton miles, or 15.811 cents, yielding $14,831.75. But the relation of cost of lignite haul to that of other traffic is as 100 is to 208, hence, the $14,831.75 must be increased 108 per cent, or a total of 208 per cent thereof taken, which produces $30,850.12 as the actual cost of train operation to be apportioned to the lignite traffic under the railroad method adopted by both experts, or a difference in favor of the state on the computations of $296.64, occasioned by the application of the relation of 210 instead of the correct relation of 208 per cent as the relative cost of lignite to all other freight traffic. We find, then, that $30,850.12 was the approximate actual expense of train operation during the fiscal year properly chargeable against the revenue received from the lignite traffic haul.

Switching Charges.

The next point of difference between the state and the company concerns switching charges. Upon this we accept the testimony of the railway company as to the fact that in the three switching yards, Fargo, Jamestown, and Mandan, the total cost of switching in making 599,022 car movements at these points was $149,471.21, approximately 25 cents per car movement. Referring to N. P. Exhibit 21, we find 4,412 cars

of lignite were moved during the fiscal year, of which amount, 2,532 cars were received at Bismarck from the Soo line, which cars so received concededly received two switching movements or 5,064 movements at Bismarck; and of the total cars moved 3,296 received four movements each, or a total of 13,184 switching movements; and that there was a single switching movement, incident to making and breaking trains in passing through terminals (as shown by tabulations of actual movements), of 1,636, giving a total of 19,884 switching movements at 25 cents per movement, or an expense of $4,971 chargeable to switching alone. Although the state in its brief contends this to be an overcharge, it seems to have been conceded as correct by the state's expert, Mr. Hillman. See page 526, abs.

In this connection let us say that no comment is made either in the testimony or in the briefs as to whether the Northern Pacific share of the switching charge for 2,532 cars, allowed at $2.50 per car by the rate bill in question (chap. 51, Sess. Laws 1907), to be apportioned between the carriers, has been figured in as revenue from the haulage of lignite coal. It is true that in the tables and in the testimony of Mr. Johnson, on page 182 of the abstract, statements are made "that the total revenue of the Northern Pacific from the movement of the coal was $63,904.20," but this is said in connection with freight earnings and average haul. This item alone would, assuming it was divided equally between the Soo and the Northern Pacific companies, amount to $3,165 each. However, counsel have assumed that this has been properly credited to the lignite revenue, and calculations made from N. P. Exhibit 1, in connection with the statutory rate allowed for carriage apportioned between the two carriers as to mileage, figuring at 27.1 tons per car, the cost would be approximately the $14.71 revenue per car for those received from the Soo line, inclusive of the switching charges. On such evidence, and from such deductions, we deem it established that the switching charge has been computed in, and is a part of, the lignite revenue, the total of which is $63,904.20, instead of being credited to the general earnings fund in excess of $6,000,000 in this state.

Station Service.

The next general subdivision of expense is that apportioned to station

service. We find that for the fiscal year station service was rendered within the state to 116,174 cars, 89 per cent of which, or 103,395, contained carload tonnage, within which class the 4,412 cars of lignite fall, and 11 per cent, or 12,779, contained merchandise or less than carload tonnage. For the carload freight, as lignite coal, no station handlers are necessary, but for the merchandise or less than carload tonnage, freight handling cost is equivalent to 50 cents per ton for an average of 19.5 tons per car; or in other words, it approximately takes the same expense to unload the average carload of way freight of merchandise that it does to render station service to twenty cars of carload lots freight of the classification of lignite coal. We can, then, equate either by carloads or by tonnage, and arrive at the same result. Using carload lots, as has the state, we add to 103,395 carloads the result of 12,779 less than carload lots multiplied by 20, or 255,580 equated carloads, making a total of 358,975 equated carloads, which bore a total actual expense of $184,472.24, including therein, of course, freight handlers' charges, which equated on carload lots produces the 255,580 equated carloads. Dividing the total expense by the total number of carloads we ascertain an equated or average actual expense of 47.4 cents per station service per car; and as each car of the 4,412 received station service at the point of origin and the point of destination, station service was rendered to the equivalent of 8,824 cars at 47.4 cents, or a total charge therefor of $4,182.58.

The state contends at pages 14 and 15 of its brief that the total number of equated cars should be applied to $129,134.24, the station costs, from which freight handlers' charges of $55,338 have been omitted. But the above computation has in effect already deducted the freight handlers' charges by equating the number of cars having less than carload tonnage. In other words, in considering the 12,779 cars containing less than carload tonnage on a basis of 20 to 1, allowance was thereby made so that the application of the total equated carloads to the amount of expense, with freight handling expenses deducted, would be approximately the equivalent of deducting it twice.

Repairs, Renewals, and Depreciation of Freight Rolling Stock.

The statistics in evidence show that for the fiscal year the freight car

repairs, renewals, and depreciation apportioned to North Dakota on a basis of total revenue car mileage, both loaded and empty, was $518,679.37. This expense, applied to a total freight car mileage of 43,168,037 miles, yields a charge of 1.2 cents per car mile for this class of expense. Applying this cost per mile to the 593,462 car miles, both empty and loaded, actually traveled by the 4,412 cars in the fiscal year in delivering their lignite freight, yields a total expense of $7,121.54. Thus far both state and railway company agree, but the state contends that this is all that should be charged for this class of expense, while the company claims that, inasmuch as under the car service rules forty-eight hours of free time is allowed for loading, and the same amount for unloading, a total of four days' free time for both, that therefore the short haul business receives greater use of a freight car than does the long haul business, and applying to said four days' free time, the average travel of a car of 20 miles per day, the company would add to the actual mileage a charge for mileage of 80 miles per car, and charge therefor at 1.2 cents per mile, which, figured on the basis of the average haul of all cars, both loaded and empty, would necessitate the increase of the above expense by 21.8 per cent thereof, or $1,552.50. And the question is whether this item is properly chargeable. We believe it is not. This general class of expense arises from use of freight cars, it costing 1.2 cents per car mile for their use. Concededly they are idle during the four days of free time, and are not in use. We can see no foundation in fact upon which to base this charge, and therefore disallow it, and find that the total charge to be allowed against the lignite traffic revenue because of freight car repairs for the fiscal year to be $7,121.54.

Traffic and General Expenses and Loss and Damage.

The next general division of expense is subdivided into three separate items as, (a) traffic expenses, (b) general expenses, and (c) loss and damage, for all of which the company seeks to charge the lignite traffic with 4.56 per cent of $58,953.07, the total revenue, or $2,688.26. The state concedes the fact that of this charge that apportioned to traffic and general expenses, in the sum of $1,456.14, is properly chargeable. This is obtained by charging the lignite traffic with the pro-

portion that the sum of the traffic expenses and general expenses, respectively $72,216.97 and $84,865.06, totaling $157,082.03, bears to the total freight revenue of $6,368,278, or a proportion of 2.47 per cent, which, applied to the gross earnings of the lignite traffic of $58,953.07, yields $1,232.12. The company claims that this percentage should be increased by the percentage ascertained in the same way, when $133,386.33 of loss and damage to freight has been so apportioned, which amount of loss and damage, the company claims, is a general overhead charge to be borne by all traffic in the proportion that the revenue from the traffic or commodity received bears to the entire freight revenue. On the contrary, the state contends that, as the freight rate on each commodity has been fixed with reference to the usual loss and damage shown by experience to result thereto in carriage, that this general item of loss and damage has already been paid by the freight collected on commodities on which the loss and damage resulted; and that, as no loss and damage is shown to have occurred arising from the carriage of lignite coal, that is, no lignite coal carried has been damaged or lost, the traffic in that commodity is not chargeable with any loss or damage. We believe the state's contention to be sound and unanswerable. Counsel for defendant company, in argument and in briefs in support of its contention, have given, as an illustration, damage arising from the wrecking of a carload of silk in transit by running into a freight train carrying lignite coal, and urge that, as the cause would be the obstruction causing the wreck, the damage resulting should be charged to all freight, because, if charged to the lignite traffic causing the wreck, all the revenue from said traffic for years might be more than equalized by the loss. Or if charged against any commodity, there would result perhaps a profit in carriage one year, while the same rate considered with the loss in the next year might result in a loss and be confiscatory according as loss or damage might occur. The basic fallacy in counsel's assumed case is that the freight rate on the train load of silk was fixed with reference to, and included as an element and item of charge therefor based upon probabilities, all dangers of wreckage. When application was made to the common carrier to transport this train load of silk, possibly from Seattle to New York city, so far as fixing the freight rate on the silk was concerned, in practical effect, the carrier had its option of carry-

ing the train load of silk with the risk omitted, and on that basis determining the freight rate with the risk omitted, and then insuring the arrival of the car at its destination and paying therefor and adding the amount of such insurance as an expense to the freight rate fixed without reference to such insurance; or, on the other hand, the carrier could do, as presumably they always do, not insure the arrival, but charge therefor adding the charge to what would otherwise be the fixed freight rate, thus carrying the insurance themselves. In fixing the freight rates on every commodity carried, this risk must be and is considered, and freight rates fixed with reference thereto. This is one of the elementary considerations in freight classifications. The source of this considerable item of expense sought to be charged as an overhead expense on all traffic is not shown, but it does appear that no portion of it arises from the lignite traffic; and presumably it has all been paid by rates fixed on other commodities on the basis of a reimbursement for such cost. And as they have been paid, the lignite traffic should not be charged with any part thereof when we are determining, as we are, the reasonableness of the rate that the legislature has said this lowest class of freight should bear. Doubtless some small charge for loss and damage should be made against this traffic, but the same should be sufficient only to reimburse for the loss and damage in the lignite traffic. As none is shown to have occurred during an entire fiscal year, the amount of an allowance in the rate for loss and damage would be no more than conjecture; and as the company makes no claims therefor based upon any probabilities of loss and damage in the lignite traffic itself, we will allow none. Accordingly, we refuse to allow the $1,232.12 item of cost urged by the company as arising from general loss and damage of freight apportioned to the state. However, the revenue from the lignite traffic should be charged with the traffic and general expenses in the sum of $1,456.14.

To recapitulate, we find the following to be correct charges against the revenue of the Northern Pacific Railway Company received from the lignite traffic, to wit: (1) For train operation expense, $30,850.12; (2) switching, 19,884 car movements at 25 cents, $4,971; (3) station service, 4,412 cars times two at 47.4 cents, $4,182.58; (4) freight car repairs, renewals, and depreciation, $7,121.54; (5) traffic and general expenses (no loss and damage allowed), $1,456.14; (6) main-

tenance of way and structures, 9,380,680 ton miles at .00759 per cent, $7,119.93; (7) taxes, 4.112 per cent of gross earnings, $58,953.07,—$2,424.15; making a total charge against the revenue from such traffic of $58,125.46. Deducting this amount from the $58,953.07, total revenue from said traffic, leaves the traffic yielding a net profit of $847.61 over and above all expenses and charges. With the finding of the foregoing facts, the discussion of the law applicable thereto will follow, after findings of fact have similarly been made as to the lignite traffic in the cases of State ex rel. McCue v. Minneapolis, St. P. & S. Ste. M. R. Co. and State ex rel. McCue v. Great Northern R. Co., companion cases to the one in which the above findings are found, and tried jointly therewith under the stipulation of counsel that the evidence in each case should be considered in all three cases so far as applicable, the cases for all purposes being by stipulation consolidated.

Statement of Facts as to the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company.

We are satisfied that this railway company has furnished all the statistics at its command tending to throw light on whether the lignite traffic is carried within this state at a profit or at a loss. But the statistics in the main amount to but estimates, inasmuch as the known bases are wanting from which to make definite calculations. This is understood and practically admitted by the railway officials themselves. The testimony of Mr. Tombs, auditor and leading statistician of the defendant company, in the examination conducted by the railroad's own counsel, virtually admits the impossibility of arriving at the cost of carriage of this commodity from the statistics at his disposal, and that any result must be merely approximate, and deductions from the statistics concerning the operation, expenses, and profit of the whole system, instead of that portion of the system within this state, and must of necessity be too indefinite to be classed as even an approximate result of the cost of transportation of this commodity. Pages 122 to 133 of abstract. We have examined all of the tables of statistics furnished, and are forced to the same conclusion. And this necessarily rejects *in toto* the gross earnings theory which counsel for this railroad have endeavored to sustain as applicable under its proof. The gross revenue

method is properly applicable to the determination of certain matters, such as the expense for taxation, where a true relation exists between the basis taken and the result sought. It is possible that, if this was a case to determine a commodity rate applicable to the entire Soo system, with the commodity moving with a reasonable uniformity over the entire system, or under conditions not peculiar to a particular locality, that the gross revenue theory might be of value. But to determine the reasonableness of a freight rate on a single commodity moving within a prescribed radius of 200 miles from the place of its production, and that wholly within a single state, and of no greater amount or proportion of the total traffic than that of lignite coal, and with no basic figures except gross expenses and gross earnings, it is impossible to get even approximate results. At best they must amount to mere estimates. To illustrate, under the application of the revenue basis as made by the company in Tables No. 2, 3, 4, 5, and 6, Group A, and other tables into which the deductions are carried, all coal carried during the summer months returns a profit regardless of the rate, while all coal carried during the six other months of the year must return a loss, even though the rate be twice that of the summer months.

However, there is in the testimony some satisfactory proof on a portion of the issues involved. During the fiscal year in question, from June 30, 1910, to June 30, 1911, this railroad transported 205,038 tons of lignite in carloads of approximately 27.1 tons per car, or 7,566 carloads, for an average haul of 41.76 miles, for a gross amount of $83,670 revenue. From N. P. Exhibit 18, we learn that 2,532 cars, or over one third of this entire traffic, were delivered at Bismarck by the Soo line to the Northern Pacific, all of which came from Wilton under a 28-mile haul, the equivalent of 69,593.5 tons, or 1,948,625 ton miles (see Soo Exhibit 35), and for which the Soo line did not collect the rate for the ordinary haul of 28 miles, but instead collected such portion thereof as the haul actually made bore to the entire haul made by both roads, as required by the rate law in question. Turning to N. P. Exhibit 18, we find that the average haul for this identical portion of the traffic carried by the Northern Pacific Railway Company was 105 miles approximately, which, when 28 miles is added, makes a total average haul of 133 miles, on which haul the Northern Pacific received, on an average, $14.75 per carload, inclusive of its share of a

$2.50 switching charge. By reference to the statutory rate, we find 71 cents per ton to be the charge for the entire haul, to which the $2.50 added makes an entire charge of $21.38, of which, for this considerable volume of traffic, the Soo road has received the difference between that amount and $14.75, the Northern Pacific charge, or $6.63 per car for hauling, or an average of 24.5 cents per ton for transportation of this coal said 28 miles. And as local conditions are matters of which the court will take judicial notice, we know that nearly 100 per cent empty car haul was necessary to earn this amount, as the north bound Soo freight from Bismarck to 28 miles north of Wilton must be practically nothing compared with this number of cars, 2,532, necessary to be used at Wilton for this haul. This item constitutes over one third of carloads handled, and over one fifth of the entire revenue received from lignite haul, for the year, and we are convinced that this common carrier in particular has a cause of complaint, as made in the testimony of the president of the road wherein he states in substance that in operation the rate law as applied to their traffic is burdensome, and renders the same unprofitable, because of "the feature of the North Dakota law making a joint rate over two railroads for a distance," thereby compelling such transportation of coal to such an amount, and for what would otherwise be about usual switching charges. The facts warrant at least the following investigation of the effect of the prorating portion of the rate statute:

The testimony is that the Missouri River division is the most expensive in operation, and least remunerative of any of the divisions of this railroad, and that upon the Missouri River division three fourths of the entire lignite traffic is hauled for two thirds of the revenue received from lignite, leaving to the other one fourth of that traffic one third of the earnings from this commodity. From this we can with reasonable certainty determine that another 2,500 cars of lignite handled on the Missouri River division, over and above the 2,532 cars used to make the lignite haul from Wilton to Bismarck on the Missouri River division, must also operate at either an actual loss or a noncompensatory rate. And comparing conditions and traffic of this road with the Northern Pacific, operating in virtually the same territory, and considering that the average haul of this commodity clearly favors the Northern Pacific railroad, while the empty car haul must

be equal and probably greater on the Soo than the Northern Pacific, we are satisfied that, as to the Missouri River division, lignite must be carried at an actual loss under the statutory rate and its application to the actual conditions under which the traffic is handled. Certain it is that the balance of lignite traffic in the state is insufficient in volume and revenue to make the traffic as a whole more remunerative on the entire Soo road within this state as to all lignite carried, than said lignite traffic is to the Northern Pacific road.

The average haul by the Northern Pacific of this lignite received from the Soo comes under a long or division haul, and may be classified either as main line through freight or as main line way freight, as its average haul is approximately 105 miles for the whole 2,532 cars so received, as to a 44-mile average haul for all other lignite hauled by the Northern Pacific, as appears from N. P. Exhibit 18. From this exhibit we also learn that the Northern Pacific Railway Company received $14.75 per car as an average charge for these 2,532 cars, or a total revenue of $37,347, from this portion of the lignite traffic received directly from the Soo road, leaving only $21,606.07 of a balance of lignite traffic revenue collected from its own road to make up its total revenue from lignite haulage of $58,953.07. For its portion of the haul the Soo gets, as heretofore stated, $6.63 per car, or 24.5 cents per ton, for transporting the coal 28 miles, where, if it were not for the last paragraph of the rate statute in question, it would receive 40 cents per ton and any switching charges, or, exclusive of switching charges, $10.84 per car, for what it now receives $6.63 per car for one third of its entire traffic in this commodity; and for which, but for this statutory provision requiring the rate to be figured over both carriers as a single haul, and apportioned between them, it would have received in revenue $27,446.88 exclusive of switching charges, while instead we find that, including its share of switching charges, it has received but $6.63 per car for 2,532 cars, for a total revenue therefrom of $16,787.16, or $10,659.72 less than it would have received had it delivered the coal to purchasers at Bismarck and collected the statutory freight therefor, and made no charge for switching expenses. With these figures and results, of which there can be no question, we can make the following calculations as to whether the Soo rate is remunerative or otherwise for at least this portion of its traffic: Let us compare

with the Northern Pacific first as to cost of conducting transportation, and apply the results to this traffic from Wilton to Bismarck. We have after considerable investigation determined that the expense of conducting transportation, as one item only of the aggregate expense, on the Northern Pacific, has cost that road $30,850.12 in earning the gross freight revenue of $58,953.07; or in other words, for every dollar of revenue received by the Northern Pacific road from the haulage of this traffic in this state, it has expended for conducting transportation 53.07 cents. We have also determined that the cost for operating expenses per ton revenue mile on the Northern Pacific road of all freight is 1.5811 mills, or that fraction over 15 cents per 100 ton miles; and that the relation between the relative cost of lignite and all freight is that of 208 to 1. Increasing the rate per ton mile by 208 per cent, we find a cost of 33 cents per 100 car miles if this traffic was carried on the Northern Pacific road. Each carload of lignite contains 27.1 tons, which carried 28 miles results in a ton mileage of 759 tons per car, the cost of which, figured at 33 cents per 100 ton mileage, gives for operating expenses alone an actual cost of $2.51. As this is but 53 per cent of the total cost of carriage on the Northern Pacific, as heretofore determined, we find that the whole cost will equal $4.73, without taking into account any classification of the service and of the fact that this is branch line service, and after its delivery to the Northern Pacific is carried as either main line way freight at a great cost reduction, or carried at a still less expense as main line through freight, the average haul being 105 miles, approximately a freight division, which would tend to classify it, or a considerable portion of it, as main line through. Now, applying the relative cost of main line way freight to this, we find the cost exclusive of switching would amount to $5.85 per car, the Northern Pacific relation of main line way to branch line freight being in the proportion of 266 to 299. But if we regard this when on the Northern Pacific as through freight, and compare this haul with the result of main line through freight, which would be more exact when the average mileage is considered, the computation would be made on a basis of relation of cost of 100 for main line through to 299 for branch line way, which would be practically the equivalent of taking three times the $4.73, or $14.14 per ton, as the cost of transportation when percentages are figured accu-

rately. Undoubtedly this is too high, and that the proper cost is about an average between the way line freight cost of $5.85, and this cost of 1.273 cents per revenue ton mile, figured on the 759 ton miles per car transported from Wilton to Bismarck at 27.1 tons per car freight for 28 miles, gives $9.66 cost per car freight that would have been the cost had the same haulage been made on the Great Northern line, assuming their branch line rate of cost as correct. The statutory rate for this distance yields a revenue of $10.84, which, at a cost of $9.66 per car, would leave a reasonable revenue of $1.18, or less than 4 cents per ton profit for the carriage of this commodity a distance of 28 to 30 miles. Instead, if we thus assume the cost to be $9.66 per car, carried for $6.63, under compulsion of the statute, we find it has been forced thereby to suffer a loss of $3.03 per car, which, figured on 2,532 cars, shows a loss on this basis of $7,671.96. And the above computations omit the fact that the empty car mileage haul chargeable against this particular movement must approximate 100 per cent, while in the figures applied the Northern Pacific empty car haul was approximately 71 per cent only. We may assume, however, that some of this is offset by the "turn around" service testified to by Mr. Little as frequent on this particular haul. Abs. 352. But it is apparent that if it was legislative wisdom to fix the statutory rate for this haul for this commodity at 40 cents per ton for a haul from 25 to 30 miles, then, when the volume of this particular haul is considered, it would seem that it was far from wisdom to compel an apportionment of such receipts and their reduction from 40 cents to 24.5 cents per ton for said distance where the traffic is delivered to a connecting carrier. The practical operation of the statute is thus to reduce the rate as here and give more than its just proportion of the freight revenue to the connecting carrier. As heretofore observed, from the fact that the average haul of this traffic delivered by the Soo to the Northern Pacific road is approximately 105 miles, while the average haul of all of its other traffic is less than 45 miles, the Northern Pacific gets a ton mileage of 7,164,258 from this traffic originating on the Soo, while from all of its other lignite traffic its ton mileage is only 2,216,420. Therefore it would seem that the traffic thus obtained by the Northern Pacific from the Soo does not operate to reduce the freight receipts of that road as materially as it does that of the Soo,

which road, from the proportionate very short haul of the same freight movement, has correspondingly suffered a considerable loss.

Let us further analyze the lignite traffic on the whole Missouri River division with particular reference to the effect of the short haul and volume of lignite traffic from Wilton to Bismarck delivered to the Northern Pacific.

From Soo Exhibit 50 we ascertain that all lignite carried on this division amounted to 139,899 tons, carried an average of 47.46 miles, producing a live ton mileage of 6,639,737 ton miles, for which a total freight revenue amounting to $56,993.72 was received. That the average carload of lignite on this division amounted to 27.32 tons. Now, turning to Soo Exhibit 35, table 27, page 1, we find the total shipment from Wilton to Bismarck for delivery to the Northern Pacific amounted to 69,593.75 tons, carried 28 miles, and amounting to 1,948,625 ton miles. Deducting this tonnage and ton mileage from the total division tonnage and ton mileage, we have remaining respectively 70,306 tons, yielding a gross mileage of 4,691,112 ton miles of other lignite shipments for the year. But of this 70,306 tons, we find more than one half thereof, or 37,173 tons, as appears from Soo Exhibit 35, page 1, third item, was delivered to local Bismarck dealers, under a shipment of 28 miles from Wilton, yielding 1,040,844 ton miles. Now, deducting this Bismarck local ton and ton mileage, we have respectively 23,133 tons, with a ton mileage of 3,650,268 remaining for the entire division; so that from the output of the Wilton mine delivered at Bismarck, 69,593 tons to the Northern Pacific connecting carrier, and 37,173 tons for local consumption, all for a haul of 28 miles for an aggregate ton mileage of 2,989,469 ton miles, out of a total lignite traffic on that division of 6,639,737 ton miles, leaving of the total balance of lignite traffic for the division 3,650,268 ton miles, produced from 33,133 tons, or an average haul for the one fourth of the lignite traffic remaining on the division of 110.16 miles, after the deduction of the Bismarck local and the Bismarck joint freight. Reduced to freight receipts, we have heretofore demonstrated that the Soo road received from the joint Northern Pacific haul, as its share thereof, $16,787.16; and from the 37,173 tons delivered in Bismarck for local consumption, at the statutory rate of 40 cents per ton, it received $14,869.20, or total freight receipts from Bismarck of $31,656.36;

and on the balance of the division from the lignite traffic, the difference between that amount and $56,993.72, or $25,337.36. Of course, the above computation does not include any transfer switching charges or other switching charges made and turned into the lignite freight revenue. It is interesting to note, however, that three fourths of the tonnage of this division is for a 28-mile haul from Wilton to Bismarck, for over one half of which the Soo must further reduce its receipts by division with the Northern Pacific connecting carrier from the statutory rate of 40 cents to 24.5 cents per ton in compliance with the statute. Further, that of the total 139,899 ton lignite haul on the Missouri River division, all but less than 1,000 tons is the output of the Wilton mine, as will be observed by a study of table 27, Soo Exhibit 35, pages 1 and 2. With this in mind it is interesting to note, as verifying our conclusions, that the average haul aside from the Bismarck local and joint haul is 110 miles, while the average haul of the same coal from Bismarck by the Northern Pacific connecting carrier is 105 miles.

The deductions from the foregoing establish that three fourths of the lignite freight on the Missouri River division is carried at approximately 1 cent per ton per mile from Wilton to Bismarck, while, if the statute did not require the prorating for the one third of the traffic delivered the Northern Pacific, it would receive the statutory rate of 40 cents per ton for 28 miles, or 1.44 cents per ton for the same carriage. The foregoing figures, and also matters of which we may take judicial notice, are conclusive that the conditions existing on the Northern Pacific and the Soo are similar, both roads traversing virtually the same lignite field, and that of the two the Northern Pacific can carry at the least expense. And in the Northern Pacific Case we have seen that the cost of similar carriage on that road is about that of the Great Northern, running from 1.2 to 1.3 cents per revenue ton mile. Therefore, out of the approximately 140,000 tons of lignite haul on this division, all but approximately 33,000 tons must have been hauled at an actual and considerable loss, and as to freight receipts the road lost money while earning $35,000 of the $57,000 gross earnings from the lignite traffic on this division; and that in earning $17,000 of the $35,000 upon which it lost, it lost approximately $11,000 over what it would have received but for the compulsory pro-

rating with the connecting carrier. Comparing also with our conclusions in the Northern Pacific Case, to the effect that that road under more favorable conditions, inasmuch as it is not forced to share its rate computed upon a basis of a short proportion of a connecting carriage haul with any other railroad, has, on approximately the same volume of business as done on the Missouri River division of the Soo road, realized less than $1,000 profit, we can draw no other conclusions than that the Soo on its Missouri River division must have sustained an actual loss of from $9,000 to $12,000.

Let us now consider the remaining one fourth of the lignite traffic conducted by the Soo on divisions other than the Missouri River division, to ascertain whether such loss can be equalized by other portions of the Soo line within this state. From Soo Exhibit 51, page 122 of the Book of Exhibits, we ascertain that the balance of the lignite traffic for that year, exclusive of the Missouri River division, was 65,139 tons, but that the average load per car was 21.51 tons, or about 6 tons per car less than on the Missouri River division, which tonnage yields 3,028 car loads of lignite freight carried during the fiscal year by this road elsewhere than on its Missouri River division, and for which it received, as shown by this table, $26,676.28, with an average car haul for lignite of 23.13 miles only.

We now observe that a condition exists in the northwestern part of the state, in the lignite fields north of and adjacent to Minot, similar to that above shown in the Bismarck territory, in that the Soo must deliver a considerable portion of its lignite traffic to the Great Northern railroad at Minot, the same as it has divided the Missouri River division traffic with the Northern Pacific at Bismarck, and be compelled to prorate or reduce what would otherwise be the statutory haul proportionate to the entire haul on both roads. The exact amount of this is ascertainable from Soo Exhibit 35, pages 2 to 6 inclusive, from which we ascertain the following joint hauls, to wit: From Wilton to Minot, for 162 miles, 1,153 tons, amounting to 18,681 ton miles; from Bitumina to Minot, 20 tons transported 141 miles, for 2,820 ton miles; from Smith's Kenmare mine to Minot, 66.6 tons transported 52 miles, for 3,463 ton miles; from Wye to Minot, 47 tons transported 47 miles, for 2,209 ton miles; from Vanderwalker to Minot, 3,244.4 tons transported 13 miles, for 42,177 ton miles; from Lloyd's to Minot, 2,675.25

tons transported 11 miles, for 29,439 ton miles; from Burlington to Minot, 1,498 tons carried 8 miles, for 11,982 ton miles; from Davis to Minot, 616 tons, carried 7 miles, for 4,312 ton miles; or an aggregate of 9,231 tons carried an average of 13.3 miles, for a total of 115,083 ton miles, amounting to 433 carloads delivered to the Great Northern and hauled by it an average of 66.4 miles (see G. N. Exhibit 1), and upon which the Soo rate is to be figured on its proportionate share of a 78-mile haul, for which total haul the statute allows a charge of 55 cents per ton, of which amount, exclusive of the division of switching charges, the Soo road would get twelve seventy-eighths, or less than 8.5 cents per ton, or $1.83 per car, where, without the prorating feature of the statute, it would receive 35 cents per ton, or $7.53 per car, or $5.77 per car more, which, figured for 433 cars, deducts $2,468.10 from what would have been the Soo earnings but for the final paragraph of the statute in question, which in practical operation reduces what would otherwise have been its earnings on 433 cars at $7.53 per car, or $3,260.49, to $792.39. Hence, one seventh of the lignite freight carried on the Soo, other than on the Missouri River division, is compelled to be carried practically gratis and at a loss of $2,468, or that much less than a reasonable rate, if the balance of the statute other than the final paragraph be taken as establishing a reasonable rate. So that on both divisions, including the connection with both common carriers, this road is compelled to carry 78,915 tons, or the sum of 69,594 tons at Bismarck and 9,321 tons at Minot, delivered to connecting carriers, at a great actual loss out of its total lignite freight of 242,981 tons carried on the Missouri River division, and 65,139 tons of lignite carried elsewhere in the state, out of an aggregate haul of 308,120 tons; so that approximately one fourth of its entire lignite traffic is carried at a loss of the sum of $2,468.10 on the Minot transfer, and $10,659.72 on the Bismarck transfer, to connecting carriers, or a total loss of $13,127.82 over what it would have received, had it carried the same freight the same distance under the statutory rate without being compelled to prorate its rate with the connecting carrier. We may here observe that, as to both the Great Northern and the Northern Pacific carriers, practically no prorating is required or possible, they being the recipients of benefits therefrom that would otherwise go to the Soo carrier; so that none of this shortage is equalized as

to the Soo road by its receiving similar benefits from any connecting carriers. We observe also from Great Northern Exhibit 1 that, according to the Great Northern tables found on page 57 of the Book of Exhibits, it acknowledges the receipt from the Soo of 10,232 tons, carried 66.4 miles on the Great Northern road for an aggregate ton mileage of 678,978 ton miles, which is about 10 per cent in excess of the showing and calculation heretofore made from the Soo tables, No. 27 Soo Exhibit 35, pages 2 to 6. The court will take judicial notice that the only connecting carrier with the Great Northern at Minot is the Soo railroad, as no other railroad enters that city. We observe also that the average lignite haul on the balance of the road within this state, other than the Missouri River division, is but 23.13 miles, while that with the Missouri River divisions slightly more than double this, or an average lignite haul of 47.46 miles. One need not be a rate expert to realize that usually the longer the haul the greater the net profit, and that it is on the long haul the railroad is enabled to move the freight at the least cost per ton mile. The longer the haul the greater the volume per train load, the less breaking of trains and switching, and the more accordingly that the road avoids the excessive cost of branch line service. In reality practically all of the haul of lignite by the Soo in this state is conducted at a cost equivalent to cost of branch line service.

It seems, therefore, that, if the statutory rate for the short haul of 50 miles or over is a reasonable rate, and one for which the carrier should be entitled to charge for ordinary transportation, and the presumption from the statute is that it is a reasonable rate, the volume of traffic on the entire Soo system within this state is insufficient and carried under too short a haul for it to equalize the loss of $13,128 occasioned by the compulsory prorating with connecting carriers in the $70,542 worth of revenue earned in the carriage of lignite, presumably at the rate fixed by statute. Or, in other words, we must conclude that the Soo loss was considerable because of the connecting carrier feature of this statute, when it has carried for $83,670 what it otherwise would have received $96,798 for, and for which, had the same carriage been made on the Great Northern or Northern Pacific lines, they would have received approximately such amount therefor. In effect and practical operation we cannot conclude other than that the actual figures

show with reasonable deductions therefrom, that the final paragraph of chap. 51 of the Session Laws of 1907, compelling the prorating of rates between connecting carriers, discriminates against the Soo, and, if the statute be otherwise taken as prescribing reasonable rates, forces the Soo to carry its entire lignite business at an actual and considerable loss, or less than the actual reasonable expense of carriage; while at the same time, under our findings as to the Northern Pacific Railway Company, and under the facts found as to the Great Northern Railway Company, both the Northern Pacific and the Great Northern are making a profit on the rates as established and accruing to them, because (1) they are the beneficiaries of the contribution enforced from the Soo by the particularly objectionable feature of the statute compelling prorating of rates, and (2) their revenues are not reduced as materially by the prorating feature, and they have the advantage in prorating, having the long haul in a proportion of five to one or more over the Soo line. In this respect it is noticeable that both the Northern Pacific and the Great Northern take about an equal proportion from the Soo under this contribution, when we consider the volume of their business and earnings, that of the Northern Pacific being, for the twelve-month period, $58,953.07, while the Great Northern gross earnings from the lignite traffic for the same period are $17,756.52. The evidence discloses that, with the aggregate haul of lignite on the Soo averaging as it does approximately 35 miles only, and considering the large amount of this commodity it is compelled to deliver to connecting carriers to its injury, disproportionate to the injury of the receiving carriers through compulsory prorating, it is, as to nearly half the lignite business, virtually a branch line of the other two railroads in accumulating for them their lignite traffic. The prorating feature, therefore, on the facts, favors such connecting carriers to the injury of the Soo line. This takes us to a consideration of the Great Northern Case.

Statement of Facts as to the Great Northern Railway Company.

The Great Northern railroad is, for accounting purposes, divided into accounting divisions, each main line railroad division constituting an accounting division, and each branch line, of the ten or more in

this state, also constituting an accounting division, and were so kept for the fiscal year in question, from June 30, 1910, to June 30, 1911, and all of the statistics as to lignite coal carriage and revenues are actual computations from freight waybills. The amount of the tonnage and the net revenue therefor, as well as the origin and destination of all shipments, are facts, and not estimates. The same is true of gross loaded and empty freight car mileage. Those expenses capable of allocating have been charged to the particular division and line, whether main or branch, and compilations have been made therefrom as to the total earnings of branch and main lines within this state, and total expenses incurred therein or properly assignable thereto on some relative basis, either of mileage, tonnage, revenue, or expense basis. See G. N. Exhibits 1 to 6, pages 57 to 62, Book of Exhibits, and state's G. N. Exhibits 33 to 48 Q4, pages 192 to 232, Book of Exhibits.

We do not deem an exhaustive analysis of these many exhibits, and the testimony offered explanatory thereof, necessary to the development, with reasonable certainty, of the problem of whether the statutory rate on lignite coal for the year in question was compensatory or confiscatory in its effect on this road. But we will state only sufficient to develop and maintain our conclusions.

For the year in question the total freight revenue assignable to the state of North Dakota from all freight amounted to $6,850,656.68, out of which the receipts local to the state, and not to be classed as interstate, but intrastate strictly (which includes lignite revenue of $17,492.41), were $371,222.78; the average carload for all freight amounted to 13.15 revenue tons; while the average carload of lignite contained 17.85 revenue tons. But in both cases the actual average live carload tonnage is reduced by a charge made against it of the percentage of empty tonnage or empty car haul chargeable to the traffic, that of all freight being thus reduced by the proportion of the empty to loaded car mileage, to wit, 17.6 per cent as to all freight, while the average load of lignite is so charged with the proportion of 25.21 per cent,—the relation that actual computation shows empty car mileage bears to the total loaded and empty car mileage used in the lignite traffic. See Exhibit 6, page 62. The actual ton mileage of all freight is approximately but 16 tons per car, while that for lignite coal amounted to 25.83 tons, a difference of nearly 10 tons per car in favor of this coal. In

the method used of determining the cost of hauling this commodity, the company has ascertained that out of a total ton mileage of 2,318,-345 ton miles for lignite, 1,423,182 ton miles were hauled on its main line, while 895,163 ton miles were hauled on the branch lines. As to all freight within the state, it has determined, with approximate correctness, that 704,312,900 ton miles were handled on its main line, and 30,881,587 ton miles were handled on its branch lines, or a total of 755,194,484 revenue ton miles, at a total expense of $3,008,-555.13 as to main line freight, and $647,905.02 expense of branch line freight operation, both being inclusive of taxes. It has divided the total main line operating expense, slightly in excess of $3,000,000, by the total revenue miles moved on the main line, in excess of 704,000,000 of ton miles, and produced, as the average cost per revenue ton mile for the main line, 4.27 mills per revenue ton mile. Similarly treating the branch lines by dividing approximately $648,000 operating expense, by approximately 51,000,000 ton miles moved on the branch lines, produces an average cost of 12.73 mills, or approximately three times the expense of 1 ton mile on the branch lines to 1 ton mile on the main line. It has then applied these figures, to wit: multiplied the main line lignite tonnage, 1,423,182 tons, by the cost per ton, 4.27 mills, and produced $6,076.99, which it alleges to be the actual cost of carriage of the lignite transported on its main line. Taking in the same way the cost of moving its branch line lignite freight of 895,163 ton miles, at 1.273 cents per ton, yields as the branch line cost of lignite haulage $11,415.42. Adding these two amounts produces $17,-492.41, which the railroad company alleges to be the approximate cost of transporting 36,678 tons of lignite for an average of 63.2 miles of haul, for which it received, as total freight receipts, $17,556.52, receiving an average of .766 mills per ton mile. It has offered testimony tending to show that even this apparent small profit of $264.11 is more than overcome by conditions peculiar to the lignite traffic, and impossible of exact ascertainment, among which it enumerates a larger empty car mileage in the haulage of lignite than as to average freight; that its main line haul is in reality a main line local train service; that the cars used for hauling this coal are idle in loading, in proportion to the time they are moving, more than in handling other freight commodities; and, lastly, that they are hauled during the winter sea-

son during cold weather, when the locomotives are unable to haul their full tonnage; and for these reasons urges that this apparent profit, which would be yielded by the average freight in the same volume and under average freight traffic conditions, should be changed to an actual loss.

It is apparent that in this manner of attempted ascertainment of the cost of moving this commodity, the result is not even approximately the actual cost of moving this lignite coal, but instead is what would be its cost assuming it to be carried under the average conditions and at the cost of the general average of all freight. For instance, the railroad's computation of 4.27 mills as the cost of carriage of this commodity on the main line probably does not cover its actual cost, for the reason that this small volume of lignite traffic is buried with five hundred times its volume of other traffic and a general average struck, which may favor the state's contentions in this case, inasmuch as it is apparent from an investigation of the Northern Pacific Case, based upon actual figures and a classification of the lignite traffic on the main line into main line way and main line through, concerning which no such classification is made or attempted in the Great Northern Case, it would seem that its figures are at least sufficiently low, if not under the actual cost of carriage of this commodity on the main line. In any event, from the very nature of its ascertainment, it must be at best but an estimate.

And the same is true of the railroad's deductions as to the cost of that portion of the lignite traffic carried on its branch lines. We may here note that out of 895,163 ton miles handled by the branch lines over three fourths thereof, or 719,000 ton miles, is the product of the Noonan mines transported an average haul of 78.8 miles, or exceeding by one fourth, or 15.6 miles, its average haul of 63.2 miles of all lignite coal. The output of this mine amounted to 12,835 tons, or approximately 500 carloads. Also there was delivered to this carrier by the Soo at Minot 10,232 tons, or approximately 400 carloads, hauled by it an average of 66.4 miles, or in excess of its average haul of all coal, a portion of which haul, amounting to 131,219 miles, was Great Northern branch line haul. So, the freight originating at Noonan and Minot constitutes all but 45,000 ton miles of the total branch ton mileage of 895,000 ton miles; 520 carloads cover balance of tonnage of

lignite carried by both branch and main line service. Everything considered, it would seem that the railroad company's charge of approximately three times its main line haul for this branch line service to lignite freight is excessive, and considerably so, and to an amount that would at least equalize any undercharge for its main line haul. While it is true that in the Northern Pacific Case the relation between main line haul and branch line service is approximately three to one, or as 100 is to 299, yet the ratio does not here hold true, because we do not know whether the main line service here rendered was main line through or main line local, not being classified, it being but the average of the cost of all main line freight local and through. Indeed, a knowledge of the country, of which we may take judicial notice, and the testimony of Mr. Martin, would rather establish this main line service to be main line way freight service. If so, taking the basis determined in the Northern Pacific Case, the relation of cost would be as 266 is to 299, which would render these railroad figures as to cost of branch line service to lignite grossly excessive, if it be conceded that the proper charge is made for main line freight at 4.27 mills.

It is apparent in the railroad figures that certain charges have been included and prorated against the cost of all freight in this state, which apparently are not chargeable against the lignite traffic. Reference is made to traffic and advertising expenses found in plaintiff's G. N. Exhibit 46E, page 216, Book of Exhibits, under charges against "outside agencies, advertising, and traffic associations," aggregating approximately $300,000, of which 3 per cent, as appears from the testimony of Mr. Martin, is charged against North Dakota freight receipts. As the lignite receipts amount to a fraction of a per cent only of the total freight receipts, we do not compute the small difference to be added to profit from this source. No reason exists, however, why the lignite traffic should be charged with any part of this expense more properly chargeable to the traffic benefited, it being admitted that there is no benefit to the lignite traffic, which is noncompetitive and must be the traffic of the road upon which it is located. It appears that a similar charge has been erroneously made as to freight handlers, but that the same is too trivial for attempted determination. As to the railroad's claim for right of reduction of earnings as figured by it, because of extra expense of the haul for the reasons above related, we cannot

see but what all items mentioned therein have been included, and proper charges on deductions therefor made in the expense computations under the classifications thereof in Exhibit 4, conceded by Mr. Martin to be used as a basis in apportioning and allocating the expense. Most of the reasons given are but those we believe to be usually incident to the expense of way or local freight trains, and included in the ascertainment of the cost of transporting by way or local freight. They urge here, as it has been urged in the Northern Pacific and Soo Cases, that the winter and cold weather increase the cost. This contention may have some basis in fact, but the rates must be regarded as fixed upon an average yearly basis, and if the rate is a reasonable one in other than winter seasons, it must be taken as reasonable for the winter season also. The railroad must keep its line open and operating in all seasons, and the expense of so doing is not a charge against any particular commodity, although possibly it may amount to an overhead charge, and to a certain extent be necessary to be considered in fixing a reasonable commodity rate. A share of this overhead expense has been already assigned to this commodity under maintenance of way and structures accounts. Exhibit 33, page 192, Ex. S. From a comparison of conditions, rates, and traffic shown with that of the Northern Pacific, and considering that only two sevenths of the carloads, and only one fourth of the volume or ton mileage, is delivered it by the Soo, under which the statutory apportionment reduces its freight receipts approximately 1.25 mills per ton mile for the same distance haul, as is apparent from plaintiff's Exhibit 48A, page 247, Book of Exhibits, and G. N. Exhibit 1, page 57, it is certain that the earnings of this road are not diminished by the prorating connecting carrier clause of this law to the same degree as the Northern Pacific on the Bismarck joint Soo haul, where it hauls over 7,000,000 out of over 9,000,000 of lignite ton miles under a reduced tariff, because of the prorating with the Soo required by the statute. In tonnage 70,000 tons is carried by the Northern Pacific under said joint haul, to 50,000 tons carried without it. It is this prorating feature that reduces the Northern Pacific earnings to nearly its actual cost of transportation. Compare N. P. Exhibit 18 with G. N. Exhibit 1.

The Great Northern has a much less empty car mileage in the lignite traffic than the other roads. The empty car haul of the Northern

Pacific is 72 per cent of the loaded haul, the Soo is 90 per cent empty haul to loaded haul, while as to the Great Northern, taking the total loaded and empty haul as 100 per cent, the same is, loaded 69.1, empty 30.9 (G. N. Exhibit 6), or the empty car mileage is 43 per cent of the loaded car mileage. This means that the Soo empty car mileage is more than double that of the Great Northern, and that the Northern Pacific percentage of empty car mileage of 72.23 is 167 per cent of the Great Northern empty car mileage of 42.27. On the Northern Pacific the average relation of a carload of lignite to all other freight is as 26.87 tons is to 19.25 tons (N. P. Exhibit 19), or that a car of lignite contains 140 per cent of the tonnage of the average carload of all freight. On the Missouri River division of the Soo line the average tonnage per car of lignite is 27.32 tons, while the average tonnage per car of all freight is 12.27 tons. Thus, a car of lignite carries on the average 222 per cent of the revenue tonnage of all freight on that division. See Soo Exhibit 50. This is the ratio for three fourths of the lignite traffic of the Soo; for the other one fourth, or that portion carried other than on the Missouri River division, the ratio of lignite load to all freight is as 21.51 is to 14.74 (Soo Exhibit 51), or a percentage of 139 per cent of lignite to all freight. The Great Northern average lignite load was reduced by the 400 carloads received at Minot from the Soo line, which averaged 21.51 tons, to the general average of 25.83 tons as the average lignite carload on the Great Northern. See G. N. Exhibit 44, page 204, Book of Exhibits, from which we learn that the carload average for all freight is 16 tons, giving a percentage of 161, the average car hauling that percentage of lignite compared to all freight. The lignite carload, then, on the respective roads, is to all other freight, as follows: Soo, 207 per cent; Northern Pacific, 140 per cent; Great Northern, 161 per cent. Against this, as tending to equalize lignite with all freight, is an empty car percentage of Soo, 90 per cent; Northern Pacific, 72.23 per cent; Great Northern, 43.27 per cent. When we consider that the empty car movement is a movement of 16 tons per car moved wholly at an expense, the empty car being of the same weight on all roads, we find it necessary to equate on a basis of 100 per cent of empty car mileage applied to relative carloads, which would produce the following figures: As to the Great Northern, raising 43.27 per cent to a common basis of 100 per cent

empty car mileage, it would realize from a revenue mileage tonnage of 59.7; the Northern Pacific on the same basis would have 37.2 revenue tons, and the Soo, considering the volume of traffic on all divisions, an average live tonnage of 25.87 per car, which equalized on a basis of 100 per cent produces 28.8 tons. We have, then, as the equated ratio of revenue tons to empty car mileage, with all roads equalized on the same empty car mileage, the Great Northern hauling 59.7 tons, while with the same empty car mileage the Northern Pacific hauled 37.2 tons, while with the same empty mileage the Soo has hauled 28.8 tons of lignite. But when the lignite carriage is compared on this basis with the relative loads of all freight, we find each equated average tonnage increased by the following percentages of lignite over all other freight per carload, to wit: Great Northern 161, Northern Pacific 140, Soo 222, which, applied to the equated empty car to all other freight tonnage above, gives Great Northern 96.11, Northern Pacific 52.08, and Soo 63.9, as the relative cost to all other freight as to each railroad. But, owing to the Northern Pacific carrying a larger average carload of all freight than the Great Northern, this ratio is reduced accordingly and proportionately in the ratio of 19.25, average carload on Northern Pacific, to 16, average carload on Great Northern, leaving the proportion 96.11 on Great Northern to 62.66 on Northern Pacific. Therefore, we find when the average load of lignite is equated to all freight, and again equated with empty to loaded car mileage, these roads hauling lignite at the following relative expense per revenue ton carried, accruing because of empty car mileage, as follows: The Great Northern gets 96 to the Northern Pacific 62.66 tons of lignite revenue haul for the same relative empty car haul, it costing the Great Northern but two thirds per revenue ton for empty car mileage in lignite traffic as is expended by the Northern Pacific. This is to a small extent equalized in relative expense per car mile, as between the Great Northern and Northern Pacific, by the fact that the Northern Pacific has an average haul of lignite of 79 miles, while the Great Northern average haul is but 63 miles. But all things considered, the Great Northern expense for empty car mileage is but approximately two thirds of that of the Northern Pacific as applied to the lignite traffic per revenue ton. And, inasmuch as, with two thirds of the expense for this item, the Northern Pacific profit on lignite

haul would have been sufficient to render the rate as to it reasonably compensatory, we conclude it must be so taken under these computations as reasonably compensatory to the Great Northern, under the conditions under which it handled lignite freight during said fiscal year.

Findings of Fact.

From the foregoing analysis of the evidence we deduce the following ultimate findings of fact, to wit:

(1) That the Northern Pacific Railway Company during the fiscal year ending June 30, 1911, received from its lignite traffic, conducted wholly within this state, $58,953.07. That the total cost of transporting all lignite freight during said period, and from which the above earnings were received, was $58,125.46, leaving as net earnings to the railroad from said source $847.61. Said coal was carried under the freight rates prescribed by chapter 51 of the Session Laws of 1907, governing rates to be charged for intrastate haulage of lignite coal. That under the above earnings we find that the rates are, as to the Northern Pacific railroad, slightly remunerative, but noncompensatory under the conditions prevailing along its line in this state as to the lignite traffic.

(2) As to the Great Northern Railway Company, the court finds that for the fiscal year ending June 30, 1911, it earned in gross receipts from the hauling of lignite coal $17,492.41, at an expense to it of not to exceed $15,000; and that as to the Great Northern Railway Company the statutory freight rate for lignite coal prescribed by chapter 51 of the Session Laws of 1907, governing said carriage, provided a remunerative and reasonably compensatory tariff or freight rate as to said commodity, under the conditions prevailing on its line within this state.

(3) As to the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company, the court finds that during the fiscal year ending June 30, 1911, the gross earnings of that road from the carriage of lignite coal were $83,670, of which $56,993.72 were the freight receipts from this commodity on its Missouri River division, upon which was handled three fourths of the entire lignite tonnage, and $26,676.28 was received

from the haulage of lignite within this state without the Missouri River division, for the haul of the remaining one fourth of the lignite traffic handled by this road. That so large a per cent of the tonnage originating on the Soo railroad is delivered at Bismarck and Minot to connecting carriers, under which its charge is prorated as required by the final paragraph of chapter 51 of the Session Laws of 1907, and under which the Soo proportion of its charge is required to be apportioned to the total haul, is so reduced as to deprive it of $13,128 which it would have received at the statutory rate, were it not for the prorating feature of the statute, it in effect receiving $83,670 for what it otherwise would have received $96,798. That the court finds that, because of the effect of this prorating feature of the statute, the entire lignite traffic on said railroad for said year was carried and handled at a net loss to it, over all receipts and revenue from said traffic in said commodity, of from $9,000 to $12,000. That because of conditions peculiar to this road and its connections with the Northern Pacific Railway Company at Bismarck and the Great Northern Railway Company at Minot, the prorating feature of the rate law in question operates to the injury of the Soo railroad in the transportation of this commodity much more injuriously than it affects its connecting carriers, the Northern Pacific and the Great Northern Railway Companies as to freight earnings from lignite coal. That prior to 1907 all three of these railroads were operating and carrying lignite coal freight with railway connections the same as at present and as existed during the fiscal year in question. That the reproductive and actual value of the Soo railroad property within this state, and engaged in and necessary to its use as a common carrier during said fiscal year, has not been established. Nor has any apportionment of the value of its railway property within this state been made as to the portion of value thereof attributable as earning its intrastate earnings, or any portion thereof as earning its interstate earnings, earned within this state. That the percentage of lignite traffic to all traffic during said year was in revenue as to the Missouri River division 16.6 per cent, and in volume of freight 45 per cent of all other freight on said division. But the court finds that the carriage of lignite coal increases the railroad expenses but 60 per cent of the usual statutory rate for the lignite haul; or in other words, but 60 per cent of the full statutory rate allowed (as the freight

tariff on lignite coal) is out-of-pocket costs therefor, or the proportion of the statutory rate made necessary to be expended because of said lignite haul, the remaining portion of the statutory rate and any amount in excess thereof as expenses arise from the apportioning to the lignite traffic of certain fixed charges or railroad expenses that would have accrued had no lignite coal been transported. That all receipts from this traffic in excess of the out-of-pocket costs contribute toward payment of fixed expenses of the railroad that would have existed without this lignite freight movement, and would have been borne by other freight instead of by lignite to the amount it has so contributed to its payment.

Preliminary Observations.

Although we refer herein to the legislative rate in question as one regulating lignite coal, the rate in fact is a maximum rate upon all intrastate coal shipments, as we held in our former opinion reported in 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869. While it has application almost solely to lignite coal, the proof shows it has governed other shipments, the amounts of which, however, are not included in any of the computations made in these findings.

This statutory rate is low. The prorating feature further reduces it, and is in effect the teeth of the statute and the portion of it that operates to the disadvantage of the Soo carrier. That part reads: "In case any shipment of coal under the provisions of this section must pass over two or more lines of railroad to reach its destination; then an additional charge of $2.50 per car for each transfer may be allowed and collected to cover cost of switching, and the total amount of freight and switching charges shall be divided among the several railroads concerned, upon such basis as to them may seem just; provided that, if such railroads cannot agree among themselves upon an equitable division thereof, then the board of railroad commissioners shall decide the matter, subject to appeal to the courts." The state contends that because the Soo has under agreement with the connecting carriers prorated according to the length of haul, and not appealed to the board of railroad commissioners for a larger share of the total joint haul freight receipts than they have taken under the arrangement in ques-

tion, that they should not be heard to complain if their receipts have been considerably reduced through prorating. But it is difficult to see what basis other than the one adopted by agreement as a general rate to fix the varying haul could be taken. But, assuming that the Soo road could have realized a greater share of the joint haul as the result of an appeal to said board, nevertheless the same case would have been before us, because whatever was thus thrown into the coffers of the Soo road would be taken from the net revenues of the Northern Pacific carrier principally, which would have reduced the receipts of that road from lignite coal to a point below the gross cost chargeable to that coal traffic, and would have been insufficient to have raised the Soo return from the traffic to the place now occupied by the Northern Pacific in such respect; so that all the difference in fact would have been that both Soo and Northern Pacific would be then hauling this freight at less than the gross cost, including, of course, out-of-pocket and all fixed charges. We, therefore, in this opinion, treat the rate fixed by the agreement between the carriers as though the same had been fixed by the board of railroad commissioners. The legal consequences in either case would be the same, so far as the review in this case is concerned.

We are led to here remark the fact of the legislative rate being a declaration of the sovereign power of this state on a matter of public policy. Importance must be given to the situation as disclosed by the facts, of which the court will take judicial notice, and concerning which legislation in the public interests and founded upon public policy has been as here declared. The central and western portion of this state is underlaid with lignite coal beds, the mining of which for fuel is as profitable as a mining enterprise as it is an economic advantage to the consumers, who must in this climate use coal six months out of the year. Thus, necessity creates an industry and a market. It would seem that the development of both must redound to the benefit of the common carriers, here as ever the connecting link between the producer and the consumer. It is easy to see that the strangulation of the mining and distribution of this coal, or the confining of it by exorbitant freight rates to as limited an area, and therefore as small a market, as possible, must temporarily operate to the great advantage of the common carriers, and against the public welfare of the people of this

state proportionately, inasmuch as those who cannot burn lignite fuel must, on these prairies, otherwise devoid of fuel, buy the eastern coal, which has increased in cost from 100 to 200 per cent between the mines in Pennsylvania and the point of its distribution to the consumer, half of which undoubtedly arises from freight charges, as in this instance, as always, the old adage proves true, that "the consumer pays the freight." As against the incentive for avarice of those benefited by freight rates, and urging in this review of this commodity rate the right to dividends from the earnings of every commodity carried, the legislature in its wisdom, exercised in the interest of sound public policy, has fixed by statute the maximum rate, and the statute must be looked upon as the legislative expression of a public policy intended to encourage industry and commerce and promote the general well-being and public good under the obvious benefits arising therefrom. It may be that to a greater or lesser extent public policy enters into the fixing of every rate statute or rate regulation, but it would seem to be here present to an unusual degree. Of course, questions of public policy may enter into every statute in the same sense as here present, and may be assumed as the reason for interference with state fixed rates only where the clearest proof makes it necessary to protect private constitutional rights from state infringement. But no harm can come from in passing remarking its presence here.

Rate Law as Involved.

The facts are somewhat involved, but the application of the law may be made under the following subdivisions leading to the determination of the issue:

(1) Where the intrastate freight rate to be reviewed is a statutory one upon a single commodity, assuming such a rate may be under certain circumstances confiscatory, when is the burden of proof met, and what degree of proof is requisite to establish the rate to be confiscatory?

(2) Whether such a rate can ever be confiscatory where the freight returns under it yield more than the out-of-pocket costs of transportation of the commodity, even though said returns are insufficient to also fully reimburse that proportion of the railroad's fixed or overhead

costs properly apportionable to such commodity. In other words, is a noncompensatory rate confiscation in law?

(3) Assuming that such a commodity rate under certain circumstances may be held confiscatory in law, is the rate attacked shown to be confiscatory? In this question is involved both the method and the measure of proof of confiscation.

(4) The rules by which the operation of the statute is measured as to whether the same is confiscatory, in turn, involve, (a) valuation of railroad property used in producing the revenue received under the rate; (b) proof that such returns under the rate predicated upon the valuation of property used to earn the same are insufficient to amount to a fair rate of interest upon such valuation; and (c) finally, though the rate may yield an inadequate percentage of return on the value of the property utilized in earning the same, to prove the rate confiscatory, it must further appear that the effect of such loss on the commodity rate is to render the total intrastate net earnings from all intrastate freight inadequate to yield a reasonable interest rate on the fair value of all its property employed in producing such total earnings.

(1) Burden and Degree of Proof. We first determine the rules of law governing the attitude of the court toward the rate attacked; where the burden of proof rests; and the degree of proof necessary before a rate can be established as unconstitutional because confiscatory. As to the governing principles the law is clear, and we can find it nowhere better stated than in the very recent decision of Louisville & N. R. Co. v. Railroad Commission, reported in 208 Fed. 35, in the following language: "In deciding the question whether or not an order made by authority of the state, fixing rates, is confiscatory, the inferior courts, as to the measure of proof, are guided by well-settled rules binding on them because announced by the Supreme Court. One of those rules is that the rate fixed by legislative authority is prima facie fair and just. . . . The presumption must be indulged at the outset that it is reasonable, and not violative of constitutional rights. The burden of proof is placed on the plaintiff [railroad] to show that the case is one calling for judicial interference with the authorized action of the local authorities. Railroad Commission v. Cumberland Teleph. & Teleg. Co. 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. Rep. 357;

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257–264, 46 L. ed. 1151–1156, 22 Sup. Ct. Rep. 900. Another rule for our guidance is that the burden of proof is not only placed on the plaintiff, but that the plaintiff is required to do more than offer a mere preponderance of evidence. The judiciary is not permitted to interfere with the rates established by legislative authority, unless it is made to appear clearly and beyond reasonable doubt that they are unreasonable, and that their enforcement would be equivalent to the taking of property for public use without just compensation. If the evidence offered leaves the court in doubt, if it is not clear, satisfactory, and convincing, the rate fixed by state authority should not be enjoined. San Diego Land & Town Co. v. National City, 174 U. S. 739–754, 43 L. ed. 1154–1160, 19 Sup. Ct. Rep. 804; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649–667, 39 L. ed. 567–573, 15 Sup. Ct. Rep. 484. So stringent are these rules against interference with the action of the local authorities in fixing rates, that it has been said that the court should not enjoin a rate unless it can hold 'that it was impossible for a fair-minded board to come to the result which was reached' [in establishing the rate]. Knoxville v. Knoxville Water Co. 212 U. S. 1–17, 53 L. ed. 371–382, 29 Sup. Ct. Rep. 148–153. These rules are not merely cautionary phrases; they are intended to mark the limits of judicial interference." Nothing can be added to this plain but comprehensive statement.

(2) Is a Noncompensatory Rate Confiscation. The legislative rate attacked has returned to the railroad more than the outlay for transportation expenses or out-of-pocket costs occasioned in the freightage of the commodity, by some 20 or 30 per cent, which excess, of course, has contributed toward the payment of the railroad's fixed or overhead charges, which would have been the same whether or not such commodity had been carried. By actual transportation or out-of-pocket costs, we refer, then, to those items only of railroad expense caused solely in the carriage of lignite freight, and which costs consume approximately 60 per cent of the revenue so produced under the legislative rate; and distinguish and differentiate such expense from that large additional proportion of railroad expense which must necessarily accrue regardless of the carriage of any particular freight commodity, and toward the payment of which fixed and practically invariable expense 20 to 30 per cent of the gross earnings from the carriage of this

coal have contributed, over and above and after the reimbursement to the railroad of its transportation or out-of-pocket costs. Under such a situation can the courts conclude, as a matter of law, that the legislative rate is confiscatory and violative of Federal constitutional rights so guaranteed the carrier? We answer in the negative. To hold otherwise would be analogous in principle to declaring that a carrier has a vested right to earn a net profit over every mile, section, or division of its road, or upon every commodity or article of commerce carried by it. See the cases cited in our former opinion, particularly St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Atlanta Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398, a case closely parallel to the one before us. There the duly constituted state authority ordered the doing of a particular act, the running of a daily train by the railroad at a loss. It was held not to invoke "the question of the profitableness of the operation of the railroad as an entirety." Likewise, the carriage, under compulsion of legislative enactment, of a single commodity among the many constituting the wholly intrastate freight traffic, at least unless of great proportionate volume as to the total intrastate traffic, should not be held to involve the "profitableness of the operation of the railroad as an entirety." If a railroad has no constitutional right that a portion of its road, less than its total system within the state, shall yield revenue over all disbursements in operation, interest on bonded indebtedness, and taxes, as against state regulation of domestic freight rates of such state, still less in principle would it have the right, as against a legislative rate, to insist upon the return to it of a gross revenue, or a return upon affreightment of one commodity more than sufficient to pay for the transportation of such commodity and in addition a fair contribution toward general overhead expense that might be in reason apportioned to its carriage. Granting that the general rule may be that a railroad must be conceded the right to exact for its service a rate that will yield returns over gross expenses, it does not follow that each commodity rate must be so fixed, without regard to the service rendered or the freight classification as to risk, desirability, or ease of handling. In determining the rea-

sonableness of this commodity rate, our finding of fact that it is much in excess of actual transportation charges, that is, out-of-pocket costs, determines, as a matter of law, that the rate is not unreasonable, or a deprivation of any rights guaranteed these defendants under the 14th Amendment to the Federal Constitution.

