REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

June 3, 1915, to October 26, 1915.

H. A. LIBBY
REPORTER

VOLUME 31

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FOR THE STATE OF NORTH DAKOTA.

APR 26 1916

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

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

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

PRESENT JUDGES OF THE DISTRICT COURTS.

District No. One,
HON. CHARLES M. COOLEY.
District No. Two,
HON. CHARLES W. BUTTZ.
District No. Three,
HON. CHARLES A. POLLOCK.
District No. Four,
HON. FRANK P. ALLEN.
District No. Five,
HON. J. A. COFFEY.
District No. Six,
HON. W. L. NUESSLE.
District No. Seven,
HON. W. J. KNEESHAW.
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District No. Nine,
HON. A. G. BURR.
District No. Ten,
HON. W. C. CRAWFORD.
District No. Eleven,
HON. FRANK FISK.
District No. Twelve,
HON. JAMES M. HANLEY.

OFFICERS OF THE BAR ASSOCIATION.

HON. BENJAMIN W. SHAW, President, Mandan.
HON. ROBERT M. POLLOCK, Vice President, Fargo.
HON. OSCAR SILER, Secretary and Treasurer, Jamestown.

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

LOUIS A. LEU v. HUGH MONTGOMERY.

(148 N. W. 662.)

Primary election law — contest — member of legislature — district court has jurisdiction — error.

1. The provisions of chapter 109, Laws 1907, known as the primary election law, and especially § 31 thereof, construed, and *held*, to authorize a contest in the district court between aspirants for nomination as candidate for the office of member of the legislative assembly. It is accordingly *held*, that the district court had jurisdiction to hear such statutory contest, and it was error for it to refuse so to do.

Constitution — legislature — members — qualification — contests — courts have jurisdiction — primary — nominations — elections.

2. Section 47 of the state Constitution, which vests in each house of the legislative assembly the power to judge of the election and qualifications of its own members, does not prevent the legislature from vesting jurisdiction in the courts to hear and decide contests involving nominations of candidates for such office, at a primary election. A primary for the purpose merely of making nominations is not an election, within the meaning of such constitutional provision.

Contests — rules of procedure — trial.

3. The provisions of chapter 109, Laws 1907, construed, and *held*, to furnish ample rules of procedure to govern the commencement, prosecution, and trial of such contests.

Statement of errors — served with notice of motion for new trial — notice of appeal — error appearing on face of judgment roll — statement of case.

4. Section 4, chapter 131, Laws 1913, requiring a statement of errors of law complained of, etc., to be served with the notice of motion for new trial, and with the notice of appeal, was not intended to apply in cases where the alleged error appears upon the face of the judgment roll proper, but only to cases where a statement of case is required in order to bring the rulings complained of upon the record.

Opinion filed September 25, 1914.

Appeal from District Court, Wells County; *J. A. Coffey*, J.

From a judgment in contestee's favor, the contestant appeals.

Reversed.

B. F. Whipple, Geo. R. Robbins, and *Geo. A. Bangs,* for appellant.

The intent of the act in question is to place the primary election under the regulation and protection of the law now in force as to elections. Nelson v. Gass, 27 N. D. 357, 146 N. W. 537, Ann. Cas. 1915C, 796.

Courts have jurisdiction, in contests for nomination to legislature. Olesen v. Hoge, 23 N. D. 648, 137 N. W. 826.

John O. Hanchett, for respondent.

It was necessary for appellant to serve and file with his notice of appeal a statement of the errors of law, or of fact, or both, claimed. Comp. Laws 1913, chap. 131; F. A. Patrick & Co. v. Nurnberg, 21 N. D. 378, 131 N. W. 354; Bertelson v. Ehr, 17 N. D. 339, 116 N. W. 335; Jackson v. Ellerson, 15 N. D. 533, 108 N. W. 241.

The appellant has not sought relief by the proper remedy. Mandamus to county auditor was the proper remedy, and all questions could have been determined. The so-called statutory remedy is not covered by the law in question. State ex rel. Plain v. Falley, 8 N. D. 90, 76 N. W. 996.

Fisk, J. This is an appeal from a judgment of the district court

of Wells county, dismissing appellant's contest proceedings, upon the ground that that court had no jurisdiction to hear and determine such proceedings. The contest grows out of the primary election held on June 24th last, and involves the nomination as a candidate for the office of representative for the 33d senatorial district. The contestant and contestee were both candidates, at such election, for the republican nomination for such office. On the face of the returns, the contestee received a majority of the votes cast, and was declared duly nominated for such office. Thereafter, and in due time, this contest was initiated by the service of an affidavit and notice of contest. Under the statute, appeals in such cases are to be disposed of in a summary manner.

The main question for determination is whether the district court had jurisdiction to hear and decide such contest. The trial judge placed his decision solely upon the ground "that the court has no jurisdiction in this proceeding to determine any of the matters or grant any of the relief asked by the contestant, and that the statutory provisions under which said proceeding is sought to be maintained have no application to legislative elections, and that there is no law under which said proceeding can be maintained." In this we think the learned court below manifestly erred. Chapter 109, Laws 1907, governs the method of placing in nomination candidates for the various state, county, and district offices, including members of the legislative assembly. Section 31 of such act, which we deem controlling, so far as material is as follows: "Any candidate at a primary election desiring to contest the nomination of another candidate or candidates for the same office may proceed by affidavit within ten days after the completion of the canvass. In case the contestant shall set forth in his affidavit, upon information and belief, that the ballots in any precinct have not been correctly counted, and that he has been prejudiced thereby, the judge shall make an order requiring the custodian of such ballots to appear before him at such time and place, and abide the further order of the court. At the time and place stated, the ballot boxes shall be opened and the ballots recounted in the presence of the court. If it should be found that a mistake has been made in counting such ballots, then the contestant shall be permitted, upon application, to amend his affidavit of contest by including such additional facts therein." The section then provides that all testimony shall be

taken in the same manner as in civil actions, and such contest tried, as nearly as may be, as civil actions are tried, the court making findings of fact and conclusions of law. It also provides for appeals to the supreme court from the final judgment in such contests within ten days; and the same shall be heard and determined in a summary manner; and it makes the provisions of the Code of Civil Procedure applicable to, and constitute, rules of practice in such proceedings.

A careful reading of this statute serves to convince us that it was clearly the legislative intent, in the enactment of such statute, to make the provisions of the general election laws, not only as to the manner of holding the elections, but also as to the method of contesting elections, applicable to such primary elections, for § 32 of the act expressly so provides. It reads: "The provisions of the statutes now in force in relation to the holding of elections, the solicitation of votes, the manner of conducting elections, of counting the ballots and making return thereof, and all other kindred subjects, shall apply to all primaries, in so far as they are consistent with this act; the intent of this act being to place the primary election under the regulation and protection of the laws now in force as to election."

We think that the provisions of § 31, supra, are too clear for serious debate, as to the legislative intent to confer upon the district courts jurisdiction to entertain a contest involving a nomination for member of the legislative assembly. It is as broad as language can make it; for it reads, "*any candidate* at a primary election desiring to contest the nomination of another candidate or candidates for the same office may proceed by affidavit within ten days," etc. By no rule of construction known to us are we authorized to limit or restrict such language so as to make it apply only to certain candidates, even though we were able, which we are not, to discover any reason why the legislature might desire to single out legislative candidates, and withhold a remedy granted to other candidates.

In the recent case of Olesen v. Hoge, 23 N. D. 648, 137 N. W. 826, while the point here under consideration was not directly raised, we assumed that jurisdiction existed in the district courts to hear such contests.

But counsel for contestee contends that there is no adequate machinery provided by such act, covering the procedure in such cases. He

argues that § 17 of the primary election law, which expressly makes applicable to primary elections numerous sections found in chapter 8 of the Political Code of 1905, relating to general elections, does not furnish such machinery, for the alleged reason that such general election statute does not provide for a judicial contest of a legislative election, and that the adoption of such statute in the primary election act cannot, and does not, operate to extend the scope of the statute thus adopted. In this we are also unable to concur. It is true, the general election statute, found in chapter 8, article 13, of the Political Code, does not refer to legislative contests, for the obvious reason that by § 47 of the Constitution each branch of the legislature is made the judge of the election and qualifications of its members; and the courts, therefore, have no jurisdiction in such cases. But a primary election is not an election within the meaning of such constitutional provision, nor within the common acceptation of the term. It merely takes the place of the former nominating conventions, and it is improper to say that the successful candidate at such primary is elected to any office. He is merely placed in nomination as a candidate for election to the office. It is very plain, we think, that in enacting § 17 of the primary election law, adopting the numerous provisions of the general election law, the legislature did not intend to restrict their application, in so far as rules of procedure are concerned, solely to cases which might arise under such general election statute. On the contrary, its aim was, no doubt, to transplant such provisions to, and make them a part of, the primary election statute, so as to carry out and effectuate the evident intent of the legislature in enacting the new statute. We therefore have no hesitation in holding, as we do, that the provisions of such act clearly adopt and make applicable to such contests the rules enacted to govern contests relative to general elections. But even were this not so, the court would, we think, be justified in adopting and applying the rules of procedure in force in analogous cases, in so far as the same are applicable. As said by the Washington court in State ex rel. McAvoy v. Gilliam, 60 Wash. 420, 111 Pac. 401: "If the course of proceeding be not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted, which may appear most conformable to the spirit of this Code."

What we have above said is a sufficient answer, we think, to contestee's argument under his second point.

The fact that the contestant is given another remedy, by mandamus or otherwise, if such be the fact, is immaterial. If another remedy exists, it is concurrent with and additional to the remedy here pursued. Such fact in no way tends to show that this statutory contest proceeding is not authorized.

But one other proposition need be considered. Counsel for contestee and respondent contends that there is nothing before this court for consideration or review, and that the appeal should be dismissed, for the reason that the appellant in taking the appeal did not comply with the provisions of section 4 of the new practice act, being chapter 131, Laws 1913, in that he failed to serve, with the notice of appeal, a statement of the errors of law he complains of. It is true no such statement was served. This omission, however, is not jurisdictional. Wilson v. Kryger, 26 N. D. 77, 51 L.R.A.(N.S.) 760, 143 N. W. 764. The court has the right, as we there held, to permit such omission to be supplied.

But we think counsel has misconstrued such statute. It was designed to, and does, effect a radical change in the rules of practice in the courts of this state. And by § 17 numerous sections of the Code of Civil Procedure were expressly repealed, including § 7058, Rev. Codes 1905, § 7655, Comp. Laws 1913, which section prescribed the contents of the statements of the case to be used on motions for new trials and on appeals, and, among other things, this section required the statement of case to have incorporated therein "a specification of the particulars in which the evidence is alleged to be insufficient to justify the verdict or other decision and of the errors of law upon which the party settling the same intends to rely. If no such specification is made the statement shall be disregarded on motion for a new trial and on appeal." The new practice act prescribes in § 2 an entirely different method for the settlement of records for presentation on motions for new trials and on appeals, by providing in brief that a transcript from the official court reporter, when certified to be correct by the presiding judge, shall constitute the statement of case. The necessity, therefore, no longer exists for incorporating in such

statement of case any specifications, either as to errors of law or insufficiency of the evidence. In lieu thereof we think it was the intention of the legislature, by § 4 of the new practice act, to require such specifications to be served with the notice of motion or notice of appeal, and it was not the purpose in the enactment of § 4 to require any statement or specification to be thus served, except in cases where, under the former statute, § 7058, Rev. Codes 1905, § 7655, Comp. Laws 1913, the same were required to be incorporated in statements of the case; and it is, of course, true, that no such specifications were required under § 7058, in order to enable the court to review rulings appearing upon the judgment roll proper. In such case, it is only necessary for the appellant to assign such ruling as error in his brief. To make our position plain, the words "errors of law," as used in § 4 of the new practice act, should be construed to refer only to errors of law occurring at the trial, which, in order to be brought to the attention of the court under the former practice, had to be specified in the settled statement of case; and they have no reference to errors appearing upon the face of the record proper. As to the latter, it would serve no useful purpose to require a statement thereof to be served with the notice; and we cannot believe the legislature intended to require such an idle and useless act to be performed. The new practice act was designed to simplify the former procedure by doing away with useless requirements, and not to add new and additional requirements not exacted thereunder.

The imperative necessity for an immediate decision of this appeal, in order that the same may be of any avail, has compelled us to treat the points raised in a somewhat cursory and brief manner, and not, perhaps, as fully as their importance demands.

The judgment appealed from is reversed, and the cause remanded for further proceedings in accordance with the views above expressed.

A. G. GROVE v. PRICE E. MORRIS.

(151 N. W. 779.)

Motion for new trial — time of — more than one year after notice of judgment — jurisdiction — trial court — was without — no action pending.

The trial court granted a new trial upon motion which was served more than a year after the notice of the entry of the judgment had been served upon defendant.

***Held*, that the case was no longer pending, but had merged into a judgment, and the trial court therefore was without jurisdiction to entertain or allow a motion for the new trial.**

Opinion filed February 27, 1915.

Appeal from the District Court of Foster County, *Coffey*, J.

Reversed.

J. J. Youngblood and *B. F. Whipple* (*Palda, Aaker, & Greene* of counsel), for appellant.

The respondent did not take the steps necessary to give the trial court authority or jurisdiction to grant a new trial, and for that reason the trial court should have refused to consider a motion for a new trial. Louder v. Hunter, 27 S. D. 271, 130 N. W. 774 and cases cited; Traxinger v. Minneapolis, St. P. & S. Ste. M. R. Co. 23 S. D. 90, 120 N. W. 770; Nerger v. Commercial Mut. Fire Asso. 21 S. D. 537, 114 N. W. 689.

The statement of the case, when settled, must be signed by the judge, with his certificate showing its allowance, and then filed with the clerk. No statement was filed in this case before the hearing of the motion. Rev. Codes 1905, § 7058, Comp. Laws 1913, § 7655.

T. F. McCue, for respondent.

A motion for a new trial, made within the time allowed by law, must necessarily stay operation of the judgment and preserve all rights until it can be heard and determined. Lurvey v. Wells, F. & Co. 4 Cal. 107; Copper Hill Min. Co. v. Spencer, 25 Cal. 17; Walker v. Hale, 16 Ala. 26; Vallentine v. Holland, 40 Ark. 338; McGee v. Ancrum, 33 Fla. 499, 15 So. 231; Central R. & Bkg. Co. v. Farley, 89

Ga. 180, 15 S. E. 34; State ex rel. Druliner v. Clark, 16 Ind. 97; Spalding v. Meier, 40 Mo. 176.

The presumption is that the trial judge had jurisdiction to make the order. The district court is one of general jurisdiction. Danforth v. Egan, 23 S. D. 43, 139 Am. St. Rep. 1030, 119 N. W. 1021, 20 Ann. Cas. 418; Richards v. Matteson, 8 S. D. 77, 65 N. W. 428.

Error must affirmatively appear, whether it be one of jurisdiction, or one of fact, or of procedure. Gould v. Duluth & D. Elev. Co. 3 N. D. 96, 54 N. W. 316; Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937; Bruegger v. Cartier, 20 N. D. 72, 126 N. W. 491.

BURKE, J. Plaintiff recovered a judgment for $235.50 in district court after trial by jury, and notice of the entry thereof was served upon attorneys for defendant February 9, 1912. A statement of the case was settled September 26, 1912. Thereafter, defendant claims he served upon the attorneys for plaintiff notice of intention to move for a new trial and notice of motion for a new trial, which latter he alleges was dated September 27, 1912, and was returnable at Carrington on the 14th of October, 1912. Defendant's attorneys, however, have filed an affidavit denying the receipt of such notice of motion. The trial court in a supplemental statement states that such a motion "was brought on . . . on the 14th of October, 1912, and that on account of the nonappearance of counsel for plaintiff I ordered the said motion to be continued until such time as counsel could be heard."

Without deciding who is right relative to this dispute, we pass on to say that no hearing upon the merits of this motion was had, and on the 22d of March, 1913, defendant served a notice of motion for a new trial, returnable at Jamestown on the 7th of April, 1913. About the existence of this motion there is no dispute. When such hearing was reached, plaintiff appeared and entered a special appearance, and objected to the jurisdiction of the court in the premises for the reason that more than one year had passed since the entry of judgment and service of the notice of entry of judgment therein, whereby the defendant had abandoned his right to a new trial, and had abandoned his right to an appeal. Notwithstanding this objection to its jurisdiction, the trial court heard and allowed said motion for a new trial, and this appeal follows. Plaintiff stoutly insists that the defendant's alleged

motion for a new trial under date of September 27, 1912, is an afterthought and in support of this points to an order of the trial judge in the case below and dated the 31st day of May, 1913, requiring the defendant's attorney to return forthwith any records or files in his possession in the above-entitled case, to the clerk of court, including all original notices, motions, and orders, and that in pursuance of said order said attorney filed certain papers including the motion for a new trial, dated March 22, 1913, and no notice of any other date, and that the statement of the case was thereafter made upon the present appeal, containing merely the latter notice of motion for new trial, and such was the state of the record until the amended statement was filed by the trial judge. We do not consider it necessary to decide this controversy, as appellant must prevail in any event. If, as insisted by defendant, a motion was served in September, 1912, it was clearly abandoned by failure of the parties to bring the same on for decision, and by the specific act of the defendant in serving a new notice of motion for new trial. See Kaslow v. Chamberlain, 17 N. D. 449, 117 N. W. 529, from which we quote: "We are of the opinion that the motion in the form in which it was noticed was abortive, and went down when not heard on the day for which it was noticed. . . . We find none [authorities] on a notice in form like the one under consideration, which hold that the motion stands over to a later day in the absence of an order by the court or stipulation of counsel." In the case at bar, if defendant is correct in his contention, the trial court at Carrington on the 14th of October continued said motion until such time as counsel could be heard. No definite date was mentioned. There was no stipulation of counsel. Furthermore, the defendant himself filed a new notice on a later date, covering the identical subject-matter.

(1) This brings us to a consideration of the position of the appellant, who states in his brief that the trial court had no jurisdiction to order a new trial, because more than a year had elapsed after notice of entry of judgment had been served upon the defendant. He calls our attention to § 7966, Comp. Laws 1913, which reads: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied;" and to § 7204, Rev. Codes 1905 (which section, however, has been since repealed and has been

superseded by § 7820, Comp. Laws 1913), which reads: "An appeal from a judgment may be taken 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. . . ." It is his position that after the end of the year the matter is no longer pending in the trial court, but becomes a judgment of record, no longer subject to appeal. Having already held that the first notice of motion for a new trial, if it ever existed, had been abandoned, we are not confronted with a situation wherein motion for a new trial is served within the year, and brought on for hearing and submitted within the year, but decided by the court after the expiration thereof, and do not pass upon that question. We have no hesitation, however, in saying that in a case like the present, where the motion is served after the expiration of the year, the trial court has lost jurisdiction entirely. This is the holding in Bright v. Juhl, 16 S. D. 440, 93 N. W. 648, and Deering v. Johnson, 33 Minn. 97, 22 N. W. 174, and the cases therein cited, —the statute construed being in all cases similar to our own. The judgment of the trial court is reversed, and the prior judgment will be in all things reinstated.

INGA HOLLER v. MARIT AMODT.

(153 N. W. 465.)

Contemplating death, one A. executed a bill of sale of his personal property and a warranty deed of his real estate, in favor of his wife. A few days later he executed a will, leaving all of the property, both real and personal, to said wife. After his death, one of the children brings this suit

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Note.—That equity will impress the share of an heir, devisee, or legatee with a constructive trust because of his fraud in frustrating decedent's intention to give the property to a third person is the well-established rule. See notes in 8 L.R.A.(N.S.) 698; 31 L.R.A.(N.S.) 176; and 106 Am. St. Rep. 95. There is a conflict of authority, however, as to whether a constructive trust may be based upon an undertaking to hold for the benefit of another property received through devise or inheritance, where no actual testamentary intention has been frustrated and the element of personal fraud is wanting. The decisions pro and con on the question are collated in note in 33 L.R.A.(N.S.) 996.

against the mother, alleging that said property had been willed to the mother in trust, and praying that distribution be ordered.

Bill of sale — warranty deed — made in contemplation of death — to wife — will later made — in favor of wife — suit by child — claiming property held in trust — distribution — complaint — amendment — motion for.

1. At the close of the evidence, plaintiff moved to amend her complaint by striking out all reference to the bill of sale and deed. This was denied by the trial court, and, for reasons stated in the opinion, such denial was error. However, this court in trial anew will consider the complaint properly amended.

Evidence — clear and convincing — must be — gift of property — by will.

2. Evidence examined and *held* not of that clear and convincing character necessary to establish the trust alleged, but does show a gift of the property, by will, to the mother, without any restrictions whatever, and with the express desire upon the part of the father that his estate be kept together for the benefit of the family and the payment of the debts. That the father trusted the mother to sometime make a distribution of the property in no manner changes the absolute character of the gift.

Opinion filed June 3, 1915.

Appeal from the District Court of Bottineau County, *Burr*, J. Affirmed.

John D. Scherer, for appellant.

Where a will is made devising all the property to a person, with the intent of having this person distribute according to the rule of succession, and such person takes the property with knowledge of the intent of the testator, he holds it in trust for such purpose, and such distribution can be compelled. Gilpatrick v. Glidden, 2 L.R.A. 662, and notes, 81 Me. 137, 10 Am. St. Rep. 245, 16 Atl. 464.

Bowen & Adams, for respondent.

The execution and delivery of the bill of sale and the deed were wholly immaterial matters, and plaintiff was not entitled to amend the complaint to conform to such proof. Maclaren v. Kramar, 26 N. D. 244, 50 L.R.A.(N.S.) 714, 144 N. W. 85.

Where a person takes property by a deed, bill of sale, or by a will, with the agreement that she would transfer the same to the natural heirs of the deceased, she becomes a trustee at once upon failing to so transfer. 3 Pom. Eq. Jur. 3d ed. §§ 1053–1055, and notes; note to Cassels v. Finn, 106 Am. St. Rep. 95.

There must be, however, on the part of the trustee, or grantee, or devisee, a fraudulent agency in procuring the devise or grant. Gilpatrick v. Glidden, 81 Me. 137, 2 L.R.A. 662, 10 Am. St. Rep. 245, 16 Atl. 464.

BURKE, J. On April 14, 1911, Knute Amodt executed a certain warranty deed to his lands and a bill of sale of his personal property to his wife; on May 5, 1911, he executed a will whereby he devised and bequeathed the same property, real and personal, to his said wife. On May 14, 1911, he died, leaving besides his wife, aforesaid, seven children. The oldest, Inga, who is married, brings this action, setting up the aforesaid facts, and claiming that the transfer of the property by the deeds and bill of sale aforesaid, and the execution of the will, were pursuant to an oral agreement had between the father and mother and children, that said property be transferred to the mother with the understanding and agreement that she "would lawfully distribute his property among his heirs, according to the rule of succession." That the purpose of said Knute Amodt in making said transfers and in preparing and executing the will was to save his estate the cost of the probate court. The mother answers, admits that the execution of the deeds and bill of sale were without consideration, and disclaims any claim thereunder. She does, however, claim under the will, and denies that it was made pursuant to any agreement that she would distribute said property among the heirs, but alleges that she is the absolute owner of the property. Upon the trial of the action, the mother was called for cross-examination, and testified that her husband had been sick about six months before his death. That she knew nothing of the deeds or bill of sale.

She testifies:

Q. Did you say that he made a testament in regard to his property?

A. Yes. It was—he left everything to me and says I shall divide it myself.

Q. That is, he made a writing in regard to his property that you call a testament?

A. Yes. He said how he wanted it. . . .

Q. Now, was your husband in bed at that time he told what he wanted to go into this testament?

A. He was in bed. It was not very much he was able to be up all winter, but he was with his full senses until the last day.

Q. And was Mr. Thompson there at the time when he wrote this testament, as you call it?

A. Yes. He was in the room with Knute, and I was not asked about anything. Just told him to state it just the way he wanted it.

Q. Was there anybody else there beside Mr. Thompson at the time he—at the time it was written?

A. Yes, it was Hans Eikness and Conrad and Emil Jonsgaard and a boy that worked for us.

Q. And did Mr. Thompson write this writing up at that time?

A. Yes, he did.

Q. And after it was written up do you know if anyone signed it?

A. Yes, the witnesses.

Q. Did your husband also sign it?

A. He could not write, but made a cross; that was good enough.

Q. After this writing was made, what was done with it, if you know?

A. Knute said that Otis Thompson should keep it for us in his safe. That was all that was said and all the children were satisfied with it. . . .

Q. Do you know when it was that this writing was made?

A. No, I do not remember. It was some weeks before he died. I can't remember it. . . .

Q. Now, at the time when he made this writing, did he say anything about why he made this—what he made this writing for?

A. He said he did it because he wanted me to have it undisturbed.

Q. At the time that he made that writing, did he say anything about making it to save the costs of administration?

A. I did not hear that,—Otis will know about that; he heard it and I didn't,—he did it for the purpose that there should not be any strife about it.

Q. At the time that he made this writing did he say anything about turning the property over to you for you to distribute, instead of the court; at the time that he made this writing did he say anything that you divide this property instead of the court?

A. Yes, he did. . . . That was about all I heard. I was in the bedroom, and told him he could tell how he wanted it done.

Q. What did you hear him say about dividing up the property instead of the court?

A. I did not hear anything about that. I suppose it is in the testament.

Q. Did you hear him say anything about your dividing up the property among the children?

A. No, he said nothing about that.

Q. Well, what did you mean when you testified that the property was given to you for you to divide the property up among the heirs?

A. Well, then, can't I have it until I get ready to divide myself? . . . I can do it then when I am in a place to do it.

Q. You understood that you were to divide up the property; but that you might make the division when you saw fit?

A. Yes, I think it was so. . . . He owned what he had, and when he gave it to me then I supposed it would be mine.

Q. But when you took the property you understood that some time you would have to divide it up among the children?

A. Yes, I understood that; when Holler came out, I said she was to be the first one to have hers; but we were so much in debt that this year had to be taken care of first.

Q. And you took the property for the purpose of dividing it up afterwards at some time?

A. That is how I understood it.

Q. And you got that understanding you had from what you heard your husband say?

A. Yes, that is how I understood it. And he understood that I was the first one to receive it because I worked hard.

Q. And you thought in taking the property that you could divide it up right away if you wanted to, or you could wait a while before you made the distribution or division?

A. No, I thought I would try to divide it so that everybody would be satisfied, in a decent way.

Q. And you do intend to divide the property according to the wishes of your husband as he told you before he died?

A. Yes, of course, I have to divide it after a while; but we were

put back those hard years, but we try and do the best we can until we get that out of the way.

Q. And in dividing it you intend to give to each of the children the share that they would have under the law?

A. Yes. That is what I thought was best.

Q. And you want to do that because your husband asked you to do that before he died?

A. Yes.

Q. And you wanted to do that because he said so at the time he made his testament?

A. Yes, I mean to divide it.

Q. And in dividing it you don't mean to leave your daughter Inga out, do you, but you intend to give her a share also?

A. No, that is what I said to Mr. Holler. Can't he tell you that I said so?

Q. And your husband said he would leave his property to you this way if it was satisfactory to all of the children, did he not?

A. Yes, everyone said "yes" to that.

Q. And the children were all consulted in regard to it, and they were all satisfied?

A. Yes, those that were home.

Q. And because the children were all satisfied, is the reason that your husband left the property that way, is it not?

A. Yes, he said that he was satisfied to have it so. And they all were agreed to have it.

Q. The children all said that it was satisfactory with them for your husband to leave the property to you, did they not?

A. Yes, I should have it just as long as I wanted it. *They all said "yes" to that.*

Q. Then because the children were all satisfied was the reason that your husband left the property to you?

A. Yes, I think it was.

Q. And that is the way—and that was the talk between you about it?

A. Yes, and was well satisfied with it. And he was glad to be ready to go Home.

Q. And you told him that you would take the property as he wanted

you to take it, and that you would divide it among the children yourself?

A. Yes, I have taken care of it, too.

Q. And the reason that you haven't made a division before this is because of the hard years and the failure of the crops?

A. Yes, of course it was; for two years we did not have anything, and we had doctor bills and funeral expenses, and we had no crop, and we had to take care of the funeral expenses.

Q. Ever since your husband died the property has not been in good shape for a division, has it?

A. No, not unless we borrowed at the bank, and that would be too expensive.

Q. And as soon as the property is in shape for division you intend to divide it as your husband requested you and as it was left to you?

A. Yes, that is the intention. The oldest she was first, that is what I said. That is what they shall have. . . .

She further testifies that all of the children were satisfied, with the exception of Inga, the oldest, this plaintiff. Other testimony was given by the witness, but we have set out the most important part. H. D. Eikness was called as a witness, and testified that he was present when the testament was written, but gave no testimony in any manner contradicting defendant. None of the other witnesses to the will were called, which is a circumstance, we think, tending to show that the testimony as given by the mother was substantially correct.

(1) The first question raised by the briefs relates to the ruling of the trial court in refusing to allow an amended complaint by striking out the reference to the deeds and bill of sale. The complaint on which the trial was had contained allegations both of the execution of the bill of sale and deeds and of the will. After defendant had been called for cross-examination, and had given the testimony aforesaid, denying all knowledge of the deed and bill of sale, plaintiff asked permission to amend the complaint by striking out all reference to the sale. Section 7478, Comp. Laws 1913, reads: "No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall

be alleged that a party has been misled, the facts shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just." Section 7479, Comp. Laws 1913, reads: "When the variance is not material as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs." Section 4780, Comp. Laws 1913, reads: "When, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof." Section 7482 reads: "The court may, before or after judgment in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

It will be noted that the utmost liberality is allowed as to amendments, *"when the amendment does not change substantially the claim or defense."* Such has been the holding of this court from the earliest date. See Nashua Sav. Bank v. Lovejoy, 1 N. D. 211, 46 N. W. 411, where it is said: "It would have been within the discretion of the trial court, upon the hearing of such a motion, to have given plaintiff leave, with or without terms, to amend the summons by adding the omitted name thereto. Such discretion would not be reviewable. . . . Courts are created for the purpose of enforcing and protecting rights, not for the purpose of seizing technical and immaterial defects to defeat them. . . . Section 142 provides that 'the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect.' Section 145 provides: 'The court shall, in every stage of action, disregard an error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be

reversed or affected by reason of such error or defect.' We think the case presented by this record clearly comes within the letter as well as within the spirit of the provisions of the sections of the Code above cited."

See Anderson v. First Nat. Bank, 5 N. D. 80, 64 N. W. 114, where this court said: "The plaintiff asked leave to amend his complaint to conform to such proof. Such an amendment is in furtherance of justice. To refuse to allow it is an abuse of discretion. Not a single reason can be adduced to support such denial. No possible prejudice could have resulted to defendant from the granting of it. Defendant could not have been surprised to its prejudice, as it did not then and does not now dispute the fact, the allegation of which plaintiff sought to incorporate in the pleading by the proposed amendment. In denying the application for leave to amend, the court debarred the plaintiff from recovering the amount due the plaintiff from defendant. To have granted the motion would have resulted in no prejudice or injustice to defendant. The denial of it resulted in great injustice to the plaintiff. . . . We are not confronted with the question whether a party can by amendment change his cause of action from contract to tort, as the amendment proposed, while showing a conversion, would have left the complaint still standing as a complaint on contract. . . . We do not think that the proposed amendment substantially changed the nature of the plaintiff's claim, within the meaning of § 4938, Comp. Laws, permitting courts to allow an amendment on the trial, to make the pleading conform to the proof. [Citing] Smith v. Savin, 141 N. Y. 315, 36 N. E. 338; Culp v. Steere, 47 Kan. 746, 28 Pac. 987; Spice v. Steinruck, 14 Ohio St. 213; Esch Bros. v. Home Ins. Co. 78 Iowa, 334, 16 Am. St. Rep. 443, 43 N. W. 229." Upon rehearing, at page 89 of the said reports, the court goes further into the powers of the trial court to grant an amendment, and says: "We will assume in this discussion that defendant's counsel is correct in his assertion that the proposed amendment showed that it was this remedy to which the plaintiff desired to resort. The mere fact that by this amendment the plaintiff sought to change his action from one at law to one in equity is by no means decisive against the power of the court to make it. Unlike a motion to amend by transmuting an equity into a law case, the granting of it does not deprive the

defendant of the right to a jury trial. When the action is transformed into an equity action, defendant has no right to a jury trial. . . . The power of the court to amend the complaint on the trial to conform to the proof is not so limited by the statute that it cannot be exercised where the amendment will change the action from law to equity. The language of the statute is that the amendment shall not 'substantially change the claim.' We do not think that the proposed amendment substantially changes the plaintiff's claim. The form of the action is altered. The recovery will be somewhat different. But both complaints rest ultimately upon the ownership by plaintiff of the notes in question. . . . It is to be noticed that the statute declares that, to cut off the power to amend to conform to the proof, it is not enough that the cause of action is different. The claim itself must be changed, and that, too, in a substantial way. If in substance the two claims—the one set forth in the original and the one embraced in the amended complaint—are the same, the power to amend on the trial to conform to the proof exists."

In Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570, it is said: "The first point urged by the defendants is that the court erred in permitting the plaintiff, after the verdict, to amend the summons, complaint, and all the proceedings by adding the name of the Northern Pacific Railroad Company as a party plaintiff. The action was originally instituted in the name of the receivers of the company, such receivers having been appointed by the proper United States circuit court in foreclosure proceedings. . . . It is true that this amendment was not made until after verdict; but the corporation had practically been a party to the action before that time, and the amendment simply brought it formally upon the record in the case. No right of the defendants could possibly be prejudiced by such amendment. The defendants were fully heard on the two questions on which they were entitled to be heard,—the question of necessity, and the question of damages. . . . Our statute relating to amendments is very broad in its provisions. Rev. Code § 5297, Comp. Laws 1913, § 5853. If the amendment is in furtherance of justice, it may be made. To hold that the amendment we are discussing should not have been made would be to return to the highly technical and extremely rigid rules of the common law relating to procedure."

In Martin v. Luger Furniture Co. 8 N. D. 220, 77 N. W. 1003, it is said: "It is elementary that the granting or refusing to grant amendments to pleadings is a matter lying largely within the discretion of the trial court, but it is equally well settled that such discretion means a legal, and not an arbitrary, discretion. . . . The general rule governing the allowance of amendments to pleadings has been well stated by Chief Justice Sawyer, in Kirstein v. Madden, 38 Cal. 162, in the following language: 'From oversight of counsel, committed under pressure of business, pleadings are often defective. In such cases, when an offer to amend is made, at such a stage in the proceedings that the other party will not lose an opportunity to fully present his whole case, amendments should be allowed with great liberality.' In Hayden v. Hayden, 46 Cal. 334, the court say: 'Undoubtedly, courts should be liberal in allowing amendments, to the end that cases may be fully and fairly presented upon their merits, and that equal and exact justice may be done between the parties.' In the light of the well-established principles enunciated by these cases, it is difficult to understand upon what legal theory the application to amend the answer was denied. . . . The argument of counsel is that a suitor cannot be permitted to assume positions in a law suit which are directly antagonistic to each other, and that to allow this to be done would, in effect, be to countenance bad faith in a suitor. This position is certainly plausible, and, abstractly considered, is unassailable; but it may, we think, in this case, be answered in part by the fact—as disclosed by the answer—that defendants have not directly alleged that the memorandum embraces the arrangement made by the parties respecting the purchase of the furniture. . . . This request, as we have seen, clearly involved a radical change of front on the part of the defendants, but we are constrained to hold that this change does not necessarily involve bad faith on defendants' part."

See Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855, where the court says: "On September 28, 1897, an amended complaint was filed in the district court, which, in substance, embraced all the allegations of the first complaint, but omitted the allegation that the defendant unlawfully entered upon the land and ousted the plaintiff thereof. In the amended complaint the following facts not contained in the first complaint were, in substance, set out, viz.: That the supreme

court had decided that the attempted foreclosure was abortive. . . . This new complaint further alleged that the defendant, since taking possession of the land, had leased the same to one Allison. . . . It was further averred that the rents, issues, and profits arising from the land had much more than met and discharged the mortgage debt and the taxes upon the land. . . . In this complaint, the plaintiff asked for an accounting in equity. . . . Counsel contended that the original complaint stated a cause of action in ejectment, and that the amended complaint alleged a cause of action for an accounting in a court of equity; and counsel contend, under an established rule of practice existing in the Code states, as well as in the states having no Code of Civil Procedure, that this is not permissible. There is good authority for this proposition of law, and we shall, at least for the purposes of this case, assume its entire correctness as stated by counsel. We are therefore to consider whether the amended complaint is obnoxious under this rule of practice. We think it is not. It lies within the discretion of the district court, either before or after judgment, to allow an amendment of a pleading in furtherance of justice, if the proffered amendment does not 'change substantially the claim or defense.' Rev. Codes 1895, § 5297, Comp. Laws 1913, § 5853. The question is, therefore, whether the facts averred in the amended complaint do substantially change the plaintiff's claim or cause of action as stated in her original complaint. As this court construes the two pleadings, the plaintiff's claim against the defendant, as presented in the two complaints, is substantially one and the same claim. It is certainly clear that a large and substantial part of the relief which a court of equity could lawfully grant the plaintiff under his first complaint could be granted with equal propriety upon the facts set out in the amended complaint. The facts pleaded in both complaints, if established, would entitle the plaintiff to relief in a court of equity as follows: First, to a decree quieting title in the plaintiff, and excluding the defendant from claiming title to the premises; second, to a decree canceling the foreclosure sale, and the certificate and deed issued pursuant to such sale; third, to a decree canceling the warranty deed from James Milne to the defendant; and, finally, to a judgment awarding the plaintiff the possession of the land. The facts pleaded in both complaints, without doubt, invoke the powers of a court of equity; and, being in a court of

equity, that court would retain jurisdiction of the case for all purposes. . . . But the two complaints differ in this: In the first it was alleged, in terms, that the defendant took possession of the premises unlawfully, and ousted the plaintiff therefrom; but this statement was qualified in the first complaint by an averment to the effect that the defendant claimed to be the owner of the land under the foreclosure sale, and the deeds of conveyance executed pursuant to such sale. We think that these two statements, when fairly construed, amount only to the allegation that the defendant entered upon the land in good faith as owner, but that he was mistaken as to his ownership, because the foreclosure under which he claimed title was illegal and abortive. It was not alleged in the first complaint that the defendant obtained possession by force, nor is it claimed in any of the plaintiff's pleadings that defendant obtained possession otherwise than peaceably. In the second complaint, the allegation that the defendant entered unlawfully and ousted the plaintiff is omitted, and in lieu thereof the plaintiff alleges only that the defendant was in possession of the premises; and by this complaint the defendant did not attempt to characterize the defendant's possession, or attempt to allege, in terms, whether the same was or was not lawful or wrongful; but, on the other hand, after stating the facts, the plaintiff prayed for an accounting, and for general relief in equity. . . . Our conclusion is, therefore, that the trial court properly denied the defendant's motion to strike out the amended complaint."

See also Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518; McLain v. Nurnberg, 16 N. D. 144, 112 N. W. 243; Webb v. Wegley, 19 N. D. 606, 125 N. W. 562, wherein it is said: "Our statute . . . permitting amendments of pleadings is very liberal in favor of such amendments. . . . If an amendment is in furtherance of justice, it may be allowed. Trial courts are vested with a broad judicial discretion regarding the subject of the allowance of amendments, and it is firmly established that an appellate court will not interfere with the action of the trial court, except in cases of a clear abuse of discretion. . . . From the record in the case at bar we are not prepared to say that the trial court abused its discretion in permitting the amendment complained of, although no showing of cause therefor was made. The original answer, while inartistically framed, clearly shows on its

face that defendant did not intend to admit liability, as numerous alleged defenses are attempted to be pleaded. In deciding this point, as above indicated, we find ample support in the authorities."

See also Barker v. More Bros. 18 N. D. 82, 118 N. W. 823, wherein it is said: "The answer is, in effect, a general denial. The record shows that there was a misunderstanding at the trial as to whether an amended answer had been served. After such misunderstanding had developed, the defendants asked leave to interpose and file an amended answer, and leave was granted to file the same. This amendment was objected to, and the objection is still insisted on. The additional fact sought to be pleaded in the amended answer is that plaintiff assigned all his interest in the contract to them for a valuable consideration, on November 7, 1902, by an instrument absolute in terms, and that it was expressly agreed and understood between the plaintiff and these defendants at that time that the assignment was absolute in terms, and not as security. . . . On the appeal, the plaintiff's contentions are: (1) That it was error to permit the defendants to interpose the amended answer. . . . In reference to the action of the trial court in permitting an amended answer to be served, we think there was no abuse of discretion, and that the plaintiff was in no way prejudiced by the amendment. The complaint alleged that the assignment to Cooper was for security purposes only. The original answer expressly denied that there was any trust relation created by that assignment, and under that allegation and denial it would not have been error to admit proof that the assignment of November 7, 1902, was not a conditional one. However, disregarding entirely the question of the sufficiency of the original answer, we discover no reason why it was prejudicial or erroneous to permit the amendment to be filed to conform to the proof. It was not a different or new defense from that which was foreshadowed by the general denial or answer, wherein there was an express denial of any trust relation growing out of the assignment. The amended answer alleged that fact in more specific terms. The plaintiff did not ask for time to present additional evidence by reason of the amendment, and there was no showing or claim of surprise. The amendment was permissible and directly within the provisions of § 6883, Rev. Codes 1905, § 7482, Comp. Laws 1913. The amendment did not substan-

tially change the defense. A wide discretion is reposed in trial court in allowing amendments."

This is also the holding of a long line of authorities in our sister state of South Dakota upon the identical statute, beginning with Kelsey v. Chicago & N. W. R. Co. 1 S. D. 80, 45 N. W. 204, where it is said: "The modern rule, and the generally prevailing principle to-day, is that all such amendments shall be made as may be necessary for the purpose of determining the real question or questions in controversy between the parties, and administering justice. Under the Code, the utmost liberality prevails upon the subject of amendments of pleadings. The power of a court to allow an amendment of a pleading on a trial is expressly conferred by § 4938, Comp. Laws, which is as follows: [citing statute identical with ours]."

See also the case of Miller v. Perry, 38 Iowa, 301, wherein the supreme court says: "Under the statute it is the rule to allow amendments to pleadings. To refuse is the exception. The right to amend is not an absolute unconditional one, but is to be allowed in furtherance of justice under a sound discretion. Amendments, within the limits of the statute, should always be allowed when substantial justice be thereby promoted, and they should not be refused so as to operate a denial of justice." See also Gans v. Beasley, 4 N. D. 140, 59 N. W. 714; Kerr v. Grand Forks, 15 N. D. 294, 107 N. W. 197; Morgridge v. Stoeffer, 14 N. D. 430, 104 N. W. 1112; Rae v. Chicago & St. P. R. Co. 14 N. D. 507, 105 N. W. 721.

The case of MacLaren v. Kramar, 26 N. D. 244, 50 L.R.A.(N.S.) 714, 144 N. W. 85, is not contrary to these decisions nor the rules which we have been reciting, but under the peculiar facts in that case it was held that the amendment proposed introduced a *substantially different defense.* The holding in MacLaren v. Kramar is in harmony with the text stated at 31 Cyc. 452, wherein it is said: "There is a wide difference between a variance such as may be cured by an amendment, and a total failure of proof. If the divergence between allegation and proof is total, so that the cause of action or defense as proved is another than that set up in the pleading, then obviously there is no room for amendment, and a dismissal of the complaint or rejection of the defense is the only course open to the court."

With the law as above outlined in mind we turn to the case at bar.

In her complaint, plaintiff alleges the execution of the deed and bill of sale, and also of the will. Her amended complaint was identical in all respects with the first one, excepting that she withdrew the allegation regarding the execution of the deed and bill of sale. This was not the substitution of a new and different cause of action, but rather the narrowing of her allegations. The defendant was in no way prejudiced nor surprised. It was therefore the duty of the trial court to allow the amendment in the interests of justice. However, this is not important in view of the fact that we have before us the amendment, and as appellant demands a trial anew in this court the same will be tried upon said amended complaint.

(2) Assuming, then, that the amended complaint is properly before us, we reach the consideration of whether the evidence is sufficient to sustain the finding of the trial court, that there was no understanding or agreement had between the said Knute Amodt and the defendant that the said defendant should distribute the property belonging to his heirs after his death. There is absolutely no testimony in the record excepting that of the defendant herself, and from it we learn that the father, before his death, told defendant that he left everything to her, and that she should divide it herself. That the time and circumstances under which she should divide the property were left entirely to her. That the father understood that the mother was the best one to receive it and keep it together and do the best that she could until the debts were paid. We think that an analysis of the testimony will show that the father intended to give the property outright to the mother; that he relied upon her to take care of the family with the proceeds of his estate; and as occasion required give to each child some portion of the same. It is very evident that he did not wish it immediately divided, as he could have attained this result by making such disposition in the will. There is nothing in the argument that it was willed to the mother to save expenses; the expenses were just as great in the methods chosen as though he had himself made the division. The father undoubtedly believed that owing to the mother's age, she would not need the property a great many years. He also realized that it was for the best interests of the family that the children should be kept together, for a time at least, and that the property be used in its entirety for the support of the family and payment of the debts. The

fact that he trusted the mother to eventually redistribute the property, with justice to all of the children, does not change the absolute character of the grant. It was no restriction upon her title. That he trusted her to use the property according to his wishes, and to eventually distribute the same in a like manner, has nothing to do with the outright gift. The will is absolute. The burden is upon the plaintiff to show by clear and convincing evidence that there existed a trust of the nature claimed, and this burden she has not met. The trial court therefore was clearly right, and the judgment is affirmed.

J. I. CASE THRESHING MACHINE COMPANY, a Corporation, v. W. J. LOOMIS.

(153 N. W. 479.)

Written contracts — employment agents — soliciting — selling — commission — conversation — independent contract — executed.

1. Where a written contract of employment of a selling and soliciting agent provides that such agent shall receive a 10 per cent commission on the sales made and accepted under his contract, and further expressly provides that "no commission shall be allowed for sales made where other goods or property is taken in part payment," proof that such agent introduced to his employer a customer who, before such introduction, had told the agent that he would purchase a threshing machine from such employer if it was satisfactory to him, and later went with such agent to the office of the employer, and there said that he would purchase such machine if satisfactory to his son, but would make no definite contract at the time, a conversation also being held at such time in the presence of the employer and of the agent in relation to the taking of a secondhand machine in trade, and the would-be purchaser and the agent returned without making a definite contract, and later the purchaser returned to the office of the principal with his son and approved of the machine, and made a contract with the employer for its purchase on condition that he could turn in a secondhand machine in part payment, which agreement was consummated,—such agent is not entitled to a recovery, upon the written contract, of the 10 per cent commission provided for in said agreement.

Words — "sell" — "barter" — "dispose of."

2. The word "sell" is not synonymous with the terms "barter" and "dispose of." It involves a money transaction.

Written contract — subsequent written contract — executed oral contract — altered by.

3. A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise. Comp. Laws 1913, § 5938.

Contract — breaking — threat to break — consideration.

4. A threat to cause a contract to be broken which another has made is not a valid consideration for a new contract between the person who makes the threat and the one who is threatened.

Conditions in contract — waiver — must be pleaded — when relied upon.

5. A waiver of a material clause of a contract must, in order to be relied upon, be specially pleaded.

Opinion filed June 4, 1915. Rehearing denied July 2, 1915.

Appeal from the County Court of Ransom County; *Thomas*, J. Action to recover for merchandise furnished. Counterclaim for commission. Judgment for defendant on counterclaim. Plaintiff appeals. Reversed.

Statement of facts by BRUCE, J.

This action was tried to the court, a jury having been waived. It was brought by the plaintiff and appellant threshing machine company to recover from the defendant and respondent the sum of $135.90 for merchandise furnished. The defendant admitted the debt, but set up a counterclaim in the sum of $420 for a commission claimed to have been earned by the defendant in the sale of a threshing machine. Both parties moved for a directed verdict. The trial court granted the motion of the defendant, and from the judgment for the difference between the amount originally sued for and the said counterclaim, namely, $396.31, the plaintiff appeals.

Lawrence & Murphy, for appellant.

A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise. Civil Code 1877, § 969; Rev. Codes 1899, § 3936; Annis v. Burnham, 15 N. D. 577, 108 N. W. 549; Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088; Foster v. Furlong, 8 N. D. 282, 78 N. W. 986; Dowagiac Mfg. Co. v. Mahon,

13 N. D. 516, 101 N. W. 903; Houghton Implement Co. v. Doughty, 14 N. D. 331, 104 N. W. 516.

Defendant cannot recover upon quantum meruit. Western Electric Co. v. Baerthel, 127 Iowa, 467, 103 N. W. 475; Apking v. Hoefer, 74 Neb. 325, 104 N. W. 177.

Charles G. Bangert, for respondent.

Contracts should be so construed as to arrive at and carry out the intention of the parties. Frost v. Williams, 2 S. D. 457, 50 N. W. 964; Rev. Codes 1905, §§ 5340, 5345, Comp. Laws 1913, §§ 5896, 5901.

They may be explained by reference to the circumstances under which they were made, and the matters to which they relate. Rev. Codes 1905, §§ 5351, 5354, Comp. Laws 1913, §§ 5907, 5910.

In construing a contract the intent is to be gathered not from detached parts, but from the whole of it. 9 Cyc. 589; Lindley v. Groff, 37 Minn. 338, 34 N. W. 26; Davis v. Ravenna Creamery Co. 48 Neb. 471, 67 N. W. 436.

If the agreement is not for a compensation, it is necessarily one for a penalty. Lyman v. Babcock, 40 Wis. 503; Sutherland, Damages, 3d ed. § 295; Woods v. J. I. Case Threshing Mach. Co. 155 Iowa, 177, 135 N. W. 399; Davis v. Huber Mfg. Co. 119 Iowa, 56, 93 N. W. 79.

BRUCE, J. (after stating the facts as above). The question before this court is whether the defendant was entitled to a commission of 10 per cent on the sale of the threshing machine in question, and by the terms of his contract of agency. Plaintiff and appellant contends that he is not, as the machine was not sold for cash, but an old threshing machine was taken in part payment thereof, and the contract of agency expressly provides that "no commission shall be paid . . . upon goods sold or exchanged for other goods on account of alleged defects; nor upon sales made where other goods or property is taken in trade or as part payment, unless at the option of the company said dealer accepts such goods or property as his commission, and promises in writing to pay the company at the time of the delivery and settlement the amount necessary to make up the net price of the new goods; nor upon any sale not recommended by the dealer in writing upon the company's 1910 order blanks; nor upon any goods sold to purchasers

who seek to purchase at the company's factory, transfer agency, or branch house, unless accompanied by the dealer."

Defendant, on the other hand, claims that such provision, even if applicable to the sale before us, is void as against public policy; and that, seeing that the company's officers completed the sale, the defendant should not be deprived of his commission because they saw fit to take a secondhand engine in part payment. If the evidence had shown in this case, as it does not, that the defendant had furnished a buyer who at the time he was presented to the company was ready and willing to make a cash purchase or the equivalent thereof, but was afterwards permitted by the company to modify such officer or agreement to the extent of turning in a secondhand machine as part of the purchase price, we would have been confronted with a very different proposition than that which is now before us.

Defendant, however, clearly relies and sues upon his contract of agency and for the 10 per cent commission which is allowed thereby, and there is no proof whatever in the record that the purchaser ever at any time agreed with anyone for a cash purchase or for the equivalent thereof; and there is therefore no showing that the defendant was ever at any time, under such contract, entitled to the 10 per cent commission which he sues for.

This contract was a "dealers" contract. It granted to the dealer and "in consideration of the premises" permission "to take orders for its (plaintiff's) machinery, extras, supplies, and repairs." It nowhere, except in the provision hereinbefore referred to, makes any mention of deals for anything but cash or properly secured notes. It expressly provides that machinery shall be delivered "only for cash, or to responsible purchasers who give ample security for all time payments with interest thereon;" that written orders shall be taken for all machinery, "whether for cash or notes, upon the company's 1910 order blanks." It speaks only of orders, and not of sales, as far as machinery is concerned, and these orders are to be sent to the company for acceptance. It provides for a commission of 10 per cent on orders for threshing machines which are accepted; but it further contains the provision that "*no commission shall be allowed for sales made where other goods or property is taken in as part payment unless* at the option of the company said dealer accepts such goods or property as his commission and

promises in writing to pay the company at the time of delivery and settlement the amount necessary to make up the net price of the new goods; nor upon any sale not recommended by the dealer in writing upon the company's 1910 order blanks." Counsel for respondent is not correct in his assumption that the contract provides for a 10 per cent commission unless an option to take the secondhand machinery is given to the agent. It positively states that no such commission shall be allowed unless the option is both given and accepted. It is therefore quite clear that the proof which was adduced did not justify a recovery upon the cause of action which was sued upon, that is to say, under the written contract of agency. Lowe v. Jensen, 22 N. D. 148, 132 N. W. 661; Yancey v. Boyce, 28 N. D. 187, 148 N. W. 539; Egan v. Burnight, — S. D. —, 149 N. W. 176; Huber Mfg. Co. v. Seabold, 14 Ind. App. 109, 42 N. E. 648; Reeves v. Watkins, 28 Ky. L. Rep. 401, 622, 89 S. W. 266.

It is claimed, it is true, that whether a commission shall be allowed in case of a trade is by the terms of the contract left to the option of the company, and that such a provision is harsh and one sided, and therefore void as against public policy. This question, however, we are not called upon to determine. All that is necessary to say is that, even if this clause of the contract had been stricken out, there is nowhere in the contract a provision for any commission on anything but a cash sale or the equivalent thereof.

It is true that there is in the record proof of a conversation with an agent of the company in which an offer was made to allow the defendant the option of accepting the secondhand machine or of guarantying the sale thereof, and that during such conversation the agent told the defendant that unless he accepted such option the deal could not be made; that the defendant told the agent that they (the company) would have his permission to break the deal, and that rather than guarantee the sale of the secondhand machine or accept it himself he would break the deal, would try and stop the deal right there, try and get Oelke to break the contract; that upon receipt of this statement from the defendant the agent informed him that he would take the matter up with Hanson, the branch house manager of the company, which he did, and later came back and said he guessed it would be all right, that Hanson would let the deal go on through without any signing.

There is no evidence, however, that commissions were spoken of during these transactions. In fact, the defendant testifies positively that they were not. Nor is there any evidence of any agreement to waive the provision in the contract which provided that no commission should be received in case of a trade.

On cross-examination the defendant testified:

Q. As I understand the testimony you gave, it was to the effect that Gonlogson asked you to take the old rig they traded in and pay the company the amount they had invested that they would have to have to make up their net?

A. Yes, sir.

Q. That was about the substance of it?

A. Yes, sir.

Q. And you refused to do that?

A. Yes, sir.

Q. What did Gonlogson say then?

A. He claimed that that was the order from the branch house manager, that he had told him to do that and he says, "I don't know as I can vary from that," and I said, "You will have to." And we talked the matter over quite a while, and he says, "I will go and telephone and see what can be done;" and he came out and came back, and of course he wanted me to sign; but I said I wouldn't; and he says, "I guess we will leave it go as it was. Let the deal go on."

Q. There was nothing said then as to what would be done with reference to your commission. He didn't say anything about what commission you were to get?

A. There was never at no time an agreement to take the secondhand rig. Never a time did I agree to take the secondhand rig. I didn't agree to it at all. That was what we argued about.

Q. You wouldn't take the secondhand goods under any consideration as your commission?

A. No, sir.

Q. Either in whole or in part?

A. No. . . . I told him rather than guarantee the sale of a secondhand rig or accept it myself, that rather than do that, I would break up the deal. I would try and stop the deal right there,—try to get Oelke to break his contract.

Q. At that time was there anything said that in the event you didn't do that, whether or not you would get any commission?

A. No, nothing mentioned about commission. Never was mentioned until I asked Mr. Hanson if they wouldn't give me a commission, and he said "No." That was about a year or two after when Oelke paid for the rig.

It is, too, a significant fact that although the contract provided for the issuance of commission certificates in cases of sales which were paid for in notes in whole or in part, as in the case at bar, and which certificates were to be redeemed in cash when the purchase price was finally paid, no such certificates appear to have been issued to the defendant, nor does there seem to have ever been any demand therefor. In fact, no demand seems to have been made for any commission at all until at least a year after the balance of the purchase price had been paid. Even then there is no demand for a commission, but merely the question, "if they would not give me a commission." The evidence, therefore, falls far short of proving any agreement for the 10 per cent commission provided for by the contract, and it is on the contract that the action is brought.

The only theory, indeed, on which the judgment can be sustained is that the company waived the provision relating to the acceptance of or guaranty of the sale of the secondhand machine and that if this were waived there is an agreement in the contract independently thereof for a 10 per cent commission. The two clauses, however, must be taken together, and where is there in the contract any agreement for commissions in cases of trades? The principal clause provides that "for each traction, portable or skid engine . . . sold, duly settled for, and delivered, . . . a commission of 10 per cent." The word "sell" is not synonymous with the terms "barter" and "dispose of." It involves a money transaction. Mora v. Murphy, 83 Cal. 12, 23 Pac. 63; Re Carr, 16 R. I. 645, 27 Am. St. Rep. 773, 19 Atl. 145, 146; Phelps v. Harris, 101 U. S. 370, 381, 25 L. ed. 855, 859; Consumers' Brewing Co. v. Norfolk, 101 Va. 171, 43 S. E. 336; 7 Adjudged Words & Phrases, 1st ed. 6407, 6408.

In addition to this we find that in the first clause of the contract the

dealer agrees to deliver machinery only for cash or to responsible purchasers who will give ample security for all time payments.

Even if the agent Gonlogson had authority to waive the provision which provides that commissions shall not be paid in cases of trades unless the sale of the article taken on such trade shall be guaranteed, and of this there is much doubt, still a new agreement for the payment of the 10 per cent commission or of any commission at all was necessary, as nowhere is there to be found in the contract any agreement to pay commissions except on cash sales or their equivalent. Plaintiff expressly claims that he is suing on the written contract and on the written contract alone, and there is no evidence of the reasonable value of the services claimed to have been rendered. Even, therefore, if there was a waiver of the option clause, such waiver in no way resurrected an agreement to pay a 10 per cent commission in cases of trades, for no such agreement is to be found in the contract.

We, too, find neither in the law nor in the contract itself any authority for any such new agreement or waiver. The contract expressly provides that no acceptance of an order "or the approval of any general agent, officer, or salesman of the company shall be deemed a waiver of any breach of duty or any stipulations of this agreement unless expressly so agreed by the company in writing."

Section 5382, Rev. Codes 1905, being § 5938, Comp. Laws 1913, provides that "a contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise." There is no such additional contract in writing in the case at bar, or at any rate no such contract is sued upon, nor do we find any proof of an execution of the alleged oral agreement, nor do we believe that there was any consideration therefor. The threat to cause a contract to be broken which the plaintiff was himself a party to, as he admits that on the visit to Fargo the taking of a secondhand machine was spoken of and discussed, can hardly be held to amount to a consideration. Not only is all of this true, but no such waiver is pleaded or relied upon, and the only theory on which plaintiff in fact relied or could rely upon under the pleadings was the theory that the clause as to secondhand machines was void as against public policy. He nowhere in his pleadings pleaded a waiver of the clause in question, and it is elementary that a plaintiff cannot show a waiver of performance or a modification

of any part of a contract without alleging it, and that the fact showing a waiver of a provision in a contract must be specially pleaded. 9 Cyc. 727.

We are not unmindful of the cases of Davis v. Huber Mfg. Co. 119 Iowa, 56, 93 N. W. 78; Woods v. J. I. Case Threshing Mach. Co. 155 Iowa, 177, 135 N. W. 399; and McGeehan v. Gaar, S. & Co. 122 Wis. 630, 100 N. W. 1072, in which commissions seem to have been allowed and on which the defendant places much reliance. In the case of Woods v. J. I. Case Threshing Mach. Co. however, there was no positive negation of the commission provided for in the case of a trade such as is to be found in the contract before us, while the holding in the case of Davis v. Huber Mfg. Co. is expressly repudiated by the sole and only authority upon which it is based, viz., § 966 of the 1st edition of Mechem on Agency, and in which the author says:

"These principles have been most frequently applied in the case of brokers employed to sell real estate, and a consideration of their application here will throw light upon the whole subject. A broker employed to sell real estate may be authorized and required by the terms of his undertaking not only to find the purchaser, but to procure from him a valid written agreement binding him to purchase upon the terms specified, and where this is his undertaking, unless the principal waives this condition by accepting the purchaser and selling to him, or otherwise, the broker has not earned his commissions until it is performed; but the authority and duty of the real estate broker, as ordinarily employed, do not go so far. As so employed, he has no implied authority to bind his principal by a written contract to sell the real estate, and, unless he contracts for more, it is no part of his implied duty to complete a binding contract with the purchaser. His duty is performed when he has found a purchaser who is ready, willing, and able to purchase *upon the terms specified,* or, if no particular terms were agreed upon, when he has produced a purchaser to whom the principal sells."

Here, in the case at bar, *the terms specified were cash or notes, and there was an express provision waiving the commission in case of a trade.* The case as a whole, indeed, comes within the general rule of the same author, which is to be found in §§ 1513 and 1514 of his second edition, and in which he says: "Section 1513. Agree-

ment to pay compensation—Express—Implied.—It is entirely competent for the parties to agree expressly not only that the agent shall be compensated for his services, but that his compensation shall be a certain sum, or shall be paid in a certain way, or shall be ascertained in a particular manner. It is also competent for them to agree that *he shall be compensated only in a certain event, or that he shall receive no compensation at all.* Section 1514. Express Agreement Conclusive.—*Wherever the parties have expressly agreed upon the fact that compensation shall or shall not be paid, or shall be paid only in a certain event, that agreement,* in the absence of fraud or mistake of fact, *is conclusive.* If the principal has expressly agreed to pay a compensation, the fact that the service was, through no fault of the agent, of no value to him furnishes no excuse for not paying. So if the agent has *expressly agreed to serve without compensation, he will have no claim for wages however beneficial his services may have proved to the principal. And so if compensation is to be paid only in a certain event, or upon the happening of a given contingency, no claim can arise except upon the happening of the event or contingency agreed upon.*"

When we examine also the case of McGeehan v. Gaar, S. & Co. supra, we find no provision which expressly negatives the allowance of a commission in cases of trades. In that case the court merely held that the plaintiff was entitled to the commissions which were provided for by the contract, and no more. It, in short, expressly upheld the terms of the contract, which provided: "If the agent takes anything in trade it is understood that he takes it on his own account, and the amount allowed for it comes out of his commission. If the amount allowed is more than his commission, he is to make up the deficiency;" and the whole recovery was based upon this provision. The sale or trade, like the one at bar, was one which the plaintiff himself had originally negotiated, but it was ultimately made and consummated by other agents of the company. "I think," the court said, "that the facts bring the case within the provision that the plaintiff is entitled to such commissions *as the contract contemplates.*"

The judgment of the county court is reversed, with directions to enter judgment for the plaintiff for the amount sued for.

Goss, J., dissenting. My views are not in accord with the majority. This is not because of the law announced, but rather because, as I view it, the main contention of the respondent is ignored entirely, and few, if any, of the facts supporting it stated. Loomis held a dealer's contract with the company wherein, as stated in the majority opinion, it was at the option of the company in the first instance, provided a sale was made under the contract, as to whether it would allow defendant a commission on the sale. But because this dealer's contract was in existence, it does not necessarily follow that the sale in all respects was made under it. Its provisions could be waived or modified according as the company and the dealer saw fit to agree with reference to the particular deal. And the main question on this appeal is not as to the law governing the parties if the sale was made strictly under the terms of the dealer's contract. It is elementary that, if such were the case, the contract would govern. But, instead, do the facts show a sale made with a waiver of the provision of the contract that the dealer should take his commission out of secondhand rigs taken in by the company on the deal, and that, instead, the dealer should be paid a commission as on a sale for cash or on time, disregarding the secondhand machinery taken in part payment? Manifestly the company contracts with reference to its own rights; and with no limitations on it concerning the sale of its own property, could make any agreement with Loomis in this respect that it saw fit. The facts surrounding the sale and the waiver, if any, will be stated.

Loomis procured the purchaser, one Oelke, since deceased. He had conditionally promised Loomis that he would purchase a threshing rig of or through him. Later in carrying out this agreement the two left Enderlin, their local town, for Fargo, where Loomis introduced Oelke to Hanson, plaintiff's Fargo agent, and all of them examined plaintiff's threshing machinery; but Oelke would not purchase a rig without his son, an engineer, also examining it. So the parties returned to Enderlin, Oelke to return to Fargo with his son that the latter might two days later also pass judgment on the rig. Oelke told Loomis that it was unnecessary for the latter to go with them to Fargo, because if the son was satisfied, as was he, with the machine, they would buy it. The son was suited with it and they agreed to purchase a $4,200 rig. Then or later the purchaser executed a note for $3,000 due that

fall, and the company agreed to take in his old threshing outfit at $1,200 as the balance of purchase price. The sale was not made independent of Loomis, but through him and one Gonlogson, whom Loomis introduced to the Oelkes and who was the plaintiff's sales agent, and who made two inspection trips to pass upon the value of the secondhand rig before the acceptance of it and closing of the purchase deal. On one of these trips and before the delivery of the machine (and whether before or after the signing of the order for the machine by Oelke the evidence does not disclose, but in any event before the deal was finally closed), Gonlogson presented to Loomis for the latter's signature a written guaranty that Loomis would sell the secondhand rig, and evidently, as assumed in the main opinion, either accept the same as his commissions, or guarantee its resale at $1,200, pursuant to the provisions of ¶ E. of the dealer's contract reading as set forth in the main opinion. To this point beyond question the parties had operated under the dealer's agreement, although the strict terms thereof had not been complied with because the order had not been taken by the dealer, but instead by the Fargo office or its agent Gonlogson, and to that extent at least it is undisputed the dealer's contract had been deviated from, although no contention of a release from dealer's commissions is made on this score as the same would be clearly untenable. Now, as to the further facts: Loomis testifies that, when he was asked to give that guaranty, he replied that the company's expert had put a price on the rig and he himself had never seen it, and as to guarantying it, "I wouldn't think of it for a minute. Well, he insisted that I would have to sign or the deal would have to be broke, and I says, 'You have my permission to break the deal because I won't do it. I will break the deal before I will sign that thing.' I says, 'Rather than do that I will break the deal;' and he insisted that I should sign in that way, and then he says, 'I will go in and see Hanson, and see if he will let the deal go through that way;' and he went and telephoned and come back, and said he guessed it would be all right, Hanson would let the deal go through without my signing. 'Well,' I says, 'I will not sign it, I refuse to sign it.' I says, 'You passed judgment on the rig, and I don't know anything about secondhand threshing rigs. You were up there and saw it, and you can accept it yourself, or the company can accept it and do what they please with it.' . . . I told

him rather than guarantee the sale of a secondhand rig or accept it myself, that rather than do that I would break up the deal; that I would try and stop the deal right there, try and get Oelke to break the contract. . . . Nothing was said about commissions." The machine had not yet been delivered or settled for. No other demands were ever made on him, and the company took the secondhand rig to Fargo and closed the deal. Two years passed. Oelke paid his note. Loomis claimed a commission on the sale, and the plaintiff refused to recognize his right to any commission.

This testimony is wholly uncontroverted. Plaintiff has proceeded on the theory that the sale was necessarily made under the dealer's contract, without any deviation therefrom; that when Loomis refused to guarantee that $1,200 would be forthcoming to plaintiff for the secondhand machinery taken by it, it was immediately exonerated from all liability for commissions under the contract. But it would seem that the question of waiver by the company of insistence upon this particular provision of the dealer's contract also is involved. Did it waive its right to stand on that contract provision under the facts? It is undisputed that the dealer breached the dealer's contract, and had the parties stopped right there and had nothing more been said or done between the company's agents and Loomis, no claim for commissions could have been made. But at this stage of the proceedings it must not be overlooked that the purchaser had not fully consummated the deal and that he was the dealer's purchaser and more or less in his control. This is important under the threat then made by the dealer that he would cause Oelke to throw up the purchase entirely. The influence of the dealer was necessary unless the company would take chances on the threat being carried out. That this was wholly beside the contract and a violation of the dealer's agreement, matters not. Did the parties with this situation before them settle their difficulty by an understanding had with the company through Hanson that, as Loomis says, the deal could go through as it was, that is, without any guaranty, but with the understanding that Loomis would be entitled to commissions? Can it be said that this is fairly open as an issue of fact to be passed upon? It would seem to be so and that the trial court's finding to that effect has substantial foundation in the evidence. Recognizing the force of this the plaintiff disputes the authority of

Gonlogson or Hansen to alter the dealer's contract. It is true that the contract contains the usual stipulations virtually divesting every agent of the company from acting for the company, but such provisions have been dealt with and disregarded by this court and others heretofore. See Westby v. J. I. Case Threshing Mach. Co. 21 N. D. 575–588, 132 N. W. 137; Advance Thresher Co. v. Vinckel, 84 Neb. 429, 121 N. W. 431; Reeves & Co. v. Younglove, 148 Iowa, 699, 127 N. W. 1017; Koester v. Northwestern Port Huron Co. 24 S. D. 546, 124 N. W. 740; First Nat. Bank v. Dutcher, 128 Iowa, 413, 1 L.R.A. (N.S.) 142, 104 N. W. 497; Nichols & S. Co. v. Paulson, 6 N. D. 400, 71 N. W. 136; and if this was the deal made and the company received the benefit of the sale under it, even though the act of the agent in making the sale was beyond the agent's authority, the reception of the benefits and their retention by the plaintiff is a ratification of the sale, *as made,* and precludes it from disclaiming the burdens arising under the sale, which burdens it must take with the benefits. Westby v. J. I. Case Threshing Mach. Co. 21 N. D. 575–588, 132 N. W. 137; Colean Mfg. Co. v. Blanchett, 16 N. D. 341, 113 N. W. 614. The facts show that the company has received $3,000 of the purchase price in cash, and the balance in the secondhand machinery at its own appraisal as to value, all under the deal made with Oelke through the assistance of its dealer, Loomis. The machine is paid for. It made the sale and took the payment under circumstances from which it can be reasonably inferred, inasmuch as it never denied liability for commissions until long afterwards, that it would pay defendant his dealer's commission. When the company should have spoken and informed Loomis that it would not pay the commission if he persisted in refusing to give the guaranty, it not only kept silent but informed him "that the deal could go through" as it was, knowing at the time his understanding was he should have his usual dealers sale commission of 10 per cent, to earn which he had procured said purchaser.