(3 and 4) Method and Measure of Proof of Confiscation. But coming now to the third and fourth subdivision of this discussion, and assuming that proof establishing that a rate on a single commodity as fixed by legislative enactment, because of volume of the traffic in that commodity, and under proper proof, may amount to confiscation of the property of the carrier, there is nothing in the record in this case from which such a conclusion can be reached. Assume that when we find the fact to be that this commodity has not paid its full proportion of the overhead and fixed railroad charges assignable to it, even though it does bring a return greater than the actual out-of-pocket costs of carriage, that we must thereby conclude in law that the commodity is carried at a loss to the carrier, so that such fact may be a basis upon which confiscation can be predicated, still this alone is far from establishing that in law the statutory rate is shown to be confiscatory and void as an infringement of constitutional property rights. To stop here would be to assume a result that must not only be proven by evidence, but established so clearly and convincingly as to leave no reasonable or substantial doubt as to the effect of the rate upon the whole earnings, of which it is but a part, when compared with and measured by the value of the property used in producing the earnings accruing from the commodity rate. In other words, until the railroad has established by proof the existence of a general deficiency in intrastate earnings, or that the same will not pay a reasonable return upon the value of the railroad property used in producing such total intrastate return, it has not established its case, although it has shown a loss to ensue in the carriage of a certain commodity at a maximum statutory rate. Or, as is well said in the special concurring opinion of Judge Grubb in Louisville & N. R. Co. v. Railroad Commission, 208 Fed. 35, at page 52, concerning the effect of an intrastate reduction in passenger rates from 3 to 2½ cents: "The plaintiff must also reasonably satisfy the court of the second proposition, that any deficiency in intrastate earnings below the point of remuneration that may exist is substantially

contributed to by the enforcement of the reduced passenger rate. That rate cannot be said to be so unreasonably low to be confiscatory, unless its operation is attended with that result. Even though the intrastate earnings have reached the unremunerative point, it does not follow that every rate reduction thereafter is an act of confiscation. It is conceivable that the reduction of a specific rate may be inconsequential in its effect on the entire intrastate business, or at least of not sufficient consequence to constitute confiscation; or that, by increasing the amount of business done at the lower rate, it may be attended with no loss of earnings or even with an increase. In such a case the fact that the entire intrastate earnings of a carrier did not, either before or after the reduction, yield a fair return, would not condemn the reduced rate." And in the main opinion, on page 40, we find the following: "The great volume of evidence submitted relates to the issue necessarily involved in the main case, as to whether or not the railroad was earning, under the general schedule of rates then in question, a fair return on the value of its property devoted to intrastate public service. The solution of that question in favor of the plaintiff would not be conclusive against the defendants in the instant case, because it is limited to intrastate passenger rates. It might be true that the plaintiff would fail to secure an adequate return on all of its property devoted to the public intrastate service, and yet the failure might not be due to the passenger rate. If the return were insufficient on the whole property, the passenger rate would not be made invalid unless it materially contributed to cause the insufficiency. It follows that, to attack the order successfully, the insufficiency of the return must be shown and also that the order as to passenger rates is at fault in causing the insufficiency. If the insufficiency of the return were proved according to rules hereinafter stated, if it appears that such insufficiency is caused by the policy of the plaintiff in operation and investment, and not by the rates attacked, the rule of adequate return would be inapplicable. The plaintiff cannot be permitted to cause the failure of return by its own acts and then complain of it. . . . Under the circumstances we would be reluctant to hold that the order fixing a passenger rate only is confiscatory, because the plaintiff fails, if it does fail, to receive an adequate return on all of its property devoted to intrastate public service." Citing Minneapolis & St. L. R. Co. v. Minnesota, 185 U. S.

257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362–412, 38 L. ed. 1014–1028, 14 Sup. Ct. Rep. 1047; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578–596, 41 L. ed. 560–566, 17 Sup. Ct. Rep. 198; San Diego Land & Town Co. v. Jasper, 189 U. S. 439–447, 47 L. ed. 892–896, 23 Sup. Ct. Rep. 571; and Re Advances in Rates by Carriers in Western Trunk Line, 20 Inters. Com. Rep. 342. And the proposition is but conversely stated in Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 548, 56 L. ed. 308, at page 312, 32 Sup. Ct. Rep. 108, where the court, in discussing a rate fixed by the Interstate Commerce Commission governing the haulage of lumber from the coast to St. Paul and Omaha, has the following to say concerning this question as to one commodity: "Where the rates as a whole are under consideration, there is a possibility of deciding with more or less certainty whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article." In Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398, concerning the effect of the state commissioner's order that a daily train be operated, the proof showing it to be at a loss to the company, and in such respect analogous to the assumed facts under discussion, it is said, on page 25, or at 51 L. ed. page 944: "But even if the rule applicable to an entire rate scheme were to be here applied, as the findings made below as to the net earnings constrain us to conclude that adequate remuneration would result from the general operation of the rates in force, even allowing for any loss occasioned by the running of the extra train in question, it follows that the order would not be unreasonable, even if tested by the doctrine announced in Smith v. Ames, 169 U. S. 540, 42 L. ed. 847, 18 Sup. Ct. Rep. 418, and kindred cases." Besides declaring the law applicable to the determination of the question of confiscation as to a single act, or by analogy a single commodity rate, as necessitating

proof of other earnings than those resulting from the rate in order to determine anything at all, the court here construes Smith v. Ames, around which the defendants have builded their briefs in this case. It is therefore doubly applicable. We still adhere to the former decision of this court reported in 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869, in which the rule is announced that "the proper test as to whether the rates thus fixed are reasonable or unreasonable is not whether the rate fixed on the particular commodity is sufficiently high to enable the carrier to earn a fair compensation after allowing for the legitimate cost to the carrier of transporting the same, but whether under such rates it will be enabled from its total freight receipts on all its intrastate traffic to earn a sum above operating expenses, reasonably necessary for such traffic, sufficient to yield a fair and reasonable profit upon its investment." The rule seems to be supported by the authorities there cited, among which are Interstate Commerce Commission v. Louisville & N. R. Co. (C. C.) 118 Fed. 613; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484, affirming the same case in 54 Ark. 101, 11 L.R.A. 452, 15 S. W. 18; State ex rel. Railroad & W. Commission v. Minneapolis & St. L. R. Co. 80 Minn. 191, 89 Am. St. Rep. 514, 83 N. W. 60; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; State ex rel. Ellis v. Atlantic Coast Line R. Co. 48 Fla. 146, 37 So. 657, affirmed in 203 U. S. 256–261, 51 L. ed. 174, 175, 27 Sup. Ct. Rep. 108.

Conceding, however, that the findings concerning the Soo may serve as the basis of proof of confiscation, if it be further established that the company is not earning a reasonable return upon all of its intrastate business when measured by the amount of its investment, that is, the value of its property within this state necessary to the earning of the revenue received, the company must also establish, to sustain its contention that the rate is confiscatory, (a) the amount of its total net earnings or net loss on its intrastate business; and (b) if it has accumulated net earnings on such intrastate business, it follows that before it can be determined whether the same constitutes a fair income on its investment, it must establish the value of its property used to produce such earnings, and also if it has suffered a net loss on its intrastate traffic, or has made an insufficient profit, measured as above stated, it

must further clearly appear that the loss from the carriage of the commodity in question materially increased the loss or insufficient return beyond what it otherwise would have been. All these must appear from the proof, established directly or by reasonable inference, before the statutory rate presumed to be reasonable and just, and therefore valid, can be held invalid as an unconstitutional deprivation of property and a denial of the equal protection of the law. Besides being the logical requirements to reach the ultimate end, it seems that these rules are now fairly definitely established. And as to the accuracy of the determination of the value of the property, as well as its apportionment of expense applied to profits to determine earnings, strict legal proof of the facts is the requirement announced by the Minnesota, Missouri, and Oregon Rate Cases, 230 U. S. 352–560, 57 L. ed. 1511–1629, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729–1030, in the decision of which estimates of experts were not accepted as sufficient proof of facts, but the railroad was held to the requirement that it prove its case by clear and satisfactory evidence, or suffer dismissal of its bill of complaint, when it seeks to establish the invalidity of legislative rates. See also Wood v. Vandalia R. Co. 231 U. S. 1, 58 L. ed. —, 34 Sup. Ct. Rep. 7, in which the method of proof known as the revenue basis, but little more than an arbitrary apportionment, is expressly held insufficient in the following language: "It is plain, however, that it does not follow from the mere fact that the total operating expenses of a railroad, or of a division of a railroad, bear a given relation to the entire receipts of that road or division, that the cost of transportation in the case of a particular class of traffic bears the same relation to the revenue derived from that class. The ratio in the first case is found by bringing together a great variety of operations involving various rates and different outlays for different sorts of traffic. It is predicated of the whole volume of business considered as such, and may be far from true of some part of it considered separately. It does not purport to be an expression of the relative cost of any specified part, but simply of that of the entire traffic to which it applies." And this is equally true as to the method of proof of the cost of carriage of lignite coal offered by the Great Northern system as to cost of carriage of coal on its main and branch lines. The Soo line, on the method of proof, claims that the revenue method is supported by

the following authorities: Re Arkansas Rate Cases, 163 Fed. 141; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493; Love v. Atchison, T. & S. F. R. Co. 107 C. C. A. 403, 185 Fed. 321, at pages 328 and 330; and also Shepard v. Northern P. R. Co. 184 Fed. 765. But the foregoing from Wood v. Vandalia R. Co., and the express disapproval of this method in the decision of the Minnesota Rate Cases, we take as the last word on the subject, and as the equivalent of establishing a failure of proof in this case as to the Soo and the Great Northern, in which the testimony in this record establishes the same method of proof here used was offered in the Minnesota Rate Cases.

As the fixing of the valuation of railroad property is a mixed question of law and fact, it can well be considered here. Neither the Northern Pacific nor the Great Northern have offered any proof either as to total intrastate earnings, or as to the value of the railroad property employed in producing such earnings, both carriers assuming that it was unnecessary to make such proof, and that, should the court find that the gross revenue from this commodity failed to pay gross expenses apportionable for the carriage of this coal, it must, as matter of law, determine the legislative rate to be confiscatory. We quote the following from the oral argument of Mr. Donnelly, taken at the trial: "What we desire to present clearly to this court, regarding the revenue derived from the handling of this particular commodity, is that the operating expenses absorb practically 98 per cent of the gross; that is, taking it on its most favorable basis. This might be taken in regard to any railroad in the United States to indicate confiscatory rates, if confiscation means what we think it means, and that brings up the real legal question in the case. If this court shall persevere in the doctrine laid down in the previous case, the contentions of the carriers will be rejected, because that doctrine is that it is within the right of the state to compel the Northern Pacific Railway Company to move this or that commodity from one point to another, even though it be shown that the company earns no revenue thereby. Such is the contention which, as we think, is the very large question in issue here. Taken from a view point most favorable to the contention of the state, it will be apparent that our operating expenses and taxes exhaust the revenue derived from this coal. If that is the doctrine adhered to, it will be announced for the first time in this case, as it has been announced in

the previous decision. . . . We have approached the case in perfect fairness, and attempted to show clearly and fairly just what it costs us to haul this coal. The actual amount involved, of course, while it is large to me or any of us, is not so in connection with the receipts of the Northern Pacific. Of course, the Northern Pacific could be compelled to move this lignite coal for nothing without appreciably affecting its revenues; and we have not made a showing, and I concede we cannot, of confiscation independently of that. We cannot say the total sum we have earned is less as a result of this rate you have told us to put into effect. But we do say we have a right to demand that each commodity moved must contribute its proportion to the earnings over and above the expense of operation." This is the summary of the Northern Pacific Case, made on oral argument by its able counsel. We might perhaps have taken counsel at his word and refused to make findings as to the cost of carriage of this commodity under the maximum statutory rate, for the reason that, conceding the facts to be as so contended, the rate is not shown to be confiscatory, the value of the property employed to produce earnings, if any were made, not being shown, and on the further grounds that the court cannot assume that the carriage of this commodity materially affected dividends or earnings of the carrier. And under the concession of counsel that the carriage of this commodity could be compelled "for nothing without appreciably affecting its revenues," and again, "we cannot say the total sum we have earned is less because of this rate you have told us to put in effect," we could conclude, as a matter of law, that the rate cannot be found confiscatory as to the Northern Pacific. In order, however, that the Federal Supreme Court, assuming that this case will reach that court of last resort, may be enabled to avoid some of the labor of exploring this entire record, and that the defendants may feel that consideration has been given in this court to these cases commensurate with their importance, and also that any benefits of proof made by one carrier may be considered in its bearing upon the proof as to others, in accordance with the stipulation of counsel virtually consolidating the cases, we have made full findings of fact as to the Northern Pacific proof, although that road in our opinion has utterly failed on its proof. And as the Great Northern has likewise stood upon the proposition that it was unnecessary to make proof of value of its properties,

or apportion such value, or make proof of intrastate earnings, what is said as to the Northern Pacific is equally applicable to it.

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." Smith v. Ames, 169 U. S. 546, 42 L. ed. 849, 18 Sup. Ct. Rep. 418; quoted with approval in the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, at page 435, 57 L. ed. 1511, 1556, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, where the foregoing is supplemented by the following rule, where intrastate rates are under examination: "Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the state for intrastate transportation affords a fair return must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed," as was also held in Smith v. Ames, supra. And again the court there says: "The necessity of this segregation of the domestic business in determining values and results of operation was recognized by both parties." And again in the same case, at 230 U. S. 426, the rule is declared to be that "the reasonableness of intrastate rates was to be determined by considering the intrastate business separately." See also Ames v. Union P. R. Co. 64 Fed. 165, an opinion by Brewer, J. This is again followed in one of the Oregon Rate Cases, Southern P. Co. v. Campbell, 230 U. S. 537, as appears from pages 549, 550, 57 L. ed. 1610, 1623, 1624, 33 Sup. Ct. Rep. 1027, where it is said: "In addition to this omission, the bill was destitute of any allegation showing the expenses incurred in the conduct of the intrastate business as distinguished from the interstate business, or the share of the value of the property which was assignable to the former. In short, the allegations of the bill were wholly insufficient to show that the complainants would be deprived of just compensation in their business of intrastate transportation by virtue of the operation of the order." Opportunity was given in the court below to amend and cure such defects in the complaint, and on failure to do so a demurrer thereto was sustained, concerning which the Supreme Court says: "But the

complainants informed the courts that they did not desire to avail themselves of this opportunity, and accordingly the bill was dismissed. We think that it cannot be said that any error was committed in thus disposing of the contention as to confiscation." This seems to be the last word of the United States Supreme Court upon this subject, to the effect that without proof of the fair value of the property devoted to intrastate traffic, there is an utter and absolute failure of proof. This alone would seem decisive of the Northern Pacific and Great Northern Cases.

The Soo, however, have offered evidence touching some of these issues. See Soo Exhibit 36, and testimony of witness Kolk, explanatory thereof, found in the direct examination at page 146, and the further examination of the witness thereon under succeeding pages to page 162 of the record. Concerning Exhibit 36 the witness testifies that it "shows what would be the cost of reproducing the Soo line and properties in this state at this time" in his judgment, and that such cost would amount to $30,047,798. But on cross-examination the witness shows that the sources of his knowledge are mere tabulations containing items for right of way, station grounds, and clearing, grubbing, and grading, organization, interest during construction, and contingencies, engineering, superintendence, and legal expenses, charges for which mentioned items alone amount to $15,000,000, or one half of the claimed total value of $30,000,000. All these items enumerated are based upon arbitraries or estimates, or upon the railroad value rather than the actual value.

This is made plain on page 152 of the record, where its witness, testifying as to the value of approximately 16,000 acres of right of way, fixed at $100 per acre, and amounting to over one and one-half million dollars, says:

Q. Then your estimate of $100 per acre is on a basis of an estimated *railroad value* of four times the normal value, is that right?

A. Yes, sir. It is based on this: That in acquiring land for a railroad company, you take a strip of land which does not necessarily follow the government subdivisions; it cuts land diagonally. Frequently it runs into buildings. All these enter into the value that the railroad company has to pay as damages to the adjoining property.

That is, the acre value of the right of way is above the normal value, for the reason that it damages the adjacent property. It is impossible, in other words, to procure a railroad right of way at the normal value of land.

The actual, reasonable, market value of railroad property is the basis upon which to determine the percentage of returns yielded by net revenues. Proof of market value is not made by proof of railroad value. The Minnesota and other rate cases in 230 U. S. settle this beyond question. See pages 454–456 of that volume, summed up in the following statement: "Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, cannot properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture." And again: "And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value over the amount invested in it, and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right. . . . We therefore hold that it was error to base the estimates of value of the right of way, yards, and terminals upon the so-called 'railroad value' of the property." Also the following excerpt applies particularly to plaintiff's offered proof of valuation of its North Dakota properties, shown by Soo Exhibit 36: "The allowance made below for a conjectural cost of acquisition and consequential damages must be disapproved. And in this view we also think it was error to add to the amount taken as the present value of the lands the further sums calculated on that value which were embraced in the items of 'engineering, superintendence, legal expenses,' 'contingencies,' and 'interest during construction.'" Exhibit 36 contains about four mil-

lions in items for engineering, superintendence, legal expenses, contingencies, and interest during construction, all based upon percentages.

But assume that this carrier defendant has some proof in the record from which the value of its North Dakota properties devoted to railroad business may be ascertained. There is no apportionment of that value between interstate and intrastate business, which is equally essential in order that the confiscatory nature of the rate may be determined. We may assume that the company has made proof of the value of its road to be $30,000,000. Any attempted apportionment on gross earnings is insufficient under the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. pages 458–461, 57 L. ed. 1565, 1566, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729. A gross earnings division, coupled with a comparison of the cost of intrastate and interstate traffic, as was done in the Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, and pages 504 to 507, 57 L. ed. 1571, 1593, 1594, 33 Sup. Ct. Rep. 975, does not meet the requirements. "It is evident that in an apportionment of expenses, either upon the revenue method or upon the ton mile and passenger mile method, relations may be assumed which do not in fact exist," and an apportionment so sought to be established is repudiated. Whether in fact any reasonably satisfactory and certain proof of such apportionment of values to traffic can be made seems doubtful, but the rule in this particular is to be declared by the court of last resort. It would seem, however, that before the Federal Supreme Court "have pricked out by the gradual approach and contact of decisions on the opposing sides" the rule to be observed in this apportionment (quoting from Noble State Bank v. Haskell, 219 U. S. 112, 55 L. ed. 117, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, the Oklahoma guaranty of bank deposits case, wherein the above language is used concerning the definition of police power), that court of last resort will have a hard task in declaring a definite rule as to apportionment that will be harmonious with the usual rules of evidence, and square with the usual contingencies. In those exceptions where relief has been granted the carrier, as in the Minnesota Rate Cases, where relief was granted to the Minneapolis & St. L. R. Co., and in the Missouri Rate Cases, where granted to the three roads as exceptions (see 230 U. S. 507, 508), relief was granted upon general

conclusions drawn without stating specifically the facts that constituted the cases of these carriers as exceptional, and so afford no guidance as to the manner of arriving at an apportionment of value or the conclusions there reached. We do not say this in criticism, but rather to illustrate that these defendants and also inferior courts, in passing upon this question, must remain in the dark as to the proper method of apportionment until further decisions of the Federal Supreme Court furnish light on the subject.

In attempting to establish its contention that a legislative rate not yielding a sufficient revenue to return a fair profit must be held in law confiscatory, irrespective of whether the effect of the rate and the loss thereunder is to reduce the railroad earnings of a similar class to below the point of being remunerative in order to be confiscatory, counsel have urged the following in oral argument: "It is perfectly obvious that if the state can say to the Northern Pacific 'you must move coal at a loss,' it can do the same as to wheat. The attorney general says a point would be reached when it could not do so; and that such point is reached when the railroads can come in and show that the rates are so low they are not making a reasonable profit on their entire business. But we must consider this element: When North Dakota is saying this as to lignite coal, Montana may be saying it as to her ore, and Idaho and Washington as to their lumber. Each state can go on until that point is reached, and then what rate is confiscatory? Is it the North Dakota coal rate or the Washington lumber rate? It is but necessary to carry this argument to its logical end in order to see the difficulties which would arise from such a construction." The argument is plausible, and would seem to have force, but it has been urged before in the court of last resort in a similar case, or at least where the effect would have been the same. We refer to Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 23, 51 L. ed. 933, at page 944, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398, wherein the same in principle was contended, as shown from the following quotation: "It is insisted that, although the case be not controlled by the doctrine of Smith v. Ames, nevertheless the arbitrary and unreasonable character of the order results from the fact that to execute it would require the operation of a train at a loss, even if the result of the loss so occasioned would not have the effect of reducing the aggregate net earnings below a reason-

able profit. The power to fix rates, it is urged, in the nature of things, is restricted to providing for a reasonable and just rate, and not to compelling the performance of a service for such a rate as would mean the sustaining of an actual loss in doing a particular service. To hold to the contrary, it is argued, would be to admit that a regulation might extend to directing the rendering of a service gratuitously, or the performance of first one service and then another and still another at a loss, which could be continued in favor of selected interests until the point was reached where, by compliance with the last of such multiplied orders, the sum total of the revenues of a railroad would be reduced below the point of producing a reasonable and adequate return. But these extreme suggestions have no relation to the case in hand." The court indicates that the point might be reached when such rates would fall under the attack here made, and so be subject to review in the Federal courts, but, as there said, such is not the issue upon which our judgment is invoked. But it would seem that under the facts assumed by counsel, the carrier may be without a remedy in the Federal courts under the Minnesota and other recent rate case holdings. But, as there intimated, the subject is one within the power of Congress to regulate as indirectly affecting commerce between the several states, assuming that the state regulations rendered the intrastate business of the various states unprofitable to the carrier, or otherwise created state-favored commodity classes amounting to discrimination against intrastate traffic. However, "sufficient unto the day is the evil thereof," and the hypothetical obstacles interposed by counsel in argument will doubtless be surmounted when necessary of determination, and presented to the proper tribunal to declare the solution.

Should this court hold that the Soo carrier has offered competent evidence to establish the value of its property, and under the data before us attempt to apportion such value between intrastate and interstate use, to determine rate of earnings made in carriage of intrastate freight, and thereunder should grant relief to this carrier on the theory that the rate was confiscatory and unconstitutional as applied to it, on appeal the result would undoubtedly be the same as in the Arkansas Rate Cases, considered elaborately by the circuit court as reported in 187 Fed. 290, and reversed and dismissed on appeal in 230 U. S. 553, 57 L. ed. 1625, 33 Sup. Ct. Rep. 1030. A comparison of the tables con-

tained in Exhibit A, 187 Fed. 349–354, shows a much similar method pursued by that court in arriving at its determination that the rate was confiscatory to that here presented by these carriers, and which methods were on appeal held insufficient to establish a case of confiscatory rates.

We conclude there is a failure of proof as to all these carriers. The rate in operation does not affect alike any two of the three carriers. It is as to the Great Northern compensatory, and a reasonable rate; as to the Northern Pacific sufficient to more than reimburse for all expenses chargeable against the lignite traffic, but yielding so little revenue over such total expense as not to be remunerative in fact; and as to the Soo line, because of the effect of the prorating requirement of the statute, the lignite traffic does not yield to it a return sufficient to pay all costs attributable to lignite carriage, but does return to it an amount some 20 or 30 per cent more than sufficient to pay its out-of-pocket costs of transportation of said commodity. The Great Northern could not on the facts establish the rate to be confiscatory; as to its effect upon the Soo carrier no sufficient proof has been made of the value of its railroad property within this state; and as to the Northern Pacific no attempt has been made to make such necessary proof. Though the Soo has offered evidence upon the value of its North Dakota properties devoted to the railroad use, it has not established by competent evidence, measured by the rule in the rate cases reported in 230 U. S. 352–560, 57 L. ed. 1511–1629, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729–1030, the value of its railroad property reasonably apportionable as employed in earning its intrastate revenues, from which, as classified and apportioned, deductions are possible as to whether the particular rate attacked is confiscatory.

Though on the trial and in this opinion all three cases have been treated as consolidated by stipulation, in awarding relief each case will be considered separately. Let the writs heretofore issued from this court, entitled in each case, directed to each defendant as prayed for, restraining each several defendant from putting in force or restoring freight tariffs of the class covered by the statutory rate which shall exceed the maximum rate prescribed in chap. 51 of the Session Laws of 1907; and also enjoining collection of a greater freight return for haulage of lignite coal than is provided in said statutory rate as the maximum to be collected therefor, be each and all continued in force. The

state will recover judgment, to be entered by the clerk of this court, for its taxable costs and disbursements prorated between the defendant companies, one third of the total to be severally entered as a judgment against each company defendant. Judgment will be entered accordingly.

SPALDING, Ch. J. (concurring). The foregoing opinion follows as closely as possible the recent decisions of the Supreme Court of the United States in cases relating to railroad rates. The decisions of that court must, of course, control those of this body in actions of this nature, when the questions or principles are the same.

While the Supreme Court has laid down no very tangible rules as methods of proving valuation, operating expenses, etc., it seems by a process of elimination to have disapproved the methods of proof adopted by the railroads in the case at bar.

About the nearest approach I can see to its stating a rule for valuation is found in the recent Minnesota Rate Cases, wherein it is said that, "for purposes of establishing rates, the valuation apart from any improvements it may make, cannot properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character," and other remarks indicating, as said by Judge Goss in expressing the views of this court, that "the actual reasonable market value of railroad property is the basis upon which to determine the percentage of returns yielded by net revenues." It would seem to me that the reasonable market value of a trunk line of railroad is about as indefinite a basis from a practical standpoint as can be imagined. The history of the last twenty-five years would appear to indicate that railway properties have no value when placed upon the market, in any degree commensurate, either with their fair and honest cost, or their earning capacity, or the value of their stocks and bonds on the market.

If the cost of replacement of the road and equipment is a proper criterion, how can it be replaced, without providing for superintendence, surveying, engineering, and the other preliminary expenses, which are as essential and necessary elements in the construction of a road as are the materials for bridges or station buildings?

It is possible that the great court which passed upon these questions only intended its disapproval of proof of the nature offered by the roads,

to go to the extent of rejecting their method of reaching the cost of these elements in replacing transportation lines, because seemingly based upon an arbitrary percentage and without an attempt to show what the actual cost would approximate. The same may be said with reference to the damages which necessarily must be paid to property owners whose property is taken or injured. The observation of every intelligent man conversant with railroad building in a part of the country where lines of many roads are being constantly extended can only lead to the conclusion that, in practice, railways are compelled, either by voluntary payment or through the medium of the courts, to pay far more for the acreage composing the right of way, and the damages to property occasioned by constructing the lines, than private individuals would have to pay for the same items for other purposes; but, if the railroads are to be constructed or extended, these are elements which someone must pay for, and if the roads are not to be allowed to charge a rate which will furnish a reasonable return on the amount invested for these purposes, I am not quite clear as to who will be found willing to advance the sums to be expended for these items, and which are expenses which must be incurred before the road can be operated or even constructed.

I am constrained to state my impression from a consideration of the authorities and the evidence submitted in the several cases, that the state of the law at this writing is such as to render it a practical impossibility for a common carrier to establish the facts necessary to its protection against confiscation through the medium of confiscatory rates. This applies as well to methods of distributing the receipts and expenditures between interstate and intrastate traffic, as to the proof of value of the plant. The methods of proof adopted by the roads in the instant cases were the same employed in several of the cases to which reference has been made in the main opinion herein, the most recent of such cases, however, not having been decided until after the proof was taken in the cases at bar, hence, the railroads find themselves provided only with proof which has met the condemnation of the Supreme Court of the United States, and which therefore must be held inadequate by this court.

N. R. LINCOLN v. GREAT NORTHERN RAILWAY COMPANY, a Corporation.

(144 N. W. 713.)

Easement — adverse and exclusive possession — pleadings — railways — private crossing.

Evidence and pleadings examined, and *held* that plaintiff has not established his right to an easement in a certain private crossing from the right of way of the defendant company, the complaint, answer, and evidence failing to show an adverse and exclusive possession to the said tract.

Opinion filed December 18, 1913. On rehearing January 3, 1914.

Appeal from the District Court of Grand Forks County, *Templeton,* Judge.

Affirmed.

W. J. Mayer, for appellant.

All material allegations of the complaint not controverted by the answer shall, for the purposes of the action, be taken as true. Rev. Codes 1905, § 6878.

A right of way incident to land is an easement. Rev. Codes 1905, §§ 4926–4928.

All easements are created by grant. The grant may be direct and express, or certain facts and conditions may lead to a conclusive presumption that it exists. 10 Am. & Eng. Enc. Law, 409.

An easement is a species of real property. Rev. Codes 1905, §§ 4705, 4706, 4708.

Private property shall not be taken or damaged without just compensation. N. D. Const. § 14, art. 1.

Owner of servient tenement cannot alter the character of the easement, even though no damage is occasioned to the dominant estate. 10 Am. & Eng. Enc. Law, 429; Dickenson v. Grand Junction Canal Co. 15 Beav. 260; Gregory v. Nelson, 41 Cal. 278, 12 Mor. Min. Rep. 124; Ballard v. Butler, 30 Me. 94; Merritt v. Parker, 1 N. J. L. 460; Johnston v. Hyde, 32 N. J. Eq. 455.

The owner of any estate in a dominant tenement may maintain an

action for enforcement of an easement attached thereto. Rev. Codes, § 4795; Stallard v. Cushing, 76 Cal. 472, 18 Pac. 427; 10 Am. & Eng. Enc. Law, 431; Hastings v. Livermore, 7 Gray, 194.

The "use" of property which might give rise to an easement by prescription may be "exclusive" in the required sense, even though participated in by the owner of the servient tenement. 22 Am. & Eng. Enc. Law, 1200, ¶ 8, 1203, and cases cited.

Murphy & Duggan, for respondent.

The basis of a claim of adverse possession must be color of title or claim of right in hostility to the owner. Schrimper v. Chicago, M. & St. P. R. Co. 115 Iowa, 35, 82 N. W. 916 (reconsidered and affirmed in 115 Iowa, 42, 87 N. W. 731); Hoban v. Cable, 102 Mich. 206, 60 N. W. 466; Deerfield v. Connecticut River R. 144 Mass. 325, 11 N. E. 105; Dunham v. New Britain, 55 Conn. 378, 11 Atl. 354; Kittaning Academy v. Brown, 41 Pa. 269.

Possession, in its inception permissive, is presumed to so continue. Smith v. Miller, 11 Gray, 145.

No adverse title was in the plaintiff. Cameron v. Chicago, M. & St. P. R. Co. 60 Minn. 100, 61 N. W. 815.

An easement of way cannot be acquired by prescription unless the use was under claim of right, and with the knowledge of the owner of the servient estate. Davis v. Cleveland, C. C. & St. L. R. Co. 140 Ind. 468, 39 N. E. 495.

It is necessary that the *use* should be under an assertion of right, and not simply a *user* under a naked license. Parish v. Kaspare, 109 Ind. 586, 10 N. E. 109.

An entry of land by permission of the owner cannot be changed into an adverse entry by *use alone.* Butler v. Bertrand, 97 Mich. 59, 56 N. W. 342.

In the absence of acts of disseisin, the presumption is that such entry and use are in subordination to the true owner. 1 Cyc. 1145, and cases cited.

Continuous use of a private way *by permission* will not ripen into a *hostile right.* Pennsylvania R. Co. v. Hulse, 59 N. J. L. 54, 35 Atl. 790.

To transform a permissive use into an adverse one, there must be *positive assertion* of a *right* hostile to the rights of the owner, and such

assertion must be brought to his attention. Hurt v. Adams, 86 Mo. App. 73; Minneapolis Western R. Co. v. Minneapolis & St. L. R. Co. 58 Minn. 128, 59 N. W. 983.

Appellant has been a mere licensee. Joint occupancy, one having title and the other having no title, it will be presumed that possession of him who has no title will be in subordination to the one holding title. Whittington v. Doe ex dem. Wright, 9 Ga. 23; 1 Cyc. 1145, and cases in notes 63 and 64.

It is settled that every presumption should be made in favor of a possession in subordination to the title of the true owner. 1 Cyc. 1145, note 65.

Use of a way over land of another does not constitute adverse possession of land used, *where it is also used by the owner;* nor does it in any sense give rise to an easement. Long v. Mayberry, 96 Tenn. 378, 36 S. W. 1041.

A railroad company has no power to dispose of its property to the prejudice of the proper conduct of its business. It is quasi public in its nature. Pennsylvania R. Co. v. Hulse, 59 N. J. L. 54, 35 Atl. 791; Turner v. Fitchburg R. Co. 145 Mass. 433, 14 N. E. 631.

A railroad right of way is such a public use as to prevent the running of limitations, or the acquisition of adverse title thereto by prescription. Southern P. Co. v. Hyatt, 132 Cal. 240, 54 L.R.A. 522, 64 Pac. 272; Jones, Easements, 232; San Francisco, A. & S. R. Co. v. Caldwell, 31 Cal. 371; Moran v. Ross, 79 Cal. 159, 21 Pac. 547; Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671; Northern P. R. Co. v. Ely, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302.

BURKE, J. About the year 1881 the St. Paul, Minneapolis, & Manitoba Railway was built from St. Paul to Winnipeg, passing through the village of Manvel, in Grand Forks county, Dakota territory, and crossing the Turtle river about a mile north of the village. Between the town and the river a tract of land was owned by one Gould, who deeded a right of way 100 feet in width through the said tract, to the said railway company. At the same time the railway company established a private crossing over the said railway and connected the two portions of the tract of land owned by Gould, severed

by the line of the railway. Thereafter, the Great Northern Railway Company succeeded to the interest of the older railway company, and the plaintiff herein, through various deeds of conveyance, succeeded to the interest of Gould in all said tract of land lying west of said right of way. At the time of the building of the said private crossing, the grade was only 2 feet in height, and the crossing therefore presented but a slight grade. About the year 1908 the bridge over the Turtle river was replaced, and in order to render the same safe from floating ice was raised about 4 feet. As the said private crossing was located but 1,000 feet from the bridge, the grade of the railway was necessarily raised at the point of the crossing. This rise is given by the various witnesses to be about 3 feet above the old grade. The defendant company graveled the new crossing and improved the same as much as they possibly could, but, owing to the presence of a public highway along the east side of the railway, it was impossible to extend the grade far enough away from the railway to give as gradual an approach as had obtained prior to the said elevation.

Plaintiff brings this action in equity to compel the railway company to reduce the elevation of the tracks at the point of the crossing so as to present the same level and condition as had existed during the twenty years prior to the change. The complaint, after alleging the incorporation of the defendant and the ownership of the land, alleges that the earlier railway company had granted to the said Gould, plaintiff's predecessor in interest, a private way appurtenant to their said land crossing the said strip of land owned by it and over its roadbed and railroad tracks, 15 feet in width and extending from the easterly boundary of plaintiff's land and the westerly boundary of the public highway; that immediately thereupon the railway company graded approaches, and has ever since maintained said private crossing, and that for more than twenty years the plaintiff and his grantors have enjoyed the actual and beneficial use of said crossing, and that said use has been open, notorious, peaceful, continuous, uninterrupted, and adverse, and was enjoyed with full knowledge and acquiescence of the said defendant; that the said grade did not exceed a height of 2 feet above the average level of the ground, and that the said crossing was safe and convenient for use; that during the summer of 1908 the defendant wrongfully and unlawfully interfered with and obstructed

plaintiff's right of way over said railway by raising said grade, thus rendering the said crossing extremely unsafe and difficult. Wherefore plaintiff demanded judgment that the said grade be declared a nuisance and lowered to its former level and condition. The answer of the defendant admits the incorporation of the company and the ownership of the land by plaintiff, and admits "that there has been a private crossing at or near the point described in the complaint for a great many years, but denies the allegations of said complaint in reference to the same having been interfered with or obstructed by this defendant, and in this behalf alleges the fact to be that said crossing now is, and has been at all times, in proper shape and fit for use for crossing purposes." Trial was had in the court below and resulted in a dismissal of the action. Plaintiff appeals and demands trial *de novo* in this court.

(1) The first point to be settled in this case is one of interpreting the pleadings. Plaintiff insists that, upon the admission of the answer for the purposes of this trial, it conclusively appears that he has such an interest in the crossing aforesaid that arises to the dignity of easement in the land, which cannot be interfered with by the defendant without bringing condemnation proceedings for that purpose. With this contention we cannot agree. Admitting all of the allegations in the complaint not specifically denied by the answer, it would only appear that the defendant company had built and maintained for the use of the plaintiff and his predecessors a private crossing over its tracks and across its railway, and that the same had been so maintained for a period of more than twenty years, under a grant from the older company.

It is plaintiff's contention that he has acquired some interest in the real estate itself, and this action is not for damages, but to enforce plaintiff's rights in the strip of land 15 feet in width which crosses the defendant's tracks. Appellant cites §§ 4926–4928, Rev. Codes 1905, in support of his contention. The said sections read as follows: Section 4926: "Title by occupancy. Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession." Section 4927: "Prescription. Occupancy for the period prescribed by the Code of Civil Procedure or any law of this state, as sufficient to bar

an action for the recovery of the property, confers a title thereto, denominated a title by prescription, which is sufficient against all." Section 4928: "Titles to real property. All titles to real property vested in any person or persons who have been, or hereafter may be, in actual open adverse and undisputed possession of the land under such title for a period of ten years, and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in law, any law to the contrary notwithstanding."

The complaint and answer taken together do not show that the possession of the railway company to this crossing has been in any manner ousted. The statement in the complaint that the land has been used as a crossing is an admission that the said right of way has during all the said time been in use for the passage of trains. The allegations of the complaint that the said grade was raised are a further admission to the same effect, so it stands admitted in the case, from the pleadings themselves, that during all of the time of the alleged prescription, defendant was using the said crossing the same as it was any other portion of its track. This fact at once differentiates the case at bar from all cases wherein the defendant has been completely ousted of its possession during the running of the prescriptive period.

It is true, as contended by the appellant, that the complaint alleges that plaintiff's possession has been *adverse,* but this must yield to the other portions of the complaint already mentioned. There is no allegation in the complaint that plaintiff has paid taxes upon the land during such period, and this, with other facts, shows the true interpretation of the pleading.

It requires no citation of authority to show that under the circumstances of this case the railway company lost no iota of its title to the land, and that plaintiff acquired none. Otherwise, the railway would have to entirely abolish all private crossings for fear of losing its land. However, on such occasions as the courts have passed upon the question, it has always been held that the title to the land remains in the railway company unimpaired. In Schrimper v. Chicago, M. & St. P. R. Co. 115 Iowa, 35, 82 N. W. 916, reconsidered in 115 Iowa, 42, 87 N. W. 731, it is said: "The basis of a claim of adverse possession must be color of title or claim of right in hostility to the owner, and if it be based on a statutory duty, it is simply permissive, and lapse

of time will not ripen it into a title." This decision was based upon a law requiring railway companies to maintain crossings where one owner possessed lands each side of the track, but is equally applicable in cases where the crossing is maintained by a private agreement with the landowner or as a matter of convenience to its patrons. In fact, in the case at bar, it is more than likely that this crossing was initially instituted in compliance with the law, but through an oversight of the pleader the answer does not deny the allegation to the effect that the railway company granted a private way across the said tracks. Thus, in Hoban v. Cable, 102 Mich. 206, 60 N. W. 466, the crossing was put in after such an agreement, and it was there held that there could be no adverse title where the use had been permissive. In Dunham v. New Britain, 55 Conn. 378, 11 Atl. 354, the plaintiff had a written license to use a certain body of water owned by the municipality. This right he enjoyed for a great many years and claimed the same to be perpetual by prescription. Later the city ousted him, and the supreme court of that state held that a permissive use could not ripen into a prescriptive right. See also Towne v. Nashua & L. R. Co. 124 Mass. 101; Deerfield v. Connecticut River R. Co. 144 Mass. 325, 11 N. E. 105; Smith v. Miller, 11 Gray, 145; Cameron v. Chicago, M. & St. P. R. Co. 60 Minn. 100, 61 N. W. 815; Davis v. Cleveland, C. C. & St. L. R. Co. 140 Ind. 468, 39 N. E. 495; Parish v. Kaspare, 109 Ind. 586, 10 N. E. 109; Butler v. Bertrand, 97 Mich. 59, 56 N. W. 342; Pennsylvania R. Co. v. Hulse, 59 N. J. L. 54, 35 Atl. 790; Hurt v. Adams, 86 Mo. App. 73; Whittington v. Doe ex dem. Wright, 9 Ga. 23; Long v. Mayberry, 96 Tenn. 378, 36 S. W. 1041; Turner v. Fitchburg R. Co. 145 Mass. 433, 14 N. E. 631; Southern P. Co. v. Hyatt, 132 Cal. 240, 54 L.R.A. 522, 64 Pac. 272; Venable v. Wabash Western R. Co. 112 Mo. 103, 18 L.R.A. 68, 20 S. W. 493; San Francisco, A. & S. R. Co. v. Caldwell, 31 Cal. 371; Moran v. Ross, 79 Cal. 159, 21 Pac. 547; Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671; Northern P. R. Co. v. Ely, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302.

In short, appellant's whole claim to equity is based upon the claim of ownership of an easement in the defendant's right of way, which he claims has not been denied, and is therefore admitted by the defendant. Holding, as we do, that the allegations of the complaint,

taken as a whole, show that such easement does not exist, plaintiff's argument necessarily falls.

Upon all of the evidence, we would probably hesitate to hold that the crossing had been injured in any manner not justified by the exigencies of the case, but in view of the fact that plaintiff has not proven his right to the land in question, excepting the permissive one to use the private crossing supplied by the defendant, it follows that he cannot maintain an action to compel the lowering of the tracks to their former level. The action of the trial court in dismissing the action was correct and is accordingly affirmed.

On Rehearing. (Filed January 3, 1914.)

Appellant has filed a petition for rehearing in which he complains that this court has placed too narrow an interpretation upon his complaint. The wording of the complaint is that the older railroad company "granted a private way over its roadbed and railway tracks." The answer admits an existence of a "private way." However, the railway company had no right to grant any easement in the land inconsistent with its own use of the right of way for railroad purposes. This for the reason that the railroad company is itself a public servant and its own interest in the land is largely in the nature of an easement. Having no right to grant the easement as interpreted by plaintiff, it certainly had no right to admit in its pleadings that the grant had been made. The court in its first opinion held that the allegations of the complaint should be construed in connection with this legal principle, and that plaintiff had therefore merely alleged a right to use the said crossing subject to all of the rights of the railway company to use the same for its own purposes. If the complaint is not given this interpretation, it is demurrable. The court adheres to the former holding that plaintiff's pleadings (as above construed) do not allege an easement superior to the right of the railway company to make necessary alterations in the elevation of its tracks. The evidence shows conclusively that the railway company made only such changes in the grade as the interest of good railroading demanded, and that the crossing was left in as good a condition as the railway company could leave it, and is in good condition as a highway and usable

as a crossing. The present track of the railroad company at the point of the crossing is about 5 feet above the level of the prairie. The ordinary public roads are graded often as high as this, and if plaintiff desires to grade his road on his own side, he can have nearly a level haul for all of the grain hauled from the farm. The rehearing is denied.

L. C. DOW as Administrator, and Josephine Lillie, as Administratrix, of the Estate of Eulalie Lillie, Deceased, Karl W. Kendall, and First National Bank of Marion, Iowa, a Corporation, v. GEORGE L. LILLIE, as Administrator of the Estate of Eulalie Lillie, Deceased.

(— L.R.A.(N.S.) —, 144 N. W. 1082.)

Ancillary administration — county court — district court — appealable orders — substantial rights.

1. An order of the district court which confirms an order of the county court in an ancillary administration, refusing to grant a petition filed by the principal administrator under the direction of the principal court for the sale of real estate in North Dakota, and the transmission of the proceeds thereof to such principal court for the payment of the debts there provided, is a final order affecting a substantial right made in a special proceeding, and is appealable as such under § 7225, Rev. Codes 1905.

Appeal — depositions — stipulations — evidence — statement of the case.

2. In the case of such an appeal, and where the trial in the district court was had upon a stipulation of facts and depositions which were included in the certified record on appeal from the county to the district court, and no oral evidence was taken in the latter court, no statement of the case is necessary, and the supreme court can take into consideration the evidence as presented by the depositions and the stipulations.

Estates — claims against — administration — orders of — rejecting claims — not res judicata.

3. In allowing or rejecting a claim, an administrator acts merely as an auditor, and his refusal to allow such claim is not *res judicata*.

Claims — proof of — jurisdiction.

4. Where there is both a principal and an ancillary administration, cred-

itors may prove their claims in either jurisdiction, and it is not always necessary that they should be proved in both.

Decedent's property — debts must be first paid — heirs — estate or interest.

5. Under the Code of North Dakota the heirs or devisees have no right to a decedent's property until his debts are paid. The creditors are the first preferred parties in interest, and until satisfied heirs or legatees have no enforceable interest.

Nonresidents — estates — administration — proof of claims — debts — real estate — sale of — proceeds to pay debts.

6. Where a resident of Iowa died in that state, and administration of her estate was had, and on such administration a creditor proved his claim and said claim was allowed by the court, but there were not assets in such jurisdiction sufficient to pay the same, and an ancillary administration was had in North Dakota, where there was real estate belonging to the estate, but no money or personal property, and there were no debts, and a petition was filed in said ancillary administration by the administrator in the principal administration under the direction of said principal court, asking for the sale of the real estate in North Dakota and the transmission of the proceeds to said principal court for the payment of the debts there proved and allowed, *held*, that said petition should have been granted, even though such debts had not been proved in North Dakota in the said ancillary administration.

(Opinion filed January 8, 1914.)

Appeal by petitioners from an order of the District Court of Bottineau County, *Burr*, J., confirming an order of the County Court of said county denying a petition filed by the administrator in and under the direction of the court of the principal administration in the state of Iowa, and in an ancillary administration in said County Court of Battineau County, North Dakota, asking for the sale of real estate in North Dakota, and the transmission of the proceeds thereof for the payment of debts proved and allowed in said principal administration.

Reversed and remanded.

Statement by BRUCE, J.

This litigation was started by the filing of a petition in proceedings pending in the county court of Bottineau county, North Dakota, relating to the administration of the estate of Eulalie Lillie, deceased. The petition was filed by the administrator in the principal administration of said estate held in the district court of Linn county, Iowa,

such administrator having been directed to file the same by the presiding judge of the Iowa court. The petition alleged the principal administration in Iowa, the allowance of claims therein far in excess of the assets of said estate, and prayed the county court of Bottineau county, North Dakota, to direct the sale of the lands located in North Dakota, and to transmit the proceeds to the administrator of the estate in Iowa, to be used in paying the debts there proved. The petition was heard by the county court of Bottineau county and denied. An appeal was seasonably taken from this order to the district court of Bottineau county. That court heard the proceedings upon the record which was made in, and which was sent up by, the county court, and on a stipulation of facts. The record of the county court included the depositions on which the cause was originally tried. The district court affirmed the order of the county court in all respects, and an appeal was taken from this order to the supreme court. The facts as disclosed by the record and the stipulations are as follows:

Eulalie Lillie at the time of her death was a resident of Marion, in the state of Iowa. On or about December 2, 1908, George L. Lillie, the respondent, filed a petition in the district court of Linn county, Iowa, asking that the estate of Eulalie Lillie be admitted to probate, and in the proceeding thus started an order was made appointing L. C. Dow and Josephine Lillie, two of the petitioners above named, as administrators. During her lifetime the said Eulalie Lillie had given to Karl W. Kendall notes aggregating $12,500. On April 27, 1909, these notes, together with other claims, were proved against the estate in Iowa, and were allowed by the court, and are now unpaid. The decedent also during her lifetime gave to petitioner the First National Bank of Marion, Iowa, her notes to the amount of $2,000. On April 23, 1909, these notes were also proved against the Iowa estate, and were allowed by the court in the sum of $1,650, which sum is still unpaid. Decedent left no real estate in the estate of Iowa and only $200 in personal property. Decedent left no personal property in North Dakota, but did leave real estate which was appraised in the probate proceedings at $14,400. During the month of May, 1911, and after the approval and allowance of the claims of the petitioners Karl W. Kendall and First National Bank of Marion, Iowa, in the probate proceedings brought in the district court of Linn county, Iowa

(which court had probate jurisdiction), a petition was filed in the county court in and for Bottineau county, North Dakota, asking that George Lillie be appointed administrator of the estate of Eulalie Lillie, situated in the state of North Dakota, and such proceedings were had thereon that George L. Lillie was duly appointed and known as the administrator of such estate. On the 7th day of June, 1910, and on the 20th day of June, respectively, the said claims of the petitioners Karl W. Kendall and First National Bank of Marion, Iowa, for $14,510.93 and $1,650, respectively, were presented and filed with George L. Lillie, administrator in the county of Bottineau, North Dakota, and the judge of said court thereupon indorsed thereon the date of their filing. No other or further action was ever taken by the said administrator, George L. Lillie, or by the said county court in reference thereto. On or about the 24th day of February, 1911, an order was made in the district court of Linn county, Iowa, on an application by the appellants and petitioners Karl W. Kendall and First National Bank of Marion, Iowa, which prayed that the administrators of the decedent's estate in Iowa might be directed to apply to the county court of Bottineau county, in North Dakota, for an order directing the administrator of the North Dakota estate to institute proceedings to sell the land in North Dakota, and to remit the proceeds of such sale to the administrators in Iowa. No claims have been proved against the estate in North Dakota, and the funds in the hands of the administrators in Iowa are entirely inadequate to pay the claims of the petitioners. Appellants Karl W. Kendall and First National Bank of Marion, Iowa, are both residents of Marion, Linn county, Iowa.

This appeal is taken from the order of the district court affirming the order of the county court. There is no demand for a trial *de novo,* nor is there any settled statement of the case, nor any specifications of fact that the appellants desire this court to review.

Engerud, Holt, & Frame, for appellants.

Claimants had two concurrent remedies. They could prove their claims in the Iowa court, or could proceed to do so in the North Dakota court, or in both courts. Their claims having been proved in the Iowa court, they were entitled to have them paid out of decedent's estate wherever located. Rev. Codes 1905, §§ 8225 to 8228; Cowden v.

Jacobson, 165 Mass. 240, 43 N. E. 98; Miner v. Austin, 45 Iowa, 221, 24 Am. Rep. 763; Lawrence v. Elmendorf, 5 Barb. 73; Re Gable, 79 Iowa, 178, 9 L.R.A. 218, 44 N. W. 352.

The right of claimant to participate in the assets of the estate in North Dakota is not *res judicata.* Chambers v. Chambers, 38 Or. 131, 62 Pac. 1013; Willis v. Marks, 29 Or. 493, 45 Pac. 293; Preston v. Knapp, 85 Cal. 559, 24 Pac. 811; Cowden v. Jacobson, 165 Mass. 240, 43 N. E. 98; Wilson v. Hartford F. Ins. Co. 19 L.R.A.(N.S.) 553, 90 C. C. A. 593, 164 Fed. 817; Miner v. Austin, 45 Iowa, 221, 24 Am. Rep. 763; Rev. Codes 1905, §§ 8225 to 8228.

The property in North Dakota should be sold and the proceeds sent to the Iowa court. Re Gable, 79 Iowa, 178, 9 L.R.A. 218, 44 N. W. 352; Pisano v. B. M. & J. F. Shanley Co. 66 N. J. L. 1, 48 Atl. 618; Lewis v. Grognard, 17 N. J. Eq. 425; Pratt v. Douglas, 38 N. J. Eq. 516; Childress v. Bennett, 10 Ala. 751, 44 Am. Dec. 503.

The function of ancillary proceedings is to gather in the assets of the estate within its jurisdiction, pay local claims, and transmit the balance to the domiciliary estate. First Nat. Bank v. Warner, 17 N. D. 81, 114 N. W. 1085, 17 Ann. Cas. 213; St. John v. Lofland, 5 N. D. 143, 63 N. W. 930; Palmeteer v. Tilton, 40 N. J. Eq. 555, 5 Atl. 105; Lobdell v. Lobdell, 36 N. Y. 333.

When the reason for a rule does not exist or enter into the controversy, the rule itself ceases to operate or govern. Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088; McCartin v. Traphagen, 43 N. J. Eq. 323, 11 Atl. 156; Dolan v. Dolan, 89 Ala. 256, 7 So. 425; Kroh v. Heins, 48 Neb. 691, 67 N. W. 771; Kempton v. Bartine, 59 N. J. Eq. 149, 44 Atl. 461; Pyle v. Pyle, 158 Ill. 289, 41 N. E. 999; Wright v. Jackson, 59 Wis. 569, 18 N. W. 486; Dick v. Williams, 130 Pa. 41, 18 Atl. 615; Messimer v. McCrary, 113 Mo. 382, 21 S. W. 17; Magemau v. Bell, 13 Neb. 247, 13 N. W. 277; Glover v. Gentry, 104 Ala. 222, 16 So. 38; Harpending v. Daniel, 80 Ky. 449.

Whether the administration be a principal or auxilliary one, the rights of the parties remain the same. Fretwell v. McLemore, 52 Ala. 134; Wright v. Phillips, 56 Ala. 82; Hamilton v. Levy, 41 S. C. 374, 19 S. E. 612; Dawes v. Head, 3 Pick. 128.

A decedent's property becomes a trust fund for the payment of his debts wherever they exist. The location of such debts creates no

preference rights. Rev. Codes 1905, §§ 5187, 8093, 8096, 8225–8228, 8134; Wright v. Phillips, 56 Ala. 69; Miner v. Austin, 45 Iowa, 221, 24 Am. Rep. 763; Lawrence v. Elmendorf, 5 Barb. 73; Goodall v. Marshall, 11 N. H. 95, 35 Am. Dec. 472; Hamilton v. Levy, 41 S. C. 374, 19 S. E. 612.

The discretion mentioned in § 8225 of our Code means a *legal* discretion, and does not confer authority upon the court to act arbitrarily. Dawes v. Head, 3 Pick. 145.

The rules of comity between states and courts should be adopted and followed, whenever they are not in conflict with the true intent and spirit of statute law, in order that justice may be done. Re Gable, 79 Iowa, 178, 9 L.R.A. 218, 44 N. W. 352; Davis v. Estey, 8 Pick. 475; Dawes v. Head, 3 Pick. 128; Fay v. Haven, 3 Met. 109; Dawes v. Boylston, 9 Mass. 337, 6 Am. Dec. 72; Jennison v. Hapgood, 10 Pick. 77; Stevens v. Gaylord, 11 Mass. 256; Probate Ct. v. Kimball, 42 Vt. 320; Miller's Estate, 3 Rawle, 312, 24 Am. Dec. 345; Goodall v. Marshall, 11 N. H. 88, 35 Am. Dec. 472; Barry's Appeal, 88 Pa. 131; Young v. Wittenmyrer, 123 Ill. 303, 14 N. E. 869; Gravillon v. Richards, 13 La. 293, 33 Am. Dec. 563; Gaines's Succession, 46 La. Ann. 252, 49 Am. St. Rep. 324, 14 So. 602; Williams v. Williams, 5 Md. 467; Wright v. Gilbert, 51 Md. 146; Parsons v. Lyman, 20 N. Y. 103; Despard v. Churchill, 53 N. Y. 192; Hamilton v. Levy, 41 S. C. 374, 19 S. E. 612; Wright v. Phillips, 56 Ala. 82; Fretwell v. McLemore, 52 Ala. 134; Childress v. Bennett, 10 Ala. 751, 44 Am. Dec. 503; Lawrence v. Elmendorf, 5 Barb. 73; Cummings v. Banks, 2 Barb. 602; Lewis v. Adams, — Cal. —, 8 Pac. 619; Apple's Estate, 66 Cal. 432, 6 Pac. 7; Miner v. Austin, 45 Iowa, 221, 24 Am. Rep. 763; McCully v. Cooper, 114 Cal. 258, 35 L.R.A. 492, 55 Am. St. Rep. 66, 46 Pac. 83; Greenwalt v. Bastian, 10 Kan. App. 101, 61 Pac. 513; Doss v. Stevens, 13 Colo. App. 535, 59 Pac. 67; Shegogg v. Perkins, 34 Ark. 117; Mitchell v. Cox, 28 Ga. 32; Spraddling v. Pipkin, 15 Mo. 118; Joy v. Elton, 9 N. D. 444, 83 N. W. 875.

The administrators in Iowa were the proper parties to bring these proceedings. State ex rel. Security Trust Co. v. Probate Ct. 67 Minn. 51, 69 N. W. 609, 908; Strauss v. Phillips, 189 Ill. 9, 59 N. E. 560; Moore v. Luther, 153 Mich. 206, 18 L.R.A.(N.S.) 149, 126 Am. St. Rep. 479, 116 N. W. 986, 117 N. W. 932; Wilson v. Hartford F. Ins.

Co. 19 L.R.A.(N.S.) 553, 90 C. C. A. 593, 164 Fed. 817; Fields v. Mundy, 106 Wis. 383, 80 Am. St. Rep. 39, 82 N. W. 343.

Noble, Blood, & Adamson, for respondent.

The so-called order from which this appeal is taken is not an appealable order. It is merely one of the conclusions of law reached by the trial court. Re Weber, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523; Prondzinski v. Garbutt, 9 N. D. 244, 83 N. W. 23; Field v. Great Western Elevator Co. 5 N. D. 400, 67 N. W. 147; Re Peterson, 22 N. D. 480, 134 N. W. 752.

The debts of a decedent cannot be made a charge against the property until the conditions of the statute have been fully met. N. D. Rev. Codes, §§ 8093, 8097, 8099, 8103, 8105, 8108.

Where action is brought on a rejected claim after three months, its rejection by the administrator can be pleaded in bar, because the limitation had run. Boyd v. VonNeida, 9 N. D. 337, 83 N. W. 329; Farwell v. Richardson, 10 N. D. 36, 84 N. W. 558; Mann v. Redmon, 23 N. D. 508, 137 N. W. 478.

Before a claimant can be exempted from the operation of the statute, he must show that he is excepted by its terms. Roaf v. Knight, 77 Iowa, 506, 42 N. W. 433; Morgan v. Hamlet, 113 U. S. 449, 28 L. ed. 1043, 5 Sup. Ct. Rep. 583; Crenshaw v. Carpenter, 69 Ala. 572, 44 Am. Rep. 539; Van Steenwyck v. Washburn, 59 Wis. 483, 48 Am. Rep. 532, 17 N. W. 289; Barry v. Minehan, 127 Wis. 570, 107 N. W. 488; Winter v. Winter, 101 Wis. 494, 77 N. W. 883.

The administration and distribution of the real property in question are governed by the laws of North Dakota, where said property is located. Wilson v. Hartford F. Ins. Co. 19 L.R.A.(N.S.) 553, 90 C. C. A. 593, 164 Fed. 817; Fields v. Mundy, 106 Wis. 383, 80 Am. St. Rep. 39, 82 N. W. 343.

Claims not filed and treated here as provided by statute cannot be enforced. Winter v. Winter, 101 Wis. 494, 77 N. W. 883; Carpenter v. Murphey, 57 Wis. 541, 15 N. W. 798; Austin v. Saveland, 77 Wis. 108, 45 N. W. 955; Eingartner v. Illinois Steel Co. 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433.

The local administrator acts wholly under and by the authority of the statutes of this state, and the acts of a foreign court of administration are not binding on him. Stacy v. Thresher, 6 How. 57, 12 L. ed.

342; McLean v. Meek, 18 How. 16, 15 L. ed. 277; Talmage v. Chapel, 16 Mass. 71; McGarvey v. Darnall, 134 Ill. 367, 10 L.R.A. 861, 25 N. E. 1005; Story, Confl. L. § 522; Freeman, Judgm. § 163; Smith v. Goodrich, 167 Ill. 46, 47 N. E. 316; Strauss v. Phillips, 189 Ill. 9, 59 N. E. 560.

Before the county court can order the sale of real estate to pay debts, the validity of the claims must be established. McGowan v. Lufburrow, 82 Ga. 523, 14 Am. St. Rep. 178, 9 S. E. 427; 18 Cyc. 680, and cases there cited; 11 Am. & Eng. Enc. Law, 1081, and cases there cited.

Where petition is made for order for sale of real property to pay debts, it must show the essential facts required by statute, including the fact that the personal estate is insufficient. Hadley v. Gregory, 57 Iowa, 157, 10 N. W. 319; 18 Cyc. 1233.

Where such application is made in the ancillary jurisdiction, to pay claims allowed in the domiciliary jurisdiction, the proceedings will be governed by the laws of the domicil where the claims were allowed. 18 Cyc. 1233; McCrary v. Tasker, 41 Iowa, 260; Conger v. Cook, 56 Iowa, 117, 8 N. W. 782; Hadley v. Gregory, 57 Iowa, 157, 10 N. W. 319.

The power of the county courts in these respects is limited by the terms of the statute. No such power existed at common law. Haynes v. Meeks, 20 Cal. 312; Worthy v. Johnson, 52 Am. Dec. 399 and note, 8 Ga. 236; Merrill v. Harris, 26 N. H. 142, 57 Am. Dec. 359; Tucker v. Harris, 58 Am. Dec. 488 and note, 13 Ga. 1; Currie v. Stewart, 27 Miss. 52, 61 Am. Dec. 500; Janes v. Throckmorton, 57 Cal. 368; Pettit v. Pettit, 32 Ala. 288; Wyman v. Campbell, 6 Port. (Ala.) 219, 31 Am. Dec. 677; 11 Am. & Eng. Enc. Law, 2d ed. 1069, note 3.

The claimant was *not a creditor* of the estate. Fields v. Mundy, 106 Wis. 383, 80 Am. St. Rep. 39, 82 N. W. 343; Bond v. Smith, 2 Ala. 660; May v. Parham, 68 Ala. 253; Riser v. Snoddy, 7 Ind. 442, 65 Am. Dec. 740; Bevers v. Park, 88 N. C. 456.

BRUCE, J. (after stating the facts as above). The first point made by the respondent is that the appeal should be dismissed on the ground that the order is not an appealable one, and that the appellants have failed to demand a trial *de novo,* or to specify certain questions of fact

that they desire the supreme court to review, or to make any settled statement, and have failed to enter up any judgment, or to appeal from any judgment. It is argued that the order of the district court was in reality one of the conclusions of law made by that court, and was not an appealable order, and that the appeal, if any, is one which should have been taken under § 7229 of the Codes of 1905, the action being, according to the contention, an equitable one. It is also claimed that even if the action is a law action, there is no settled statement, no notice of intention to move for a new trial, no motion for a new trial, no appeal from any order denying a new trial, and no appeal from any judgment.

We are fully satisfied that the order appealed from was a final order affecting a substantial right made in a special proceeding, and was therefore appealable under § 7225, Rev. Codes 1905. Subdivision 2 of § 7225, Rev. Codes 1905, declares to be appealable a final order affecting a substantial right in a special proceeding. Remedies in the courts of justice are by the Code of North Dakota divided into actions and special proceedings. See Rev. Codes 1905, § 6741. "An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Rev. Codes 1905, § 6742. "Every other remedy is a special proceeding." Rev. Codes 1905, § 6743. It is quite clear to us that the proceeding at bar is not an action under the definition of § 6742, and that therefore it must, under § 6743, be classified as a special proceeding. The proceeding is not "*an ordinary proceeding* in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." An ordinary proceeding, as the term is used in the Code, is such a proceeding as was known to the common law, and was formerly conducted in accordance with the proceedings of the common-law courts. Under the modern Codes it seems that it must generally be such a proceeding as is started by the issuance of a summons and results in a judgment which can be enforced by an execution. Hallahan v. Herbert, 57 N. Y. 409; Roe v. Boyle, 81 N. Y. 305; Hyatt v. Seeley, 11 N. Y. 52; Belknap v. Waters, 11 N. Y. 477; Re Cooper, 22 N. Y. 67; Re Rafferty, 14 App. Div. 55, 43 N. Y.

Supp. 760; Cornish v. Milwaukee & L. R. Co. 60 Wis. 476, 19 N. W. 443; Van Winkle v. Stow, 23 Cal. 458; McNiel v. Borland, 23 Cal. 144; State ex rel. Carleton v. District Ct. 33 Mont. 138, 82 Pac. 789, 8 Ann. Cas. 752; Wildman v. Wildman, 70 Conn. 700, 41 Atl. 1. A special proceeding, on the other hand, is a remedy which is of statutory origin. Roe v. Boyle, 81 N. Y. 305; Hyatt v. Seeley, 11 N. Y. 52; Re Myers, 72 N. Y. 1, 4, 28 Am. Rep. 88; Mills v. Thursby, 2 Abb. Pr. 432; Crosby's Estate, 55 Cal. 574, 588; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206. Proceedings, indeed, such as those before us, have repeatedly been held to be special proceedings, and not actions. Scott's Estate, 15 Cal. 220; Re Joseph, 118 Cal. 660, 50 Pac. 768; Re Burton, 93 Cal. 459, 29 Pac. 36; Deer Lodge County v. Kohrs, 2 Mont. 66; Burris v. Kennedy, 108 Cal. 331, 41 Pac. 459; Crosby's Estate, 55 Cal. 574; Ex parte Smith, 53 Cal. 204; Missionary Soc. v. Fly, 56 Ohio St. 405, 47 N. E. 538; Seward v. Clark, 67 Ind. 289; Carpenter v. Superior Ct. 75 Cal. 596, 599, 19 Pac. 174; Re Blythe, 110 Cal. 226, 42 Pac. 641; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656; Re Burton, 93 Cal. 459, 29 Pac. 36. So, too, it is equally clear that the order is a final order and affects a substantial right. See Bolton v. Donavan, 9 N. D. 575, 84 N. W. 357; Ellis v. Southwestern Land Co. 94 Wis. 531, 69 N. W. 363; Re Sullivan, 40 Wash. 202, 111 Am. St. Rep. 895, 82 Pac. 297. It is an order, not a judgment, for in such cases the district court enters no judgment. See Rev. Codes 1905, §§ 7986, 7989.

Being a final order in a special proceeding, no statement of the case was required. In such cases the statute (Rev. Codes 1905, § 7206) provides that the clerk of the district court shall transmit to the supreme court the order appealed from and the original papers used by each party on the application for such order. These papers, the statutes provide, must be certified by the clerk of the district court, and no other certification or attestation is necessary. In such a case, and where no oral evidence has been taken before the district court, and the order made by the district court is based entirely on the record of the county court and the stipulation of counsel, no statement of the case is necessary. Oliver v. Wilson, 8 N. D. 590, 593, 73 Am. St. Rep. 784, 80 N. W. 757; State ex rel. Minehan v. Meyers, 19 N. D. 805,

817, 124 N. W. 701. We have, at the request of counsel for respondent, carefully examined our holding in the case of Re Peterson, 22 N. D. 480, 134 N. W. 751. We find nothing, however, in that case which is antagonistic to the propositions herein advanced. If oral evidence had been taken in the district court, a settled statement of the case might have been necessary, but such was not the fact in the case at bar.

Not only then is the order appealable, but we are at liberty to examine the depositions which are to be found in the record in the case. This is important, as in them we find proof of what we believe to be important, if not necessary, facts, namely, that the decedent was a resident of the state of Iowa, and that there was in Iowa but $200 worth of personal property and proved debts of many thousands of dollars.

Respondent next contends that appellants can have no relief for the reason that their claims were presented to the administrator of the decedent's estate in North Dakota, that there is no record of their approval by him, and that no suit was brought upon them within the period prescribed by § 8105, Rev. Codes 1905. We do not, however, consider these facts to be pertinent. An administrator's act in passing upon a claim is not *res judicata.* In allowing or rejecting any claim he acts merely as an auditor. His allowance or rejection simply means that he is or is not satisfied as to the justice of the claim, but it is in no sense a judicial determination, as he is not vested with judicial functions respecting it. Chambers v. Chambers, 38 Or. 131, 62 Pac. 1013. It was not necessary in this case that the claims should have been proved or adjudicated in North Dakota. They were approved by the court of the principal administration, in Iowa. It was optional with the petitioners and appellants to file their claims either in Iowa or in North Dakota. The heirs and other persons interested in the estate had the right to defend in Iowa as well as in North Dakota.

So, too, the statute of limitations or of nonclaim is not here involved. This is not an attempt to prove claims in North Dakota, but to induce the North Dakota court to sell property and to transmit the funds derived therefrom for the payment of claims properly proved and allowed in another state. Section 5187 of the Rev. Codes of 1905 provides that "when any person having title to any estate, not otherwise limited by marriage contract, dies without disposing of the

estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this Code and the Probate Code, *subject to the payment of his debts.*" In this clause there is no qualification as to where those debts shall exist, or where they shall have been allowed. Section 8093 of the Code provides: "*All the property of the decedent,* except as otherwise provided for the homestead and personal property set apart for the surviving wife or husband and minor child or children, shall be chargeable with the payment of the debts of the deceased, the expenses of administration, and the allowance to the family, and the property, personal and real, may be sold as the court may direct in the manner hereinafter prescribed." Section 8096 provides: "The estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and allowance to the family. . . ." Section 8225 provides: "Upon the settlement of such estate, and after the payment of all debts for which the same is liable in this state, the residue of the personal estate may be distributed and disposed of in manner aforesaid by the county court; or in the discretion of the court, it may be transmitted to the executor or administrator, if any, in the state or country where the deceased had his domicil, to be there disposed of according to the laws thereof." Section 8226 provides: "If such person dies insolvent, his *estate* found in this state shall, as far as practicable, be so disposed of that all his creditors here and *elsewhere* may receive each an equal share in proportion to their respective debts." Section 8227 provides: "To this end his *estate* shall not be transmitted to the foreign executor or administrator until all the creditors who are citizens of this state have received their just proportions; and no creditor who is not a citizen of this state shall be paid out of the assets found here, until all those who are citizens have received their just proportions as provided in the preceding section." Section 8228 provides: "If there is any residue after such payment to the citizens of this state, it may be paid to any other creditors who have duly proved their debts here, in proportion to the amount due to each of them, but no one shall receive more than would be due to him if the whole *estate* was divided ratably among all the creditors as before provided. The balance may be transmitted to the foreign executor or administrator, or, if there is none, it shall after the expiration of one year from the appointment of the administrator

be distributed ratably among all creditors, both citizens and others, who have proved their debts in this state." Section 8134 provides: "When a sale of property of the estate is necessary to pay the allowance of the family or the debts outstanding against a decedent, or the debts, expenses, or charges of administration, or legacies, or when such sale is for the best interests of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the executor or administrator may also sell any real estate as well as personal property of the estate in his hands and chargeable for that purpose upon the order of the county court; and an application for the sale of real property may also embrace the sale of personal property. To obtain an order for the sale of real property, the executor or administrator must present a verified petition to the county court, setting forth the amount of personal property that has come into his hands as assets, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or determined; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses, and charges of administration already approved, and an estimate of what will or may accrue during the administration; the facts showing the sale to be for the best interests of the estate, if the application is made upon that ground; a general description of all the real property except the homestead, of which the decedent died seised, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof; the names of the legatees and devisees, and the heirs of the decedent, so far as known to the petitioner. If any of the matters herein enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity are stated in the decree. If it appears to the court from such petition that it is necessary to sell the whole or some part of such real estate, for the purposes and reasons mentioned in this section, or any of them, or that such sale is for the best interests of the estate, such petition must be filed, and an order thereupon made directing all persons interested in the estate to appear before the court at a time and place specified,

not less than four, and not more than ten, weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the decedent as is necessary, or for the best interests of the estate."

It seems to us quite clear from the foregoing sections of the Code, and especially §§ 5187, 8225, 8226, and 8096, that the legislature fully contemplated and authorized the sale of real estate where such is necessary to pay debts duly proved in a foreign jurisdiction. Our statutes, in short, seem to have adopted the policy which would be chosen by any honest man, and to look upon the property of a decedent as a trust fund to be devoted to the payment of his debts wherever they exist. It is true that every reasonable protection is cast around the local creditor, but in that there is no suggestion of an intent that foreign creditors may be defrauded. Such is in accord with a sound public policy and a common honesty. "We cannot think," says Chief Justice Parker in the case of Dawes v. Head, 3 Pick. 128, "that in any civilized country advantage ought to be taken of the accidental circumstance of property being found within its territory which may be reduced to possession by the aid of its courts and laws to sequester the whole for the use of its own subjects or citizens, where it shall be known that all the estates and effects of the deceased are insufficient to pay his just debts. Such a doctrine would be derogatory to the character of any government." An examination of the case of Re Gable, 79 Iowa, 178, 9 L.R.A. 218, 44 N. W. 352, discloses the fact that under similar circumstances, and if the creditors had been in North Dakota and the real estate in Iowa, the Iowa court would have decreed a sale of the real estate and the transmission of the funds to North Dakota. We can hardly believe that the legislature of North Dakota intended that it, its courts, and its citizens should be less honest than those of the state of Iowa. "There is an obligation," says the supreme court of Iowa in the case of Re Gable, supra, "wherever the laws of comity rest, which impels courts to enforce them with an authority not to be disregarded, though it be not prescribed by statute or by the common law. That obligation exists when justice demands authority to be exercised to the end that right may prevail; that property and property rights, domestic rights, and the liberty of the citizens, may be protected and enforced. A court of justice, which is established

that justice may be enforced and upheld, can have no more binding obligation resting upon it than that which requires that it shall do justice. . . . Under the law upon the subject, which prevails over the whole Union, all the property of a decedent, including his lands, except a homestead and other exemptions, is subject to the payment of his debts, and is assets for that purpose. Debts must be paid before the assets can be distributed to the heirs, legatees, and devisees, without regard to the place of residence of the creditors. Justice requires that creditors should be paid when they have duly established their claims. Such claims may be established either in the principal or ancillary administration. They will be paid when established in the ancillary administration, if assets sufficient are found within its jurisdiction. If sufficient assets for the payment of debts are not found under the control of the principal administration, and there is under the control of the ancillary administration money assets in excess of the debts proved therein, justice would forbid that such administration should disregard the demands of right, and distribute the assets to the heirs; but as it has not before it the claims of all the creditors, some having been established in the principal administration proceedings, justice demands that the ancillary administration, in response to the demands of comity, transmit the money assets to the principal administrator." See also Davis v. Estey, 8 Pick. 475; Dawes v. Head, 3 Pick. 128; Fay v. Haven, 3 Met. 109; Joy v. Elton, 9 N. D. 444–449, 83 N. W. 875.

We also find no merit in his contention that §§ 8225 and 8226, which impress the estate of a decedent with a trust in favor of creditors, and which provide for the transmission of the residue of the *estate* to the executor or administrator in the state or county of the decedent's domicil, relate only to cases in which the decedent has left a will. It will be noticed, indeed, that the word "administrator," as well as "executor," is used in §§ 8225–8227 and 8228. An administrator "is a person lawfully appointed to manage and settle the estate of a deceased person who has left no executor." Smith v. Gentry, 16 Ga. 31, 32; 1 Words & Phrases, p. 198. A distinction is made in law between an executor and an administrator. See Webster's Dictionary. There is nothing in the sections before us which give any reason for or any intimation of any desire on the part of the legislature that their

provisions shall be confined to cases of testacy. It is also to be noticed that the statutes make use of the word "*estate*," and not "personal property."

Nor do we believe that there is any merit in the argument that § 8134, Rev. Codes 1905, and which provides that any local creditor may make an application for the sale of real estate if the administrator neglects so to do, covers local creditors merely, or creditors who have proved their claims in North Dakota, and that there is no machinery provided for in cases such as that before us. The legislative intention that the estate shall be impressed with a trust appears to us to be clear. It also appears to us that it was the intention that the rights of foreign creditors who had proved their claims in another jurisdiction should be based rather upon comity than upon the concession of a natural right, and that a wise discretion should be used in relation to the matter. We believe that under such circumstances the omission to provide for the machinery is in no way important, the ordinary machinery of the law being deemed adequate for the purpose.

In this connection it is well to take up the further claim of respondent that upon the death of the deceased the real estate vested in the heirs, and could not be subjected to the payment of debts such as those before us, or to use the words of the petition, that "our statutes, being a rule of property, vested the title in the heirs freed from the creditors' claims after the limitations." Whether this be true generally, it is not for us to determine. It is sufficient for us to say that §§ 3741 and 3742 of the Code have already been construed by this court, and then in the case of Friese v. Friese, 12 N. D. 82, 85, 86, 95 N. W. 446, we find it stated that "property not disposed of by will passes to the heirs, . . . subject to the control of the county court, and to the administrator appointed by the court for the purpose of administration. Rev. Codes 1899, § 3741. Such property is to be distributed subject to the payment of the debts of the intestate. Id. § 3742. Under these sections, the administrator or executor has the exclusive right to the personal property for purposes of administration. Jahns v. Nolting, 29 Cal. 508. 'The whole matter of dealing with the estates of deceased persons is one of statutory regulation, and the policy and intent of our statute very clearly contemplate that property of decedents left undisposed of at death . . . shall, for the purposes of ascertaining

and protecting the rights of creditors and heirs, and properly transmitting the title of record, be subjected to the process of administration in the probate court.' Re Strong, 119 Cal. 663, 51 Pac. 1078. This indebtedness was the property of the deceased, Ludwig Friese, and the statute prescribes the course to be taken for its proper distribution. It is not permissible, therefore, for these plaintiffs to disregard the due administration of the estate, and litigate their rights as heirs or legatees in the first instance in any court other than the county or probate court. The estate of Ludwig Friese must first be subjected to the claims of creditors, before any distribution of it can occur, and it is not the policy of the statute to permit any person claiming decedent's property to take possession of it until all debts are paid. . . . We have seen that heirs or devisees, as such, have no right to decedent's property until his debts are paid. The creditors are the first preferred parties in interest, and until satisfied, heirs or legatees have no enforceable interest. Haynes v. Harris, 33 Iowa, 517."

It is next urged that to lay down the rule announced in this opinion would be highly dangerous, as it would permit the appointment of an administrator in a state in which the deceased had little or no property, and that "fake" claims of all kinds and descriptions might be presented without any notice or chance to defend being given to the local creditors. We do not, however, anticipate any such danger. In the case at bar, the claims of petitioners were presented in the domiciliary court, and where they would naturally be expected to be presented. There can come no harm to the local creditors in this case for the simple reason that there are no local creditors, and the controversy is merely between the heirs and the Iowa creditors. The heirs certainly had an opportunity to defend, and a knowledge of, the proceedings in Iowa. So, too, we do not hold that in every case the local and ancillary administration may be required to transmit all of the funds, or to sell and transmit the proceeds of the real estate, to the domiciliary state. If there are local creditors who have had no legal notice of the proceedings in the domiciliary state, we have no doubt that the court may protect their interests, and that in the same way it may protect such creditors against fraud. It is a question of comity and of sound judicial discretion. Comity and sound judicial discretion would never require the transmission of funds or assets, or the sale of

property, when it would be fraudulent as to local creditors. So, too, the assets would necessarily be transferred to be disposed of according to the laws and the judgment of the domiciliary state and the domiciliary court. If no sufficient notice had been given in that court to the local creditors in the ancillary state, we have no question that the domiciliary court would protect their rights.

We are cognizant of the fact that at common law the real estate of a decedent could not be subjected to the payment of debts. We are, however, dealing with statutes, and not with the common law. Nor have we any fault to find with counsel's definition of the word "comity," and that comity is "a willingness to grant a privilege, not as a matter of right, but out of deference and good will." We, in fact, hold that petitioners have no rights, but are merely entitled to the protection which comity should give, and that our legislature merely recognized such comity. We too have examined carefully the cases of Re Gable, 79 Iowa, 178, 9 L.R.A. 218, 44 N. W. 352; Hadley v. Gregory, 57 Iowa, 157, 10 N. W. 319; McCrary v. Tasker, 41 Iowa, 260; Conger v. Cook, 56 Iowa, 117, 8 N. W. 782, which are cited by counsel for respondent in support of the proposition that the Iowa courts under similar circumstances would not grant similar privileges. We, however, construe them otherwise. We have also read 18 Cyc. 1233, 1233-d, 1234-c; and Durston v. Pollock, 91 Iowa, 668, 60 N. W. 221; but with the same result. In 18 Cyc. page 1235, indeed, and after the statements referred to by counsel for the respondent, we find the following: "As a general rule assets remaining in the hands of an ancillary representative after paying the claims of local creditors will be transferred to the place of the domicil for distribution. This rule, however, is not absolute or inflexible, but on the contrary the transfer will or will not be made as the court may deem proper in the exercise of a sound judicial discretion according to the circumstances of the case. In the absence of special circumstances making a local distribution proper, the general rule should prevail, since the distribution, wherever made, must be according to the law of the decedent's domicil, and comity requires that it should be accorded to that jurisdiction; but the court may, even in cases where a transmission of the residue is proper, refuse to so order until the domiciliary representative has given a sufficient bond to secure its proper administration. While there is no question as to the author-

ity of the court in the ancillary jurisdiction to order a residue of assets in that jurisdiction transmitted to the domiciliary representative, the court of one jurisdiction has no authority over the representative of the other to compel him to bring in such assets, whether it be the court of the domiciliary or of the ancillary jurisdiction." See also cases cited. There is no attempt in the case at bar on the part of the Iowa court to enforce its powers here. It merely petitions the local court to exercise its undoubted powers, and in conformity with justice and with interstate comity.

We have also examined the cases of Smith v. Union Bank, 5 Pet. 518, 8 L. ed. 212; Vaughan v. Northrup, 15 Pet. 1, 10 L. ed. 639; Aspden v. Nixon, 4 How. 467, 11 L. ed. 1059; Stacy v. Thrasher, 6 How. 44, 12 L. ed. 337; McLean v. Meek, 18 How. 16, 15 L. ed. 277; and Security Trust Co. v. Black River Nat. Bank, 187 U. S. 211, 47 L. ed. 147, 23 Sup. Ct. Rep. 52, which are cited by counsel for respondent. We believe, however, that the reasoning and conclusions before pursued and arrived at will show the same to be inapplicable to the case before us. We do not, indeed, find that the decisions mentioned, when carefully examined in connection both with the facts therein disclosed and the law pronounced, are in any way antagonistic to the conclusions herein arrived at.

Finally, counsel for respondent contends that §§ 8286, 8287, and 8288, Rev. Codes 1905, and which, in our opinion, make a trust estate of the property of a deceased person for the benefit of his creditors, only apply where the deceased died insolvent, and that a sale of the real estate can only be ordered under such statutes where there is proof that the entire property of the decedent is insufficient to pay his debts. He asserts that insolvency is not in this case; that it is not set forth as a ground for relief in the petition; and that there is no testimony regarding it in either court. We cannot, however, so hold. The petition alleges that "said Eulalie Lillie owned no real property in the state of Iowa, and the personal property of which she died seised did not exceed in value the sum of $200." It further alleges that claims in excess of $14,150 have been proven and allowed in said state. The answer admits "that the estate of decedent in the state of Iowa does not exceed in value the sum of $200." The record shows real estate in North Dakota of an appraised value of $14,600, with outstanding

mortgages amounting to $4,130, exclusive of interest, and no personal property, and debts in Iowa amounting in all to $20,059.70, exclusive of interest. It would be absurd to state that the Iowa estate is not insolvent, or that the North Dakota and Iowa estates taken together are not in the same condition. We believe that this is all the showing that is required by the statute.

It is also claimed that the liability under the notes to the petitioners Karl W. Kendall and First National Bank of Marion, Iowa, is a joint liability merely as an accommodation maker, and that there is no showing as to the resources of the other makers. We do not, however, deem this fact to be of any importance here. Even if we can, and should, go behind the findings of the Iowa court in this case, which allowed these claims against the estate of the deceased, we can see no reason for criticizing or repudiating that allowance. The mere fact that the deceased signed the notes in question as an accommodation maker, and without consideration, if such be the case, did not release her, and does not now release her estate, from a primary liability to pay them. She signed the notes on their face along with the other makers. The contract as expressed by the terms of the notes is a direct and absolute promise to pay them in full. By so signing the notes she made herself primarily liable, and the payee is not required to first exhaust his remedies against the other parties. "The maker upon the face of the paper, with whatever motive or purpose he may sign it," says the supreme court of California in Auld v. Magruder, 10 Cal. 282, "is bound by the contract which he signs, according to the legal effect and meaning of the words. He cannot vary that meaning by parol. The words import an unconditional promise to pay the payee so much money at a certain time. The law affixes to this unequivocal language its obvious signification. The payor is not permitted to contradict the words by showing that when he promised to pay absolutely, he meant to bind himself to pay conditionally, or on some contingency, or if another did not, or if demand was made and notice given. This contract being his own, and precise in its terms, he must fulfil it according to those terms." This has been the holding of this court. See Northern State Bank v. Ballamy, 19 N. D. 509, 31 L.R.A.(N.S.) 149, 125 N. W. 890. See also § 6495, Rev. Codes. 1905; Inkster v. First Nat.

Bank, 30 Mich. 147; Lord v. Ocean Bank, 20 Pa. 384, 59 Am. Dec. 728.

The order of the District Court is reversed, and the cause is remanded for further proceedings according to law and the conclusions reached in this opinion.

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

JENNIE M. BLATCHLEY v. DAKOTA LAND & CATTLE CO., a Corporation, and W. L. Richards.

(145 N. W. 95.)

Husband and wife — deed — execution of — homestead — abandonment — action.

Action by a widow to set aside a deed executed by the husband alone to a tract of land upon which she had never resided, and which deed was executed some four months after the husband himself had abandoned the land as a home.

Evidence examined, and *held* that plaintiff's husband during his lifetime had abandoned his homestead interests in the land in litigation, and that therefore his widow cannot maintain an action to set aside the transfer, although she did not join in the deed.

Opinion filed January 10, 1914.

Appeal from the District Court of Dunn County, *Crawford,* J.

Affirmed.

Thomas H. Rugh, for appellant.

The husband is the head of the family and has the right to choose the home, or that place of domicil denominated the homestead, and the actual presence of the wife is not necessary to the inception and preser-

Note. — The question in the above case, as to the husband's power without wife's consent to convey premises by his sole deed after abandonment, is discussed in a note in 37 L.R.A.(N.S.) 807. See also notes in 12 Am. St. Rep. 683, and 95 Am. St. Rep. 909.

On the question of the conveyance of a homestead by a husband after abandonment by wife, see note in 8 L.R.A.(N.S.) 565.

vation of the homestead. Rev. Codes, 1905, § 4076; Rosholt v. Mehus, 3 N. D. 514, 23 L.R.A. 239, 57 N. W. 783; Gaar, S. & Co. v. Collin, 15 N. D. 622, 110 N. W. 81.

Even though the wife does not live with her husband on the homestead, or in this state, yet she has her interest in the homestead, and same could not be transferred by mere deed or sale act of husband. Mason v. Derks Lumber & Coal Co. 94 Ark. 107, 26 L.R.A.(N.S.) 574, 125 S. W. 656; Justice v. Souder, 19 N. D. 618, 125 N. W. 1031; Silander v. Gronna, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245; Rosholt v. Mehus, supra; Roberts v. Roberts, 10 N. D. 531, 88 N. W. 289; Gaar, S. & Co. v. Collin, supra; Powell v. Patison, 100 Cal. 236, 34 Pac. 677; American Sav. & L. Asso. v. Burghardt, 19 Mont. 323, 61 Am. St. Rep. 507, 48 Pac. 391; Asher v. Sekofsky, 10 Wash. 379, 38 Pac. 1133; Alt v. Banholzer, 39 Minn. 511, 12 Am. St. Rep. 681, 40 N. W. 830; Gleason v. Spray, 81 Cal. 217, 15 Am. St. Rep. 47, 22 Pac. 551; Smith v. Pearce, 85 Ala. 264, 7 Am. St. Rep. 44, 4 So. 616; Murphy v. Renner, 99 Minn. 348, 8 L.R.A.(N.S.) 565, 116 Am. St. Rep. 418, 109 N. W. 593; Note to Jerdee v. Furbush, 95 Am. St. Rep. 936; Rogers v. Day, 115 Mich. 664, 69 Am. St. Rep. 593, 74 N. W. 190.

Blatchley provided no other home or place of abode for his wife, the plaintiff, and his conveyance of the property without the wife joining is void. And his death cannot validate such transfer. Waples, Homestead, pp. 383, 384; Pipkin v. Williams, 57 Ark. 242, 38 Am. St. Rep. 241, 21 S. W. 433; Cooper v. Cooper, 162 Mich. 304, 127 N. W. 266; 21 Cyc. 557.

Plaintiff's right of action is not barred under § 5054, Revised Codes 1905; that section refers to *conveyances,* and there has been no *valid conveyance* in this case. The pretended transfer being *void,* time will not confirm it. Rev. Codes 1905, § 6686.

Blatchley's grantee had notice of all the facts without plaintiff filing a declaration of homestead, and the grantee knew that Blatchley was married, and the doctrine of *caveat emptor* applies. 10 Cyc. 1054, and cases cited. Security Loan & T. Co. v. Kauffman, 108 Cal. 214, 41 Pac. 467; Justice v. Souder, 19 N. D. 613, 125 N. W. 1029; Styles v. Theo. P. Scotland & Co. 22 N. D. 469, 134 N. W. 708; Barber v.

Babel, 36 Cal. 11; Dunn v. Buckley, 56 Wis. 190, 14 N. W. 67; Pipkin v. Williams, 57 Ark. 242, 38 Am. St. Rep. 241, 21 S. W. 433; Hardman v. Portsmouth Sav. Bank, 10 Kan. App. 327, 61 Pac. 984; McKenzie v. Shows, 70 Miss. 388, 35 Am. St. Rep. 654, 12 So. 336; Phillips v. Stauch, 20 Mich. 369; McDonald v. Sanford, 88 Miss. 633, 117 Am. St. Rep. 758, 41 So. 369, 9 Ann. Cas. 1; Jerdee v. Furbush, 95 Am. St. Rep. 935, note 1.

The husband cannot alienate the homestead without the act and consent of the wife. Bolen v. Lilly, 85 Miss. 344, 107 Am. St. Rep. 291, 37 So. 811; Roberson v. Tippie, 209 Ill. 38, 101 Am. St. Rep. 217, 70 N. E. 584; Adams v. Gilbert, 67 Kan. 273, 100 Am. St. Rep. 456, 72 Pac. 769; Burkhardt v. James Walker & Son, 132 Mich. 93, 102 Am. St. Rep. 386, 92 N. W. 778; Alt v. Banholzer, 12 Am. St. Rep. 683, note; Gleason v. Spray, 81 Cal. 217, 15 Am. St. Rep. 47, 22 Pac. 551.

W. F. Burnett, for intervener and respondents.

The homestead here claimed was abandoned; the wife (plaintiff) was never on the land in question, and never at any time had or claimed any interest or estate in the land in question, until after the husband's death. The husband at no time claimed this land as his homestead under the laws of this state. Brokken v. Baumann, 10 N. D. 453, 88 N. W. 84.

Even if plaintiff ever had any claim of right, it is barred. Rev. Codes 1905, § 5054.

The homestead may be abandoned by the husband without the consent of the wife. The land here in question was abandoned for all purposes. Brennan v. Wallace, 25 Cal. 108; Stewart v. Pritchard, 101 Ark. 101, 37 L.R.A.(N.S.) 807, 141 S. W. 505; Beranek v. Beranek, 113 Wis. 272, 89 N. W. 146; Farmers' Bldg. & L. Asso. v. Jones, 68 Ark. 76, 82 Am. St. Rep. 280, 56 S. W. 1062; Wilmoth v. Gossett, 71 Ark. 594, 76 S. W. 1073; Allen v. Hawley, 66 Ill. 164; Vasey v. Township One, 59 Ill. 188; Titman v. Moore, 43 Ill. 169; Inge v. Cain, 65 Tex. 75; Drew v. Wooten, 27 Tex. Civ. App. 456, 66 S. W. 331.

Or where the wife voluntarily joins the husband in the acts of abandonment, she cannot recover. Phillips v. Springfield, 39 Ill. 83; Kramer v. Lamb, 84 Minn. 468, 87 N. W. 1024; Jordan v. Godman, 19 Tex. 274; Rockwell Bros. & Co. v. Hudgens, 57 Tex. Civ. App. 504, 123 S.

W. 185; Farmers' Bldg. & L. Asso. v. Jones, 68 Ark. 76, 82 Am. St. Rep. 280, 56 S. W. 1062; Guiod v. Guiod, 14 Cal. 506, 76 Am. Dec. 440; Brennan v. Wallace, 25 Cal. 108; Titman v. Moore, 43 Ill. 169; Williams v. Moody, 35 Minn. 280, 28 N. W. 510; Wilson v. Gray, 59 Miss. 525; Robertson v. Hefley, 55 Tex. Civ. App. 368, 118 S. W. 1159; Inge v. Cain, 65 Tex. 75.

BURKE, J. This is an action by a widow to have set aside a deed executed by the husband alone, to a tract of land upon which she had never resided. The plaintiff was married in 1881 at Cedar Rapids, Iowa, where she and her husband lived until 1894, when they went to Bowdle, South Dakota. While staying at a hotel at the latter place, the husband deserted the wife, stating to her that he was going to look up a location further west. According to her testimony, she did not see him again for a year, when she went to the city of Dickinson, North Dakota, and discovered that he was living upon a ranch near that place. She says that she hired a rig and started out to the ranch, but meeting him upon the road they both returned to Dickinson. According to the wife's testimony, he refused to allow her to return with him, saying that the place was not suitable for her, and she returned to Cedar Rapids, Iowa, where her parents resided. Two or three years later she again returned to Dickinson; this time, as she says, to see her husband on a matter of business and to go to the ranch if he would allow her. Upon this occasion the husband met her in Dickinson and she did not go to the land. During those times the husband was a mere squatter upon the land in question, but later, on September 20, 1899, he filed a homestead entry upon the tract. The wife never visited North Dakota after the two visits above mentioned, and it appears from the evidence that the relations between herself and husband were so strained, for some reason, that they did not live together. On the 14th day of December, 1901, the husband made final proof upon the land and received final receiver's certificate. On October 24, 1901, he sold all of his personal property and left the land with the intent never to return thereto, removing to Iowa and establishing his home there. February 13, 1902, in accordance with a previous understanding, he returned to Dickinson and executed a deed to the premises in favor of the Dakota Land & Cattle Company. In this deed it is stated that he was an unmarried man. After

the execution of the deed he returned to Iowa, living there until the time of his death, on April 13, 1910. Shortly after his return to Iowa, he was committed to an insane asylum and never recovered. The question of his sanity, however, is not before us.

It is the contention of the plaintiff that the deed made by her husband in February, 1902, is void, because she, his wife, did not join therein. The respondents contend that the homestead, if such it was, had been abandoned by the husband prior to the execution of said deed, and that in any event this action is barred under the statutes of limitations, § 5054, Rev. Codes 1905. As we have reached the conclusion that the homestead had been abandoned by the husband prior to the execution of the deed, it will not be necessary for us to pass upon the question of the limitation statute.

(1) The facts are undisputed that the wife was never in her life upon the land now claimed as a homestead. Her husband had resided thereon and proved up as a government homestead, but had sold his personal property and moved from the state some four months before the execution of the deed in question. Thus, under an almost unbroken line of authorities, he, as head of the family, unless acting in bad faith, had voluntarily abandoned the premises, and the land had lost its homestead character. The cases supporting this doctrine are gathered in an excellent note found at page 807, vol. 37, L.R.A.(N.S.), from which we will largely quote.

In Beranek v. Beranek, 113 Wis. 272, 89 N. W. 146, the husband in good faith decided to change his home and rented another. His family refused to accompany him, and upon his alienating the land the court says: "Thus, it is seen that, while the husband may not alienate or encumber his homestead without his wife's consent, he may relinquish or abandon it at will without her consent, or against her wishes. This results from the dependent condition of the wife, and the giving of the husband, as the head of the family, the right to make and select the family domicil. If it be thought there is anything amiss in this condition of things, it is for the legislature, and not the courts, to afford a remedy. Applying the law to the facts presented in this case, we cannot escape the conclusion that the evidence shows a relinquishment and abandonment of the homestead in question by Frank Beranek in his lifetime, binding upon his wife and fatal to the recovery

herein. It is not to be understood that such homestead right can be defeated by the husband abandoning his family and leaving them to shift for themselves. Such was not this case. The husband, in apparently good faith, decided to change his home, rented another house, and sought to move his family thereto. He had an absolute right to do so and thus relieve himself from the disability of this statute. The refusal of the wife to follow him did not preserve the status of the homestead."

In Anderson v. Kent, 14 Kan. 207, the family consisted of a husband and wife, and the wife abandoned the homestead with an intention never to return. The husband sold the furniture with an intent to abandon the premises. Some three weeks later he executed a deed to the premises, which deed was held to be good against an attack by the wife, upon the same grounds as urged in this case.

In Brin v. Anderson, 25 Tex. Civ. App. 323, 60 S. W. 778, the husband changed the location of the homestead without consulting his wife, and the court says: "It is true that he did not consult her in reference to the designation, and she was ignorant of the fact that it had been made until after this suit was brought. And it may be true that he did not make the wisest selection that could have been made, but there is nothing to indicate that he was influenced by any benefits secured or promised to him individually, and not participated in by his wife, or that he was actuated by any feeling of malice, ill-will or spite toward her. If the selection made was disadvantageous to the wife, it was probably more so to the husband, as it is not likely that she would go to and from the several tracts of land in cultivation as often as he would. The fact that some of the land designated as homestead was separate property of the wife is of no importance. If it was impressed with the homestead character, the husband had the right to designate it as part of the homestead; and his doing so, and thereby excluding the land in controversy from his homestead, would not be a fraud upon her."

In Smith v. Uzzell, 56 Tex. 315, the court says: "When the wife voluntarily leaves the homestead with intent never again to return to it, and seeks with her husband a home in a foreign land, . . . whatever right she may have had in and to the homestead exemption is lost. . . . If, however, the husband, in fraud of the right of the wife and without her consent, should seek by an abandonment to withdraw

the homestead from the pale of its exemption given for the benefit of the family, he could have no power to do so; but while he acts in good faith, and not against the will of the wife, having alone in view the good of the family, of which by nature and by law he is the recognized head, his power to abandon a homestead ought not to be questioned; and in the absence of evidence to the contrary, it ought to be presumed when a removal from a homestead is made, that it was made in good faith, and with the consent of the wife."

In Portwood v. Newberry, 79 Tex. 337, 15 S. W. 270, it is held that if the wife willingly leaves the homestead with her husband, and remains away for a great number of years, she cannot assert a right of homestead against the grantee of a deed executed by the husband alone shortly after they had left the homestead. See also Farmers' Bldg. & L. Asso. v. Jones, 68 Ark. 76, 82 Am. St. Rep. 280, 56 S. W. 1062; Wilmoth v. Gossett, 71 Ark. 594, 76 S. W. 1073; Brennan v. Wallace, 25 Cal. 108; Allen v. Hawley, 66 Ill. 164; Vasey v. Township One, 59 Ill. 188; Finley v. Saunders, 98 N. C. 462, 4 S. E. 516; Kramer v. Lamb, 84 Minn. 468, 87 N. W. 1024; Hart v. Randolph, 142 Ill. 521, 32 N. E. 517; Styles v. Theo. P. Scotland & Co. 22 N. D. 475, 134 N. W. 708; Guiod v. Guiod, 14 Cal. 506, 76 Am. Dec. 440; Newbro v. Friar, 131 Mich. 368, 91 N. W. 609. Stewart v. Pritchard, 101 Ark. 101, 141 S. W. 505, 37 L.R.A.(N.S.) 807, is a well-considered case, written in the year 1911. In this connection, it must be said that Blumer v. Albright, 64 Neb. 249, 89 N. W. 809, and Collins v. Boyett, 87 Tenn. 334, 10 S. W. 512, seem to be in conflict with the above line of authorities.

Applying the law as above to the facts in this case, we find that a decision rests largely upon the question of the good faith of the husband in deeding his land to defendant. If it appears that his abandonment of the homestead was prompted by a desire to deprive the wife of a right to the homestead, we might hold that his conduct was an act of bad faith which would defeat such abandonment, but upon the whole evidence we have reached the conclusion that the evidence does not justify such conclusion. At the time of the trial the husband was dead, and the relations between himself and his wife could only be learned from her testimony. True, she says that upon each of her trips to Dickinson she offered to accompany the husband to the ranch, and was denied this

privilege, but at those times the husband had not made application for the land, and had no interest whatever therein excepting as a squatter. Although she knew his place of residence for about seven years before the abandonment, she never made any further effort to establish herself upon the land, nor did she file any homestead declaration to apprise the world that she claimed any interest therein. Her own testimony discloses that she had lived with her parents in Cedar Rapids, Iowa, and had disputed there, with certain grantees, property owned by her husband in Iowa. It is thus apparent that she and her husband were not on friendly terms, and the natural conclusion is that they had agreed to separate and live apart. During those eight years she did nothing to prevent her husband from selling the land, and it must be presumed that her determination to claim the same as a homestead was reached later. During all of this time the husband resided alone upon the land and held himself out to the world as a single man. The deed given to this defendant makes that statement under oath, and while there is some testimony that one of the officers of the defendant company, who is now deceased, admitted to plaintiff that he knew that the husband was married, yet this knowledge is practically denied, and anyhow not brought to the formal attention of the defendant company.

After the husband had returned to Iowa, the wife learned of the deed given to the defendant, but no effort was made to recover the land until eight years after she had acquired such knowledge, and during that time the land had increased very rapidly in value.

Our conclusion is that at the time of the execution of the deed in controversy, neither plaintiff nor her husband had any homestead rights whatever in the land, and the title passed absolutely to the defendant. It follows that the judgment of the trial court quieting title in defendant is correct, and is accordingly affirmed.

MARY C. WATERMAN v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation.

(145 N. W. 19.)

Personal injury — railway accident — trial — evidence — medical experts — opinions — jury — excessive damages — new trial — motion for.

1. Plaintiff, while a passenger on defendant's train on May 29, 1911, was injured by being thrown violently from her seat against another seat, owing to the act of the train crew in carelessly shunting another car against such train while standing at the depot at Wishek. She claims to have received very serious and permanent injuries, but the extent thereof, and whether the same will be permanent, rests largely upon the opinions of medical experts, such opinions being very much in conflict, although agreeing that she is suffering from what in medical science is known as traumatic neurosis, or railway spine. According to the opinions of nearly all the experts such ailments are in most cases curable.

The cause was tried about five months after the accident, resulting in a verdict for $25,000 and interest, upon which judgment for $26,000 was thereafter entered. Subsequently, a motion for a new trial was made upon the statutory ground, among others, of excessive damages appearing to have been given under the influence of passion or prejudice. Such motion was denied upon condition that plaintiff within twenty days remit all sums in excess of $16,000, which condition was complied with, and a new judgment entered for that amount.

Held, that the verdict, in the light of the testimony, was clearly excessive, and shows passion or prejudice of the jury, and that it was the duty of the trial court, under § 7063, Rev. Code 1905, to grant a new trial unconditionally, and his refusal so to do was prejudicial error.

New trial — remittitur in lieu of — unliquidated damages — damages — excessive — passion or prejudice.

2. Section 7063 construed, and *held*, not to authorize a remittitur in lieu of a new trial in cases involving unliquidated damages, where, as in this case, the damages assessed are so grossly excessive as to unmistakably show that the jury must have been actuated by either passion or prejudice. In such a case the defendant is entitled to a new trial.

Rulings of trial court — testimony — objections.

3. Certain assignments of error based upon alleged insufficiency of the evidence to justify a recovery, and upon certain rulings on objections to testimony, examined and *held* without merit.

Opinion filed November 20, 1913. Rehearing denied January 19, 1914.

Appeal from District Court, Logan County, *J. A. Coffey,* J.

From a judgment in plaintiff's favor, and from an order denying a new trial, defendant appeals.

Reversed and a new trial ordered.

John L. Erdall, S. E. Ellsworth, and *Geo. M. McKenna* (*Alfred H. Bright,* of counsel), for appellant.

A new trial should be granted because excessive damages appear to have been given under the influence of passion or prejudice. Partello v. Missouri P. R. Co. 217 Mo. 645, 117 S. W. 1138; Creve Coeur Lake Ice Co. v. Tamm, 90 Mo. App. 202; Chlanda v. St. Louis Transit Co. 213 Mo. 244, 112 S. W. 249.

A new trial should always be granted where the verdict is so grossly excessive as to lead to the conclusion that it must have been reached through undue passion or prejudice of the jury. Johnson v. Great Northern R. Co. 107 Minn. 285, 119 N. W. 1061; Landro v. Great Northern R. Co. 114 Minn. 162, 130 N. W. 553; Bucher v. Wisconsin C. R. Co. 139 Wis. 597, 120 N. W. 518; Louisville & N. R. Co. v. Reaume, 128 Ky. 90, 107 S. W. 290; Gibney v. St. Louis Transit Co. 204 Mo. 704, 103 S. W. 43.

If plaintiff was suffering from a real trouble or disease, the great preponderance of the evidence proves that it was functional or subjective, and not organic, and no large verdict should be permitted to stand, based upon such testimony. Johnson v. Great Northern R. Co. 107 Minn. 285, 119 N. W. 1061; Depow v. Chicago & N. W. R. Co. 151 Wis. 109, 138 N. W. 43; Bucher v. Wisconsin C. R. Co. 139 Wis. 597, 120 N. W. 518; Robinson v. Spokane Traction Co. 47 Wash. 303, 91 Pac. 972; Schwartzbauer v. Great Northern R. Co. 112 Minn. 356, 128 N. W. 286; Oberg v. Northern P. R. Co. 136 Fed. 981.

The verdict cannot stand because the evidence fails to establish the fact, to a certainty, that the disease or trouble of which plaintiff complains will be permanent. Landro v. Great Northern R. Co. 114 Minn. 162, 130 N. W. 553; Fleming v. Lobel, — N. J. L. —, 59 Atl. 28, 17 Am. Neg. Rep. 324; Kanen v. Philadelphia & R. R. Co. 70 N. J. L. 619, 57 Atl. 268, 16 Am. Neg. Rep. 127.

Plaintiff has never received that care or medical treatment which would be likely to effect a cure in such a case. The opinions of the experts for the plaintiff, that she was permanently injured, were not

based upon anything substantial, but were purely speculative. Bucher v. Wisconsin C. R. Co. 139 Wis. 597, 120 N. W. 518; Baxter v. Chicago & N. W. R. Co. 104 Wis. 330, 80 N. W. 652, 6 Am. Neg. Rep. 746; Johnson v. Great Northern R. Co. 107 Minn. 285, 119 N. W. 1061; Collins v. Janesville, 99 Wis. 464, 75 N. W. 88; Strong v. Stevens Point, 62 Wis. 255, 22 N. W. 425; Morrison v. Northern P. R. Co. 34 Wash. 70, 74 Pac. 1064; Goken v. Dallugge, 72 Neb. 16, 99 N. W. 818, 101 N. W. 244, 103 N. W. 287, 9 Ann. Cas. 1222, 16 Am. Neg. Rep. 479.

Assuming that plaintiff has traumatic neurosis or hysteria, she can be cured by proper treatment. Such ailment is not necessarily of a permanent character. Osler's Practice of Medicine, 7th ed. p. 1096.

The verdict of the jury was clearly against the law, because the reasonable certainty of the permanency of the alleged injuries had in no sense been established. Rev. Codes 1905, § 6558; Strohm v. New York, L. E. & W. R. Co. 96 N. Y. 305; Curtis v. Rochester & S. R. Co. 18 N. Y. 541, 75 Am. Dec. 258, 9 Am. Neg. Cas. 606; Filer v. New York C. R. Co. 49 N. Y. 45, 10 Am. Rep. 327, 5 Am. Neg. Cas. 147; Clark v. Brown, 18 Wend. 229; Lincoln v. Saratoga & S. R. Co. 23 Wend. 435; Shoemaker v. Sonju, 15 N. D. 518, 108 N. W. 42, 11 Ann. Cas. 1173; Elzig v. Bales, 135 Iowa, 208, 112 N. W. 540; Chicago, M. & St. P. R. Co. v. Lindeman, 75 C. C. A. 18, 143 Fed. 946, 20 Am. Neg. Rep. 243; Hemenway v. Washington Water Power Co. 49 Wash. 338, 95 Pac. 269; Louisville & N. R. Co. v. Reaume, 128 Ky. 90, 107 S. W. 290; Illinois C. R. Co. v. Houchins, 121 Ky. 526, 1 L.R.A.(N.S.) 375, 123 Am. St. Rep. 205, 89 S. W. 530.

Assuming that the injury is permanent, a verdict of $16,000 is excessive and against the law. Rooney v. New York, N. H. & H. R. Co. 173 Mass. 222, 53 N. E. 435, 6 Am. Neg. Rep. 78; Peterson v. Roessler & H. Chemical Co. 131 Fed. 156; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1, 12 Am. Neg. Cas. 574; McKenna v. North Hudson County R. Co. 64 N. J. L. 106, 45 Atl. 777, 7 Am. Neg. Rep. 463; Falldin v. Seattle, 57 Wash. 307, 106 Pac. 914; Re Jeremiah Smith & Sons, 196 Fed. 1002; O'Flanagan v. Missouri P. R. Co. 145 Mo. App. 276, 129 S. W. 1021; Canaday v. United R. Cos. 134 Mo. App. 282, 114 S. W. 88.

The evidence of the negligence of defendant is so uncertain and of such doubtful character, that the verdict must in any event be set aside. Depow v. Chicago & N. W. R. Co. 151 Wis. 109, 138 N. W. 43.

It is an undisputed fact that the *settlement* of such cases often effects a *cure* of the *disease,* and evidence of such fact is proper. Osler's Practice of Medicine, 7th ed. p. 433; Robinson v. Spokane Traction Co. 47 Wash. 303, 91 Pac. 973.

It is not only the right, but the duty, of this court to review the opinion evidence of the experts. Bucher v. Wisconsin C. R. Co. 139 Wis. 597, 120 N. W. 518; Strong v. Stevens Point, 62 Wis. 255, 22 N. W. 425; Schultz v. Chicago, M. & St. P. R. Co. 48 Wis. 375, 4 N. W. 390; Louisville & N. R. Co. v. Fox, 11 Bush, 495.

It is true that courts may be reluctant to interfere with the verdicts of juries on the ground of excessive damages, but to uphold them where a great wrong has been committed would, as a precedent, be doing an infinite wrong to the community. Union P. R. Co. v. Hand, 7 Kan. 393; Slette v. Great Northern R. Co. 53 Minn. 346, 55 N. W. 137; Collins v. Albany & S. R. Co. 12 Barb. 492; Partello v. Missouri P. R. Co. 217 Mo. 645, 117 S. W. 1138; Johnson v. Great Northern R. Co. 107 Minn. 285, 119 N. W. 1061; Landro v. Great Northern R. Co. 114 Minn. 162, 130 N. W. 553; Bucher v. Wisconsin C. R. Co. 139 Wis. 597, 120 N. W. 518; Louisville & N. R. Co. v. Reaume, 128 Ky. 90, 107 S. W. 290; Gibney v. St. Louis Transit Co. 204 Mo. 704, 103 S. W. 43; Depow v. Chicago & N. W. R. Co. 151 Wis. 109, 138 N. W. 43; Robinson v. Spokane Traction Co. 47 Wash. 303, 91 Pac. 972; Schwartzbauer v. Great Northern R. Co. 112 Minn. 356, 128 N. W. 286; Fleming v. Lobel, — N. J. L. —, 59 Atl. 27, 17 Am. Neg. Rep. 324; Kanen v. Philadelphia & R. R. Co. 70 N. J. L. 619, 57 Atl. 268, 16 Am. Neg. Rep. 127; Morrison v. Northern P. R. Co. 34 Wash. 70, 74 Pac. 1064; Goken v. Dallugge, 72 Neb. 16, 99 N. W. 818, 101 N. W. 244, 103 N. W. 287, 9 Ann. Cas. 1222, 16 Am. Neg. Rep. 479; Strohm v. New York, L. E. & W. R. Co. 96 N. Y. 305; Shoemaker v. Sonju, 15 N. D. 518, 108 N. W. 42, 11 Ann. Cas. 1173; Elzig v. Bales, 135 Iowa, 208, 112 N. W. 540; Chicago, M. & St. P. R. Co. v. Lindeman, 75 C. C. A. 18, 143 Fed. 946, 20 Am. Neg. Rep. 243; Hemenway v. Washington Water Power Co. 49

Wash. 338, 95 Pac. 269; Peterson v. Roessler & H. Chemical Co. 131 Fed. 156.

Where evidence as to whether injury is permanent is in conflict, and it appears that the lapse of a reasonable time will afford an opportunity to determine this question, at least a new trial will be granted. Stevens v. New Jersey & H. R. R. Co. 74 N. J. L. 237, 65 Atl. 874; Searles v. Elizabeth, P. & C. J. R. Co. 70 N. J. L. 388, 57 Atl. 134, 15 Am. Neg. Rep. 614; Kanen v. Philadelphia & R. R. Co. 70 N. J. L. 619, 57 Atl. 268, 16 Am. Neg. Rep. 127; Fleming v. Lobel, — N. J. L. —, 59 Atl. 27, 17 Am. Neg. Rep. 324.

W. S. Lauder, A. B. Atkins, and *O'Daniull & Atkins,* for respondent.

It is elementary law that the jury are the sole judges of the weight of the testimony and the credibility of the witnesses, and of the facts, and, having passed upon all these questions, the court will not set aside the verdict when supported by substantial evidence, even though the evidence is conflicting. Taylor v. Jones, 3 N. D. 235, 55 N. W. 593.

It is also an established rule of law that the court will not direct a verdict even where there is no conflict, if the evidence is such that different minds might reasonably draw different conclusions. Clemens v. Royal Neighbors, 14 N. D. 116, 103 N. W. 402, 8 Ann. Cas. 1111; Houghton Implement Co. v. Vavrowski, 19 N. D. 594, 125 N. W. 1024; Edwards v. Chicago, M. & St. P. R. Co. 21 S. D. 504, 110 N. W. 832; Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; Walklin v. Horswill, 24 S. D. 191, 123 N. W. 668; Berry v. Chicago, M. & St. P. R. Co. 24 S. D. 611, 124 N. W. 859; Casey v. First Bank of Nome, 20 N. D. 211, 126 N. W. 1011; Charles E. Bryant & Co. v. Arnold, 19 S. D. 106, 102 N. W. 303.

In a case tried by jury, the appellate court will not review the evidence to determine its *weight,* but simply to ascertain if there is sufficient legal evidence to support the verdict. Unzelmann v. Shelton, 19 S. D. 389, 103 N. W. 646; Comeau v. Hurley, 24 S. D. 255, 123 N. W. 715; Olson v. Day, 23 S. D. 150, 120 N. W. 883, 20 Ann. Cas. 516; Mosteller v. Holborn, 20 S. D. 545, 108 N. W. 13; Grant v. Powers Dry Goods Co. 23 S. D. 195, 121 N. W. 95.

On the question of the permanency of the injuries, the jury had the

right to believe the testimony of plaintiff and her expert witnesses. And even where the evidence is conflicting as to the permanency of the injuries, or where recovery is doubtful, the courts will not set aside a verdict as excessive. 13 Cyc. 130, 132, notes, 66–69, and cases cited.

The verdict in this case was not excessive. Zibbell v. Southern P. R. Co. 160 Cal. 237, 116 Pac. 513; Houston & T. C. R. Co. v. Gray, — Tex. Civ. App. —, 137 S. W. 729; Galveston, H. & S. A. R. Co. v. Ranson, — Tex. Civ. App. —, 125 S. W. 63; San Antonio Traction Co. v. Probandt, — Tex. Civ. App. —, 125 S. W. 931; Englert v. New Orleans R. & Light Co. 128 La. 473, 54 So. 963; Corby v. Missouri & K. Teleph. Co. 231 Mo. 417, 132 S. W. 712; Starck v. Washington Union Coal Co. 61 Wash. 213, 112 Pac. 235; Haggard v. Seattle, 61 Wash. 499, 112 Pac. 503; Reeks v. Seattle Electric Co. 54 Wash. 609, 104 Pac. 126; James v. Oakland Traction Co. 10 Cal. App. 735, 103 Pac. 1082; Canfield v. Chicago, R. I. & P. R. Co. 142 Iowa, 658, 121 N. W. 186; Gordon v. Kansas City Southern R. Co. 222 Mo. 519, 121 S. W. 80; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; Wabash Western R. Co. v. Friedman, 41 Ill. App. 270; St. Louis, I. M. & S. R. Co. v. Rogers, 93 Ark. 564, 126 S. W. 375, 1199; McCulloch v. Illinois Steel Co. 243 Ill. 464, 90 N. E. 664; Olson v. Gill Home Invest. Co. 58 Wash. 151, 27 L.R.A.(N.S.) 884, 108 Pac. 140; Texas & P. R. Co. v. Matkin, — Tex. Civ. App. —, 142 S. W. 604.

The granting or refusing of a new trial on the ground of excessive damages rests in the sound judicial discretion of the trial court, and in reviewing same, the appellate court will be guided by the general rule applicable to other discretionary orders. Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Pratt v. Pioneer Press Co. 32 Minn. 217, 18 N. W. 836, 20 N. W. 87; Stutz v. Chicago & N. W. R. Co. 73 Wis. 147, 9 Am. St. Rep. 769, 40 N. W. 653.

It is the duty only of the appellate court, to *review* and ascertain whether or not it appears that the trial court either *withheld* or *abused* its discretion. Lincoln v. Central Vermont R. Co. 82 Vt. 187, 137 Am. St. Rep. 998, 72 Atl. 821; Barlow v. Foster, 149 Wis. 613, 136 N. W. 825; Taylor v. White River Valley R. Co. 29 S. D. 12, 135 N. W. 759; Dorffi v. Duluth, W. & P. R. Co. 117 Minn. 276, 135 N. W. 529.

The courts of this state have power to order a reduction of the amount of the verdict, and in case such order is not complied with, to grant a new trial. Ross v. Robertson, 12 N. D. 27, 94 N. W. 765; Aronson v. Oppegard, 16 N. D. 595, 114 N. W. 377; Galvin v. Tibbs, H. & Co. 17 N. D. 600, 119 N. W. 39; Lohr v. Honsinger, 20 N. D. 500, 128 N. W. 1035.

In an action for unliquidated damages, where the law furnishes no rule for measurement other than the discretion of the jury, courts will not disturb the verdict unless it is so improper as to evince passion, prejudice, partiality, corruption, or misapprehension. 37 Century Dig. 1029–1031; Casey v. First Bank of Nome, 20 N. D. 211, 126 N. W. 1011; Gull River Lumber Co. v. Osbrone-McMillan Elevator Co. 6 N. D. 276, 69 N. W. 691; Flath v. Casselman, 10 N. D. 419, 87 N. W. 988; Ross v. Robertson, 12 N. D. 27, 94 N. W. 765; Libby v. Barry, 15 N. D. 286, 107 N. W. 972; Bristol & S. Co. v. Skapple, 17 N. D. 271, 115 N. W. 841; Magnuson v. Linwell, 9 N. D. 157, 82 N. W. 743; Nilson v. Horton, 19 N. D. 189, 123 N. W. 397; Swain v. Fourteenth Street R. Co. 93 Cal. 179, 28 Pac. 829, 11 Am. Neg. Cas. 209; Mize v. Hearst, 130 Cal. 630, 63 Pac. 30.

The fact that a motion for a new trial was denied only on the remission of a part of the verdict does not necessarily show that the verdict must have been improperly reached by the jury, or that the trial court so found. Grant v. Wolf, 34 Minn. 32, 24 N. W. 289; Wilcox v. New York, N. H. & H. R. Co. 81 Fed. 143; Lee v. Southern P. R. Co. 101 Cal. 118, 35 Pac. 572.

The question of the permanency of plaintiff's injuries does not go to her right to a *verdict,* but to the *amount* of such verdict. Louisville, N. A. & C. R. Co. v. Wright, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584, 14 Am. Neg. Cas. 488; Buel v. New York C. R. Co. 31 N. Y. 314, 88 Am. Dec. 271, 5 Am. Neg. Cas. 87; Matteson v. New York C. R. Co. 35 N. Y. 487, 91 Am. Dec. 67; Central R. Co. v. Smith, 76 Ga. 209, 2 Am. St. Rep. 31; Evansville & T. H. R. Co. v. Guyton, 115 Ind. 450, 7 Am. St. Rep. 458, 17 N. E. 101.

There was no motion by defendant for a directed verdict in this case, and hence there was no opportunity for the trial court to have erred, either in passing upon the question of defendant's negligence, or the

sufficiency of the evidence, but *all* questions were left to the jury, and no exceptions were saved by the defendant. Donahue v. Gallavan, 43 Cal. 573; Cravens v. Dewey, 13 Cal. 40.

FISK, J. Plaintiff, while a passenger on defendant's train on May 29, 1911, sustained personal injuries caused by the alleged negligence of defendant's train crew in shunting a certain car against a portion of the train in which plaintiff was seated while such train was standing at the depot at Wishek. The sudden impact caused by such collision threw plaintiff violently from her seat against the arm of the seat immediately in front of her, and then back against another seat, rendering her unconscious for a few minutes, after which she was removed from the car and taken to the hotel in Wishek, where she remained about one month, and afterwards was taken to her home. She was under the care of physicians and nurses almost continually from the time of such injuries until the trial, which was had at the following November term of court held in Logan county. Plaintiff contends that, as a result of the accident, she has lost the sense of hearing in her right ear; that her right arm is so paralyzed that she is unable to control its movement, and that her right foot and limb are also paralyzed. In brief, she claims to be crippled for life, as a result of which injuries her earning capacity has been entirely destroyed, and that she will, during the remainder of her life, be compelled to employ the services of physicians and nurses. At the time of the accident she was thirty-two years of age, a high school graduate, and claims to have had an earning capacity of about $600 per year.

Defendant contends, on the contrary, that plaintiff is not permanently injured; that she has not lost her sense of hearing, and that her ailment is what is known in medical science as traumatic neurosis, or railway spine, which is a nervous condition, and that in most cases it may be entirely cured. The medical witnesses practically all agree as to the nature of her ailment, but there is some conflict in their testimony as to the probability of a permanent cure. The weight of such testimony would appear to support appellant's contention. Of course, such testimony consists of mere opinions, entitled to little or much weight according to the various expert's information upon the subject upon which such opinions are expressed. It is no doubt true

that we cannot weigh the testimony for the purpose of determining which is entitled to the most weight. That was the province of the jury. We refer to such conflict merely to emphasize the fact that a conflict in opinion evidence is somewhat different, and should be viewed in a somewhat different light, from that arising in testimony dealing with *facts*.

The burden which rested upon the plaintiff of proving, to a reasonable degree of certainty, the permanency of her injuries, is established, if at all, only by the opinions of experts. The time which elapsed between the date of the accident and the time of trial was but a little more than five months. From our view-point a dispassionate consideration of the entire testimony leaves the nature of plaintiff's injuries, in so far as their permanency is concerned, in at least considerable doubt.

The jury assessed her damages at the sum of $25,000 and interest from the date of the accident. Final judgment was entered on such verdict on December 5, 1911, for the sum of $26,000. Subsequently, a motion for a new trial was made, and on September 5, 1912, an order was entered in effect granting a new trial unless plaintiff should, within twenty days thereafter, remit all of such judgment in excess of $16,000, in which event the motion should be denied. Plaintiff remitted such excess, and on September 3, 1912, a new judgment was entered for $16,000 with interest thereon from such date, from which judgment this appeal is prosecuted.