A word as to the majority opinion. It states that Gonlogson, after phoning Hansen, "later came back and said he guessed it would be all right; that Hansen would let the deal go on through without any signing. There is no evidence, however, that commissions were spoken of during these transactions. In fact, the defendant testifies posi-

tively that they were not." Commissions were not *spoken of,* but the majority ignore and overlook the crucial fact that the company's act in presenting the blank guaranty to the dealer for signature was for the only possible purpose of having him elect in what he should take his commissions. Surely the company would not have taken his guaranty and claimed that no commissions were owing because they were not then "spoken of." Commissions were in the minds of the parties throughout the deal: when Oelke was procured as a purchaser by Loomis; when Gonlogson was utilizing Loomis to close the sale, and in doing so presented the guaranty blank to Loomis that he should guarantee payment of $1,200 worth of machinery or buy it at that figure. That they were not "spoken of" matters not. Guaranties are not asked under such circumstances merely as accommodations. Under the holding and ideas of the majority such is all Loomis's acts amounted to —but an accommodation to assist defendant to sell its machinery. "Actions sometimes speak louder than words," they did so here, and concerning commissions not "spoken of" orally.

To quote again from the majority opinion: "It is, too, a significant fact that although the contract provided for the issuance of commission certificates in cases of sales which were paid for in notes in whole or in part, as in the case at bar, and which certificates were to be redeemed in cash when the purchase price was finally paid, no such certificates appear to have been issued to the defendant, nor does there seem to have ever been any demand therefor," and more along the same line of reasoning. This would be proper addressed to a jury, as it is an argument *on facts.* It has no place in the opinion to justify a holding that the evidence presents no disputed question of fact of waiver for a jury's consideration. It seems to me that this is a usurpation of the province of the jury.

Because no commissions were "spoken of," and no commission certificates issued, might well be found by a jury to be no sufficient reason for a conclusion of fact that commissions were not earned, when considered with a finding for which there is evidence, that the guaranty was intentionally waived when Gonlogson, after talking with Hansen, in charge of the sale, told Loomis, Oelke's friend, in whom Oelke had confidence, and after Loomis's threat to break the deal, that it *"would be all right. Hansen would let the deal go through without any sign-*

ing." This intentionally chloroformed Loomis and enabled it to secure the sale with resulting profits. A jury only can determine the fact of whether Loomis was thus misled into believing a waiver of contract provisions was intended, and that he should have his commissions accordingly. Believe the judgment should be affirmed.

BURKE, J. dissenting. Being unable to agree with the majority, and believing the matter of especial importance, I will set forth my views in a separate dissent. Loomis was the local agent of the plaintiff, and as such signed the regular selling contract. This contract is in evidence, and consists of three parts: First, those things which the company agrees to do; second, those things which the agent agrees to do; and a third part, supplemental and explaining the first and second subdivisions. Under the first subdivision we find: "And the company in consideration of the premises, and for the due observation of this agreement, upon the part of said dealer, agrees: (a) To allow the following commissions to the said dealer, which will be in full for all charges, services, expenditures, etc., . . . for each traction, portable, or skid engine, . . . separator, trucks, straw stacker, feeder and band cutter, . . . water tank, engine tender, . . . sold, duly settled for and delivered within the proper territory, by or through the agency of the said dealer, and not otherwise, a commission of ten per cent." Under the third subdivision, which in a nature explains and modifies the first and second subdivisions, appears this paragraph: "(e) That no commission shall be paid . . . upon sales made where other goods or property is taken in trade or as part payment, unless *at the option of the company,* said dealer accepts such goods or property as his commission, and promises in writing to pay the company, at time of delivery and settlement, the amount necessary to make up the net price of the new goods." The entire controversy in this case is over the construction of the words which we have italicised, *"at the option of the company."* The threshing machine company claims that those words mean that the company has the option of paying or not paying the agent if any secondhand machinery is taken in in part payment. Loomis, on the other hand, insists that the company has the option of paying the commission *in cash or secondhand goods.*

The majority opinion adopts the threshing machine company's version of the contract, and it is from this portion of their opinion that I wish to register a vigorous dissent.

The case at bar is typical of at least half of the threshing machine sales made in this country. There is no dispute that Loomis furnished a buyer satisfactory to the company, who sold him a new rig for $4,200, taking in payment short term notes, since paid, and which were practically cash, for $3,000, and also a secondhand rig upon which they placed a valuation of $1,200. Loomis was not consulted about the valuation of this secondhand rig and had not even examined it. The company sent its representative to Loomis, pending the sale, and exercised its option and required Loomis to accept his commission out of the secondhand machinery. This Loomis refused to do, because, as he said, he had not examined said secondhand machinery and did not know its value. Thereupon the representative of the company, after telephoning to the general manager, notified Loomis that the sale could go through without him having to take his commission in this manner. Loomis insists that this entire transaction amounted to a waiver of the company's option to require him to accept secondhand machinery as his commission and that he is, therefore, entitled to cash. As already stated, this court holds that when any secondhand machinery is taken in upon a sale the agent is entitled to no commission unless the company gives it to him as a "tip." It is with this construction of the contract that I take issue. It is safe to say that one half of the threshing machine business of this country, amounting to many millions of dollars annually, consists of sales in which part of the consideration is secondhand goods. I do not know who will be the most surprised, the threshing machine companies or their thousands of agents, to learn that the agents have not earned commissions on those sales. Such a construction seems to me so unreasonable and so unnatural, that it should be unnecessary to produce further argument or authority to refute it. Every dictate of reason and common sense points to the construction contended for by Loomis, to wit, that the company had the *option to pay cash or require him to take his commission from the secondhand rig.* In fact, the company recognized this construction when it sent out its agent to exercise such option and demand that Loomis take his commission from his secondhand property, other-

wise the visit of Gonlogson was an idle ceremony and a useless expense. An examination of the authorities shows only three cases at all similar to ours: Davis v. Huber Mfg. Co. 119 Iowa, 56, 93 N. W. 78; Woods v. J. I. Case Threshing Mach. Co. 155 Iowa, 177, 135 N. W. 399; McGeehan v. Gaar, S. & Co. 122 Wis. 630, 100 N. W. 1072. While those cases are not exactly in point, they clearly show that the construction of the contract adopted by the majority opinion is utterly untenable. In all three of these cases, the court held that in the absence of some action upon the part of the threshing machine company requiring the agent to take his commission from the secondhand machinery, that said commission was payable in cash. In the case of Woods v. J. I. Case Threshing Mach. Co. supra, the Iowa supreme court quotes enough of their contract to show that it is the identical contract which existed between the parties to this suit, such quotations as are given being word for word, comma for comma, identical with the contract before us. The Iowa court says: "Plaintiffs [the selling agents] had nothing to do with the secondhand engine as to either transaction in which it figured. Their commission was due when they furnished a purchaser who was satisfactory to the defendant, and they were not bound to rely upon the outcome of some deal the defendant made without their approval." If the Iowa court had held that the commission was not due until the company had exercised its option and given it to the selling agent, they certainly would not have used the language above quoted.

To recapitulate, it is my opinion that the contract provides generally for a 10 per cent cash commission, whether the purchase price was represented partly by secondhand goods or not. In case the company so elected, the agent must take his commission out of the secondhand machinery. The company, however, was under no obligations to exercise this option, and in such case the agent would automatically be entitled to cash. If this construction is correct, we have to determine whether under the facts in this case the company exercised this option. Upon this phase of the question, I have only to say that the matter was properly for the jury, who, under direction of the court, found that the company had not exercised the same. This phase of the question, however, I do not deem of much importance. I must respectfully but most earnestly dissent.

On Petition for Rehearing Filed July 2, 1915.

BRUCE, J. A petition for rehearing has been filed in this case, which calls to our attention the fact that in stating the evidence we used the word "allow," instead of "pay," and that the contract actually read, "No commissions shall be paid for sales made when other goods or property are taken in part payment." We do not see, however, how this fact can alter the inevitable conclusion which must be arrived at in this case. As we before stated, it is the written contract alone that is sued upon, and the suit is brought for the 10 per cent commission provided for in that contract. There is no proof of a contract for any other commission. This commission, it is expressly stated, cannot be recovered unless the agent guarantees the sale of the second-hand machinery which is taken in trade. This the defendant (the agent) has positively refused to do. How, therefore, he can recover 10 per cent commission upon the written contract is difficult for us to see. It is idle to say that there was a waiver. In our view of the case no such waiver is proved, and certainly no such waiver is *pleaded*. That a waiver and estoppel must be specially pleaded in order to be relied upon has been so often and so recently held by this court, and is so well established as a general principle of law, that no argument upon the proposition is necessary.

It is urged, we know, that the plaintiff is a threshing machine company, but we have yet to learn that there is one law of contracts and of pleading and practice for threshing machine companies, and another for other persons. The law, as we understand it, is no respecter of persons. It is also urged that the proof shows that the sale was actually consummated at the farm of the purchaser, and not at the office of the plaintiff company. This fact we consider to be immaterial, as the suit is brought upon the written contract, and upon the written contract alone, and for the commission provided for in that contract. It is also urged that the evidence shows that the purchaser had agreed with the defendant agent to purchase for cash, and before the visit to the company had consummated the sale. We find, however, no such proof in the record. All that the defendant testified to is that: "I went out to Oelke's and told him I had the agency for the Case Threshing Machine Company and asked him if I could sell him a

rig, as I understood he was in the market for a rig; but he said he did not know but what I could sometime, but at that time I couldn't do business with him. Well, of course, that didn't discourage me, and I went back again several other times. About a year later than that, —some time later than that, I don't know exactly the time,—I went out there again and talked to him, and he says, 'I will tell you, Loomis, I am going to buy a rig; and if the rig you represent, that is, the Case rig, is what you say it is, I will buy it. You need not come out again bothering me, because I am busy, but if your rig is as you represent it to be I will buy it. So there is no use bothering me any more, because,' he says, 'you and I have done lots of business together.' "

If this evidence shows a consummated sale or enforceable agreement to purchase for cash or secured notes and at the terms provided for in the agent's contract, then no person is safe in talking with any selling agent. It is needless to say that it lacks all of the essentials of a valid contract.

The petition for a rehearing is denied.

Goss, J., and BURKE, J., renew their dissents.

P. A. WENBERG v. GIBBS TOWNSHIP.

(153 N. W. 440.)

Congress — right of way — granting — highways — construction of — certified plat — location — filing of — superior title.

The act of Congress approved July 26, 1866, granting a right of way for the construction of highways over public lands not reserved for public use, attached to and created a superior title therein to the grant of such lands to the Northern Pacific Railroad Company, under act of Congress approved July 2, 1864, because the certified plat of definite location of said road, containing the tract afterwards deeded to plaintiff, was not filed with the commissioner of the general land office until May 26, 1873, and did not apply to any interest in said lands previously granted to the public by the United States government.

Opinion filed March 16, 1915. Rehearing denied June 7, 1915.

Appeal from the District Court of Burleigh County, *Nuessle,* J. Affirmed.

Newton, Dullam, & Young, for appellant.

Chapter 33 of the Laws of 1871 of the Territory of Dakota, providing that all section lines in the territory be and are declared public highways, amounts to an acceptance of the Federal grant. Walcott Twp. v. Skauge, 6 N. D. 382, 71 N. W. 544; Keen v. Fairview Twp. 8 S. D. 558, 67 N. W. 623; Wells v. Pennington County, 2 S. D. 1, 39 Am. St. Rep. 758, 48 N. W. 305; Tholl v. Koles, 65 Kan. 802, 70 Pac. 881; Wallowa County v. Wade, 43 Or. 253, 72 Pac. 793; Streeter v. Stalnaker, 61 Neb. 205, 85 N. W. 47.

The lands over which the highway is laid out in the case at bar were a part of the grant made by the government to the Northern Pacific Railway Company by act of Congress of 1864. The map of definite location of the line of road was not filed till in 1873. Such grant, however, was *in præsenti,* and took effect as of the date of the act of Congress. Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; Bardon v. Northern P. R. Co. 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856; Northern Lumber Co. v. O'Brien, 204 U. S. 190, 51 L. ed. 438, 27 Sup. Ct. Rep. 249; Walbridge v. Russell County, 74 Kan. 341, 86 Pac. 473; St. Louis & S. F. R. Co. v. Love, 29 Okla. 523, 118 Pac. 261.

H. R. Berndt, State's Attorney, for respondent.

The act of Congress of July, 1864, created no reservation for "public uses." Hence, all lands within the then territory of Dakota remained, where not reserved for public uses, public lands of the United States. Menotti v. Dillon, 167 U. S. 703, 42 L. ed. 333, 17 Sup. Ct. Rep. 945; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629–644, 28 L. ed. 1122–1127, 5 Sup. Ct. Rep. 566; United States v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; Northern P. R. Co. v. Sanders, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671.

The railway company acquired by fixing its general route, only an inchoate right to the odd-numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located, and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on

the general route of the road, as it saw proper. Barden v. Northern P. R. Co., 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389.

Pending the grant to the Northern Pacific Railroad, Congress, in 1866, granted "the right of way for construction of highways over public lands not reserved for public uses," and, in 1871, the legislative assembly of the territory of Dakota, by enactment of January 12th, 1871, accepted such grant for highway purposes. Public Highways, chap. 33; 16 Stat. at L. 378.

At the time of the grant for highway purposes, the Northern Pacific Railway Company had not filed its map of definite location of its line or roadbed, and no right to any specific sections of land had attached, except an inchoate right. It was therefore competent for Congress to dispose of the public lands along the general route of the railroad. Northern P. R. Co. v. Sanders, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671; Menotti v. Dillon, 167 U. S. 703, 42 L. ed. 333, 17 Sup. Ct. Rep. 945.

A different rule would obtain in the event that, prior to the date of such grant, the lands along said section lines had been appropriated and had passed from the public domain. Walcott Twp. v. Skauge, 6 N. D. 382, 71 N. W. 544; Keen v. Fairview Twp. 8 S. D. 558, 67 N. W. 623; Wells v. Pennington County, 2 S. D. 1, 39 Am. St. Rep. 758, 48 N. W. 305; Tholl v. Koles, 65 Kan. 802, 70 Pac. 881; Wallowa County v. Wade, 43 Or. 253, 72 Pac. 793; Streeter v. Stalnaker, 61 Neb. 205, 85 N. W. 47.

Burke, J. In April, 1913, plaintiff was the owner of the west one half, section 23, 139–79, Burleigh county, North Dakota, having purchased the same from the Northern Pacific Railway Company; in that month the defendant township improved the highway between said land and the section immediately to the west thereof, thereby taking 4 acres from plaintiff's land, whereupon this action was brought for damages. A proper consideration of the case requires a review of facts beginning July 2, 1864, upon which date an act of Congress was approved granting the alternate sections of a strip of land from Lake Superior to Puget sound in aid of the construction of the Northern Pacific Railroad.

Act July 2, 1864, chap. 217, 13 Stat. at L. 365. From such grant we quote: "And be it further enacted, that there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line . . . every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, . . . and whenever on the line thereof, the United States [shall] have full title, not reserved, sold, granted or otherwise appropriated, and free from preemption, or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office, . . . whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, . . . or otherwise disposed of, other lands shall be selected by said company in lieu thereof, etc." It is agreed that the said Northern Pacific Railroad Company constructed its line adjacent to the plaintiff's land and filed its plat of definite location on or about the 26th day of May, 1873. In the meantime, and on or about the 26th of July, 1866, an act of Congress was approved, being now known as § 2477, U. S. Rev. Stat. Comp. Stat. 1913, § 4919, wherein, among other things, it was enacted that "the right of way for the construction of highways over public lands not reserved for public uses is hereby granted," etc. This act, by which all of the public domain was burdened with an easement in favor of the public for use as a highway, was approved slightly over two years after the grant of the Northern Pacific Railway Company, but almost seven years before said railroad company had filed its certificate of definite location. On January 12, 1871, there was enacted by the legislative assembly of the territory of Dakota, chapter 33 of the Session Laws of that year, which provided, among other things, that "hereafter all section lines in this territory shall be and hereby are declared public highways as far as practicable. . . ." This territorial act was approved more than two years before the said railroad company had filed its certificate of definite location.

At the time the act of July 2, 1864, was approved, the land in controversy was Indian country, *i. e.*, the claims of the Indian tribes had not at that time been extinguished, but the fee was in the United States,

the Indians having merely a right of occupancy subject to the dominion and control of the government and its right to convey the land in fee. In June 19, 1874, all rights of the Indians were extinguished by treaty.

It is appellant's contention that the grant from the United States to the Northern Pacific Railroad Company of July 2, 1864, was *in præsenti,* and that upon the filing of the plat of definite location title to all of said lands passed to the railroad company as of July 2, 1864, and therefore Congress was without power to burden said lands with highway easements on July 26, 1866, and plaintiff, as successor in interest of the said railroad company, is entitled to remuneration for the tract taken for such highway. Defendant, on the other hand, contends that while the grant of 1862 was *in præsenti,* yet it attached to no particular tracts of land until May 26, 1873, when the plat of definite location was filed, and that in the interim from July 2, 1864, to May 26, 1873, Congress had power to sell or otherwise encumber any parcel or tract within the said strip, and that the company's remedy was to select other lands in lieu thereof as provided in said act.

Plaintiff's land was one of the alternate sections selected by the railroad under act of 1864. For some reason not apparent to this court, the defense of prescription was waived by defendant, and we are asked to pass upon the controversy above outlined. Appellant in his brief cites Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; Bardon v. Northern P. R. Co. 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856; Northern Lumber Co. v. O'Brien, 204 U. S. 190, 51 L. ed. 438, 27 Sup. Ct. Rep. 249; Walbridge v. Russell County, 74 Kan. 341, 86 Pac. 473; St. Louis & S. F. R. Co. v. Love, 29 Okla. 523, 118 Pac. 259, all of which we have examined with care, and which in our opinion are not in point; for instance, Walbridge v. Russell County is unlike the case at bar in that the grant to the Union Pacific Railway Company was made in 1862, and the certificate of definite location was filed July 11, 1866, or fifteen days before the approval of the act of Congress creating the highway easement. This difference justifies the language of the Kansas court, that "at the time of the grant for public road purposes in 1866, the lands in question belonged to the Union Pacific Railway Company." In Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep.

100, it was held that the pre-emptioner acquired no rights as such, because the Indian title had not been extinguished until after the Northern Pacific certificate of definite location had been filed. The other cases cited by appellant are as easily distinguished.

On the other hand, the plain reading of the act of 1864 is that the lands granted should be those *"not reserved, sold, granted or otherwise appropriated . . . at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office."* Nothing can be plainer than that said railroad was to take such lands as the government had left in said strip on May 26, 1873.

Besides the plain reading above, we have the expression of the Supreme Court of the United States at least four times upon the same proposition. In Menotti v. Dillon, 167 U. S. 703, 42 L. ed. 333, 17 Sup. Ct. Rep. 945, it is said: "The Acts of 1862 and 1864 by necessary implication recognize the right of Congress to dispose of the odd-numbered sections, or any of them, within certain limits on each side of the road at any time prior to the definite location of the line of the railroad." And again in the same opinion, it is said: "A grant of public lands in aid of the construction of a railroad is, until its route is established, in the nature of 'a float,' and title does not attach to specific sections until they are identified by an accepted map of definite location. . . . The railroad company accepted the grant subject to the possibility that Congress might, . . . prior to the definite location of its line, sell, reserve, or dispose of enumerated sections for other purposes than those originally contemplated." In Northern P. R. Co. v. Sanders, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671, it is said: "The company acquired, by fixing its general route, only an inchoate right to the odd-numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located. . . . Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road." The act of 1866 did not take from the railroad company any lands to which it had then acquired an absolute right. The right it acquired was to earn such of the lands within the exterior lines of that route as were not sold, reserved, or disposed of at the time of the definite location of its road. The act did not violate any contract between the United States and the

railroad company, for the reason that the contract itself recognized the right of Congress at any time before the line was definitely located. See also Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341. Also Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030, from which we quote: "As the sections granted were to be within a certain distance on each side of the line of the contemplated railroad, they could not be located until the line of the road was fixed. The grant was therefore in the nature of 'a float,' but when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title then attached as of the date of the grant, *except as to such parcels as had been in the meantime,* under its provisions, *appropriated to other purposes.*"

While this point is not decided by any previous decision of our own court, it is interesting to note the case of Walcott Twp. v. Skauge, 6 N. D. 382, 71 N. W. 544, wherein it is said at page 388: "Highways once established over the public domain under and by virtue of this act, the public at once became vested with an absolute right to the use thereof, which could not be revoked by the general government, and whoever thereafter took the title from the general government took it burdened with the highway so established." While appellant has specified four errors for review, they are all similar and all answered by the foregoing arguments. The judgment of the trial court is in all things affirmed.

On Rehearing.

A petition for rehearing was granted by this court, partly because appellant had been deprived of a hearing originally on account of the small sum involved. Upon such rehearing appellant merely urges that, notwithstanding the grant of the right of way aforesaid by the act of July 26, 1866, and its acceptance by chapter 33, Sess. Laws 1871 of the Territory of Dakota, that later enactments of the legislature, to wit, § 1348, Rev. Codes 1905, Comp. Laws 1913, § 1920, declared a policy of this state to compensate the owners of section lines when the same were laid out and opened as public highways. We very much doubt the power of the legislature to waive a right of way granted by Congress in 1866, and accepted in 1871, especially as the state did not own said right of way, but merely held as trustee for the public; but such a discussion

is unnecessary as we are agreed the legislature did not, by said § 1348, Rev. Codes 1905, Comp. Laws 1913, § 1920, intend to waive any of the rights which the public had acquired by the acceptance under chapter 33, Sess. Laws 1871. See § 1357, Rev. Codes 1905, Comp. Laws 1913, § 1930. Judgment of the trial court is in all things affirmed.

ANDREW SCHMIDT et al. v. JOHN JOHNSTONE.

(153 N. W. 293.)

Separate deeds — to different grantees — for different parts of larger tract — separate actions — in name of grantor — for separate uses — use plaintiffs — real parties in interest — distinct actions — decision in either — not bar to others.

1. Following Randall v. Johnstone, 25 N. D. 284, it is *held* that where three separate deeds for three different tracts constituting parts of a certain larger tract are executed to different grantees while the grantor is out of possession, and the three grantees bring separate actions in the name of the grantor as nominal plaintiff for their separate uses, such use plaintiffs are the real parties in interest; and such actions are separate and distinct, and between different parties, and the decision of one suit is not a bar to the bringing of the other.

Land contract — action to remove cloud on title — equitable action.

2. An action to cancel a contract and remove a cloud upon the title of plaintiff's land, caused by the recording of such contract, in the office of the register of deeds, is essentially an equitable action.

Use and occupation — damages for — equitable issues — dependent upon — judgment — jury trial.

3. In such action damages for the value of the use and occupation of the land are dependent upon a determination of the equitable issues; and a demand for judgment for such use and occupation does not necessarily transform it into an action at law, or entitle defendant to a jury trial.

Court of equity — jurisdiction — once obtained — retained — complete relief.

4. A court of equity, having once obtained jurisdiction of a controversy, will retain it for the purpose of administering complete relief and doing entire justice between the parties with respect to the subject-matter.

Trial court — striking case from calendar — motion for — denial of.

5. *Held* that the trial court, for reasons stated in the opinion, properly refused to strike case from the calendar.

Opinion filed May 13, 1915. Rehearing denied June 7, 1915.

From a judgment of the District Court of Golden Valley County, *Pollock,* Special J., defendant appeals.

Affirmed.

F. C. Heffron and *J. A. Miller,* for appellant.

A change of venue is not complete until the files are received by the court to which they are sent, and therefore this case could not be legally put on the calendar for the term commencing before their receipt by the clerk. Stringer v. Jacobs, 9 Ark. 497, 50 Am. Dec. 221; 50 Cyc. 174.

Constitutional provisions as to right to trial by jury are universally held to refer to such rights as they existed at the time of the adoption of the Constitution. Smith v. Kunert, 17 N. D. 120, 115 N. W. 76; Copp v. Henniker, 55 N. H. 179, 20 Am. Rep. 194; Stillwell v. Kellogg, 14 Wis. 462; Whallon v. Bancroft, 4 Minn. 109, Gil. 70; 24 Cyc. 101, 102, notes 76–78.

The Code action to determine adverse claims to real property is a composite action, either legal or equitable, depending upon the matters at issue between the parties. Davis v. Judson, 159 Cal. 121, 113 Pac. 148; Burleigh v. Hecht, 22 S. D. 301, 117 N. W. 367; Kenny v. McKenzie, 25 S. D. 485, 49 L.R.A.(N.S.) 775, 127 N. W. 597.

An action for possession of real property, by one out of possession against the person in possession, in the Code action to determine adverse claims, is an action in ejectment. Ottow v. Friese, 20 N. D. 86, 126 N. W. 503; Burke v. Scharf, 19 N. D. 227, 124 N. W. 79; Burleigh v. Hecht and Kenny v. McKenzie, supra; Code Civ. Proc. 1913, § 8147.

And same triable by jury. Donahue v. Meister, 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096; Gillespie v. Gouly, 120 Cal. 515, 52 Pac. 816; Haggin v. Kelly, 136 Cal. 481, 69 Pac. 140; Davis v. Judson, 159 Cal. 121, 113 Pac. 148; Angus v. Craven, 132 Cal. 691, 64 Pac. 1091; Atkinson v. J. R. Crowe Coal & Min. Co. 80 Kan. 161, 39 L.R.A. (N.S.) 31, 102 Pac. 50, 106 Pac. 1052, 18 Ann. Cas. 242; Burleigh v. Hecht, 22 S. D. 301, 117 N. W. 367; Kenny v. McKenzie, 25 S. D. 485, 49 L.R.A.(N.S.) 775, 127 N. W. 597; Haines's Appeal, 73 Pa.

169; North Pennsylvania Coal Co. v. Snowden, 42 Pa. 488, 82 Am. Dec. 530, 14 Mor. Min. Rep. 294; Chandler v. Graham, 123 Mich. 327, 82 N. W. 814; Stonecifer v. Yellow Jacket Silver Min. Co. 3 Nev. 38, 3 Mor. Min. Rep. 4; Meigs v. Willis, 66 How. Pr. 466; Newman v. Duane, 89 Cal. 597, 27 Pac. 66; Hughes v. Dunlap, 91 Cal. 385, 27 Pac. 642; Taylor v. Ford, 92 Cal. 419, 28 Pac. 441; Tabor v. Cook, 15 Mich. 322.

The rule is against splitting an indivisible cause of action, no matter under what pretext or what form of action, nor who are the parties or alleged parties to the various proceedings. Baird v. United States, 96 U. S. 430, 24 L. ed. 703; Pierro v. St. Paul & N. P. R. Co. 39 Minn. 451, 1 Am. St. Rep. 673, 40 N. W. 520; 1 Van Fleet, Former Adjudication, §§ 59, 70, 144, and 156; Dutton v. Shaw, 35 Mich. 431; 23 Cyc. 1174, note 85; Continental Ins. Co. v. H. M. Loud & Sons Lumber Co. 93 Mich. 139, 32 Am. St. Rep. 494, 53 N. W. 394; Dils v. Justice, 137 Ky. 822, 127 S. W. 472; Craig v. Broocks, — Tex. Civ. App. —, 127 S. W. 572; 1 Sutherland, Code Pl. & Pr. § 218; Reynolds v. Jones, 63 Ark. 259, 38 S. W. 151; Guernsey v. Carver, 8 Wend. 494, 24 Am. Dec. 60; Hughes v. Dundee Mortg. & Trust Invest. Co. 26 Fed. 831; Secor v. Sturgis, 16 N. Y. 554; Kennedy v. New York, 127 App. Div. 89, 111 N. Y. Supp. 61.

A judgment for a part of an entire indivisible demand, all of which is due when action is commenced, is an election to take the part in satisfaction of the whole, and estops the plaintiff from recovering the residue. Headnote 4 to Deweese v. Smith, 66 L.R.A. 971, 45 C. C. A. 408, 106 Fed. 438; South & North Ala. R. Co. v. Henlein, 56 Ala. 368; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Cunningham v. Morris, 19 Ga. 583, 65 Am. Dec. 611; McDole v. McDole, 106 Ill. 452; Brannenburg v. Indianapolis, P. & C. R. Co. 13 Ind. 103, 74 Am. Dec. 250; Day v. Brenton, 102 Iowa, 482, 63 Am. St. Rep. 460, 71 N. W. 538; Madden v. Smith, 28 Kan. 798; Powell v. Weiler, 11 B. Mon. 186; Bennett v. Hood, 1 Allen, 47, 79 Am. Dec. 705; Milroy v. Spurr Mountain Iron Min. Co. 43 Mich. 231, 5 N. W. 287, 12 Mor. Min. Rep. 53; O'Brien v. Manwaring, 79 Minn. 86, 79 Am. St. Rep. 426, 81 N. W. 746; Taylor v. Heitz, 87 Mo. 660; Johnson v. Payne, 11 Neb. 269, 9 N. W. 81; Bendernagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448; Kline v. Stein, 46 Wash. 546, 123 Am. St. Rep. 940, 90 Pac. 1041;

Collins v. Gleason, 47 Wash. 69, 125 Am. St. Rep. 891, 91 Pac. 566; Guernsey v. Carver, 8 Wend. 492, 24 Am. Dec. 60; Ewing v. McNairy, 20 Ohio St. 315; Simes v. Zane, 24 Pa. 242; Morey v. King, 51 Vt. 383; Stone v. Pratt, 25 Ill. 25; Wichita & W. R. Co. v. Beebe, 39 Kan. 470, 18 Pac. 502; Pinney v. Barnes, 17 Conn. 420; Welles v. Rhodes, 59 Conn. 498, 22 Atl. 286; Pomeroy v. Prescott, 106 Me. 401, 138 Am. St. Rep. 347, 76 Atl. 898, 21 Ann. Cas. 574; Mallory v. Dawson Cotton Oil Co. 32 Tex. Civ. App. 294, 74 S. W. 953; Phillips v. Portsmouth, 112 Va. 164, 70 S. E. 502; Cornett v. Moore, 30 Ky. L. Rep. 280, 97 S. W. 380; Loomis v. Robinson, 76 Mo. 488; Coster v. New York & E. R. Co. 6 Duer, 46; German F. Ins. Co. v. Bullene, 51 Kan. 764, 33 Pac. 467; Lock v. Miller, 3 Stew. & P. (Ala.) 14; Franklin School Twp. v. Wiggins, 142 Iowa, 377, 120 N. W. 1032.

The prosecution to judgment of a portion of an indivisible cause of action is a bar to any action for any portion thereof, including all matters that could and should have been included in the first action. Smith v. Chicago, M. & St. P. R. Co. 83 Wis. 271, 50 N. W. 497, 53 N. W. 550; Craig v. Broocks, — Tex. Civ. App. —, 127 S. W. 572; O'Brien v. Manwaring, 79 Minn. 86, 79 Am. St. Rep. 426, 81 N. W. 746; L. Bucki & Son Co. v. Atlantic Lumber Co. 48 C. C. A. 455, 109 Fed. 411; Kennedy v. New York, 127 App. Div. 89, 111 N. Y. Supp. 61; Franklin School Twp. v. Wiggins, 142 Iowa, 377, 120 N. W. 1032.

Neither can such a cause of action be split by assignment, so as to permit more than one action to be brought thereon without full concurrence by the debtor. German F. Ins. Co. v. Bullene, 51 Kan. 764, 73 Pac. 467; Smith v. Jones, 15 Johns. 229; Willard v. Sperry, 16 Johns. 121; Marziou v. Pioche, 8 Cal. 536; Herriter v. Porter, 23 Cal. 385; Pueblo v. Dye, 44 Colo. 35, 96 Pac. 969; Chicago & N. W. R. Co. v. Nichols, 57 Ill. 464; Mandeville v. Welch, 5 Wheat. 277, 5 L. ed. 87; Thatch v. Metropole Ins. Co. 3 McCrary, 387, 11 Fed. 29; Day v. Brenton, 102 Iowa, 482, 63 Am. St. Rep. 460, 71 N. W. 538; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Roby v. Eggers, 130 Ind. 415, 29 N. E. 365; Ingraham v. Hall, 11 Serg. & R. 78; Continental Ins. Co. v. H. M. Loud & Sons Lumber Co. 93 Mich. 139, 32 Am. St. Rep. 494, 53 N. W. 394; Thomas v. Rock Island Gold & S. Min. Co. 54 Cal. 578; St. Lawrence Boom & Mfg. Co. v. Price, 49 W. Va. 432,

38 S. E. 526; Phillips v. Portsmouth, 112 Va. 164, 70 S. E. 502; 2 Stone, Judgm. p. 1102, 23 Cyc. 443; 1 Am. & Eng. Enc. Law, 158.

A judgment in a prior action between the same parties, which involves the same subject-matter, renders *res judicata* every question which was directly or impliedly involved in the decision. Brown v. First Nat. Bank, 66 C. C. A. 293, 132 Fed. 450; Kline v. Stein, 46 Wash. 546, 123 Am. St. Rep. 940, 90 Pac. 1041.

It is the right of this defendant to but one single trial upon a single cause of action. Durango Land & Coal Co. v. Evans, 25 C. C. A. 523, 49 U. S. App. 305, 80 Fed. 425; Livingston v. Proseus, 2 Hill, 526; Chamberlain v. Taylor, 92 N. Y. 348; Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258; Comp. Laws 1913, §§ 9405, 9406.

All necessary parties shown by pleadings or proof must be brought in before the court can lawfully enter a decree or judgment. Shields v. Barrow, 17 How. 130, 15 L. ed. 158.

A defendant in possession cannot be ejected from land, the title quieted, and damages recovered from him, without ascertaining who the real owner is. Comp. Laws 1913, § 7639; Birney v. Warren, 28 Mont. 64, 72 Pac. 293; Gray v. Pike, 38 Mich. 650.

Possession of real property is notice to the world of the right and claims of the party in possession thereto. O'Toole v. Omlie, 8 N. D. 444, 79 N. W. 849; Dickson v. Dows, 11 N. D. 407, 92 N. W. 798; Niles v. Cooper, 98 Minn. 39, 13 L.R.A.(N.S.) 49, 107 N. W. 744; Garbutt v. Mayo, 128 Ga. 269, 13 L.R.A.(N.S.) 58, 57 S. E. 495; Notes in the two latter cases in 13 L.R.A.(N.S.) 49 to 140.

Harold Harris and *T. F. Murtha,* for respondents.

If appellant at any time was entitled to a jury trial, he waived such right by trial and submitting all his rights and defenses to the court without a jury, and by failing to demand a jury trial, and by demanding a new trial in the supreme court. Comp. Laws 1913, §§ 7608, 7637; 24 Cyc. 149, et seq. 154, 155, 158; Webster v. White, 8 S. D. 479, 66 N. W. 1145; Citizens' Gaslight Co. v. Wakefield, 161 Mass. 432, 31 L.R.A. 457, 37 N. E. 444.

But the claims and issues here involved were properly triable in a court of equity. Gescheidt v. Quirk, 66 How. Pr. 272; Gilroy v. Badger, 27 Misc. 640, 58 N. Y. Supp. 392; Comp. Laws 1913, § 9406; Burke v. Scharf, 19 N. D. 227, 124 N. W. 79; Galbraith v. Payne, 12

N. D. 164, 96 N. W. 258; 39 Cyc. 1400, notes 35 and 37; Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037; Cotton v. Butterfield, 14 N. D. 469, 105 N. W. 236; Suessenbach v. First Nat. Bank, 5 Dak. 477, 41 N. W. 662 (subdiv. 6 of syllabus).