The first and principal assignment of error urged by appellant is predicated upon the refusal of the trial court to grant its motion for a new trial upon the ground of excessive damages appearing to have been given under the influence of passion or prejudice. That the trial court considered the verdict greatly excessive is beyond question, for he ordered a new trial in the event plaintiff declined to remit the large sum of $10,000. The full amount prayed for in the complaint, $25,000 and interest, was allowed by the jury. Whether the district court considered such allowance so large as necessarily to show either passion or prejudice does not definitely appear, but we think, in the light of the record, that this is the only view it could have taken. The verdict is, to our minds, so glaringly excessive and unauthorized by the evidence as to compel the conclusion that it must have been arrived at through passion or prejudice. It cannot be accounted for on any other

theory. Section 7063, Rev. Codes 1905, enumerates the grounds for new trials, and the fifth ground is "excessive damages appearing to have been given under the influence of passion or prejudice." Excessive damages allowed in the absence of passion or prejudice of the jury is not therein made a ground for granting a new trial. Tunnel Min. & Leasing Co. v. Cooper, 50 Colo. 390, 39 L.R.A.(N.S.) 1064, 115 Pac. 901, Ann. Cas. 1912C, 504.

In the above case the Colorado court, in construing a statute similar to our § 7063, supra, among other things, said: "It is apparent that trial courts here, under this provision, no longer have power to set aside verdicts because simply excessive, but can only do so when it is also found that the excess award is due to passion or prejudice. When the finding is that the verdict was so reached, a new trial must be granted, as it is then beyond the power of the court to permit a remittitur of a portion of the verdict and enter a judgment for such sum as in its judgment the jury should have returned. . . . The right, by this provision, to grant new trials because of excessive verdicts, unless influenced by passion or prejudice, having been withdrawn from the courts, it logically follows that when, under this particular subdivision of the Code, it was found that the verdict was excessive, and a remittitur of nearly three fourths of it was required, such finding, although the judge may have declared that he was not able to say that the verdict was returned as the result of passion or prejudice, was, as a matter of law, a finding to that effect, and the verdict must be so treated. Upon such a verdict, defendant had an absolute right, under the Code, to a new trial, and the court had no more authority to deny it, or disregard a portion of the verdict and enter a judgment upon the residue, than it had to deny the plaintiff a jury trial, or enter judgment against it without any trial at all. Still, without a verdict for that sum, and indeed without any lawful verdict, judgment was given for $10,000 upon the mere consent of plaintiff to accept it. That action was a plain violation of law, because what the Code of Civil Procedure gives, in the situation here disclosed, and all that it gives, is a right to the losing party to have, and it makes it the duty of the court to grant, a new trial." The court cites and quotes from Sloan v. New York C. & H. R. R. Co. 1 Hun, 540; 18 Enc. Pl. & Pr. 144; and Gulf, C. & S. F. R. Co. v. Coon, 69 Tex. 730, 7 S. W.

492, after which the opinion continued as follows: "Since, therefore, on principle and authority, the finding of the court that the verdict was excessive must be treated, in legal effect, as a finding that it was returned under the influence of passion or prejudice, it was reversible error to allow plaintiff to remit a portion of it and enter judgment for the residue, because the gist of the whole matter is that no trial by an impartial jury has been had. To permit the court in such situation to substitute its judgment as to the amount which the plaintiff ought to have, for that of a jury, would be in effect to deny the right of the defendant to such a trial as the general laws provide and the Constitution guarantees."

The Texas court in Gulf, C. & S. F. R. Co. v. Coon, supra, said: "The trial judge concluded that it was excessive, as he required plaintiff to enter a remittitur of $3,000 as a condition to his overruling the motion for a new trial. If the judge was of opinion [that] the verdict was excessive, he should have granted a new trial. The damages are assessed by the jury; if the verdict is excessive the judge, in actions like this, has no measure by which to determine how much it is excessive; his attempt to do so is an invasion of the rights of the jury. His only course in such a case is to grant a new trial."

South Dakota holds likewise. Murray v. Leonard, 11 S. D. 22, 75 N. W. 272, and Davis v. Holy Terror Min. Co. 20 S. D. 399, 107 N. W. 374.

In the recent case decided by us of Carpenter v. Dickey, ante, 176, 143 N. W. 964, we took occasion to review and cite the authorities, both pro and con, bearing upon this question. In that case we were not called upon to announce a rule governing cases such as this, where it appears that the passion or prejudice merely extended to the assessment of damages, and could not have influenced the jury in passing upon the other issues in the case. But in the case at bar such a situation is presented, for it is quite clear, we think, that plaintiff is entitled to recover something, the only question being the amount. We are firmly of the opinion that the trial court had, under the statute, no alternative but to grant the motion for a new trial unconditionally, and that it was therefore reversible error not to have done so. We approve the rule of the Colorado court in Tunnel Mining & Leasing Co. v. Cooper, 50 Colo. 390, 39 L.R.A.(N.S.) 1064, 115 Pac. 901, Ann.

Cas. 1912C, 504, in so far as it is there held that a new trial should be granted where the damages are so excessive as to show passion or prejudice. It is unnecessary in the case at bar to go to the extent of deciding, as was decided in that case, that the trial court has no power to grant a new trial, or to require a remittitur in lieu of a new trial, in cases where the damages assessed are deemed excessive, but it does not appear that the same were given under the influence of passion or prejudice, and we do not wish to be understood as so holding. In cases of excessive damages not given under the influence of passion or prejudice, it may be that the trial court possesses the inherent power, regardless of the statute, to grant a conditional order for a new trial in the event the plaintiff will not voluntarily remit a designated portion from the recovery. The case at bar, however, comes clearly within the statute which in effect prescribes that a new trial shall be granted unconditionally because of the "excessive damages appearing to have been given under the influence of passion or prejudice." As we construe the statute, the legislature has in effect said that where the verdict is thus tainted, no part of it should stand, for the parties are entitled to an assessment of damages not by the court, but by a jury which is not influenced in its deliberations by any improper motive. If such statute is to be given effect according to its plain mandate in any case, it seems to us that the case at bar is clearly such a case, for the amount awarded by the verdict is so large as to shock the sense of justice and to unmistakably point to the fact that the jury must have been controlled either by sympathy for the plaintiff, or by prejudice against the railway company, such as constitutes in legal effect "passion or prejudice" within the meaning of the statute.

Were we in any doubt as to our duty in the premises we should feel like resolving such doubt in favor of directing a new trial owing to the very unsatisfactory showing as to the extent of the plaintiff's injuries. We feel that in the interests of justice a new trial should be had to the end that the true nature of the injuries may be more clearly established. The time which has now elapsed since the accident will no doubt prove of considerable aid in establishing the true situation relative to the alleged permanency of such injuries. Even if we deemed this a proper case for the granting of a new trial conditionally, we feel that a very material reduction should be made from the

judgment as finally entered, and we believe it would be more satisfactory to both parties to have a new trial.

We place our decision entirely upon the statute, and hence we are not required to determine what the rule should be in the absence of such statutory rule. As will be seen by an examination of the authorities cited by us in Carpenter v. Dickey, supra, there is much conflict in the decisions, but they were mostly all decided without reference to any statute. In addition to the authorities heretofore cited, we add, as lending support generally to our views that a new trial should be granted, the following: Partello v. Missouri P. R. Co. 217 Mo. 645, 117 S. W. 1138; Creve Coeur Lake Ice Co. v. Tamm, 90 Mo. App. 202; Johnson v. Great Northern R. Co. 107 Minn. 285, 119 N. W. 1061; Landro v. Great Northern R. Co. 114 Minn. 162, 130 N. W. 553; Bucher v. Wisconsin C. R. Co. 139 Wis. 597, 120 N. W. 518; Louisville & N. R. Co. v. Reaume, 128 Ky. 90, 107 S. W. 290; Gibney v. St. Louis Transit Co. 204 Mo. 704, 103 S. W. 43.

In view of another trial we need not notice in detail appellant's other assignments. Suffice it to say that we have considered them, and as to assignments numbered 2 to 8 inclusive, we deem them without merit. The other two in effect present the same point as the first, and need not be specially noticed.

The judgment appealed from is reversed and a new trial ordered.

STATE OF NORTH DAKOTA v. ALEC OIEN.

(145 N. W. 424.)

Cross-examination — witness — impeachment — arrest — no presumption of guilt — improper questions — offense — guilty — conviction.

Upon cross-examination for the purpose of impeachment it is improper to ask a witness whether or not he has been arrested. A mere arrest carries no presumption of guilt. He may, however, be asked whether or not he is guilty of the offense, or has been convicted thereof.

Opinion filed December 31, 1913. Rehearing denied February 13, 1914.

Appeal from the District Court of Mountrail County, *Frank E. Fisk,* J.

Reversed.

E. R. Sinkler, for appellant.

Where complaining witness in a bastardy case definitely fixes a certain material date, it is improper for the state to try to elicit from the witness her *reasons* for the fixing of such date. Sprenger v. Tacoma Traction Co. 15 Wash. 660, 43 L.R.A. 706, 47 Pac. 17; Fulton v. Metropolitan Street R. Co. 125 Mo. App. 239, 102 S. W. 47; Zetsche v. Chicago, P. & St. L. R. Co. 238 Ill. 240, 87 N. E. 412.

An accusation or indictment for a crime is not admissible to discredit a witness. It is error to permit the question, and prejudicial error when the witness answers that he has been arrested or charged with crime. People v. Elster, 2 Cal. Unrep. 315, 3 Pac. 884; Marx v. Hilsendegen, 46 Mich. 336, 9 N. W. 439; People v. Wolcott, 51 Mich. 612, 17 N. W. 78; Kober v. Miller, 38 Hun, 184; Van Bokkelen v. Berdell, 130 N. Y. 141, 29 N. E. 254; Sullivan v. Newman, 63 Hun, 625, 43 N. Y. S. R. 893, 17 N. Y. Supp. 424; V. Loewer's Gambrinus Brewery Co. v. Bachman, 45 N. Y. S. R. 48, 18 N. Y. Supp. 138; People v. Carolan, 71 Cal. 195, 12 Pac. 52; Smith v. State, 79 Ala. 21; Bates v. State, 60 Ark. 450, 30 S. W. 890; People v. Hamblin, 68 Cal. 101, 8 Pac. 687; People v. Crapo, 76 N. Y. 288, 32 Am. Rep. 302; People v. Noelke, 94 N. Y. 144, 46 Am. Rep. 128; People v. Irving, 95 N. Y. 541; State v. Kent (State v. Pancoast) 5 N. D. 516, see page 557, 35 L.R.A. 518, 67 N. W. 1052; 2 Wigmore, Ev. p. 1110, § 982 (3); People v. Silva, 121 Cal. 668, 54 Pac. 146; People v. Warren, 134 Cal. 202, 66 Pac. 212; State v. Nussenholtz, 76 Conn. 92, 55 Atl. 589; Germinder v. Machinery Mut. Ins. Asso. 120 Iowa, 614, 94 N. W. 1108; Ashcraft v. Com. 22 Ky. L. Rep. 1542, 60 S. W. 931; Howard v. Com. 110 Ky. 356, 61 S. W. 756, 13 Am. Crim. Rep. 533; Johnson v. Com. 22 Ky. L. Rep. 1885, 61 S. W. 1005; Com. v. Welch, 111 Ky. 530, 63 S. W. 984; Ashcraft v. Com. 24 Ky. L. Rep. 488, 68 S. W. 847; Lange v. Wiegand, 125 Mich. 647, 85 N. W. 109; State v. Renswick, 85 Minn. 19, 88 N. W. 22; Lipe v. Eisenlerd, 32 N. Y. 238; McKesson v. Sherman, 51 Wis. 303, 8 N. W. 200; 1 Greenl. Ev. 16th ed. 461(b), 461(c) pp. 579, 580; Slater v. United States, 1 Okla. Crim. Rep. 275, 98 Pac. 110; State

v. Sanderson, 83 Vt. 351, 75 Atl. 961; Starling v. State, 89 Miss. 328, 42 So. 798; State v. Stewart, 6 Penn. (Del.) 435, 67 Atl. 786; Missouri K. & T. R. Co. v. Creason, 101 Tex. 335, 107 S. W. 527; Musgraves v. State, 3 Okla. Crim. Rep. 421, 106 Pac. 544; Nelson v. State, 3 Okla. Crim. Rep. 468, 106 Pac. 647; Dotterer v. State, 172 Ind. 357, 30 L.R.A.(N.S.) 846, 88 N. E. 689; Keys v. United States, 2 Okla. Crim. Rep. 647, 103 Pac. 874; Smith v. United States, 161 U. S. 85, 40 L. ed. 626, 16 Sup. Ct. Rep. 483; Langhorne v. Com. 76 Va. 1012; State v. Ripley, 32 Wash. 182, 72 Pac. 1036; Watson v. State, 155 Ala. 9, 46 So. 232; Landy v. Moritz, 33 Ky. L. Rep. 223, 109 S. W. 897; State v. Nyhus, 19 N. D. 326, 27 L.R.A.(N.S.) 487, 124 N. W. 71; Roop v. State, 58 N. J. L. 479, 34 Atl. 749; Carr v. State, 43 Ark. 99, 5 Am. Crim. Rep. 438; Anderson v. State, 34 Ark. 257; Stanley v. Ætna Ins. Co. 70 Ark. 107, 66 S. W. 432; Re James, 124 Cal. 653, 57 Pac. 578, 1008; State v. Burton, 2 Marv. (Del.) 446, 43 Atl. 254; Bonaparte v. Thayer, 95 Md. 548, 52 Atl. 496; State v. Huff, 11 Nev. 17; State v. Fournier, 108 Minn. 402, 122 N. W. 329; Kolb v. Union R. Co. 23 R. I. 72, 54 L.R.A. 646, 91 Am. St. Rep. 614, 49 Atl. 392; State v. Thompson, 127 Iowa, 440, 103 N. W. 377; Dungan v. State, 135 Wis. 151, 115 N. W. 350; People v. Derbert, 138 Cal. 467, 71 Pac. 564.

The argument of counsel to the jury was highly improper and prejudicial to the defendant, when he referred to the fact that defendant did not produce witnesses and offer proof as to character of complaining witness. Such evidence would have been *inadmissible* in any event. Com. v. Moore, 3 Pick. 194; Morse v. Pineo, 4 Vt. 281; Swisher v. Malone, 31 W. Va. 442, 7 S. E. 439; Bookhout v. State, 66 Wis. 415, 28 N. W. 179.

So also was his appeal to the jury as taxpayers, and his reference to their self interests. Cooksie v. State, 26 Tex. App. 72, 9 S. W. 58; State v. Warford, 106 Mo. 55, 27 Am. St. Rep. 322, 16 S. W. 886; Cleveland, C. C. & St. L. R. Co. v. Newlin, 74 Ill. App. 638; Davis v. State, — Tex. Crim. Rep. —, 55 S. W. 340.

It was error for the court to instruct the jury further, at their request, in the absence of defendant and his counsel, and without notice to either of them. Rev. Codes 1905, §§ 7021, 7027.

After the retirement of the jury, all further instructions or com-

munication should be made in the presence of counsel. State v. Murphy, 17 N. D. 48, 17 L.R.A.(N.S.) 609, 115 N. W. 84, 16 Ann. Cas. 1133; Kuhl v. Long, 102 Ala. 569, 15 So. 267; Cooper v. State, 79 Ala. 54; McNeil v. State, 47 Ala. 498; Collins v. State, 33 Ala. 435, 73 Am. Dec. 426; Feibelman v. Manchester F. Assur. Co. 108 Ala. 180, 19 So. 540; Redman v. Gulnac, 5 Cal. 148; People v. Trim, 37 Cal. 274; Fish v. Smith, 12 Ind. 563; Hall v. State, 8 Ind. 444; Jones v. Johnson, 61 Ind. 257; Davis v. Fish, 1 G. Greene, 406, 48 Am. Dec. 387; State v. Frisby, 19 La. Ann. 143; State v. Davenport, 33 La. Ann. 231; Kullberg v. O'Donnell, 158 Mass. 405, 35 Am. St. Rep. 507, 33 N. E. 528; Sargent v. Roberts, 1 Pick. 337, 11 Am. Dec. 185; Goode v. Campbell, 14 Bush, 75; Read v. Cambridge, 124 Mass. 567, 26 Am. Rep. 690; Norton v. Dorsey, 65 Mo. 376; Chinn v. Davis, 21 Mo. App. 363; State v. Miller, 100 Mo. 606, 13 S. W. 832, 1051; State v. Alexander, 66 Mo. 148; Chouteau v. Jupiter Iron Works, 94 Mo. 388, 7 S. W. 467; Plunkett v. Appleton, 9 Jones & S. 159, 51 How. Pr. 469; Watertown Bank & Loan Co. v. Mix, 51 N. Y. 558; Wheeler v. Sweet, 137 N. Y. 438, 33 N. E. 483; Kehrley v. Shafer, 92 Hun, 196, 36 N. Y. Supp. 510; People v. Cassiano, 30 Hun, 388; Moravee v. Buckley, 11 Ohio L. J. 225; Seagrave v. Hall, 10 Ohio C. C. 395, 6 Ohio C. D. 497; Wade v. Ordway, 1 Baxt. 229; Traders and Truckers Bank v. Black, 108 Va. 59, 60 S. E. 743; Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224.

Under a law requiring all instructions to be in writing, it is error to orally instruct the jury. Wettengel v. Denver, 20 Colo. 552, 39 Pac. 343; Parris v. State, 2 G. Greene, 449; Hartwig v. Gordon, 37 Neb. 657, 56 N. W. 324; Montelius v. Atherton, 6 Colo. 224; Lee v. Stahl, 9 Colo. 208, 11 Pac. 77; Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224.

This rule applies with equal force to the giving of additional oral instructions. 12 Cyc. 680; People v. Hersey, 53 Cal. 574; Gile v. People, 1 Colo. 60; State v. Stoffel, 48 Kan. 364, 29 Pac. 685; Gilbert v. State, 78 Miss. 300, 29 So. 477; Mallison v. State, 6 Mo. 399.

After full charge in writing has once been delivered, it is error for the court, upon request, to further charge *orally;* such further charge should also be reduced to writing. Bowden v. Achor, 95 Ga. 243, 22

S. E. 254; Ohio & M. R. Co. v. Rowland, 51 Ind. 285; State v. Potter, 15 Kan. 302.

On appeal, it is not necessary to set out what these additional instructions were, in the bill of exceptions. The fact that they were given is sufficient. State v. Fisher, 23 Mont. 540, 59 Pac. 919; Swaggart v. Territory, 6 Okla. 344, 50 Pac. 96.

Questions of the complaining witness as to acts of sexual intercourse with other men than defendant, along about the same time, or generally, are proper, as touching her credibility, if for no other purpose. State v. Read, 45 Iowa, 469; McCoy v. People, 65 Ill. 439, 1 Am. Crim. Rep. 71.

The evidence is insufficient to justify or to sustain the verdict. All the evidence of the complaining witness in such cases should be most closely scrutinized, and conflicting statements should be viewed with great care and caution. State v. McKnight, 7 N. D. 445, 75 N. W. 790.

BURKE, J. Defendant was adjudged to be the father of an illegitimate child, and appeals to this court. As grounds for reversal he alleges nineteen errors of the trial judge, none of which are prejudicial excepting the one hereinafter considered.

One of the witnesses for the defendant, after giving testimony very damaging to the cause of the state, upon cross-examination by the state's attorney, was asked:

Q. Ever been arrested?

Objected to as incompetent, irrelevant, and immaterial. Overruled. Exception granted.

A. Once.

Move to strike out the answer as incompetent, irrelevant, and immaterial. Denied and exception granted.

The witness was not asked to explain the nature of the offense for which he had been arrested, nor the outcome of the proceedings. Appellant insists that this ruling is reversible error, and in support of this contention has cited something over fifty cases, all in point and including two cases from this court.

It is elementary that a witness should not be asked whether he has been arrested or accused of a crime, but whether or not he has been convicted, or was in fact guilty of the crime. In this connection we quote briefly from the case of State v. Kent (State v. Pancoast), 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; "Where a cross-examiner seeks to impair the credibility of a witness by proof of collateral crimes, he should be confined to specific acts. He may ask the witness whether or not he committed the act, or whether he has been convicted thereof, or imprisoned therefor, but manifestly the interrogatories should be so framed as to permit the witness to admit or deny the act itself. He should not, for impeachment purposes, be asked questions which simply suggest inference. It has repeatedly been held that a party could not be asked whether or not he had been indicted for a particular offense, on the ground that an indictment did not prove guilt. . . . It was not proper then to ask plaintiff in error in this case . . . whether or not he was not 'accused,' etc., and whether or not it was not 'claimed by the bank officers,' etc., because all that may have been true, and yet no such crime as claimed have been committed." Greenleaf on Evidence, 16th ed. 461(b), (c) page 579, reads: Whatever may be the limit in this respect, nothing short of the conviction of a crime is admissible for the purposes of impeachment. The mere accusation or indictment will not be admitted for the reason that innocent men are often arrested, charged with a criminal offense. We think the trial court probably relied upon the language found in State v. Rozum, 8 N. D. 548, 80 N. W. 477, but as said case is practically nothing more than a reference to the case of State v. Kent, supra, it cannot be considered as overruling the rule announced in such case. That such was the intention of this court is shown in State v. Nyhus, 19 N. D. 326, 27 L.R.A.(N.S.) 487, 124 N. W. 71, from which we quote; "In so far as defendant was asked and compelled to answer questions in regard to former arrests, the rule in the Kent Case, as above quoted, was clearly violated. . . . By these questions the line of proper cross-examination was passed. We do not deem it necessary to cite authorities on this question, except State v. Kent, supra. That case has often been cited in subsequent decisions of this court, and its soundness on this point has never been questioned, although the rule has not been stated in subsequent cases with the same accuracy and fullness as in

the Kent Case. The error in permitting such cross-examination would be alone ground for a new trial." The trial court will grant a new trial in the case.

ANNIE BOOREN v. GEORGE E. McWILLIAMS.

(145 N. W. 410.)

Breach of promise of marriage — statement of plaintiff to her physician — contrary to her testimony on trial — privileged communications — evidence — offer of proof by defendant — remarks by the court — prejudicial.

1. In an action for breach of promise of marriage, defendant offered to show by a physician a conversation with the plaintiff on the occasion of a visit to her subsequent to her confinement, which conversation, if testified to, would show statements of plaintiff in direct conflict with her claims in this litigation. During the proceedings to determine whether the testimony of the doctor was privileged under the statute, the court, in addressing counsel, said in part: "If a man can act as a doctor just as has been testified to here, if he can act as a doctor and make a call, and then, when called again, repudiate the professional part of it and become something else, if he can do that in a case of this kind, he can go out and separate his visits into two calls. He can make the call professionally and act as a detective right straight through. We have a good and wholesome statute on that, and if this kind of business can prevail, there is nothing in it, and it is wiped out and torn to pieces." The offer of proof which called forth this declaration was to show statements made by plaintiff when it was claimed the witness was not attending her in a professional capacity. It is *held* under these facts and all the surrounding circumstances, that this statement by the court was unwarranted, and in a case where the evidence of the parties as to the direct issues was practically uncorroborated and in direct conflict, and a slight thing might influence the verdict, was prejudicial.

Note. — For a collection of the authorities on the measure of damages for breach of promise to marry, see note in 41 L.R.A.(N.S.) 840.

On the question of the right to prove seduction in aggravation of damages in breach of promise case, see notes in 4 L.R.A.(N.S.) 616, and 36 L.R.A.(N.S.) 388. And as to the necessity of averring seduction in order to recover therefor in an action for breach of promise, see note in 33 L.R.A.(N.S.) 702. See also note in 26 Am. Dec. 677.

Errors — fair trial.

2. Many minor errors disclosed in the record, all unfavorable to the defendant, considered in connection with the whole record, indicate that he did not have a fair trial.

Physician — testimony — consent of patient — object of the statute.

3. Section 7304, Rev. Codes 1905, prohibits a physician being examined as a witness, without the consent of his patient, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient. *Held*, that the object of this statute is to inspire confidence in the patient and encourage him to make a full disclosure to the physician of his symptoms and condition, by protecting against physicians making known to the curious the ailments of their patients, particularly when afflicted with diseases which might bring reproach, criticism, unfriendly comment, or disgrace upon the patient, if known to exist.

Evidence — privileged communications — physicians — burden of proof — defendant.

4. When a party to litigation seeks to exclude the testimony of a physician on the ground that it is privileged under the above statute, the burden is upon such party to bring or show the evidence to be within the terms of the statute granting the privilege.

Question of the privileged character of evidence for the court — circumstances — opinion of physician — belief of patient.

5. The question of the privileged character of the testimony is for the court, taking into consideration all the circumstances, and, if necessary, the opinion of the physician and the belief of the patient.

Privileged communications — necessary facts to show — information acquired while attending patient — necessary to enable him to prescribe.

6. Two facts must combine to render the testimony of a physician privileged under the provisions of § 7304, Rev. Codes 1905, namely, he must have acquired the information while attending the patient in his professional capacity, and the information must also have been necessary to enable him to prescribe or act for the patient. *Held*, under the facts of this case, that the testimony sought to be elicited from the physician was not privileged, as it is clear that the questions did not call for information necessary to enable the physician to prescribe or act for her.

Offer of proof — confinement — information given by plaintiff to attending physician — unprivileged.

7. An offer was made to prove that the physician who attended plaintiff during confinement, on a subsequent visit to her, was told by plaintiff that she did not have intercourse with defendant until after the 4th of July, or about six and one-half months prior to the birth of a child; that she never had any talk with defendant about marriage, and that the reason she let him have inter-

course with her was that she thought, if she became pregnant, he would marry her. *Held*, that, under the circumstances surrounding the visit, it is apparent that such information, if given the physician, was not necessary to enable him to prescribe or act for the plaintiff, and that therefore it was not privileged under the statute.

Breach of promise of marriage — seduction — aggravation of damages — physical suffering at birth of child — proper.

8. In an action for breach of promise of marriage, in which seduction is a proper element in aggravation of damages, the physical suffering occasioned by the birth of a child resulting from the seduction may be considered in determining the damages.

Instructions to jury — damages — prejudice.

9. An instruction to a jury that it might take into consideration all the other facts and circumstances in the case in assessing damages is too broad; but in this case cannot be said to have been prejudicial.

Evidence — rulings of court — error.

10. Certain rulings of the court on the admission and exclusion of evidence examined, and *held* erroneous.

Contract of marriage — implied promise — issues — jury.

11. Without setting forth the evidence on the subject of a contract of marriage, it is *held* that the record in this case discloses sufficient evidence tending to show an implied agreement to marry, to warrant submitting the issues to the jury.

Opinion filed January 14, 1914.

Appeal from a judgment of the District Court of Towner County for plaintiff, and from an order denying a new trial, Hon. *J. F. Cowan*, J.

Reversed.

P. J. McClory and *Bangs, Cooley, & Hamilton*, for appellant.

At common law there was no immunity granted a physician from testifying fully as to conversations had with his patients, but the laws of this state have exempted or prohibited physicians from testifying as to information acquired from his patient while in attendance, and which is necessary to enable the physician to properly prescribe. Rev. Codes 1905, § 7304; Wigmore, Ev. § 2380; Greenl. Ev. 16th ed. § 247a.

Upon the question of whether or not the information gained by a physician from his patient while in attendance upon such patient was *necessary* to enable the physician to prescribe, the *court* is just as well qualified to pass as is or was the physician, or to consider the nature

and character of such information. Madsen v. Utah Light & R. Co. 36 Utah, 528, 105 Pac. 801.

To entitle a party to the privilege extended by our statute, it is necessary that the information be acquired by the physician while he is attending the patient in a professional capacity. Edington v. Ætna L. Ins. Co. 77 N. Y. 564; People v. Austin, 199 N. Y. 446, 93 N. E. 57.

The burden of showing that the evidence sought to be excluded under this statute is privileged is upon the party who seeks to exclude it. Chicago, I. & L. R. Co. v. Gorman, 47 Ind. App. 432, 94 N. E. 730; People v. Koerner, 154 N. Y. 355, 48 N. E. 730; People v. Schuyler, 106 N. Y. 298, 12 N. E. 783; Smits v. State, 145 Wis. 601, 130 N. W. 525; Campau v. North, 39 Mich. 606, 33 Am. Rep. 433; Lincoln v. Detroit, 101 Mich. 245, 59 N. W. 617; Edington v. Ætna L. Ins. Co. supra; Green v. Metropolitan Street R. Co. 171 N. Y. 201, 89 Am. St. Rep. 807, 63 N. E. 958; Griffiths v. Metropolitan Street R. Co. 171 N. Y. 106, 63 N. E. 808, 11 Am. Neg. Rep. 620, 63 App. Div. 86, 71 N. Y. Supp. 406; People v. Austin, supra; Travis v. Haan, 119 App. Div. 138, 103 N. Y. Supp. 973; Dejong v. Erie R. Co. 43 App. Div. 427, 60 N. Y. Supp. 125; Griebel v. Brooklyn Heights R. Co. 68 App. Div. 204, 74 N. Y. Supp. 126; Benjamin v. Tupper Lake, 110 App. Div. 426, 97 N. Y. Supp. 512; Cooley v. Foltz, 85 Mich. 47, 48 N. W. 176; People v. Cole, 113 Mich. 83, 71 N. W. 455; Green v. Terminal R. Asso. 211 Mo. 18, 109 S. W. 715; Kansas City, Ft. S. & M. R. Co. v. Murray, 55 Kan. 336, 40 Pac. 646; Smith v. John L. Roper Lumber Co. 147 N. C. 62, 125 Am. St. Rep. 535, 60 S. E. 717, 15 Ann. Cas. 580; Missouri P. R. Co. v. Castle, 97 C. C. A. 124, 172 Fed. 841; Madsen v. Utah Light & R. Co. 36 Utah, 528, 105 Pac. 799; Collins v. Mack, 31 Ark. 684; Re Bruendl, 102 Wis. 45, 78 N. W. 169; Heuston v. Simpson, 115 Ind. 62, 7 Am. St. Rep. 409, 17 N. E. 261; Pennsylvania Co. v. Marion, 123 Ind. 415, 7 L.R.A. 687, 18 Am. St. Rep. 330, 23 N. E. 973, 3 Am. Neg. Cas. 261; New York & St. L. R. Co. v. Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871; Penn Mut. L. Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769; Raymond v. Burlington C. R. & N. R. Co. 65 Iowa, 152, 21 N. W. 495, 3 Am. Neg. Cas. 365; Keist v. Chicago G. W. R. Co. 110 Iowa, 32, 81 N. W. 181; Battis v. Chicago, R. I. & P. R. Co. 124

Iowa, 623, 100 N. W. 543; Munz v. Salt Lake City R. Co. 25 Utah, 220, 70 Pac. 852, 13 Am. Neg. Rep. 214; May v. Northern P. R. Co. 32 Mont. 522, 70 L.R.A. 111, 81 Pac. 328, 4 Ann. Cas. 605; Patterson v. Cole, 67 Kan. 441, 73 Pac. 54, 14 Am. Neg. Rep. 543; McRae v. Erickson, 1 Cal. App. 326, 82 Pac. 209; Colorado Fuel & Iron Co. v. Cummings, 8 Colo. App. 541, 46 Pac. 875.

The instruction of the court to the jury that damages could be assessed for mental suffering, and also by reason of the fact that she became pregnant, and that a child was born, was error. Giese v. Shultz, 53 Wis. 462, 10 N. W. 598; Musselman v. Barker, 26 Neb. 737, 42 N. W. 759; Tyler v. Salley, 82 Me. 128, 19 Atl. 107.

The consent of the woman by deceit or artifice is an essential and necessary element, and must be shown, to establish the fact of seduction. Lee v. Hefley, 21 Ind. 98; Bradshaw v. Jones, 103 Tenn. 331, 76 Am. St. Rep. 655, 52 S. W. 1072; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Marshall v. Taylor, 98 Cal. 55, 35 Am. St. Rep. 144, 32 Pac. 867; Baird v. Boehner, 72 Iowa, 318, 33 N. W. 694; Gover v. Dill, 3 Iowa, 337; Brown v. Kingsley, 38 Iowa, 220; Parker v. Monteith, 7 Or. 277; Patterson v. Hayden, 17 Or. 238, 3 L.R.A. 529, 11 Am. St. Rep. 822, 21 Pac. 129; Breon v. Henkle, 14 Or. 494, 13 Pac. 289.

An instruction that submits to the jury to find whether or not a certain fact exists, when there is no evidence to *prove* such fact, is misleading and erroneous. Clement v. Boone, 5 Ill. App. 109; American Transp. Co. v. Moore, 5 Mich. 368; State Bank v. Hubbard, 8 Ark. 183.

The burden of proving why she submitted to having sexual intercourse with defendant is, in such cases, upon the plaintiff. The promise of marriage must be the moving cause, to show seduction. Cooper v. State, 90 Ala. 641, 8 So. 821; People v. Wallace, 109 Cal. 611, 42 Pac. 159; Phillips v. State, 108 Ind. 406, 9 N. E. 345; People v. Hubbard, 92 Mich. 322, 52 N. W. 729.

Questions referring to plaintiff's intimacy with other men are proper in such cases. State v. McKnight, 7 N. D. 450, 75 N. W. 790.

A witness may testify as to the conduct, demeanor, or manner of another. 5 Enc. Ev. 674; M'Kee v. Nelson, 4 Cow. 355, 15 Am. Dec. 384; Beans v. Denny, 141 Iowa, 52, 117 N. W. 1091; Lewis v. Mason,

109 Mass. 169; Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18.

It is highly proper to examine a party as to statements made out of court inconsistent with her testimony given in the trial. Hall v. Chicago, R. I. & P. R. Co. 84 Iowa, 311, 51 N. W. 150.

There is nothing in this case to show even an *implied* promise of marriage. Button v. Hibbard, 82 Hun, 289, 64 N. Y. S. R. 80, 31 N. Y. Supp. 483.

Mere attentions, although exclusive and long continued, are not enough to show a *promise* of marriage. Walker v. Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100; Espy v. Jones, 37 Ala. 379; Walmsley v. Robinson, 63 Ill. 41, 41 Am. Rep. 111; Burnham v. Cornwell, 16 B. Mon. 284, 63 Am. Dec. 529; Standiford v. Gentry, 32 Mo. 477; Weaver v. Bachert, 2 Pa. St. 80, 44 Am. Dec. 159; Yale v. Curtiss, 151 N. Y. 598, 45 N. E. 1125; Munson v. Hastings, 12 Vt. 346, 36 Am. Dec. 345.

F. T. Cuthbert, A. R. Smythe, L. H. Sennett, and *John J. Kehoe,* for respondent.

Our statute, § 7304, Revised Codes 1905, no doubt was intended to protect not only the attending physician, but the patient as well, in the same manner and under the same wholesome rule that prevailed under the common law in reference to attorneys and clients. Burgess v. Sims Drug Co. 114 Iowa, 275, 54 L.R.A. 364, 89 Am. St. Rep. 359, 86 N. W. 307, 10 Am. Neg. Rep. 42.

The statute should be given a liberal construction, in order that its purposes may be fully accomplished, and not only the physician, but the patient, protected. McRae v. Erickson, 1 Cal. App. 326, 82 Pac. 209; Edington v. Mutual L. Ins. Co. 67 N. Y. 185; Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 281, 36 Am. Rep. 617; Munz v. Salt Lake City R. Co. 25 Utah, 220, 70 Pac. 852, 13 Am. Neg. Rep. 214; Madsen v. Utah Light & R. Co. 36 Utah, 528, 105 Pac. 799; State v. Kennedy, 177 Mo. 98, 75 S. W. 987; Thomas v. Byron Twp. 168 Mich. 593, 28 L.R.A.(N.S.) 1186, 134 N. W. 1021, Ann. Cas. 1913C, 686; Patterson v. Cole, 67 Kan. 441, 73 Pac. 54, 14 Am. Neg. Rep. 543; Burgess v. Sims Drug Co. supra; Battis v. Chicago, R. I. & P. R. Co. 124 Iowa, 623, 100 N. W. 543; Colorado Fuel & Iron Co. v. Cum-

mings, 8 Colo. App. 541, 46 Pac. 875; Colo. Gen. Stat. § 3649 is § 4824 of 2 Mills' Anno. Stat.

It is true that the burden is on the party seeking to suppress the evidence, to show that it is within the terms of the statute. But the establishing of the relation of physician and patient during the time the physician acquired the information from the patient is sufficient, and gives rise to the presumption that the physician acquired the information to enable him to properly act and prescribe for the patient. Edington v. Mutual L. Ins. Co. 67 N. Y. 185; Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 281, 36 Am. Rep. 617; Munz v. Salt Lake City R. Co. 25 Utah, 220, 70 Pac. 852, 13 Am. Neg. Rep. 214; Madsen v. Utah Light & R. Co. 36 Utah, 528, 105 Pac. 799; State v. Kennedy, 177 Mo. 98, 75 S. W. 987; Re Redfield, 116 Cal. 637, 48 Pac. 794; Patterson v. Cole, 67 Kan. 441, 73 Pac. 54, 14 Am. Neg. Rep. 543; Colorado Fuel & Iron Co. v. Cummings, 8 Colo. App. 541, 46 Pac. 875; Battis v. Chicago, R. I. & P. R. Co. 124 Iowa, 623, 100 N. W. 543; Thomas v. Byron Twp. 168 Mich. 593, 38 L.R.A.(N.S.) 1136, 134 N. W. 1021, Ann. Cas. 1913C, 686.

The information obtained from the plaintiff by the doctor while he was attending her was and is privileged to the plaintiff. Edington v. Mutual L. Ins. Co. 67 N. Y. 185; Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 281, 36 Am. Rep. 617; Re Darragh, 52 Hun, 591, 5 N. Y. Supp. 58; Freel v. Market Street Cable R. Co. 97 Cal. 40, 31 Pac. 730; McRae v. Erickson, 1 Cal. App. 326, 82 Pac. 209; Battis v. Chicago, R. I. & P. R. Co. 124 Iowa, 623, 100 N. W. 543; Green v. Nebagamain, 113 Wis. 508, 89 N. W. 520; Patterson v. Cole, 67 Kan. 441, 73 N. W. 54, 14 Am. Neg. Rep. 543; Colorado Fuel & Iron Co. v. Cummings, 8 Colo. App. 541, 46 Pac. 875; Heuston v. Simpson, 115 Ind. 62, 7 Am. St. Rep. 409, 17 N. E. 261; Pennsylvania Co. v. Marion, 123 Ind. 415, 7 L.R.A. 687, 18 Am. St. Rep. 330, 23 N. E. 973, 3 Am. Neg. Cas. 261; Munz v. Salt Lake City R. Co. 25 Utah, 220, 70 Pac. 852, 13 Am. Neg. Rep. 214.

The plaintiff did not waive her rights under such statute when and because she offered herself as a witness. May v. Northern P. R. Co. 32 Mont. 522, 70 L.R.A. 111, 81 Pac. 328, 4 Ann. Cas. 605; Neolle v. Hoquiam Lumber & Shingle Co. 47 Wash. 519, 92 Pac. 372; Burgess v. Sims Drug Co. 114 Iowa, 275, 54 L.R.A. 364, 89 Am. St. Rep. 359,

86 N. W. 307, 10 Am. Neg. Rep. 42; Hilary v. Minneapolis Street R. Co. 104 Minn. 432, 116 N. W. 933; Green v. Nebagamain, 113 Wis. 508, 89 N. W. 520; Williams v. Johnson, 112 Ind. 273, 13 N. E. 872; McConnell v. Osage, 80 Iowa, 293, 8 L.R.A. 778, 45 N. W. 550.

And plaintiff did not waive such rights by answering questions on her cross-examination as to a matter of privilege between herself and the doctor. She still had the right to object to the doctor testifying touching such matter. Burgess v. Sims Drug Co. 114 Iowa, 275, 54 L.R.A. 364, 89 Am. St. Rep. 359, 86 N. W. 307, 10 Am. Neg. Rep. 42; Larson v. State, 92 Neb. 24, 137 N. W. 894; Lauer v. Banning, 152 Iowa, 99, 131 N. W. 783.

That which is privileged to the patient is *any information* acquired by the attending physician which is necessary for him to act or prescribe for his patient. 2 Cyc. 136; Boyle v. Northwestern Mut. Relief Asso. 95 Wis. 312, 70 N. W. 351; Auld v. Cathro, 20 N. D. 461, 32 L.R.A.(N.S.) 71, 128 N. W. 1025, Ann. Cas. 1913A, 90.

Misconduct of an attorney in examining a witness is always a proper subject for the trial court to control. Abbott, Civil Jury Trials, 3d ed. p. 477; Whitney v. Swensen, 43 Minn. 337, 45 N. W. 609; Krapp v. Hauer, 38 Kan. 430, 16 Pac. 702; Tuller v. Ginsburg, 99 Mich. 137, 57 N. W. 1099.

Witnesses should answer proper questions promptly, politely, and without evasion, and this matter is properly within the control of the trial court, who not only sees the witnesses, but has full opportunity to correctly judge them and their actions. Clark v. Field, 42 Mich. 342, [illegible] N. W. 19.

It is not reversible error to refuse requested instructions, if the substance of such instructions is covered by the court on its general instructions. State v. Hayes, 23 S. D. 596, 122 N. W. 652; State v. Jackson, 21 S. D. 494, 113 N. W. 880, 16 Ann. Cas. 87; Waterhouse v. Jos. Schlitz Brewing Co. 16 S. D. 592, 94 N. W. 587; United States v. Adams, 2 Dak. 305, 9 N. W. 718; Young v. Harris, 4 Dak. 367, 32 N. W. 97; Territory v. Chartrand, 1 Dak. 379, 46 N. W. 583; Cheatham v. Wilbur, 1 Dak. 335, 46 N. W. 580.

Seduction is a proper element to consider in aggravation of damages for breach of promise of marriage, if properly predicated on such prom-

ise. Wrynn v. Downey, 27 R. I. 454, 4 L.R.A.(N.S.) 616, 114 Am. St. Rep. 63, 63 Atl. 401, 8 Ann. Cas. 912; Stokes v. Mason, 85 Vt. 164, 36 L.R.A.(N.S.) 388, 81 Atl. 162; Giese v. Schultz, 69 Wis. 521, 34 N. W. 913; Musselman v. Barker, 26 Neb. 737, 42 N. W. 759; Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; McKinsey v. Squires, 32 W. Va. 41, 9 S. E. 55.

It is proper in such cases to offer evidence of the plaintiff's feelings and mortification resulting from the breach of the contract. Reed v. Clark, 47 Cal. 194; Royal v. Smith, 40 Iowa, 615; Coolidge v. Neat, 129 Mass. 146; Bennett v. Beam, 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8; Goodal v. Thurman, 1 Head, 209; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936; Grant v. Willey, 101 Mass. 356.

The seduced female herself cannot be cross-examined as to her intercourse with other men. Neither can the witnesses. Such evidence does not go to prove or disprove the promise of marriage. Dodd v. Norris, 3 Camp. 519, 14 Revised Rep. 832; Shattuck v. Myers, 13 Ind. 46, 75 Am. Dec. 236; Smith v. Yaryan, 69 Ind. 445, 35 Am. Rep. 232; Hoffman v. Kemerer, 44 Pa. 452; Doyle v. Jessup, 29 Ill. 460; Vaughan v. Perine, 3 N. J. L. 728, 4 Am. Dec. 411.

The latitude of cross-examination is largely in the discretion of the trial court. State v. Foster, 14 N. D. 561, 105 N. W. 938; State v. Longstreth, 19 N. D. 268, 121 N. W. 1114, Ann. Cas. 1912D, 1317.

Where different minds might reach different conclusions on the same facts, the question is for the jury. Gordon v. Ashley, 191 N. Y. 193, 83 N. E. 686; Tousey v. Hastings, 194 N. Y. 82, 86 N. E. 831; Re Totten, 179 N. Y. 112, 70 L.R.A. 711, 71 N. E. 748, 1 Ann. Cas. 900.

While it is true that an acceptance of an offer of marriage must be shown, it need not be in or by words. It may be inferred by circumstances and by the conduct of the parties. Morgan v. Yarborough, 5 La. Ann. 316; Wells v. Padgett, 8 Barb. 323; Daniel v. Bowles, 2 Car. & P. 553; Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77; Johnson v. Caulkins, 1 Johns. Cas. 116, 1 Am. Dec. 102; Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672; Bracken v. Dinning, 141 Ky. 265, 132 S. W. 425; Kennedy v. Rodgers, 2 Kan. App. 764, 44 Pac. 47; Johnson

v. Leggett, 28 Kan. 590; Homan v. Earle, 53 N. Y. 267; Blackburn v. Mann, 85 Ill. 222; Thurston v. Cavenor, 8 Iowa, 155; Coil v. Wallace, 24 N. J. L. 291; Chamness v. Cox, 131 Ind. 118, 30 N. E. 901.

Where there is substantial conflict in the evidence, and the jury has made its findings, appellate courts will not disturb the verdict. Caledonia Gold Min. Co. v. Noonan, 3 Dak. 189, 14 N. W. 426, 121 U. S. 393, 30 L. ed. 1061, 7 Sup. Ct. Rep. 911; State ex rel. Morrill v. Massey, 10 N. D. 154, 86 N. W. 225; Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; Nichols & S. Co. v. Stangler, 7 N. D. 109, 72 N. W. 1089; Axiom Min. Co. v. White, 10 S. D. 202, 72 N. W. 462; Casey v. First Bank, 20 N. D. 211, 126 N. W. 1011; Charles E. Bryant & Co. v. Arnold, 19 S. D. 106, 102 N. W. 303; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225.

The verdict in this case as to the amount of damages is reasonable, and should not be disturbed. Lanigan v. Neely, 4 Cal. App. 760, 89 Pac. 441; Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024; Fisher v. Kenyon, 56 Wash. 8, 104 Pac. 1127, 20 Ann. Cas. 1264; Kennedy v. Rodgers, 2 Kan. App. 764, 44 Pac. 47; F. A. Patrick & Co. v. Austin, 20 N. D. 261, 127 N. W. 109; Lawver v. Globe Mut. Ins. Co. 25 S. D. 549, 127 N. W. 615; Nilson v. Horton, 19 N. D. 187, 123 N. W. 397; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225; Casey v. First Bank, 20 N. D. 211, 126 N. W. 1011.

Error, to be reversible, must be shown to have substantially and materially and unjustly affected the rights of the party asserting it. Whitney v. Brown, 75 Kan. 678, 11 L.R.A.(N.S.) 468, 90 Pac. 277, 12 Ann. Cas. 768; Mageau v. Great Northern R. Co. 103 Minn. 290, 15 L.R.A.(N.S.) 511, 115 N. W. 651, 14 Ann. Cas. 551; Johnson v. Walker, 86 Miss. 757, 1 L.R.A.(N.S.) 470, 109 Am. St. Rep. 733, 39 So. 49; Woods v. Lisbon, 138 Iowa, 402, 16 L.R.A.(N.S.) 887, 128 Am. St. Rep. 208, 116 N. W. 143; Grimestad v. Lofgren, 105 Minn. 286, 17 L.R.A.(N.S.) 990, 127 Am. St. Rep. 566, 117 N. W. 515; Kuhl v. Chamberlain, 140 Iowa, 546, 21 L.R.A.(N.S.) 766, 118 N. W. 776; Madson v. Rutten, 16 N. D. 281, 13 L.R.A.(N.S.) 554, 113 N. W. 872; McClain v. Lewiston Interstate Fair & Racing Asso. 17 Idaho, 63, 25 L.R.A.(N.S.) 691, 104 Pac. 1015, 20 Ann. Cas. 60; Shaw v. Lobe, 58 Wash. 219, 29 L.R.A.(N.S.) 335, 108 Pac. 450; Cetofonde v.

Camden Coke Co. 78 N. J. L. 662, 27 L.R.A.(N.S.) 1058, 75 Atl. 913; Miller v. Northern P. R. Co. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215.

SPALDING, Ch. J. This is an action for damages for breach of promise of marriage aggravated by seduction. The defendant is a bachelor forty-six or forty-seven years of age, and quite well to do, owning and residing on a farm in Towner county. The plaintiff was a divorced woman and the mother of two children, who were not living with her at the time the incidents occurred which are the basis of this action.

She and the defendant were strangers. She heard that he was in need of female help in his household, and applied to him for employment under her maiden name. Her application resulted in her being employed as housekeeper.

It is not now necessary to relate the acts which occurred between the parties, which, according to plaintiff's version, resulted in illicit intercourse between them, and the birth of a child which died shortly after its birth.

The defendant denies *in toto* all illicit relations and any agreement to marry, and claims not to have known that she was pregnant until the time of her confinement. On becoming ill, she asked him to call the doctor, which he accordingly did. The doctor visited her in response to the call, and she was delivered of a child. He visited her a second time and a third time. After the plaintiff had shown facts and acts which she claimed constituted an engagement to marry, and the subsequent relations of the parties, the doctor who attended her during confinement was called as a witness by the defendant. He testified that McWilliams, the defendant, called him over the telephone on the morning of the 22d of January, 1910; that he heard him say to someone that "the doctor wanted to know what is the matter with you;" that McWilliams replied to the doctor. His reply was excluded on objection. On this visit he was acting as her physician and nothing else, and a child was born to her at that time. We pass over certain objections made to his testifying as to the child being full term or otherwise, and come at once to a question on which a majority of the members of this court, after a reargument granted and had, are agreed, and which compels a reversal.

The doctor testified that he visited the plaintiff on a third occasion in the month of January, 1910, about a week following his first visit to her. On that occasion he had a conversation with her of which he had a recollection. The doctor was examined by plaintiff for the purpose of laying the foundation for an objection, and testified that this conversation was not had under the same conditions and circumstances as previous conversations; that he was not there in the capacity of a physician or treating the patient at that time; that he went there by request through her sister over the telephone, and that he took it not to be in a professional capacity; that, on receiving the call through the sister to go there, he went and found plaintiff still in bed; that he did not talk to her about her physical condition, or how she was getting along; that he might have asked her how she felt; that this was about a week after his second visit; that he had been there in the capacity of a physician and taken charge of the patient during confinement; that on his second visit he discharged himself and told her that he would not come again unless she requested him to; that he did not believe she was sick when he was there; that she was in bed, but had recovered from confinement, and was not what we could call sick, but was apparently in perfect health and normal; that he did not make any examination of her physically, though he thought he asked her if she felt all right; that he did not talk to her about medicine or treatment or ask her about that at all; that, at that time, he had something else in mind other than a professional trip, and no one had agreed to compensate him for that trip; that he made it as an act of charity; that McWilliams had never requested him to go there; that the last talk he had had with plaintiff was that he would not call again unless sent for by her.

After these preliminaries, the defendant offered to prove by the witness that, about the 27th day of January, 1910, the witness had a conversation with plaintiff, wherein she told witness that the defendant had never promised to marry her, and that she and defendant had never talked of marriage. This offer was objected to on the ground that no foundation was laid; that it was incompetent, irrelevant, and immaterial; and for the reason that it was immaterial under the provisions of subdivision 3, § 7304, Rev. Codes 1905. This objection was

sustained and exception taken, whereupon offer of proof number 4 was made in writing.

This offer was to prove by the doctor that, on or about the 27th day of January, 1910, plaintiff and witness had a conversation, and that in it the plaintiff told witness that the defendant had never promised to marry her, and that thereupon witness asked her why she had allowed him to have intercourse with her, and that she replied that she had allowed him to have intercourse with her because she believed that, if he did get her in a family way, he would marry her, and that she further said that there had never been any talk of marriage between plaintiff and defendant.

At this point counsel for plaintiff addressed the court and said: "If the court please, this brings up to a critical proposition, rather a critical proposition, and personally I would like a little time to examine the construction of the statute; if a man can be called in the capacity of a physician, and then switch over and become a spotter, it seems to me there should be some law on it." The court replied: "Yes, I think that, myself," whereupon counsel for defendant stated that he desired to take an exception to remarks of counsel, and asked the court to caution the jury to pay no attention to them. To this, the court replied: "No, the jury will pay no attention to those remarks at all, but I do think that this is a very serious proposition in this case. If a man can act as a doctor just as has been testified to here, if he can act as a doctor and make a call, and then when called again repudiate the professional part of it and become something else, if he can do that in a case of this kind, he can go out and separate his visits into two calls. He can make the call professionally and act as a detective right straight through. We have a good and wholesome statute on that, and if this kind of business can prevail there is nothing in it, and it is wiped out and torn to pieces. The same would apply to attorneys, and no man would then be safe if that is what this statute means. No man can be safe in going to an attorney and telling him his story and telling him his case, because he could divide his inquiries into what was necessary for the case, and then pump him out of the other side and make use of it." An exception was taken and granted to the remarks of the court. Error is assigned thereon.

1. It needs no argument to bring out the fact that these remarks

by the court in the presence of the jury, although directed to counsel, were highly prejudicial to the defendant. We say this without at this time considering the question of the admissibility of statements claimed to have been made by plaintiff to the witness. The defendant was contending and attempting to show that statements made by the plaintiff to the witness, when not in attendance upon her in the capacity of a physician, were diametrically opposed to her claim upon the witness stand when seeking to recover from the defendant for a breach of promise of marriage, aggravated by seduction.

She had testified that the acts of sexual intercourse which resulted in her pregnancy occurred in the month of May, and that there was an engagement to marry. It was sought to show by the witness that she had told him that there never was any promise of marriage or any talk of marriage; that no intercourse occurred until after the 4th of July, a time much less than nine months prior to the birth of the child, and that she had had intercourse with the defendant, because she thought if she became pregnant, he would marry her.

It is self-evident that these statements, if made, would have a very marked bearing upon the weight to be given her testimony on the main facts of the case. The proceedings of counsel for defendant were regular and proper, that is to say, they were offers of evidence which counsel had a right to make, and they were submitted in a proper manner to call for the ruling of the court. Instead of overruling the offers made and granting an exception, the court made a speech, in effect charging the defendant or his counsel with attempting to impose upon the plaintiff by employing the physician to both attend her and act as a detective or spotter to secure evidence, by way of admissions and statements from the plaintiff, favorable to defendant, and which might defeat her in any attempt to secure damages from him. Such remarks reflected upon the integrity and good faith of the defendant and his counsel, and may well have had a marked influence upon the verdict.

The plaintiff testified to acts and statements between the parties which might be construed as constituting an agreement to marry, also as to acts of illicit intercourse. The defendant denied positively any direct or implied agreement to marry, as well as any improper relations with the plaintiff. The testimony of neither party was corroborated to any considerable extent. The language used, if the testimony of the plain-

tiff was true, and relied upon as constituting the agreement to marry, was susceptible of more than one interpretation. The defendant had never introduced her to his relatives or acquaintances as his promised wife; had never given her a ring or made her presents, or spoken of her in the presence of others as his future wife. She had never informed others that she had promised to be his wife, or contemplated assuming that relation to him. In this state of the record, it is apparent that evidence of but slight weight improperly excluded, if received, might change the verdict.

In this state of affairs, the court addresses remarks which, as we have said, seriously and unnecessarily reflect upon the integrity and the motives of the defense made by McWilliams. A case might be imagined in which the testimony was nearly all one way and clearly showed an agreement to marry and other incidental facts, where such remarks might be held nonprejudicial, but in this case no such conditions existed when the offers were made or during the trial. Furthermore, that they were prejudicial is pretty clearly disclosed by comparison of the testimony of the witness given prior to these remarks, and his testimony as continued after he had heard them as addressed to counsel. We have set out enough to show that he clearly testified before this attack of the court, that, on the third occasion, he was not visiting the plaintiff in his professional capacity; that he did not prescribe for her, nor investigate her condition with the view of prescribing for her, or do anything along those lines other than to make the conventional inquiry as to how she felt; that he did not understand that he was there in his capacity as physician.

Immediately after the remarks made by the court, he testified that he could not believe but what he was called in a professional capacity, and, after giving some details, that the conversation he had there with her was in connection with his professional call, and, partly at the suggestion of the court, he testified that any information he received at that time was acquired while he was attending the patient and asking questions concerning her health, which would be necessary for him to prescribe for her if he found she needed it.

The language used by the court was very strong and catchy. It might lead one to infer that the defendant had expressly employed the doctor to act as a detective and serve him in that capacity. No evi-

dence is disclosed having any tendency to support any inference or statement of that nature. This examination of the witness was preliminary to his offered testimony, and made to determine whether the testimony offered was privileged, and in so far as the doctor's opinion on the subject had a bearing, it is obvious that the change of front was detrimental to the defendant. It was the duty of the court to, as far as possible, secure an unbiased statement from the physician as to his relations to the plaintiff on the occasion of the third visit. It may be that the latter part of his testimony was influenced by the language employed by the court, and, regardless of the effect of the language employed and the attitude of the court upon the jury, it may have influenced the testimony of the witness prejudicially to defendant. Counsel might by cross-examination have discredited the witness, but at that stage of the examination, and in that manner, it was not for the court to do so. People v. Fielding, 158 N. Y. 542, 46 L.R.A. 641, 70 Am. St. Rep. 495, 53 N. E. 497, 11 Am. Crim. Rep. 88; Edwards v. Mt. Hood Constr. Co. 64 Or. 308, 130 Pac. 49.

In the Fielding Case, the court says: "In a case that is free from doubt upon the merits, the appellate courts disregard errors of the trial court, even in a criminal case, when it is reasonably certain that they could not have affected the result. A proposition is reasonably certain when it is supported by the strong probabilities, but here, the strong probabilities are that the errors did affect the result. The average man cannot read the eloquent but inflammatory language of the district attorney without being impressed by it, and it is safe to presume that the effect would be heightened by hearing those words spoken with animation and enthusiasm under the exciting circumstances surrounding an important criminal trial. The jury might be told by the court to forget them, but could they forget them? They might be told to disregard them, but how can we be certain that they did disregard them?"

The above language applied to remarks by a prosecuting attorney. If the remarks of the prosecuting attorney in addressing the jury may be prejudicial to a party, how much more so will inflammatory remarks of the court be? Every attorney of experience knows that, as a rule, the jurors watch the court for the slightest intimation as to its opinion as to the merits of the action, not only for remarks, but as to the in-

flection of the voice, the countenance, gestures, and the general attitude and bearing toward the parties.

In the Edwards Case, the court says: "The writer knows from experience on the circuit bench that it is sometimes very difficult for a judge to refrain from making comments on a case during the progress of the trial, and especially where an apparent injustice seems to have been perpetrated; but, after a reversal or two occasioned by this practice, he concluded to go not to the ant, but to the meek and lowly oyster, to 'consider its ways and be wise,' and to keep the judicial mouth shut."

2. In this connection, it may be observed that the record discloses many minor errors which we shall not take up separately or further, but all of which were unfavorable to the defendant, and which come very near, when considered in connection with the whole record, disclosing an attitude of the court unfavorable to the defendant, and which it seems to this court must have been clearly apparent to the jury throughout the trial.

We do not say that any one of these minor errors was sufficient to justify a reversal, but we do think they go a long way toward showing that the defendant did not have a fair trial. See Willoughby v. Smith, — N. D. —, 144 N. W. 79; People v. Fielding, 158 N. Y. 542, 550, 46 L.R.A. 641, 70 Am. St. Rep. 495, 53 N. E. 497, 11 Am. Crim. Rep. 88; Quanah, A. & P. R. Co. v. Galloway, — Tex. Civ. App. —, 154 S. W. 653.

3. Having concluded that the judgment in this case must be reversed, it will be unnecessary for us to pass upon other assignments of error, except for the guidance of the court on a new trial. For this reason, we take up the assignments of such questions as are likely to arise on another trial.

The most important question in the case relates to the admissibility of testimony offered to show, by Dr. Roberts, that the plaintiff stated to him on the occasion of the third visit, to which we have referred, that the defendant had never promised to marry her, nor had any talk with her on the subject, and that she permitted him to have intercourse with her in the belief that, if she became pregnant, he would marry her, and that no intercourse occurred until after the 4th of July, 1909. The exclusion of evidence of these statements requires a consideration of

§ 7304, Rev. Codes 1905, which, as far as material, is as follows: "A person cannot be examined as a witness in the following cases: . . . A physician or surgeon cannot, without the consent of his patient, be examined as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient. . . . "

It is in effect contended by respondent that ¶ 3, § 7304, supra, inhibits the physician from testifying as to any conversation had with a patient while in attendance as a physician, or as to any facts learned while so engaged, regardless of their being necessary to enable the physician to prescribe or act for the patient.

By appellant it is urged that on the occasion of the third visit of Dr. Roberts, so far as disclosed by the record, he was not attending as her physician, and, further, that in cases he was so in attendance upon her, the statements offered as made by the plaintiff to him were not within the prohibition of the statute, for the reason that they were not necessary to enable him to prescribe or act for her as her physician.

At common law, an attorney was not permitted to testify as to communications made by his client or knowledge acquired during consultations, but no such privilege was extended to physicians and patients. As to them, the privilege is purely statutory, and was intended to inspire confidence in the patient and encourage him in making a full disclosure to the physician as to his symptoms and condition, by preventing physicians from making known to the curious the ailments of their patients, particularly when afflicted with diseases which might bring reproach, criticism, unfriendly comment, or disgrace upon the patient, if known to exist. Capron v. Douglass, 193 N. Y. 11, 20 L.R.A.(N.S.) 1003, 85 N. E. 827; People v. Schuyler, 106 N. Y. 298, 12 N. E. 783; McKinney v. Grand Street, P. P. & F. R. Co. 104 N. Y. 352, 10 N. E. 544; Treanor v. Manhattan R. Co. 28 Abb. N. C. 47, 16 N. Y. Supp. 536; 4 Wigmore, Ev. § 2389.

4. It is quite universally held that, where a party to litigation seeks to exclude the testimony of a witness on the ground that it is privileged by statute or otherwise, the burden is upon the party desiring to exclude the testimony of the physician, to bring or show it within the terms of the statute granting the privilege. This rule is consonant with common sense and justice, and meets with our approval. People v. Schuyler,

supra, at p. 304; People v. Austin, 199 N. Y. 446, 93 N. E. 57; Griffiths v. Metropolitan Street R. Co. 171 N. Y. 106, 63 N. E. 808, 11 Am. Neg. Rep. 620; Edington v. Ætna L. Ins. Co. 77 N. Y. 564; 4 Wigmore, Ev. 2381. We are of the opinion that the burden thrown upon the plaintiff was not sustained, if the determination of the questions rests with the witness.

5. We are, however, satisfied that the question of the privileged character of the testimony is for the court, taking into consideration all the circumstances, and if necessary the opinion of the physician, and the belief of the patient. Griffiths v. Metropolitan Street R. Co. 171 N. Y. 106, 63 N. E. 808, 11 Am. Neg. Rep. 620; Re Redfield, 116 Cal. 637, 48 Pac. 794; Mitchell's Case, 12 Abb. Pr. 249; Edison Electric Light Co. v. United States Electric Lighting Co. 44 Fed. 294; Johnson Steel Street-Rail Co v. North Branch Steel Co. 48 Fed. 191; Roeser v. Pease, 37 Okla. 222, 131 Pac. 534; 4 Wigmore, Ev. § 2383, note 2; 2 Enc. Ev. 115; but see Redmond v. Industrial Ben. Asso. 78 Hun, 104, 28 N. Y. Supp. 1075, affirmed in 150 N. Y. 167, 44 N. E. 769.

6. Would the testimony of the doctor as to the statements made by plaintiff to him on the third visit, to which reference has been made, be privileged under the provisions of the statute? It is obvious that two elements must coincide to bring the testimony of this witness within the prohibition: First, he must have acquired the information while attending the patient in his professional capacity, and second, the information which it is sought to disclose must have been necessary to enable the physician to prescribe or act for the patient.

In the determination of this question, we are not influenced by any previous decisions of this court on the subject. There are none. We are thus left free to consider and determine it as seems most consonant with the purpose of the enactment, and best insures the administration of justice.

Nearly every state has a statute of this nature. They assume various forms, a few being identical with our own, others being much more general. The authorities on the subject are far from uniform. We do not attempt to refer to many, nor to discriminate and distinguish in this opinion between those which are in conflict. It is sufficient to say that we have given them careful and exhaustive examination,

have carefully weighed the reasons given by the respective courts for their conclusions, and, among the vast number of cases on this subject, have selected a few directly in point on statutes identical with our own, which seem to present reasons which are persuasive, and which most clearly tend to the fair administration of justice between parties.

This visit was a week or more subsequent to the birth of the child. The doctor testified that the woman was in a normal condition. Had the information which defendant offered to show as acquired by the doctor relating to the time when the first intercourse occurred between the parties, been disclosed on or prior to his first visit, that is, prior to her confinement, it is apparent that it might have had some bearing upon his method of treating her or the child, but, coming so long subsequent thereto, it is very doubtful if it had any such bearing. In any event, we are unable to see how any question of the promise of marriage, or how her reasons for allowing defendant to have intercourse with her, could aid a physician in prescribing for her, even if he were there for that purpose on the occasion of the third visit. The burden was on the plaintiff to show that this information was necessary to enable the doctor to prescribe. Of course, we are not saying that the fact that he did not prescribe for her would make the evidence admissible. It would be too narrow a construction of the statute to admit the evidence whenever a physician, in seeking to ascertain whether a prescription is necessary, finds none needed. The statute unquestionably applies to information obtained, and necessary to enable the physician to determine whether a prescription is necessary.

The provisions of the section referred to are most wholesome and salutary, when applied to cases coming within the reasons for the enactment of the statute, but, if construed too strongly in favor of the patient, the beneficent effects intended to result from this enactment will be far more than overcome by the injustice which must in many cases result. It would often enable the patient to give his version of an affair, and then exclude all conflicting evidence, and place the opposite party at the mercy of the patient, who might testify falsely, or, by exaggeration or misinterpretation prevail, when, if the true facts were disclosed, no cause of action or defense would be shown. Such a result should not be encouraged when not made necessary by a fair interpretation or an imperative statute, and to hold, as in effect argued, that

any conversation had by a patient with his physician while attending him as such is privileged would be to repeal by judicial fiat the solemn qualification imposed by the legislature upon the application of the privilege, by rendering the phrase, "which was necessary to enable him to prescribe or act for the patient," totally ineffective.

Of the many authorities bearing on this subject, we have selected for reference a few based on statutes identical with our own, not, however, unmindful of the fact, as we have indicated, that some may be found which apparently sustain respondent's contention. Among these latter are several, where it was offered to show statements made by a patient to a physician in attendance, which appear not to have been made with a view to enabling the physician to prescribe or act, but which were made to a physician employed by the defendant in personal injury actions, and whose employment was as much to acquire information and prejudicial admissions from the patient as to prescribe for him. This case discloses no such facts, and it will be early enough to pass upon such a state of facts when it is before us.

Indiana cases are not, in the main, authority, for the reason that the corresponding statute of that state is much broader than our own, and contains no provision relating to the necessity of the information. However, in a recent Indian case, a question very similar to the one here involved was considered, and it was held that the testimony was not privileged. The report of that case discloses that a physician had attended upon a patient in an effort to relieve her from the consequences of a criminal operation. A few days after attending her, he called to collect his bill. He was asked whether at that visit he had any conversation with the deceased except that which pertained to the collection of his bill. He answered: "None that I can recall; no more than a physician would have with a patient generally,—ask them how they were." It was then proposed to prove that on that occasion the patient told him that the defendant had nothing to do with producing her condition and more to the same effect. This offer was refused. The court says: "It would be a perversion of the statute to hold that the communication in question was privileged." It may be remarked that the purpose sought to be accomplished by the introduction of this evidence was identical with that sought in the case at bar, namely, to prove conflicting statements. Seifert v. State, 160 Ind. 464, 98 Am. St. Rep.

340, 67 N. E. 100. See also Edington v. Ætna L. Ins. Co. 77 N. Y. 569; People v. Austin, 199 N. Y. 446, 93 N. E. 57; Griffiths v. Metropolitan Street R. Co. 171 N. Y. 106, 63 N. E. 808, 11 Am. Neg. Rep. 620; Benjamin v. Tupper Lake, 110 App. Div. 426, 97 N. Y. Supp. 512; Travis v. Haan, 119 App. Div. 138, 103 N. Y. Supp. 973; Griebel v. Brooklyn Heights R. Co. 68 App. Div. 204, 74 N. Y. Supp. 126; Missouri P. R. Co. v. Castle, 97 C. C. A. 124, 172 Fed. 841; Campau v. North, 39 Mich. 606, 33 Am. Rep. 433; Collins v. Mack, 31 Ark. 684; Re Black, 132 Cal. 392, 64 Pac. 695; Rogers, Expert Testimony, § 43; Smith v. John L. Roper Lumber Co. 147 N. C. 62, 125 Am. St. Rep. 535, 60 S. E. 717, 15 Ann. Cas. 580; and authorities collected in note in 15 Ann. Cas. 582. See also note in 17 Am. St. Rep. 565; People v. Cole, 113 Mich. 83, 71 N. W. 455.

In the Benjamin Case the court said: "There was also an error in excluding evidence that will require a new trial. A physician who had treated the plaintiff for the injury was called by the defendant and testified that he had a conversation with her as to the manner in which this accident occurred. He was then asked: 'What did she tell you as to that?' This was objected to as incompetent and immaterial. In reply to questions by the court, the witness stated that 'this talk was while I was making an examination of her case in order to prescribe for her, and as a part of my examination.' The court sustained the objection, and the defendant excepted. The witness nowhere stated that it was necessary for him to know how the accident happened in order to enable him to act for the plaintiff in a professional capacity, and it is apparent here that it was not necessary for him to know how the accident happened in order to enable him so to act. It was sufficient for that purpose that he knew or was informed of the character of the injuries received, and not as to how they were received. If the plaintiff in such talk made admissions to the physician as to the manner in which the accident happened, it not appearing that the information so acquired was necessary to enable him to act in that capacity, such admissions were not protected by § 834 of the Code of Civil Procedure."

The Campau Case discloses that the plaintiff was a nurse. At the trial the court excluded certain testimony from Dr. Lichty, her physician. Plaintiff claimed she was ruptured by blows and other acts of

violence while acting as Campau's nurse. He called Lichty, and sought to prove by him that, while he was attending her in a professional capacity, she told him that she had been ruptured before she went to live with plaintiff, and had not been ruptured by him. The question was objected to, and the trial court sustained the objection. The Michigan statute is substantially like our own as to the competency of a physician's testimony. In disposing of the point on appeal, it was held that the exclusion of that testimony was error. The court said: "The objection and ruling were based on the statute. The common law gives no privilege in such a case. . . . The rule given by the statute is beneficial and based on elevated grounds of policy, and it ought not to be frittered away by refinements. It is not to be forgotten, however, that parties have their rights, and that when one takes the stand as witness to establish, by his or her oath, the cause of action alleged, the state of facts to give immunity under the statute ought to appear distinctly before making any exclusion of proof of contradictory admissions. So far as practicable, the courts ought to see to it that the statute is not used as a mere guard against exposure of the untruth of a party, and that a rule intended as a shield is not turned into a sword. The objection in the present case was not warranted by the facts in the record. The offer was to show Miss North's admission that her rupture was not caused by plaintiff in error, but existed before she went to live with him. This was material, and it does not appear in the record from the doctor's testimony or in any way that, in case she made the admission as to the pre-existence of the rupture, and as to its not being caused by plaintiff in error, it was information 'necessary to enable the doctor to prescribe for her as a physician, or to do any act for her as a surgeon.' And yet this is one of the fundamental conditions for exclusion which the statute specifies."

In the Cole Case, the court said: "2 How. Anno. Stat. (Mich.) § 7516, prohibits a disclosure of any information acquired by any attending physician, 'which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.' The attending physician was asked if Miss Jordan told him who was the father of her child. This was ruled out as a confidential communication, within the prohibition of the statute. This information was not necessary to enable the physician to prescribe for her,

and the testimony was therefore admissible. . . . Judgment reversed and a new trial ordered."

In the case of Green v. Terminal R. Asso. 211 Mo. 18, 109 S. W. 715, the Missouri court, passing upon a statute identical with ours, uses this language: "The statute does not say, in effect, that the door of the sick room shall be locked once for all. It does not say, in effect, the mouth of the physician . . . shall be closed once for all. The wise general rule being that the admissions of a party to a suit made outside the court room are admissible in evidence against him, the statute does not say that all such admissions made to a physician or surgeon are privileged. It stands precisely the other way. The information under its ban is not all information acquired from a patient, but is such only as was 'necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon.' These are clear words in the law, and under no canon of construction should they be interpreted out of the law by refinement or . . . fanciful ills. In other words, the danger of frittering away this statute is not to operate as a scarecrow frightening courts from their duty to give to every word of it a due office and meaning, because zealous and astute at all times to see to it that the statute be so construed as not to strike down its obvious purpose."

In the Castle Case, decided by the circuit court of appeals of this circuit, the court through Judge Carland says: "The question then is narrowed down to this: Was the fact that plaintiff told the witness that he was injured by having his foot slip off the brake beam onto the 'T' rail of the track, and one of the car wheels of the first car passing over his foot, a confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline? . . . In the case at bar there was beyond question a crushed right leg about 4 inches above the ankle. The injury beyond question was caused by one of defendant's cars passing over plaintiff's leg. Whether the injury was caused by plaintiff's or defendant's negligence was the pivotal question in the case. It is impossible to imagine anything that Castle, the injured person, could say to the physician in reference to the cause of the injury that would in any way throw any light upon the manner of treating the same. How

the leg came to be crushed was for the purpose of treatment absolutely immaterial. What plaintiff told the witness was of no assistance whatever to enable him to discharge the functions of his office. The statute is in derogation of the common law, and often excludes the best evidence. It should not, therefore, be extended to matters of evidence not coming clearly within its provision, as the object and purpose of all trials is the development of the true facts in each case. We find no cases which, under similar circumstances, have held testimony such as was offered in the present case inadmissible."

In the Roper Case, 147 N. C. 62, 125 Am. St. Rep. 535, 60 S. E. 717, 15 Ann. Cas. 580, the North Carolina court passed upon a statute identical with our own except that to it is attached a proviso permitting the presiding judge to compel a disclosure, if, in his opinion, it was necessary to the administration of justice. In that case, the trial court declined to exercise the discretion conferred by the statute and admit the answer as a matter of right in the defendant, and the supreme court held that, in view of such action, it developed upon them to pass upon the meaning and application of the paragraph reading, "which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." This makes that case directly in point as an authority on the case at bar, and it was held that information given by the patient to the physician, as to how he was hurt, was not privileged.

It has been suggested that the record discloses a mental condition of the plaintiff bordering on melancholia or some form of insanity, which might render it proper and necessary for the doctor to acquire information on the occasion of the third visit, as to the relations between her and the defendant. A careful search of the record, however, discloses nothing which we think justifies such suggestion. It is true that it appears that she wept and was in doubt as to her future course, and there is some testimony to show that her sister found her crying, and told the defendant that if he did not marry her, he would pay for it, and that she replied to her sister and to him that it was no use to do anything; that when she left his house she would leave in her coffin; that she did not want his money; that, "I don't need his money; 5 cents' worth of carbolic acid is all I need." The time of these occurrences and this statement is not definitely fixed, but it is clear, we

think, that they occurred after the third visit of the doctor. When this visit was made she was still in bed, but the conversation to which we have referred, and other acts disclosed in the record surrounding it, but which are of no importance in this connection, took place after she was up and around the house, and are given as having occurred in the kitchen. Hence, they do not relate to her mental condition at the time of the visit in question, even if they are of enough significance to warrant consideration.

Many of the authorities cited on this question are not in point when carefully read. Many relate only to conversations which left their bearing in doubt. We see no room for doubt as to the information sought to be shown in this case as disclosed by the record. We conclude that the statements in question are not shown to be necessary to enable the doctor to prescribe or act for the patient, and that she could have had no reasonable ground to believe them so, and that, hence, they were not privileged.

7. Error is assigned because the court charged the jury that it might take into consideration the pain and physical suffering occasioned by the birth of the child, in assessing damages, if found for the plaintiff. The authorities on physical suffering occasioned by childbirth, constituting a proper element of damages in an action for breach of promise aggravated by seduction, are not in harmony. Some hold that they are too remote from the cause of action, which, of course, is the breach of promise. Others hold to the contrary. It is true that there must be some line drawn, beyond which facts do not constitute an element of damages in such case. In no case can the plaintiff recover all the damages directly and incidentally occasioned by the wrongful act of the defendant. We are disposed, however, to agree with the statement of this doctrine given by Mr. Sutherland in § 985 of his work on Damages, wherein he says: "If seduction is on principle an element of damages in an action for breach of promise, and the disgrace or injury to reputation which follows it is such an element, it seems illogical to exclude any other direct result of the seduction from the consideration of the jury. Mental suffering may result from seduction without pregnancy following, but compensation for disgrace or injury to reputation must be based on the theory that seduction has resulted in pregnancy. Hence the physical suffering and the expense

connected with confinement, where pregnancy follows the seduction, are not more remote than injury to the reputation."

Authorities holding that, in such an action, the fact of the birth of a child may be shown, are not in point on this question, however. In conflict with the opinion of Mr. Sutherland, see Giese v. Schultz, 53 Wis. 462, 10 N. W. 598; Giese v. Schultz, 65 Wis. 487, 27 N. W. 353. We hold that it was not error for the court to charge that the jury might, in case it found for the plaintiff, take into consideration the physical pain incident to the birth of the child, in fixing the damages.

8. The instruction that the jury might take into consideration all the other facts and circumstances in the case, we believe to be too broad, but we cannot say that it was prejudicial to the defendant in the instant case.

9. Other errors occurred in excluding some of the evidence offered by defendant to show that, during the time the plaintiff claimed to have been engaged to marry him, she had received other men as company. It is self-evident that her relations to other men during such time, and the consent or objection of the defendant thereto, might have had an important bearing on the weight to be given the testimony of the plaintiff. If she was keeping company during the period when she claims to have been engaged to marry defendant, with other men, and particularly, if she was doing so with the knowledge of the defendant, and without objection on his part, it certainly would have a tendency to discredit her claims.

The same principle also applies to the sustaining of the objection of plaintiff to the question propounded to her, as to whether she told her sister anything about any talk of marriage, and to the ruling sustaining plaintiff's objection to questions tending to impeach or discredit her evidence relating to the time when the child was begot.

10. It is further the contention of the appellant that the evidence is insufficient to sustain the verdict. To discuss this question fully would require the setting forth of a large volume of the testimony relating to the alleged acts of familiarity and intercourse between the parties, and their relations, and would unduly extend this opinion. We content ourselves with saying that, while the evidence is weak, and not convincing, when taken in connection with all the surrounding facts and circumstances shown, we think it was sufficient to warrant sub-

mitting the issues to the jury. There was evidence tending to show an implied agreement to marry.

11. We have now passed upon all the questions which we think material and likely to arise on a second trial, but may observe that it is claimed that, if the testimony of the doctor was privileged, the plaintiff waived such privilege. It is unnecessary to pass upon this in view of our conclusion that his testimony was not privileged. The order denying a new trial and the judgment of the District Court are reversed.

BURKE, J. (dissenting). The majority opinion, roughly interpreted, holds that there must be a new trial for four reasons:

First, because, while arguing with counsel, the trial court asked whether the doctor could act both as a physician and a detective.

Second, because said doctor was not allowed to testify to that part of the conversation had with plaintiff, which the court says was not necessary for her treatment.

Third, for rulings in the exclusion of testimony, for instance, that the defendant had received other men as company during the time she claims the engagement existed.

Fourth, because there appear minor defects in the rulings of the trial court which, though not error, show upon the whole that the defendant did not have a fair trial. The other paragraphs, namely, numbers four, five, eight, nine, and eleven, do not lead to a reversal.

I respectfully dissent, and will briefly state my reasons for thinking each of the above reasons for reversal unsound.

(1) It is stated in the first paragraph of the syllabus that it was error of the trial court to ask the attorney for defendant if the doctor must not have called either as a physician or a detective. The majority opinion carefully states that this remark would not be reversible error in all cases, but that in this case the issues are very close and therefore the remarks were prejudicial.

Upon general principles, I believe it unwise to distinguish between the different cases. If the error is not pronounced enough to be reversible in all cases, the opinion should be affirmed so far as that assignment is concerned. I do not wish to be understood as sanctioning those remarks, but we should remember that the defendant could

have guarded against the entire incident by asking that the jury be excluded during the argument of this question of law. The plaintiff did nothing whatever to provoke the remark of the trial court; it was defendant's attorney who was arguing with the judge. Why should the plaintiff be penalized so heavily for something which she did not provoke, and which she could not prevent? No two trial courts conduct a case in exactly the same manner, and there is no set standard by which it can be said that one method is better than the others. Many trial judges, including the writer when upon the district bench, believe it better to have the juries listen to the law arguments as they thereby become acquainted with the reasons for the exclusion of offered testimony. Again, principles of law can be readily absorbed by juries, and this tends to a more enlightened citizenship as a whole, the jurors being usually men of influence, disseminating the knowledge thus gained amongst their neighbors. The average juryman is not as easily influenced as some appellate courts seem to think, and the writer for one, after presiding at something over a thousand jury trials, has reached the conclusion that they can safely be intrusted with all the sound legal information that the lawyers and the judge can give them. In the case at bar, the remark was no stronger coming from the lips of the judge, than from the lips of the plaintiff's attorney, and the same thought had doubtlessly suggested itself to each member of the jury before the trial court mentioned it. The facts were such that the truth must be apparent to everyone. The plaintiff was a hired girl, a stranger in the place, and absolutely unknown to the physician until he was called upon to treat her professionally. He had no interest in her excepting as a patient, and if there is any other capacity in which he acted excepting as a physician or a detective, the majority of this court has neglected to mention it. Neither do I believe that a trial court should imitate an oyster. On the contrary, I think the discretion of trial judges should be enlarged. They are men of integrity, learning, and judgment, and can be relied upon to do nothing intentionally wrong. The habit of reversing them because members of the appellate courts think they could conduct the trials in a better manner is one of the greatest evils of our jurisprudence. A reversal in any case is a serious matter, as it means a delay

of justice, expense to the litigants, expense to the taxpayers generally, and congestion of business in the lower courts.

It is my firm conviction that the jury was not influenced one iota by the fact that the said remark was made by the trial judge instead of by the plaintiff's attorney. The trial court promptly charged the jury to disregard his remarks when so requested.

I will not dwell further upon this phase of the opinion, as I consider the next paragraph much more important.

(2) It is stated in paragraph six of the opinion that the conversation between the doctor and plaintiff relative to the subjects of the time of the promise of marriage,—whether there had been a promise of marriage,—and relative to the time of the alleged acts of sexual intercourse with McWilliams, were "not privileged, as it is clear that the questions did not call for information necessary to enable the physician to prescribe or act for her." This I consider a most vicious holding, not only upon the merits of this case, but upon the subject of privileged communication generally. In effect, the majority opinion divides the doctor's conversation into two parts. That which they concede was necessary for him to prescribe for her, and that portion which they contend unnecessary, and they hold that it was error to exclude the latter part of the conversation. In other words, they put the burden upon this sick woman, while undergoing the agonies of childbirth, to determine at her peril whether the questions asked her by her physician were necessary for her treatment. Thus, when the physician said to her, "Q. Did McWilliams ever promise to marry you?" then plaintiff must revolve in her own mind the question of her legal rights. She must first say to herself, "Is this question necessary for my treatment, or is the doctor just carrying on a social conversation with me, or is he trying to get information to help McWilliams in case of a trial?" Having reached the conclusion that the question was not necessary for her treatment, she must say to the doctor: "Now, Doctor, after due deliberation, I have decided that your question is not necessary for you to prescribe for my present illness, and therefore I decline to answer you, but, Doctor, if you will ask me questions necessary to aid you in treating me, I will give you all the information you desire."

This ridiculous situation is a complete answer to the majority opin-

ion, and I could well leave the subject here, were it not that the majority opinion has quoted, from Wigmore on Evidence and three decisions from the Federal, New York, and Michigan courts, certain language which, though since repudiated, and in one instance taken from a criminal case, is liable to mislead the casual reader of this opinion. To understand the subject if privileged communications, it is necessary to look into the history of this legislation somewhat. At page 2381, vol. 40, Cyc. it is said: "At common law there was no privilege as to communications between physician and patient, and this rule still prevails where not changed by statute." The first Code enactment was in New York at the time of the adoption of the Field Code, about sixty years ago. The statute in this state was, of course, adopted considerably later. The majority opinion, following Mr. Wigmore, states that the statute was enacted to prevent physicians from disclosing to the curious the ailments of their patients, particularly one afflicted with reproachful and unpopular diseases. This, I consider the fundamental error of the opinion. While the statute was doubtlessly intended to cover the evil mentioned, yet, it also intended to prevent other evils which had grown up in the country. See Smart v. Kansas City, 208 Mo. 162, 14 L.R.A.(N.S.) 565, 123 Am. St. Rep. 415, 105 S. W. 709, 13 Ann. Cas. 932, and note. At the time of the enactment of most of the statutes, many railway companies, mining corporations, factories, and other large enterprises were establishing hospitals for the treatment of their employees. The physicians in charge of those hospitals were dependent for their positions upon the good will of the corporations, and it was urged that some at least of those physicians were taking advantage of their positions to obtain from the patients information which would tend to defeat a claim for damages. The legislatures of the various states probably felt that injured employees were unable to give a true account of the manner of their injury, and wholly unable to withstand any "third degree work," especially by a physician in whom they should have the utmost confidence. That the legislature intended to remedy this evil is apparent to everybody, excepting Mr. Wigmore and the few courts who have followed him. Upon the enactment of the first privileged communication statutes desperate assaults were made upon the law in attempts to secure the admission of such evidence upon the grounds that

the information obtained by the physician was not necessary for medical treatment. In the early days a few courts were deceived by this sophistry, and those cases are quoted in the majority opinion. However, it did not take long to demonstrate the injustice of this holding, and in recent years there has been a decided tendency towards a liberal construction of the statutes to protect the patient against any traps set for him by the physician. Among the later decisions will be found a case from New York, one from Michigan, and others from the Federal courts, which in effect overrule the earlier cases relied upon by the majority of this court. I have taken the trouble to read all of the cases cited by the majority of this court as well as many others, which for some reason they seem to have overlooked, and I have discovered that, with three possible exceptions, none of the cases cited in the majority opinion support the same, while on the contrary the cases as a whole are simply massed against it. I will quote briefly from some of those cases.

Re Gruendl, 102 Wis. 45, 78 N. W. 169, says: "The purpose of the statute . . . is to facilitate and make safe, full and confidential disclosure by patient to physician of all facts, circumstances, and symptoms, untrammeled by apprehension of their subsequent enforced disclosure and publication on the witness stand, to the end that the physician may form a correct opinion, and be enabled safely and efficaciously to treat his patient."

In McRae v. Erickson, 1 Cal. App. 326, at page 332, 82 Pac. 209, it says: "The intention of the statute is to exclude all statements made by a patient to his physician while attending him in that capacity for the purpose of determining his condition; nor does this construction do violence to the language of the act liberally construed, which we think is to be understood as forbidding a physician to be examined 'as to any information acquired in attending the patient, the acquisition of which was necessary (or which it was necessary for him to acquire) in order to enable him to prescribe or act for the patient.' Of this necessity, from the nature of the case, the physician must commonly be regarded as the sole judge, for it would be obviously unreasonable to require of the patient the exercise of any judgment with reference to the propriety of the questions asked by his physician."

The California statute is almost identical with ours, and reads as

follows: "A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." Kerr's Code Civ. Proc. § 1881. When any person attempts to avoid the force of this holding by saying that the statute differs from ours, he has taken untenable grounds. In Battis v. Chicago, R. I. & P. R. Co. 124 Iowa, 623, 100 N. W. 543, it is said: "It may be true, possibly, that the knowledge acquired by the physician was not, in point of fact, and strictly speaking, necessary and proper to enable him to perform the functions of his office, but of this we are not in position to judge, nor are we called upon to determine what the fact might be when reduced to a last analysis. It was the condition of plaintiff that was the subject of the inquiry, and it was the professional judgment of the physician that was called for. The privilege cannot be subject to measurement by metes and bounds, and we may well assume that all that was told to the physician, and all that was developed by his examination or came under his observation, was necessary and proper for his understanding of the condition of his patient. The relation of physician and patient being established, if, by any fair intendment, communications made have relation to the physical or mental condition of the patient, we are bound to hold them privileged."

Briesenmeister v. Supreme Lodge, K. P. 81 Mich. 525, 45 N. W. 977, says: "This statute covers all information which Dr. Inglis acquired by observation while in attendance upon Mr. B. of his condition or ailments, which in any manner enabled him to prescribe for him, as well as to communications made to him by his patient. . . . All disclosures by the patient to his physician respecting his ailments are privileged, whether they are necessary to enable the doctor to prescribe for him as a physician or not."

Obermeyer v. F. H. Logeman Chair Mfg. Co. 120 Mo. App. 59, 96 S. W. 673, is a case where the physician's testimony shows that he had a double purpose. That court says: "The fact that Dr. A. examined respondent at the instance and request of appellant, for the purpose of treating him, did not remove his incompetency. . . . The doctor's testimony shows that he had a double purpose in holding the interview with respondent: First, to ascertain his condition

for the purpose of treating him professionally; second, to ply the boy with questions while he was suffering from shock and severe pain as a result of the recent injury, for the purpose of getting some statement or admission from him that would be advantageous to his (Amyx's) employer, the appellant, in case the boy should sue to recover compensation for his injury. In these circumstances we are not inclined to split the interview into parts and determine what parts were and were not necessary, to enable the doctor to prescribe for the respondent, but to hold him incompetent to testify to any part of the interview."

In Pennsylvania Co. v. Marion, 123 Ind. 415, 7 L.R.A. 687, 18 Am. St. Rep. 330, 23 N. E. 973, 3 Am. Neg. Cas. 261, the court says: "The physician had no business to interrogate his patient for any purpose or object other than to ascertain the nature and extent of the injury, and to gain such other information as was necessary to enable him to properly treat the injury and accomplish the object for which he was called professionally; and such communications are privileged, and he cannot disclose them. If the physician took advantage of the fact of being called professionally, and while there in that capacity made inquiries of the injured party concerning matters in which he had no interest or concern professionally, or for the purpose of qualifying himself as a witness, he cannot be permitted to disclose the information received. The patient puts himself in the hands of his physician; he is not supposed to know what questions it is necessary to answer to put the physician in possession of such information as will enable the physician to properly treat his disease or injury, and it will be conclusively presumed that the physician will only interrogate his patient on such occasions as to such matters and facts as will enable him to properly and intelligently discharge his professional duty, and the patient may answer all questions propounded which in any way relate to the subject or to his former condition, with the assurance that such answers and communications are confidential, and cannot be disclosed without his consent."

The Indiana statute is worded somewhat differently, but has the same general object as our own, and in this connection I assert that, while all of those privileged communication statutes are worded slightly different, they were intended to cover the same evils, and a case under one is exactly in point under another, and it is idle to attempt to

distinguish cases from the different states upon the ground that the statutes are worded slightly differently.

In Doran v. Cedar Rapids & M. C. R. Co. 117 Iowa, 442, 90 N. W. 815, upon similar facts, the court says: "We are not referred to any authorities which make this distinction. It seems to us that whenever an injured party consults a physician, as physician and discloses to him his physical condition, and thus enables him to obtain information which as an ordinary person he would not have obtained, such physician is prohibited from testifying with reference to the knowledge thus obtained."

See also, to the same effect, the following additional cases: Kling v. Kansas City, 27 Mo. App. 231; Edington v. Mutual L. Ins. Co. 67 N. Y. 185; Feeney v. Long Island R. Co. 116 N. Y. 375, 5 L.R.A. 544, 22 N. E. 402; Re Hunt, 122 Wis. 460, 100 N. W. 874; McRae v. Erickson, 1 Cal. App. 326, 82 Pac. 209; State v. Kennedy, 177 Mo. 98, 75 S. W. 979; Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 281, 36 Am. Rep. 617; Dambmann v. Metropolitan Street R. Co. 55 Misc. 60, 106 N. Y. Supp. 221; Jones v. Brooklyn B. & W. E. R. Co. 21 N. Y. S. R. 169, 3 N. Y. Supp. 253; Sloan v. New York C. R. Co. 45 N. Y. 125; Re Redfield, 116 Cal. 637, 48 Pac. 794; Griffiths v. Metropolitan Street R. Co. 171 N. Y. 106, 63 N. E. 808, 11 Am. Neg. Rep. 620; Green v. Nebagamain, 113 Wis. 508, 89 N. W. 520; Colorado Fuel & Iron Co. v. Cummings, 8 Colo. App. 541, 46 Pac. 875; Pennsylvania Co. v. Marion, supra; Thomas v. Byron Twp. 168 Mich. 593, 38 L.R.A.(N.S.) 1186, 134 N. W. 1021, Ann. Cas. 1913C, 686; Union P. R. Co. v. Thomas, 81 C. C. A. 491, 152 Fed. 365; and note at page 945, vol. 13, Ann. Cas.; Munz v. Salt Lake City R. Co. 25 Utah, 220, 70 Pac. 852, 13 Am. Neg. Rep. 214; Patterson v. Cole, 67 Kan. 441, 73 Pac. 54, 14 Am. Neg. Rep. 543; Madsen v. Utah Light & R. Co. 36 Utah, 528, 105 Pac. 799; Burgess v. Sims Drug Co. 114 Iowa, 275, 54 L.R.A. 364, 89 Am. St. Rep. 359, 86 N. W. 307, 10 Am. Neg. Rep. 42; Re Bruendl, 102 Wis. 47, 78 N. W. 169; 10 Enc. Ev. 1064; 23 Am. & Eng. Enc. Law, 86, 87; Potter's Dwarr. Stat. 202.

Space forbids detailed analysis of more of the above cases, but, upon their authority, I assert that, with three possible exceptions, and one of these a criminal case, the cases cited by the majority opinion do not sustain the doctrine announced therein, while the cases as stated above

are simply massed against it. Applying the law to the case at bar, we find that plaintiff has testified positively that the doctor was acting as her physician.

In this connection it is interesting to note that defendant made four offers of proof. He offered to prove that the conversation had with the plaintiff, upon which the majority opinion bases reversal, was first had with the plaintiff upon the occasion of his second visit. Upon this occasion the doctor testifies: "This second trip I have just been asked about was made in my professional capacity. To see her as a physician. Any talk I had with her was while I was there in attendance and inquiring about her health and her condition and that of the child. I was talking with her in reference to her condition, when I asked any questions which I did, or gained the information that I did."

The *identical offer* was made regarding the third conversation, upon which the doctor has testified that he did not make the third visit as a physician, but, having later changed his mind, he testifies:

Q. Doctor, this talk that you had on that occasion you had with the patient, the plaintiff in this case, with reference to assisting you or enabling you to prescribe and to act for her, did you not?

A. Yes, sir.

Again he testified:

Q. Now, it is a fact, is it not, that any information which you received at that time was acquired while you were attending the patient and asking questions concerning her health, which would be necessary for you to prescribe or act for her in her physical condition; that is true is it not?

Q. By the court. If you found she needed it?

A. Yes.

It thus appears that the doctor has testified positively that he was her physician, and had questioned her along the lines indicated to enable him to prescribe for her. The doctor considered the information necessary for her treatment. The trial court has held that the conversation was necessary and privileged, and his holding should not be reversed excepting for an abuse of discretion. The patient was a hired girl, poor and friendless, a stranger in the country and absolutely unknown

to the doctor. Any conversation that he held with her must have been either in his professional capacity, as a private detective of McWilliams, or strictly social. We can dismiss the last without comment; the doctor had no social interest in the girl. Let us say that his high sense of honor prevented him from interviewing the girl in the interest of McWilliams; then why did he ask her about her relations with McWilliams? The majority opinion says that the information was not necessary. My learned brothers should have said that *they saw no necessity* for it. An examination of the evidence quickly discloses why the doctor considered this information necessary. It is so well known that the courts can almost take judicial notice of the fact that the mothers of illegitimate children sometimes attempt to injure the child, and sometimes attempt to kill the father, and sometimes attempt suicide. Any physician who does not know those simple facts and make inquiry of the patient along this line is neglecting a serious duty. That there was such a necessity in this case will be seen by reading the following testimony quoted from the record: The plaintiff states: "McWilliams did state to me after the baby was born, that he did not know whose baby it was. This was four days after the baby was born. George came to the room about ten minutes after the baby was born. The doctor was in there. He heard the baby cry and says: 'My God, my God!' and went out again. The first conversation I had with him after the baby was born, I said, 'George, can I talk with you? and he said, 'Yes.' I said, 'George, what is to become of me?' He said, 'Well, you have dragged all this upon yourself; you can stay here until you get well and then I don't care where you go,' and I said, 'What shall I do with the baby?' and he said, 'You can put the baby in a convent.'" Plaintiff's sister, who was a witness upon the trial, testified to a conversation between plaintiff and defendant had a few days after the baby was born, wherein the plaintiff "was crying so hard that I had to go out there; and when I came in she says, 'Selma, I am all alone in the world with my disgrace, what shall I do?' I says, 'Anna, you are not alone in your disgrace. George McWilliams is the father of your child, in the rocking chair in the sitting room, and he has got to marry you.'" Whereupon the witness turned to McWilliams and said: "'If you do not marry her, you will pay for this. If there is a law in the state of North Dakota we will go for it, and we will see what we can do,' and

then my sister cried so hard, and she says: 'Oh! don't fight with him. All I want is 5 cents' worth of carbolic acid, and that is all I want because I will never leave this house with the baby in my arms; *when I leave this house I leave in my coffin.*'" These extracts from the testimony are given to show that the doctor well knew the necessity for accertaining the mental condition of the plaintiff to determine whether or not there was danger of suicide, injury to the child, or injury to McWilliams. In making those inquiries to properly care for his patient, he naturally learned the facts regarding the date of intercourse and the dispute regarding marriage with McWilliams, and he should not be allowed now to disclose that information without her consent. My conclusion is that the testimony of the doctor should have been excluded.

(3) In paragraph ten of the syllabus it is said, "Certain evidence examined and held erroneous." In the body of the opinion it is explained that the errors consisted in exclusion of testimony, for example, that plaintiff received calls from other men during the time of the alleged engagement to McWilliams.

Taking up the alleged exclusion of the evidence as to visits of other men. I quote from the record to show that every scrap of this kind of evidence was admitted without objection, unless some plain violation of the rules of evidence appeared.

The specification of error upon which the majority opinion pass is as follows: "The court erred in sustaining plaintiff's objections to the following questions propounded to plaintiff on cross-examination, to wit:

"Q. Later than that there was another man out there one night to call on you, was there not?

"Q. In the month of September did you have a man call on you at the McWilliams's place when you were there alone?

"Q. You sent for him to come up to your place, to the McWilliams's place?

"Q. Did you send for Elmer Hanson to come up after the baby was born?"

Those are four questions asked of the plaintiff herself upon cross-examination, excluded by the trial court, and held by the majority to be error. The majority opinion states a lot of elementary law relative to the right of the defendant to show plaintiff's relations with other

men at the time she claims to have been engaged to him. The opinion was evidently written without a close examination of the record. It appears from a careful examination that the four questions above mentioned were shut out upon perfectly proper grounds, and that the plaintiff was cross-examined upon this very subject until counsel got tired and quit. To show that this is the case, I set out herein a part of her testimony containing the rulings of which complaint is made.

The plaintiff was asked upon cross-examination:

Q. Now you say that when you went to those various places you asked George whether you could go or not? . . .

A. I stated that on some occasions I asked George if I could go. I asked him to get his permission to go. He told me that I could go. He says it is all right if I went. He says he don't care to go out any place anyway, and if I get a chance to go out with somebody he said it is all right, because he was too old to go to dances and entertainments.

Q. And he told you that it was all right for you to have young men taking you around?

A. Yes, he didn't object, he said it was all right. He told me it was all right and wanted me to go. On the occasion I went with Hanson to the dance, I left McWilliams's place about 8 o'clock in the evening and did not get back until about breakfast time. My sister and I went to a bowery dance. My sister said it was Swanson's grove. George did not go along. George was at the Bryan meeting and at the Billy Bennett show when I went to those place with Hanson. Between the 1st of April and the 1st of July, I was in Hanson's company four times. I was out with him four times. He was there one Sunday to visit. That is all I can remember.

Q. In the first week you were at McWilliams's place he called on you, didn't he?

A. Yes.

Q. That wasn't Sunday?

A. No, it was the middle of the week. Not the first time. The first time he called on me was in the afternoon of the second week. I used to talk with him over the phone. He used to call me up and talk to me.

And again she testifies: "I have testified in regard to a man named

Elmer Hanson. He came to McWilliams's place a few days after I got there. It was not the first week. It must have been the second week. He remained there about an hour." And so on for many pages of the printed record. She further testified that Hanson was her sister's intended husband.

After all of this testimony, she was asked the following question:

Q. Later than that there was another man out there to call on you, was there not?

A. I can't remember.

Mr. Cuthbert: That is objected to as too indefinite and not proper cross-examination unless for an impeaching question, and then it is too indefinite as to time and as to place and description. (Sustained by the court and exception granted defendant.)

The Court: The main question in this case is, Was there a promise of marriage? There may have been a thousand men out to see her, but the main question is, Was there a promise of marriage?

Mr. Sinkler: I will make an offer of proof.

The Court: There is no use making an offer of proof; the best way is to ask legitimate questions, but I will allow you to make any offer of proof you wish. Have you it in writing?

A. I have.

The Court: Submit it to me.

Mr. Sinkler: I have not on that particular point.

Q. In the month of September did you have a man call on you at the McWilliams's place while you were there alone?

Mr. Cuthbert: Objected to as improper cross-examination, not a proper impeaching question, and immaterial. (Sustained and exception granted.)

A. In the month of April I did not have a man call on me outside of Elmer Hanson at night. There was never anyone else but Elmer Hanson. I had a conversation with Elmer Hanson after the baby was born.

Q. You sent for him to come up to your place, to the McWilliams's place?

Mr. Cuthbert: Objected to as not proper cross-examination, not a proper impeaching question, and as immaterial. (Sustained and exception granted.)

A. I had a talk with Elmer Hanson over the phone a few days after the baby was born. In the conversation over the 'phone I did not say

to Elmer Hanson, "Come up and see the baby, it looks like George. God knows you ain't the father, and we don't blame you for it." I did not say that in substance.

Q. Did you send for Elmer Hanson to come up after the baby was born?

Mr. Cuthbert: Objected to as immaterial, not proper cross-examination, and not proper impeaching question. (Sustained and exception granted.)

How, in the face of the record, the opinion can assert that "error occurred in excluding the evidence offered by defendant to show that, during the time the plaintiff claimed to have been engaged to marry him, she had received other men as company," is absolutely beyond my powers of comprehension. As stated above, the plaintiff was cross-examined upon this subject without let or hindrance, and without objection, unless the questions themselves contained some specific objection. Thus, to the first question, namely: "In the month of September, did you have a man call on you at the McWilliams's place while you were there alone?" the objection was properly sustained if for no other reason than the lack of a definite date. To the question: "Later than that there was another man out there one night to call on you, was there not?" the objection was interposed that it was too indefinite as to time and as to place and description. This objection was sustained and very properly so. The question was not confined to any period of time, and certainly not to the time during which it was alleged that the engagement existed. And to the question: "You sent for him to come up to your place, to the McWilliams's place?" the objection was interposed and sustained for the very good reason that no time was specified as the date of such visit. And the last question, to wit, "Did you send for Elmer Hanson to come up after the baby was born?" for the first time is definite as to time, and shows that the visit occurred after McWilliams had repudiated the alleged contract of marriage. Certainly the fact that she sent for a friend after her repudiation by McWilliams in no manner tended to show conduct inconsistent with her claim that an engagement had existed nine months before that time. It thus appears beyond question that no evidence sought to be elicited by proper questions was excluded relative to her conduct with other men.

(4) In the second paragraph of the syllabus it is stated that many minor errors disclosed in the record, all unfavorable to the defendant, considered in connection with the whole record, indicated that he did not have a fair trial. In the body of the opinion, it is said: "We do not say that any one of these minor errors was sufficient to justify a reversal, but we do think they go a long way towards showing that defendant did not have a fair trial." These quotations are all that appear in the opinion, and we are left in the dark as to the number and identity of those "minor errors." It is, however, not unfair to assume that they are less serious than the one treated by me in the last paragraph, and I decline to concur in a reversal based upon a cat in the bag proposition.

In conclusion, and in a general way, I consider a reversal in any case a misfortune. It delays justice, and makes costs to the litigants and the community. In the case at bar the injustice is especially marked. Plaintiff is a hired girl who earns $6 per week. Defendant admits he is worth over $70,000. This action was begun four years ago this month, and has been very expensive litigation. To order a new trial may practically deny plaintiff any legal redress whatever.

Goss, J. I concur in the foregoing dissent.

THE STATE OF NORTH DAKOTA EX REL. G. A. EBBERT v. CHARLES E. FOUTS, as County Auditor, of McHenry County, North Dakota.

(— L.R.A.(N.S.) —, 145 N. W. 97.)

Tax deed — void — grantee entitled to valid deed — application for — proceedings — regularity.

When the grantee in a tax deed receives a void instrument, he is entitled, upon proper application, to the issuance to him of a valid tax deed, providing the proceedings leading up to the same are in all things valid.

Opinion filed January 16, 1914.

Appeal from the District Court of McHenry County, *Burr*, J. Affirmed.

Christianson & Weber, for respondent.

The tax deed issued in this case not only incorrectly states the proceedings had at the tax sale, but such untrue and incorrect recitals render the deed void. Youker v. Hobart, 17 N. D. 296, 115 N. W. 839.

One who, in good faith, attends a tax sale and becomes a purchaser, is entitled to a valid and proper deed, and mandamus will lie to compel the proper officers to issue to him a proper and valid deed, containing truthful recitals of the proceedings had. Cooley, Taxn. 3d ed. p. 1370.

An officer who has made and issued an irregular or imperfect deed on a tax sale may, where the law has been substantially complied with, issue another or second and perfect deed on the same sale, upon application. 37 Cyc. 1429; State ex rel. White v. Winn, 19 Wis. 305, 88 Am. Dec. 689; Duggan v. McCullough, 27 Colo. 43, 59 Pac. 743; Woodman v. Clapp, 21 Wis. 360; Gould v. Thompson, 45 Iowa, 450; McCready v. Sexton, 29 Iowa, 356, 4 Am. Rep. 214.

The officer has not performed the functions of his office, nor done his *duty*, in such cases, *until he has executed and delivered a deed which truthfully states the proceedings had.* Gibson v. Pekarek, 25 S. D. 281, 126 N. W. 597, Ann. Cas. 1912B, 944; Maxcy v. Clabaugh, 6 Ill. 26; State ex rel. White v. Winn, 19 Wis. 305, 88 Am. Dec. 689; Eaton v. North, 32 Wis. 303; McCready v. Sexton, 29 Iowa, 356, 4 Am. Rep. 214; Duggan v. McCullough, 27 Colo. 43, 59 Pac. 743.

J. H. Ulsrud, for appellant.

The production of the tax certificate issued upon sale is a condition precedent to the right of the county auditor to issue tax deed. Reed v. Merriam, 15 Neb. 323, 18 N. W. 137; Thompson v. Merriam, 15 Neb. 498, 20 N. W. 24; Cooley, Taxn. 3d ed. p. 1370.

The tax deed issued in this case is regular and valid. 37 Cyc. 1429.

BURKE, J. Under § 1261 of the Code of 1899, it was a duty of the auditor in conducting tax sales, to sell the land to the bidder who would pay "the total amount of taxes, penalties, and costs charged against it, including any personal tax specified in the list and in the advertisement, which are a lien upon it for the smallest or least quantity thereof which

may be designated by any sufficient description." Tax deeds issued under this provision uniformly contained a recital that this procedure had been followed. In fact, the form to be used was set forth in full in § 1275, Code 1899, and contained the above recital. In 1901 the legislature changed the law, and provided that the sale should be made to the person who would pay the amount due for taxes, etc., for "the lowest rate of interest from the date of sale on the amount of such taxes, penalties, and costs so paid by him, which said rate shall in no case exceed 24 per cent per annum." See chapter 154, Sess. Laws 1901. Through an oversight, however, no amendment was made until 1913, of the form of tax deed which had been prescribed to meet the requirements of a sale under the earlier law.

In 1907, taxes were duly and regularly levied upon a lot in McHenry county, and in December, 1908, the said real estate was sold according to law for said taxes, and a certificate of sale issued, which certificate was later assigned to plaintiff. The premises were never redeemed from the tax sale, and after the legal notice had been given, plaintiff applied to the county auditor for a tax deed, at the same time surrendering his tax certificate. The county auditor issued such a deed in March, 1913, but said instrument, being as prescribed under the old law, contained the recital that the purchaser had accepted the smallest part of said real estate that was worth the amount of the taxes, whereas in fact he had obtained the land because he had bid the lowest rate of interest. About the time of the issuance of this deed, chapter 281, Sess. Laws 1913, went into effect, and under this provision the county auditor was directed to issue all tax deeds reciting the facts as prescribed by law, to wit: That the bidder had agreed to accept the lowest rate of interest on the amount of the taxes, etc.

In the meantime the question of the validity of a tax deed containing an erroneous recital of the manner of the sale had reached this court, and a similar tax deed had been held void. See Youker v. Hobart, 17 N. D. 296, 115 N. W. 839.

Plaintiff's position was this: He had purchased the premises according to law by agreeing to pay the lowest rate of interest of any of the bids received, and had done everything in his power to earn a tax deed. He had surrendered his certificate to the auditor, and was entitled to a good and valid tax deed. The deed which he had received

was utterly void under a decision of this court, because it recited that the sale had been conducted in an unauthorized manner.

Under those circumstances, he applied to the county auditor for a second deed, conforming to the requirements of chapter 281, Sess. Laws 1913, and correctly reciting the conduct of the sale. Upon the refusal of the auditor to issue such second tax deed, this writ of mandamus was obtained.

(1) The facts having been stipulated, there is no dispute excepting upon the question of law. The first question is whether or not the auditor had any authority to issue the second deed. Upon the part of the plaintiff, it is contended that the first deed is a nullity and that the duties of the auditor are the same as though he had issued no deed whatever, while the defendant contends that, having once issued a deed, he has no further authority in the premises. In his brief, he had argued that, as the law requires the purchaser to produce his certificate at the time of the issuance of the tax deed, and that the purchaser in this case is unable to produce such certificate at this time, such deed cannot issue. We cannot agree with this contention. When plaintiff applied for the tax deed originally, he deposited with the auditor the certificate, and it has remained on file in his office ever since. Until a valid tax deed has been issued this certificate is not canceled. Thus, the plaintiff is able to produce it at the time of the second application. Defendant's contention that the production of the certificate is a condition precedent to the authority to issue the deed thus loses its force. It is beyond question that the first tax deed was absolutely void, which differentiates this case from those cases where there was merely some slight irregularity, such as Reed v. Merriam, 15 Neb. 323, 18 N. W. 137. As to the true rule, see State ex rel. White v. Winn, 19 Wis. 305, 88 Am. Dec. 689; Lain v. Shepardson, 23 Wis. 224; McCready v. Sexton, 29 Iowa, 356, 4 Am. Rep. 214; Dyke v. Whyte, 17 Colo. 296, 29 Pac. 128; 37 Cyc. 1435; Mack v. Price, 35 Kan. 134, 10 Pac. 521. In State ex rel. White v. Winn, 19 Wis. 305, 88 Am. Dec. 689, it is said: "The owner of a valid certificate of a sale of lands for taxes, to whom a deed fatally defective in form has been issued, and who has never been in actual possession of the land, may compel the clerk of the county board of supervisors, by mandamus, to execute to him a proper deed." We think

it was the duty of the county auditor upon a proper showing to issue the deed in this case.

The order of the trial court is in all things affirmed.

MERCHANTS STATE BANK OF VELVA, a Corporation, v. PHILLIP KERSHTIEN.

(144 N. W. 1080.)

Chattel mortgage — foreclosure — payment — appeal — trial de novo — judgment.

In an action to foreclose certain chattel mortgages executed and delivered by defendant to plaintiff, the defense was that of payment by the sale and transfer of a quarter section of land at an agreed consideration. A counterclaim was also alleged for a balance claimed to be due the defendant from the plaintiff on such purchase price after satisfying such mortgage indebtedness. Plaintiff bank denied such sale and transfer.

On a trial *de novo* in this court the evidence is examined, and it is *held* that the issues were correctly decided by the lower court in defendant's favor, with the exception that the amount allowed defendant under his counterclaim was excessive. In this respect the judgment is modified to conform to the evidence, and as thus modified, the same is affirmed.

Opinion filed December 29, 1913.

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

Action to foreclose certain chattel mortgages. Defense payment and counterclaim. From a judgment in defendant's favor, plaintiff appeals.

Modified and affirmed.

Noble, Blood, & Adamson, for appellant.

George A. McGee, for respondent.

FISK, J. This is an action by the plaintiff bank to foreclose two chattel mortgages executed and delivered by defendant to such bank on October 10, 1905, to secure the payment of two promissory notes at that time executed and delivered by defendant to plaintiff, one for the sum of $215 and the other for the sum of $730, both payable on October 10, 1906, and bearing interest at the rate of 12 per cent per annum from date. The complaint is in the usual form. The answer

admits the execution and delivery of the notes and mortgages as alleged, and alleges, by way of defense, that the same have been fully paid and satisfied. Such answer also pleads facts to the effect that in the month of October, 1906, defendant sold to the plaintiff certain described real property consisting of 160 acres, at the agreed price of $3,000 less encumbrances thereon, aggregating $1,489.55, and that plaintiff retained from the purchase price thereof a sufficient sum to pay and satisfy said notes and mortgages. Such answer thereafter sets forth a counterclaim alleging the sale of such land by the defendant to the plaintiff, and that there is a balance still due the defendant from the plaintiff on such agreed purchase price, of the sum of $565.45, for which he prays for an affirmative judgment. Plaintiff served a reply, putting in issue the facts alleged in the counterclaim.

The issues thus framed by the pleadings were tried by the district court without a jury, and at the conclusion of the trial findings of fact and conclusions of law favorable to the defendant were made and filed, and judgment entered in defendant's favor for the sum of $442.86, with interest and costs, from which judgment this appeal is prosecuted. The case is here for trial *de novo.*

During all the transactions had by defendant with plaintiff bank, one G. N. Livdahl represented the bank as its cashier or managing officer, and the record discloses that certain negotiations were had between Livdahl and the defendant in the fall of 1906, looking to a trade whereby defendant was to enter into a contract for the purchase of 400 acres of land, and as a part payment of the purchase price he was to transfer title to a quarter section described in exhibit "6," at the agreed price of $3,000, the value of his equity over and above the encumbrances thereon, which was then thought to be about $1,500, to be thus applied on such purchase price. Pursuant thereto, exhibit "6," which is a warranty deed, was executed and delivered by defendant and wife to Livdahl, but the contract for the sale and purchase of the 400-acre tract was never executed owing to a dispute or misunderstanding as to the consideration to be paid, Livdahl claiming and testifying that the price was to be $20 per acre, while defendant testified that the agreed price was $15 per acre. Defendant also testified that in such negotiations Livdahl represented to him that he was acting for the bank, and that he so understood and believed, while Livdahl positively denies this,

and testified that the 400-acre tract was his individual property and that the bank had no interest therein whatsoever. Defendant also testified that after the deal as to the 400-acre tract fell through, he entered into an agreement with the bank, acting through Livdahl, to the effect that the agreed value of his equity in the quarter deeded by himself and wife by exhibit "6" should be applied by the bank to the indebtedness due from him on the notes and chattel mortgages described in the complaint, and that the balance should be paid to him.

The principal ground of controversy is over the issue of fact as to whether in these transactions, and especially the last one, wherein the defendant contends that he was to be credited by the plaintiff bank for the value of his equity in the land deeded by himself and wife, on his indebtedness represented by these notes, and the surplus paid to him, Livdahl acted for and as the manager of the bank, or merely, as he contends, in his individual capacity. Upon this issue the testimony of Livdahl and of defendant is in direct conflict. The record leaves the question in some doubt, but the trial court had the opportunity which we do not possess, of hearing the witnesses testify, and after a careful consideration of the evidence printed in the abstract, we feel reasonably well satisfied that in the main the findings are correct, and should not be disturbed. The testimony of the defendant is positive, unequivocal, and consistent throughout, and it impresses us as being truthful; while that of Livdahl is somewhat inconsistent, vacillating, and fails to impress us favorably. The defendant's version of the transaction is quite reasonable and probable upon its face, while we cannot say as much for the testimony of the witness Livdahl. After the deal fell through as to the 400-acre tract of land, it impresses us as rather strange that Livdahl should retain defendant's deed to the quarter which he deeded, without offering to pay the value of defendant's interest in such land, but it is quite natural and reasonable that he should make the deal in behalf of the bank, as testified to by defendant, to apply the value thereof upon the notes in suit. Whether the original deal was or was not between defendant and Livdahl individually, instead of the bank, is not very material or controlling, for in either aspect of this question Livdahl, who, under the testimony, was the active and sole representative and manager of the bank, had the undoubted authority in its behalf to enter into the subsequent arrangement testified to by defendant.

Livdahl testified positively that at the time exhibit "6" was executed and delivered by the defendant and his wife, his name, as grantee, was inserted therein, and that the words "Gustave N. Livdahl, McHenry, North Dakota," which appear in typewriting, were inserted at the same time and in the same ink as the other typewritten portions were inserted at the date the deed was prepared; but we are clearly convinced that he was either mistaken or intentionally testified falsely, for it is manifestly apparent from an inspection of the original deed that such is not the fact, for the ink is of a different shade from the balance of the instrument. This witness, later in his testimony, sought to explain the difference in the shade of ink by testifying that he had a typewriter with a tricolor ribbon. However, whether the words above quoted were, as a matter of fact, inserted in the deed before its execution and delivery, is not of controlling importance. Defendant's version of the transaction is corroborated by the fact appearing in evidence that the bank, in 1907 or 1908, received certain rents from the tenant who farmed such quarter; and it also appears that Livdahl went with defendant to make the arrangement with such tenant to crop the land. This fact is inconsistent with Livdahl's contention that neither he nor the bank has, or claims to have, any interest in such quarter. There are other circumstances throughout the testimony tending to corroborate the contention of the defendant, but we deem it unnecessary to review the testimony at length in this opinion. Suffice it to say that, except in the particulars hereafter mentioned, the findings of the trial court not only have abundant support in the testimony, but we deem them in accord with the clear preponderance thereof.

We think the judgment should be modified with respect to the amount of defendant's recovery under his counterclaim. The trial court found that the encumbrances against such quarter aggregated the sum of but $1,500, thus leaving defendant's equity worth the sum of $1,500. But the proof, we think, fairly tends to show that such encumbrances aggregated about the sum of $1,660, and that consequently the value of defendant's equity was but $1,340, and, after deducting the indebtedness of $1,057.14 represented by such notes, the balance of $282.86 is the amount due defendant, with interest to be added from October 6, 1906, at the legal rate.

The trial court is directed to modify its judgment accordingly, and

as thus modified the same will be affirmed, but without costs to either party.

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

PLYMOUTH TOWNSHIP v. HERMAN KLUG.

(145 N. W. 130.)

Quarantine — township board — order for, given by telephone — not at regular meeting — regularity — order for necessaries by defendant — paid for by board — defendant liable — implied promise to pay.

Defendant was placed in quarantine by the township board upon orders given by the members of the board over the telephone, and not at a regularly called meeting. After the establishment of the quarantine, defendant requested the chairman of the board to have some groceries sent to his farm from a neighboring village. The groceries were so furnished, and the charges for transportation, amounting to $15, were paid by the township board, which later attempted to collect from the defendant. Defendant insists that the quarantine was irregular, because not established at a legal meeting of the board, and therefore the charge against him for drayage is illegal.

Held, that defendant is bound upon an implied promise to pay for the services, and moreover such quarantine was legally established by the board without a formal meeting.

Opinion filed January 20, 1914.

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

Affirmed.

Frank B. Feetham, for appellant.

The statutes provide a method by which boards of health can make and publish general rules relative to the establishment of quarantine, and thereafter, when so provided by such rules, the attending physician, town clerk, or any other official, can order quarantine without a meeting of the board. Rev. Codes 1905, §§ 269, 270; Young v. Blackhawk County, 66 Iowa, 460, 23 N. W. 923.

In this case no such rules or regulations were ever made by any board of health, and the requirements of the statutes have not been met. Rev. Codes 1905, §§ 282, 3116–3118, 3123, 3227.

These orders and rules of the board of health are in the nature of special laws, and must be pleaded and proved before the courts will take notice of them. State v. Butts, 3 S. D. 577, 19 L.R.A. 725, 54 N. W. 603.

Official powers must be exercised not only in the manner prescribed by law, and in the name of the public, but by an *official body or board* acting as such at a meeting authorized and duly called as by law provided. 2 Abbott, Mun. Corp. § 655, p. 1578; Forcum v. Montezuma Independent Dist. 99 Iowa, 435, 68 N. W. 803; Conger v. Latah County, 5 Idaho, 347, 48 Pac. 1064; Blue v. Briggs, 12 Ind. App. 105, 39 N. E. 886.

The determination of the members *individually* is *not* the act by *the board.* McCullough v. Moss, 5 Denio, 577; Livingston v. Lynch, 4 Johns. Ch. 596; Rice v. Plymouth County, 43 Iowa, 136; Taylor v. Wayne, 25 Iowa, 447; Young v. Blackhawk County, 66 Iowa, 460, 23 N. W. 923.

O. B. Burtness, for respondent.

Sections 3116 to 3125, Revised Codes of 1905, govern the matters here presented, and make it the duty of the board of health to *immediately* care for a person infected with a contagious disease. These laws have for their object the preservation of the health of the community. Such board may act in a summary manner in emergency. Rev. Codes 1905, § 3131.

The quarantine in this case was *necessary,* required *immediate* action, and the acts were regular and within the powers of the board, and the defendant asserted, in April, 1910, that he was *under quarantine* and asked the township board to furnish him with goods. He cannot now be heard to contradict these facts. The board furnished him the goods, —necessaries;—he accepted the benefits, and is bound thereby. 16 Cyc. 784 and following pages; Rae v. Flint, 51 Mich. 526, 16 N. W. 887.

In such cases, the statutes do not contemplate a formal meeting of the board before action can be taken to preserve the health of the people. Rev. Codes 1905, §§ 3131, 3132; Rae v. Flint, supra.

BURKE, J. The plaintiff is an organized township in Grand Forks county, and the defendant is a farmer residing within the township. In April, 1910, some of defendant's children and a hired man became sick, and upon calling a physician the same was pronounced to be scarlet fever, a contagious disease. The doctor immediately called upon the clerk of the township board and notified him of the existence of the disease, but did not post any written notice of the quarantine until some days later, for the reason that he happened to have no placards with him. Upon receiving the notice from the doctor, the clerk telephoned to the chairman of the town board, who in turn called up the other members of the board individually upon the telephone, and discussed the situation. After such a discussion, the chairman called up the clerk and directed him to post quarantine notice upon the defendant's farm, which was immediately done. Defendant obeyed the quarantine notice, and a day or two later called upon the chairman of the board and asked him, inasmuch as he was under quarantine and could not go to town for groceries, to send the stuff out to him. A day or two after this, the town board had a meeting whereat, upon motion, the board authorized the clerk to hire a drayman to furnish provisions to the defendant, and under this arrangement the township expended the sum of $15 in delivering groceries, etc., to the defendant. The goods were delivered by a drayman of the village of Niagara, who presented a bill of $15 to the township and received his pay. When the township presented the bill to the defendant, however, he refused payment, and this suit resulted. In appellant's brief it is stated: "The matter presented to this court is the broad question, under these undisputed facts, Can the township recover of the defendant? If it can, the judgment must stand; if it cannot, the defendant is entitled to judgment." It is conceded that the township board took no action at its regular meeting relative to the establishment of the quarantine, as they considered the matter had been fully cared for in the conversations held over the telephone.