It is a proper suit in equity and triable as such, and defendant cannot, by raising a legal issue in his answer, transform the suit into a legal action. Gresens v. Martin, 27 N. D. 231, 145 N. W. 823; Preteca v. Maxwell Land Grant Co. 1 C. C. A. 607, 4 U. S. App. 326, 50 Fed. 674; Angus v. Craven, 132 Cal. 691, 64 Pac. 1091; Beamer v. Werner, 86 C. C. A. 289, 159 Fed. 99; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Comp. Laws 1913, §§ 5449, 5450, 7208; Hamilton v. Batlin, 8 Minn. 403, Gil. 359, 83 Am. Dec. 787; Lees v. Wetmore, 58 Iowa, 170, 12 N. W. 238; Pier v. Fond du Lac, 38 Wis. 470; Herron v. Knapp, S. & Co. 72 Wis. 553, 40 N. W. 149; Davenport v. Stephens, 95 Wis. 456, 70 N. W. 661; Kruczinski v. Neuendorf, 99 Wis. 264, 74 N. W. 974; Post v. Campbell, 110 Wis. 378, 85 N. W. 1032; Casgrain v. Hammond, 134 Mich. 419, 104 Am. St. Rep. 610, 96 N. W. 510.

The contract for the land had been rescinded by mutual consent. Christ v. Johnstone, 25 N. D. 6, 140 N. W. 678; Randall v. Johnstone, 25 N. D. 284, 141 N. W. 352.

A contract for real estate may be rescinded orally or by mutual consent. Mahon v. Leech, 11 N. D. 181, 90 N. W. 807; Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856; Haugen v. Skjervheim, 13 N. D. 616, 102 N. W. 311; Comp. Laws 1913, §§ 5829 and 5830.

The breaking done on the land was done in bad faith, and no recovery can be had. 16 Cyc. 22 et seq.; Hunter v. Coe, 12 N. D. 505, 97 N. W. 869; 39 Cyc. 1402, note 65.

He did not plead a claim for improvements, and in the absence of such a plea is not entitled to recover for improvements. Blackburn v. Lewis, 45 Or. 422, 77 Pac. 746.

There has been no "splitting" of a cause of action. The parties named had each a separate cause of action. Comp. Laws 1913, § 7466; Randall v. Johnstone, supra.

The question of the sufficiency of the complaint where the deficiency could have been made good by amendment cannot be raised for the first time in the supreme court. First Nat. Bank v. Warner, 17 N. D. 76, 114 N. W. 1085, 17 Ann. Cas. 213; Harshman v. Northern P. R. Co.

14 N. D. 69, 103 N. W. 412; Golden Valley Land & Cattle Co. v. Johnstone, 21 N. D. 97, 128 N. W. 690.

CHRISTIANSON, J. This action was brought to cancel a contract constituting a cloud on the title of the plaintiffs to a half section of land, *viz.*, the north one half, sec. 11, twp. 138, range 106, in Golden Valley (formerly Billings) county, and to quiet title thereto in the plaintiffs. The case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiffs, for the use and benefit of the plaintiff Andrew Schmidt, for a cancelation of the contract; $679.75 damages for the use and occupation of said premises; and also quieting the title to said lands in plaintiffs. Defendant appeals to this court, and demands a trial *de novo*.

The complaint herein contains not only the allegations required in a statutory action to quiet title, but sets forth the contract in full, and alleges that such contract was canceled and abrogated by the consent of the parties thereto, and that, after such cancelation, the defendant, for the purpose of encumbering and beclouding the title to the land and harassing the owners thereof, in defiance of the rights of such owners, and as part of a fraudulent scheme on the part of the defendant to procure the use of said lands, caused such contract to be recorded; that plaintiffs have been excluded from said lands since the spring of 1906 to the present time; and that the value of such use and occupation was $6,000. The plaintiffs pray for judgment that the contract be canceled and adjudged null and void; and the defendant required to surrender the same to the plaintiffs; that title to the premises be quieted in plaintiffs, and that plaintiffs recover the value of the use and occupation of the premises. The answer denies that the contract has been canceled or abrogated, and alleges that the same is in full force and effect; that the plaintiffs have no right to maintain the present action, for the reason that the plaintiff Golden Valley Land & Cattle Company heretofore elected to try and determine its alleged rights in and to said section of land by bringing and prosecuting to judgment two former actions for the recovery from the defendant of portions of said section of land, only, to wit, an action entitled, A. T. Christ et al., Plaintiffs v. John Johnstone et al., Defendants, for the southwest quarter; and an action entitled, Samuel Randall et al. v. John Johnstone et al., for the southeast

quarter of said section. Plaintiffs served a reply denying all the new matter alleged in the answer.

The material facts in the case are as follows: On January 15, 1906, the defendant, John Johnstone, then a resident of Sioux Falls, South Dakota, through one Murphy, a soliciting agent for the plaintiff Golden Valley Land & Cattle Company, entered into the following preliminary contract with said Golden Valley Land & Cattle Company, for the purchase of the lands involved in this action and other lands, to wit:

This agreement made and entered into this 15th day of January, 1906, by and between Golden Valley Land & Cattle Company, of Ramsey county, Minnesota, party of the first part, and John Johnstone, of Minnehaha county, South Dakota, party of the second part.

Witnesseth: That the said party of the first part in consideration of the covenants and agreements of said party of the second part, hereinafter contained, agrees to sell and convey unto the said party of the second part or his assigns, by warranty deed, upon the prompt and full performance of said party of the second part of this agreement, the following described premises situate in the county of Billings, in the state of North Dakota, to wit:

All of section eleven (11), township one hundred and thirty-eight (138), range one hundred and six (106), containing six hundred and forty acres (640), more or less, according to the government survey thereof. And the said party of the second part in consideration of the premises hereby agrees to pay said party of the first part as and for the purchase price of said premises, the sum of eight thousand dollars ($8,-000) on the following terms: The party of the second part agrees to convey by warranty deed free of encumbrance, the following property situated in the city of Sioux Falls, South Dakota:

Lot thirteen (13) block fifty-one (51), Gales sixth addition to the city of Sioux Falls; lot one (1), block six (6), Summit addition to the city of Sioux Falls:

Consideration forty-two hundred dollars ($4,200).

The party of the second part further agrees to deed his property to first party when first party delivers to second party contracts covering above described land as follows: One contract covering the E. half of section eleven (11), township one hundred thirty-eight (138), range

one hundred and six (106), showing a balance due of one thousand three hundred dollars ($1,300), payable on or before four (4) years with 6 per cent interest; and one contract covering the W. one half of section eleven (11), township one hundred and six (106), showing a balance due of twenty-five hundred dollars ($2,500), payable in five (5) annual payments and drawing 6 per cent interest.

Provided, however, that in case the party of the second part is unable to secure two or three homesteads in the immediate vicinity of the above described land, then and in that case the party of the second part is to have the privilege of selecting land of equal value similarly located containing the same number of acres, at the same price, or at such price as may be agreed upon by both parties to this agreement.

Party of the second part agrees to pay all taxes that may hereafter become due upon said premises. But should default be made in the payment of said several sums of money or any or either of them or any part thereof, or in the payment of interest or taxes or any part thereof, or in any of the covenants herein to be by said party of the second part kept or performed, then this agreement to be void, at the election of the said party of the first part, time being of the essence of this agreement.

It is hereby agreed that any moneys heretofore paid on this contract shall be treated as settled damages for breach thereof, and that under such default said party of the first part is to have possession of said premises. The conditions of this contract shall bind the heirs, executors, administrators, and assigns of each party hereto.

In witness whereof, said parties have hereunto respectively set their hands and seals the day and year first above written. Papers to be exchanged on or before April 1st, 1906.

Golden Valley Land & Cattle Company,
D. J. McMahon, Sec.

John Johnstone
Hance Murphy, Witness.

On the 7th day of June, 1907, the defendant, Johnstone, acknowledged the execution of the contract, and on June 8th, 1907, caused the same to be recorded in the office of the register of deeds of Billings county. It will be observed that the contract is almost identical in terms with that construed by this court in the case of Golden Valley Land &

Cattle Co. v. Johnstone, 25 N. D. 148, 151, 141 N. W. 76, but covers a different section of land. The plaintiffs claim that the contract involved in this action was afterwards abrogated by the mutual agreement of the parties, and the contract involved in Golden Valley Land & Cattle Co. v. Johnstone, 25 N. D. 148, 141 N. W. 76, substituted in lieu thereof. This is denied by the defendant, who claims that he purchased both sections. It is somewhat difficult to see how the latter contention can seriously be made in view of the fact that both contracts call for a conveyance by Johnstone of the same Sioux Falls, South Dakota, real estate. It is undisputed that the defendant has never conveyed the real estate, or paid one cent on either contract.

In January, 1906, and for more than eight years prior thereto, the plaintiff Northwestern Improvement Company was the owner in fee simple of the land involved in this law suit; and on April 27, 1906, the Northwestern Improvement Company conveyed title by warranty deed to the plaintiff Missouri Slope Land & Investment Company. On May 5, 1909, The Missouri Slope Land & Investment Company conveyed title by warranty deed to the plaintiff Golden Valley Land & Cattle Company. On January 2, 1909, the Golden Valley Land & Cattle Company conveyed title by warranty deed to the plaintiff J. S. Brawford. On January 19, 1909, the plaintiff Brawford and his wife conveyed title by warranty deed to the plaintiff Stondall Land & Investment Company. On January 16, 1908, the Stondall Land & Investment Company entered into a contract with the plaintiff Andrew Schmidt, whereby they agreed to sell and conevy said land to him upon certain terms and conditions, which he has kept and performed. Under the terms of this contract, Schmidt is the equitable owner of the premises. On April 5, 1906, and prior thereto, the plaintiff Golden Valley Land & Cattle Company held a contract to purchase said premises; and on the 5th day of April, 1906, it sold the premises by a written contract to the said J. S. Brawford, and afterwards on December 2, 1907, J. S. Brawford sold the premises by written contract of sale to the said Stondall Land & Investment Company. So, as a matter of fact, the Golden Valley Land & Cattle Company parted with any title which it had on April 5, 1906, and the title which it subsequently held was merely in trust for its subsequent grantee. The only interest which the plaintiff asserts to these premises is under the

contract dated January 15, 1906. It will be observed that this contract covers the whole of section 11. The Golden Valley Land & Cattle Company sold the southwest quarter of said section 11 to another party, with the result that title was finally vested in A. T. Christ, who brought an action to quiet title against the defendant and his wife, which resulted in a judgment in plaintiff's favor, which was affirmed by this court in the case of Christ v. Johnstone, 25 N. D. 6, 140 N. W. 678. The southeast quarter of section 11 was also sold, and title eventually vested in Samuel Randall, who brought an action to quiet title and obtain possession thereof, which also resulted in a judgment adverse to the defendant in this case. The decision in the Randall Case was also affirmed by this court. See Randall v. Johnstone, 25 N. D. 284, 141 N. W. 352. The issues of fact presented in this case are identical with those which existed in the two cases last referred to, and in view of the fact that the contract under which defendant claims has in two different decisions been held to be abrogated and canceled, it seems that the defendant has considerable audacity to again come into court and assert rights thereunder. In fact, in the case of Christ v. Johnstone, supra, the defendant did not question the propriety of the findings of the court canceling the contract, but only attacked that part of the judgment awarding damages against him for the use and occupation. In the case of Randall v. Johnstone, he urged that the plaintiff ought not to recover because it had elected to split its cause of action. And in this case the defendant asks this court to overrule Randall v. Johnstone, and decree to the defendant a half section of land for which he has not paid one cent, and which he has for years wrongfully withheld from the lawful owners. Appellant's counsel asserts that the decision of this court in the case of Randall v. Johnstone is unsound and should be overruled. We are unable to agree with appellant's counsel, and are all agreed that the doctrine promulgated in that case is sound and should be adhered to. Appellant's counsel has cited a number of authorities on the proposition of law relative to splitting causes of action. We have no doubt that the authorities cited are good law when applied in a proper case. But they have no application in this case. The fact that one wrongful act may affect a number of persons does not necessarily require all persons affected to assert their rights in one

action, and that is the doctrine for which appellant's counsel contends. "If two or more persons sustain injuries by the same wrong, a distinct right of action accrues to each, and separate actions may be maintained by them." 23 Cyc. 449, 1 C. J. 1118.

In the case of Christ v. Johnstone, Christ was the real party in interest, and brought an action to quiet title to the tract of land which he owned. Christ had no interest in any other portion of section 11, except the southwest quarter thereof. The same identical condition existed with reference to the action brought by Randall to quiet title to the southeast quarter. Neither Christ nor Randall was interested in the north half of section 11, but the equitable owner of this portion of the section was Andrew Schmidt, the use plaintiff in this action. At the time Johnstone filed his contract, the Golden Valley Land & Cattle Company had already conveyed its interest in the premises involved in this action by contract of purchase to Brawford, and it never subsequently obtained title except as a trustee for the equitable owner. When Johnstone recorded his contract he caused a cloud to be placed against the title of all four quarters embraced in the section, then owned by three different parties. The trial court found that Schmidt was not in any manner a party to either the Christ Case or the Randall Case, and this finding is clearly correct. It would certainly be a peculiar doctrine to hold that the rights of Schmidt to maintain an action to remove the cloud of the contract upon the title of his land is barred because Christ and Randall, at a prior time, have caused the titles to their own land to be quieted, as against the cloud placed thereon by the same wrongful act of the defendant. And we venture to say that it is almost unheard of for a defendant to come into a court of equity and urge that he has some rights by reason of his own wrongful conduct under a contract which has twice been adjudicated to be of no validity. We have no hesitancy in adhering to the doctrine laid down by this court in Randall v. Johnstone. The same is not only sound from a legal standpoint, but is founded upon primary principles of justice and equity.

Before any proceedings were had in the action, defendant's counsel asked that the legal issues be tried to a jury, although no specification was made of what the specific issues were. And one of the errors assigned on this appeal is that defendant was denied a trial by jury

in violation of his constitutional rights. The only contention now made by the defendant is that, as the plaintiff asked for judgment for the value of the use and occupation of the premises, and as the trial court heard evidence and determined the value thereof, that this issue should have been submitted to a jury. The undisputed evidence, however, shows that the improvements were all made after the trial of the Christ and Randall Cases. Hence, it is self-evident that the defendant did not make the improvements in good faith, and the trial court found that the improvements were made in bad faith, and that the defendant was not entitled to recover therefor.

It is not contended that the amount of damages assessed by the trial judge for the use and occupation of the premises is excessive; and we are satisfied that the trial judge was eminently just and fair with the defendant in assessing such damages, and allowed the defendant credit for all the improvements made on the premises, for which defendant was entitled to credit.

This action was brought to cancel a contract, and to remove the cloud caused by the recording thereof; also to quiet title to the premises in the plaintiff. This relief can be obtained only in equity, and the action is clearly equitable. O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Hamilton v. Batlin, 8 Minn. 403, Gil. 359, 83 Am. Dec. 787; Angus v. Craven, 132 Cal. 691, 64 Pac. 1091; Beamer v. Werner, 86 C. C. A. 289, 159 Fed. 99; Post v. Campbell, 110 Wis. 378, 85 N. W. 1032. See also Gresens v. Martin, 27 N. D. 231, 145 N. W. 823. The mere fact that, as a result of the determination of the equitable issues, plaintiffs may or do become entitled to a money judgment, does not necessarily change it into an action at law. Avery Mfg. Co. v. Crumb, 14 N. D. 57, 103 N. W. 410. The principal relief asked and awarded in this action was equitable. The damages for the use and occupation of the premises were merely incidental to and wholly dependent upon a determination of the equitable issues. It is well settled that a court of equity, having once obtained jurisdiction, will retain it, and do complete justice between the parties. Bidwell v. Aster Met. Ins. Co. 16 N. Y. 267; Pom. Eq. Jur. 3d ed. § 862; 16 Cyc. 106, 109. See also Beach, Eq. Jur. §§ 538, 727, 994, 996. In this case it would have been an idle ceremony to call a jury to determine the value of the use and occupation, as there is no substantial conflict

in the evidence on this question; and the trial court would doubtless have been required to instruct the jury to return a verdict for the plaintiff for at least the amount of damages awarded in the judgment herein. No error was committed in denying defendant's demand for a jury trial.

This action was originally commenced in the district court of Billings county, wherein the land was then situated, but subsequently to the commencement of the action, and after the same had been noticed for trial and placed upon the calendar for trial in the district court of Billings county, that county was divided at the general election held in November, 1912, and Golden Valley county created out of a portion thereof. The premises involved in this action were situated in that part of Billings county which became Golden Valley county. On January 14, 1913, the attorneys for the respective parties entered into a written stipulation for a transfer of said action from the district court of Billings county to the district court of Golden Valley county, and on the same day an order was duly entered by the district court pursuant to such stipulation, transferring said action and directing the clerk of the district court of Billings county to transmit all the pleadings, files, and papers therein to the clerk of the district court of Golden Valley county.

On the 15th day of July, 1913, defendant's attorneys filed written objections to the trial of said action at that term on the following grounds: "1. That no notice of trial or note of issue in this action has been served or filed in the district court for said Golden Valley county. 2. That on the opening day of said July, 1913, term of said district court, this action was not at issue in said district court for Golden Valley county, wherefore upon the foregoing grounds defendant objects to said action being placed on the calendar and tried at said July, 1913, term." The objections were overruled and the cause set for trial and tried on July 29th, 1913. The trial court's ruling on this objection is also assigned as error. The correctness of this ruling seems too obvious to require any extended discussion. But see § 3230, Compiled Laws; 40 Cyc. 176, et seq.

All questions presented on this appeal have been considered; and it follows from what has been said that the judgment of the District Court must be affirmed. It is so ordered.

STATE OF NORTH DAKOTA v. IRA CRAY.

(153 N. W. 425.)

Jury — finding of — question of fact — binding on appellate court — substantial evidence.

1. The finding of jury on a disputed question of fact is binding upon the appellate court, if there is any substantial competent evidence to sustain such finding.

New trial — motion for — jury — misconduct of — ground for motion — discretion of court — abuse of.

2. A motion for a new trial on the ground of misconduct of a juror is addressed largely to the sound judicial discretion of the trial court, and the appellate court will not interfere unless it is shown that such discretion has been abused.

New trial — motion for — newly discovered evidence.

3. This rule also applies to a motion for a new trial on the ground of newly discovered evidence.

Discretion of trial court — abuse of — new trial — verdict — evidence.

4. In the instant case it is *held* that this court cannot say that the court abused its discretion in denying a new trial. It is also *held* that the evidence is sufficient to sustain the verdict.

Opinion filed April 29, 1915. Rehearing denied June 7, 1915.

Appeal from the District Court of Williams County, *Fisk*, J.

Ira Cray was convicted of the crime of grand larceny, and appeals. Affirmed.

Middaugh, Cuthbert, Smythe, & Hunt, for appellant.

The court erred in permitting rebuttal examination of the witness Borth to cover matters already testified to in the state's case in chief. Moseley v. Com. 24 Ky. L. Rep. 1811, 72 N. W. 344; People v. Hillhouse, 80 Mich. 584, 45 N. E. 484; People v. Quick, 58 Mich. 32, 25 N. W. 302; Reddick v. State, 72 Miss. 1008, 16 So. 490; State v. Hunsaker, 16 Or. 497, 19 Pac. 605; United States v. Gardiner, 2 Hayw. & H. 89, Fed. Cas. No. 15,186a; Jones, Ev. 2d ed. § 137.

Methods of examining a witness, not for impeachment, but for the

sole and apparent purpose of prejudicing him in the eyes of the jury, are wholly improper and should be condemned. McDonald v. Jacobs, 77 Ala. 524; Grubey v. National Bank, 35 Ill. App. 354; Tijerina v. State, 45 Tex. Crim. Rep. 182, 74 S. W. 913; Jones, Ev. 2d ed. § 137.

No foundation was laid for the introduction in evidence of the tickets for flaxseed from the elevator, and same was wholly improper and prejudicial. Jones, Ev. 2d ed. § 843; People v. Mather, 4 Wend. 229, 21 Am. Dec. 122; People v. Graham, 21 Cal. 261; People v. O'Brien, 96 Mich. 630, 56 N. W. 72; People v. Fong Ah Sing, 70 Cal. 8, 11 Pac. 323.

Where a general subject is entered upon in an examination in chief, the cross-examining counsel may ask any relevant question on the general subject, and is not bound to follow the line of examination pursued by the other counsel. Jones, Ev. 2d ed. § 824; Vogel v. Harris, 112 Ind. 494, 14 N. E. 385; Pye v. Bakke, 54 Minn. 107, 55 N. W. 904; Hay v. Reid, 85 Mich. 296, 48 N. W. 507; Leo Austrian & Co. v. Springer, 94 Mich. 343, 34 Am. St. Rep. 350, 54 N. W. 50; Davis v. Hays, 89 Ala. 563, 8 So. 131; Sayres v. Allen, 25 Or. 211, 35 Pac. 254.

It is the general rule of law that greater latitude is allowed on motion for a new trial on the evidence in criminal than in civil cases. Summerour v. State, 112 Ga. 19, 37 S. E. 98; Williams v. State, 85 Ga. 535, 11 S. E. 859; State v. Jones, 2 Bay, 520; Gibbons v. People, 23 Ill. 518.

Where evidence against the accused is wholly circumstantial, each essential circumstance in the chain or series of circumstances relied upon to establish guilt must be independently proved to a moral certainty or beyond a reasonable doubt, that is, to the same degree of certainty as the main fact. People v. Carson, 155 Cal. 164, 99 Pac. 970; People v. Weber, 149 Cal. 325, 86 Pac. 671; State v. Dinneen, 7 Pen. (Del.) 505, 76 Atl. 623; Kennedy v. State, 31 Fla. 428, 12 So. 858; Sumner v. State, 5 Blackf. 579, 36 Am. Dec. 561; Dunn v. State, 166 Ind. 694, 78 N. E. 198; Com. v. Webster, 5 Cush. 298, 52 Am. Dec. 711; People v. Vanderpool, 1 Mich. N. P. 264; People v. Aikin, 66 Mich. 460, 11 Am. St. Rep. 512, 33 N. W. 821, 7 Am. Crim. Rep. 345.

It is erroneous to instruct that it is sufficient that, after taking all the testimony together, the jury are satisfied beyond a reasonable doubt of guilt. Walbridge v. State, 13 Neb. 237, 13 N. W. 209; Bradshaw v. State, 17 Neb. 147, 22 N. W. 361, 5 Am. Crim. Rep. 499; State v. Maher, 25 Nev. 465, 62 Pac. 236; People v. Lustig, 206 N. Y. 162, 99 N. E. 183; State v. Messimer, 75 N. C. 385; State v. Snell, 2 Ohio N. P. 55, 5 Ohio S. & C. P. Dec. 670; Dossett v. United States, 3 Okla. 591, 41 Pac. 608; State v. Glass, 5 Or. 73; State v. Aughtry, 49 S. C. 285, 26 S. E. 619, 884, 27 S. E. 199; Lawless v. State, 4 Lea, 173; Black v. State, 1 Tex. App. 368; Hampton v. State, 1 Tex. App. 652; State v. Flanagan, 26 W. Va. 116; State v. Sheppard, 49 W. Va. 582, 39 S. E. 676; Kollock v. State, 88 Wis. 663, 60 N. W. 817; Buel v. State, 104 Wis. 132, 80 N. W. 78, 15 Am. Crim. Rep. 175.

Where a juror has made statements outside the jury room concerning the case or evidence offered therein, indicating a fixed opinion unfavorable to the losing party, or illwill toward him, it is ground for a new trial. Tomlinson v. Derby, 41 Conn. 268; Blalock v. Phillips, 38 Ga. 216; Jewsbury v. Sperry, 85 Ill. 56; Chicago City R. Co. v. Brecher, 112 Ill. App. 106; Wightman v. Butler County, 83 Iowa, 691, 49 N. W. 1041; Albin Co. v. Demorest Mfg. Co. 22 Ky. L. Rep. 245, 56 S. W. 982; Nesmith v. Clinton F. Ins. Co. 8 Abb. Pr. 141; Mix v. North American Co. 209 Pa. 636, 59 Atl. 272; Ewers v. National Imp. Co. 63 Fed. 562; Pool v. Chicago, B. & Q. R. Co. 6 Fed. 844; Allum v. Boultbee, 2 C. L. R. 1072, 9 Exch. 738, 23 L. J. Exch. N. S. 208, 18 Jur. 406, 2 Week. Rep. 459; Svenson v. Chicago G. W. R. Co. 68 Minn. 14, 70 N. W. 795, 2 Am. Neg. Rep. 183; State v. Robidou, 20 N. D. 518, 128 N. W. 1124, Ann. Cas. 1912D, 1015; Pettibone v. Phelps, 13 Conn. 445, 35 Am. Dec. 88 and cases therein cited.

A new trial will be granted on the ground of newly discovered evidence only where the latter is of such a character as will probably change the result of the former trial. Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Spelling, New Trials, § 221; 29 Cyc. 886; State v. DeMarias, 27 S. D. 303, 130 N. W. 782, Ann. Cas. 1913D, 154.

Evidence is not necessarily cumulative because along the same line

of that given on the former trial. It may be as to a dissimilar fact. It may bring to life some new and independent truth. Grogan v. Chesapeake & O. R. Co. 39 W. Va. 415, 19 S. E. 563; Cooper v. Ellis, 3 Ind. App. 142, 29 N. E. 444; Anderson v. State, 43 Conn. 514, 21 Am. Rep. 669; Waller v. Graves, 20 Conn. 305; Layman v. Minneapolis Street R. Co. 66 Minn. 452, 69 N. W. 329; Goldsworthy v. Linden, 75 Wis. 24, 43 N. W. 656; Dale v. Street, 88 Ga. 552, 15 S. E. 287; Able v. Frazier, 43 Iowa, 175; Fellows v. State, 114 Ga. 233, 39 S. E. 885; Gray v. Harrison, 1 Nev. 502.

New trials are frequently granted on such ground, even though the new evidence is cumulative. Oberlander v. Fixen, 129 Cal. 690, 62 Pac. 254; Holmes v. Clark, 54 Ga. 303; Hupp v. McInturf, 4 Ill. App. 449; Schlencker v. Risley, 4 Ill. 483, 38 Am. Dec. 100; Cleslie v. Frerichs, 95 Iowa, 83, 63 N. W. 581; White v. Nafus, 84 Iowa, 350, 51 N. W. 5; Butts v. Christy, 23 Ky. L. Rep. 2355, 67 S. W. 377; Mercer v. King, 19 Ky. L. Rep. 781, 42 S. W. 106; Berberich v. Louisville Bridge Co. 20 Ky. L. Rep. 467, 46 S. W. 691; Adams Oil Co. v. Stout, 19 Ky. L. Rep. 758, 41 S. W. 563; Parsons v. Lewiston, B. & B. Street R. Co. 96 Me. 503, 52 Atl. 1006, 12 Am. Neg. Rep. 38; Keet v. Mason, 167 Mass. 154, 45 N. E. 81; St. Paul Harvester Co. v. Faulhaber, 77 Neb. 477, 109 N. W. 762; German Nat. Bank v. Edwards, 63 Neb. 604, 88 N. W. 657; Wall v. Trainor, 16 Nev. 131; Hess v. Sloane, 47 App. Div. 585, 62 N. Y. Supp. 666; Kring v. New York C. & H. R. R. Co. 45 App. Div. 373, 60 N. Y. Supp. 1114; Keister v. Rankin, 34 App. Div. 288, 54 N. Y. Supp. 274 (reversing 29 App. Div. 539, 51 N. Y. Supp. 634); Vollkommer v. Nassau Electric R. Co. 23 App. Div. 88, 48 N. Y. Supp. 372; Durant v. Philpot, 16 S. C. 116; Wilson v. Seaman, 15 S. D. 103, 87 N. W. 579; Halliday v. Lambright, 29 Tex. Civ. App. 226, 68 S. W. 712; Gilman v. Nichols, 42 Vt. 313; Hurd v. Barber, Brayton (Vt.) 170.

C. C. Converse, State's Attorney, and *M. V. Boddy,* Asst. State's Attorney, for respondent.

It is sufficient if, taking the testimony all together, the jury is satisfied beyond a reasonable doubt that the state has proven each material fact charged, and that the defendant is guilty. Bradshaw v. State, 17 Neb. 147, 22 N. W. 361, 5 Am. Crim. Rep. 499; State v. Glass,

5 Or. 73; Wightman v. Butler County, 83 Iowa, 691, 49 N. W. 1014.

The granting or refusing of a motion for a new trial on the ground of misconduct of the jury, or of a juror, is largely in the discretion of the trial court, and its action will not be disturbed unless there clearly appear an abuse of discretion. State v. McDonald, 16 S. D. 78, 91 N. W. 447; State v. Baughman, 111 Iowa, 71, 82 N. W. 452; 8 Enc. Ev. 975; Fuller v. Fletcher, 44 Fed. 34; State v. Gay, 18 Mont. 51, 44 Pac. 411; State v. Webb, 20 Wash. 500, 55 Pac. 935; People v. Hunt, 59 Cal. 430; State v. Allen, 89 Iowa, 49, 56 N. W. 261; Grottkau v. State, 70 Wis. 462, 36 N. W. 31.

The rule above stated also applies in connection with the action of the trial court on such motion on the ground of newly discovered evidence. The appellate court will not, as a rule, interfere with the action of the lower court, and especially where the newly discovered evidence appears to be wholly cumulative or impeaching in its character. State v. Albertson, 20 N. D. 512, 128 N. W. 1122; State v. Brandner, 21 N. D. 310, 130 N. W. 941; State v. Reilly, 25 N. D. 339, 141 N. W. 720; Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Barrett v. Third Ave. R. Co. 45 N. Y. 628; Hayne, New Trial & App. § 8; Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; Baker v. Joseph, 16 Cal. 173; Arnold v. Skaggs, 35 Cal. 684; Nelson v. Carlson, 54 Minn. 94, 55 N. W. 821.

It is largely a matter of judicial discretion in any event. Oberlander v. Fixen, 129 Cal. 690, 62 Pac. 254; White v. Nafus, 84 Iowa, 350, 51 N. W. 5; Layman v. Minneapolis Street R. Co. 66 Minn. 452, 69 N. W. 329; Lampsen v. Brander, 28 Minn. 526, 11 N. W. 94; Wilson v. Seaman, 15 S. D. 103, 87 N. W. 577; State v. Madigan, 66 Minn. 10, 58 N. W. 179; Re McClellan, 21 S. D. 209, 111 N. W. 540, 37 Century Dig. Columns 1113 to 1150; 29 Cyc. 799; Nicholsin v. Metcalf, 31 Mont. 276, 78 Pac. 483; Scott v. Chambers, — Mich. —, 29 N. W. 94; Gaines v. White, 1 S. D. 434, 47 N. W. 524; Grace v. McArthur, 76 Wis. 641, 45 N. W. 518; Taylor v. California Stage Co. 6 Cal. 229; Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; Gran v. Houston, 45 Neb. 813, 64 N. W. 245; Wherry v. Duluth, M. & N. R. Co. 64 Minn. 415, 67 N. W. 223, 12 Am. Neg. Cas. 163; Hoffine v. Ewing, 60 Neb. 729, 84 N. W. 93.

CHRISTIANSON, J. The defendant was convicted in the district court of Williams county, upon a charge of venue from McKenzie county, of the crime of grant larceny, and sentenced to imprisonment in the state's penitentiary for the term of two years. Thereafter a motion for new trial was made and denied; and this appeal is taken from the judgment and the order denying a new trial.

There are 153 assignments of error, but 148 of these relate to rulings on the admission or rejection of evidence, and are grouped by appellant under five separate classes, *viz.*, (1) Incompetent, argumentative, and improper rebuttal; (2) irrelevant and immaterial; (3) leading, suggestive, and calling for a conclusion of the witness; (4) assumption of a statement of facts and no foundation; (5) improper restrictions on cross-examination. It will be observed that the objections indicate that the rulings challenged related to matters largely within the discretion of the trial court. We have carefully examined every one of the assignments, and are unable to find any instance wherein the ruling of the trial court constituted prejudicial error. In fact, on the oral argument, it was virtually conceded by appellant's counsel that the rulings of the trial court upon the admission or rejection of evidence would not in themselves entitle defendant to a new trial, but appellant's counsel contended that these matters, when considered with the other matters urged in support of the motion for a new trial, would require that a new trial be granted. The remaining six assignments are based upon the insufficiency of the evidence to sustain the verdict; the alleged misconduct of a juror named Turner; and newly discovered evidence. These are the only assignments of error worthy of any serious consideration.

The testimony shows that on December 31st, 1912, one Elbert Payne was the owner of about 397 bushels of flax stored in a shack situated about 20 miles from the town of Riverview, and only a short distance from where the defendant and his brother owned and farmed certain lands in McKenzie county in this state. In the morning of December 31, 1912, a son of one Clark had occasion to go to the shack in question to look for a certain knife which had been left there at some previous time, and when there he observed that the roof of the shack had been broken open and some flax taken out of the shack. He forthwith notified his father and also Mr. Payne, the owner of the flax,

with the result that these parties and another neighbor went up to the shack in question and found that the roof had been broken open and some of the flax removed; they also found a wagon trail leading to the shack, and they testified positively that they "back-tracked" this trail to the house of the defendant,—to the very place in the yard where the wagon started that morning. And they further testified that they thereupon tracked the wagon from the shack all the way to the elevator at Riverview, where the flax was delivered. These witnesses for the state claim that they were able to track this wagon on account of a peculiar mark made by the hoof of one of the horses, by reason of the fact that a piece had been broken out of the hoof. It is conceded that these parties reached the elevator at Riverview shortly after the defendant had unloaded his load of flax, and while the defendant was still at the elevator. It is likewise conceded that at that time Payne accused the defendant of stealing the flax. The complaining witness also claims that at that time he called the defendant's attention to the defect in the hoof by means of which it is claimed the defendant was tracked, and in this he is corroborated by other witnesses. The defendant denies this, and says that no reference was made to the defective hoof, and he and his witnesses claim that the horses were shod, and that for that reason the mark claimed to have been made could not possibly have been made. The defendant produced several witnesses who testified that the horses were shod. But, on the other hand, as already stated, three witnesses for the state testified positively that they tracked the horses on the day the flax was stolen, first from the place of the defendant to the shack, and next from the shack to the elevator where the grain was sold. These witnesses testify positively that the horses were not shod on that day, and that they noticed the peculiar mark as already stated, and at the elevator observed that the horses were not shod and noticed the defect in the hoof which caused the mark to be made. There is a square conflict in the testimony as to the condition of the roads on that morning, and the character and quality of the flax. Appellant's counsel, however, contends that the prime question in the case is whether or not the horses were shod on the 31st of December, 1912, and his contention is that upon this question the evidence is insufficient to sustain the verdict. It is true that there is strong evidence on this feature of the

case in favor of the defendant; but on the other hand there were four witnesses for the state who testified positively that they observed the horses on the day in question and that at that time the horses were not shod.