(1) Appellant contends that the quarantine established by conversations over the telephone instead of at a regular meeting was invalid and a nullity, and reasons therefrom that all expenses incurred by the township were likewise invalid, and not a charge against the defendant. The respondent, on the other hand, insists that the question of the valid-

ity of the quarantine is immaterial insomuch as the defendant personally requested the township board to furnish the services for which the charge is made, and that in effect he is liable under an implied promise to pay for the services, and besides is estopped by reason of his said request to now deny the existence of the quarantine.

We think that the township is correct in its contention. The defendant believed that he was under quarantine and requested the township to transport his groceries to him. While it is possibly his construction of the law that this was a township charge, yet he is chargeable with knowledge that the expense in turn could be charged against him if he were financially responsible, and he has not alleged the contrary in this case. Thus, his situation is very similar to what it would have been had he called up the drayman himself and asked him to deliver his goods to the farm. Of course, it cannot be contended in such case that the invalidity of the quarantine would prevent the drayman from recovering. Having requested the township to render him the same services, why is he not as liable to them? If appellant says in answer to this question that the township had established a pretended quarantine, and that therefore they were themselves responsible for the expense, the answer can be made that, even though irregular, the quarantine was established in good faith and the expenses incurred in the same manner, and we are of the opinion that the defendant is estopped to claim any irregularity unless he can show some bad faith upon the part of the township.

Moreover, we think the quarantine was in fact regular. The powers of the township board are prescribed by law, and among others we find § 282, Rev. Codes 1905: "It shall be the duty of each local board of health whenever it shall come to its knowledge that a case of . . . contagious disease exists within its jurisdiction, immediately to examine into the facts of the case, and if such disease appears to be of the character herein specified, such board shall adopt such quarantine and sanitary measures as in its judgment tend to prevent the spread of such disease . . . " While it is true that the meetings of the township board must be upon three days' notice, yet we do not believe the statute contemplated the delay of a regular meeting when such an emergency

as a contagious disease is presented. To require the board to act in this deliberate manner might defeat the very object of a quarantine law. Besides the law, as above quoted, says that the board shall "immediately" examine, etc.

In Rae v. Flint, 51 Mich. 526, 16 N. W. 887, "the city of Flint did not see fit to create a board of health as a distinct agency, but elected the policy authorized by the statute of 1879. The whole duty and the whole authority remain therefore in the common council. No part of either was transferred. The duty to guard the public health and prevent the spread of contagion was imperative, and the power of the common council was commensurate with the duty. Neither the power nor the obligation could be lessened by the failure to designate a subagency."

We think it was the duty of the clerk to establish the quarantine in this case without waiting for the formality of a three days' notice meeting.

The trial court took this view of the law, and directed a verdict for the plaintiff, and the same is accordingly affirmed.

RICHARD G. P. VALLANCY v. JOHN C. HUNT, Martha Hunt, John Gardiner, and William McDonald.

(145 N. W. 132.)

Replevin — redelivery bond — penalties — requirements — judgment notwithstanding verdict.

A party who desires to avoid the penalties of a redelivery bond in replevin must show a delivery or offer of delivery of the property within a reasonable time, in substantially as good condition as when taken, and without material depreciation in value. Evidence in the case at bar examined, and *held*, that defendants have not shown such a delivery or offer of delivery. Judgment for plaintiff ordered, notwithstanding verdict.

Opinion filed January 20, 1914.

Appeal from the Second Judicial District, Rolette County, *Hon. Frank E. Fisk*, Special Judge.

Reversed.

Fred E. Harris and *Knauf & Knauf,* for appellant.

Before a witness can testify as to value of property, he must show himself competent and qualified. There was an entire lack of such showing on the part of the witness Wilkie. Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Guiterman v. Liverpool, N. Y. & P. S. S. Co. 83 N. Y. 365.

A witness must show his qualifications before he can give expert testimony. Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197; San Diego Land & Town Co. v. Neale, 88 Cal. 50, 11 L.R.A. 604, 25 Pac. 977; Jones v. Mechanics' F. Ins. Co. 36 N. J. L. 29, 13 Am. Rep. 405.

The judgment in the replevin action was a *final* judgment. It was directed by the supreme court, and is in form and substance sufficient. It is binding upon defendants, the Hunts, and is binding upon them and the sureties in this action. Cheatham v. Morrison, 37 S. C. 187, 15 S. E. 924; Craig v. Herring, 80 Ga. 709, 6 S. E. 283; Schott v. Youree, 142 Ill. 233, 31 N. E. 593; Boyd v. Huffaker, 40 Kan. 634, 20 Pac. 459; Johnson v. Mason, 64 N. J. L. 258, 45 Atl. 619.

When a return of personal property is adjudged in an action for its recovery, plaintiff, if he secured possession, must return same in a reasonable time, in the same condition, substantially, as when taken, if he would avoid the penalty. Cobbey, Replevin, § 1182; Parker v. Simonds, 8 Met. 205; Berry v. Hoeffner, 56 Me. 170; Capital Lumbering Co. v. Learned, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 455; Jackson v. Morgan, 167 Ind. 528, 78 N. E. 633; Schott v. Youree, 142 Ill. 233, 31 N. E. 591; Kennedy v. Brown, 21 Kan. 171; O'Loughlin v. Carr, 9 Kan. App. 818, 60 Pac. 478; Hershler v. Reynolds, 22 Iowa, 152; Boyd v. Huffaker, 40 Kan. 634, 18 Pac. 508; Paulson v. Nichols & S. Co. 8 N. D. 606, 80 N. W. 765, 6 N. D. 400, 71 N. W. 136.

In such cases, satisfaction can only be had by a strict compliance with the terms of the undertaking. 2 Black, Judgm. § 586; Cheatham v. Morrison, 37 S. C. 187, 15 S. E. 924.

The property must be redelivered in a safe condition and without deterioration in value. Fair v. Citizens' State Bank, 69 Kan. 353, 105 Am. St. Rep. 168, 76 Pac. 847, 2 Ann. Cas. 960; McPherson v. Acme Lumber Co. 70 Miss. 649, 12 So. 857; George v. Hewlett, 70

Miss. 1, 35 Am. St. Rep. 626, 12 So. 855; Washington Ice Co. v. Webster, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947; Swift v. Barnes, 16 Pick. 194; Leighton v. Brown, 98 Mass. 515; Stevens v. Tuite, 104 Mass. 329; Maguire v. Pan-American Amusement Co. 205 Mass. 64, 137 Am. St. Rep. 422, 91 N. E. 138, 18 Ann. Cas. 110; Hazlett v. Witherspoon, — Miss. —, 25 So. 150; Yelton v. Slinkard, 85 Ind. 190; Berry v. Hoeffner, 56 Me. 170; Parker v. Simonds, 8 Met. 210; Carlon v. Dixon, 14 Or. 293, 12 Pac. 394; Jordan v. La Vine, 15 Or. 329, 15 Pac. 281.

F. T. Cuthbert & A. R. Smythe and *H. E. Plymat,* for respondents.

The return or tender back of the property in substantially the same condition as when seized or repossessed is all that the law requires. Fair v. Citizens' State Bank, 69 Kan. 353, 105 Am. St. Rep. 168, 76 Pac. 847, 2 Ann. Cas. 960; 24 Am. & Eng. Enc. Law, 538; Shinn, Replevin, § 679; Horn v. Citizens' Sav. & Commercial Bank, 8 Colo. App. 539, 46 Pac. 838; Jones v. Messenger, 40 Colo. 37, 90 Pac. 64; Three States Lumber Co. v. Blanks, 69 L.R.A. 283, 66 C. C. A. 353, 133 Fed. 479.

It is also true that there must be no deterioration in value. The witnesses who testified upon this point were amply qualified. Bailey v. Walton, 24 S. D. 119, 123 N. W. 701; Cochrane v. National Elevator Co. 20 N. D. 169, 127 N. W. 725; Withey v. Pere Marquette R. Co. 141 Mich. 412, 1 L.R.A.(N.S.) 352, 113 Am. St. Rep. 533, 104 N. W. 773, 7 Ann. Cas. 57, 19 Am. Neg. Rep. 309.

The condition of the property *when taken* must be established, and its condition when *returned.* This is the only way to satisfy this requirement, or to establish value. Fair v. Citizens' State Bank, 69 Kan. 353, 105 Am. St. Rep. 168, 76 Pac. 847, 2 Ann. Cas. 960; Jones v. Messenger, 40 Colo. 37, 90 Pac. 64; Washington Ice Co. v. Webster, 125 U. S. 426, 427, 31 L. ed. 799, 800, 8 Sup. Ct. Rep. 947; Capital Lumbering Co. v. Learned, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454; George v. Hewlett, 70 Miss. 1, 35 Am. St. Rep. 626, 12 So. 855; Hinkson v. Morrison, 47 Iowa, 167; Yelton v. Slinkard, 85 Ind. 190, 24 Am. & Eng. Enc. Law, 538.

The verdict of the jury is *conclusive* as to all facts upon which there is conflicting evidence. Johnson v. Glidden, 11 S. D. 237, 74 Am. St. Rep. 795, 76 N. W. 933, 5 Am. Neg. Rep. 97; Baxter v. Campbell,

17 S. D. 475, 97 N. W. 386; Bedtkey v. Bedtkey, 15 S. D. 310, 89 N. W. 479; Edgemont Implement Co. v. N. S. Tubbs Sheep Co. 22 S. D. 142, 115 N. W. 1130.

Courts will not disturb verdicts where there is conflicting evidence. Caledonia Gold Min. Co. v. Noonan, 3 Dak. 189, 14 N. W. 426, affirmed in 121 U. S. 393, 30 L. ed. 1061, 7 Sup. Ct. Rep. 911; State ex rel. Morrill v. Massey, 10 N. D. 154, 86 N. W. 225; Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454, approved in Nichols & S. Co. v. Stangler, 7 N. D. 109, 72 N. W. 1089; Axiom Min. Co. v. White, 10 S. D. 202, 72 N. W. 462.

The jury are the exclusive judges of the facts, the evidence, its weight, and of the credibility of the witnesses. Casey v. First Bank, 20 N. D. 211, 126 N. W. 1001; Charles E. Bryant & Co. v. Arnold, 19 S. D. 106, 102 N. W. 303; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225; Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724; Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Black v. Walker, 7 N. D. 414, 75 N. W. 787; Taylor v. Jones, 3 N. D. 235, 55 N. W. 593; Becker v. Duncan, 8 N. D. 600, 80 N. W. 762.

The tender of the property in question was sufficient. Capital Lumbering Co. v. Learned, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454; Frey v. Drahos, 10 Neb. 594, 7 N. W. 319; Gans v. Woolfolk, 2 Mont. 458; McClellan v. Marshall, 19 Iowa, 561, 87 Am. Dec. 454; 34 Cyc. 1575.

On motion for a directed verdict, the trial court and the Supreme Court will assume the evidence of the plaintiff to be undisputed, and give to it the most favorable construction for a plaintiff possible. Ernster v. Christianson, 24 S. D. 103, 123 N. W. 711; John Miller Co. v. Klovstad, 14 N. D. 435, 105 N. W. 164; Northern P. R. Co. v. Vidal, 106 C. C. A. 661, 184 Fed. 707.

Only a tender or return of the property in substantially the same condition and value is required. Leeper, G. & Co. v. First Nat. Bank, 26 Okla. 707, 29 L.R.A.(N.S.) 747, 110 Pac. 655, Ann. Cas. 1912B, 302; Wells, Replevin, § 422; Shinn, Replevin, § 679; Cobbey, Replevin, § 1389; Washington Ice Co. v. Webster, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947; Larabee v. Cook, 8 Kan. App. 776, 61 Pac. 815; Allen v. Fox, 51 N. Y. 562, 10 Am. Rep. 641; Yelton

v. Slinkard, 85 Ind. 190; Edwin v. Cox, 61 Ill. App. 567; Harts v. Wendell, 26 Ill. App. 274; Archer v. Long, 47 S. C. 556, 25 S. E. 84; Reavis v. Horner, 11 Neb. 479, 9 N. W. 643; Johnson v. Mason, 64 N. J. L. 258, 45 Atl. 618; Pickett v. Bridges, 10 Humph. 171; Pabst's Brewing Co. v. Rapid Safety Filter Co. 54 Misc. 305, 105 N. Y. Supp. 962.

The burden of showing error is upon the appellant, since the presumption is that the trial court did not err. Clyde v. Johnson, 4 N. D. 92, 58 N. W. 512; Gould v. Duluth & D. Elevator Co. 3 N. D. 96, 54 N. W. 316; Selvage v. Green, 45 Ind. App. 642, 91 N. E. 357; Faulkner v. Baltimore & O. S. W. R. Co. 44 Ind. App. 441, 89 N. E. 511; C. Scheerer & Co. v. Deming, 154 Cal. 138, 97 Pac. 155; Runyan v. Snyder, 45 Colo. 156, 100 Pac. 420; Linson v. Spaulding, 23 Okla. 254, 108 Pac. 747; Pierce v. Pierce, 52 Wash. 679, 101 Pac. 358.

Error, if it exists, must be shown to have been prejudicial, material and damaging. Whitney v. Brown, 75 Kan. 678, 11 L.R.A.(N.S.) 468, 90 Pac. 277, 12 Ann. Cas. 768; Mageau v. Great Northern R. Co. 103 Minn. 290, 15 L.R.A.(N.S.) 511, 115 N. W. 651, 946, 14 Ann. Cas. 551; Johnson v. Walker, 86 Miss. 757, 1 L.R.A.(N.S.) 470, 109 Am. St. Rep. 733, 39 So. 49; State use of Hart-Parr Co. v. Robb-Lawrence Co. 17 N. D. 257, 16 L.R.A.(N.S.) 227, 115 N. W. 846; Grimestad v. Lofgren, 105 Minn. 286, 17 L.R.A.(N.S.) 990, 127 Am. St. Rep. 566, 117 N. W. 515; Kuhl v. Chamberlain, 140 Iowa, 546, 21 L.R.A.(N.S.) 766, 118 N. W. 776; Madson v. Rutten, 16 N. D. 281, 13 L.R.A.(N.S.) 554, 113 N. W. 872; McClain v. Lewiston Interstate Fair & Racing Asso. 17 Idaho, 63, 25 L.R.A. (N.S.) 691, 104 Pac. 1015, 20 Ann. Cas. 60; Shaw v. Lobe, 58 Wash. 219, 29 L.R.A.(N.S.) 335, 108 Pac. 450; Centofonde v. Camden Coke Co. 78 N. J. L. 662, 27 L.R.A.(N.S.) 1058, 75 Atl. 913; Miller v. Northern P. R. Co. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215.

BURKE, J. In the year 1901, the defendants John and Martha Hunt purchased a threshing outfit consisting of engine, separator, blower, stacker, weigher, and self-feeder, from a machinery dealer in Rolla, North Dakota, giving in payment therefor his notes secured upon the said property. Before the maturity of the said notes, they were sold to the plaintiff, Vallancy, who in the fall of 1905 instituted the fore-

closure proceedings and replevined the property under a chattel mortgage. The defendants desired to retain possession of the property pending the action, and furnished a redelivery bond with the defendants Gardiner and McDonald as sureties, conditioned that the defendants Hunt "shall deliver the said property to the plaintiff if such delivery should be adjudged, and for the payment to them of such sum as may for any cause be recovered against the defendants in the action." Under this bond the property was returned to the Hunts and retained by them as hereinafter shown. The action itself reached this court and was decided in favor of Vallancy. See Vallancy v. Hunt, 20 N. D. 579, 34 L.R.A.(N.S.) 473, 129 N. W. 455.

The merits of that case are not, of course, now before us, excepting to observe that the property was directed to be delivered to Vallancy, and a money judgment for costs was also rendered in his favor. The decision was announced in December 31, 1910, and shortly thereafter Mr. Hunt's attorney tendered to the attorney for Mr. Vallancy the sum of $216.40 costs, and later deposited the same to the credit of Mr. Vallancy in the State Bank of Rolla. He also testifies that the said attorney told him that "it would be no use to make a tender of the property, because they would not accept it. They intended to realize upon their rights to recover upon the judgment for money damages."

Although there is some doubt upon the question, we will assume that the tender of the machinery was duly and regularly waived by Vallancy.

The present suit was instituted by Vallancy against the Hunts and their bondsmen to recover upon the redelivery bond hereinbefore mentioned. The defendants answered alleging the tender of the property and the costs as a complete defense against the action. The principal dispute arises over the condition of the threshing outfit at the time of the tender of the same to plaintiff, and upon this question there is considerable conflict. The witnesses for the plaintiff testified that the machine was absolutely worthless. As an example we quote from the testimony of the witness O'Laughlin: "The machinery had been used before the bond was given for the years 1901, 1903, 1904, and 1905. It had been used for four seasons before the commencement of that action. The same threshing outfit was used during the fall of 1905 after this action was commenced, for threshing purposes, and again during the

fall of 1906, and again during the threshing season of 1908, for threshing purposes. Since that time it has been on the Bartley farm, 4 miles south. I have seen the machine out there a number of times. Saw it there in the summer of 1911 four different times. I made an examination at that time; I was engaged in selling similar machinery in this vicinity fourteen years, and handled some about every year. I examined it with some care in 1911, between the 1st and 10th of September, made a careful examination. The separator was covered with chicken manure, the corners or joints of it were grown up with green stuff,—the way a separator will grow up if it stands out three years in one place. The engine was covered with rust; the front wheels were badly dished. The spout was gone off the weigher; a sprocket wheel was gone; the rattle rakes on the feeder; the belts were all gone; there was no tank pump or tank either, and the lubricators were gone off the engine. The flues in the boiler were badly rusted. The machinery was of no practical value. It had no market value at that time."

Upon the other hand, the defendant insisted that the machinery was in as good condition in 1911 as it had been when rebonded in 1905, and took the stand himself to substantiate this claim. He testified in part as follows: "Well, it is in better condition to-day than it was in 1905, and the reasons for that are that up until 1905, I ran it. (Objection sustained.) In 1905 it was all shaken to pieces on account of a small cylinder pulley of the machine when it was shipped here. . . . After 1905 the machinery was in very bad condition on account of it having been run with a pulley wheel too small on the separator, and it had shaken it all to pieces, and the engine had broken also what we call the intermediate gear on the traction in such a condition that we couldn't move it home; that is, we moved it on the farm, but not to its usual place, and it was in that condition at the time it was replevined. In 1906 I hired a man for three months during the summer, a mechanic, and put him to work on it, replacing everything that needed replacing, and fixing the machine over so it was practically in better shape for threshing than it ever was before. I will correct that by saying it was in a whole lot better condition. . . . I rebuilt the machine; made it 50 per cent over from what it was in 1905. . . . The reason it is in better condition now is, as I said before, it had been all shaken to pieces in 1905, and after that it was replevined, and it has

only been run two seasons since that. In those two seasons it ran a whole lot better than it ever did before. . . . The wood is not as strong, not as sound; there are a number of parts of the machine that are not as strong as they were, not as sound as they were, which happened by the weather conditions; still it is in better shape even than before; and there are some few things that have been taken away from the machine; some of them that were taken and stored here; my brother has some of them; that would make it look as though it had been robbed; those are things which were taken and placed away for safe-keeping; and there are a few joints that are not as good as they were at that time, but generally speaking the machine is worth the same amount. . . . It is worth $2,000." Upon cross-examination he further testifies: "Before I used the threshing (machine) in 1906, I placed some repairs upon it; rebuilt the machine or hired it done. It cost me about $350; that was after the other Vallancy action was commenced. . . . The machine has had a number of fixings placed on it since Vallancy started that action, and placed there by me. The repairs and the man's labor cost me about $350. The castings and things didn't cost so much; it was principally woodwork and the man's work fixing it over. Some of the joints are not in the same condition now as in 1905,—that it is rotted to some extent. They were rotted to some extent in the fall of 1908. I used it that fall after the trial of the other action. After I got through using it that fall, it was left down at Bartley's place. It has remained standing down there in the yard ever since. . . . I have made no repairs on the separator since quitting threshing with it in the fall of 1908, and it has been standing out, as far as I know, in the same place all the time since. I haven't used it since then. I heard LaFrance testify about the flues being rusted. What he said was true. I heard him state the condition of the joints of the separator. They are not so bad as he represented it to be."

Another witness testified that Gardiner, one of the bondsmen, and a defendant in this action, had removed from the machine the spout that carried the grain from the elevator to the wagons and put it upon his own threshing rig. Other witnesses for the defendant testified that the threshing rig was worth about the sum of $1,800, but as to two or three of those witnesses it is extremely doubtful if their evidence was

properly received, because the examination of the rig was not sufficient for an opinion.

Thus, the witness Wilkie testifies as to the value of the rig as follows:

I was on the place the day before we come here. I went right by the rig and looked at it. . . .

Q. During those visits have you examined the condition of the machinery?

A. Well, not exactly examined it to know what it would be worth; I have seen it standing there and looked at it now and again.

Q. That is, when you say you looked at it, you mean you have been up to it?

A. Went up there myself.

Q. To where the machinery was?

A. Yes.

Q. That was during the past summer?

A. Yes.

Q. And then you were out there again on the 9th of this month?

A. Yes.

Q. Well, at those trips that you were out there, were you close to the machinery, close so you could see the condition it was in?

A. Yes, I was close.

Cross-examination by plaintiff to test his knowledge.

Q. You didn't examine this machinery with the intention of finding out its value?

A. No.

Q. You didn't make any close examination of the machinery?

A. No.

Q. You didn't open it up and look into it at any place, did you?

A. Well, a fellow could look in without opening it, by walking around.

Q. Casually looked at it as you walked past it?

A. Yes, and looked inside of it.

Q. Did you make a careful examination to see whether everything was all right in it or not?

A. No; I did not.

Q. Did you make a careful examination to see whether there was rust on any of the parts?

A. Well, there is often rust on new things; you can't tell much by rust.

Q. You only saw it and walked around close to it; and when was it you walked around close to it and looked at it?

A. I think sometime in July in the summer; I am not quite sure.

Question by defendant. Now, from your knowledge of the values of machinery, and from your examination of this machinery that you referred to, I ask you to state what the reasonable market value would be for that rig complete in this vicinity? Objected to. Overruled.

A. Well, I don't really know. . . .

Q. Just listen to the question. Do you know, and have you known, the value, the market values of threshing machines, new and second-hand, from your knowledge as a thresher and purchaser of machines, and what you have seen bought and sold in Rolette county during the last year?

A. I have.

Q. Now, from that knowledge, and from your examination of this machinery in question, can you state the reasonable market value of it? Objected to and overruled.

A. A couple of thousand or over, I should think.

Cross-examination.

A. I have seen no machinery like this in question sold during the past two years. I have seen some in the same condition. I haven't examined the condition of this machinery so as to know the joints and the fixings of that kind upon it. I don't know whether the joints and boards were rotted or not. I did not examine it that close. I don't know whether the flues in the engine are badly rusted or not. I didn't examine them very close. . . . It is a fact that I failed to make a careful examination of this machinery. I didn't ever examine it for the purpose of testifying as to its value. Just noted it casually as I went there, and that is what I told you the other day. The fact that the boards and belts on the separator were rotted, and that the return flues in the engine were badly rusted, would make a difference in the market or sale value of the machinery at this time. It ought to have some market value at this time. I know it has some sale value at this time. I would not be willing to pay $1,600 for it.

We have set out rather more of the testimony than necessary, to show its unsatisfactory nature. At the close of all of the testimony, plaintiff moved the court for a directed verdict upon the grounds that the undisputed evidence showed the threshing rig to be in a different condition and of less value than it had been in 1905, when rebonded by the defendants. This motion was denied, and forms the basis of this appeal.

There is not much dispute upon the legal proposition that, in order to avoid the terms of a bond, the defendants must show a return, or offer to return, of the property rebonded in substantially the same condition, and without material deterioration in value. See Cobbey, Replevin, § 1184; Note to Three States Lumber Co. v. Blanks, 69 L.R.A. at page 286; Gibbs v. Bartlett, 2 Watts & S. 34; Nichols & S. Co. v. Paulson, 10 N. D. 440, 87 N. W. 977; Jackson v. Morgan, 167 Ind. 528, 78 N. E. 633; Fair v. Citizens' State Bank, 69 Kan. 353, 105 Am. St. Rep. 168, 76 Pac. 847, 2 Ann. Cas. 960; Schott v. Youree, 41 Ill. App. 476, 142 Ill. 233, 31 N. E. 591; McPherson v. Acme Lumber Co. 70 Miss. 649, 12 So. 857; Washington Ice Co. v. Webster, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947. From the Gibbs v. Bartlett Case, 2 Watts & S. 34, we quote: "It would be anything but an act of justice to permit a person who has wrongfully deprived another of his goods, and retained them in his possession until they were nearly destroyed by time and use, afterwards, when judgment was rendered against him for his wrongful act, to save a forfeiture of the bond by an offer to return the article in its depreciated condition. Nor can the sureties be placed in any better situation than the principal."

It is conceded that the question as to whether or not the machinery was in substantially the same condition and value in 1911 as it had been in 1905 was a question of fact for the jury, if a conflict in the evidence existed that would warrant reasonable minds in arriving at different conclusions upon the question. From an examination of the evidence, however, we have reached the conclusion that the undisputed evidence shows the machinery to be in a substantially different condition after the lapse of five years. True, there is some evidence that, owing to repairs made in 1906, the value of the machinery had not been depreciated, but there is no evidence that the machinery is in the same condition substantially as it was at the time it was rebonded by the defendants. The plaintiff was entitled to the rig in substantially the

same condition that it was when taken from him, and this obligation is not met by tendering to him the threshing machine nearly six years older, after it has stood out without shelter of any kind, and from which substantial parts have been taken, even though some witnesses have testified that it is equally valuable at the present time. The repairs may not have been desired by the plaintiff, and they furnish further evidence that the machine was not in the same condition. If the repairs were minor, it probably would not make much difference, but when they are to replace the natural deterioration of a threshing machine which has stood exposed to the elements for nearly six years, they cannot be called minor repairs. Those repairs, moreover, were made in 1906, some five years before the machine was tendered in satisfaction of the bond, since which time the threshing rig had been operated at least two years. Having reached the conclusion that the trial court had erred in refusing a directed verdict for the plaintiff, it becomes unnecessary to pass upon the other errors assigned. The trial court will order the entry of a judgment notwithstanding the verdict, in favor of the plaintiff, for the relief demanded.

T. J. ATWOOD v. G. A. TUCKER, James Reid, and Jos. R. Goyden, Garnishees.

(— L.R.A.(N.S.) —, 145 N. W. 587.)

Summons — affidavit for publication — residence of defendant — must be stated if known — postoffice address.

1. An affidavit for publication of summons filed under § 6840, Rev. Codes 1905, requiring the "stating the place of defendant's residence if known to the affiant, and if not known, stating that fact," as a basis for substituted service, is not complied with by filing an affidavit stating "that the last known postoffice address of the defendant is unknown."

Affidavit of publication of summons — statutory requirements — void affidavit.

2. Such an affidavit for publication is not a substantial compliance with such statutory requirement, and is void.

Garnishee — personal service on — substituted service of summons — void affidavit — judgment — defendant and garnishee — void — jurisdiction — default of garnishee to answer — jurisdiction — garnishee not concluded.

3. Personal service of regular garnishment proceedings upon resident garnishee defendants was had, who defaulted and thereby admitted liability. Subsequently attempted substituted service of summons by publication was had upon a void affidavit for publication. Judgment was entered against both defendant and garnishee by default. *Held:*

(a) Such judgment as to both defendant and garnishees was void as entered without jurisdiction.

(b) Judgment against the garnishee defendants cannot be entered by default until after entry of a valid judgment against the principal defendant, the garnishment proceedings not being an independent action, but wholly ancillary to the main action against the principal defendant.

(c) Garnishee defendants, by defaulting in answer, are not concluded from raising the question of jurisdiction over the principal defendant by motion to vacate the judgment against the principal defendant and themselves for want of jurisdiction.

(d) Such a motion to vacate is a direct, and not a collateral, attack upon the purported judgment.

(e) Default of garnishee defendants cannot clothe the court with jurisdiction in the main action or validate void proceedings taken against the principal defendant, and the proceedings against the garnishees fall with the failure of jurisdiction in the main action against the principal defendant.

Opinion filed January 21, 1914.

From an order of the District Court of Stutsman County, *Coffey,* J., denying an application by garnishee defendants to vacate a judgment taken against them and the principal defendant, for want of jurisdiction in the principal action, garnishee defendants appeal.

Reversed and both principal action and garnishment proceedings ordered dismissed for failure of jurisdiction in the principal action prior to attempted entry of judgment therein.

Geo. A. Stillman, for appellants.

The trial court was without jurisdiction to enter the judgment, for want of a sufficient affidavit for service of the summons by publication. The *residence* of the defendant—whether known or otherwise—is not mentioned. The affidavit recites that "the last *known postoffice* address of defendant is *unknown.*" Rev. Codes, 1905 § 6840; Brown,

Jurisdiction, 2d ed. § 51, p. 221; Pomeroy v. Betts, 31 Mo. 419; Lonkey v. Keyes Silver Min. Co. 21 Nev. 312, 17 L.R.A. 351, 31 Pac. 57; New York Baptist Union v. Atwell, 95 Mich. 239, 54 N. W. 760; Fetes v. Volmer, 28 N. Y. S. R. 317, 8 N. Y. Supp. 294; Bothell v. Hoellwarth, 10 S. D. 491, 74 N. Y. 231.

The judgment against the defendant is a nullity. Williams v. Fairmount School Dist. 21 N. D. 198, 129 N. W. 1027.

No judgment can be given or entered against a garnishee until *after* a *valid* judgment is given and entered against the defendant in the main action. 20 Cyc. 978–91, inclusive; 9 Enc. Pl. & Pr. 810; 3 Wade, Attachm. §§ 327, et seq; 2 Sutherland, Code Pl. § 2791; Hinds v. Miller, 52 Miss. 845; Frisk v. Reigelman, 75 Wis. 499, 17 Am. St. Rep. 198, 43 N. W. 1117, 44 N. W. 766; Shoemaker v. Pace, — Tex. Civ. App. —, 41 S. W. 498; St. Louis, I. M. & S. R. Co. v. McDermitt. 91 Ark. 112, 120 S. W. 831; Matheney v. Earl, 75 Ind. 531; Iron Cliffs Co. v. Lahais, 52 Mich. 394, 18 N. W. 121; Streissguth v. Reigelman, 75 Wis. 212, 43 N. W. 1116; State v. Barry, 14 N. D. 316, 103 N. W. 637; Jordan v. Davis, 10 Okla. 329, 61 Pac. 1063; Traders' Mut. L. Ins. Co. v. Humphrey, 207 Ill. 540, 69 N. E. 375.

Oscar J. Seiler and *A. W. Aylmer,* for respondent.

The trial court was correct in refusing to set aside the judgment, because the remedy of appellant was by *appeal,* and this appeal is too late. Rood, Garnishment, § 390; Hardin v. Hardin, 26 S. D. 601, 129 N. W. 111; 23 Cyc. 1145.

Defects in proof of service cannot be attacked collaterally. Hanson v. Franklin, 19 N. D. 259, 123 N. W. 386; Ricketson v. Richardson, 26 Cal. 149.

The affidavit for the service of the summons by publication was sufficient. Hanson v. Graham, 82 Cal. 631, 7 L.R.A. 127, 23 Pac. 36.

A person may have a *residence* separate from his *domicil.* Savage v. Scott, 45 Iowa, 130; Hanson v. Graham, supra.

The action in district court was an action *in rem,* and its jurisdiction was complete by reason of the garnishment. Burcell v. Golstein, 23 N. D. 257, 136 N. W. 245; Rood, Garnishment, § 5.

The property or debt garnished has a situs distinct from the debtor's domicil, for the purpose of attachment or garnishment. Harvey v.

Great Northern R. Co. 50 Minn. 405, 17 L.R.A. 84, 52 N. W. 905; Rood, Garnishment, §§ 233, 241; Note to case of Goodwin v. Claytor, 67 L.R.A. 209; Steer v. Dow, 75 N. H. 95, 20 L.R.A.(N.S.) 263, 71 Atl. 217; A. B. Baxter & Co. v. Andrews, 131 Ga. 120, 20 L.R.A. (N.S.) 268, 62 S. E. 42; McShane v. Knox, 103 Minn. 268, 20 L.R.A.(N.S.) 271, 114 N. W. 955; Holford v. Trewella, 36 Wash. 654, 79 Pac. 308.

To say that debts due nonresidents could not be garnished would defeat the statute. Rood, Garnishment, § 384, note 14.

Goss, J. In September, 1908, plaintiff Atwood began an action in district court against defendant Roan, and obtained personal service of a garnishment upon Tucker, Wallis, and Goyden, as garnishee defendants, within Stutsman county. Personal service was not had on defendant Roan, but after service of the garnishee defendants plaintiff filed a defective affidavit for publication of summons reciting "that the last known postoffice address of the above-named defendant, Charles Roan, is unknown," instead of stating "the place of the defendant's residence if known to the affiant, and if not known, stating that fact," as required by § 6840, Rev. Codes 1905. The affidavit omits to state the place of defendant's residence or that his residence was unknown. Instead it does allege that his last known postoffice address is unknown, the equivalent of saying that he does not know what his last postoffice address was. This affidavit was the basis for substituted service by publication of summons. The garnishee defendants defaulted in answering the garnishee summons. Judgment was entered March 2, 1909, against the defendant, Roan, for $289.35 costs and damages upon such substituted service, and judgment was also then taken for said amount against all of the garnishee defendants. On September 23, 1911, the garnishee defendants moved to vacate the judgment taken against the defendant and themselves, basing the motion upon an affidavit reciting the alleged invalidity of the service of summons by publication in the main action, and upon the entire record, contending that the entire proceeding is void as had without jurisdiction of the defendant, Roan, or any subject-matter. This motion was denied by order dated February 3, 1912, and judgment thereon entered reaffirming the judgment sought to be vacated, with added costs taxed in the sum of $15. From

this order and judgment defendant appeals, staying proceedings pending appeal.

Two main question are presented: (1) Is the affidavit for publication of summons a substantial compliance with the requirements of § 6840, or on the contrary is it a nullity; (2) if said affidavit be fatally defective, can the garnishee defendants, in default in answer after personal service had upon them, and who offer no answer or defense on the merits as against the purported judgment taken against them by default, now urge that the judgment taken by the plaintiff against them as garnishee defendants is invalid?

As to the first contention, it is elementary that where constructive service of summons is had, the statute governing it must be strictly complied with. The attack here made on this judgment is direct, and not collateral. Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292, and Freeman v. Wood, 11 N. D. 1, 88 N. W. 721. So we are not confronted with any presumptions applicable as tending to support the validity of a judgment against collateral attack. The affidavit for publication speaks for itself, and it is not contended that there is any presumption that any other affidavit of publication was ever filed. The fact that the plaintiff may have known the place of the defendant's residence and still have been able to truthfully declare on his oath that defendant's "last known postoffice address is unknown" to him, in itself, is enough to condemn the affidavit as invalid as a substantial departure from statutory requirements. An examination of the authorities is conclusive against respondent's contention that the terms "residence" and "postoffice" are interchangeable and synonymous; and that the statutory requirement of a disclosure as to the fact of residence is not complied with by a showing of fact of "last known postoffice address." See the recent cases of Gibson v. Wagner, — Colo. App. —, 136 Pac. 93, and Norris v. Kelsey, 23 Colo. App. 555, 130 Pac. 1088. The Colorado statute required the fact to be stated in the affidavit for publication that the postoffice address was unknown, and the affidavit filed stated the residence as unknown. The judgment entered thereon was held void under collateral attack, following Empire Ranch & Cattle Co. v. Gibson, 23 Colo. App. 344, 129 Pac. 520; Empire Ranch & Cattle Co. v. Howell, 22 Colo. App. 389, 125 Pac. 592; and Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 117 Pac. 1005, and numer-

ous holdings cited in these opinions. See also Ruby v. Pierce, 74 Neb. 754, 104 N. W. 1142, where a return showing "last" usual place of residence was held not to be a compliance with the statutory requirement of service at the usual place of residence, and that the word "last" constituted an added unauthorized qualification to the return of service, and rendered the judgment entered thereon void. See also Wick v. Rea, 54 Wash. 424, 103 Pac. 462; Gilmore v. Lampman, 86 Minn. 493, 91 Am. St. Rep. 376, 90 N. W. 1113, at page 494, where it is also pointed out why the California cases cited by respondent, particularly San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 Pac. 300, and Hanson v. Graham, 82 Cal. 631, 7 L.R.A. 127, 23 Pac. 56, decisions under the provisions of §§ 412, 413, of the California Code of Civil Procedure, do not apply under our practice, inasmuch as under the California practice the affidavits and order for publication are not an essential part of the record in the case. Besides, under our practice and statutes no order for the publication is required in obtaining substituted service of summons, since the change made in 1895 from the former practice and statutory procedure requiring such an order. In many jurisdictions an order for publication is a necessary step in constructive service, and decisions are found giving force to the presumption that proper evidence of nonresidence is presumed to have been exhibited, or the order for service by publication could not have been obtained, and judgments void without such a presumption obtaining have been held valid. But no presumption to this effect has ever been indulged in this state, but rather the contrary was the law when an order for publication was essential. Simensen v. Simensen, 13 N. D. 305, 100 N. W. 708, passing on the validity of a judgment entered in 1893. Manifestly, if there be any relaxing of the rule as to essentials, it would be found in such jurisdictions, instead of in those like ours where the affidavit for publication is a necessary part of the record and the contents of which must affirmatively establish the right to proceed further with constructive service. Though it is held in San Diego Sav. Bank v. Goodsell, supra, that the term "address" may be, for the purpose of their procedure, considered as sufficient compliance with the statute requiring the residence of a nonresident defendant to be disclosed to the court, upon an application for an order for service by publication, with direction to be made in such order for mailing of

summons, that holding is not authority to the effect that an affidavit stating, as here, that the "last known postoffice address is unknown," is the equivalent of a statement as required by our statute, that the place of the defendant's residence is unknown. A glance at the many authorities cited under "residence" in vol. 7, Words & Phrases, will disclose that the term "residence" has a definite legal meaning, *i. e.*, as a place of one's abode, dwelling, home, or habitation. Conceding that the term "address" is synonymous with "abode" or "residence," as is intimated in the California case above cited, the qualification wherein defendant swears to his last known postoffice address may or may not in fact be a compliance with the requirements of the statute that the affidavit shall state "the place of defendant's residence if known to the affiant, and if not known, stating that fact," according to whether the postoffice address does or does not properly designate the place of the defendant's residence. For instance, one's residence may be within one state and his postoffice within another, in which case, if the postoffice be taken as his residence, an attachment could not issue or service by publication could not be had, while with the actual place of defendant's residence stated either or both would be available. This is not only possible, but perhaps frequent, as to those domiciled in either state who, reside alongside of or near a boundary line between two states. We cannot hold a postoffice address to have been meant or intended to be synonymous with the mandatory statutory requirement that the place of defendant's residence if known shall be stated, and if not known, that fact shall be stated, all as a basis for further proceedings in obtaining substituted service. For further cases on this subject, see North Star Lumber Co. v. Johnson, 196 Fed. 56, appealed and affirmed in 206 Fed. 624, discussing a similar statute of Oregon in proceedings *in rem* under attachment, although it seems publication is there made upon an order therefor; and Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. If we depart in one particular from the plain statutory requirement on a matter concededly jurisdictional, under a theory as here advanced of substantial compliance, not only is the rule consonant with all previous decisions on such jurisdictional questions disregarded, that such requirements are to be strictly construed (see Soderberg v. Soderberg, 1 Dak. 503; Whaley v. Carter, 1 Dak. 504; Chamberlain v. Hutchins,

1 Dak. 506; Beach v. Beach, 6 Dak. 371, 43 N. W. 701; Rhode Island Hospital Trust Co. v. Keeney, 1 N. D. 411, 48 N. W. 341; Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095; Birchall v. Griggs, 4 N. D. 305, 50 Am. St. Rep. 654, 6 N. W. 842; Severn v. Giese, 6 N. D. 523, 72 N. W. 922; Simensen v. Simensen, 13 N. D. 305, 100 N. W. 708), but there is imported an element of uncertainty as to jurisdictional requirements in this and kindred proceedings *in rem,* where, if the plain language of the statute be adhered to as the guide, there can be neither uncertainty nor ambiguity.

We conclude that the affidavit for publication was void; that consequently no valid proceedings were thereafter had in the main action against the defendant, and that the only jurisdiction remaining in the court immediately after the filing of this purported affidavit for publication was such as was conferred upon it in a limited sense by the provisional remedy of garnishment and proceedings had thereunder. This takes us to the discussion of the garnishment side of the case.

The second question, as to the right of the garnishee defendants to attack the default judgment, involves a more extended discussion of our statutes and the general law of garnishment. The controlling sections of the statute are § 6972, expressly authorizing the service of a summons by publication upon the defendant where service of garnishee summons has been had; and § 6977, providing that "if any garnishee, having been duly summoned, shall fail to serve his affidavit [of nonliability] . . . the court may render judgment against him for the amount of the judgment which the plaintiff shall recover against the defendant in the action for damages and costs, together with the costs of such garnishee action;" and also § 6982, providing that "the proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant as parties defendant," and prescribing the procedure, and that "when the garnishment is not in aid of an execution, no trial shall be had of the garnishee action until the plaintiff shall have judgment in the principal action; . . . and if the defendant has judgment, the garnishee action shall be dismissed with costs. The court shall render such judgment in all cases as shall be just to all the parties and properly protect their respective interests, and may adjudge the recovery of an indebtedness, . . . or personal property disclosed or found to be liable to be applied to the plaintiff's

demands; or . . . when proper, direct . . . any money or other thing paid over or delivered to the clerk or officer. The judgment against a garnishee shall acquit and discharge him from all demands by the defendant or his representative for all money . . . delivered or accounted for by the garnishee by force of such judgment."

These statutes authorize the service by publication of a summons against the principal defendant after the service, as here had, of the garnishee summons and proceedings upon the garnishee defendant, and answer the contention of counsel for the appellant that valid garnishment cannot be had in an action wherein the service of the summons against the principal defendant must be had by publication. It is argued with some force that, inasmuch as the judgment against the garnishee defendant cannot be entered until the entry of judgment in the main action against the defendant, and the court under substituted service, being without jurisdiction of the person of defendant and powerless therefore to enter a personal judgment against him, can enter no valid judgment against the garnishee defendants. Such is not the construction to be placed upon these statutory provisions. The portions of § 6982, authorizing the court to "adjudge the recovery of an indebtedness . . . found to be liable to be applied to plaintiff's demand," plainly have relation to the form of a judgment to be entered under § 6977, and as supplementary to that section; or in other words, it provides that the judgment to be entered in proceedings where substituted service of the defendant is had shall be a judgment *in rem* (Hartzell v. Vigen, 6 N. D. 117, 35 L.R.A. 451, 66 Am. St. Rep. 589, 69 N. W. 203) against the fund to be applied to satisfy the indebtedness found to exist in plaintiff's favor against the principal defendant, and is analogous to similar proceedings under attachment. In either case the property is subjected to the payment of the lien, whether obtained by attachment or garnishment, and the court does not, in a strict sense, render any judgment against the defendant, but merely adjudges the prima facie amount of plaintiff's recovery and subjects the property liened in garnishment or attachment to its payment.

It is here noticeable that this defect, destroying jurisdiction over the *res,* the subject-matter in the main action, and of the power to proceed therein, is one of record. It does not depend upon any question of whether the record as made reflects the truth as to service, but in-

stead it plainly appears from the jurisdictional papers that the affidavit for publication is insufficient to perpetuate the jurisdiction of the court over the *res* already temporarily acquired by garnishment beyond the sixty-day period after such garnishment, and upon the expiration of which period such limited jurisdiction of the court must fall in the absence of personal service in the main action, or of the first publication of a valid substituted service of the summons after the filing of a valid affidavit as a basis therefor. "Such service is a condition precedent to the preservation of such jurisdiction." Rhode Island Hospital Trust Co. v. Keeney, 1 N. D. 411, 48 N. W. 341; Gribbon v. Freel, 93 N. Y. 93. This time limit is prescribed by §§ 6844 and 6850, Rev. Codes 1905. Within sixty days after the garnishment and the jurisdiction thereunder acquired under § 6850, without a valid publication of this summons having been made upon a valid affidavit for publication, all jurisdiction, either of the *res* or of the garnishee defendants, was wholly devested by lapse of time under the provisions of § 6844, Rev. Codes 1905. This must be so unless the proceedings against the garnishee defendants are to be treated as a separate action or proceeding which may legally proceed to judgment independent of the outcome of the principal action. Section 6982 provides that the proceedings against a garnishee shall be deemed an action, and that the garnishee defendant is a party defendant, but also provides that no trial of the garnishee action shall be had until the plaintiff shall have judgment in the principal action. Rights acquired by default of the garnishee defendant must be held in abeyance and be without force upon which to enter a judgment against the garnishee until after the judgment is entered against the principal defendant. Under our statute and under the general law, garnishment proceedings are "purely ancillary to the suit against the principal defendant, dependent upon it for their existence and validity. If for any reason the court fails to get jurisdiction of the principal suit, the garnishment must inevitably fall with it. This principle is universal. It is all the same whether the lapsing came from failure to get personal service of the summons in the principal suit upon the defendant therein in the time and manner prescribed by law, or from failure to comply with the statute directing the mode of obtaining substituted service thereof by publication or otherwise. . . . The garnishee may raise and rely upon the objection [of want of valid

judgment against the principal defendant] at any stage of the proceedings. He does not waive it by answering and going to trial. If judgment has been rendered against the defendant, but is absolutely void, of course, it cannot support the garnishment proceedings, and the garnishee should move the court that he be discharged on that ground. . . . On the other hand, if the court has jurisdiction of the principal suit, the garnishee can inquire no further, for no errors or irregularities therein, not jurisdictional, will in any manner impair the protective force of the garnishment judgment, and beyond this the garnishee has no interest." Rood, Garnishment, §§ 224–226. To the same effect, see Shinn, Attachm. & Garnishment, §§ 707–713. "No valid judgment can be entered against a garnishee until a valid judgment is first entered against the principal defendant. Therefore a judgment against the garnishee entered upon a judgment against the principal defendant which is void will be no protection to the garnishee when he is thereafter sought to be held liable on his indebtedness to the principal defendant." See also Waples, Attachm. & Garnishment, §§ 474–479. "The plaintiff's right of action, the effectiveness of the judgment, and the protection of the garnishee from subsequent attack after payment under judgment, depend upon the principal action, its rightful institution, rightful judgment thereon, and rightful execution of the judgment." And again: "The suit against the garnishee is hypothetical. The right of action depends upon the right of the plaintiff in the main suit. If the plaintiff is the creditor of the principal defendant, and has a right of action against the garnishee, he may step into the shoes of the principal defendant and so become the creditor of the garnishee. In other words, he has no right to recover of the garnishee unless he can show that he ought to be subrogated to the right of the garnishee's creditor, and empowered to sue on that creditor's right. . . . He [garnishee] is held chargeable if the plaintiff should make out his main case. The decree, though literally positive and free from all contingency, is qualified by law so as to render it dependent upon the principal judgment. . . . He is sued by one not a party to the contract by which he became indebted, and is required to perform his contract obligations by violating them; at least, the letter of the contract is disregarded by the law which diverts the payment." See also §§ 545, 546, and 552 of same authority. "Garnishment is in no sense a new suit, but is a special

auxiliary remedy for more effectually reaching defendant's credits, and is always ancillary to the main action under which it is brought." 20 Cyc. 979. In 20 Cyc. 1146, we find: "Where payment is made under a judgment which is void by reason of the court not having jurisdiction of the subject-matter of the parties, such payment is regarded as voluntary, and will not be available to the garnishee as a defense," citing many cases.

But respondent contends that though such defense might have been availed of by the garnishee defendant at any time prior to judgment taken against him, he cannot after entry thereof be heard to urge want of jurisdiction, and that the entry of judgment against him gives rise to a conclusive presumption that a valid judgment has been rendered against the principal defendant in the main action, citing 20 Cyc. 1140; Holbrook v. Evansville R. Co. 114 Ga. 1, 39 S. E. 937; Heffernan v. Grymes, 2 Leigh, 512, cited in Cyc. as supporting its text announcing such to be the general rule. An investigation of these cases discloses that neither sustain the text that a garnishee defendant is concluded by the judgment rendered against him from questioning the validity of the judgment rendered against the principal defendant, if the text has reference to such a proceeding as this, where the judgment against the principal defendant is not a judgment, but is void for want of jurisdiction. The text must be taken as announcing a rule under a judgment where jurisdiction in the principal action was had in the court rendering it. This statement at 20 Cyc. 1140 B, must be considered with 20 Cyc. 1074, subdivs. 2 and 3, and 20 Cyc. 1144, subdivs. 3, b, c, d. The first case above, Holbrook v. Evansville R. Co., was a review of certiorari proceedings on a record in which jurisdiction affirmatively appeared, and an attack on the record disclosing jurisdiction in the main action was made by the garnishee to establish as a fact that service in the main action had never been had, and therefore no jurisdiction existed in the main case, and hence the garnishee judgment was void. And this question of fact of service was actually tried on the garnishee's application in the court entering the judgment, and determined in favor of the fact of service and the validity of the judgment before certiorari was instituted. The holding, then, is in effect simply that the garnishee under those circumstances had his day in court on the very question of fact of whether service had been had,

the basis for jurisdiction, and he was concluded thereby on the facts as disclosed by the record reviewed in certiorari. There is much said in the opinion that would sustain respondent's contention in this case, and that may have caused the unqualified statement in the text in 20 Cyc. at 1140 B. But the decision in the case cited turned on another point entirely. No authorities are cited or reviewed in that case, and the *obiter* is clearly contrary to fundamentals. Likewise, Heffernan v. Grymes, supra, is not authority for the proposition that a garnishee defendant, after judgment against him, cannot question jurisdiction of person or subject-matter in the main action. What is there said under garnishment and attachment is pure *obiter,* as the judgment against the garnishee defendant is in fact reversed on the merits, as was also the finding of the lower court of liability of the absent and defaulting principal defendant to the plaintiff on the merits. However, in this connection, a later case of Central of Georgia R. Co. v. Wright, 5 Ga. App. 514, 63 S. E. 639, squarely supports respondent's contention that this garnishee is estopped by the judgment against him to question jurisdiction in the main suit against the principal defendant. But this case cites no authority. The opinion reasons in a circle, *i. e.,* "while it is true that there must be a valid judgment against this principal debtor . . . before a valid judgment can be rendered against the garnishee, still" because a judgment is rendered against the defendant, the court is presumed to have had before it proof of jurisdiction and proper evidence on which to render it, and the garnishee is concluded. Because a court must have jurisdiction before rendering a valid judgment, it is there conclusively presumed that it must have had it because it purported to render a judgment. And this was said in the face of a direct attack on the judgment on grounds of a want of jurisdiction by a party who is not protected in payment, but is a volunteer therein, if he pays without the court having actually (not presumptively) had jurisdiction in the principal case. The very statement of the fallacy of such reasoning ought to be sufficient to condemn it. But let us see the possible consequences to this garnishee defendant of announcing a rule barring him, upon any mere presumption, from questioning jurisdiction of the court in the main action under this direct attack on jurisdictional grounds. Should we hold him to be so concluded, he must and does pay the judgment against him. Suppose he removes

to Minnesota or some other state. The defendant there demands payment of this debt still owing to him from the garnishee, unless these garnishment proceedings protect the garnishee defendant against compulsory repayment. Payment is refused. Suit follows. The foreign court examines the record made in this case there offered by this garnishee, there a principal defendant, upon whom there rests the burden of establishing a defense of his payment of a judgment against him taken under valid garnishment proceedings, and the foreign court scans the offered record of this case and discerns at once from the record that no jurisdiction was ever here obtained in the principal action, to proceed by substituted service *in rem* against the fund temporarily liened by garnishment. The sole question always open in a defense or suit upon a foreign judgment is the question of fact, Did the foreign court have jurisdiction? Needless to say the defendant there would not be concluded by these proceedings, void because of want of jurisdiction. Jurisdiction must there appear to have been here had to protect this garnishee, a defendant there. Though by circuitous reasoning, amounting but to judicial fiat, he might be here held concluded to question jurisdiction in this suit, that fact would not avail in such an inquiry there into jurisdiction, with the consequent and inevitable result that he would be called upon by legal proceedings to pay the debt the second time. Such a condition should be avoided, and all that is necessary to obviate it is an application of the usual and elementary rules applying to jurisdiction. The defendant can urge want of jurisdiction of person or subject-matter at any stage of proceedings, and no good reason exists why a garnishee defendant should not be permitted to do likewise. A garnishee defendant has liabilities by contract and operation of law in common with the defendant. He is held to an exercise of good faith toward his defendant in any disclosure he may make under garnishment, and in many courts circumstances may compel him to defend in behalf of the defendant (20 Cyc. 1143), though on this a conflict exists. He is charged to know the record facts concerning jurisdiction in the main action, to enable him to know whether a payment under a purported judgment against himself as a garnishee is a legal payment of the debt of the defendant, or whether it is on the contrary a volunteer payment to a party not in privity of law by judgment with himself and the principal defendant. 20 Cyc. 1146. On the

question of the record concluding an attack for want of jurisdiction, consult Black on Judgments, §§ 275 and 276, holding the better rule to permit even collateral attack on jurisdictional grounds. We quote therefrom: "The pith of the argument extracted from them [cases like those cited by respondent, holding recitations in a record or judgment conclusive upon jurisdiction], and which is truly as applicable to one class of judgments as to the other [having reference to judgments *in personam* and judgments *in rem*], is that to say that the paper relied on is a record because it recites the defendant's appearance, and that he cannot deny the jurisdiction over him because the paper is a record, is reasoning in a vicious circle; and that unless a court has jurisdiction it can never make a record such as to import absolute verity, and the party ought not to be estopped by any allegation in a supposed record from proving any fact which goes to establish the truth of a plea alleging want of jurisdiction." The leading case on this subject is Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589. If this is the law as to collateral attack, which question we do not decide, it certainly should be here applied, where the attack as here is direct by motion by a party to the proceedings. On the conclusiveness of this judgment, see § 229, Rood on Garnishment: "The writer has found but few reported cases deciding the question whether the statements contained in the record of the main action are conclusive upon the garnishee. These all seem to have been rendered by courts adopting the doctrine that the record is conclusive. They hold that the garnishee cannot dispute the record of the main action. Whatever may be the law between the parties, or even between one of the parties and a stranger to the suit, the writer is of very firm conviction that this indisputable presumption should never be applied against a garnishee, who, from his position, can never raise the question directly, and whose property may be taken from him upon that judgment, or proceedings ancillary to it, without any assurance of protection from future liability in another state. It is generally admitted that the record of any judgment may be contradicted to show want of jurisdiction, where such judgment was rendered by a court of another state, and this has often been done in garnishment proceedings. Adding to this the well-settled principle that payment of a garnishment judgment rendered by a court having no jurisdiction affords the garnishee no protection, what assurance

has the garnishee that he will not again be required to pay in a suit in another state?" The validity of a garnishment "depends upon the pursuit of the steps prescribed by law for its prosecution, and no aid can be lent to it by the voluntary acts of the garnishee. Like attachment by seizure, its validity depends upon the proper performance of each and every act prescribed by the statute, and without the performance of any one of them the court is without jurisdiction, and the whole proceeding is void and will be reversed on error." If no act of the garnishee can lend validity to the garnishment proceedings, certainly no act of his can indirectly accomplish the same purpose in the proceedings attempted in the main action, when the court is on the face of the record without jurisdiction. Either the judgment in the main action binds both defendant and garnishee, and this independent of any act of the garnishee, whether defaulting or otherwise, or it binds neither defendant nor garnishee, being invalid as to both. It is hard to consistently reason that the garnishee defendant may be bound by his own act in defaulting in answer, and thereby be obligated to pay plaintiff a sum as a debt belonging to the defendant, and at the same time the defendant be not bound for want of jurisdiction, which concededly he may raise at any time. To so hold is to in effect, by legal proceedings, confiscate the property of the garnishee defendants for the benefit of a third party, and to deny to him the command of the statute, § 6982, that the court shall only render such a judgment "as shall be just to all parties, and properly protect their respective interests." It is only a valid judgment entered with jurisdiction and in strict compliance with statutory requirements, that operates to "acquit and discharge him (garnishee) of all demands by the defendant." It is only such a judgment, with plain record proof of jurisdiction, that a foreign jurisdiction will recognize, and the record of the domestic judgment should affirmatively disclose jurisdiction, that a garnishee compelled to pay a debt to another thereunder may exhibit the judgment record with proof of our statutes in the foreign jurisdiction, and be protected there as well as at home. He should not be forced to disgorge on some theory of estoppel against raising jurisdictional defects conceived by the domestic court, which theory the foreign court will not be obliged to respect if it follows the fundamentals governing jurisdiction. We hold the determination as to indebtedness, as well as all

other proceedings had in the main action, were void for want of compliance with statute governing substituted service of summons; that all proceedings had in garnishment were merely ancillary thereto, and had for their source as to authority to enter judgment against the garnishee defendants, the necessity of valid proceedings in the main action, and all fell with the failure of the qualified jurisdiction once obtaining in the main action; and that the garnishee's default in answer in nowise validated the judgment against the principal defendant, which if void rendered the judgment against the garnishees void, and that the garnishee is not estopped by default in answer, to question the conclusiveness, on jurisdictional grounds, of the main judgment.

The order and judgment appealed from is ordered set aside, and all proceedings dismissed as void for want of jurisdiction.

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

THE CITY OF LAMOURE, a Municipal Corporation, Charles A. Finch, E. W. Field, and Christian Deisem v. M. C. LASELL and Deitrich Suemper and Henry Harke, Manchester State Bank, a Corporation, Romain F. Beeber, and Ada Woodward.

(145 N. W. 577.)

Complaint — allegations — incomplete and defective — remedy — not by demurrer — motion to make definite — bill of particulars.

1. Where the allegations of a complaint are simply imperfect, incomplete, and defective in form, rather than in substance, the remedy is not by demurrer, but by a motion to make more definite and certain, or for a bill of particulars.

Complaint — form — substance — motion to make definite.

2. The complaint in this action is lengthy, and is sufficiently set out in the opinion, and it is *held* that in matters of form it is at most only subject to attack for incomplete and imperfect statements, and that the remedy for its defects is by motion to make more definite and certain, or for a bill of particulars, rather than a general demurrer.

Municipality — suits — parties — city — vacation of part of plat.

3. A municipality is regarded as the representative of the public for the purpose of maintaining suits in equity or at law for the vindication of public

rights; hence a city is a proper party plaintiff in an action to cancel an attempted vacation of a part of the plat of an addition to the city, and to enjoin the fencing and obstruction of streets therein by the party so attempting to vacate by declaration of vacation.

Adverse claims — action to determine — city may maintain — streets, alleys, and parks.

4. Section 7519, Rev. Codes 1905, authorizes the maintenance of an action to determine adverse claims to real property by any persons having an estate or interest in, or lien or encumbrance upon, real property, whether in or out of possession thereof, . . . against any person claiming an estate or interest in, or lien or encumbrance upon, the same, for the purpose of determining such adverse estate, interest, lien, or encumbrance. *Held* that the city may maintain an action under such section to determine the rights of a party claiming title in fee to streets, alleys, and parks dedicated to public use.

Additions to city — purchasers of lots — presumption — vacation of part of plat — arbitrary action — judicial question.

5. Parties purchasing lots in an addition to a city are presumed to purchase with reference to the convenience of access to the lots from others points, to facilities for drainage, securing water, and accessibility to public parks and other similar influences, and all such may enter into the consideration for the purchase. When there is shown an attempt to vacate a large part of the plat of an addition to a city, which was dedicated long before plaintiffs, who were such purchasers, made their purchases, an attempted vacation made under the provisions of § 2941, Rev. Codes 1905, which authorizes the vacation of any part of a plat, when such vacation does not abridge or destroy any of the rights and privileges of other proprietors in said plat, is made subject to objection by such purchasers, and when objection is made, the abridgment or destruction of their rights becomes a judicial question, and in such case a portion of a plat cannot be arbitrarily vacated simply by the execution and filing of a declaration of vacation.

City — streets — sidewalks — public work — rights acquired — infringement.

6. Where the city has improved the streets and alleys and laid cross walks, sewers, and water mains, ordered sidewalks constructed, and done other acts of a public nature, and at the expense of the city, within part of a plat attempted to be vacated by the filing of a declaration of vacation, the city has acquired rights which would be infringed or destroyed by the vacation of the plat, of which it cannot be deprived, at least without its consent.

Opinion filed January 24, 1914.

Appeal from an order of the District Court of LaMoure County overruling a demurrer to plaintiffs' complaint seeking to determine the

rights of the city and other parties in the streets, alleys, and parks of a portion of Northern Pacific addition to the city of LaMoure, and to enjoin the defendants from obstructing, closing, and otherwise interfering with the streets, alleys, etc., in such addition, *Hon. J. A. Coffey,* J.

Affirmed.

Lasell & Knapp, for appellants.

The demurrer of the defendants should have been sustained. The test as to whether a complaint can resist attack by demurrer is whether the demurring party could admit *all* there is in the complaint and still escape liability. Donovan v. Allert, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441.

Plaintiffs have mistaken their remedy. The nature of the action is determined by the prayer for relief. Where the facts as set forth by the pleader are in doubt, resort may be had to the prayer to ascertain what the pleader means or intends. 31 Cyc. 111; Gillett v. Tregange, 13 Wis. 472, 7 Mor. Min. Rep. 432; Topping v. Parish, 96 Wis. 378, 71 N. W. 367.

The action seems to have for its object the quieting of title in the city, in the *streets* and *alleys* of N. P. addition to city. Such action is not proper, because abutting property owners own to the middle of the streets. Donovan v. Allert, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441.

Recitals of an instrument which are incorporated into a pleading are not averments, and tender no issue. Omaha Sav. Bank v. Rosewater, 1 Neb. (Unof.) 723, 96 N. W. 68.

Where a pleading is doubtful, after giving its language a reasonable construction, it should be resolved against the pleader. J. Thompson & Sons Mfg. Co. v. Perkins, 97 Iowa, 607, 66 N. W. 875; Lampman v. Bruning, 120 Iowa, 167, 94 N. W. 562.

All essential facts must be stated definitely, and not left to inference. 1 Estes, Code Pl. 4th ed. pp. 166, 218; Moore v. Bessie, 30 Cal. 572; Hicks v. Murray, 43 Cal. 522; Elwood v. Gardner, 45 N. Y. 349; First Nat. Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473; Jasper v. Hazen, 2 N. D. 401, 51 N. W. 583; Green v. Palmer, 15 Cal. 411, 76 Am. Dec. 492; 4 Enc. Pl. & Pr. 600; McConnoughey v. Weider,

2 Iowa, 408; Miller v. Van Tassel, 24 Cal. 459; Baltzell v. Nosler, 1 Iowa, 588, 63 Am. Dec. 466; Thompson v. Munger, 15 Tex. 523, 65 Am. Dec. 176.

In such an action it must appear from the complaint that plaintiff had some right, and that there had been a violation of such right. Emerson v. Nash, 124 Wis. 369, 70 L.R.A. 326, 109 Am. St. Rep. 944, 102 N. W. 921.

The law of this state does not permit plaintiff city to bring an action to quiet title. Milwaukee Trust Co. v. Van Valkenburgh, 132 Wis. 638, 112 N. W. 1083; Manning v. School Dist. 124 Wis. 84, 102 N. W. 356; Miller v. Bayer, 94 Wis. 123, 68 N. W. 869; Kliefoth v. Northwestern Iron Co. 98 Wis. 495, 74 N. W. 356.

Jones & Hutchinson, for respondent.

The city of LaMoure is the proper party plaintiff in this action, and has the right to maintain. It is interested in its streets, alleys, and parks, and in protecting the rights of the public in same. Methodist Episcopal Church v. Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; Lynde v. Budd, 2 Paige, 191, 21 Am. Dec. 84, and cases cited.

The platting and recording of an addition to a city, the use of such addition by the city, the keeping up of the streets and sidewalks therein by the city, constitute a complete dedication thereof to the public use. Corning & Co. v. Woolner, 206 Ill. 190, 69 N. E. 53; Clark v. McCormick, 174 Ill. 164, 51 N. E. 215.

The sale and conveyance of lots in a town or city, and according to its plat, imply a grant or covenant to the public that the streets and alleys shall be forever open to the public use, free from all claim of the proprietors. Cole v. Minnesota Loan & T. Co. 17 N. D. 409, 117 N. W. 354, 17 Ann. Cas. 304.

The proprietors of an addition to a city, after dedication and sale of lots, cannot, by mere declaration, vacate a part of such addition, and deprive the public of the use of the streets, etc., therein. Chrisman v. Omaha & C. B. R. & Bridge Co. 125 Iowa, 133, 100 N. W. 63; State v. Leaver, 62 Wis. 387, 22 N. W. 576; Reilly v. Racine, 51 Wis. 526, 8 N. W. 417; Shea v. Ottumwa, 67 Iowa, 39, 24 N. W. 582; Madison v. Mayers, 97 Wis. 399, 40 L.R.A. 635, 65 Am. St. Rep. 127, 73 N. W. 43; 36 Century Dig. § 1429.

SPALDING, Ch. J. The appeal in this case is from an order overruling a general demurrer to plaintiff's complaint, and is taken by two of the defendants, M. C. Lasell and Deitrich Suemper. We only give the material parts of the complaint, omitting the allegations relating to defendants who do not appeal, and which allegations in no way affect the remaining paragraphs of the complaint.

It is alleged first, that the city of LaMoure is a municipal corporation under the laws of the state of North Dakota. Paragraph 3 alleges that the plaintiff Finch is a resident citizen, elector and taxpayer of the city of LaMoure, and has been for a period of fifteen years, and that, among other property owned by him in the said city of LaMoure, are certain lots in block 46 of Northern Pacific addition thereto, and that his home and residence for himself and family are upon a part of the property described, and that he brings this action, not only for himself, but for and in behalf of others similarly situated in said city of LaMoure.

Paragraphs 4 and 5 contain similar allegations as to plaintiffs Deisem and Field, except that their property is in other blocks in the same addition.

Paragraph 6 alleges that, prior to May, 1883, one Wells was the owner of certain real estate, including that contained in Northern Pacific addition to LaMoure; that, at said time, it was contiguous to what was known as the town of LaMoure, a nonincorporated town, but composed of places of business and residences, and these were constituent parts of a village or town in which people made their homes and conducted their businesses; that said Wells, while said town was growing, and for the purpose of partaking in the advantages and reaping the benefits thereof, and enhancing the value of his property, and making sales to buyers, surveyed and platted a portion of his said real estate as a part of said town of LaMoure, in the usual manner, laying out lots, blocks, streets, and alleys, and designating a part thereof as a public park; that a plat of such survey was prepared by said Wells, and the addition was named Northern Pacific addition to LaMoure; that such plat designated all lots and blocks by number, streets and boulevards by name and number, and said park by name; that it was filed by said Wells as owner in the office of the register of deeds of LaMoure county, June 21, 1883, and, ever since that time, has remained of

record without change or alteration, until an attempted vacation of a part thereof in the year 1910, referred to later; that, during all such times, said Wells and his successors in interest in said property have taken and received all benefits and privileges from said lands being so marked and described and platted, and used as such by the people of said town, now city. A copy of such plat is annexed and made a part of the complaint.

Paragraph 8 alleges that defendant Suemper is the owner of record of a part of the real estate included in said addition described in the vacation declaration later referred to, and made a part of the complaint.

Paragraph 10 alleges that the defendant Beeber is the owner of record of that part of the real estate in such addition described as tract 3, belonging to M. C. Lasell, in the vacation declaration; a copy of which is attached and made a part of the complaint; that said Lasell is the preceding owner of record, but that both Lasell and Beeber claim to have certain interests or title therein, the extent of which is unknown to plaintiffs.

In ¶ 11, it is alleged that, subsequent to the filing of said plat of said addition, the owner proceeded to sell lots located therein, as designated in such plat, and for a period of about twenty-seven years he and his successors in interest have continued in the sale and disposition of portions of said tract in the form of lots, as shown on said plat, and with the streets, alleys, and parks of record, as designated in said plat; and that these plaintiffs purchased the property now owned by them, and described and situated in said addition, in view and relying upon said plat, and the streets, alleys, and parks thereon designated, and designation of streets, alleys, and parks; they had to these plaintiffs and others similarly situated a value, and that they parted with the consideration therefor.

Paragraph 12 alleges that, about the 5th of November, 1883, the village of LaMoure was duly incorporated under the laws of the territory of Dakota by the residents of the unincorporated town of LaMoure, and included therein was such addition, and that Wells, the owner thereof, joined and participated in such village organization.

Paragraph 13 alleges that, subsequent to the filing of said plat, and on the 5th of December, 1905, said village of LaMoure, as incorporated, was duly organized as a city under the laws of the state, and

said Northern Pacific addition was included within, and was a part of such reorganization; that there was never any protest to either the organization of the village of LaMoure or the city, or any objection made by said owner, Wells, or his successors in interest.

Paragraph 14 alleges the acceptance by the people residing in the village or town of LaMoure of said plat, with its designation of lots, etc., and such streets and alleys were used as were necessary for the uses of the inhabitants of the town; that, upon the organization and incorporation of the village of LaMoure, said plat was accepted, acted upon, and the designation of streets, etc., accepted by said town of LaMoure, which acceptance of such designation is continued in the reorganization of said village as a city; that among other acts of acceptance by said village and city are the following: That the streets, alleys, and highways therein had been accepted and used by the public; that improvements had been made by said city in all parts of said addition; that grades for said streets, alleys, and highways had been made, public work done therein by said city; that permanent public improvements, such as sewer mains and water mains, had been established in various parts of said addition; that sidewalks had been ordered put in, cross walks laid by said city at the expense of said city; that, until shortly prior to the institution of this action, no tax had been demanded or paid upon that portion of said plat marked and designated as streets, alleys, and highways; that no levy thereon has ever been made, and that it has at no time been considered as private property; that nonpayment of taxes on said streets, alleys, and highways was continued for about twenty-seven years, and that said improvements have continued during the same period of time; that the acts of acceptance refer not only to the whole of said addition, but to the parts specifically referred to and made the subject of this action.

Paragraph 15 alleges that the streets, alleys, and highways, boulevards and parks, contained in said addition, and as designated on said plat, have been so used for a period of more than twenty years; that more than twenty years have elapsed since the dedication of said portion of said real estate designated as alleys and streets, etc.; that they have been dedicated to the public use, accepted and used by the public and the said city, for the use and benefit of its inhabitants and the people residing therein; that the said city of LaMoure is now entitled to

the use of said streets, alleys, parks, and boulevards; that defendants have no title, interest, or equity thereon whatsoever.

It is alleged in ¶ 16, that the defendants, Suemper and others, including defendant Lasell, upon the 16th of April, 1910, filed in the office of the register of deeds of said LaMoure county, and had recorded, a so-called vacation declaration for a portion of said Northern Pacific addition, which vacation declaration is attached; that therein said defendants attempted to vacate a portion of said addition, regardless of the rights of plaintiffs and other citizens of the city, and of the city itself; that since the filing of said declaration, defendants have unlawfully appropriated streets and alleys of said addition to their own private use, and closed the same to the use of the public; that said defendants have plowed said streets and alleys, and asserted title and ownership of the same, and claim some right, title, and interest therein adverse to plaintiffs; that said defendants threaten to forbid the use of said streets, alleys, etc., by plaintiffs and the other residents of the city of LaMoure, the public, and the city itself, and to prevent the city of LaMoure from conducting its work of public improvements thereon.

The prayer for relief asks: First, that the defendants be required to set forth their adverse claims to the property described, particularly the streets, alleys, highways, and parks attempted to be vacated, that the validity, superiority, and priority of said adverse claims be determined; second, that the claims of defendants be adjudged null and void; third, that the title to the streets, alleys, highways, and boulevards and parks in said addition be adjudged to be in the public, for the public use of the city of LaMoure and the citizens thereof, and that the defendants be debarred and enjoined from asserting any claim or interest therein adverse to said public use and purposes; fourth, that the plaintiffs have general relief, and that defendants, their agents, etc., be perpetually enjoined from appropriating said streets, alleys, highways, and parks to their private use, and closing the same to the use of the public, and that the defendants, etc., be restrained, pending the determination of this action.

An examination of the plats referred to indicates that the attempted vacation is of about the north half of such plat; that the individual plaintiffs own a number of lots at a greater or less distance from the

vacated part, and also from a considerable park which was included in the plat, but that some of such property and the residence of one plaintiff are within less than two blocks from such park.

The declaration of vacation referred to attached to the complaint, in brief recites that the defendants Suemper, Harke, and Lasell are the owners of the property therein described, consisting of lots, blocks, etc., all of which are particularly described, and this is followed by a declaration that they vacate the plat as to certain described property, is signed and acknowledged, and was filed for record, April 16, 1910, in the office of the register of deeds. General demurrers were interposed to the complaint. These demurrers were overruled, with leave to the defendants Beeber, Harke, Suemper, and Lasell to withdraw same, and answer within thirty days after service of the order. They elected to stand upon their demurrer, and defendants Suemper and Lasell have appealed to this court from the order, and assign as error such order.

The brief of appellants is largely devoted to complaints of the insufficiency, or rather incompleteness, of the allegations of the complaint. Their objections to ¶¶ 1, 2, 3, 4, and 5 are practically conceded to be without merit. As to ¶ 6, it is complained that there is nothing which connects either of the appellants with the plat, and it is therefore contended that, if the statements were admitted to be true, they would not affect any rights plaintiffs have in the addition in question. We cannot agree with this contention. The declaration of vacation is a part of the complaint, and, while the complaint does not constitute nor contain a complete abstract of the title, showing a chain of conveyances from Wells, who platted the addition, to these defendants, the declaration of vacation alleges that they are the owners of the property which they attempt to vacate. The complaint alleges that they have taken possession and inclosed and obstructed the streets, alleys, etc., in the part of the addition which they seek to vacate. As far as the ownership goes, they were not in position to deny ownership at the time of the attempted vacation. The complaint also alleges that each of the parties at the time the action was commenced claimed an interest or title therein. It seems to be objected that the city and private individuals who are plaintiffs could not join as plaintiffs in

the action, but no authorities are cited, and the subject is not discussed. We therefore pass it.

It is said that there is no allegation showing that the city of La-Moure had any right or interest in the matter whatsoever. We think the complaint shows to the contrary. It alleges that the city had accepted the plat; that it had been used by the public; that improvements had been made in all parts of said addition by the city; that grades of the streets, alleys, and highways therein had been made; public work done thereon; that permanent improvements, such as sewer mains and water mains, had been established in various parts of said additions; that sidewalks had been ordered and cross walks laid by the city, at the expense of the city; that such improvements had continued during a period of about twenty-seven years. We think this is a sufficient statement to indicate that the city has an interest in the streets and alleys and parks of the addition, and to entitle it to maintain the action. The municipality is regarded as the representative of the public for the purpose of maintaining suits in equity or at law for the vindication of the public rights, hence the city was a proper party plaintiff in this action. Methodist Episcopal Church v. Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; Hoboken Land & Improv. Co. v. Hoboken, 36 N. J. L. 544; Lee v. Harris, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230; California v. Howard, 78 Mo. 88.

The next objection is that the allegations regarding streets, alleys, etc., affected, are too general. It is conceded that the action might be maintained if particular streets, alleys, etc., were designated. This is not ground for demurrer. At most it is an incomplete statement of facts, and the defendants' remedy was by motion to make more definite and certain, or for a bill of particulars. The complaint is sufficient when attacked by a general demurrer, if it contains allegations of facts sufficient to reasonably and fairly apprise the defendant of the nature of the claim against him. Where the allegations are simply imperfect, incomplete, and defective in form, rather than substance, the remedy is as above suggested. Weber v. Lewis, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105; Milwaukee Trust Co. v. Van Valkenburgh, 132 Wis. 638, 112 N. W. 1083. A large part of appellants' brief comes under the foregoing objection, so we need not make further specific reference to such parts.

It is next objected that the plaintiffs have not brought the proper action. It is claimed that it is in effect an action to quiet title. This objection might possibly be good under some statutes authorizing the bringing of actions to quiet title, but it has no merit when considered with reference to the statute of this state. It is not necessary for us to pass upon the character of the title to the streets held by the city, or the interests of the individual plaintiffs therein in this connection. It is evident that the defendants claim some interests in the streets.

Section 7519, Rev. Codes 1905, is not limited in its application, as similar provisions were formerly limited in this state, and as they may still be in some states, but it authorizes the maintenance of an action to determine adverse claims by "any persons having an estate or interest in, or lien or encumbrance upon, real property, whether in or out of possession thereof, and whether said property is vacant or unoccupied, against any person claiming an estate or interest in, or lien or encumbrance upon, the same, for the purpose of determining such adverse estate, interest, lien, or encumbrance." It therefore is immaterial as regards the right to maintain the action whether the interests of the defendants in the public streets dedicated in the plat in question are those of the holders of a title in fee, or an easement, or are simply qualified rights to the title thereto. It is likewise immaterial whether the rights of the city and plaintiffs are those of the owners of an easement only, or of a title in fee, or of a right to the use and occupation.

It is urged that the complaint contains no allegations showing that any right of any plaintiff has been violated by the defendants. There is no merit in this contention subject to the qualification which we have already discussed. The action to quiet title, if this be such an action, will lie to quiet whatever title or interest the city or the individual has in the property in dispute. Section 7519, supra. The complaint clearly shows that the defendants are asserting interests adverse to those of the public, in the streets, alleys, and public parks previously dedicated to public use.

We have now covered the objections noted in the brief of appellants to the order of the trial court, and might stop at this point, but, on oral argument, it was urged that we should announce the law regarding the right of the owner of a part of a plat to vacate it in the manner attempted by these defendants. We shall confine the decision resulting from our own research on this subject to the narrowest possible grounds.

Art. 1, chap. 32, Rev. Codes 1905, provides for laying out towns, additions thereto, and subdividing outlots. Article 3 of the same chapter relates to the vacation of plats by written declaration. Section 2940 permits the proprietors of any town, village, city, or addition thereto, to vacate the same at any time before the sale of any lots therein, by a written declaration recorded in the same office with the plat to be vacated, and that it shall operate to destroy the force and effect of the record of the plat vacated, and devest all public rights in the streets, alleys, etc., described in such plat. It further provides that, where any lots have been sold in the plat, it may be vacated as therein provided by all the owners of lots in such plat joining in the execution of the declaration.

Section 2941 authorizes the vacation of any part of a plat under the provisions and subject to the conditions of art. 3, provided such vacation does not abridge or destroy any of the rights and privileges of other proprietors in said plat, and provided that it shall not authorize the closing or obstructing of any public highways laid out according to law.

Section 2941 is the authority under which appellants claim to have proceeded in declaring the vacation of the portion of the plat referred to. The substance of these sections seems to be the same as corresponding sections of the Code of Iowa. The language is not identical, but the meaning we think is the same. It must be apparent that, when one buys a lot in a platted addition to a city, the lot itself is not the only consideration he receives. He purchases with reference to the streets, alleys, public parks, and other public conveniences incident to the lot which he purchases. He may desire a residence in an addition thus platted because of the convenience of access and egress afforded by the streets and alleys. Some of them may add peculiar value to his purchase by reason of affording direct routes to and from some point. He may prefer to reside in a particular addition because of the number and convenience of the public parks or commons to the property which he purchases. The drainage or the feasibility of constructing sewers and water mains may be of considerable importance and enter into his consideration in the purchase. These and many other elements may be controlling influences. They are among the natural and usual consid-

erations weighed by one contemplating the purchase of property in any part of a city or village. If the owner of the remaining part of the plat or of a considerable portion of it can at will, and without the consent either of interested parties or of authorities competent to pass upon such matters, arbitrarily vacate a plat or such part thereof as may include the facilities and considerations which have entered into the purchase by those who have acquired lots therein, the owner would be afforded an opportunity to injure others which the law does not recognize without their consent or a suitable consideration.

As we have indicated, the complaint in the case at bar contains a copy of the plat of this addition, which shows that a considerable tract of land, designated Spring park, was located within a short distance of the property of one of these plaintiffs; that some of the streets and alleys attempted to be vacated were continuations or parts of the same streets and alleys on which the individual plaintiff's properties were situated; and these facts were doubtless an essential part of the consideration in their purchase, as alleged. It is said in Shearer v. Reno, — Nev. —, 136 Pac. 705, the purchasers took not merely the interest of the grantor described in his deed, but, as appurtenant to it, an easement in the streets and in the public grounds named on the plat or map, with an implied covenant that subsequent purchasers should be entitled to the same rights. In that case it was held that the grantor could no more recall his easement and covenant than he could recall any other part of the consideration. They added materially to the value of every lot purchased. That case differs from the instant case in that there was no formal acceptance, and here there was an acceptance by the city as well as by the organization which preceded it. It was held that the dedication was irrevocable when third parties had been induced to act and part with value and consideration on it, and that it was not affected because the property was not at once subject to the uses designed. We commend the reading of that opinion for authorities on this question, which we need not review. However, in some material respects, the Nevada statute differs from ours.

Several Iowa authorities are cited bearing upon the case here involved. In McGrew v. Lettsville, 71 Iowa, 150, 32 N. W. 252, it is held that the term "proprietors" as used in the chapter relating to vacation of plats or parts of plats indicates the owners of the land, and not alone

the persons who originally plat the land. In Chrisman v. Omaha & C. B. R. & Bridge Co. 125 Iowa, 133, 100 N. W. 63, the court says: "It is possible that under § 918 the title of the municipality in streets and alleys may be devested, even after their acceptance, where the original plat is vacated in its entirety. Ordinarily, such action would not seriously affect any public interest, for the reason that it will not be likely to occur after any considerable improvements have been made. On the other hand, it is not reasonable to suppose that it was intended by the legislature to confer on the proprietors of a plat the power to devest a city or town of title in streets on which public moneys had been expended, without the knowledge or consent of its officers. A fair interpretation would seem to be that the public rights in the streets which may be devested are those of acquiring title by acceptance."

We construe the last sentence above as an intimation that the arbitrary vacation of a part of a plat may be only made by the proprietor prior to its acceptance by the municipality. In the case at bar, however, we need not go as far as the Iowa court seems to have gone in the case quoted. All we need consider is whether the rights and privileges of purchasers of lots in the Northern Pacific addition to LaMoure are abridged or destroyed by the vacation of the portion of the plat attempted to be vacated. While, as we have heretofore said, the complaint in this respect may be imperfect, and some of the allegations indefinite and perhaps incomplete, yet facts are charged which tend to show an abridgment of the rights and privileges of these purchasers and owners, and whether their rights and privileges are abridged or destroyed is a question for determination on trial after issues are framed. So far as the personal plaintiffs are concerned, the most that the appellants can claim under this statute is that they may arbitrarily vacate the portion of the plat of the addition, if none of the parties entitled to be heard in the premises object, and subject to the determination of the question suggested in a proper judicial proceeding. As to the city, the complaint charges facts showing that it has acquired rights which will be infringed if not destroyed by the vacation of the plat. It is true that the complaint does not specify the streets and alleys, or the portions of the plat, wherein the sewers, water mains, sidewalks, crossings, and roads have been constructed, but if it is nec-

essary to enter into these details in the complaint, the statements are only incomplete, and not bad on demurrer. The court must take the allegations for the purpose of this case as admitted by appellants, and, when so taken, they show an abridgment or obstruction of public use and rights. Our conclusion is that the order of the District Court overruling the demurrer must in all things be affirmed.

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1. A cause of action implies a right to begin an action and someone who has a right to sue, and someone who may be lawfully sued. It involves both a

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2. Under N. D. Rev. Codes 1905, § 7345, permitting the consolidation of actions between the same parties, which might have been joined, four distinct actions in claim and delivery brought by different parties and involving different property, but against the same defendant, cannot be consolidated, either for the purposes of trial in the district court, or of appeal to the supreme court, even though they involve similar questions of law and fact. Willoughby v. Smith, 209.

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1. An order of the district court dismissing, without any hearing on the merits or plea being filed, proceedings to punish a statutory criminal contempt, under Rev. Codes 1905, § 9374, for violation of an injunction granted in an action to abate a liquor nuisance, is not appealable, since § 7573 only allows appeals in contempt cases where the defendant has been found guilty, and in the absence of a statute authorizing appeals in criminal contempt cases no appeal will lie. State ex rel. Heffron v. District Ct. 32.
2. An order of the district court which confirms an order of the county court in an ancillary administration, refusing to grant a petition filed by the principal administrator under the direction of the principal court for the sale of real estate in North Dakota, and the transmission of the proceeds thereof to such principal court for the payment of the debts there provided, is a final order affecting a substantial right made in a special proceeding and is appealable as such under § 7225, Rev. Codes 1905. Dow v. Lillie, 512.

NOTICE OF APPEAL.

3. Where a notice of appeal is served in good faith, and a mistake is made in failing to serve a statement of errors of law complained of and specifications of insufficient evidence with the notice of appeal as required by § 4, chap. 131, of Laws of 1913, additional time may be allowed to correct the mistake by the supreme court under § 7224, Rev. Codes 1905, and § 7 of the new practice act. Wilson v. Kryger, 77.

TIME FOR APPEAL.

See also supra, 3; infra, 18.

4. Laws of 1913, chap. 131, § 14, shortening the time for appeals from one year to six months, applies only to those judgments entered, or notice of the entry of which was served, less than six months prior to the date the act went into effect, and while as to such judgments appeals must be taken within six months after the act took effect, all other judgments are governed by the old statute. Wilson v. Kryger, 77.

APPEAL AND ERROR—continued.

5. The "rendition" of a criminal judgment within the meaning of § 10139, Rev. Codes 1905, allowing one year thereafter for appeal, means the pronouncement of sentence, and does not include the entry of judgment. Re Schantz, 380.

STATEMENT OF CASE.

See also infra, 17, 18.

6. The service of a statement of the errors of law complained of and specifications of insufficient evidence with the notice of appeal as required by § 4, chap. 131, of Laws of 1913, is not a jurisdictional prerequisite to such appeal. Wilson v. Kryger, 77.
7. In case of an appeal from an order of the district court confirming an order of the county court in an ancillary administration, refusing to grant a petition filed by the principal administrator under the direction of the principal court for the sale of real estate in the state of the ancillary administration, and the transmission of the proceeds thereof to such principal court for the payment of debts there provided, where the trial in the district court is had upon a stipulation of facts and depositions which are included in the certified record on appeal from the county to the district court, and no oral evidence is taken in the latter court, no statement of the case is necessary, and the supreme court can take into consideration the evidence as presented by the depositions and the stipulations. Dow v. Lillie, 512.

ASSIGNMENTS OF ERROR.

8. Assignments of error not supported in appellant's brief and argument will be deemed by the supreme court to have been abandoned. Willoughby v. Smith, 209.
9. An assignment of error must, in order to be of any avail, challenge some specific ruling of the trial court. Willoughby v. Smith, 209.
10. An assignment of error alleging the insufficiency of the evidence to sustain the verdict, or that the verdict is contrary to law and was the result of prejudice and bias on the part of the jury, or that the entire record shows that appellant did not get a fair trial, is not a proper assignment, and will be ignored by the supreme court. Willoughby v. Smith, 209.
11. Assignments of error relating to rulings in the admission and exclusion of testimony cannot be considered on appeal from a judgment and the denial of a motion for a new trial, where they are not predicated upon specifications of error as settled by the trial court in the statement of the case.

APPEAL AND ERROR—continued.

and especially where no reference is made as required by rule 14, (old rules) to the pages of the abstract in which the specifications or the matter upon which they are assigned are to be found. Morris v. Bradley, 362.

PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

12. An objection that an instruction to which exception was taken in other respects required, rather than permitted, the jury to allow interest, will not be considered on appeal where it is not incorporated in the exception to the charge, and was not called to the attention of the trial court at the time of the motion for a new trial. Stoll v. Davis, 373.

13. An exception to an excerpt from a charge to which no objection was taken while the jury was in the court room will not be considered on appeal where the entire charge properly covers the issue. Stoll v. Davis, 373.

DISMISSAL OF APPEAL.

14. An appellant cannot as a matter of right dismiss his own appeal. Thornhill v. Olson, 27.

15. The supreme court will not, except upon a showing of inadvertence or mistake, or some other reason which may entitle the petitioner to equitable consideration and to a special order, allow a dismissal of an appeal without prejudice. Thornhill v. Olson, 27.

16. The supreme court will allow a dismissal of an appeal without prejudice to appellant's right to take a second appeal or to take advantage of the provisions of the new practice act, N. D. Laws 1913, chap. 131, where it appears that the trial court, on rendering judgment for plaintiff in an action to recover possession of real property, brought after the passage of the new practice act, but before it took effect, announced that an order would be entered staying all proceedings except the entry of judgment; that plaintiff, on the day before the entry of the stay order, entered judgment and took possession of the premises, and that plaintiff was ejected, and defendant, to obtain an order to restrain plaintiff from interfering with his possession, took an appeal to the supreme court from the judgment, neglecting to make a motion for a new trial, necessary, under the old practice, to a review of the evidence, relying upon the agreement of counsel that the appeal could be taken under the new practice act. Thornhill v. Olson, 27.

17. Where actions are improperly consolidated for the purposes of trial, by the express or implied consent of counsel, respondents cannot urge that the ap-

APPEAL AND ERROR—continued.

peals be dismissed on the ground that but one statement of the case was settled, and that a separate abstract and brief was not filed on each appeal, especially where no possible prejudice is claimed or can result to the respondents. Willoughby v. Smith, 209.

18. Mere delay in settling a statement of the case or in taking an appeal, where the appeal was taken within the statutory limit, is not ground for dismissal of the appeal. Wilson v. Kryger, 77.

PRESUMPTIONS ON APPEAL.

19. District courts are courts of record and have general jurisdiction, and on appeal all reasonable presumptions must be indulged in support of their judgments. State v. Riley, 236.

20. An intention to adjourn in two days will, in the absence of a contrary showing on appeal, be presumed the reason for pronouncing sentence, no objection thereto having been interposed, on the day following the verdict of guilty, in view of § 1088, Rev. Codes 1905, as amended by chap. 88, Laws of 1907, providing that the time appointed for sentence must be at least two days after the verdict, if the court intends to remain in session so long, or, if not, at as remote a time as can be reasonably allowed. State v. Riley, 236.

21. It not appearing from the record, in an action for damages for an unjustifiable assault, that any request or demand was made upon the defendant, his attorney, or any witness to produce a club admittedly used by the defendant in the affray, no presumption could be indulged in that the club was secreted, and that evidence was suppressed. Stockwell v. Brinton, 1.

DISCRETION OF LOWER COURT.

22. Abuse of discretion upon the part of a trial court occurs where the court erroneously decides that a stream is a navigable one, and grants a mandatory injunctional order for the destruction of a bridge pending a trial upon the merits. Bissell v. Olson, 60.

23. The trial court in a criminal case abuses its discretion by denying a motion before trial for leave to amend the information by inserting the title of the court in the caption as required, where the information has been duly filed with the clerk and bears an indorsement on the back containing the court's title. State v. Butler, 231.

ERRORS WAIVED OR CURED BELOW.

24. The portion of an instruction complained of must be considered in the light of all the instructions, and when thus considered it will be upheld, even

APPEAL AND ERROR—continued.

though defective or inaccurate when considered alone, if it is supplemented by other instructions fully and correctly stating the law. Carpenter v. Dickey, 176.

25. Any error of the court committed in instructions concerning exemplary damages in an action only for damages for an unjustifiable assault is rendered nonprejudicial by a verdict of the jury that no cause of action existed even for compensatory or actual damages. Stockwell v. Brinton, 1.

26. A party does not acquiesce in an invalid judgment so as to be barred from asserting its invalidity on appeal, by abandoning a motion to vacate the judgment pending an appeal to the supreme court, and later dismissing the appeal without prejudice to an appeal upon the merits after denial of another motion to vacate because of the pendency of the appeal, where he later makes another motion to vacate the judgment, which is granted by the trial court. Crane v. First Nat. Bank, 268.

27. Any objection to the action of a court in limiting the right of argument to forty-five minutes at the close of the testimony is waived where the attorneys for both parties immediately afterwards enter into an agreement to submit the cause to the jury without argument, although at the time the court made the ruling one of the parties excepted to it. Stockwell v. Brinton, 1.

REVIEW OF FACTS.

28. A finding of the trial court, on a partnership accounting, against the contention of the partner who had sole charge of the business that the reason his books showed a large balance of cash received over that disbursed was that in many instances collections were included in the item of cash sales, will be sustained on appeal, where upon many of the days upon which he claimed that the collections were so included the collections were larger than the cash item, a large part of the collections were not in cash, and such partner was an experienced business man and the business had been apparently prosperous. Semple v. Burke, 200.

29. A finding by the trial court in an action by a bank to foreclose a chattel mortgage, that, as claimed by the mortgagor, a deed of land by himself was made, not to the cashier with whom he dealt, but to the bank, with the understanding that a part of it was to be applied in payment of the mortgage,—will be upheld upon appeal for trial *de novo*, where, though the testimony of the cashier and mortgagor is in direct conflict, that of the former is vacilating and insufficient, while that of the latter is direct and consistent, and is corroborated by reason and by circumstances, including the fact that the cashier's name as grantee was inserted in the deed in different ink from that used in the body of the instrument. Merchants' State Bank v. Kershtien, 603.

APPEAL AND ERROR—continued.

What Errors Warrant Reversal.

30. Assignments of error based upon rulings in the admission and exclusion of evidence will not be sustained, where from the whole record it is manifest that no prejudicial error was committed. Willoughby v. Smith, 209.

31. An error in the admission of the opinion of a witness as to the ownership of property is not prejudicial, where he has already testified to the same effect without objection. Willoughby v. Smith, 209.

32. The question, "Well, the jury cleared him, did they not?" put to a witness upon cross-examination by defendant in a civil action for assault, the question referring to a criminal trial against the same defendant for the same assault, is not prejudicial where the court sustained an objection, and fully cautioned the jury to disregard it. Stockwell v. Brinton, 1.

33. It is prejudicial error to refuse to permit cross-examination of the maker of a note as to how he claims to have paid the note, where he has testified on rebuttal that a full settlement was had between him and the payee, conveying the impression to the jury that the note, as well as all of the other notes held by the payee against him, were talked over at and included in the settlement, and where it is a vital and much disputed issue as to whether any sum is still due on any of the notes. Willoughby v. Smith, 209.

34. The refusal of the trial court to give requested instructions, when the same are substantially and correctly covered by the general instructions, is not prejudicial error. Willoughby v. Smith, 209.

35. A defendant in an action for breach of promise of marriage aggravated by seduction, in which the testimony of both parties is uncorroborated and conflicting, is prejudiced by the court's denunciation at length of what it terms the role of physician and detective, in ruling out the defendant's offer to show by testimony of a physician who attended the plaintiff during confinement, that she stated to him that the defendant had made no promise of marriage. Boren v. McWilliams, 558.

Determination and Disposition of Cause.

36. The supreme court may order a new trial where a consideration of the entire record convinces them that a fair and impartial trial was not accorded appellant, though there is no specific ruling necessarily constituting prejudicial error requiring a reversal. Willoughby v. Smith, 209.

37. A new trial must be granted on appeal, without the alternative of a remittitur, where the verdict is so excessive as to unmistakably show passion or prejudice on the part of the jury, in view of § 7063, Rev. Codes 1905, includ-

APPEAL AND ERROR—continued.

ing in the enumeration of grounds for a new trial excessive damages appearing to have been given through passion or prejudice. Waterman v. Minneapolis, St. P. & S. Ste. M. R. Co. 540.

38. Where the jury may have erroneously considered a carrier liable for punitive damages, in addition to compensatory damages, and included them in the verdict, a judgment on the verdict will be set aside, and a new trial ordered. Voves v. Great Northern R. Co. 110.

39. The supreme court, in reviewing a ruling upon a motion for judgment upon the pleadings in an action upon a hail insurance policy, when the insured is not entitled to a full recovery because of an allegation in the answer that the insured had only a half interest in the crops, will not direct the entry of a final judgment, but will remand the case for a new trial, as the insured may be able, in a trial upon the merits, to establish a full insurable interest and a right to recover the full amount of the policy. Berglund v. State Farmers' Mut. Hail Ins. Co. 17.

ARGUMENT OF COUNSEL.

Waiver of objection to limitation of time for, see Appeal and Error, 27.

ASSAULT.

Presumption on appeal in action for, see Appeal and Error, 21.
On passenger, see Carriers, 1.
Punitive damages for, see Damages, 1, 2.
Cross-examination of witness in action for, see Witnesses, 4, 5.

ASSIGNMENT FOR CREDITORS.

A general assignment for the benefit of creditors, which does not purport on its face to transfer all of the debtor's unexempt property, and provides for the payment to the debtor of any surplus which may remain in the assignee's hands after satisfying the claims of the assenting creditors, and which contains a provision directing the assignee, after converting the property into cash, "to distribute the proceeds of said property ratably among the creditors of the party of the first part as shall consent to this trust agreement, and shall agree in consideration of the benefits accruing to them thereunder to absolve and discharge the party of the first part from any and all liability," is void as an unlawful attempt by the debtor to coerce his creditors to surrender a portion of their just claims as a condition to receiving their just share of the estate, and tends directly to

ASSIGNMENT FOR CREDITORS—continued.
delay and hinder them in the collection of their claims; and also on the ground that it does not purport to transfer all the debtor's unexempt property, and provides for the payment due him of any surplus which may remain in the assignee's hands, thus operating to put the surplus beyond the reach of nonassenting creditors, and to hinder and delay them in the collection of their demands. Maclaren v. Kramar, 244.

ASSIGNMENTS OF ERROR.
On appeal, see Appeal and Error, 8–11.

ATTACHMENT.
As to garnishment, see Garnishment.

ATTEMPT.
To commit rape, see Rape.

ATTORNEYS.
Argument of, see Trial, 1.

AUTOMOBILES.
Action against seller of oil for damages to automobile resulting from use thereof, see Evidence, 20, 21; Sale, 1.

BAIL. See Criminal Law, 5.

BANKS.
Right of state to preference in distribution of assets of insolvent bank, see Subrogation.

BAR.
Of limitations, see Limitation of Actions.

BILL OF PARTICULARS. See Pleading, 3.

BILLS AND NOTES.
Payment by note, see Payment.

BLANKS.
In caption of indictment, see Indictment, etc., 1.

BOARDS OF HEALTH. See Health.

BONDS.
Redelivery bonds, see Claim and Delivery.
Failure of contractor to furnish statutory bond, see Counties, 3.
Of guardian, see Guardian and Ward.

BREACH OF PROMISE.
Prejudicial error in action for, see Appeal and Error, 35.
Measure of damages for, see Damages, 3.
Evidence in action for, see Evidence, 13, 15.
Examination of plaintiff in action for, see Witnesses, 1.

BRIDGES.
Review of discretion granting injunction for destruction of, see Appeal and Error, 22.

BROKERS.
Instruction in action by broker to recover commissions, see Trial, 9.

BURDEN OF PROOF. See Evidence, 7–9.

CAPTION.
Of indictment, see Indictment, etc., 1.

CARRIERS.

PASSENGER CARRIERS.

Damages for assault on passenger, see Damages, 1, 2.

1. Proof of ratification of an unwarranted assault by a conductor upon a passenger, sufficient even to go to the jury, is not established by his mere retention in service, where it appeared he had been in the employ of the

CARRIERS—continued.

company for eleven years; that he possessed good habits, and that he had never before had any similar trouble. Voves v. Great Northern R. Co. 110.

CARRIERS OF FREIGHT.

2. A maximum freight rate prescribed by statute for the intrastate carriage of a commodity is presumed to be reasonable, and the presumption continues until the rate is shown beyond a reasonable doubt to be confiscatory. State ex rel. McCue v. Northern P. R. Co. 438.
3. In determining the reasonableness of statutory maximum rates for the intrastate carriage of a commodity, the actual reasonable market value of railroad property, and not the so-called "railroad value," is the proper basis for ascertaining whether the carrier's total net income from carrying intrastate rates yields a fair return on the investment. State ex rel. McCue v. Northern P. R. Co. 438.
4. A maximum freight rate fixed by statute for the intrastate carriage of a commodity is not confiscatory as a matter of law so long as it produces more revenue than is sufficient to pay the actual expenses occasioned by the transportation of the commodity, even though it is insufficient to reimburse the carrier for that proportion of the railroad's fixed or overhead cost properly apportionable to the commodity; and in order to establish that a noncompensatory rate is confiscatory under such circumstances, either the carrier must show, in addition to the noncompensatory feature of the commodity rates, that if net total intrastate earnings are insufficient to yield a reasonable return on the fair valuation of the property used to produce its net earnings, or it must be reasonably certain that the loss on the commodity under the commodity rate reduces the balance of the net intrastate freight earnings to a point where such total net intrastate earnings, including the loss on the commodity rates, failed to yield a fair and reasonable return on the investment. State ex rel. McCue v. Northern P. R. Co. 438.

CAUSE.

Of accident, sufficiency of proof of, see Evidence, 23.
Question for jury as to, see Trial, 5.

CHANGE OF VENUE. See Venue.

CHATTEL MORTGAGE.

Review on appeal of findings in action to foreclose, see Appeal and Error, 29.

CHILDBIRTH.
Suffering occasioned by, as element of damages for breach of promise in which seduction is an element, see Damages, 3.

CITIES. See Municipal Corporations.

CLAIM AND DELIVERY.
Consolidation of actions, see Action or Suit, 2.

5. The redelivery undertaking in an action of claim and delivery is not only a substitute for the possession of the property by the plaintiff, but as security for any money judgment recovered. Larson v. Hanson, 406.
6. The redelivery undertaking in an action of claim and delivery must be construed with reference to the intent of the legislature in providing for it and the purpose for which it is given. Larson v. Hanson, 406.
7. A judgment for money only is properly rendered against the sureties on a redelivery undertaking in claim and delivery, where the record in the action of claim and delivery shows that the defendant sold the property, which consisted of about forty head of live stock, at auction to ten or twelve different purchasers; that some of them resold it to others, and that it was scattered over a wide territory a year before the trial of that action, although the principals on the undertaking testify in general terms that they could have returned the property at such time, especially where it appears that the sureties executed the undertaking on the day of the advertised sale, and knew that it was to be sold, were present at the sale, saw it sold, and made no objection. Larson v. Hanson, 406.
8. The sureties upon a redelivery undertaking executed by two defendants in an action of claim and delivery are not discharged from liability by the dismissal of the action as to one of the defendants either with the consent or without objection by the plaintiff. Larson v. Hanson, 406.
9. While the customary practice in an action of claim and delivery is to take judgment in the alternative for the return of the property, or for its value if a return cannot be had, judgment need not be entered for its return or possession where on the record of the trial it appears that the property cannot be returned. Larson v. Hanson, 406.
10. To avoid the penalties of a redelivery bond in replevin, the obligor must show a delivery or offer of delivery of the property within a reasonable time, in substantially the same condition that it was when taken; and this condition is not met by showing a tender of the property, a threshing machine, after the lapse of six years, during which time it has stood exposed to the elements, some of the parts having been taken from it, even though there is evidence that owing to substantial repairs, its value has not depreciated. Vallancy v. Hunt, 611.

CLAIMS.
Against decedents' estates, see Executors and Administrators.
Against city, presentation of, see Municipal Corporations, 2.

CLASSIFICATION.
By statute, see Constitutional Law, 2–5.

CLOUD ON TITLE. See also Public Lands, 1.

1. Under the principle that he who seeks equity must do equity, the grantee of lands mortgaged to secure a third person's debt cannot, as plaintiff in an equitable action to determine adverse claims, obtain relief against the mortgage without paying the debt, although the mortgagor was not liable for the debt, and its enforcement, by foreclosure or otherwise, is barred by the statute of limitations. Keller v. Souther, 358.
2. A city, whether claiming the fee, an easement, or qualified rights, may maintain an action to determine the rights of a party claiming rights adverse to the public in streets, alleys, and parks dedicated to public use, under § 7519, Rev. Codes 1905, authorizing the maintenance of an action to determine adverse claims to real property, by any person having an estate or interest in, or lien or encumbrance upon, real property, whether in or out of possession thereof, against any person claiming an estate of interest in, or lien or encumbrance upon, the same, for the purpose of determining such adverse estate, interest, lien, or encumbrance. Lamoure v. Lasell, 638.

COMMON CARRIERS. See Carriers.

COMPENSATION.
Of officers, see Officers.

COMPLAINT.
Of plaintiff, see Pleading, 3, 4.

COMPUTATION.
Of term of imprisonment, see Criminal Law, 5.

CONCLUSIVENESS.
Of judgment, see Judgment, 5, 6.

CONDITION PRECEDENT.
To taking effect of warranty, see Sale, 2, 3.
To maintenance of action for specific performance, see Specific Performance, 3.

CONFIDENTIAL COMMUNICATIONS.
Evidence of, see Evidence, 11–14.

CONFISCATION.
Confiscatory freight rates, see Carriers, 2, 4.

CONSOLIDATION.
Of actions, see Action or Suit, 2; Appeal and Error, 17.

CONSTITUTIONAL LAW.
Confiscatory freight rates, see Carriers, 2, 4.

Vested Rights.

1. There is no vested and inalienable right of property in that which is a nuisance, or the use of which is injurious to the public weal. State v. Olson, 304.

Equal Protection and Privileges.

2. It is not necessary that all forms of vice should be condemned in order that any particular form may be prohibited. State v. Olson, 304.
3. Police laws need not necessarily be omnibus in their character, and it is permissible to legislate against one form of evil even though many other and similar evils have not been condemned. State v. Olson, 304.
4. No product which is injurious to the community should escape regulation and condemnation because there are others equally injurious which are not at the same time regulated or forbidden. State v. Olson, 304.
5. The fact that the anti-snuff act (Laws 1913, chap. 271) which makes it unlawful "for any person, firm, or corporation to import, manufacture, distribute, or give away any snuff or substitute therefor, under whatever name called, and as defined in this act," and which defines snuff as "any tobacco that has been fermented, or dried or flavored or pulverized or cut or scented, or otherwise treated, or any substitute therefor or imitation thereof, intended to be taken by the mouth or nose," exempts from its pro-

CONSTITUTIONAL LAW—continued.

visions "ordinary plug, fine cut, or long cut chewing tobacco, as now commonly known to the trade of North Dakota," does not render such statute invalid or subject to the charge of class legislation. State v. Olson, 304.

DUE PROCESS OF LAW; RIGHT TO LIFE, LIBERTY, AND PROPERTY.

6. Police statutes can only be set aside as unreasonable interferences with the right to liberty and property if it can be said that they cannot possibly have any reasonable relation to the public health, morality, or to the real public welfare. State v. Olson, 304.

7. Laws 1913, chap. 271, making it unlawful "for any person, firm, or corporation to import, manufacture, distribute, or give away any snuff or substitute therefor, under whatever name called, and as defined in this act," and which defines snuff as "any tobacco that has been fermented or dried or flavored or pulverized or cut or scented, or otherwise treated, or any substitute therefor or imitation thereof, intended to be taken by the mouth or nose," and which further provides that "ordinary plug, fine cut, or long cut chewing tobacco, as now commonly known to the trade of this state, shall not be included in such definition,"—is valid and cannot be successfully attacked as being unconstitutional upon the ground that it deprives any person of life, liberty, or property without due process of law, or denies to any person the equal protection of the laws. State v. Olson, 304.

CONSTRUCTION.

Of redelivery bond, see Claim and Delivery, 6.

Of statute, see Statutes, 2, 3.

CONTAGIOUS DISEASES.

Protection against, see Health.

CONTEMPT.

Appeal in contempt case, see Appeal and Error, 1.

Mandamus to compel court to try charge of contempt, see Courts, 2.

Dismissal of attachment for, see Dismissal, 2.

Dismissal of charge of, as *res judicata* in subsequent proceeding, see Judgment, 5.

CONTRACTS.
Of counties, see Counties.
Good faith of transfers between relatives, see Evidence, 18.
Specific performance of, see Specific Performance.

MEETING OF MINDS.

1. No meeting of the minds essential to an enforceable contract occurs when the person named as mortgagee in an instrument intended as a mortgage offers to sell it, representing it to be a mortgage, whereas it has not been acknowledged by the mortgagor's wife, and the recipient of the offer replies that he will look into the title and take over the instrument if everything is all right, there being no showing that everything was "all right," and it appearing that the mortgagor's wife afterwards said that she would not have signed had she known the nature of the instrument. Yetter v. Goolsby, 403.
2. An offer of sale of land with a request for an answer by return mail demands an acceptance by such mail, and in absence thereof the offerer will be released. Ackerman v. Maddux, 50.
3. A merchant cannot recover the amount alleged to be due him for goods, under a complaint alleging a sale at a fixed price, where the evidence shows that the goods, priced at $130, were delivered upon the purchaser's offer to pay $30 in cash and a colt which he valued at $100 and promised to pasture during the summer, the merchant agreeing to "look at the colt" later, and that the merchant having inspected the colt two days later, refused to allow $100 for it, and merely terminated the negotiations when the purchaser refused to take less, and that nothing further was done until the purchaser, at the end of the summer, left the colt in a livery stable with notice to the merchant, who shortly before had declined to accept it when tendered. Strobel v. Thorstensen, 388.

CONTRIBUTION.
Between sureties, see Principal and Surety.

CONVERSION. See Trover.

COUNTIES.
Injunction to restrain performance of contract by county commissioners, see Injunction.
Mandamus to county commissioners, see Mandamus.

COUNTIES—continued.

Duty of county officer to turn fees into county treasury, see Officers.

1. A contract by county commissioners for the construction of a courthouse cannot be attacked upon the ground that, as it contains no provision for lighting, heating, and sewerage systems, the building will be useless for courthouse purposes, and the commissioners must intend to exceed the sum authorized by the voters by subsequently supplying such systems, where the commissioners are by statute given the entire supervision of the construction of the courthouse, and the contract price does not exceed the amount authorized, and the county seat has no electric light plant, no city waterworks, and no sewerage system. McCann v. Carlson, 191.
2. A contract by county commissioners for the construction of a courthouse is not void because the title to the site has not been vested in the county at the time of the execution of the contract, where the offer of an individual to donate a tract of land owned by him and to pay the expense of condemning an adjoining tract has been accepted by the commissioners. McCann v. Carlson, 191.
3. A contract by county commissioners for the construction of a courthouse is not void because the statutory bond was not furnished by the contractor until after the signing of the contract, where the statute, requiring the giving of the bond before the contract is entered into, makes the commissioners in such event personally liable for all claims not paid within thirty days after the completion of the work. McCann v. Carlson, 191.

COUNTY AUDITOR.

Duty to account for fees, see Mandamus; Officers, 2–5; Statutes, 3.

COURTHOUSE.

Contract for construction of, see Counties.

Injunction to restrain performance of contract for construction of, see Injunction.

COURTS.

Presumptions in support of judgment of, see Appeal and Error, 19.

Judicial notice by, see Evidence, 1.

As to judges, see Judges.

COURTS—continued.

As to venue of action, see Venue.

Process of, see Writ and Process.

1. The jurisdiction of a district court at a regular term in which the judge of another district presided during the trial of a criminal action in which the defendant filed an affidavit of prejudice against the resident judge under § 9929, Rev. Codes 1905, is not affected by the fact that at the same time the resident judge conducted a trial in another county of his district, pursuant to an adjournment of a regular term therefor, which began as required by law before the term in which the affidavit of prejudice was filed. State v. Riley, 236.
2. The supreme court, under the superintending control granted in N. D. Const. art. 4, § 86, and under N. D. Rev. Codes 1905, § 7822, providing that mandamus may be issued by it to any inferior tribunal to compel the performance of an act which the law specially enjoins, and § 9374, providing that any person violating an injunction granted in cases of violation of the liquor laws shall be punished for contempt, may, in the absence of other adequate remedy, compel by mandamus the district court, where it has erroneously decided that it is without jurisdiction, to proceed and try a charge of contempt of court for violation of an injunction granted in an action to abate a liquor nuisance. State ex rel. Heffron v. District Ct. 32.

CREDIBILITY.

Of witnesses, see Witnesses, 3, 4.

CRIMINAL CONTEMPT. See Appeal and Error, 1.

CRIMINAL LAW.

Appeal in criminal case, see Appeal and Error.

Abuse of discretion in criminal case, see Appeal and Error, 23.

Discrimination in legislating against vice, see Constitutional Law, 2–5.

Due process in criminal matters, see Constitutional Law, 7.

Constitutionality of statute forbidding manufacture or sale of snuff, see Constitutional Law, 5, 7.

Evidence in criminal case, see Evidence.

Sufficiency of proof to sustain conviction in criminal case, see Evidence, 24.

CRIMINAL LAW—continued.

As to requisites and sufficiency of indictment, information, or complaint, see Indictment, etc.

Change of judge in criminal case, see Judges, 2.

Former jeopardy, see Judgment, 5.

New trial in criminal case, see New Trial, 3.

Argument of state's attorney, see Trial, 1.

Change of venue, see Venue.

See also Prostitutes; Rape.

1. No criminal should be allowed to complain or to escape punishment because someone else is more of a criminal or more dangerous to society than he. State v. Olson, 304.

PRELIMINARY EXAMINATION.

2. A preliminary examination is not, in view of § 9791, Rev. Codes 1905, dealing with criminal information, a prerequisite to a prosecution under an information charging the defendant with maintaining a public nuisance continuously from a named day to the commencement of the criminal action, which was begun by filing the information during a regular session of the district court. State v. Riley, 236.

JURISDICTION; IRREGULARITIES.

Jurisdiction of court in criminal case, see also Courts, 1.

3. A criminal case transferred from one judicial district to another is a case pending in the district to which it is transferred, and a judgment rendered therein is not void under § 6765 of Revised Code of 1905, providing that no district judge shall give judgment in any action or proceedings not pending in his district. State v. Winbauer, 43.

4. Where jurisdiction is obtained of the person and subject-matter of a criminal prosecution, no error or irregularity in its exercise can make the judgment void. State v. Winbauer, 43.

SENTENCE AND IMPRISONMENT.

Presumption in support of legality of sentence, see Appeal and Error, 20.

CRIMINAL LAW—continued.

Authority of judge to pronounce judgment and sentence outside his judicial district, see Judges, 1.

5. A temporary release from imprisonment by legal means, the period of which is excluded by § 9513, Rev. Codes 1905, in computing the term of imprisonment, is effected by obtaining after sentence a certificate of probable cause, furnishing a bail bond on appeal, and serving notice of appeal, and it continues after the defendant has dismissed his appeal until he delivers himself up, in compliance with his bond, for imprisonment. Re Schantz, 380.

CROP-CONTRACT PLAN.

Purchase of land on, see Vendor and Purchaser.

CROSS-EXAMINATION.

Of witness, see Appeal and Error, 32, 33; Witnesses.

CUSTODY.

Of infants, habeas corpus to determine, see Habeas Corpus; Judgment, 6.

DAMAGES.

Remittitur on appeal, see Appeal and Error, 37.
Evidence in mitigation of, see Evidence, 17.
New trial because of error as to, see Evidence, 37, 38.
Instructions as to, see Trial, 6.

EXEMPLARY OR PUNITIVE.

1. A carrier is not liable for punitive damages, in addition to actual damages, for an unwarranted assault by a conductor upon a passenger, under § 6562, Rev. Codes of 1905, which is declaratory of the common law, where the unwarranted acts were in no way authorized, sanctioned, or ratified by the carrier. Voves v. Great Northern R. Co. 110.
2. A railroad conductor who commits an unwarranted assault upon a passenger is liable for actual and punitive damages. Voves v. Great Northern R. Co. 110.

BREACH OF PROMISE.

3. The physical suffering occasioned by the birth of a child resulting from

DAMAGES—continued.

seduction may be considered in determining the damages in an action for breach of promise of marriage, in which seduction is a proper element in aggravation. Booren v. McWilliams, 558.

PERSONAL INJURIES.

4. A recovery of damages for future medical treatment of a sprained ankle cannot be sustained, where there is no proof in the record justifying such an allowance and the expenses to be incurred in the future are too uncertain and speculative. Carpenter v. Dickey, 176.
5. A verdict for more than $5,000 for a sprained ankle is so grossly excessive as to shock the sense of justice and to show passion and prejudice of the jury. Carpenter v. Dickey, 176.
6. A verdict of $25,000 and interest as damages for injuries resulting in traumatic neurosis, as to whose curability medical experts disagree, the weight of their testimony being in the affirmative, is so excessive as clearly to indicate passion or prejudice on the part of the jury. Waterman v. Minneapolis, St. P. & S. Ste. M. R. Co. 540.

DEBTOR AND CREDITOR.

Assignments of debtor, see Assignment for Creditors.
Creditors of decedent, see Executors and Administrators.
As to remedies of creditors, see Garnishment.
Exemptions of homestead, see Homestead.

DECEDENTS.

Administration of estates of, see Executors and Administrators.

DECLARATIONS.

In pleading, see Pleading, 3, 4.

DEDICATION.

Action by city to cancel attempted vacation of part of plat, see Parties, 2.
Complaint in suit to cancel attempted vacation of part of plat, see Pleading, 4.

1. A city acquires a right in a platted addition thereto, of which it cannot, without its consent, be deprived by the mere filing of declaration of vacation

DEDICATION—continued.

of a large part of the plat, where it has improved the streets and alleys and laid crosswalks, sewers, and water mains, ordered sidewalks constructed, and done other acts of a public nature at its own expense within the part of the plat attempted to be vacated. Lamoure v. Lasell, 638.

2. Parties purchasing lots in an addition to a city are presumed to purchase with reference to the convenience of access to the lots from other points, to facilities for drainage, securing water, and accessibility to public parks and other similar influences; and a large part of the plat which was dedicated long before they purchased the lots cannot, over their objection and by the mere filing of a declaration of vacation, be vacated under § 2941, Rev. Codes 1905, which authorizes the vacation of any part of a plat, when such vacation does not abridge or destroy any of the rights and privileges of other proprietors in the plat. Lamoure v. Lasell, 638.

DEEDS.

Tax deeds, see Taxes.

DEFAULT.

Of purchaser of land on a crop-contract plan, see Vendor and Purchaser.

DEFAULT JUDGMENT. See Garnishment; Judgment, 1, 7, 8.

DEFENSE.

Necessity of pleading, see Pleading, 5.

DEFINITENESS.

Of indictment, see Indictment, etc., 5.

Of complaint, see Pleading, 3.

DEFINITIONS.

Female, see Prostitutes.

Snuff, see Snuff.

See also Dictionaries.

DELAY.

In settling statement of case or in taking appeal, see Appeal and Error, 18.

DELAY—continued.
In serving notice of cancelation of land contract, see Vendor and Purchaser, 1.

DEMURRER.
To complaint, see Pleading, 3.

DICTIONARIES.
Dictionaries do not give to words their meaning, but are simply chronicles of what has been done, the meaning of words being determined by prior usage. State v. Olson, 304.

DISCHARGE.
Of surety, see Claim and Delivery, 8.

DISCRETION.
Review of, on appeal, see Appeal and Error, 22, 23.

DISCRIMINATION.
Unconstitutionality of, see Constitutional Law, 2–5.

DISEASE.
Protection against, see Health.

DISMISSAL.
Appealability of order of dismissal, see Appeal and Error, 1.
Of appeal, see Appeal and Error, 14–18.
As to one of two defendants in action of claim and delivery, see Claim and Delivery, 8.
Of charge of contempt as *res judicata*, see Judgment, 5.

1. A promise by a district court to dismiss an action upon the doing of certain things which it is for the court by a subsequent order to determine have been done does not constitute a dismissal. State ex rel. Heffron v. District Ct. 32.
2. The dismissal of an action to abate a liquor nuisance, in which an injunction is granted, does not in itself operate to dismiss an attachment for a contempt of court committed by the unlawful sale of liquor on the premises affected during the life of the injunction. State ex rel. Heffron v. District Ct. 32.

DISORDERLY HOUSES. See Prostitutes.

DISQUALIFICATION.
Of judge, see Judges, 2.

DISTRICT COURTS.
Presumption in support of judgment of, see Appeal and Error, 19.
Jurisdiction of, see Courts, 1.

DOCUMENTARY EVIDENCE. See Evidence, 10.

DRUGS.
Judicial notice of fear in regard to, see Evidence, 2.

DUE PROCESS OF LAW. See Constitutional Law, 6, 7.

DUPLICITY.
In indictment, see Indictment, etc., 2–4.

EASEMENTS.

1. A landowner acquires no easement in the right of way of a railway company by using a private crossing for the prescriptive period, since the use of the same by the railway company for the passage of trains precludes the exclusive user essential to the acquisition of an easement. Lincoln v. Great Northern R. Co. 504.
2. A railway company's admission of the existence of a private way, in answering a complaint alleging a grant of a private way across its road bend, cannot be construed as an admission of a grant of an easement in its right of way, since a railway company, being of a public nature, is without power to grant an easement in land inconsistent with its own uses for railway purposes. Lincoln v. Great Northern R. Co. 504.

EMBEZZLEMENT.
By agent, see Principal and Agent.

EMPLOYEES. See Master and Servant.

ENTRY.
Of judgment, see Judgment, 2–4.

EQUAL PROTECTION AND PRIVILEGES. See Constitutional Law, 2–5.

EQUITABLE ESTOPPEL. See Estoppel.

EQUITY.
Subrogation in, see Subrogation.
See Cloud on Title; Injunction; Maxims; Specific Performance.

ERROR. See Appeal and Error.

ESTOPPEL.
To complain of invalid judgment, see Appeal and Error, 26.

A person who obeys a quarantine established upon his house by a town board, and requests the board to deliver provisions to him, is estopped to deny the regularity of the quarantine as a means of escaping liability to the town for expense incurred in complying with the request. Plymouth Twp. v. Klug, 607.

EVIDENCE.
Presumption on appeal as to suppression of evidence, see Appeal and Error, 21.
Prejudicial error as to, see Appeal and Error, 30–33, 35.

JUDICIAL NOTICE.

1. The courts may take judicial notice of the meaning generally given to words and terms within their jurisdiction, even though the meaning is not the one generally given in the world at large. State v. Olson, 304.
2. The courts may take judicial notice of the general fear in a community that drugs and opium are, and that they can be, easily mingled with snuff, and perhaps be less readily detected, than in other forms of tobacco. State v. Olson, 304.
3. The courts may take judicial notice of the fact that the use of tobacco in any form is uncleanly, and that its excessive use is injurious. State v. Olson, 304.

EVIDENCE—continued.

4. The courts may take judicial notice of the fact that snuff is generally used in North Dakota by holding it between the lip and gum without mastication, or by plastering it on the gums, and that it is absorbed, rather than chewed. State v. Olson, 304.
5. The courts may take judicial notice that the use of tobacco in any form by the young is injurious, and that the use of snuff is especially so. State v. Olson, 304.
6. The courts may take judicial notice that tobacco held between the lip and the gums, or plastered upon the gums, and absorbed rather than chewed, can be used by the schoolboy with less possibility of detection than tobacco which is masticated. State v. Olson, 304.

PRESUMPTIONS AND BURDEN OF PROOF.

Presumptions in favor of validity of legislative action, see Legislature. See also infra, 11.

7. A stream claimed to be navigable, which is not meandered nor declared to be navigable by the legislature, is presumed to be non-navigable, and the burden of proof is upon the party claiming it to be navigable to prove that it is so in fact. Bissell v. Olson, 60.
8. The burden of proof to show that a stream is navigable in fact is not met by the evidence, where it appears that the stream was not meandered, and that boats of light draft had made trips up the river; that at one time a house and at another time logs had been rafted for a considerable distance: where it was not shown that the stream was at its natural stage, or if not at its natural stage, that it continued to be capable of use for such purposes for a considerable length of time; and it further appeared that the stream flowed through a well-populated district, with towns and villages along its banks, and was not used as a highway at all; and from the testimony of many old residents that before the construction of dams the river was not navigable at all, and that at periods it was nearly dry, and useless for navigation, even by boats of the very lightest draft. Bissell v. Olson, 60.
9. The jury cannot be permitted to arbitrarily and without evidence, infer negligence, but there must be evidence affirmatively establishing some circumstances from which the inference fairly arises that the injury resulted from the want of some precaution which the defendant ought to have taken. Garraghty v. Hartstein, 148.