The question of the credibility of the witnesses and the credence to be given to their testimony was a matter for the jury, and its finding, based upon conflicting evidence, is binding upon this court. The only authority this court has is to review the rulings of the trial court to ascertain whether or not the defendant has been afforded a fair trial under the laws of this state. He was entitled to have the issues of fact submitted to a jury, and the finding of the jury upon an issue cannot be set aside, if there is any substantial competent testimony in the record to sustain such finding. And there is ample testimony in this case from which the jury could find that the horses of the defendant were not shod on December 31st, 1912. This is also true of the other issues of fact involved in the action. The jury believed that the witnesses for the state told the truth upon all disputed issues, and that the defendant and his witnesses did not, and by their verdict have said that they were satisfied beyond a reasonable doubt of defendant's guilt. The trial judge, who saw and heard all the witnesses testify, and had an opportunity to observe their demeanor while testifying, has added his approval to the jury's finding by denying a motion for a new trial. The findings of the jury and trial court upon this question are binding on this court.

The charge of misconduct of a juror is based solely upon the affidavit of one Jensen. The material part of the affidavit of Jensen is as follows: "That while he was attending said trial as a spectator, as aforesaid, he became acquainted with one W. C. Turner, who was one of the regular panel of jurors during said term, and who was one of the jurors who returned the verdict finding the defendant above named guilty of the charge of grand larceny. That after he became acquainted with the said juror, Turner, as aforesaid, and while said action was being tried, before the same was closed either by the state or by the defendant, and while the defendant above named was submitting testimony in his behalf, affiant and said Turner were sitting in front of the Great Northern Hotel in said city of Williston, conversing; said Turner aforesaid stated to affiant that the defendant above

named, Ira Cray, and his witnesses, claimed that the roads in the vicinity of where the flax was claimed to have been stolen were frozen and hard; that he, Turner, knew better; that he knew they were dusty, he having done considerable hauling that fall and winter himself. That there was only one question in the case, and that was, 'If the defendant can prove that the horses were shod, if he can satisfy us that the horses were shod and that there wasn't any piece out of the hoof, there wouldn't be anything to the case,' as far as the state was concerned. 'But I believe in my own mind that Cray is guilty, and if it was left to me he would be found guilty.' Affiant further says that the same evening while affiant was passing the Great Northern Hotel, he saw said Turner in conversation with one of the witnesses who appeared for the state, a witness by the name of Unfred, a grain buyer at Riverview, as he testified, and affiant heard said Turner in said conversation use the name of the defendant above named, and knows of his own knowledge that he and the said Unfred were talking concerning the above entitled action; that immediately that said Turner and Unfred saw this affiant they quit talking, Unfred getting up from the seat upon which he and the said Turner had been sitting, and walked away; that affiant then sat down beside said Turner and at said time said Turner informed affiant that Unfred had stated that he was but a witness and didn't care how the case went."

In opposition to the affidavit of Jensen, the state tendered the affidavit of the juror Turner, which is as follows: "That he is a citizen and resident of Williams county, North Dakota, and that he is fifty-four years of age; that his postoffice is Buford, North Dakota, but that his nearest railroad point is Bainville, Sheridan county, Montana. That he was one of the jurors on the regular panel for the June, 1913, term of the district court of Williams county, and was one of the jurors who tried the case of the State against Ira Cray, in which the defendant was charged with the theft of certain flax; that affiant has read a copy of an affidavit of one John H. Jensen, exhibited to him by C. C. Converse, of Schafer, North Dakota, in which said Jensen states that this affiant stated to said Jensen that this affiant knew that the roads in the vicinity where the flax was claimed to have been stolen were not frozen and hard, but that they were dusty, he having done considerable hauling that fall and winter himself; and affiant

now states on his oath that he did not make such statement, nor did he make any statement in substance the same, either to the said Jensen or to anyone else, either at the time and place claimed by Jensen or at any other time or place; that, as a matter of fact, this affiant has never at any time done any hauling on the south side of the Missouri river, nor within 30 or 40 miles of where the flax was stolen, and has no acquaintance in that vicinity, and had not been anywhere in that vicinity during the fall of 1912 nor the winter following, and had no means of knowing the condition of the roads in question in this case except the testimony given by the witnesses; that, with respect to the statement in Jensen's affidavit to the effect that affiant stated to him that 'if the defendant can prove that the horses were shod, if he can satisfy us that the horses were shod and that there wasn't any piece out of the hoof, there wouldn't be anything to the case, as far as the state was concerned,' affiant states that he has no recollection of making such a statement except to other members of the jury in the jury room; that affiant cannot remember, and does not believe, that he made such a statement except to a member of the same jury; that said Jensen is a stranger to the affiant; that affiant has no recollection of meeting him nor of talking to him, nor to anyone else in his presence, and cannot believe that he could have made such a statement as the one set out in this paragraph to a total stranger, as Jensen is; that, with respect to the statement attributed to affiant by Jensen to the effect, 'I believe in my own mind that Cray is guilty, and if it was left to me, he would be found guilty,' affiant now states positively on his oath that he did not make such statement nor any statement of like meaning, neither to Jensen nor to anyone else; that the defendant and all his brothers and the complaining witness and all the witnesses for the state were entire strangers to this affiant at the beginning of the trial, and that affiant undertook and entered upon the duties of a juror in said case with a mind perfectly free from bias of any sort, either for or against the defendant; and that, throughout the trial, his only interest in the case was to perform his duties as a juror fairly and impartially to the best of his ability, and that is what he did."

The question is whether or not the juror Turner was shown to be an unfit person to discharge the duties of a juror in this case. The

defendant was entitled to a fair trial, and this included the right to be tried by twelve fair and impartial jurors. The presumption is that he has had such trial, and that the jury by which he was tried consisted of fit jurors, who properly discharged their duties. The burden is upon the defendant to overcome this presumption, and show that he has been deprived of a fair trial. There is nothing to indicate who Jensen is, or that he is worthy of any more, or as much, credit as Turner. The trial judge had an opportunity to observe not only the witnesses, but the jurors as well. He was entirely familiar with all the various details and incidents in the case, which it is impossible for this court to ascertain. And being possessed of this knowledge,—in addition to that conveyed by the affidavits,—he made a finding adverse to the contentions of appellant. This finding is entitled to great credence by this court, as it related to a matter peculiarly within the knowledge of the trial judge.

It is also well settled that the question of granting or denying a motion for a new trial on the ground of alleged misconduct on the part of a juror is largely within the sound judicial discretion of the trial court, and the appellate court will not interfere unless an abuse of such discretion appears. In State v. Robidou, 20 N. D. 518, 523, 128 N. W. 1124, Ann. Cas. 1912D, 1015, this court said: "The refusal or denial of a motion for a new trial for alleged misconduct on the part of the jury is, as a general rule, a matter within the discretion of the judge presiding at the trial; and unless it appears that this discretion was abused, or that there has been palpable error, or unless it appears that the trial court refused to review and consider the evidence by which its consideration of the motion should have been guided or controlled, the refusal of the trial judge to grant a new trial will not as a general rule be disturbed on appeal. 12 Enc. Pl. & Pr. 561, 562 and cases cited; State v. McDonald, 16 S. D. 78, 91 N. W. 447; State v. Andre, 14 S. D. 215, 84 N. W. 783; Pettibone v. Phelps, 13 Conn. 445, 35 Am. Dec. 88; State v. Allen, 89 Iowa, 51, 56 N. W. 261; State v. Beasley, 84 Iowa, 83, 50 N. W. 570; Perry v. Cottingham, 63 Iowa, 41, 18 N. W. 680; State v. Salverson, 87 Minn. 41, 91 N. W. 1, 12 Am. Crim. Rep. 644; People v. Johnson, 110 N. Y. 134, 17 N. E. 684; State v. Cucuel, 31 N. J. L. 249; State v. Taylor, 134 Mo. 109, 35 S. W. 92; State v. Howard, 118

Mo. 136, 24 S. W. 41. In State v. McDonald, 16 S. D. 78, 91 N. W. 447, the court says: 'Upon a careful examination of the affidavits, we are unable to say that the trial court erred in refusing the motion for a new trial upon the ground stated. The question was largely in the sound judicial discretion of the trial court, and, this court being unable to say that there was an abuse of such discretion, the ruling of the court should not be disturbed.' In State v. Andre, 14 S. D. 215, 84 N. W. 783, the court says: 'A motion for a new trial for alleged misconduct of the jury, or any other ground specified by statute, being addressed to the sound discretion of the trial judge, whose superior knowledge of all the facts and circumstances enables him to know the requirements of justice, a reviewing court will never interfere, unless an abuse of such discretion affirmatively appears.'" See also Wightman v. Butler County, 83 Iowa, 691, 49 N. W. 1041; Svenson v. Chicago G. W. R. Co. 68 Minn. 14, 70 N. W. 795, 2 Am. Neg. Rep. 183; State v. Baughman, 111 Iowa, 71, 82 N. W. 452; State v. Gay, 18 Mont. 51, 44 Pac. 411; State v. Webb, 20 Wash. 500, 55 Pac. 935. We are satisfied that this court cannot say either that the trial court abused its discretion, or that it erred in finding that the juror Turner had not been guilty of such misconduct as would require a new trial.

As already stated, a new trial was also asked on the ground of newly discovered evidence, and several affidavits were offered in support of this ground of the motion. Counter affidavits were offered by the state to show that all of the newly discovered evidence was either known to the defendant at the time of the former trial, or could have been known if he had exercised due diligence. Practically all of the newly discovered evidence is cumulative, and some of it doubtless was known to the defendant at the time of the former trial. Appellant asserts that the rule laid down in Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762, to wit: "A new trial will be granted on the ground of newly discovered evidence only where the latter is of such character as will probably change the result of the former trial,"—should be applied. And he earnestly contends that the alleged newly discovered evidence is of such nature that on a new trial a different result is probable. This was, however, a matter peculiarly within the knowledge of the trial judge, who saw and heard the witnesses, including

the defendant, observed their manner and appearance, and was familiar with the various incidents in the trial of the action.

Appellant also contends that the rule requiring a showing that the newly discovered evidence could not with reasonable diligence have been discovered and produced by the defendant upon the former trial, has been greatly relaxed by the courts,—especially in criminal cases. New trials are granted only in the interest of justice. And the question of whether or not the ends of justice demand a relaxation of the rule in question was also a matter to be determined in the first instance by the trial court; and subject to review in this court only in case of abuse of discretion on part of that court. It may be observed that our law making newly discovered evidence a ground for a new trial in criminal cases reads as follows: ". . . . When new evidence is discovered material to the defense, and which the defendant could not, with reasonable diligence, have discovered and produced at the trial." . . . Comp. Laws 1913, § 10917, subdiv. 7. The fundamental rule applicable to motions for a new trial on the ground of newly discovered evidence is that this is addressed to the sound judicial discretion of the trial court, and that its action thereon is conclusive on this court, unless it appears affirmatively that the discretion vested in the court below has been abused. Heyrock v. McKenzie, supra; State v. Albertson, 20 N. D. 512, 128 N. W. 1122; State v. Brandner, 21 N. D. 310, 130 N. W. 941; State v. Reilly, 25 N. D. 339, 376, 377, 141 N. W. 720; Hayne, New Trial & App. § 8. See also Aylmer v. Adams, 153 N. W. 419.

It was for the trial court to pass upon all questions presented by the motion for new trial, and determine whether the newly discovered evidence was material, and would be likely to produce a different result upon a retrial of the case, and also whether or not defendant could, or could not, by the exercise of reasonable diligence, have produced such evidence upon the former trial. The trial judge answered these questions adversely to the contentions of the appellant, and his finding is conclusive on this court, unless it can be said that in so doing he has abused his discretion. Upon a careful consideration of all the affidavits submitted upon this motion, we are compelled to say that no such abuse is shown. There being no error justifying a reversal of the judgment or the order denying a new trial, they must be affirmed. It is so ordered.

CHRISTIANSON, J. (On Rehearing) A petition for rehearing filed herein ably and earnestly presents that a new trial should be granted on the ground of newly discovered evidence. It is contended that this evidence is of such character that a different result would be probable on a retrial. And exception is taken to that part of the former opinion wherein we said that "this was, however, a matter peculiarly within the knowledge of the trial judge, who saw and heard the witnesses, including the defendant, observed their manner and appearance, and was familiar with the various incidents in the trial of the action." In discussing this matter the petition for rehearing says: "Just how Judge Fisk, sitting as trial judge, is more able to determine the probable result of a trial than any of the members of this learned court, with the same record before them, is beyond our comprehension."

If the rule contended for by appellant's counsel were adopted, it would abolish the fundamental principle applicable to motions of this kind, *viz.*, that they are addressed to the sound judicial discretion of the trial court. The law applicable to motions of this kind has been fully discussed by this court in the case of Aylmer v. Adams, 153 N. W. 419, and we can add nothing to what has been there said. We have before us, it is true, a statement of case, containing the testimony offered, reduced to narrative form, and also the affidavits relative to the newly discovered evidence. But even at that we would be compelled to base our judgment upon "the comparison of one lifeless record with another,—the affidavits with the record of the proceedings on the trial."

The trial judge was entirely differently situated. He had seen and heard the witnesses, and observed their appearance and demeanor, and was familiar with the trial and its various incidents. See Braithwaite v. Aiken, 2 N. D. 57, 63, 49 N. W. 419. When the trial judge considered the alleged newly discovered evidence he was required to weigh it with the evidence received at the trial, and in such consideration the peculiar knowledge received by him during the trial entered into and formed part of the reasons on which his judgment was based, when he held that a new trial should be denied.

In Spelling on New Trial and Appellate Practice, § 221, it is said: "The probability of a different result upon a retrial, often suggested

as a test of the sufficiency in point of materiality and importance of alleged new evidence to warrant a new trial, is merely a guide for the courts in arriving at a conclusion as to whether, with the addition of the new evidence, the result ought to be different." But the duty of deciding the motion rests primarily with the trial court, and the question whether a different result is probable is necessarily included in its decision.

The petition for rehearing is based on the erroneous theory that this court has denied a new trial. The question of whether or not a new trial ought to be granted was primarily a question for the trial court. The function of this court on this appeal is merely to review the ruling of the trial court on this motion, and this review is limited to a determination of the question of whether in denying a new trial the trial court abused its discretion, and thereby effected an injustice. The discretion vested in the trial court should always be exercised in the interests of justice. The presumption is that it was properly exercised. Even if all the newly discovered evidence had been offered at the trial, there would still be ample evidence to sustain the verdict. The trial court, after considering the newly discovered evidence, and weighing the same with the evidence adduced upon the trial, was still of the opinion that substantial justice had been accomplished at the former trial. There is nothing to justify this court in saying that the trial court erred in its conclusion, or abused its discretion in so holding. A rehearing is denied.

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

(L.R.A.1916A, 493, 153 N. W. 442.)

One Havlicheck and wife entered into a written contract of sale of 400 acres of land, near Minot, to plaintiffs. Eighty acres of Illinois land was to be

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Note.—The authorities passing upon escrow agreements are reviewed in an extensive note in 130 Am. St. Rep. 910.

As to payment by check, see note in 35 L.R.A.(N.S.) 26.

accepted in part payment. The contract provided for inspection of the Illinois land. It was reported to be satisfactory. H. and wife then executed to Thornhill their warranty deed to the 400 acres and a bill of sale of the personal property thereon, pursuant to the contract. Plaintiffs executed their deed to the Illinois land. All deeds, bill of sale, and the preliminary contract of sale, accompanied by a written escrow agreement, were deposited in the Second National Bank of Minot. This bank received as depositary in escrow all of the deeds to be delivered according to the conditions of the written escrow agreement, which provided that the deeds were "to be delivered to the parties who are entitled to same upon performance of the agreements set forth" in the preliminary agreement of purchase and sale of the land. The original sale agreement stipulated for an initial payment of $1, made and received; that certain mortgages should be assumed by the purchaser; and the further payment of $3,000 in cash should be made by Thornhill to H., but with no definite time fixed for payment. Abstracts of title to all land here and in Illinois were also to be furnished. No stipulation was made for inspection of them. These papers were so deposited in escrow on April 15, 1912. Four days later H. and wife executed and delivered their warranty deeds, immediately placed of record, to the 400 acres to defendant, Olson, as grantee, who, under the findings of the jury, it must be assumed, bought with notice of the escrow arrangement and the previous deposit of the papers thereunder with the bank. On April 23d plaintiffs procured title to the Illinois tract, which before that time they did not own, although they had attempted to deed same by the invalid deed in which the wife of one of said grantors had not joined, and which deed had been one of the instruments deposited in escrow. May 11th a second and valid deed to the Illinois tract was deposited with the bank to replace the invalid one, or to cure any defect of title thereunder, and on that day plaintiff served notice on H. and wife to appear at the bank at a certain hour that day to close up the escrow matter. They did not appear. On April 19th Thornhill served Olson with a written notice of the escrow arrangement, stating that "all interest, right, or title you acquire in said premises you take subject to the equities of the undersigned under and by virtue of said contract for deed." On May 11th plaintiffs, acting by their agent, the Brush-McWilliams Company, deposited with said bank a check drawn by plaintiffs on an Illinois bank and indorsed by the Brush-McWilliams Company, which check was payable to said bank, as payee, for the sum of $3,000. The bank thereupon treated the check as cash, but retained it, and it never has been cashed. On deposit with it of said check, the bank delivered, on May 11th, the deed of H. and wife, held by it in escrow, to plaintiffs. Neither H. and wife nor Olson has ever participated in the escrow proceedings after April 15th, nor done any act to recognize the same, or toward performance of the original contract of sale, after the deposit in escrow made April 15th; but on the contrary have disregarded the same, Olson having claimed at all times to have been a good

faith purchaser without notice of the escrow proceedings. He has paid H. and wife part, if not all, of the consideration for his deed. The action, though in equity to quiet title, is based upon title arising under a valid delivery by the bank to plaintiffs of the deed in escrow. It was tried as a law action to a jury, which found for plaintiffs for possession and $750 damages for detention thereof. Findings and conclusions were also made in accordance with and supplemental to the verdict. Defendant appeals as in an action at law on specifications of error, and not as on a trial *de novo*, and the case is submitted on appeal as a law case on an appeal from both an order denying a new trial and from the judgment. *Held:*

Deed — delivery — escrow — depositary — second delivery.

1. That the delivery of the deed by the bank to plaintiffs was unauthorized, and was in disregard of the escrow agreement in that it was delivered without a cash payment made by plaintiffs of $3,000 to said depositary, as was stipulated for by the escrow agreement before a valid second delivery of the deed could be made.

Escrow agreement — depositary — check — in lieu of cash — substantial performance — second delivery.

2. Under the escrow agreement said depositary was without authority to accept a check as and in lieu of a cash payment, and that the doctrine of substantial performance does not apply to a second delivery of deeds under a written escrow agreement.

Escrow — conditions — precedent — valid second delivery — what is — grantor — consent — withheld — title.

3. The conditions stipulated for in an escrow agreement in writing, upon which the second delivery of the deed shall be made, are conditions precedent to its valid second delivery, and the consent of the grantor to its second delivery is deemed to be withheld until full compliance has been had with the escrow agreement. As a deed delivered without consent of the grantor passes no title, consent being essential to its validity, a deed delivered by the depositary in violation of the escrow agreement is no delivery, and passes no title.

Depositary — agent of both parties — must not aid either — mere conduit — powers — acts in excess of — void.

4. The depositary is the agent of both parties, but neither for one more than the other, and is empowered to aid neither; and is merely a conduit used in passing title for convenience and safety. A delivery by the depositary in excess of its powers is a nullity.

Bank depositary — check in lieu of cash — loan by bank.

5. The reception by the bank of the check in lieu of money did not amount to a loan of money by the bank to the plaintiffs, and will not be treated as such.

Bank — accepting check — in lieu of cash — not act of grantors — void.

6. The act of the depositary in accepting the check as cash was not the act of the grantors, but was void as in excess of authority conferred by them upon the bank.

Performance — escrow agreement — ability to perform — not in issue.

7. The question involved is one of performance of the escrow agreement,—not of the ability of the plaintiffs to perform that agreement,—as such ability, without full performance, cannot amount to compliance.

Deposit in bank — escrow — title — agreement — construction of.

8. It is assumed, without deciding, that the deposit of papers with the bank amounted to a deposit in escrow. Plaintiffs can have no standing on their claim of title, unless the same constituted an agreement in escrow.

Law — errors in — law action — trial de novo — theory.

9. The case is treated on this appeal as it was tried below, and treated by the parties on the appeal, *viz.*, a review of errors at law in a law action, and not a trial *de novo*.

Title — not shown — relief — dismissal.

10. It appears from the theory had of the case on trial and on appeal, that no title can ever be shown to have been in plaintiffs, and that they can never recover on the basis of title having passed to them, and are therefore without possibility of relief in this action; and the same is accordingly ordered dismissed.

Opinion filed March 31, 1915. Rehearing denied June 7, 1915.

Appeal from the judgment of the District Court of Ward County, *Leighton,* J., and an order refusing a new trial.

Defendant appeals.

Order reversed and dismissed.

Palda, Aaker, & Greene, for appellant.

Plaintiffs must show title in fee simple, as alleged in the complaint, or they cannot recover. Brown v. Comonow, 17 N. D. 84, 114 N. W. 728; Hebden v. Bina, 17 N. D. 235, 138 Am. St. Rep. 700, 116 N. W. 85; Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227; Harmon v. Goggins, 19 S. D. 34, 101 N. W. 1088; Weeks v. Cranmer, 17 S. D. 173, 95 N. W. 875; Youker v. Hobart, 17 N. D. 296, 115 N. W. 839.

In matters of escrow the law holds the grantee to very strict performance of the conditions imposed. 16 Cyc. 577, and note 5; Cotton v.

Gregory, 10 Neb. 125, 4 N. W. 939; Henderson v. Johns, 13 Colo. 280, 22 Pac. 461; Hoig v. Adrian College, 83 Ill. 267.

An escrow given to the grantee or obligee by the depositary before compliance with the conditions, or before the happening of the event stipulated, passes no title to the grantee, or gives no right to the obligee. 16 Cyc. 579, and cases in note 20; Everts v. Agnes, 4 Wis. 356, 65 Am. Dec. 314; Black v. Shreve, 13 N. J. Eq. 455; Patrick v. McCormick, 10 Neb. 1, 4 N. W. 312; Schmidt v. Musson, 20 S. D. 389, 107 N. W. 367; Matteson v. Smith, 61 Neb. 761, 86 N. W. 472; Daggett v. Daggett, 143 Mass. 516, 10 N. E. 311.

Where a first delivery under an escrow agreement violates such agreement, a second attempted delivery does not relate back as a delivery and transfer of title as of the date of the first delivery or deposit. 16 Cyc. 561; Rev. Codes 1905, §§ 4954, 4955, 4957, Comp. Laws 1913, §§ 5497, 5498, 5500; Patrick v. McCormick, 10 Neb. 1, 4 N. W. 312; Baum's Appeal, 113 Pa. 58, 4 Atl. 461; 3 Words & Phrases, 2467—cases cited; Price v. Pittsburgh, Ft. W. & C. R. Co. 34 Ill. 13; Demesmey v. Gravelin, 56 Ill. 93; May v. Emerson, 52 Or. 262, 96 Pac. 454, 1065, 16 Ann. Cas. 1129; Cagger v. Lansing, 43 N. Y. 550; Taft v. Taft, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426; Stephens v. Rinehart, 72 Pa. 434; Schmidt v. Musson, 20 S. D. 389, 107 N. W. 367; 4 Kent, Com. 454.

There is no delivery by relation in this case. In some exceptional cases there is such a thing as constructive delivery; but in the case of an escrow, there is no effect to be given to the instrument until the delivery to the depositary. 4 Kent, Com. 454, 455; May v. Emerson, 52 Or. 262, 96 Pac. 454, 1065, 16 Ann. Cas. 1129; Jackson ex dem. Russell v. Rowland, 6 Wend. 667, 22 Am. Dec. 557; Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592.

The intention of the grantor to give present title is the test of the right to claim delivery by relation. It has no connection with an escrow, which depends entirely upon the happening and doing of the things mentioned in the escrow agreement. Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592; Jackson v. Rowley, 88 Iowa, 184, 55 N. W. 339; Taft v. Taft, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426; May v. Emerson, 52 Or. 262, 96 Pac. 454, 1065, 16 Ann. Cas. 1129.

Plaintiffs have not shown title, and have mistaken their remedy. The deed of the Havlichecks conveyed legal title to defendant. Cannon v. Handley, 72 Cal. 133, 13 Pac. 315; May v. Emerson, 16 Ann. Cas. 1129 and note, 52 Or. 262, 96 Pac. 454, 1065; Wilkins v. Somerville, 80 Vt. 48, 11 L.R.A.(N.S.) 1183, 130 Am. St. Rep. 906, 66 Atl. 893; Pom. Spec. Perf. of Contr. §§ 464–466; Flanagan Estate v. Great Central Land Co. 45 Or. 335, 77 Pac. 485.

The submission of special findings is discretionary with the court; but an abuse of it will constitute reversible error. Morrow v. Saline County, 21 Kan. 484; Ryan v. Rockford Ins. Co. 77 Wis. 611–615, 46 N. W. 885; Burke v. McDonald, 2 Idaho, 679, 33 Pac. 49, 17 Mor. Min. Rep. 325; Cole v. Boyd, 47 Mich. 98, 10 N. W. 124; Bess v. Chesapeake & O. R. Co. 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234, 7 Am. Neg. Cas. 126.

Greenleaf, Bradford, & Nash, for respondents.

Defendant must prove his claim as alleged or suffer a nonsuit with respect thereto, and he thereby waives his right to a nonsuit against the plaintiff showing a right, interest, lien, or encumbrance, even though the same is not in accord with the allegations of the complaint. Hooper v. Henry, 31 Minn. 264, 17 N. W. 476; Windom v. Schuppel, 38 N. W. 757; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434.

Under an escrow agreement, where there is a duty to be performed by each party, one party may waive the performance of the conditions by the other, and he does so waive by demanding a delivery of the escrow when a condition in his favor to be performed by the other party has not been performed. Hoyt v. McLagan, 87 Iowa, 746, 55 N. W. 18; Bradbury v. Davenport, 120 Cal. 152, 52 Pac. 301; Tharaldson v. Everts, 87 Minn. 168, 91 N. W. 467.

Appellant took with full knowledge of respondents' rights; he was guilty of fraud, and should not be permitted to profit by his own wrong, and justice required that delivery should take effect as of the date of delivery of the escrow. Conneau v. Geis, 73 Cal. 176, 2 Am. St. Rep. 785, 14 Pac. 580; McDonald v. Huff, 77 Cal. 279, 19 Pac. 499; Marr v. Rhodes, 131 Cal. 267, 63 Pac. 364; 4 Kent, Com. 454; Devlin, Deeds, § 328; Shirley v. Ayres, 14 Ohio, 307, 45 Am. Dec. 546; Brown v. Austen, 35 Barb. 341; Whitfield v. Harris, 48 Miss.

710; Hall v. Harris, 40 N. C. 303; Whitmer v. Schenk, 11 Idaho, 702, 83 Pac. 775; Simpson v. McGlathery, 52 Miss. 723.

The fact that the court invoked the legal fiction of relation in furtherance of justice does not render the title any less the legal title. Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792.

The term "fee simple" has never been used to distinguish between legal and equitable estates. It merely defines the largest estate in lands. Loventhal v. Home Ins. Co. 112 Ala. 108, 33 L.R.A. 259, 57 Am. St. Rep. 17, 20 So. 419; Gaylord v. Lemar F. Ins. Co. 40 Mo. 13, 93 Am. Dec. 289; Mitchell v. Black Eagle Min. Co. 26 S. D. 260, 128 N. W. 159, Ann. Cas. 1913B, 85; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434.

Goss, J. The complaint is in the usual form of an action to quiet title, alleging plaintiffs to be the owners in fee of the 400 acres involved. The relief sought is confirmation of title in plaintiffs and possession, and $2,000 for use and occupancy, and general equitable relief. The answer claims title in defendant and demands a dismissal. A jury was used and a general verdict was found for plaintiffs. In addition thereto the court filed findings and conclusions. Judgment was rendered in the plaintiffs' favor quieting title in them to the land, and awarding them judgment in the sum of $750 damages. Motion for new trial was made, based upon errors of law occurring at the trial and insufficiency of the evidence to justify the verdict and findings. Defendant appeals from both the judgment rendered and the order denying a new trial.

In brief, the facts are that both parties to this action are real estate dealers operating at Minot, the plaintiffs through the Brush-McWilliams Company, managed by H. J. Halvorson. In April, 1912, Frank Havlicheck and wife owned the real estate the subject of this suit. On the 8th of that month they entered into a written agreement with Thornhill for the sale to him of the land and all the personal property thereon for a consideration of some $6,900 and the further transfer to them of an 80-acre tract in Illinois, and stipulating that the Illinois tract should be examined by one Voitan, a son-in-law of Havlicheck, and if found as stated the contract should be "binding and in full force and effect." The contract provided as to the money considera-

tion as follows: "In consideration thereof the second party (Thornhill) covenants and agrees to pay the sum of $3,000 in cash, $1 of which is paid and receipt whereof is hereby acknowledged; as a consideration of the performance of this contract, said second party shall assume and pay one mortgage for $3,300 due 1917, drawing 8 per cent interest, and one mortgage for $600 due 1915, drawing 9 per cent interest."

Soon after the execution of this preliminary agreement, Voitan inspected the 80-acre tract in Illinois, and on return made a favorable report to Havlicheck. Further papers were then executed. These consisted of a warranty deed by Bob Willets and F. C. Thornhill, as grantors, to Frank Havlicheck, as grantee, purporting to convey the Illinois 80-acre tract. On the same date, April 15, 1912, Havlicheck and wife executed to plaintiffs a bill of sale of the personal property on the farm and also their warranty deed to plaintiffs of the farm. These deeds and bill of sale, together with the preliminary agreement of purchase and sale, were placed by the Brush-McWilliams Company, acting as agent of the plaintiff, in the Second National Bank of Minot. The following written statement, agreed to by the parties, accompanied the deposit of said papers, *viz.:* "We herewith deliver to you to be held in escrow the following papers, to wit: (the preliminary agreement, bill of sale, and two warranty deeds above mentioned are here described). The above papers to be delivered to the parties who are entitled to same upon performance of the agreements set forth in the agreement dated April 8, 1912, first above mentioned." (This has reference to the preliminary agreement of purchase and sale.) "In addition to the agreement first above described, it is agreed and understood that there is a $700 mortgage to the Second National Bank of Minot, North Dakota, dated April 3, 1912, due October 1st, 1912, drawing 12 per cent interest, made by Frank Havlicheck and Mary Havlicheck, which is to be paid by Havlicheck and released immediately." No money was deposited or paid, other than the initial payment of $1, mentioned in the preliminary contract. Said contract contained no stipulation as to when the $3,000 in cash should be paid, nor did it contain any provision as to examination of abstracts of title that the parties therein contracted to furnish. Subsequent to the deposit of these papers in the bank, Thornhill procured title by deed on

April 23d, 1912, to the Illinois 80-acre tract. On May 6, 1912, recognizing that the deed of Bob Willets and F. C. Thornhill of April 15, 1912, to Frank Havlicheck, was not signed by the wife of Willets, plaintiffs caused a new warranty deed to the Illinois tract to be executed by Robert W. Willets and wife and Fred C. Thornhill. This deed was deposited with the Second National Bank by the agent of the Brush-McWilliams Company, together with a check for $3,000, dated May 11, 1912, payable to the order of the Second National Bank, signed by "Willets & Thornhill, by F. C. Thornhill," and drawn on "D. A. Bridgeford & Company, Farmers Bank, Joy, Illinois," and indorsed by "Brush-McWilliams Company, E. A. Long, Sec'y." On the same day there was served upon Havlicheck and wife a notice subscribed by Willets and Thornhill stating that they were "now ready to close the deal between themselves and you, the papers in which were deposited in escrow in the Second National Bank of Minot, North Dakota, heretofore, and you will be at the Second National Bank at 10 o'clock A. M. on Saturday, May 11, 1912, so that the matter can be fully closed up." Havlichecks did not appear, however, as they had on April 19th, two days after the deposit of the so-called escrow agreement with the bank, executed and delivered for a cash consideration paid them their warranty deed to the land in controversy to the defendant, Jourgen Olson, as grantee, and which deed was that day filed for record. Without cashing the check for $3,000, treating the same as cash, the bank delivered to plaintiffs the deed of Havlicheck and wife to plaintiffs. This deed was placed on record May 11th. On or shortly after April 19th, 1912, plaintiffs, learning of Olson's purchase of this land, caused a written notice signed by F. C. Thornhill, to be served upon Olson. It reads: "You are hereby notified that the undersigned holds a contract for deed, dated April 8, 1912, executed and delivered by Frank Havlicheck and Mary Havlicheck, his wife, to F. C. Thornhill, by the terms of which the said Frank Havlicheck and Mary Havlicheck have agreed, in writing, to convey by warranty deed unto the said F. C. Thornhill (now follows the description of the land), and you are notified that any and all interest, right, or title you acquire in said premises you take *subject to the equities of the undersigned under and by virtue of said contract for deed.* You are further notified that said contract covers a contract

for sale of certain personal property (now follows the description of the personal property), said property being situated on the above described real estate. Dated this 19th day of April A. D. 1912." This notice is significant in view of the fact that it amounts to a construction of the escrow arrangement contemporaneous with that agreement. It is dated two days after the deposit of the papers with the bank.

In its instructions to the jury the court left as a fact for its determination the matter of whether the plaintiffs "have complied with all the conditions of the contract entered into between plaintiffs and Frank and Mary Havlicheck relating to the sale and purchase of the real estate in question." It then instructed that, "if you find that plaintiffs have complied with all the conditions of the contract between plaintiffs and Frank and Mary Havlicheck, and further find that defendant at the time he received the deed from Frank and Mary Havlicheck did know of the making of the contract between Frank and Mary Havlicheck and the plaintiffs, or had notice thereof sufficient to place a prudent man upon inquiry, and before the payment by defendant of the $3,900, then your verdict must be for the plaintiff." The right of recovery was made to depend upon whether defendant had notice of the escrow arrangement. As the jury found for the plaintiffs, it must be assumed for the purposes of this decision that defendant had notice of such deposit and bought subject to the rights of plaintiffs thereunder.

Defendant strenuously insists, first, that plaintiffs must recover upon the strength of their own title, and not upon the weakness of that of their adversary, and, second, that in order to recover as owners or at all, they must establish that title vested in them by a valid delivery of the Havlichecks' deeds deposited in escrow; and defendant asserts that a valid delivery has never been had, inasmuch as a full performance on the part of the plaintiffs of the escrow agreement has not only not been shown, but that the evidence conclusively establishes nonperformance of that agreement in that delivery of the Havlicheck deed to the plaintiffs, as made by the depositary, was unauthorized and void, and did not and could not clothe plaintiffs with title; and that therefore plaintiffs have no title and cannot maintain this action. To quote from the brief of appellant: "At the time of the deposit on April 17, 1912, the plaintiffs had three things to do, namely, pay

$3,000 in cash, deliver a new deed, and furnish an abstract of title to the lands conveyed by such deed. The doing of those things would constitute performance on their part. . . . In the case at bar there cannot be found in the original contract between Havlicheck and the plaintiffs, nor in the memorandum filed with the depositary, the slightest intimation of the purpose to confer on the depositary any power to pass on the sufficiency of the plaintiffs' deed or of the abstract of title to the Illinois property, nor is there anything at all to indicate that plaintiffs were to deposit anything with him, either the money, deed, or abstract. He was simply authorized to deliver the papers named to the parties who are entitled to the same upon performance of the agreement. The agreement requires the payment to Havlicheck of $3,000 *in cash,* the delivery to him of a deed and abstract of title to the Illinois land. Now, can we read into these exhibits authority to the bank to do what it did in this case? accept a check from unknown parties on an unknown bank—no matter how well indorsed—in lieu of cash; a deed not in the usual form of conveyances made in this state conveying land in another state; an abstract of title on the sufficiency of which even an attorney would not undertake to give an opinion, and all this without even conferring with the persons whose property it attempted to dispose of by the immediate delivery to the plaintiffs of the deed to that property?" The question of performance is thus raised, and nonperformance is asserted.