DOCUMENTARY EVIDENCE.

10. A letter as to the result of the analysis of the oil is properly excluded in an

EVIDENCE—continued.

action for damages alleged to have been caused to an automobile by the use of certain lubricating oil, where it appears that a sample of the oil was submitted to a college professor for analysis, that he turned it over to an assistant, who made a report thereon to the professor, who wrote the result to plaintiff; that shortly thereafter the laboratory and records were destroyed by fire; and that, at the time of the trial, the professor could not remember the name of the assistant, nor the incident at all. Knight v. Willard, 140.

CONFIDENTIAL COMMUNICATIONS.

Question for jury as to privileged character of communication, see Trial, 2.

11. When a party to litigation seeks to exclude the testimony of a physician on the ground that it is privileged under the statute, the burden is upon such party to bring the evidence within the terms of the statute granting the privilege. Booren v. McWilliams, 558.
12. Not all statements made to an attending physician, but merely those necessary to enable him to prescribe for the patient, are within the privilege of § 7304, Rev. Codes 1905, providing that a physician or surgeon cannot, without the consent of his patient, be examined as to any information acquired while attending the patient, which was necessary to enable him to prescribe or act for the patient. Booren v. McWilliams, 558.
13. The privilege of statements to a physician under § 7304, Rev. Codes 1905, which extends the same only to information necessary to enable him to prescribe for the patient, does not apply to statements of a plaintiff in an action for breach of promise of marriage aggravated by seduction, made to the physician who attended her during confinement, to the effect that intercourse between the defendant and herself began at a date which was but six and one-half months before the birth, that she never talked with the defendant about marriage, and that she submitted to intercourse in the hope that the defendant would marry her if she became pregnant, the same not having been made until his third call, and after he had pronounced her condition normal. Booren v. McWilliams, 558.
14. The object of § 7304, Rev. Codes 1905, prohibiting a physician from being examined as a witness, without the consent of his patient, as to any information acquired in attending the patient which was necessary to enable him to prescribe for the patient, is to inspire confidence into the patient, and encourage him to make a full disclosure to the physician of his symptoms and condition, by protecting him against physicians making known to the curious the ailments of their patients, particularly when afflicted

EVIDENCE—continued.

with diseases which might bring reproach, criticism, or disgrace upon the patient if known to exist. Booren v. McWilliams, 558.

RELEVANCY AND MATERIALITY.

Assignments of error as to admission or exclusion of, see Appeal and Error, 11.

15. It is error to exclude evidence in an action of breach of promise of marriage, to show that during the alleged engagement the plaintiff accepted attentions of other men. Booren v. McWilliams, 558.

16. Evidence, in an action on a note for the purchase price of a valve for an engine, the defense being a breach of warranty, that the buyer and his engineer compared questions sent him by the seller, upon notice that the valve did not work, with the original directions sent with the valve, and that the questions called for answers relative to the manner of installation is admissible, where the directions were lost, as showing that the buyer substantially complied with a provision of the contract of guaranty requiring him as a prerequisite to a claim for breach of warranty to answer fully all questions asked him by simply answering that he had installed the valve according to directions. Gould Balance Valve Co. v. Herold, 287.

17. An agreement whereby a mortgagor waived foreclosure and agreed to deliver the mortgaged property to the mortgagee, with permission to sell it and apply the proceeds upon the mortgage debt, is not admissible in evidence to mitigate the damages recoverable by the mortgagee from his agent for misconduct in accepting the mortgage, where there is no evidence that the property was delivered to the mortgagee or that he realized anything under the agreement, and there is affirmative evidence that much of the property had been dissipated, and that the comparatively valueless remainder was subject to prior encumbrances. Morris v. Bradley, 362.

WEIGHT AND SUFFICIENCY.

Assignment of error alleging insufficiency of, see Appeal and Error, 10.
Sufficiency of proof of attempt to commit rape, see Rape.

18. Clearer and more convincing proof is required of the good faith of transfers between near relatives than of transfers between strangers. Willoughby v. Smith, 209.

19. The test of navigability of a stream for commerce and traffic is whether or not it is capable of such use in its natural state; and the value of evidence

EVIDENCE—continued.

showing that it is used for navigation rests upon the proposition that that fact proves it navigable; and while evidence that it never has been so used is not of equal weight, yet it is entitled to great weight as tending to show that it cannot be navigated to advantage,—where it is shown that the stream flows through a well-settled country, with towns and villages, having commercial relations with each other, along its banks. Bissell v. Olson, 60.

20. In an action against the vendor of lubricating oil for damages to an automobile caused by the use of the oil, the oil is not shown to have been defective by evidence of the presence in the cylinders and crank case of a carbon deposit, which might have been occasioned by an overflow of the oil, regardless of its quality, into the combustion chambers due to wear in the cylinders, where there was no evidence that such wear was caused by the oil in question, rather than by the ordinary use of the automobile, and that the defects in the engine did not exist before defendant's oil was used, and where it appears that after the engine was cleaned, nothing being broken thereon, and defendant's oil no longer used, the same trouble was experienced with other oils until the engine suddenly broke all to pieces. Knight v. Willard, 140.

21. There is an entire absence of evidence of damages in an action to recover for damages to an automobile engine from the use of defective lubricating oil, where the man who repaired the engine and removed all traces of defendant's oil, by the condition of the engine at which time the damages must be measured, testifies that there was nothing broken and that the cylinders were fluted and cut, but does not state the cost of replacing the cylinders and repairing the damage, and where it appears that, the engine being an old one, a part at least of the fluting and scarring of the cylinders may have been present when plaintiff began to use defendant's oil. Knight v. Willard, 140.

22. A finding that a hole in a sidewalk had existed for a sufficient time prior to the accident to impute to the village authorities knowledge of its existence is warranted by the testimony of two witnesses,—one to the effect that the hole existed in the prior autumn, the accident happening in the spring; and the other to the effect that it was there two or three weeks before the accident. Carpenter v. Dickey, 176.

23. The fall of a part of the roof of a room in a mine does not appear to have been caused by removing a pillar in the manner directed by an incompetent pit boss, so as to justify a verdict in favor of a miner suing, upon the theory that it was so caused, for resulting injuries, where from the evidence, including conflicting testimony of the plaintiff, it is impossible to tell where the plaintiff was standing when injured, thus making it con-

EVIDENCE—continued.

jectural whether the falling matter was loosened in removing the pillar or by a blast set off the previous night. Jackson v. Chase, 367.

24. A conviction of the crime of an attempt to commit rape upon an adult woman may be sustained upon proof consisting solely of the uncorroborated but consistent testimony of the prosecutrix that the defendant made repeated attempts to kiss her, and repeatedly took hold of her, and at one time struggled with her for ten minutes to induce her to consent to sexual intercourse with him, although at that particular time he desisted from his efforts upon her threatening to tell her husband, who was not on the premises, and on another occasion desisted because of her threat to call for help to others who were on the premises. State v. Owens, 329.

EXAMINATION.

Of witnesses, see Witnesses.

EXCEPTIONS. See Appeal and Error, 12, 13.

EXECUTION.

Necessity of pleading defense of justification under judgment and execution, see Pleading, 5.

EXECUTORS AND ADMINISTRATORS.

POSSESSION AND DISPOSAL OF PROPERTY.

Appeal from order confirming order refusing permission for sale of real estate, see Appeal and Error, 2, 7.

1. Sections 8225 and 8226 of the North Dakota Revised Code, which impress the estate of a decedent with a trust in favor of creditors, and provides for the transmission of the residue of the estate, to the executor or administrator in the state or county of the decedent's domicil, do not relate only to cases in which the decedent has left a will. Dow v. Lillie, 512.

2. Under statutory provisions authorizing the sale of real estate of a nonresident decedent to pay debts approved in the administration of the decedent's estate in a foreign jurisdiction, and transmit the same there for distribution, a sale will be ordered where the claim to pay which the sale is asked has been duly proved in the foreign court, which was the domiciliary court of the decedent, and there are not assets in such jurisdiction sufficient to pay the same, and the petition asking for the sale of real estate is filed

EXECUTORS AND ADMINISTRATORS—continued.

in an ancillary administration had in the state where the real estate is thus situated and in which there is no money or personal property and no debts, and the contestants of the sale are the heirs, who had knowledge of the foreign administration, and opportunity to defend against the claims. Dow v. Lillie, 512.

3. Section 8134, Rev. Codes 1905, which provides that any local creditor may make an application for the sale of real estate of a decedent if the administrator neglects to do so, does not cover local creditors merely to the exclusion of creditors in a foreign jurisdiction. Dow v. Lillie, 512.
4. Under the Code of North Dakota the sale of real estate of a nonresident, located in that state, is authorized to pay debts of the estate duly proved in the domiciliary jurisdiction, to the exclusion of the heirs of the decedent in North Dakota. Dow v. Lillie, 512.
5. The statute of limitations or of nonclaim is not involved in an action by a principal administrator to sell real estate in a state other than that of his appointment, and transmit the funds derived therefrom for the payment of claims, properly proved and allowed in the state of his appointment, although the claims, to pay which the sale is sought were filed in the ancillary administration in the state where the real estate is situated, but not allowed by the administrator, nor action brought thereon within the time limited but were properly filed and allowed in the state of the principal administration. Dow v. Lillie, 512.

CLAIMS AGAINST ESTATE.

6. In allowing or rejecting a claim, an administrator acts merely as an auditor, and his refusal to allow such claim is not *res judicata*. Dow v. Lillie, 512.
7. Where there is both a principal and an ancillary administration, creditors may prove their claims in either jurisdiction, and it is not always necessary that they should be proved in both. Dow v. Lillie, 512.

EXEMPLARY DAMAGES. See Damages, 1, 2.

EXEMPTIONS.

Of homestead, see Homestead.

FACTS.

Review of, on appeal, see Appeal and Error, 28, 29.

FEES.
Mandamus to compel officers to adjust fees belonging to county, see Mandamus, 2–4.
Duty of county auditors to pay fees into county treasury, see Statutes, 3.
Of officers generally, see Officers.

FILING.
Of order for judgment, see Judgment, 2–4.

FINALITY.
Of order for purpose of appeal, see Appeal and Error, 2.

FINDINGS.
Review of, on appeal, see Appeal and Error, 28, 29.

FORMER ADJUDICATION. See Judgment.

FORMER JEOPARDY. See Judgment, 5.

FOUNDATION.
Laying foundation for admission of documentary evidence, see Evidence, 10.

FRAUD.
Of agent, see Principal and Agent.

FRAUDULENT CONVEYANCES.
Proof of good faith of transfers between near relatives, see Evidence, 18.

FREIGHT CARRIERS. See Carriers, 2–4.

GARNISHMENT.
Vacation of default judgment against garnishee, see Judgment, 7.

1. No valid judgment can be rendered against the garnishee defendant upon a

GARNISHMENT—continued.

default judgment against the principal defendant based upon attempted service by publication under a void affidavit, where, as under § 6982, Rev. Codes 1905, the garnishee proceedings are ancillary to the suit against the principal defendant and judgment against him is a prerequisite to judgment against the garnishee defendant. Atwood v. Tucker, 622.

2. The fact that under § 6982, Rev. Codes 1905, no judgment can be had against a garnishee until judgment is obtained by the plaintiff against the principal defendant does not preclude valid garnishment proceedings, where service against the principal defendant is had by publication as authorized by § 6972, under which service personal judgment cannot be had against the principal defendant, since a judgment *in rem* in the action against him is authorized by the further provision of § 6982, that the court may adjudge the recovery of an indebtedness disclosed or found to be applicable to the plaintiff's demand, this provision relating to § 6977, prescribing the form of judgment to be rendered against the garnishee. Atwood v. Tucker, 622.

GOOD FAITH.

Sufficiency of proof of, see Evidence, 18.

GRADE.

Of railroad crossing, who may compel lowering of, see Railroads.

GUARDIAN AND WARD.

Limitation of time for suit against sureties on guardian's bond, see also Limitation of Actions, 1, 2.

Effect of laches to bar remedy on guardian's bond, see Limitation of Actions, 3.

1. A ward, even after attaining majority, has no cause of action against a guardian or his sureties until an accounting has been had in the county court. Gronna v. Goldammer, 122.

2. The sureties upon a guardian's bond, having equal right with the ward to institute proceedings to compel an accounting by the guardian, are not in position to complain of the operation Rev. Codes 1905, § 8284, which provides that no action can be maintained against such sureties unless commenced within three years from the discharge or removal of the guardian, being deferred by reason of the failure of the guardian to file his final account and obtain such discharge, although the ward may have taken no steps to compel the same. Gronna v. Goldammer, 122.

HABEAS CORPUS.

Conclusiveness of decision in habeas corpus case, see Judgment, 6.

Upon a writ of habeas corpus to determine the custody of a child, the court is not bound to deliver the child into the custody of any particular person or claimant, but may leave it in such custody as its welfare at the time may seem to require. Knapp v. Tolan, 23.

HAIL INSURANCE. See Appeal and Error, 39; Pleading, 1.

HARMLESS ERROR. See Appeal and Error, 30–35.

HEALTH.

Constitutionality of health regulation, see Constitutional Law, 4.
Estoppel to deny regularity of quarantine, see Estoppel.

A quarantine established by a township board upon orders given by members of the board by telephone, and not at a regular meeting, is legal in view of § 282, Rev. Codes 1905, making it the duty of local boards of health, upon learning of the existence of a contagious disease, to examine into the facts immediately, and, if warranted, to adopt a quarantine; and the general requirement that three days' notice be given of a regular meeting of a township board does not apply. Plymouth Twp. v. Klug, 607.

HIGHWAYS.

Suit to quiet title to, see Cloud on Title, 2.
Establishment by dedication, see Dedication.
Sufficiency of proof of notice of defective sidewalk, see Evidence, 22.
Presentation of claim against city for injury on, see Municipal Corporations, 2.
Who may maintain suit to enjoin fencing and obstruction of, see Parties, 2.
Sufficiency of complaint in suit to enjoin fencing and obstructions of streets, see Pleading, 4.
Stream as public highway, see Waters, 4.
See also Easements.

HOMESTEAD.
On public lands, see Public Lands.

A wife cannot avoid the husband's deed of an abandoned homestead in which she did not join, where during its acquisition the parties lived apart, and the wife, beyond making two attempts to visit the land while the husband was a mere squatter, made no efforts to establish herself upon the land, and filed no declaration of homestead. Blatchley v. Dakota Land & Cattle Co. 532.

HOUSE OF ILL FAME. See Prostitutes.

HUSBAND AND WIFE.
Rights in homestead, see Homestead.

IMPRISONMENT. See Criminal Law, 5.

IMPUTED NOTICE. See Notice.

INDICTMENT, INFORMATION AND COMPLAINT.
Discretion in denying motion for leave to amend, see Appeal and Error, 23.

CAPTION.

1. An information is not rendered demurrable by omission to fill the blank in the caption, intended for the title of the court, where the indorsement on the back includes the title of the court in which it is filed. State v. Butler, 231.

DUPLICITY.

2. An information charging substantially in the language of § 9089, Rev. Codes 1905, that the defendant wrongfully engaged in an unlawful premeditated fight in a ring, is not rendered duplicitous or uncertain by the further averment that they fought and contended by beating and attempting to beat each other, the latter averment merely adding definiteness and certainty to the former. State v. Butler, 231.
3. Different offenses are charged respectively by a criminal complaint stating that the defendant committed an offense continuously since the 1st of January and at sundry and divers times between that date and June 27, of the

INDICTMENT, ETC.—continued.

same year, and an information charging the same defendant with having committed an offense of the same nature from day to day continuously from the 1st of January of that year to the commencement of the action, which was commenced by filing the information on September 7, following, during a regular session of the district court. State v. Riley, 236.

4. But one offense is charged by an information stating that on the 27th of June and continuously from January 1st of the same year to the commencement of the criminal action, since the allegation as to June 27th, which is included within the extreme dates, is merely surplusage. State v. Riley, 236.

DESCRIPTION OF OFFENSE.

5. Under the system of procedure prevailing in North Dakota, and particularly under the provisions of § 9856, Rev. Codes 1905, an information is sufficiently definite if the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended, and it is sufficient if the act or omission is charged with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case. State v. Butler, 231.

INFANTS.

Guardianship of, see Guardian and Ward.

Habeas corpus to determine custody of, see Habeas Corpus; Judgment, 6.

INFORMATION.

For criminal offense, see Indictment, etc.

INJUNCTION.

Contempt in violating, see Appeal and Error, 1; Courts, 2; Judgment, 5.

Review of discretion in granting, see Appeal and Error, 22.

Against unlawful sale of liquors, see Dismissal, 2.

Right of city to maintain injunction suit, see Parties, 2.

Sufficiency of complaint in injunction suit, see Pleading, 4.

The courts cannot, in an equitable action to restrain the performance of a con-

INJUNCTION—continued.
tract by county commissioners for the construction of a courthouse, supervise them in the exercise of the discretion as to its construction, given them by N. D. Rev. Codes 1905, § 2566, and tell them the kind of courthouse they must erect, so long as they are exercising their discretion in good faith. McCann v. Carlson, 191.

INSOLVENCY.
As to assignment for creditors, see Assignment for Creditors.
Of banks, see Banks.

INSTRUCTIONS.
Exceptions to, see Appeal and Error, 12, 13.
Waiver or cure of error in, see Appeal and Error, 24, 25.
Prejudicial error as to, see Appeal and Error, 34.
Erroneous instruction as ground for new trial, see New Trial.
In general, see Trial, 6–9.

INSURANCE.
Appeal in action on insurance policy, see Appeal and Error, 39.
Judgment upon pleadings in action on policy, see Pleading, 1.

INTOXICATING LIQUORS.
Contempt in violating injunction as to, see Courts, 2; Dismissal, 2; Judgment, 5.

IRREGULARITIES.
In judgment, see Criminal Law, 4.

JEOPARDY.
Former jeopardy, see Judgment.

JOINT DEBTORS AND CREDITORS.
Dismissal as to one of two codefendants, see Claim and Delivery, 8.

JUDGES.
Prejudicial error in remarks of, see Appeal and Error, 35.
Change of judge, see also Courts, 1.
Jurisdiction of district in which judge of another district presided, see Courts, 1.
Change of venue because of disqualification of, see Venue, 2.

1. Under § 6764, Rev. Codes 1905, a judge who has jurisdiction over the person and subject-matter of a criminal action properly pending in his judicial district has authority to pronounce a judgment and sentence outside his judicial district. State v. Winbauer, 43.
2. The substituted judge had jurisdiction where the accused, upon, arraignment at a regular term of the district court, filed an affidavit of prejudice against the presiding judge under § 9929, Rev. Codes 1905, and the latter procured the attendance of another judge, by whom the proceedings were resumed within five days. State v. Riley, 236.

JUDGMENT.
Presumptions in support of, see Appeal and Error, 19.
Acquiescence in invalid judgment, see Appeal and Error, 26.
On appeal, see Appeal and Error, 36–39.
In action on redelivery bonds, see Claim and Redelivery, 7, 9.
Validity of judgment in criminal case, see Criminal Law, 3, 4.
Judgment against principal defendant as condition precedent to judgment against garnishment, see Garnishment.
Judgment under pleadings, see Pleading, 1.

By Default.

1. A default judgment against the appellant was properly rendered in the district court upon appeal from a justice's court in which the appellant's demurrer to the complaint upon the ground that it was oral, and not taken down on the docket, was overruled, where the appellant, having objected to the trial of the case at the appointed term of the district court upon the ground that it was not at issue since the complaint was oral, appeared and amended a hearing on the demurrer, but, the demurrer having been overruled, and the case ordered to trial in the regular order, the appellant did not appear. Chamberlain-Wallace Co. v. Akers, 395.

JUDGMENT—continued.

ENTRY; FILING.

2. Where a district judge, previous to the expiration of his term of office, signed written findings of fact, conclusions of law, and order for judgment in favor of a party, and transmitted the same to his attorneys that they might prepare and cause the entry of the formal judgment by the clerk as directed in the order and required by N. D. Rev. Codes 1905, §§ 7078, 7079, and the findings, conclusions, and order for judgment were not filed until the term of the judge had expired, there is no compliance with the mandatory provisions of Rev. Codes 1905, §§ 7039, 7040, and the judgment is invalid. Crane v. First Nat. Bank, 268.
3. The written findings, conclusions, and order for judgment as filed with the clerk of the court, constitute the final decision of the court under N. D. Rev. Codes 1905, §§ 7039, 7040. Crane v. First Nat. Bank, 268.
4. The unfiled written findings, conclusions, and order for judgment are subject to revocation by the court at any time before they are filed with the clerk. Crane v. First Nat. Bank, 268.

CONCLUSIVENESS OF ADJUDICATION.

Conclusiveness of administrator's rejection of claim, see Executors and Administrators, 6.

5. The dismissal, without any hearing on the merits or plea being filed, of a charge of contempt of court in violating an injunction granted in an action to abate a liquor nuisance, does not preclude, on the ground of former jeopardy or *res judicata*, a subsequent proceeding for contempt embracing a longer period of time, commencing from the same date. State ex rel. Heffron v. District Ct. 32.
6. The decision of a court of competent jurisdiction on a writ of habeas corpus brought to determine the rights of conflicting claimants to the care and custody of a minor child is *res judicata* in so far as to preclude the issuance of a second writ by another court as a matter of right, where no material change of circumstances is shown to have arisen since the prior determination. Knapp v. Tolan, 23.

OPENING AND SETTING ASIDE DEFAULT.

7. A garnishee defendant is not, by defaulting in answer, concluded from moving to vacate the default judgment against himself, upon the ground of want

JUDGMENT—continued.

of jurisdiction over the principal defendant upon whom service was attempted to be made by publication under a void affidavit. Atwood v. Tucker, 622.

8. A motion to reopen a default judgment upon the ground that the defendant therein was assured by his attorney that the case was not at issue, and would not be tried at the ensuing term, is properly denied by the trial court, as the mistake is one of law. Chamberlain-Wallace Co. v. Akers, 395.

JUDICIAL NOTICE. See Evidence, 1–6.

JURISDICTION.

On appeal, see Appeal and Error.
Of courts, generally, see Courts.
In criminal case, see Criminal Law, 3, 4.
Vacation of judgment for lack of, see Judgment, 7.

JURY.

New trial for matters pertaining to, see New Trial.

JUSTICE OF THE PEACE.

Default judgment on appeal from justice to district court, see Judgment, 1.

A complaint in an action in a justice's court is not, in view of § 8378, Rev. Codes 1905, providing that a pleading in justice's court may be oral or written, and need be in no particular form, but must be intelligible to a person of ordinary understanding, demurrable upon the ground that it was oral, and was not taken down in the docket as required, where the summons contained a complete statement of the cause of action, and the docket contained a reference to the summons and a notation that the complaint was oral. Chamberlain-Wallace Co. v. Akers, 395.

LABORERS.

In general, see Master and Servant.

LACHES. See Limitation of Actions, 3.

LAND CONTRACT. See Vendor and Purchaser.

LEGAL REPRESENTATIVES. See Executors and Administrators.

LEGISLATURE.

Enactment of statutes by, see Statutes.

All presumptions are in favor of the validity of legislative action, and, in view of the fact that the legislature, coming from the people, is in close touch with industry and ordinary duties of life, and has the opportunity of a thorough investigation by means of committees and research, the court will not interpose its judgment and discretion and theory, on an ultimate question of fact and public policy against that of the legislative body. State v. Olson, 304.

LETTERS.

Admissibility in evidence, see Evidence, 10.

LIBERTY.

Guaranty of right to, see Constitutional Law, 6, 7.

LIMITATION OF ACTIONS.

Payment of barred claim as condition of relief in equity, see Cloud on Title, 1.

Limitation of time for action against sureties on guardian's bond, see Guardian and Ward, 2.

See also Executors and Administrators, 5.

1. Rev. Codes 1905, § 6787, which provides for a six-year statute of limitations in certain cases, has no application to a suit brought against the sureties on a guardian's bond. Gronna v. Goldammer, 122.
2. Under § 8284, Rev. Codes 1905, providing that "no action can be maintained against the sureties on any bond given by a guardian unless commenced within three years from the discharge or removal of the guardian," it is necessary that there be a formal order of the court discharging or removing the guardian in order to set the statute running. Gronna v. Goldammer, 122.
3. Before a remedy on a guardian's bond will be barred because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed. Gronna v. Goldammer, 122.

LUBRICATING OIL.

Injury to automobile by use of defective lubricating oil, see Sale, 1.

MANDAMUS.

Original jurisdiction of appellate court, see Courts, 2.

1. A resident, taxpayer, and citizen of the county is qualified to act as a relator in proceedings in the name of the state to compel action by the county commissioners, when the county auditor retains fees which belong to the county and fails to account for them and pay them to the county treasurer, and the board of county commissioners neglects and refuses, on demand, to adjust the account of such fees and determine the amount thereof as required by Rev. Codes 1905, § 2430. State ex rel. Braatelien v. Drakeley, 87.
2. Neither criminal prosecution nor removal from office furnishes an adequate remedy which would inhibit the maintenance by a taxpayer of mandamus proceedings against county commissioners to adjust the fees belonging to the county, received by the county auditor, which he fails to pay into the county treasury. State ex rel. Braatelien v. Drakeley, 87.
3. Mandamus will lie to compel the county commissioners to perform their ministerial duty of adjustment of the fees belonging to the county, received by the county auditor, which he fails to pay into the county treasury, but it will not lie to compel a determination of any particular sum due or not due the county from the auditor. State ex rel. Braatelien v. Drakeley, 87.
4. In mandamus proceedings to compel the county commissioners to adjust fees belonging to the county, retained by the county auditor, the court will not direct them to order the state's attorney to bring suit against the auditor for such fees, where the commissioners have undoubtedly entertained in good faith the opinion that the fees belonged to the auditor, as the court will not assume that, when advised of the law and the duty of the commissioners to make an adjustment with the auditor, the auditor will refuse or fail, if anything is found due the county, to pay it over, or that, on his refusal, the commissioners will neglect to order the state's attorney to bring suit therefor. State ex rel. Braatelien v. Drakeley, 87.

MANDATORY INJUNCTION.

Review of discretion in granting, see Appeal and Error, 22.

MARRIAGE.

Breach of marriage promise, see Breach of Promise.

MASTER AND SERVANT.
Sufficiency of proof of cause of injury to servant, see Evidence, 23.

A minor suing for injuries caused by the fall of matter from the roof of a mine is guilty of contributory negligence which warrants a judgment for the defendant notwithstanding a verdict for the plaintiff, and irrespective of the incompetency of the pit boss alleged to have directed the removal of a pillar in an unsafe manner, where the miner, having set off a blast the night before, began work without inspecting or propping the roof, even after being warned by another that conditions were unsafe, it having been admittedly one of the plaintiff's duties to keep the roof propped. Jackson v. Chase, 367.

MATERIALITY.
Of evidence, see Evidence, 15–17.

MAXIMS. See also Cloud on Title, 1.

1. De minimis non curat lex. Ackerman v. Maddux, 50.
2. Respondeat superior. Person v. Valley City, 342; Voves v. Great Northern R. Co. 110.

MEDIUM.
Of payment, see Payment.

MEETING OF MINDS. See Contracts.

MEETINGS.
Regularity of meetings of township board, see Health.

MINES.
Sufficiency of proof of cause of injury to miner, see Evidence, 23.
Contributory negligence of injured miner, see Master and Servant.

MISTAKE.
In notice of appeal, see Appeal and Error, 3.
As ground for vacation of default judgment, see Judgment, 8.

MITIGATION.
Of damages, evidence as to, see Evidence, 17.

MORTGAGE.

Chattel mortgage, see Chattel Mortgage.
Condition of equitable relief against, see Cloud on Title, 1.
Offer to sell mortgage, see Contracts, 1.
Cancelation of mortgage given to secure loan negotiated by agent who embezzled money, see Principal and Agent.
Limitation of time for action founded on right of homestead in mortgaged property, see Public Lands, 1.

MUNICIPAL CORPORATIONS.

Suit by, to quiet title, see Cloud on Title, 2.
Platted addition to, see Dedication.
Sufficiency of proof of notice of defective condition of sidewalk, see Evidence, 22.
As to health officers, see Health.
Right to maintain action, see Parties, 2.
See also Towns.

1. Where a city council, acting in its official capacity, authorizes the city's agents and officers to construct a sidewalk adjacent to plaintiff's property, and, through a mistaken belief that a portion of plaintiff's building extends into the street and is an unlawful obstruction thereon, authorizes such agents or officers to remove the same by going upon such private property, and cutting off the portion of the building claimed to thus form an obstruction, and committing other acts of trespass thereon, the municipality is liable, and must respond in damages for such wrongful trespass. Persons v. Valley City, 342.
2. Sections 2703 and 2704, Rev. Codes 1905, requiring verified claims for damages resulting from injuries alleged to have arisen from the defective, unsafe, dangerous, or obstructed condition of any street, cross walk, sidewalk, culvert, or bridge of the city, or from the negligence of the city authorities in respect thereto, to be presented to the city council as a prerequisite to the institution and maintenance of a suit thereon against the city, do not apply to a claim based upon a trespass to real property. Persons v. Valley City, 342.

NAVIGABLE WATERS. See Waters.

NEGLIGENCE.
Measure of damages for negligence causing personal injury, see Damages, 4–6.
Presumption of, see Evidence, 9.
Contributory negligence of servant, see Master and Servant.
As question for jury, see Trial, 3, 4.
Instructions as to, see Trial, 7.

If a person has no reasonable ground to anticipate that a particular act would or might result in injury to anybody, such act is not negligent, but if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Garraghty v. Hartstein, 148.

NEW TRIAL.
Grounds for, on appeal, see Appeal and Error, 36–39.

For Matters Pertaining to Jury or Verdict.

1. The giving of an erroneous instruction that the jury may render a verdict for the amount asked for in the complaint, which includes a specified sum for future medical attendance, when there is no proof in the record justifying a recovery for such item, does not alone necessitate a new trial, where plaintiff receives a verdict for the full amount prayed for in the complaint, as the appellant is injured by such instruction only to the extent of such item and the judgment may be reduced to the extent thereof. Carpenter v. Dickey, 176.
2. Where a verdict is so excessive as to show passion and prejudice in an action involving unliquidated damages, and it appears probable that such bias and prejudice also actuated the jury in the decision of the other issues, the court has no power to authorize a remittitur as to a portion of the recovery in lieu of a new trial. Carpenter v. Dickey, 176.
3. A new trial should be had where, in a prosecution for rape, the defendant's previous good reputation is clearly established, and the state relies for conviction upon the practically uncorroborated, and in many respects, inconclusive and unsatisfactory evidence of the complaining witness, who possessed a low character, and who admitted that prior to the occasion in controversy she had had intercourse with one other man, and another witness positively testified that she saw her lying on a bed with another

NEW TRIAL—continued.

man, and the state's attorney improperly remarked to the jury in his closing argument that he did not come to try a case unless the defendant was guilty. State v. Gunderson, 294.

AFFIDAVITS.

4. Affidavits of jurors are inadmissible to impeach their verdict on the ground of misconduct of the jury except where the misconduct consists of a resort by the jury to a determination of the issues by choice. Johnson v. Seel, 299.

5. The affidavit of an attorney for a party which merely recites admissions made to the attorney by certain members of the jury is neither admissible as proof of alleged misconduct on the part of such jurors during the trial, in visiting the office of the defendant's attorney as invited guests, where they were treated to beer, nor as proof of other misconduct, other than determining the issues by chance, inasmuch as the affidavits of the jurors themselves would be inadmissible. Johnson v. Seel, 299.

NONCLAIM.

Statute of, see Executors and Administrators, 5.

NOTICE.

Of appeal, see Appeal and Error, 3.

Proof of notice to village of defective condition of sidewalk, see Evidence, 22.

Of meeting of township board, see Health.

To seller, of defects in articles sold, see Sale, 3.

Of petition for change of venue, see Venue, 1.

Recently acquired knowledge of an investing agent will be imputed to his principal. Ackerman v. Maddux, 50.

NUISANCE.

Vested right in property which is a nuisance, see Constitutional Law, 1.

Preliminary examination in prosecution for maintaining, see Criminal Law, 2.

Dismissal of action to abate, see Dismissal, 2.

OFFERS. See Contracts.

OFFICERS.
Judges, see Judges.
Justice of the peace, see Justice of the Peace.
Mandamus to, see Mandamus.
Municipal liability for acts of, see Municipal Corporations.
Construction of statute as to compensation of, see Statutes, 3.

1. Where the policy of the legislature has been to place county officials on a salaried basis and to turn all fees into the county treasury, such fees belong to the county unless the statute shows a clear and plain legislative intent to grant them to the salaried officer, and any doubt should be resolved in favor of the public. State ex rel. Braatelien v. Drakeley, 87.
2. N. D. Laws 1907, chap. 70, an act to fix the salaries of county auditors, providing that all moneys received as fees for certifying to abstracts or deeds in excess of the salary as thereby limited shall be paid by the county auditor, at the end of each month, into the revenue fund of the county, require an accounting by the auditor, at the end of each month, of such fees and the payment of the excess over his salary into the county treasury. State ex rel. Braatelien v. Drakeley, 87.
3. The provision of N. D. Laws 1907, chap. 70, an act fixing the salaries of county auditors according to the assessed valuation of the property in the different counties, that the auditor shall turn into the county treasury the fees received by him for certifying to abstracts and deeds in excess of the salary therein provided, means the salary fixed for the class of counties to which his county belongs, he not being entitled to retain such fees to an amount equaling the salary provided for the counties embraced in the maximum class unless his county belongs to such class. State ex rel. Braatelien v. Drakeley, 87.
4. Under N. D. Laws 1907, chap. 70, classifying, for the purpose of fixing the salary of the auditors, the different counties with reference to the assessed valuation of the property therein, and providing that no county auditor shall receive more than a certain amount depending on the valuation of the property in his county, the compensation of an auditor is limited to the amount applicable to the class in which his county belongs. State ex rel. Braatelien v. Drakeley, 87.
5. The requirement of N. D. Laws 1907, chap. 70, an act to fix the salaries of county auditors, that the fees received for certifying to abstracts or deeds shall be turned into the county treasury, controls the incidental provision that the auditor may retain such fees as compensation for making the certificate, in chap. 219, an act to secure the payment of taxes before trans-

OFFICERS—continued.
fers of property, enacted previously at the same session of the legislature. State ex rel. Braatelien v. Drakeley, 87.

OIL.
Injury to automobile by use of defective lubricating oil, see Sale, 1.

OPINION EVIDENCE.
Error in admission of, see Appeal and Error, 31.

ORAL COMPLAINT. See Justice of the Peace.

PARKS.
Suit to quiet title to, see Cloud on Title, 2.

PARTIES.
To mandamus proceedings, see Mandamus, 1.

1. A purchaser who has not assigned his contract of purchase, but has agreed to sell to another on other and different terms, being obligated to deliver good title to his vendee, has still an interest in the subject-matter, and may bring, in his own name, an action for specific performance against his vendor. Ackerman v. Maddux, 50.
2. A municipality is regarded as the representative of the public for the purpose of maintaining suits in equity or of law for the vindication of public rights, and therefore a city is shown to be a proper party plaintiff in an action to cancel an attempted vacation of a part of the plat in an addition to a city, and to enjoin the fencing and obstruction of streets, by a complaint alleging that the city has accepted the plat; that it has been used by the public; that improvements have been made by the city in all parts of the addition; that grades of streets, alleys, and highways therein have been made; that public work has been done thereon; that permanent improvements, such as sewer mains and water mains, have been established in various parts of the addition; that sidewalks have been ordered and crosswalks laid by the city at its own expense; and that such improvements have continued during a period of about twenty-seven years. Lamoure v. Lasell, 638.

PARTNERSHIP.
Review on appeal of findings in suit for accounting, see Appeal and Error, 28.

PASSENGER CARRIERS. See Carriers, 1.

PAYMENT.
Review on appeal of findings as to, see Appeal and Error, 29.

Notes given by a second purchaser of a chattel, to whom it was transferred under an arrangement between the original seller and the first purchaser, who had become financially involved, will not be deemed to have been accepted in payment *pro tanto* of notes given by the first purchaser, where a receipt for the second purchaser's notes, given by the seller to the first purchaser, recited that they were collateral to those of the latter, and were to be indorsed upon them as fast as collected, and where the first purchaser thereafter not only made no demand for his own notes, though frequently inquiring as to the collection of the others, but also ceased to pay interest on a mortgage given to secure them and to pay taxes on the land mortgaged. Kenney v. Cunningham, 434.

PERSONAL INJURIES.
Damages for, see Damages, 4–6.
On highways, see Evidence, 22.
Sufficiency of proof of cause of, see Evidence, 23.
Injury to employee, see Master and Servant.
Question for jury as to cause of, see Trial, 5.
Instructions in action for, see Trial, 7, 8.

PETITION.
Of plaintiff, see Pleading, 3, 4.

PHYSICIANS AND SURGEONS.
Privileged communications to, see Evidence, 11–14; Trial, 2.

PLAT. See Dedication.

PLEADING.

In criminal prosecution, see Indictment, etc.

JUDGMENT ON PLEADINGS.

Review of ruling on motion for judgment on pleadings, see Appeal and Error, 39.

1. One holding a hail insurance policy is not entitled, in an action upon the policy, to a judgment upon the pleadings for want of defense, upon motion, for the full amount of the policy as adjusted by the insurer, where the answer alleges that the insured's interest in the crops is not to exceed a half interest therein. Berglund v. State Farmers' Mut. Hail Ins. Co. 17.

AMENDMENTS.

2. In an action of conversion against an officer who has seized goods, where testimony tending to show justification of a judgment and execution, under an answer amounting merely to a general denial, is promptly objected to when offered, and exceptions preserved, the pleadings cannot, after the trial, be amended to conform to the proof introduced, nor does the allowance thereafter of the service and filing of an amended answer pleading such justification operate to avail the defendant, where no proof is thereafter offered in support of such amended answer. Maclaren v. Kramar, 244.

COMPLAINT.

Complaint in action in justice's court, see Justice of the Peace.

3. A complaint is sufficient as against a general demurrer if it contains allegations of facts sufficient, reasonably, and fairly to appraise the defendant of the nature of the claim against him; and where the allegations of a complaint are simply imperfect, incomplete, and defective in form, rather than in substance, the remedy is not by demurrer, but by motion to make more definite and certain, or for a bill of particulars. Lamoure v. Lasell, 638.
4. A complaint in a suit to cancel an attempted vacation of the part of the plat of an addition to a city, and to enjoin the fencing and obstruction of streets, sufficiently connects the defendants with the plats which was filed by a prior owner of the lands now owned by them, where the declaration of vacation is made a part of the complaint; and while the complaint does not constitute nor contain a complete abstract of title showing the chain of conveyances from the prior owner who platted the addition, to the defendants, the declaration of vacation alleges that they are the owners of

PLEADING—continued.
the property covered by the vacation, and the complaint alleges that they claim an interest or title therein. Lamoure v. Lasell, 638.

PLEAS AND ANSWERS.

5. The defense of justification under judgment and execution constitutes new matter, and must be pleaded in the answer in order to be available as a defense to an officer who has levied the execution and sold goods thereunder. Maclaren v. Kramar, 244.

REPLY.

6. A reply is neither necessary nor proper where the answer, containing no counterclaim, presents merely defensive matter. Keller v. Souther, 358.

POLICE POWER. See Constitutional Law, 3, 6, 7.

PRACTICAL CONSTRUCTION.
Of statute, see Statutes, 3.

PREGNANCY.
As aggravating damages in breach of promise case, see Damages, 3.

PREJUDICE.
Disqualification of judge by, see Judges, 2.

PREJUDICIAL ERROR. See Appeal and Error, 30–35.

PRELIMINARY EXAMINATION. See Criminal Law, 2.

PRESCRIPTION.
Easements by, see Easements, 1.

PRESUMPTIONS.
On appeal, see Appeal and Error, 19–21.
As to reasonableness of freight rates, see Carriers, 2.
In favor of validity of legislative action, see Legislature.
In general, see Evidence, 7–9.

PRINCIPAL AND AGENT.
Imputing to principal knowledge of agent, see Notice.

The cancelation of a mortgage given to secure a loan which was negotiated by an intermediary whom the borrower supposed to be the lender's agent, and who embezzled the money, cannot be avoided by the lender upon the theory that the intermediary was the borrower's agent, where there was no actual or ostensible agency of the intermediary for the borrower, since in such circumstances the lender delivered the money to the intermediary at his peril. Larson v. Butler, 426.

PRINCIPAL AND SURETY.
Sureties on redelivery bond, see Claim and Redelivery.
Liability on bond of guardian, see Guardian and Ward.

Payment by one of the cosureties after the claim against him has been barred by limitations is voluntary, and does not entitle him to contribution from the other cosureties. Gronna v. Goldammer, 122.

PRIVATE CROSSING. See Railroads.

PRIVILEGED COMMUNICATIONS.
Evidence of, see Evidence, 11–14.

PRIZE FIGHTS.
Indictment for engaging in, see Indictment, etc., 2.

PROCESS. See Writ and Process.

PROPERTY.
Guaranty of right to, see Constitutional Law, 6, 7.

PROSTITUTES.

The word "female" as used in chapter 87 of the Laws of 1900, which provides that "any female who frequents or lives in houses of ill fame, or who commits fornication for hire, shall be deemed a prostitute and shall be guilty of a misdemeanor," includes a married as well as an unmarried woman, and therefore a married woman may be convicted of the crime of being a prostitute. State v. Phillips, 206.

PUBLICATION.
Service by, see Garnishment; Judgment, 7.

PUBLIC CONTRACTS. See Counties.

PUBLIC CORPORATIONS. See Counties; Municipal Corporations.

PUBLIC LANDS.

1. Under N. D. Rev. Codes 1905, § 5504, providing that no action founded upon a right of homestead in property conveyed or encumbered prior to the taking effect of such section, otherwise than is provided by law in force at the time of the execution of such conveyance or encumbrance, and for which no declaration of homestead shall have been filed previous to the taking effect of such section, shall be maintainable, unless such action is commenced before a specified date, provided that such limitation shall not apply if the homestead claimant was, at the time of the execution of such conveyance or encumbrance, in the actual possession of the property claimed, and had not quit such possession previous to the commencement of such action, a purchaser of a homestead acquiring title a few years after the expiration of the period of limitation specified in § 5504, through a mortgage theretofore executed by the homesteader and his wife after such section took effect, cannot maintain an action to quiet title as against a prior mortgage executed by the homesteader only, in violation of the statute, before § 5504 took effect, where no declaration of homestead was ever filed, and the homesteader was in possession at the time he executed the prior mortgage, and had quit possession previous to the commencement of the action by such purchaser. Vannetta v. McClintock, 166.
2. There is a sufficient location of the right of way of a railroad upon lands of the United States to entitle it to land under the act of Congress of March 3, 1875, 18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568, where the grade is completed and ready for ties and rails, and a plat and profile of the road have been approved by the Secretary of the Interior prior to the entry of a settler, although the plat was not filed in the land office in the district in which the land is situated. Northern P. R. Co. v. Barlow, 159.

PUBLIC WATERS. See Waters.

PUNITIVE DAMAGES. See Appeal and Error, 38; Damages, 1, 2.

QUARANTINE.
Estoppel to deny regularity of, see Estoppel.
Regulations as to, see Health.

QUIETING TITLE. See Cloud on Title.

RAILROADS.
Easement over right of way, see Easements.
Land grants to railroad, see Public Lands, 2.

A landowner whose right to use a private railway crossing is merely permissive cannot compel the railway company to lower the grade which it raised in constructing an approach to a new bridge which was raised above the danger line. Lincoln v. Great Northern R. Co. 504.

RAPE.
Sufficiency of evidence to sustain conviction of attempt to rape, see Evidence, 24.
New trial of prosecution for, see New Trial, 3.

In the case of an attempt to commit rape there need merely be proof of the assault and of the intent to overcome resistance, if made, and that the prosecutrix finally desists from her struggles and yields, does not necessarily negative the fact that during the struggles, and, until the acquiescence, the defendant intended to use the force necessary to overcome it, nor, if he started with, or at any time during the struggle had, the intention to overcome such resistance with force, is it a defense that he became tired of his efforts and for this or any other reason desisted without accomplishing his purpose or putting forth his full strength; and whether or not he had any such intention during the struggle is for the jury to determine from the facts. State v. Owens, 329.

RATES.
Of carrier, see Carriers, 2–4.

RATIFICATION.
Of assault on passenger, see Carriers, 1.

REAL ESTATE AGENTS. See Brokers.

REAL PROPERTY.
Easements in, see Easements.
Of decedents, sale of, see Executors and Administrators, 1–5.
Specific performance of contract as to, see Specific Performance.
Rights, duties and liabilities on transfer of, see Vendor and Purchaser.

REASONABLENESS.
Of freight rates, see Carriers, 2–4.

RECORD.
On appeal, see Appeal and Error, 8–11.

REDELIVERY BONDS. See Claim and Delivery.

RELATIVES.
Evidence as to good faith of transfers between, see Evidence, 18.

RELEVANCY.
Of evidence, see Evidence, 15–17.

REMANDING. See Appeal and Error, 39.

REMITTITUR. See Appeal and Error, 37; New Trial, 1, 2.

REMOVAL OF CAUSES. See Criminal Law, 3.

REPEAL.
Of statute, see Subrogation.

REPLEVIN. See Claim and Delivery.

REPLY. See Pleading, 6.

RESIDENCE.
Statement as to, in evidence for substituted service of summons by publication, see Writ and Process.

RES JUDICATA. See Judgment.

SALE.

Offer to sell, see Contracts, 1, 3.

Evidence in action for purchase price of articles sold, see Evidence, 16.

Proof of defective condition of article sold, see Evidence, 20, 21.

Of real estate of decedent, see Executors and Administrators, 2–5.

Tax sale, see Taxes.

Of land generally, see Vendor and Purchaser.

1. The fact that while a large amount of a carbon deposit, alleged to have been caused by defective lubricating oil, producing the damages complained of, was being cleaned out of the cylinders of an automobile engine, the manager of defendant, the vendor of the oil, picked up some of the deposit and told plaintiff that he was going to send it to headquarters, and that afterwards the treasurer of defendant told plaintiff that he had heard that some other party had had trouble with their oil, and that in that instance the trouble was traced to dirty barrels, does not constitute an admission by defendant that the oil was defective. Knight v. Willard, 140.
2. Where one purchases a valve to be attached to his engine under a contract providing that settlement by note or cash should be made on delivery, and that the warranty under which the valve was sold should not take effect until compliance with such condition, settlement by cash or note is a condition precedent to the taking effect of the warranty. Gould Balance Valve Co. v. Herold, 287.
3. Where one purchases a valve for an engine under a contract providing for a warranty and requiring the return of the valve, if defective, within a specified time, and the giving of a written notice, stating wherein it fails and the giving of complete information by answering all questions asked, a substantial compliance with the requirements for the giving of the notice and complete information by answering pertinent questions is a condition precedent to the right of vendee to enforce any liability of the seller upon the warranty. Gould Balance Valve Co. v. Herold, 287.

SEDUCTION.

As aggravating damages in breach of promise case, see Damages, 3.

SERVICE.

Of process, see Writ and Process.

SNUFF.

Constitutionality of anti-snuff act, see Constitutional Law, 5, 7.
Judicial notice as to, see Evidence, 2, 4–6.

In North Dakota the word "snuff" has a well-established meaning in the popular mind, and includes any tobacco, whether fermented or not, which is finely cut or ground and dried in order that it may be taken into the mouth and absorbed without the necessity of mastication, and is naturally adapted to such use, even though it is not usually taken in the nose. State v. Olson, 304.

SPECIFIC PERFORMANCE.

Who may maintain action for, see Parties, 1.

1. An agreement by a purchaser of land to sell the premises will not defeat his right to specific performance of the contract for its purchase, under a provision that no sale of the premises shall be "binding upon" the vendor unless he shall first consent thereto by writing. Ackerman v. Maddux, 50.
2. A breach of an independent covenant in a land contract, as distinguished from a condition which is not material inducement to the contract, is not a bar to specific performance. Ackerman v. Maddux, 50.
3. Where the payment of taxes is not made a condition precedent to the right of a purchaser to rely upon his land contract, and, prior to the bringing of an action by him for specific performance, no attempt has been made to forfeit the contract on account of his failure to pay them, and upon the trial he tenders and offers to pay their amount into court, such prior default will not defeat his action for specific performance. Ackerman v. Maddux, 50.

STATE.

Right to preference in distribution of assets of insolvent bank, see Subrogation.

STATEMENT.

Of case on appeal, see Appeal and Error, 6, 7, 17, 18.

STATE'S ATTORNEY.

Argument of, see Trial, 1.

STATUTE OF LIMITATIONS. See Limitation of Actions.

STATUTES.

Repeal of, see Subrogation.

1. A title of an act which evinces the intention to prohibit the sale of an article is broad enough to prohibit the sale of substitutes therefor. State v. Olson, 304.
2. A statute which deals with one subject only will ordinarily control in case of conflict between it and a statute dealing with the same subject only incidentally and having some other main object. State ex rel. Braatelien v. Drakeley, 87.
3. The principle that a course of conduct indicating a common understanding by administrative officers as to the meaning of a statute, acquiesced in by all parties concerned for a long period of time, should have great weight in determining its real meaning, is inapplicable in the case of a construction by the county auditors of their salary statute as permitting them to retain fees in excess of their salary, in face of a denial that all auditors have so construed the statute, and where the statute has only been in force a relatively short time and it appears that the legislature, by a later law, has evinced its dissent from such construction. State ex rel. Braatelien v. Drakeley, 87.

SUBROGATION.

The right of the state to preference, under N. D. Rev. Codes 1905, § 7387, on the distribution of the assets of an insolvent bank having state money on deposit, is not defeated by the repeal of such preference right by a statute becoming effective after the failure of the bank, so that the surety of the bank, having paid the state's claim and being subrogated to its rights, is entitled to a preference. State ex rel. Miller v. Buttzville State Bank, 196.

SUBSTITUTED JUDGE. See Courts, 1.

SUBSTITUTED SERVICE. See Garnishment; Judgment, 7; Writ and Process.

SUIT. See Action or Suit.

SUPERINTENDING CONTROL. See Courts, 2.

SURETIES. See Principal and Surety.

SURPLUSAGE.
In indictment, see Indictment, etc.

TAXES.
Provision for payment of, by purchaser; effect on right to specific performance, see Specific Performance.

The grantee in a tax deed who receives an instrument void because not containing the recitals required by the statute in force at the time of its issuance is entitled upon proper application to the issuance due him of a valid tax deed providing the proceedings leading up to the same are in all things valid. State ex rel. Ebbert v. Fouts, 599.

TAXPAYER.
As relator in mandamus proceedings, see Mandamus, 1.

TENDER.
Of property to avoid penalties of redelivery bond, see Claim and Redelivery, 10.

Under N. D. Rev. Codes 1905, § 5260, and under the doctrine of *de minimis non curat lex*, a shortage of a few cents in a tender of payment under a land contract will not invalidate the tender, where its refusal is not based upon the shortage. Ackerman v. Maddux, 50.

TERM.
Of imprisonment, see Criminal Law, 5.

TIME.
For taking appeal, see Appeal and Error, 4, 5.
Extension of time for service of notice of appeal, see Appeal and Error, 3.
Computation of term of imprisonment, see Criminal Law, 5.

TITLE.
Of statute, see Statutes, 1.

TOBACCO.
Judicial notice as to, see Evidence, 3, 5.
Snuff, see Snuff.

TORTS.
Matters as to negligence, generally, see Negligence.

TOWNS.
Establishment of quarantine by, see Health.
Estoppel to deny liability to, for expense of quarantine, see Estoppel.

TRESPASS.
Liability of municipality for, see Municipal Corporations.

TRIAL.
Prejudicial error in remarks or conduct of judge, see Appeal and Error, 35.
New trial, see New Trial.
As to witnesses on, see Witnesses.

ARGUMENT AND CONDUCT OF COUNSEL.

Waiver of objection to limitation of time for argument of counsel, see Appeal and Error, 27.

1. It is a breach of professional propriety and professional ethics for a state's attorney to state to the jury in his argument in a criminal case that he would not be before them to try the case unless the defendant was guilty. State v. Gunderson, 294.

QUESTIONS OF LAW AND FACT.

2. The question of the privileged character of testimony of a physician as to information obtained while attending a patient is for the court, taking into consideration all of the circumstances and, if necessary, the opinion of the physician and the belief of the patient. Booren v. McWilliams, 558.
3. Usually it is the province of the jury, under proper instructions, to say from the facts and circumstances disclosed, whether due care was or was not

TRIAL—continued.

exercised, or in other words, whether negligence ought to be inferred; but it is always not only the province but the duty of the court, first, to determine, as a matter of law, whether upon the facts most favorable to the plaintiff, negligence can properly be inferred. Garraghty v. Hartstein, 148.

4. The question of defendant's negligence should not be submitted to the jury, where it appears that while driving at a fast trot along the side of a road, he came in contact with a rope, extending across the road, tied to a horse, causing the other end to unwind from a fence post, causing the picket pin attached to the end of the rope to swing against plaintiff's arm and break it while she was on the opposite side of the post from defendant. Garraghty v. Hartstein, 148.

5. The court cannot say that it is a physical impossibility, as matter of law, to produce a sprained ankle by stepping in a hole about a foot deep in a sidewalk and falling upon one's side, but it is for the jury to say under the evidence whether such injury was caused by the hole or in some other manner. Carpenter v. Dickey, 176.

INSTRUCTIONS.

Exceptions to instructions, see Appeal and Error, 12, 13.
Waiver or cure of error in instructions, see Appeal and Error, 24, 25.
Prejudicial error as to instructions, see Appeal and Error, 34.
Erroneous instruction as ground for new trial, see New Trial.

6. An instruction which, dealing with one element of damages, with its attendant facts, states that the jury may take into consideration all other facts and circumstances, is too broad. Booren v. McWilliams, 558.

7. An instruction is not erroneous because it embodies an incorrect statement of the law in that it assumes that plaintiff may recover though guilty of contributory negligence, where contributory negligence is not pleaded or relied upon as a defense and there is no intimation in the record that plaintiff was not exercising due care at the time of his injury. Carpenter v. Dickey, 176.

8. An instruction as to what plaintiff must prove in an action for personal injuries is not objectionable on the ground that it fails to enumerate all the necessary elements, where the omitted elements are stated in the other portions of the charge. Carpenter v. Dickey, 176.

9. An instruction in an action by a real estate broker to recover commission, that if the owner promised to pay him a stated commission, the plaintiff could recover a certain amount with interest from the time that the plaintiff was entitled to commission, if the jury could find him so entitled, is not

TRIAL—continued.
objectionable as failing to state that before the plaintiff can recover he must sell the land according to his contract with the owner. Stoll v. Davis, 373.

TRIAL DE NOVO.
On appeal, see Appeal and Error, 29.

TROVER.
Amendment of pleading in action of conversion, see Pleading, 2.

TRUSTEE PROCESS. See Garnishment.

USER.
Acquirement of easement by, see Easements.

VACATION.
Of part of plat, see Dedication.
Of judgment, see Judgment, 7, 8.

VENDOR AND PURCHASER.
Acceptance of offer to sell, see Contracts, 2.
Specific performance of contract, see Parties; Specific Performance.
Sale for taxes, see Taxes.
Tender of payment under land contract, see Tender.

1. Delay on the part of the vendor of land on the crop-contract plan, in serving a notice of cancelation of the contract until spring, when the purchaser has seeded the land, is not a waiver of the latter's default, where the vendor has repeatedly urged the purchaser to deliver half of the crop as required by the contract, but the latter, by promises and excuses, kept putting it off until the notice of cancelation was served, and, after such service, did nothing to relieve the default, and has never deposited any sum to cover his indebtedness. Duffy v. Egeland, 135.
2. A purchaser of land on the crop-contract plan is in default at the time of the service upon him of a notice of cancelation of the contract, where it appears that credits due him from the vendor, relied upon as payment of the purchase price, were applied by agreement upon other indebtedness, and

VENDOR AND PURCHASER—continued.
that he failed to deliver one half the crops and to pay the taxes according to the contract. Duffy v. Egeland, 135.

VENUE. See also Criminal Law, 3.

1. A petition for a change of venue under § 9929, Rev. Codes 1905, of which no notice has been given to the prosecuting attorney, is not, when filed during the term and before the trial, although the cause has been continued, rendered insufficient by § 9920, Rev. Codes 1905, providing that if the cause is continued, the petition shall, upon reasonable notice to the prosecuting attorney, be presented before the term to which it is continued, since that section, following § 9919, Rev. Codes 1905, authorizing a change of venue upon the ground of local prejudice, does not apply to a petition for a change upon a combination of the ground specified in § 9919 with prejudice of the judge, filed under § 9929, which requires only that a change upon such double ground must be sought before trial, though it also makes it the duty of the trial judge to order the change as provided "in this article," which includes § 9920. State v. Boyd, 224.
2. A mandatory duty which leaves the trial judge no power to pass upon the question of his own disqualification, and no jurisdiction except to order a change of venue and to procure the attendance of another judge, is imposed upon the former by § 9929, Rev. Codes 1905, providing that if, in a specified manner, the defendant in a criminal action asks for a change of the place of trial upon the grounds of local prejudice and prejudice of the judge, the court shall order the action removed to another county or judicial subdivision, and procure the attendance of another judge to preside at the trial. State v. Boyd, 224.
3. Where the place of trial in a criminal case is changed to another judicial district, the court to which the case is removed for trial has full jurisdiction and authority to hear, try, and determine the case, and, upon conviction, to impose the punishment provided by law, and the trial shall be conducted the same in all respects as if the case had been commenced in said court, and on the trial of the case the judge of the district to which the action has been transferred acts as the judge of said district, and not as the acting judge of the judicial district from which the case was transferred. State v. Winbauer, 43.

VERDICT.
New trial for errors in, see New Trial.

VESTED RIGHTS. See Constitutional Law, 1.

WAIVER.
Of error in trial court, see Appeal and Error, 24–27.
Of default of purchaser of land on crop-contract plan, see Vendor and Purchaser.

WARDS. See Guardian and Ward.

WARRANTY.
On sale of personalty, see Sale, 2, 3.

WATERS.
Review of discretion in ordering destruction of obstructions, see Appeal and Error, 22.

1. The capacity of a navigable stream cannot be increased by artificial means to the injury of a riparian proprietor, without compensation. Bissell v. Olson, 60.

WHAT ARE PUBLIC OR NAVIGABLE WATERS.

Review on appeal of discretion of court in determining navigability of stream, see Appeal and Error, 22.
Presumption and burden of proof as to navigability, see Evidence, 7, 8.
Sufficiency of proof of navigability, see Evidence, 19.

2. A stream which is not tidewater must, in order to be navigable, be navigable in fact in its natural state without aid of artificial means, and be of sufficient capacity to render it capable of being used as a highway of commerce either in the transportation of the products of the mines, forests, of the soil of the country through which it runs, or of passengers. Bissell v. Olson, 60.
3. A stream, in order to be navigable in fact, must be capable of use as a public highway for a considerable portion of the year, and it is insufficient that it has an adequate volume of water therefor occasionally as the result of freshets, for brief periods of uncertain recurrence and duration. Bissell v. Olson, 60.
4. A stream which is capable of being navigated unaided by artificial means during freshets or stages of water occurring frequently, and at times of reasonable certainty, and continuing long enough to make its use of commercial value, is a public highway for that purpose. Bissell v. Olson, 60.

WILLS.

Matters concerning executors and administrators, see Executors and Administrators.

WITNESSES.

Prejudicial error as to cross-examination of, see Appeal and Error, 32, 33.

Privileged communications to, see Evidence, 11–14.

1. It is error to rule out questions propounded to the plaintiff in an action on breach of promise of marriage aggravated by seduction and pregnancy, as to statements made by her to her sister about there being any talk of marriage between the parties, and as to the time when the child was begotten. Booren v. McWilliams, 558.
2. The cross-examination of the maker of a note with reference to his knowledge concerning a receipt delivered by the payee to another on his payment of money to be credited on the note is proper and material, where knowledge of the contents of the receipt, if shown, is inconsistent with the prior testimony of the witness that his indebtedness to the payee is only a certain amount, which is much less than the amount of the receipt. Willoughby v. Smith, 209.
3. For the purpose of affecting the credibility of a witness it is improper to ask him on cross-examination whether he has ever been arrested, since a mere arrest carries no presumption of guilt. State v. Oien, 552.
4. Where, in an action for damages for an unjustifiable assault, a witness for the plaintiff testified on direct examination that he was friendly to the defendant, the answer to a question upon cross-examination as to whether he was one of those who joined in asking the government to appoint the defendant postmaster, or whether he refused to do so, is admissible to determine the bias or prejudice of the witness, and as affecting his credibility. Stockwell v. Brinton, 1.
5. A physician who examined a party to an affray for injuries immediately afterwards, and who was called by the plaintiff in a civil action for damages for an unjustifiable assault to prove the physical condition of the plaintiff at that time, and who testified in detail concerning the wounds, their nature, and the character of the weapon from which they were probably received, may, upon cross-examination be permitted to state his opinion that the wounds received were not dangerous, such evidence being material upon the question of damages. Stockwell v. Brinton, 1.

WORDS.
Definitions of, see Definitions; Dictionaries.

WRIT AND PROCESS.
Sufficiency of service to sustain judgment, see Judgment, 7.
Sufficiency of default judgment against principal defendant upon service by publication to sustain judgment against garnishee, see Garnishment.

An affidavit for substituted service of summons by publication, stating "that the last known postoffice address of the defendant is unknown," is not a sufficient compliance with § 6840, Rev. Codes 1905, requiring it to state "the place of the defendant's residence if known to the affiant, and, if not known, stating that fact." Atwood v. Tucker, 622.