Neither the agreement of sale nor the memorandum of the escrow agreement clothes the depositary, the bank, with the power to make a new agreement with either party to the escrow arrangement, such as was in fact made when the bank elected to receive, instead of cash, a chose in action. It is true it asserts that it received this as cash, and would pay the cash on it, a matter wholly immaterial inasmuch as no act of its was called for under the contract; nor could it thus supplement and so perform the agreements covenanted to be done by plaintiffs. Assume that the depositing of the papers with the bank would be held as an authorization of the deposit of the money at that place in lieu of the papers delivered, still the fact remains that a check for $3,000 is not $3,000 in cash, nor does it demonstrate that plaintiffs could comply with their agreement and pay $3,000 cash. In the law governing performance of escrow agreements, there is no doctrine of

substantial compliance to be found. Compliance must be full and to the letter, or else constitute but noncompliance. The principle must not be ignored that the parties to the escrow agreement have accurately defined the conditions under which the legal delivery, technically known as the second delivery, by the depositary, shall take place. Until exact compliance with such stipulated conditions is had, the deed is presumed, if delivered, when legality of delivery is challenged on such grounds, to have been wrongfully delivered, some cases going to the extent of treating it on the basis of a stolen deed. The gist of the question is that by the escrow agreement the grantor thereby states the conditions *precedent,* upon full performance of which *only* he consents to the second delivery of his deed; and as it is such second delivery that causes the divestiture of his title, he thus stipulates for the conditions precedent under which only he consents to the delivery and thereby the parting with his title to the grantee. Conversely, his consent is, by the terms of his stipulation, the escrow agreement, withheld until such full compliance. A deed delivered without consent passes no title, as the delivery is as essential to the passing of title as is the existence of the written deed itself. Consequently, as between the parties to an escrow agreement, the grantee in a deed so delivered must show compliance with the escrow agreement before a valid delivery is established and title thereunder is shown to have been vested. And the depositary is the agent of both parties, neither for one more than the other, but is empowered to aid neither, being merely the conduit used in the transaction for convenience and safety. Some authorities term the depositary under an escrow agreement as the special agent of both parties, with powers limited only to those stipulated for in the escrow agreement. His powers are thus limited, however he may be termed. Hence, it was not within the power of the bank by its act to aid plaintiffs in their performance by saying that it, a mere depositary, and powerless except to receive the money at the most, would treat the check as cash, or on Havlicheck's demand pay cash on the check to him, something it was under no obligation to do unless he himself first elected to treat the check as cash, something he never has done. Certainly the bank could not make such election for him. The principles of law are the same whether a financial institution or a pauper be chosen as the depositary. The powers of either cannot ex-

ceed those conferred by the escrow agreement. This case involves nothing analogous to the doctrine of equitable performance, wherein it has been held that a party refusing to perform and convey where checks or drafts are tendered in payment must refuse on the specific ground of their not amounting to cash, or be held to waive it. North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466–478, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453; McCulloch v. Bauer, 24 N. D. 109, 139 N. W. 318; McVeety v. Harvey Mercantile Co. 24 N. D. 245, 139 N. W. 586, Ann. Cas. 1915B, 1028; Wells, F. & Co. v. Page, 3 L.R.A.(N.S.) 103, and note (48 Or. 74, 82 Pac. 856). Such cases turn on the proof of ability to perform, instead of, as here, on the fact of performance or nonperformance. We are not concerned with the ability of the plaintiffs to have paid $3,000, nor with whether this check might not have been cashed or been convertible into cash. Instead, notwithstanding their ability may be presumed, delivery of the deed has not been had, because the condition precedent to its delivery did not turn on that question, but instead was dependent upon performance by the payment of the cash, a condition which the depositary was powerless to alter. True, plaintiffs could have borrowed $3,000 of the depositary bank as a separate transaction, had it, as a bank and independently, loaned it to plaintiffs, and said amount then left with the bank would no doubt have constituted performance so far as a cash deposit was concerned. But this was not the legal effect of what was done, as, no doubt, might have developed had this check been transmitted to the bank on which it was drawn and had it gone to protest. It was a simple matter to say that this check would have been treated as cash, as the bank cashier testifies. H. had the right to have the cash there, instead of something that the bank might term, and credit convenience might consider, "equally as good" as cash. For plaintiffs the check is better than cash for they still possess the cash in lieu thereof. The consent to the delivery of the deed, made by the depositary, was never given by the Havlichecks, inasmuch as the conditions upon which they would consent to a delivery had never been complied with, and the deed therefore, as between the parties to this action, challenged on that ground, is void. Tiffany, Real Prop. § 406: "An escrow is, it has been held, utterly invalid to transfer any rights until the performance of the condition,

so that, if the person with whom it is deposited wrongfully yields possession thereof to the grantee, it cannot transfer any title;" citing Smith v. South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179; Hinman v. Booth, 21 Wend. 267; Calhoun County v. American Emigrant Co. 93 U. S. 127, 23 L. ed. 827; Heney v. Pesoli, 109 Cal. 53, 41 Pac. 819; Taft v. Taft, 59 Mich. 195, 60 Am. Rep. 291, 26 N. W. 426 (opinion by Justice Campbell); Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369; Jackson v. Rowley, 88 Iowa, 184, 55 N. W. 339; Ober v. Pendleton, 30 Ark. 61; Black v. Shreve, 13 N. J. Eq. 458; Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314. See also Artcher v. Whalen, 1 Wend. 179; Jackson ex dem. Gratz v. Catlin, 2 Johns. 248, 3 Am. Dec. 415, affirmed in 8 Johns. 520, holding that the condition must not only be performed within a reasonable time, but by the particular party specified in the agreement. These authorities are elaborately reviewed in Taft v. Taft, 59 Mich. 195, 60 Am. Rep. 291, 26 N. W. 426, as is also the doctrine of relation urged by respondent, but which is of no concern; inasmuch as no title ever vested in the plaintiffs the doctrine of relation need not be discussed. From the syllabus in Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314, we quote: "Delivery of an escrow, to be valid, must be with assent of grantor; if its delivery is made to depend upon the performance of certain conditions, his consent is withheld until such performance." "If the grantee obtains possession of the escrow without the performance of the conditions, he acquires no title thereby." "Depositary of escrow is as much agent of grantee as of grantor. If he delivers escrow before the proper conditions have been performed, he cannot be said to have done so as the agent of the grantor. To obtain escrow from depositary, without performing conditions upon which it was to be delivered, is as much against the assent of the grantor as it would be to take it from the desk or drawer where the grantor had deposited it, without his knowledge or consent." In Tiedeman on Real Property, 3d ed. § 579, it is stated: "A delivery before the performance of the condition will not have the effect of passing the title to the grantee, not even against innocent purchasers for value of the grantee." "Escrows can operate only from the time that the condition is performed;" citing, besides some of the above cases, Chipman v. Tucker, 38 Wis. 43, 20 Am. Rep. 1; Houston Land & T. Co. v. Hubbard, 37 Tex. Civ.

App. 546, 85 S.W. 474; Sutton v. Gibson, 119 Ky. 422, 84 S. W. 335; Wisconsin & M. R. Co. v. McKenna, 139 Mich. 43, 102 N. W. 281. "An instrument delivered in violation of the terms on which it has been placed as an escrow is not in fact delivered, and that its possession by the grantee is no more effective to convey title than would be the possession of a forged or stolen instrument. Some authorities proceed upon the theory that a depositary is a special agent of the depositor, and therefore, his powers being limited to the conditions of the deposit, one who claims through him takes the risk of the agent exceeding his powers," 16 Cyc. 582. "If the deed is delivered before the previous condition is performed, it will not be the deed of the grantor, or have any effect as such. . . . 'The delivery, to be valid, must be with the assent of the grantor; if the grantee obtained possession of the escrow without performance of the condition, he obtains no title thereby, because there has been no delivery with the assent of the grantor, which assent is dependent upon compliance with the condition.'" Washb. Real Prop. § 2180. Continuing as to the relation of the depositary, the author says: "The depositary of an escrow was as much agent of the grantee as of the grantor. 'He is as much bound to deliver the deed on performance of the condition as he is to withhold it until performance.' And, being thus in the hands of the agent of the grantee, the deed takes effect the moment the condition is performed, without any formal delivery into the hands of the grantee;" citing Shirley v. Ayres, 14 Ohio, 308, 45 Am. Dec. 546. See also 11 Am. & Eng. Enc. Law, 2d ed. 345–349, that "the grantee or other party who is to receive the benefit of the instrument cannot acquire the title by gaining possession of it by theft, by fraud, or by the voluntary act of the depositary, but only by the performance of the condition or the happening of the contingency." In the note to page 349 it is stated that "a literal compliance with condition is necessary." See also Patrick v. McCormick, 10 Neb. 1, 4 N. W. 312; Schmidt v. Musson, 20 S. D. 389, 107 N. W. 367; Matteson v. Smith, 61 Neb. 761, 86 N. W. 472; Daggett v. Daggett, 143 Mass. 516, 10 N. E. 311. In fact there seems to be no authority to the contrary. Respondents' brief cites none. The main payment of $3,000 cash, called for by the contract, and the only cash payment stipulated for, has never been made to the depositary. This stands admitted. Defendant urges non-

performance and is in position to make that defense. Only one conclusion can be reached, and that is that no valid delivery of the Havlicheck deed has been had, and that plaintiffs have neither title nor vestige of title upon which to base their action, not maintainable without proof of title in them. There was no proof of performance for submission to the jury, hence their finding is a nullity.

It appears conclusively that plaintiffs cannot recover relief in this form of action, and upon the theory upon which the same has been tried, the record establishing that no title can ever be shown in plaintiffs, and without which as a basis plaintiffs cannot recover. This appellate court is confronted with the fact that this action, though in equity, is here on appeal taken as in a law case. It is therefore limited to a review of errors of law, instead of empowered to try the issues *de novo*. Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 759; Merritt v. Adams County Invest. Co. 29 N. D. 496, 151 N. W. 11. The theory upon which the trial and appeal have been had has been adopted, and accordingly judgment will be directed as in an action at law, where the right of the plaintiff to ever recover is by the proof conclusively negatived. It is therefore ordered that the judgment, verdict, findings, and conclusions entered, be set aside and vacated, and a judgment be entered dismissing this action, but without prejudice, however, to plaintiffs' right to maintain another action to enforce any right which they may have had under the contracts.

CHRISTIANSON, J. (dissenting). I cannot agree to the legal principles announced by my associates in this case. This action was brought to determine adverse claims under the provisions of chapter 31 (§§ 8144–8165) of the Code of Civil Procedure of the Compiled Laws of 1913. The complaint is drawn in strict conformity with the form provided by § 8147, Compiled Laws, and the prayer for judgment demanded involves all six of the grounds provided for in the prayer for judgment in this section. The complaint alleged that the plaintiff was the owner of the premises, and in the fifth subdivision of the prayer for judgment asked for $2,000 damages for the use and occupancy of the premises. The defendant in his answer, after denying the allegations of the plaintiff's complaint, further alleged "that he is the owner in fee of the real estate described in the complaint,

having purchased the same from Frank Havlicheck, the owner thereof, and that possession of the said premises was delivered over to him at the time of the purchase by the said Frank Havlicheck," and prayed for judgment that he be adjudged the owner in fee of the premises, and that plaintiffs be decreed to have no right, title, or interest therein, and be enjoined from further asserting the same. It is true as stated in the majority opinion that upon the request of the defendant, certain issues were submitted by the trial court to a jury. The only questions submitted were whether or not the plaintiffs had complied with their part of the agreement with Havlicheck, and the value of the rents and improvements. The jury returned a verdict in favor of the plaintiffs, and also found the value of the use and occupancy of the land to be $750. The court thereupon made findings of the fact and conclusions of law the same as in an action in equity, and judgment was entered pursuant to such findings and conclusions. The answer of the defendant asserting title in himself and asking for affirmative judgment was a counterclaim. Power v. Bowdle, 3 N. D. 107; 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404; Betts v. Signor, 7 N. D. 399, 75 N. W. 781. Section 8153, Compiled Laws, provides: " . . . A defendant interposing a counterclaim shall, for purposes of trial, be deemed plaintiff, and the plaintiff and codefendants against whom relief is sought, shall be deemed defendants as to him. The court in its decision shall find the nature and extent of the claim asserted by the various parties, and determine the validity, superiority and priority of the same." It was the duty of the court to determine and adjudicate the claims set forth in defendant's answer, even though plaintiffs' cause of action might fail. Reichelt v. Perry, 15 S. D. 601, 91 N. W. 459. Spencer v. Beiseker, 15 N. D. 140, 107 N. W. 189. Whether or not the action is to be regarded as a legal or equitable action must be determined by the pleadings, and under the issues framed by the pleadings, this is an equitable action. Mitchell v. Black Eagle Min. Co. 26 S. D. 260, 265, 128 N. W. 159, Ann. Cas. 1913B, 85; Tracy v. Wheeler, 15 N. D. 248, 249, 6 L.R.A.(N.S.) 516, 107 N. W. 68; Powers v. First Nat. Bank, 15 N. D. 466, 470, 109 N. W. 361. While a jury may be called to try certain or all issues of fact, the verdict is advisory only, and it still remains an action in equity. Reichelt v. Perry, 15 S. D. 601, 91 N. W. 459; O'Neil v.

Tyler, 3 N. D. 47, 53 N. W. 434; Spencer v. Beiseker, 15 N. D. 140, 107 N. W. 189. The fact that the trial court considered this an action in equity is apparent from the fact that findings of fact and conclusions of law were prepared and signed by the trial court, and the judgment in the case was entered pursuant thereto. It is true, the trial court adopted the verdict of the jury, but this did not change the case to an action at law. In the majority opinion it is said: "This appellate court is confronted with the fact that this action, though in equity, was tried as one at law, and with an appeal taken as in the law case." This fact, however, in no manner changed the form or scope of the action. This court has held that in an equity case, where the district court calls in a jury for advisory purposes, that an appeal to this court cannot be taken under the provisions of the so-called Newman act. Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 759; Spencer v. Beiseker, 15 N. D. 140, 107 N. W. 189. Hence, surely no inference can be drawn that the scope of the action is limited by the fact that the appeal was taken as in an action at law.

One of the propositions which is most earnestly contended for by appellant in this case is that the plaintiffs had mistaken their remedy, and that their proper remedy would be to bring an action for specific performance. It seems to me that this reasoning is fallacious and entirely contrary to the provisions of the statute under which the action was brought. One of the principal objects intended to be accomplished by this form of action was to avoid a multiplicity of suits, and make it possible to have the estates and interests of the various persons claiming adversely to one another adjudicated and determined in one action. In such action the court may decree that plaintiff do equity by paying whatever sum is necessary, before granting equitable relief. Powers v. First Nat. Bank, 15 N. D. 466, 471, 109 N. W. 361. Judgment may be entered reforming deed, and foreclosing same as a mortgage. Murphy v. Plankinton Bank, 18 S. D. 317, 100 N. W. 614. The very purpose of the action, as defined by the legislature, is to determine adverse claims. The defendant has interposed a counterclaim,—alleging that he is the owner and that the plaintiffs have no interest in the premises. Defendant asked that a jury be called, and certain issues of fact tried to the jury. Can he now be permitted to say that because this favor was granted that the action

has been changed from an equitable to a legal action, or the scope of the action limited? I believe not. Under the express provision of the statute, the court, under the issues as framed by the pleadings in this case, should adjudicate "the nature and extent of the claims asserted by the various parties, and determine the validity, superiority, and priority of the same." Comp. Laws § 8153; Spencer v. Beiseker, supra. Mitchell v. Black Eagle Min. Co. 26 S. D. 260, 265, 128 N. W. 159, Ann. Cas. 1913B, 85. In my opinion all the rights and estates, both legal and equitable, of these parties, should be determined in this action, and even though it be conceded that the judgment should be reversed, still the action ought not to be dismissed, but remanded for a new trial in order that the proper proceedings might be had in the trial court.

Prior to the escrow agreement, the plaintiffs and the Havlichecks entered into executory contract whereby the Havlichecks agreed to convey the premises involved to the plaintiffs. "While there is a diversity of judicial opinion as to the relations existing between the parties to such a contract, the great weight of authority is to the effect that upon the execution of the contract the purchaser becomes the beneficial owner in equity, and the vendor retains the legal title in trust for such vendee." Woodward v. McCollum, 16 N. D. 42, 49, 111 N. W. 623. "Equity treats things agreed to be done as actually performed, and where real estate is sold under a valid contract, and the deed executed and placed in escrow, to be delivered at a future date on payment of the purchase money, evidenced by promissory note due on said day, the equitable title passes at once to the vendee." Fouts v. Foundray, 31 Okla. 221, 38 L.R.A.(N.S.) 251, 120 Pac. 960, Ann. Cas. 1913E, 301. This executory contract remained unaffected by the escrow agreement. Even though the delivery of the deed be held void, still the plaintiffs are the equitable owners of the premises, and the defendant, Olson, having purchased with notice, merely holds the legal title in trust for the plaintiffs. Plaintiffs' equitable title has been held sufficient to sustain their position in this action. Mitchell v. Black Eagle Min. Co. 26 S. D. 260, 267, 128 N. W. 159, Ann. Cas. 1913B, 85; Collins v. O'Laverty, 136 Cal. 31, 35, 68 Pac. 327. But even though plaintiff's title was insufficient, still under the issues tendered by defendant's answer claiming

title in himself, the rights of these parties could and should be determined in this action.

Nor do I agree that the failure on the part of the plaintiffs to pay $3,000 in currency is such departure from the terms of the escrow agreement as will avoid the delivery of the deed to the plaintiffs. In the usual course of commercial transactions, actual currency is seldom used, and even in cases where a tender or deposit is required to be made in currency, it may be done by check unless specific objection is made thereto. Comp. Laws, § 5816; 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; Ugland v. Farmers' State Bank, 23 N. D. 536, 137 N. W. 572. It is true that it is a rule of law that where an instrument is deposited as an escrow, it cannot be operative until the conditions or the event stipulated upon is performed or has happened. But in applying this rule, it should be borne in mind that it was laid down nearly four centuries ago, and that while it has been adhered to since that time, and remains a correct statement of an abstract principle of law, still the conditions under which it was formulated no longer exist, and it should be construed in accord with the conditions of to-day. "When the reason of a rule ceases, so should the rule itself." "The law respects form less than substance." These are among the maxims of our jurisprudence. In the days when this rule was formulated, a payment meant payment in money. To-day, in commercial transactions the actual currency is rarely used, and, as indicated by this court in the two decisions cited above, a check drawn upon a solvent bank, where the drawer has ample funds on deposit so it will be paid on presentation, is for every purpose as good as cash.

Havlicheck never called for the money. If he had it would have been paid to him, and the papers delivered to him. In what manner was he prejudiced? If he had gone to the depositary, he would have received exactly what he claims to be entitled to receive under the escrow agreement. It appears that no objection was made to the fact that the payment was made by check, and in view of the fact that the bank accepted the check and treated it as cash, and stood willing and ready to pay to Havlicheck the full amount thereof in cash at any time he called for it, it seems to me to be indeed a highly technical

and unjust rule to say that this alone avoids the delivery of the deed. "Where the obligee may fairly be said to have performed his part, although not all the conditions have been complied with, the delivery will be sometimes upheld, if no real injury is caused thereby." 16 Cyc. 577. In Boyd v. American Sav. Bank & T. Co. 40 Wash. 571, 82 Pac. 904, the syllabus reads: "Where the assignee of the prospective purchaser of stock in escrow made arrangements with the holding bank whereby drafts of the prospective seller, drawn on the payments which by the escrow agreement were to have been made to the bank for the prospective seller's credit, should be honored, and the seller was informed by the bank that, when he drew, the amount due would be placed to his credit, and prior to any declaration of forfeiture the amount due was in fact so deposited to the seller's credit, there was a substantial compliance with the contract, so as to prevent a forfeiture, though at the time the seller was informed of the arrangement there were payments overdue under the contract."

In this case the depositary was a responsible financial institution. And there can be absolutely no question but that Havlicheck could have had his $3,000 in cash any time he might have asked for it.

The assistant cashier of the bank testified as follows:

This check was presented to us by Willets & Thornhill for the purpose of complying with this agreement.

Q. And it was received by you as such?

A. We would have paid the money at any time.

Q. Mr. Byorum, after the receiving of this check, "exhibit 7," by you, were you ready at all times, was the bank ready at all times, to turn over the amount to the parties entitled thereto under the contract?

A. It was.

Q. And did you receive that check as cash?

A. We received it the same as cash.

Q. Ready to pay the cash any time it was demanded?

A. Yes, any time it was demanded.

The trial court and jury found that the defendant took title with full knowledge of the rights of the plaintiffs, and that the plaintiffs had performed their part of the escrow agreement, and it seems to me that this holding is correct; but even though it is not, this case should

not be dismissed, but remanded for a retrial in the district court, as all the rights and estates of the parties can and ought to be determined in this action. I am authorized to state that Justice Burke concurs in this dissent.

STATE BANK OF NEW SALEM, a Corporation, v. BISMARCK ELEVATOR & INVESTMENT COMPANY, a Corporation.

(153 N. W. 459.)

Circumstantial evidence — civil and criminal actions — equally competent.

1. Circumstantial evidence is equally competent in civil and criminal cases.

Burden of proof — verdict — legal evidence to support — court — question of law for.

2. Whether there is any legal evidence in the record, upon which a verdict for the party holding the burden of proof can be based, is a question of law to be determined by the court.

Evidence — different conclusions — admitting of — question for jury.

3. If there is such evidence as would cause reasonable men to draw different conclusions, the case should be submitted to the jury.

Surmise or suspicion — insufficient — nothing for jury.

4. But a mere surmise or suspicion will not require a submission to a jury, or sustain the refusal on the part of the trial court to grant a nonsuit, and take the case from the jury.

Opinion filed June 7, 1915.

Appeal from the District Court of Mercer County; *Crawford,* Special J.

Judgment for plaintiff. Defendant appeals.

Reversed and remanded.

H. L. Berry, for appellant.

When the nature of the evidence is such that no verdict for plaintiff can be found except upon mere conjecture, surmise, or suspicion, the

Note.—The subject of granting compulsory nonsuits is historically traced and set forth in note in 24 Am. Dec. 620, and this case is in accord with the trend of modern decisions.

court should grant a motion for verdict for the defendant. Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000.

A mere scintilla of evidence is not sufficient to warrant submitting case to jury. Ibid.; 1 Jones, Ev. p. 907, and cases cited in note 51.

Courts are no longer required to submit cases to juries merely because some evidence has been offered by the party having the burden of proof, unless such evidence be of such a character as to cause reasonable men to draw different conclusions. Linkauf v. Lombard, 137 N. Y. 417, 20 L.R.A. 48, 33 Am. St. Rep. 743, 33 N. E. 472.

It is proper for the court to take the case away from the jury when the evidence is so loose, inconclusive, and speculative that it does not establish the facts required of the party having the burden of proof, without indulging in mere conjecture or speculation. 1 Jones, Ev. p. 908, and cases cited in note 54; Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1, 66 Am. Dec. 308.

The charge in this case imputes a crime. The strongest presumption in law is "that a person is innocent of crime or wrong." Rev. Codes 1905, § 7317, Comp. Laws 1913, § 7936; Sprague v. Dodge, 95 Am. Dec. 528, note; Conroy v. Pittsburgh Times, 139 Pa. 334, 11 L.R.A. 725, 23 Am. St. Rep. 188, 21 Atl. 154; 2 Jones, Ev. pp. 144, 145; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Bowman v. Eppinger, 1 N. D. 21, 44 N. W. 1000.

Geo. I. Reimestad and *Thorstein Hyland,* for respondent.

It is not necessary that evidence be *direct,* in order to be sufficient; it may be circumstantial. Positive or direct testimony is not required where the circumstances adduced will support an inference of the truth of the matter alleged. Underwood v. Atlantic Elevator Co. 6 N. D. 274, 69 N. W. 185; Jones, Ev. ¶ 6, p. 5, and cases cited; Peters v. Lohr, 24 S. D. 605, 124 N. W. 853, 38 Cyc. 2080, 2084, and cases cited.

It will be presumed that evidence in possession of a party, and which he fails to produce, is unfavorable to such party, and secondary evidence may be introduced. Jones, Ev. p. 21, and cases cited.

Any evidence of any fact which relates to the property in question, as to identity, description, quantity, or other material matter, is admis-

sible in conversion cases. Rev. Codes 1913, § 7909; Schmidt v. Scanlan, 32 S. D. 608, 144 N. W. 128; 38 Cyc. 2080.

In order to constitute reversible error, it is necessary for the appellant to show that there has been prejudice. Madson v. Rutten, 16 N. D. 282, 13 L.R.A.(N.S.) 554, 113 N. W. 872; Kinney v. Brotherhood of American Yeomen, 15 N. D. 21, 106 N. W. 44; Underwood v. Atlantic Elevator Co. 6 N. D. 274, 69 N. W. 185.

CHRISTIANSON, J. This is an action in conversion. Plaintiff sues to recover the value of certain wheat grown during the year 1912, on certain lands in Mercer county, covered by a crop mortgage executed to the plaintiff by one Ankarberg on October 30th, 1911. The complaint is in the usual form, and alleges that Ankarberg raised a large amount of grain upon the land described in the mortgage during 1912, and that the defendant on or about October 9th, 1912, wrongfully appropriated and converted this grain to its own use. The answer puts in issue all the allegations of the complaint.

The evidence shows that the plaintiff had a mortgage securing an indebtedness of $400 on the crops grown during the year 1912, on the northwest quarter of section 30, township 144, range 84, in Mercer county, of which indebtedness only $132.01 had been paid. In September, 1912, 776 bushels of wheat were threshed on this land. There were two grain markets which could be reached by going in an easterly direction from the land, namely, Deapolis and Fort Clark. The defendant owned and operated the elevator at Deapolis in the fall of 1912. A witness for the plaintiff testified that in September, 1912, he saw Ankarberg load one or two loads of grain on this land, and haul the same in an easterly direction over the road which would lead either to Deapolis or Fort Clark, but he disclaims any knowledge as to whether the grain was hauled to one place or the other.

One Thue, who operates a store at Deapolis, was called as a witness for the plaintiff, and testified that during the fall of 1912 he saw Ankarberg haul some grain to Deapolis; where such grain came from or what it consisted of, he does not say, and of this fact apparently he has no knowledge. Thue also testified that he cashed certain grain checks given to Ankarberg by the defendant company, aggregating in all $234.50. He further states that he cannot say what kind of grain

these tickets were given for. There is no evidence to show whether or not Ankarberg farmed other lands, or raised other grain that year, —except that it does appear that he had some flax grown on some other land. There is, however, absolutely no evidence showing that Ankarberg hauled or delivered 1 bushel of grain grown on the premises in question, to the defendant. The only evidence on which plaintiff relies to establish the fact of such delivery and the conversion of the wheat by the defendant is the testimony of one witness to the effect that he saw Ankarberg haul one or two loads in an easterly direction toward Deapolis or Fort Clark, and the testimony of Thue as to the cashing of certain checks. At the close of the plaintiff's case, defendant moved for a dismissal of the action on the grounds, among others, that plaintiff had failed to prove the allegations of its complaint or establish any cause of action against the defendant. This motion was also renewed at the close of all the testimony. Both motions were denied, and exceptions saved to such rulings. The cause was submitted to the jury, which returned a verdict in favor of the plaintiff for $210. Judgment was entered pursuant to the verdict, and the appeal is taken from the judgment.

While numerous errors are assigned, we deem it necessary to consider only one, namely, the denial of the motions to dismiss. It is conceded that there is no direct evidence in this case of the conversion by the defendant. But plaintiff's counsel asserts that this can be established by circumstantial evidence. It is true, as asserted by plaintiff's counsel, that circumstantial evidence is equally competent in civil and criminal cases, and that the facts essential to establish plaintiff's case need not necessarily be proven by direct testimony, but may be established by circumstantial evidence.

This, however, does not mean that the jury might resort to conjecture or surmise, or be permitted to fancy or imagine situations and circumstances which did not appear in evidence. It only means that the jury were to consider the facts and circumstances proven, and make such just and reasonable inferences therefrom as the guarded judgment of reasonable men would ordinarily make under like circumstances; and that they might find any fact proven which they believed might rightfully and reasonably be inferred from the evidence in the case. But such inferences should be the logical and natural result

drawn from the evidence by probable deduction. The plaintiff had the burden of showing by competent evidence that the defendant had converted the wheat on which plaintiff had a mortgage, and the value of the wheat so converted. The evidence in this case fails to prove such conversion. At the best it only creates a suspicion that such conversion took place. This is not sufficient. A verdict cannot be based upon mere conjecture or suspicion.

In the case of Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000, this court said: "When the nature of the evidence in an action for damages is such that no verdict for the plaintiff can be returned except based upon mere conjecture, surmise, or speculation, it is proper for the trial court to direct a verdict for the defendant." In Jones, Commentaries on Evidence, § 174, vol. 1, p. 906, this proposition is discussed in the following language: "It is also in the province of the judge to determine whether there is *sufficient evidence* in the case to warrant its submission to the jury. If there is such evidence as would cause reasonable men to draw different conclusions, the case should be submitted to the jury. But a mere *scintilla of evidence* or mere surmise will not sustain a refusal on the part of the judge to take the case from the jury and to grant a nonsuit. The recent decisions have extended the province of the judge in such cases and have completely exploded the old doctrine by which a judge was compelled to submit the case to the jury if there was a scintilla of evidence to support the claim of the plaintiff. In place of the old rule has come the more reasonable one, that in every case there is a preliminary question for the judge, whether there is evidence upon which the jury may properly proceed to find a verdict. When the evidence with all the inferences that the jury can justifiably draw from it is insufficient to support a verdict for the plaintiff, it is the duty of the court to take the case from the jury and to direct a verdict or grant a nonsuit as the facts of the case may warrant. It is proper for the court to so instruct the jury when the evidence has been too loose and inconclusive to establish the facts sought to be proved without indulging in mere conjecture or speculation."

We are satisfied that the evidence was insufficient to establish the plaintiff's cause of action. Hence, it was error to deny the motions to dismiss. The error in denying the motion to dismiss at the close of

plaintiff's case was of course cured by defendant's subsequent introduction of testimony. Bowman v. Eppinger, 1 N. D. 21, 4 N. W. 1000. But the error assigned in denying the motion to dismiss at the close of all the testimony is well taken. The judgment is reversed, and a new trial ordered.

HOLLANDSWORTH-HART LUMBER COMPANY, a Corporation, v. BISMARCK ELEVATOR & INVESTMENT COMPANY, a Corporation.

(153 N. W. 461.)

This case is governed by the decision rendered in State Bank v. Bismarck Elevator & Invest. Co. ante, 102.

Opinion filed June 7, 1915.

Appeal from the District Court of Mercer County; *Crawford,* Special J.

Judgment for plaintiff. Defendant appeals.

Reversed and remanded.

H. L. Berry, for appellant.

Thorstein Hyland and *Geo. I. Reimestad,* for respondent.

CHRISTIANSON, J. This appeal was argued and submitted at the same time as State Bank v. Bismarck Elevator & Invest. Co. ante, 153 N. W. 459. This is also an action in conversion. The plaintiff herein claims a lien, by virtue of a chattel mortgage, on the same wheat involved in the case of State Bank of New Salem v. Bismarck Elevator & Investment Company, supra. It was conceded on the argument that the evidence in the two cases is substantially the same, and that on the question of the sufficiency of the evidence to sustain the verdict, a decision in one case would be decisive of the other. In this case also the defendant moved for dismissal on substantially the same grounds and with the same result as in the other case. The record respecting the motions to dismiss is the same in both cases. Hence, this case is the

same in principle, and controlled by the decision in the case of State Bank v. Bismarck Elevator & Invest. Co. and on the authority of that case, therefore, the judgment herein is reversed, and the case remanded for a new trial.

MERCHANTS STATE BANK OF VELVA, NORTH DAKOTA, a Domestic Corporation, v. COUNTY OF McHENRY in the state of North Dakota, S. O. Sampson, as Sheriff of McHenry County, North Dakota, and Sam Kota, as Treasurer of McHenry County, North Dakota.

(153 N. W. 386.)

State banks — capital stock — surplus — reserve funds — undivided profits — loans and discounts — banking furniture and fixtures — not taxable to bank as personal property — collection of taxes — action to enjoin.

Action to enjoin collection of a tax levied against a state bank upon its shares of capital stock. *Held,*

1. The capital stock, surplus, reserve funds, undivided profits, loans and discounts, banking furniture and fixtures not real estate, and all strictly banking utilities, are not taxable to the bank, nor at all, as items of personalty, but of and to the shareholders, apportioned on a per share valuation.

Capital stock — shares of — taxation of — bank not subject to — assessed to shareholders.

2. A bank is not subject to taxation for the value of its shares of capital stock. Instead, assessment and levy should be made upon the value of the shares determined under § 2115, Comp. Laws 1913, and in the name of and against its respective shareholders.

Bank stock — shares — assessment and levy against bank void.

3. The purported assessment and tax levied thereon against the bank for the aggregate value of its bank shares is void.

Collection of — injunction to prevent — equitable relief — not proper remedy.

4. Such a void tax cannot be canceled and its collection enjoined by a

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Note.—There is a considerable conflict of authority as to whether an injunction will lie to restrain the collection of illegal taxes. The general doctrine is that it will not, and the case above is in accord with that rule. The subject receives a complete discussion, with authorities carefully collated on both sides, in note in 22 L.R.A. 699. See also note in 69 Am. Dec. 198.

suit in equity, unless there also exists some generally recognized head of equitable jurisdiction entitling the court to administer equitable relief.

Banks — void tax — payment of — injury — action at law for recovery back.

5. No irreparable injury can result to plaintiffs from enforced collection of this void tax, as it may sue to recover it back, and therefore has an adequate relief at law.

Banks — action to enjoin collection of void tax — multiplicity of suits — equitable jurisdiction — will not lie.

6. As no action at law will lie against the bank by its shareholders upon its being compelled to pay the void tax, no multiplicity of suits can arise to confer equitable jurisdiction. Equitable relief is denied and this action ordered dismissed.

Opinion filed June 9, 1915.

From a judgment of the District Court of McHenry County; *Burr*, J., canceling the tax and staying its collection, defendants appeal.

Reversed and dismissed.

John Thorpe, State's Attorney of McHenry county, and *George E. Wallace*, of and for the State Tax Commission; *J. H. Ulsrud* and *D. J. O'Connell*, for appellants.

Palda, Aaker, & Greene, for respondent.

Goss, J. This is an action to enjoin collection of a tax levied against a state bank upon its shares of capital stock. Cancelation of the tax is sought. The complaint alleges that the bank delivered to the assessor a statement verified by the cashier showing its capital stock, surplus, reserve fund, and undivided profits "in excess of 5 per cent of its loans and discounts," and the names and residences of its stockholders, together with the number of shares of stock owned by each shareholder. That the assessor "did assess the capital stock of said plaintiff bank in the sum of $4,806; that upon said assessment there was levied a tax against the plaintiff of $310.95, which became due and payable on December 1, 1911. . . . That said assessment was made contrary to law and the tax levied thereon is void and illegal; that the plaintiff has refused and still refuses to pay said tax." That distraint of plaintiff's property is threatened. That unless enjoined, collection will be made to plaintiff's irreparable injury, for which there

will be no adequate remedy at law. A general demurrer was interposed, which was overruled, with leave given to answer. None was served, and later, on proof submitted, a judgment by default was rendered canceling the tax. Defendant appeals, assigning error upon the conclusions of law and the overruling of the demurrer. The state tax commission also appeared with counsel on the argument, and requested that the law governing assessment of banks and bank stock be declared and settled. Questions necessarily presented are: (1) Whether a tax is valid when levied upon an assessment of bank shares in one aggregate amount and against the bank instead of upon the value of the shares and against each shareholder named as owner. (2) What is the method of assessment of bank stock as contemplated by statute? (3) Although the tax be invalid, whether equitable relief from its collection should be awarded.

For purposes of taxation, the bank and its stockholders are separate individuals. The bank is not taxed upon its strictly bank personalty holdings. Instead, the total value of its capital stock is determined and prorated, and the tax is levied against the shares in the names of the respective individual shareholders. A majority of the states proceed likewise in taxing banks. First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701, and lengthy note in 58 L.R.A. 513, and notes in 45 L.R.A. 737, and 3 L.R.A.(N.S.) 584. Bank real estate is taxable as such, and when owned by the bank is taxed to it as owner. Likewise personalty owned by a bank, and not properly a part of its banking assets and banking business, is taxable to it as owner. But its capital, surplus, reserve, undivided profits, loans and discounts, banking furniture and fixtures not real estate, and all such strictly banking utilities and banking agencies, are taxable as the personal property not of and to the bank, but of and to the shareholders, and determined and apportioned upon a per share valuation.

The authorization of and chartering of national banks involves Federal finance, an instrument of Federal government, and is a matter solely within congressional control. As the right to tax necessarily carries with it the power to destroy, it has always been held that the states do not possess the power to directly or indirectly tax national banks, their business or franchises. M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; First Nat. Bank v. Kentucky, supra. The national

banking act, however, permits the states to tax shareholders upon the value of national bank shares owned by them, under restrictions guarantying them against excessive, unfair, and unjust taxation. Thus the provisions of § 2115, Comp. Laws 1913, authorizing taxing of shareholders upon the value of shares owned by them, instead of taxing the bank *in solido,* purposely draws a distinction between the bank and its shares and its shareholders. For taxation purposes shareholders in state and national banks are on an identical basis. See notes in 3 L.R.A.(N.S.) 584, 45 L.R.A. 737; and 58 L.R.A. 513. The distinction between the bank and shareholders is well drawn in Re First Nat. Bank, 25 N. D. 635, page 640, L.R.A.1915C, 386, 146 N. W. 1064, as follows: "It proceeds upon the theory that the bank and its shareholders are one. . . . The shareholders pay no tax upon the real estate. That is the property of the bank. The shareholders and the bank are as distinct for purposes of taxation as separate individuals."

Assuming that these bank shares represent property of an assessable value for taxation purposes, the assessment and tax attempted to be levied thereon *in solido* against the bank violates both the letter and spirit of our taxing laws. Comp. Laws 1913, § 2115. The assessment and the tax levied thereon should have been against the shareholders for and upon the value of their respective shares. The bank as an entity is not subject to taxation for the value of its capital stock represented by shares. The alleged tax is void in law. Farmers' & T. Bank v. Hoffman, 93 Iowa, 119, 61 N. W. 418; Kimball v. Corn Exch. Nat. Bank, 1 Ill. App. 209, both on all fours with this case.

But invalidity alone is insufficient to warrant equitable relief from collection of the alleged tax. See authorities collated in Bismarck Water Supply Co. v. Barnes, 30 N. D. 555, L.R.A.1916A, —, 153 N. W. 454. Besides establishing the tax to be void, plaintiff must bring itself within some generally recognized head of equitable jurisdiction to entitle it to equitable relief. It has recognized this necessity, and urges that relief should be granted to avoid its irreparable injury; to prevent a multiplicity of suits being brought against it by its shareholders; and that it has no adequate legal remedy should relief be denied. No irreparable injury can result from enforced collection of this void tax. It has an adequate remedy at law to recover any illegal

tax paid under and because of actual distraint. St. Anthony & D. Elevator Co. v. Bottineau County (St. Anthony & D. Elevator Co. v. Soucie), 10 N. D. 346, 50 L.R.A. 262, 83 N. W. 212, and Bismarck Water Supply Co. v. Barnes, supra.

There can be no multiplicity of suits against plaintiff by its stockholders to recover of it because of any void tax so paid. Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County, 11 N. D. 107, 111, 90 N. W. 260. Relief in equity has been denied stockholders seeking to defeat collection of a tax when levied against the bank *in solido* instead of against individual stockholders; First Nat. Bank v. Chehalis County, 6 Wash. 64, 32 Pac. 1051, affirmed in 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; State, North Ward Nat. Bank Prosecutors, v. Newark, 39 N. J. L. 380; Castles v. New Orleans, 46 La. Ann. 542, 15 So. 199. But it must not be assumed that if the bank pays this tax it is subject to an action at law by its stockholders to recover such payment. There is no such resulting liability. Stockholders have no direct pecuniary interest in the nonpayment of this void tax, different from a stockholder's interest in any unwarranted or extravagant expense or disbursement made by a corporation. Because the bank may waste its funds does not entitle its stockholders to compel a further waste by distribution to them of its assets while it is an existing and going business concern. While a bank is a trustee of its funds for its stockholders, they individually have no interest cognizable in law in the nonpayment of this void tax. Under certain circumstances equity would intervene on their petition as against the taxing power or against the bank's officers, as illustrated by Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903, and Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; but not as against the bank, unless by an action in the nature of an accounting. If this void tax be paid, the stockholders have no right by an action at law to further mulct it in damages, because of such disbursement. There is no basis upon which to predicate a claim that a liability to a multiplicity of suits exists. There is no ground for equitable interference.

As this tax is void the county will be responsible in damages for its enforced collection. Equity will leave the plaintiff to pursue such fully adequate legal remedy.

It will not be assumed, however, that the county will persist in

enforcing collection of this illegal tax in the face of this adjudication of its invalidity.

No other questions are presented necessary to decision. The judgment appealed from is ordered set aside, and a judgment of dismissal directed to be entered.

CHRISTIANSON, J., did not participate, BUTTZ, District Judge, sitting in his stead.

GEORGE RITTLE v. PLINN H. WOODWARD.

(153 N. W. 951.)

Verdict — evidence — sufficient to support.

Evidence examined, and held sufficient to support the verdict, and errors assigned on admission of evidence, and instructions held not well taken.

Opinion filed June 14, 1915.

Appeal from the County Court of Increased Jurisdiction of Wells County, *Jansonius,* Judge.

Affirmed.

T. F. McCue, for appellant.

Where the verdict is contrary to law and the evidence, or where it is manifestly against justice, it is the duty of the court to set it aside. Smith v. Williams, 23 Iowa, 28.

Or that injustice will result therefrom. Jourdan v. Reed, 1 Iowa, 135; Willoughby v. Smith, 26 N. D. 209, 144 N. W. 79.

Hearsay evidence is wholly improper at any stage of the trial. State v. Murphy, 17 N. D. 48, 17 L.R.A.(N.S.) 609, 115 N. W. 84, 16 Ann. Cas. 1133; Johnston v. Spoonheim, 19 N. D. 191, 41 L.R.A.(N.S.) 1, 123 N. W. 830.

Where there is no measure of value of property or of damages, plaintiff cannot recover. Spicer v. Northern P. R. Co. 21 N. D. 61, 128 N. W. 302; 13 Cyc. 214, and cases cited.

The law requires a trial court to instruct on every material point in the case, and when instructions are misleading, prejudicial error is

presumed. Chicago City R. Co. v. Rohe, 118 Ill. App. 322; Coates v. Burlington, C. R. & N. R. Co. 82 Iowa, 498, 17 N. W. 760.

J. J. Youngblood, for respondent.

Where the evidence is conflicting, the findings of the jury settle the matter. Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454.

Goss, J. Recovery is sought for a balance of wages claimed under an express contract. Numerous counterclaims are interposed. One is for damages arising from plaintiff's quitting before expiration of the alleged employment period. Plaintiff claims an employment by the month, and denies prematurely terminating it. Defendant admits a liability for $60, which he tendered before suit, and which was refused. Judgment was asked for $94.95, and the verdict returned was for $86.45. The appeal is from both the judgment and the order denying a new trial.

Error is assigned on the claim that the evidence is insufficient to support recovery in that it preponderates in support of defendant's case. Appellant's brief, however, admits that the evidence presented a square conflict upon an issue of fact to the jury, and which found against him by their verdict. The testimony shows the issue to be one of credibility. It is elementary that the verdict with substantial support in the testimony is conclusive on issues of fact presented.

He next urges error in allowing respondent's attorney to explain how an exhibit, a farm laborer's lien statement received in evidence on defendant's offer, contained erroneous dates and a less term of employment than plaintiff's testimony on trial tended to establish. The evidence objected to tended to show that plaintiff could not read or write English, and that the dates mentioned in the statement were discovered to be erroneous, caused through the mistake of his attorney preparing it, and that defendant was so informed. The evidence was admissible.

Error is assigned upon the court's refusal to strike certain testimony as to plaintiff's furnishing board to defendant's hired men, "for the reason that the complaint pleads an agreed contract price and the evidence shows that the price charged is a price fixed by plaintiff and his wife." The wife testified to telling defendant before furnishing the board that 25 cents a meal would be charged, and that defendant "thought it was high," but the board was taken thereafter. This

is sufficient to establish an express contract. But it also appears that plaintiff's pleadings do not put this matter in issue. Defendant puts in a counterclaim for the difference between the $16\frac{2}{3}$ cents per meal claimed by him to have been its reasonable worth, instead of 25 cents per meal collected, and attempts to recover that difference on 134 meals, or $11.17. Under the issues under the pleadings the burden is upon him, and not upon the plaintiff, to make said proof. The ruling was correct. What is said under this assignment also disposes of another, based upon refusal to instruct as requested, "that the plaintiff having alleged in his complaint an agreed price for boarding, he is required to prove such contract and cannot recover for 25 cents per meal, as there is no evidence to show the reasonable value of the board so furnished, and plaintiff cannot recover any sum under the evidence for the board he claims to have furnished." Plaintiff does not seek a recovery for board. The instruction was properly refused.

Another assignment is based upon a correction in the written instructions made by drawing a pen through the following portion thereof: "In this case you must in any event find for the plaintiff. The amount you find cannot exceed $94.95 and cannot be less than $60." The instruction obliterated would have been proper to have given the jury. They were instructed practically to the same effect elsewhere. One paragraph of defendant's answer pleads a tender and deposit of $60, and that the deposit has been kept good, and by reply plaintiff admits it. This prevented allowance of interest had the jury returned a verdict that only $60 was due at the termination of the employment; and in addition the costs of suit would be thrown by operation of law upon the plaintiff had the verdict been but $60. Manifestly there could be no possible error in giving the instruction. Its omission was not error against defendant. Taken as a whole the instructions are clear, accurate, and sufficient. All other errors specified are abandoned by no argument of them in the brief. Judgment is ordered affirmed.

C. A. CROSS v. FARMERS ELEVATOR COMPANY OF DAWSON, NORTH DAKOTA, a corporation, and G. M. Magee, William Hoeft, Sam Swanson, Frank Eberl, S. E. Kepler, Mrs. S. E. Kepler, R. M. Bunker, Berndt Nelson, John C. Taylor, E. J. Raymond, E. L. Bunker, H. K. Grimm, M. W. Naylor, M. H. Raymond, R. E. Young, and John F. Kepler, as Officers, Directors, and Stockholders Thereof.

(153 N. W. 279.)

Corporation — promoter of — stock — subscription to — limitation of — court of equity — one seeking relief in — clean hands — control of corporation — "dummy" subscribers — for benefit of promoter.

1. He who comes into a court of equity must come with clean hands, and a promoter of a corporation who has prepared and caused to be circulated a stock subscription form or contract by which some, at least, of the subscribers to the capital stock of a corporation, are made to agree not to purchase more than ten shares of such stock, and who in violation of such form or agreement has himself, before the capital stock of said corporation has been subscribed in full, obtained control of said corporation by obtaining an issue of stock to "dummies," and which stock he has afterwards had assigned to him, cannot come into a court of equity and complain because the directors of such corporation have taken such control from him by the sale of the balance of the capital stock of said corporation, even though such sale was for the principal purpose of depriving him of such control.

Incorporation laws — policy of — capital stock — subscription to.

2. The policy of the incorporation laws of the state of North Dakota is that the capital stock of a corporation shall be fully subscribed as soon as possible, and when such capital stock is sold at par, a stockholder has no ground for complaint, even though the additional money may not be absolutely necessary to the existence of the corporation.

Capital stock — subscription to — contract as to individual number of shares — valid as to parties to it.

3. The subscribers to the stock of a corporation may enter into an agreement under the terms of which neither themselves nor subsequent subscribers to the stock will be entitled to and receive more than the stipulated number of shares, and this agreement will be binding on the parties to it though not on the corporation.

Opinion filed June 7, 1915. On petition for rehearing June 15, 1915.

Appeal from the District Court of Kidder County, *Nuessle,* J.,

Action to have canceled and set aside certain shares of the capital stock of a corporation, and to enjoin the directors from selling any more stock, fixing the salaries of the officers, and declaring dividends. Judgment for defendants. Plaintiff appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an action which is brought by the plaintiff, C. A. Cross, for the purpose of obtaining the control of the defendant elevator company by having canceled and set aside seventy shares of stock which were issued after he had obtained the control of such corporation by the purchase of a majority of its stock before such later issue, and to restrain the board of directors and the board of directors elect from selling any more stock, fixing the salaries of the officers and employees of the corporation, and declaring any dividends. The complaint also asks for an accounting from said directors.

The trial court dismissed the action on the ground that the plaintiff, C. A. Cross, did not come into court with clean hands, and was not entitled to any relief, but should be left in the position in which the court found him. The plaintiff has appealed and a trial *de novo* is demanded.

The findings of fact by the trial court, which, with a few modifications which will appear later in this opinion, we concur in on this trial *de novo,* were as follows: "That the Farmers Elevator Company of Dawson, North Dakota, is a corporation organized in August, 1909, and existing under and by virtue of the laws of the state of North Dakota, with its principal place of business at Dawson, Kidder county, North Dakota; that the purpose and object of said corporation was to build an elevator, buy and sell grain and feed, and to build and operate a feed mill, and afford a better market to the farmers residing in the vicinity of Dawson for the grain raised by them; that, pursuant to such purpose, and to enlist the interest and secure the co-operation of a large number of the residents of that community, the subscribers of stock of said company, at the time of their subscription thereto, entered into and subscribed an agreement in writing which is in words and figures following: 'We, the undersigned, do hereby agree to pur-

chase the number of shares of stock in the Farmers Elevator Company, Dawson, North Dakota, which appears opposite our signatures, and hereby contract with the said company to purchase the stock upon demand. Said stock to be paid for at the rate of fifty ($50) dollars a share. It is further agreed that no stockholders be allowed to own or vote more than ten shares of stock in his own name, and that no stock shall be negotiable or sold to any party without first being offered to the said elevator company at its face value, and that no person, firm, or corporation shall be qualified to purchase or hold stock in said elevator company unless they are bona fide residents of Kidder county, North Dakota.' Which agreement was signed by all the stockholders buying stock during the first year of the corporate existence of such corporation, except said C. A. Cross, who subscribed for one share; that thereafter, when the organization of said corporation was complete, said agreement was incorporated and adopted as one of the by-laws of said company, and ever since its adoption has been and now is in full force and effect as such. 2. That the plaintiff, C. A. Cross, was the principal promoter of said corporation, and was its secretary and one of its directors for the first two years of its existence, and received one hundred ($100) dollars in cash and two shares of the capital stock of said company for his services as such promoter; that said C. A. Cross drew and circulated the agreement set out in finding No. 1 herein, and induced stockholders to sign said agreement and take stock in such corporation upon the strength of said agreement and his representations that such agreement was valid and binding. 3. That the capital stock of said corporation was and is ten thousand ($10,000) dollars, divided into two hundred (200) shares of the par value of fifty ($50) dollars each; that ever since the incorporation of said company its directors endeavored to sell all the stock at par, and the unissued stock of said corporation has at all times since its incorporation been for sale at par to qualified purchasers; that during the first year of its corporate existence one hundred and six (106) shares of the capital stock were sold and issued; that thereafter, in July, 1911, Edgar Bon and E. L. Bunker were appointed a committee by the directors to dispose of the balance of the capital stock, but no more could be sold until the spring of 1913, at which time seventy (70) shares of the un-

issued capital stock of said corporation were sold at par and regularly issued to qualified purchasers, to wit:

Sam Swanson	2 shares
G. M. Magee	2 shares
Frank Eberl	2 shares
William Hoeft	1 share
Berndt Nelson	1 share
R. M. Bunker	2 shares
S. E. Kepler	5 shares
Mrs. S. E. Kepler	5 shares
H. K. Grimm	10 shares
M. W. Naylor	10 shares
M. H. Raymond	10 shares
R. E. Young	10 shares
John F. Kepler	10 shares

"That forty (40) of such shares were sold before June 7, 1913, annual meeting of the stockholders at which directors were elected, and thirty of such shares were sold after such meeting; that each of the purchasers of said stock paid to the corporation par value therefor, and they are now, and at all times since the purchase of said stock have been, bona fide stockholders of said corporation, and owners of such stock, and entitled to all the rights and benefits of stockholders in corporations of the state of North Dakota; that said stock was issued and sold according to the statutes of the state of North Dakota. 4. That at all times since its organization said corporation, in order to carry on its business, has had to borrow greater or less sums of money, and to pay interest thereon; that at times it has been necessary to have at its command large sums of money, and that the additional capital so secured by said sale of stock could be used to great advantage by the corporation, though not absolutely necessary in order to carry out the purposes of its organization and conduct the business as specified in its articles of incorporation. 5. That after its incorporation in the year 1909, the corporation built a grain elevator on the Northern Pacific right of way at Dawson, North Dakota, at an expense of fifty-seven hundred twenty-five ($5,725.) dollars; that at the time said elevator was completed the company did not have enough money to

pay for same, and was in debt and was dependent upon borrowed capital to conduct its business; that thereafter plans and specifications were prepared for building a feed mill, and estimates therefor received, but on account of lack of money such feed mill has not been built; that the money arising from the sale of stock sold and issued in 1913 is the property of the corporation, and is for the joint benefit of all of the stockholders of such corporation. 6. That said elevator building was erected in the fall of 1909, and opened for business on or about October 1st of that year, and has ever since been and now is used and employed by said corporation in its business of buying and selling grain. That said company has, ever since the opening of said elevator, conducted an ordinary elevator business for profit, by purchasing and selling grain in the open market, and has transacted a large volume of business, and such business has been profitable to said corporation and the stockholders thereof, it having been shown to the court that for the first year's business, embracing the period from the opening of said elevator in the fall of 1909 to June 30th, 1910, adopted by said company as the end of its first fiscal year, a dividend of 22 per cent was earned, and such dividend was the net profit from the conduct of said business for such period, after paying all expenses, charges, and obligations in and about the conduct of said business. And it further appearing to the court that during the next fiscal year, ending on June 30th, 1911, which was a period of poor crops and small business in that locality, the said defendant corporation paid all its obligations, charges, and expenses in full, and, after summing up its business for said period, had a small deficit, to wit, about $27; and it having been further shown that for the next fiscal year, ending June 30th, 1912, the said corporation earned and paid to its stockholders a net dividend on the total capital stock invested, of 10 per cent, after paying all its debts, charges, and expenses of conducting said business; and it further appearing to the court that for the next fiscal year, ending June 30th, 1913, a large net profit was earned by said corporation after deducting all expenses, charges, debts, and obligations of said business, together with a sum equal to 15 per cent of the cost of the elevator as deterioration of the said elevator building; and that there is now a large surplus available for dividends to be paid stockholders, amounting to approximately $2,900. 7. That the plaintiff, C. A.

Cross, knew that unissued stock was for sale at par at all times, and has not at any time expressed his intention or desire to purchase any of the unissued stock of such corporation, or demanded or offered to pay for any part thereof; that the said Cross had due opportunity to purchase such unissued stock, but refused so to do. 8. That at the stockholders' meeting of said corporation held in July, 1912, a resolution was introduced, passed, and adopted, to the effect that four of the seven directors elected at that meeting should hold office and serve for a term of two years, and three for a term of one year, and that the board of directors should designate which members should serve for two years and which members for one year; that the board of directors thereafter at their meeting held on January 30, 1913, designated George Magee, William Hoeft, Frank Eberl, and Sam Swanson as directors to hold office for a term of two years, and John C. Taylor, Henry Albreacht, and R. A. Haase as directors to hold office for a term of one year; but through the neglect and oversight of the secretary of such meeting no record was made of such resolution. That a meeting of the stockholders was held June 7, 1913, which was the regular annual meeting of the stockholders of such corporation, lawfully and properly called; that C. A. Cross participated in such meeting, and was afforded an opportunity to vote on each and every ballot held, and voted upon some of such ballots; that at such annual meeting of the stockholders the following resolution was unanimously adopted: 'No. 7. Whereas, to the best knowledge and belief of the majority of the stockholders of this company, a certain resolution was adopted at the regular annual meeting of the stockholders on July 3, 1912, which provided for four of the seven directors to be elected for a term of two years, and three for a term of one year, and provided that the board of directors should designate which members should serve for two years and which members for one year; and whereas, the secretary then acting failed to enter such action of the stockholders in the minutes of the meeting; and whereas, the directors all at this meeting on July 6th, 1912, carried out a portion of said instruction by providing that four of the directors were elected for two years and three for one year, and did at their meeting on January 30th, 1913, carry out the full instruction of the stockholders at their meeting on July 3, 1912, by the passage of a former by-law providing that four of the seven directors should hold

office for a term of two years, and three for a term of one year, and designating George Magee, William Hoeft, Frank Eberl, and Sam Swanson as directors to hold for a term of two years, and John C. Taylor, Henry Albreacht, and R. A. Haase directors to hold for a term of one year. Now, therefore, be it resolved by the stockholders of this company that the said action of said stockholders as directed at their respective meetings on July 3 and July 6, 1912, and of the said directors on January 30, 1913, as hereinbefore set forth, be and the same hereby is in all respects approved, ratified, and confirmed, and is hereby adopted as the action of this assembly.' That at such stockholders' meeting the president announced that three directors were to be elected, and E. L. Bunker, S. E. Kepler, and E. J. Raymond received a majority of the votes cast, and were declared elected as directors for the year beginning July 7, 1913. 9. That the plaintiff, C. A. Cross, in order to secure control of this corporation, during the winter and spring of 1912 and 1913, with full knowledge of the agreement among the stockholders and by-law of said corporation set out in finding No. 1 herein, and with the intent and purpose to avoid the force and effect of such agreement and by-law, bought and owns fifty-three (53) shares of the capital stock of said corporation, being a majority of the stock then issued, and placed them in the names of his children and friends. 10. That the purchasers of said seventy shares of stock sold in the year 1913, as found and set out in finding No. 3 hereof, purchased the same in order that they, and those of the stockholders of said corporation who were friendly to them, might retain control of the corporation, and in order to prevent the plaintiff, Cross, from securing control thereof; and that the said corporation and the officers and directors thereof knew the motive and reason for such purchase by said purchasers at the time of the sale and issuance of said stock to them."

W. P. Costello and *Miller & Zuger,* for appellant.

In corporate or popular government one person or one set of persons, because they believe their policy right, and another policy dangerous, cannot rightfully invade the field of the suffrage upon which such policy rests, and disfranchise, in whole or in part, those who disagree with them. Luther v. C. J. Luther Co. 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69.

The power to enact by-laws restraining the sale and transfer of stock must be found in the governing statute or the charter. Such restrictions must have their source in legislative enactment, as the corporation itself cannot create such impediment. 4 Thomp. Corp. pp. 4137, and cases cited, 4138; Ireland v. Globe Mill. & Reduction Co. 20 R. I. 190, 38 L.R.A. 299, 38 Atl. 116; 1 Cook, Stockholders & Corp. Law, §§ 331 and 332; Morgan v. Struthers, 131 U. S. 246, 33 L. ed. 132, 9 Sup. Ct. Rep. 726; Feckheimer v. National Exch. Bank, 79 Va. 80; Re Klaus, 67 Wis. 401, 29 N. W. 582; Rev. Codes 1905, § 4194, Comp. Laws, 1913, § 4527.

"He who comes into a court of equity must come with clean hands." This maxim is confined to his conduct in the matter before the court, and not to matters *aliunde*. Because his conduct in other matters not before the court may not be blameless is no reason why he should be denied redress in the matter directly before the court. It is sufficient if the suitor shows that he has acted justly, fairly, and legally in the subject-matter of the suit. 1 Pom. Eq. Jur. p. 339; Equitable Gaslight Co. v. Baltimore Coal Tar & Mfg. Co. 65 Md. 85, 3 Atl. 108.

Directors of a corporation occupy a fiduciary relation to the stockholders, and are treated by the courts as trustees for the stockholders. 10 Cyc. 787 and cases cited; Elliott v. Baker, 194 Mass. 518, 80 N. E. 450; Miner v. Belle Isle Ice Co. 93 Mich. 397, 17 L.R.A. 412, 53 N. W. 218; Luther v. C. J. Luther Co. supra.

Where there is a contest for control, and the directors sell and issue a large number of shares of treasury stock of the company to a person on their side of the controversy, and thus gain control of the corporation, where the same was in no sense necessary for the proper management of the corporation, but expressly for the purpose of gaining control, the certificates so issued will be canceled. Elliott v. Baker, 194 Mass. 518, 80 N. E. 450; 10 Cyc. 543; Humboldt Driving Park Asso. v. Stevens, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568; Miner v. Belle Isle Ice Co. 93 Mich. 397, 17 L.R.A. 412, 53 N. W. 218; Jones v. Morrison, 31 Minn. 140, 16 N. W. 854.

Where the question of the legality of the election of the board of directors of a corporation is incidental to the relief demanded by the plaintiff, the court has the right to review such election and to determine its validity. 2 Spelling, Priv. Corp. § 606; Re Argus Printing Co.

1 N. D. 434, 12 L.R.A. 781, 26 Am. St. Rep. 639, 48 N. W. 347; Schmidt v. Pritchard, 135 Iowa, 240, 112 N. W. 801; 26 Am. & Eng. Enc. Law, 978.

R. L. Phelps and *Newton, Dullam, & Young,* for respondents.

A stockholder may make a contract with the corporation to do, or not to do, certain things in regard to stock, or may waive certain rights, or submit to certain restrictions respecting which the stockholders might have no power or compulsion over him. New England Trust Co. v. Abbott, 162 Mass. 148, 27 L.R.A. 271, 38 N. E. 432; Adley v. Whitstable Co. 17 Ves. Jr. 322, 11 Revised Rep. 87.

What may well be made the subject of a contract between the different interests of a partnership would not be good as a by-law of a corporation. A by-law limiting the number of shares one might buy is invalid as such; it, however, constituted a contract among the members. New England Trust Co. v. Abbott, supra; Seattle Trust Co. v. Pitner, 18 Wash. 401, 51 Pac. 1048; Cratty v. Peoria Law Library Asso. 219 Ill. 523, 76 N. E. 707; Thomp. Corp. §§ 980, 3523; John C. Grafflin Co. v. Woodside, 87 Md. 146, 39 Atl. 413; Hladovec v. Paul, 222 Ill. 254, 78 N. E. 619.

A party who accepts and acts upon an agreement is bound thereby without signing it. Vogel v. Pekoc, 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386; Griffin v. Bristle, 39 Minn. 456, 40 N. W. 523; McDermott v. Mahoney, 139 Iowa, 292, 115 N. W. 32, 116 N. W. 788; McFadden v. Los Angeles County, 74 Cal. 571, 16 Pac. 397; Austin v. Searing, 69 Am. Dec. 665 and note, 16 N. Y. 112; Thomp. Corp. § 1054.

A court of equity will leave such a party to his remedy at law. Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co. 49 C. C. A. 324, 111 Fed. 287.

Consistency requires that a defendant should not be punished in such cases for doing that which the complainant does with perfect impunity. Thus, an author who has pirated a large part of his work from others is not entitled to have his copyright protected. Edward Thompson Co. v. American Law Book Co. 62 L.R.A. 607, 59 C. C. A. 148, 122 Fed. 922.

An exclusive privilege for deceiving the public is not one that a court of equity can be required to aid. Fetridge v. Wells, 4 Abb. Pr.

144; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436.

Chancery deals only with conscionable claims and demands. Scranton Electric Light & Heat Co's Appeal, 122 Pa. 154, 1 L.R.A. 285, 9 Am. St. Rep. 79, 15 Atl. 446.

The statute making it the duty of the defendants to issue stock to the full amount of the fixed capital of the company, their motives are not the subject of judicial inquiry under the disclosed facts. State ex rel. Page v. Smith, 48 Vt. 266; Rural Homestead Co. v. Wildes, 54 N. J. Eq. 668, 35 Atl. 896.

An old stockholder has no right to subscribe for the untaken stock superior to one who owns no stock. Curry v. Scott, 54 Pa. 270.

Where an old stockholder has the right to stock of a new issue in proportion to the number of shares of old stock owned by him, he must, as a prerequisite to relief, offer to take what he claims as his *pro rata* share of the new stock. Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; Stokes v. Continental Trust Co. 186 N. Y. 285, 9 Ann. Cas. 738, 78 N. E. 1090, 12 L.R.A.(N.S.) 969.

To entitle a stockholder to maintain an action for damages for refusal to allow him to subscribe for new shares, he must allege and prove that he offered to subscribe and pay for them in the regular way within the time fixed for such subscription. Bonnet v. First Nat. Bank, 24 Tex. Civ. App. 613, 60 S. W. 325; Wilson v. Montgomery County Bank, 29 Pa. 537; Crosby v. Stratton, 17 Colo. App. 212, 68 Pac. 130.

Appellant has waived his right to a *pro rata* proportion of the stock. Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Crosby v. Stratton, 17 Colo. App. 212, 68 Pac. 130; Bonnet v. First Nat. Bank, 24 Tex. Civ. App. 613, 60 S. W. 325; Hoyt v. Shenango Valley Steel Co. 207 Pa. 208, 56 Atl. 422; Thomp. Corp. § 3645; Stokes v. Continental Trust Co. and Curry v. Scott, supra.

He is estopped to complain of irregularities in the election of officers. Thomp. Corp. §§ 921, 935; People ex rel. Swan v. Loomis, 8 Wend. 396, 24 Am. Dec. 33; State ex rel. Martin v. Thompson, 27 Mo. 365; Philips v. Wickham, 1 Paige, 590; Re Argus Printing Co. 1 N. D. 434, 12 L.R.A. 787, 26 Am. St. Rep. 639, 48 N. W. 347.

BRUCE, J. (after stating the facts as above). It is difficult for us to find in the voluminous record which is before us or in the brief of counsel any ground whatever on which the plaintiff can seek equitable relief. He seeks the control of the corporation, and complains that stock has been sold since he obtained the majority thereof, and that the purpose of this sale was to take the control from him, when as a matter of fact the only purpose for which he acquired the stock which he did, and which he admits was acquired through "dummies" and in violation of the agreement between the stockholders that no person should acquire more than ten shares, was in order that he himself might get that control. The evidence is clear that the stock of the corporation has at all times been for sale, and that quite recently and before the sale of the seventy shares which plaintiff now seeks to set aside, he himself had the opportunity of buying fifty of these shares and thus of gaining a permanent control. His proposition, however, is that if the motive of the directors of a corporation in selling the balance of the unsold capital stock, or in taking subscriptions thereto, is to take the control from one who holds the majority of the shares before such sale, such sale is fraudulent and may be set aside, even though such stock is sold at par and the money therefor is collected. This proposition is to us a novel one and has no support whatever in principle or in the authorities. Section 4525, Compiled Laws, of 1913 provides that, "after the secretary of state issues the certificates of incorporation as provided in § 4512, the directors named in the articles of incorporation *must proceed* in the manner specified . . . in their by-laws or if none, then in such manner as they may by order adopt, to open books of subscription to the capital stock then unsubscribed, and to secure subscriptions to the full amount of the fixed capital; and to levy and collect assessments thereon in the manner provided by article 10 of this chapter."

The only understanding that we can derive from this section is that it was the intention of the legislature that the stock of private corporations, even if not to be looked upon as a trust fund, so that the same might not be depleted by dividends after once having been collected (see discussion in 4 Thompson on Corporations, 2d ed. §§ 3415, et seq. On this question we are not here required to pass), should be fully subscribed for as soon as possible, and this not merely for the protec-

tion of the public, who, when it is dealing with a $10,000 or a $50,000 corporation, has the right to deal with one which is not on paper merely, but for the protection of the subscribers to the stock, who have the right to believe that they are subscribing for stock in a corporation which will have funds, or at any rate have subscribers who can be held for the amount which will be sufficient for fully developing the purpose and business of the institution. "The stockholders, too," says the supreme court of Wisconsin, in Adler v. Milwaukee Patent Brick Mfg. Co. 13 Wis. 57, "being in general free from personal responsibility, the capital stock constitutes the sole fund to which creditors look for the liquidation of their demands. It is the basis of the credit which is extended to the corporation by the public, and a substitute for the individual liability which exists in other cases. So far as the creditors are concerned it is regarded in the law as a trust fund pledged for the payment of the debts of the corporation." And how can stock which is not subscribed for, and which in cases of insolvency or approaching insolvency would never be subscribed for, be any protection to the creditors of a corporation or to the stockholders who have already subscribed, and who have rights which should be protected. It is to be remembered that in the case at bar we are not dealing with treasury stock which has been bought in or otherwise acquired by the corporation, but with the unsubscribed balance of the capital stock, which § 4525, Compiled Laws of 1913, says the directors *must* endeavor to have subscribed to the full amount, and which constitutes the only asset with which a corporation comes into the world. It is clear to us that no stockholder should be allowed to complain because the directors have done their duty and have not merely obtained subscriptions for, but have obtained the payment in full and at par for, the balance of the stock which the public and the other stockholders had the right to believe the corporation would have subscribed.

It may be, and on this question we are not required to pass, that the stockholders of a corporation have a preference in regard to subscriptions to the treasury stock, but we as yet know of no case which has held that one who has purchased a majority of the stock of a corporation at a time before the stock has been fully subscribed has a vested interest in the control of the corporation so that the remaining stock may not be sold and subscribed for, nor can we see any reason

for such a holding. The evidence, it is true, shows that the sale of such stock was not absolutely necessary to the existence of the corporation. It is quite clear, however, that with the increased money the business could be greatly enlarged, and more economically conducted. Even if it would not, the public and the stockholders had a right to have the stock subscribed.

Not only is this true, but the plaintiff is hardly in the position to come into a court of equity and complain of his loss of the control of the corporation. It is clear from the record that he was the original promoter of the enterprise, and that as such he drew an agreement and a contract of subscription in which it was provided that no stockholder should hold more than ten shares. The purpose of this agreement was that the elevator could be in fact, as well as in name, a farmers' elevator, and that the farmers of the community might be generally interested and benefited thereby. It is clear that, even though he may not have signed this agreement himself, a number of the subscriptions were taken on it with his knowledge and acquiescence. It is also shown that this agreement was later embraced in the by-laws of the company, and we find no objection in the record made by the plaintiff to the adoption of this by-law. It is also clear from the testimony that, though plaintiff may have had some doubt of the validity of the by-law, he was so far controlled thereby that he obtained the subscriptions to the shares of stock which gave him his majority in the names of his family and his friends for the purpose of evading the same. He now comes into a court of equity and asks relief because the officers of the corporation at one time refused to transfer on the books of the corporation the assignments of these "dummies" to him, though in spite of this fact he was allowed to vote the shares of stock at the meetings of this corporation. It is unnecessary for us to say whether the by-law was valid or not. It is sufficient to say that "the subscribers to the stock of a corporation may enter into an agreement under the terms of which neither themselves nor subsequent subscribers to the stock will be entitled to and receive more than the stipulated number of shares, and this agreement will be binding upon the parties to it, though not on the corporation. 4 Thomp. Corp. 2d ed. § 3523; Hladovec v. Paul, 222 Ill. 254, 78 N. E. 619. A plaintiff who has violated this agreement, and thus obtained the control of a corporation,

cannot come into a court of equity and complain because others have obtained control of the corporation, and this not by evading the agreement, but by doing that which the law contemplates.

There is, too, no merit in the proposition that, on account of the prosperous condition of the corporation and some accumulated earnings, the stock was worth more than par, and that a fraud was committed on the plaintiff by the sale at par. We are here, it is to be remembered, not dealing with treasury stock, but with the original unsubscribed capital stock, the value of which was fixed by the articles of incorporation. The record of the corporation in the past has shown that it has not been a wise thing to dissipate all of its earnings in dividends, and though the plaintiff complains that the directors are about to declare dividends and to apportion the same on the new stock, as well as on the old, there is absolutely no proof in the record of this fact. Whether the new stock would share in the past profits it is not necessary for us to determine. It is shown, indeed, that during the second year of the existence of the corporation accumulated profits of 7 per cent were entirely swept away by a failure of crops. The record shows also that no provision has been made for deterioration. It also shows that a feed mill is a part of the scheme of the corporation and reasonably necessary. It further shows that running capital is necessary in order to save borrowing money, and to be able to take advantage of the exigencies of the market.

Plaintiff's sole and only ground of complaint when reduced to its essentials is that he has lost the control of the corporation by the officers of the corporation doing that which the statute contemplates that they should do,—that is, by obtaining subscriptions to all of the shares of capital stock, when he himself at no time would have had that control if he had not violated his agreement with the other stockholders. The record shows no mismanagement or business inability on the part of the directors. There is no pretense that any of the other stockholders own or control more than ten shares. We agree thoroughly with the finding of the trial court that he does not come into equity with clean hands, and that he is not entitled to any relief herein, but should be left in the position in which the court finds him.

The above considerations, we think, are the only ones that are material in this case, though other questions are involved.

The judgment of the District Court is affirmed.

On Petition for Rehearing.

BRUCE, J. Our attention is called in the petition for a rehearing, to the decision in the case of Luther v. C. J. Luther Co. 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69, which although referred to in the main brief, is claimed to have been overlooked by us. In that case, however, although relief was granted to the plaintiff and his co-complainants, it was granted wholly on account of the co-complainants, and not on account of the plaintiff. The court in the opinion expressly said: "Were Clarence J. Luther the sole plaintiff, we should have little doubt that he ought to be dismissed from a court of equity without relief, for the reason that his own conduct has been so in outrage of his duties as a director and officer of the corporation that no court can patiently listen to his prayer for enforcement of fiduciary principles and duties. That objection does not, however, exist to some of the other plaintiffs who, as stockholders, ask that their rights be protected as to them."

In the case at bar, C. A. Cross is the sole plaintiff. No other creditors or stockholders complain. He does not come into equity, therefore, with clean hands, and even the decision of Luther v. C. J. Luther Co. would deny him relief.

The petition for a rehearing is denied.

HART-PARR COMPANY, a Corporation, v. FRANK FINLEY.

(153 N. W. 137.)

Before time fixed for delivery defendant gave notice of cancelation of his

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Note.—As to the right of the seller, upon breach of executory contract, to maintain action for contract price, see notes in 17 L.R.A.(N.S.) 808; 26 L.R.A.(N.S.) 248; and 94 Am. St. Rep. 119. And as to the right to recover purchase price where purchaser wrongfully repudiates his contract, see note in 51 L.R.A.(N.S.) 735.

written and accepted order of plaintiff for a traction engine. Plaintiff refused to permit cancelation, insisting upon performance, with defendant repudiating the contract and declaring that he would not accept or pay for the machine. Plaintiff thereafter tendered it, and upon defendant's refusal to accept it, left the engine at defendant's farm against his protests and without his consent. Plaintiff claims title passed as on a delivery, and sues for the purchase price, $2,400, and freight $104 additional. *Held:*

Executory contract — anticipatory breach — doctrine of — overruled.

1. The doctrine that there can be no anticipatory breach of an executory contract of purchase and sale, adopted in Stanford v. McGill, 6 N. D. 536, is overruled, and the overwhelming weight of authority, both English and American, followed.

Executory contract — notice of cancelation — damages — accruing to plaintiff subsequent to notice — freight charges — relief from.

2. The unconditional notice of cancelation, though not acquiesced in by plaintiff, operated to relieve defendant from damages resulting from the acts done by plaintiff in performance of the contract subsequent to notice of cancelation, and relieved defendant from freight charges incurred by plaintiff after such notice of cancelation.

Executory contract — performance — delivery — repudiation.

3. Though plaintiff could keep the contract alive and insist upon its performance up to the time for delivery, and could incur freight expense in so doing after notice of cancelation, its right to recover for it depends upon defendant's subsequent withdrawal of his repudiation and subsequent performance.

Notice of cancelation — charges incurred after — increase of damages by act of own party — purchase price.

4. The incurring of the freight charge after notice of cancelation received is an enhancement by plaintiff of its own damages, and not recoverable, unless suit can be maintained for the purchase price.

Delivery of property — acceptance — payment of purchase price — concurrent acts — contract may provide otherwise — title — when it vests.

5. Unless the contract stipulates the contrary, delivery and acceptance of property and vesting of title thereunder and payment of the purchase price therefor are concurrent acts, and until delivery and acceptance title does not vest, and the purchase price payable only on the vesting of title is not recoverable in a suit for the purchase price.

Delivery — validity of — acceptance — constructive delivery — exception.

6. To constitute a valid delivery on sale of personal property, there must be an acceptance of it by the purchaser or his agent. Constructive delivery may be an exception.

Acceptance of delivery — refusal — repudiation of contract — before time for delivery — title — operation of law.

7. In the face of a refusal to receive delivery of the property in performance of a contract of purchase and sale, the purchaser standing on a repudiation of it declared while the contract was wholly executory, with repudiation not subsequently waived or withdrawn, title cannot be cast upon the purchaser by operation of law.

Executory contract of sale — repudiation — attempted delivery after — title — suit for purchase price.

8. The attempted delivery did not vest title, and suit for the purchase price cannot be maintained, nor can the freight charges incurred after notice of cancelation be recovered.

Contract — construction — delivery — passing of title — recovery of purchase price.

9. The contract cannot be construed as authorizing a recovery independent of delivery of property or vesting of title in defendant, but instead is a contract of purchase and sale with payment conditioned upon the passing of title.

Opinion filed April 20, 1915. On petition for rehearing June 15, 1915.

From a judgment of the District Court of Grand Forks County, *Cooley,* J., dismissing this action, plaintiff appeals.

Affirmed.

Geo. R. Robbins and *Geo. A. Bangs,* for appellant.

If one is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum. 2 Mechem, Sales, § 1415.

The contract made was a lawful one, and imposed upon the buyer an absolute obligation to pay. To relieve him from such obligation the court must make a new contract, instead of enforcing the one made by the parties themselves. Burnley v. Tufts, 66 Miss. 49, 14 Am. St. Rep. 540, 5 So. 627.

Under such a contract as is before us, when the plaintiff brings action thereon to recover the contract amount, the title to the property, *ispo facto,* vests in the defendant. The amount of the contract may be the happening of the contingency therein specified. National Cash Register Co. v. Hill, 136 N. C. 272, 68 L.R.A. 100, 48 S. E.

637; National Cash Register Co. v. Dehn, 139 Mich. 406, 102 N. W. 965; Burnley v. Tufts, 66 Miss. 49, 14 Am. St. Rep. 540, 5 So. 627; Tufts v. Griffin, 107 N. C. 47, 10 L.R.A. 526, 22 Am. St. Rep. 863, 12 S. E. 68; White v. Solomon, 164 Mass. 516, 30 L.R.A. 537, 42 N. E. 104; American Soda Fountain Co. v. Vaughn, 69 N. J. L. 582, 55 Atl. 54; La Valley v. Ravenne, 78 Vt. 152, 2 L.R.A.(N.S.) 97, 112 Am. St. Rep. 898, 62 Atl. 47, 6 Ann. Cas. 684; Marion Mfg. Co. v. Buchanan, 118 Tenn. 238, 8 L.R.A.(N.S.) 590, 99 S. W. 984, 12 Ann. Cas. 707; Jessup v. Fairbanks, M. & Co. 38 Ind. App. 673, 78 N. E. 1050; Kilmer v. Moneyweight Scale Co. 36 Ind. App. 568, 76 N. E. 271; Phillips v. Hollenberg Music Co. 82 Ark. 9, 99 S. W. 1105; Whitlock v. Auburn Lumber Co. 145 N. C. 123, 12 L.R.A. (N.S.) 1214, 58 S. E. 909.

Courts cannot construe equities into a contract; it must be carried out as the parties were content to make it. Martineau v. Kitching, L. R. 7 Q. B. 436, 455, 41 L. J. Q. B. N. S. 227, 26 L. T. N. S. 836, 20 Week Rep. 769; Benjamin, Sales, 4th ed. 716, 717.

Upon performance of the contract by plaintiff, the title to the goods vested in the defendant, and plaintiff can recover the purchase price. 35 Cyc. 527, 537, 599 note 9; 24 Am. & Eng. Enc. Law, 1118–1120, note 1; Dowagiac Mfg. Co. v. Higinbotham, 15 S. D. 547, 91 N. W. 330; International Harvester Co. v. Pott, 32 S. D. 82, 142 N. W. 652; Martyn v. Western P. R. Co. 21 Cal. App. 589, 132 Pac. 602; Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926.

The detriment caused in the case is the contract price of the goods. Comp. Laws, §§ 3528, 3589, 4590; International Harvester Co. v. Pott, 32 S. D. 82, 142 N. W. 652.

O. B. Burtness (*L. E. Birdzell,* of counsel), for respondent.

Where a contract provides for the transfer of title to chattels at a future date, title will not vest in the purchaser, if the contract is repudiated before delivery. Chapman v. Ingram, 30 Wis. 295; Moody v. Brown, 34 Me. 107, 56 Am. Dec. 640; Burdick, Sales, §§ 363, 364; 1 Mechem, Sales, § 729; 2 Mechem, Sales, §§ 1191, 1698; Nichols & S. Co. v. Paulson, 6 N. D. 403, 71 N. W. 136; Acme Food Co. v. Older, 64 W. Va. 255, 17 L.R.A.(N.S.) 807, 61 S. E. 235; Hallidie v. Sutter Street R. Co. 63 Cal. 577.

Upon a breach of contract to purchase chattels, the remedy is an

action to recover damages for the breach. This remedy is exclusive, and the measure of damages is not the purchase price. Mechem, Sales, §§ 1698, 1699; Burdick, Sales, 2d ed. § 364; Nichols & S. Co. v. Paulson, 6 N. D. 403, 71 N. W. 136; Minneapolis Threshing Mach. Co. v. McDonald, 10 N. D. 408, 87 N. W. 993; Reeves & Co. v. Bruening, 13 N. D. 166, 100 N. W. 241; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 524, 101 N. W. 903; Colean Mfg. Co. v. Blanchett, 16 N. D. 341, 113 N. W. 614; Chapman v. Ingram, 30 Wis. 295; Tufts v. Weinfeld, 88 Wis. 647, 60 N. W. 992; Acme Food Co. v. Older, 64 W. Va. 255, 17 L.R.A.(N.S.) 807, 61 S. E. 235; Unexcelled Fire-Works Co. v. Polites, 130 Pa. 536, 17 Am. St. Rep. 788, 18 Atl. 1058; Heiser v. Mears, 120 N. C. 443, 27 S. E. 117; Danforth v. Walker, 37 Vt. 239; American Pub. & Engraving Co. v. Walker, 87 Mo. App. 503; Tufts v. Lawrence, 77 Tex. 526, 14 S. W. 165; McCormick Harvesting Mach. Co. v. Balfany, 78 Minn. 370, 79 Am. St. Rep. 393, 81 N. W. 10; Sherman Nursery Co. v. Aughenbaugh, 93 Minn. 201, 100 N. W. 1101; Funke v. Allen, 54 Neb. 407, 69 Am. St. Rep. 716, 74 N. W. 832.

Specific performance of a contract for the future sale of an ordinary chattel is not maintainable. Burdick, Sales, § 363.

An exception exists where the chattel is unique or is especially made for the purchaser. Knudtson v. Robinson, 18 N. D. 12, 118 N. W. 1051; Bement v. Smith, 15 Wend. 493; Pom. Eq. Jur. § 1402.

The provisions of the North Dakota Code as to rights of seller and obligations of buyer do not change the common-law rules. Proposed Civil Code of New York, 1865 (Commissioners Notes) § 498 and 1850, 1851; N. D. Rev. Codes 1899, §§ 3553, 4987, 4988; N. D. Rev. Codes 1905, §§ 4991, 6572, 6573, Comp. Laws 1913, §§ 5536, 7155, 7156; Reeves & Co. v. Bruening, 13 N. D. 166, 100 N. W. 241; Colean Mfg. Co. v. Blanchett, 16 N. D. 346, 113 N. W. 614; Minneapolis Threshing Mach. Co. v. McDonald, 10 N. D. 408, 87 N. W. 993; Nichols & S. Co. v. Paulson, 6 N. D. 400, 71 N. W. 136; Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926; Martin v. Western P. R. Co. 21 Cal. App. 589, 132 Pac. 602; Hallidie v. Sutter Street R. Co. 63 Cal. 575.

There is no question of anticipatory breach of contract in this case. A purchaser of chattels, the same as any other contractor, has the

right to arrest performance while the contract is executory. Davis v. Bronson, 2 N. D. 300, 16 L.R.A. 655, 33 Am. St. Rep. 783, 50 N. W. 836, 1 Mechem, Sales, § 1699; Collins v. Delaporte, 115 Mass. 159; Clark v. Marsiglia, 1 Denio, 317; American Pub. & Engraving Co. v. Walker, 87 Mo. App. 503; Gibbons v. Bente, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 756; Chicago Bldg. & Mfg. Co. v. Barry, — Tenn. —, 52 S. W. 451; Parker v. Russell, 133 Mass. 74.

The value of goods sold should not be recovered of the customer unless he has become the owner of the property and can protect it against assignee or creditor of the seller. Moody v. Brown, 34 Me. 107, 56 Am. Dec. 640; Nichols & S. Co. v. Paulson, 6 N. D. 400, 71 N. W. 136.

The plaintiff sues for the price of goods sold and delivered. The facts do not disclose such condition. They merely show a contract for a sale. Colean Mfg. Co. v. Blanchett, 16 N. D. 346, 113 N. W. 614; Reeves & Co. v. Bruening, 13 N. D. 166, 100 N. W. 241.

The Code does not change the common-law rule governing the passing of title under an executory contract. Colean Mfg. Co. v. Feckler, 20 N. D. 188, 126 N. W. 1019; Westby v. J. I. Case Threshing Mach. Co. 21 N. D. 575, 132 N. W. 137; Proposed Civil Code of New York, 1865, § 498; N. D. Rev. Codes 1899, § 3353; Rev. Codes 1905, § 4991; Comp. Laws 1913, § 5536; Dowagiac Mfg. Co. v. Higinbotham, 15 S. D. 547, 91 N. W. 330; Bement v. Smith, 15 Wend. 493; Comp. Laws 1913, § 7155; Hallidie v. Sutter Street R. Co. 63 Cal. 575.

Where title has not passed to the vendee, the vendor would have no action for the purchase price. Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926; Martyn v. Western P. R. Co. 21 Cal. App. 589, 132 Pac. 602.

After the seller had accepted a written order from the buyer for goods to be shipped on a certain day, the latter notified him not to ship them, and refused to accept them from the carrier when they were shipped; an action will not lie for the price. Acme Food Co. v. Older, 64 W. Va. 255, 17 L.R.A.(N.S.) 807, 61 S. E. 235; Unexcelled Fire-Works Co. v. Polites, 130 Pa. 536, 17 Am. St. Rep. 788, 18 Atl. 1058; Tufts v. Lawrence, 77 Tex. 526, 14 S. W. 165; Reeves & Co. v. Bruening, 13 N. D. 157, 100 N. W. 241; Dowagiac Mfg. Co. v.

Mahon, 13 N. D. 516, 101 N. W. 903; Stanford v. McGill, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938.

A party to an executory contract may stop the performance by an explicit order, and will subject himself only to such damages as will compensate the other party for being deprived of its benefits. Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; Collins v. Delaporte, 115 Mass. 159; Parker v. Russell, 133 Mass. 74; Davis v. Bronson, 2 N. D. 300, 16 L.R.A. 655, 33 Am. St. Rep. 783, 50 N. W. 836; Burdick, Sales, § 369; 2 Mechem, Sales, § 1091; Dowagiac Mfg. Co. v. Higinbotham, 15 S. D. 547, 91 N. W. 330; International Harvester Co. v. Pott, 32 S. D. 82, 142 N. W. 652.

Goss, J. This action is to recover $2,400 damages as the purchase price of an engine plaintiff claims to have sold and delivered defendant, together with an additional $104 freight charge thereon. June 10, 1912, defendant executed and delivered the usual written machinery order to plaintiff. It was duly accepted. Before the stipulated time for delivery, defendant notified plaintiff he would not receive the engine and to cancel his order. Plaintiff refused cancelation, insisting upon full performance. On receipt of defendant's written notice of revocation, and on June 29th, plaintiff wrote defendant as follows: "Referring to your letter of June 22d, in which you ask us to cancel your order, wish to say that we cannot do this. . . . The order contains no provision for cancelation, and like any other contract it cannot be abrogated or annulled without the consent of all the parties thereto. We will ship you the engine promptly on July 15th (the date specified for shipment in the order), and will carry out our part of the contract in every detail. We shall then insist that you carry out yours, and you have absolutely no grounds whatever upon which to refuse to do so." Defendant's reply, duly received, was: "Yours of the 28th of June, refusing to cancel order, at hand. . . . Now I positively will not receive said engine, and do not think you are giving me a square deal in trying to hold me up. If it is a case of damages, make a statement and I will consider it. But if you wish to go to law, I am ready." On July 15th, the earliest date fixed for performance, plaintiff tendered the engine to defendant f. o. b. at Forest River, according to the terms of the con-

tract. He refused to accept it, or to execute and deliver his notes or pay the freight. On August 13th, and within the stipulated period for performance, plaintiff took said tractor to the home of defendant, and unconditionally tendered it to him in performance of its obligation; defendant refused to receive the engine, which plaintiff then left at his farm against his expressed wishes and protest and without his consent; that the freight from the factory to Forest River was $104.

These are the findings. The appeal is from the judgment of dismissal, raising only the legal conclusions to be drawn from the findings. The decision is the answer to whether a suit can be maintained for the purchase price and freight added, as for damages suffered by the failure of the defendant to receive the stock engine ordered for future delivery to him, where before the time for delivery he had given plaintiff his unequivocal and unconditional notice of cancelation of his order, and that he would neither receive the engine nor pay for it; with defendant refusing to receive or pay for the engine and insisting upon his repudiation.

Plaintiff claims: (1) That the attempted cancelation and notice was ineffectual for any purpose, and amounted to but defendant's offer that the contract might be canceled, which offer was rejected, leaving the written contract in force; under which, however, it was not obliged to tender the engine in the face of the defendant's offer and refusal to receive it; but nevertheless it claims it did deliver it to him, and thereby parted with its title, and therefore can recover damages as for the purchase price, and (2) irrespective of the passing of title, the order should be construed as authorizing a recovery for $2,400 and freight, inasmuch as such is plaintiff's contract rights, because payment was not conditioned upon the passing of title as a condition either precedent or concurrent. Defendant asserts that: (1) title did not vest in defendant, as the contract was repudiated before delivery, upon which repudiation an action for damages only for such breach is accorded to the seller, with the measure of damages recoverable fixed by § 7156, Comp. Laws 1913, as declared where the title does not pass to the purchaser; and (2) that a purchaser has a right to stop performance of an executory contract of purchase and sale by notice of its cancelation, and the question of

breach of contract by anticipation is not involved; and (3) that upon notice of cancelation it became the duty of the seller to mitigate its damages, rather than enhance them; and that freight paid for the shipment made after notice of cancelation was such an enhancement of its damages.

The questions presented are whether (1) this purchaser had a right to cancel his executory contract of purchase while it remained wholly executory; (2) the effect of his attempted cancelation thereof; (3) the measure of damages for the breach; and (4) the effect of cancelation to mitigate such damages.

The difficulty is not in passing upon the issues in the light of the common law alone, or of our statutes, declaratory thereof; but instead arises in their solution in harmony with both the common law and consonant in reason with the holding and the principles announced in Stanford v. McGill, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938; wherein was repudiated the common-law doctrine that there could be an anticipatory breach of a wholly executory contract of purchase and sale. Stanford v. McGill is the bulwark behind which the plaintiff is intrenched. Under the doctrine of that case it reasons that this attempted cancelation is ineffectual except to relieve it from the necessity of making a tender; that the contract never was breached until refusal to accept the tendered property; that the attempted cancelation in no wise relieved defendant from his obligation to purchase and pay the purchase price, inasmuch as it constituted but a mere offer, the rejection of which left the contract unaffected; and under which it has performed promptly and punctually upon the first day upon which it could elect to perform; that it thereby cast title upon defendant and can recover the purchase price therefor that it can recover as damages for freight paid, because if it can disregard the cancelation at its pleasure, that cannot logically furnish a foundation for minimizing such damages necessarily incurred in moving the machine to Forest River, that it might be there for tender on July 15th; that under the reasoning of Stanford v. McGill it had the right to expect that, notwithstanding defendant's attempted repudiation, he would nevertheless repent thereof upon a tender made to him, and perform; and that accordingly it had the right to make shipment and place itself in readiness to perform its part on the first day possible;

that it is therefore entitled to recover at least the freight, inasmuch as that damage should not be mitigated on any plea that it should take notice of a futile attempt at cancelation, and anticipate that defendant's refusal would be the result of the tender, to do which is diametrically contrary to one of the chief reasons for the holding in Stanford v. McGill. And appellant can confidently inquire why it should be compelled to recognize an attempted repudiation for purposes of mitigation of damages, inoperative under Stanford v. McGill, to relieve defendant from his performance, and when the attempted repudiation itself did not affect the original rights of plaintiff under the contract? How can you mitigate as to the amount of the necessary expense of performance when the contract is unaffected by the attempted repudiation, and consequently valid as an entirety during the time the expense to be mitigated was incurred? Plaintiff propounds, in effect, these questions for answer.

"A party to an executory contract may always stop performance on the other side by an explicit direction to that effect, though he thereby subjects himself to the payment of such damages as will compensate the other for the loss he has sustained by having his performance checked at that stage of its progress." 2 Mechem, Sales, § 1091. This is the settled law even in Massachusetts (which, together with North Dakota and Nebraska, is the only state rejecting the doctrine of anticipatory breach of executory contracts), as there declared in Collins v. Delaporte, 115 Mass. 159–162, in these words: "A party to an executory contract may stop its performance by an explicit order, and will subject himself only to such damages as will compensate the other party for being deprived of its benefits;" and is also recognized as the law in Parker v. Russell, 133 Mass. 74. But the application of this general rule of law seems inconsistent with the doctrine that there can be no anticipatory breach, but yet that the notice, although not operating to affect the contract rights in the least, nevertheless, as to damages recoverable, may in effect "stop performance." As all the law is to this effect our holding could be based upon this principle alone as to this phase of the case. However, to do so, and to cite, affirm, or leave intact the declared doctrine in Stanford v. McGill, would seem to be applying a general rule of law

unharmonious with logical results of the principles and reasoning in that case.

Recent authorities sustain the doctrine of anticipatory breach. 6 R. C. L. §§ 384–387; O'Neill v. Supreme Council, A. L. H. 1 Ann. Cas. 422 and note (70 N. J. L. 410, 57 Atl. 463), the opinion of which is by Justice Pitney, and contains an elaborate discussion and citation of authority, English and American. Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780, declares that "the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture *or sale of goods;*" citing the leading English case of Hochster v. De La Tour, 2 El. & Bl. 678, and other English cases, and stating; "This doctrine, which thus obtains in England, has been almost universally accepted by the courts of this country." In the course of that Federal opinion, Stanford v. McGill is cited, and it, together with Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384, followed as the authority in Stanford v. McGill, is repudiated. It says: "We think that there can be no controlling distinction on this point between the two classes of cases, and that it is proper to consider the reasonableness of the conclusion that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a *locus pœnitentiæ* be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction *per se* is there between liability for a refusal to perform future acts to be done under a contract in course of performance, and liability for a refusal to perform the whole contract, made before the time for commencement of performance?" To the same effect see Wester v. Casein Co. 206 N. Y. 506, 100 N. E. 488, Ann. Cas. 1914B, 377; Holt v. United Secur. L. Ins. & T.

Co. 12 Ann. Cas. 1105 and note, (74 N. J. L. 795, 11 L.R.A.(N.S.) 100, 67 Atl. 118), and the second trial of the same case in 76 N. J. L. 585, 21 L.R.A.(N.S.) 691, 72 Atl. 301; Kelly v. Security Mut. L. Ins. Co. 9 Ann. Cas. 661 and note (186 N. Y. 16, 78 N. E. 584); Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 59, 30 L.R.A. 33–47, 48, 38 N. E. 773; Brady v. Oliver, Ann. Cas. 1913C, 376 and note (125 Tenn. 595, 41 L.R.A.(N.S.) 60, 147 S. W. 1135); Greenwall Theatrical Circuit Co. v. Markowitz, 97 Tex. 479, 65 L.R.A. 302, 79 S. W. 1069; Oklahoma Vinegar Co. v. Carter, 94 Am. St. Rep. 112 and note, (116 Ga. 140, 59 L.R.A. 122, 42 S. E. 378); Krebs Hop Co. v. Livesley, Ann. Cas. 1913C, 758 and note, (59 Or. 574, 114 Pac. 944, 118 Pac. 165); 35 Cyc. 528, 583–586. All these recent decisions repudiate the doctrine of Stanford v. McGill. Justice Pitney, after citing scores of decisions supporting anticipatory breach, has the following to offer, found in 1 Ann. Cas. 423: "So far as observed the only states dissenting from the doctrine are Massachusetts, Nebraska, and North Dakota. Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; Carstens v. McDonald, 38 Neb. 858, 57 N. W. 757; King v. Waterman, 55 Neb. 324, 75 N. W. 830; Stanford v. McGill, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938. The latter decision is based partly, and the Nebraska decisions princpally, upon the authority of Daniels v. Newton, which is the leading case upon this side of the question. . . . But in Parker v. Russell, 133 Mass. 74, it was held that a refusal of performance of a substantial part of the contract after the time for entering upon performance has begun entitles the injured party to treat the *entire* contract as absolutely broken, and to recover *immediately* his damages based upon the whole value of the contract, including compensation for nonperformance in the future as well as in the past. In Ballou v. Billings, 136 Mass. 307, it was held that, for the purposes of rescission by the promisee, notice that the promisor will not perform *has the same effect as an actual breach.* These and other cases show that, even in Massachusetts, the reasoning on which the decision in Daniels v. Newton was based *is hardly carried to its logical conclusion.*" When Stanford v. McGill was decided there may have been some doubt about what the trend of authority might be in the future, but the contrary rule has since been unanimously followed, and the law generally applicable to

executory sale contracts settled in harmony therewith. As no property rights can be involved, inasmuch as no rule of property could have grown out of that decision, no harm can come from harmonizing the law in this jurisdiction with that generally prevailing. Accordingly, Stanford v. McGill to that extent is overruled. The notice of repudiation given was such as might have authorized plaintiff to have considered the entire contract as breached, and brought its action immediately for damages had it so elected. But this it did not do, and the option to do so rested with it; and at the time stipulated for performance plaintiff was charged with notice previously given that defendant would not receive the property, which obviated necessity of a tender or of any further act by it. Sections 5775 and 5824, Comp. Laws 1913. It could treat the contract as subsisting "up to the time when performance should commence, for the purpose of insisting that the other party, who has previously repudiated it, shall then and finally determine whether he will comply with its terms or persist in his resolution not to perform upon his part. But the party who has *not* broken his compact is not allowed to treat it as in force for the purpose of performing in direct opposition to the refusal of the other to abide by its terms, *and then enforce the payment of the contract price.*" 6 R. C. L. 1026; Danforth v. Walker, 37 Vt. 239; Davis v. Bronson, 2 N. D. 300, 16 L.R.A. 655, 33 Am. St. Rep. 783, 50 N. W. 836; Collins v. Delaporte, 115 Mass. 159; Gibbons v. Bente, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 756; note to 33 Am. St. Rep. 795, 796; Kadish v. Young, 108 Ill. 170, 48 Am. Rep. 548; John A. Roebling's Sons' Co. v. Lock Stitch Fence Co. 130 Ill. 660, 22 N. E. 518; Acme Food Co. v. Older, 17 L.R.A.(N.S.) 807, and note, (64 W. Va. 255, 61 S. E. 235.)

As to the assertion that title was vested in defendant, and that therefore it could sue for the purchase price, title could not be cast upon defendant in the face of his persistent refusal to accept title or the engine. There are cases where delivery may be constructively made or may be presumed, but that is not ours. The contract remains executory, and no title passes as on an executed sale until the buyer accepts a delivery of the property. Section 5536, Comp. Laws 1913; Nichols & S. Co. v. Paulson, 6 N. D. 400, 71 N. W. 136; Colean Mfg. Co. v. Blanchett, 16 N. D. 341, 113 N. W. 614; Reeves & Co.

v. Bruening, 13 N. D. 157–166, 100 N. W. 241; Colean Mfg. Co. v. Feckler, 20 N. D. 188–195, 196, 126 N. W. 1019; Westby v. J. I. Case Threshing Mach. Co. 21 N. D. 575–589, 590, 132 N. W. 137.

Plaintiff has cited as sustaining a recovery with the purchase price as the measure of damages, with title cast upon defendant, a score of cases of conditional sale contracts where the property sold was delivered, but title for some cause was reserved as is usual for security purposes. Such is not precedent, as title passes in contemplation of law under a conditional sale contract, when the seller sues for the purchase price; the goods having been delivered, and it being solely at the option of the seller whether he will treat the title as vested, or retain it to otherwise enforce what in either event must be payment of purchase price. The purchaser in possession under a conditional sale contract has no option in that matter, the election being the right of the seller. Such are treated as executed sales for a purchase price for property delivered and received. This is already settled law here. Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516–524, 101 N. W. 903, and Poirier Mfg. Co. v. Kitts, 18 N. D. 556, 120 N. W. 558; the latter decision holding that a vendor in a conditional sale contract may elect to waive his title and sue for purchase price. See 23 L. R. A. (N.S.) 145, and note, on effect of an action for the purchase price being a waiver of vendor's right under a conditional sale contract to recover the property *in specie*. Appellant cites Dowagiac Mfg. Co. v. Higinbotham, 15 S. D. 547, 91 N. W. 330, as sustaining his theory that title passed without acceptance of the property by defendant. That case must be understood as one in which a *delivery* was made to the carrier authorized to receive it as the agent of the consignee, with title passing on such delivery. Consult opinions in International Harvester Co. v. Pott, 32 S. D. 82, 142 N. W. 652.

Appellant cites 35 Cyc. 527, reading: "Where the buyer refuses to accept the goods or a part thereof, the seller, if he makes a proper tender, may nevertheless maintain an action for the price." This is misleading unless considered in connection with the subject-matter immediately preceding it. The principle stated applies only where title has passed by an actual or constructive delivery, as an examination of the very cases cited will demonstrate, among which are White v. Solomon, 164 Mass. 516, 30 L.R.A. 537, 42 N. E. 104, the opinion

in which, by Justice Holmes, is squarely to the contrary. An excerpt bearing on this question will be found later in this opinion. It was there held that payment was not conditioned on title passing because of the peculiar stipulations of the contract. National Cash Register Co. v. Dehn, 139 Mich. 406, 102 N. W. 965, is also cited as sustaining said text, which an examination will show to have been a conditional sale contract where title was retained for security with a prior delivery had, with title for such purpose waived and vested by the suit for the purchase price. Nearly every case cited as sustaining the text is likewise distinguishable. The true rule here applicable is found at 35 Cyc. 592. Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926, cited by appellant, has no application, as title is there held to have passed, the opinion stating: "of course, in a case where the title to the property contracted for has not passed to the vendee, the vendor, upon a breach of the contract, would have no cause of action for the purchase price."

The purchase price cannot be recovered as the measure of damages in the absence of a provision in the contract to the contrary, unless title to the goods has vested in the purchaser, as the transfer of title and payment therefor are in contemplation of law concurrent acts, and "if the buyer refuses to accept the goods *even wrongfully,* he cannot be sued for the price, because the event on which he undertook to pay the price has not happened." White v. Solomon, 164 Mass. 516, 30 L.R.A. 537, 42 N. E. 104; Reeves & Co. v. Bruening, 13 N. D. 157–166, 100 N. W. 241; Minneapolis Threshing Mach. Co. v. McDonald, 10 N. D. 408, 87 N. W. 993, construing § 7156, Comp. Laws 1913.

Plaintiff claims the right to recover independently of the passing of title, as on a contract stipulating for the payment of money without the passing of title being a condition either precedent or concurrent to payment. There are two equally conclusive answers to this contention: First, there is no basis in the pleadings for such a claim, as it sues as for recovery of a purchase price of property sold and delivered; and, secondly, the contract itself negatives such a claim, showing on its face to be a contract for the purchase and sale of personal property with payment by notes stipulated to be made as a condition concurrent upon delivery of such property, with title the considera-

tion for the notes. Acme Food Co. v. Older, 64 W. Va. 255, 17 L.R.A. (N.S.) 807, 61 S. E. 235.

To summarize in conclusion. Defendant had the right to tender a breach of the contract by notice that he would never perform, which repudiation plaintiff might have elected to accept as a present and immediate breach. Stanford v. McGill, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938, is to this extent overruled. Instead, it elected to keep the contract alive until the stipulated time for performance arrived, when, defendant not having withdrawn his renunciation, it could dispense with tender of performance and sue for damages. This it elected not to do, but chose to make a tender and afford defendant a further opportunity to receive it, in the event of which reception of the property, he could have been sued for the purchase price. However, he refused to receive either property or title, standing upon his repudiation of the contract, but thereby rendering himself liable for all damages accruing to the other party because of such breach. The measure of damages for breach is by § 7156, Comp. Laws 1913, and the common law, governed by a different rule from where title has been vested, in which event it is to be deemed to be the contract price. Section 7155, Comp. Laws 1913. As this suit is for the contract price for goods sold and delivered, it is not maintainable. There is an entire failure of proof of damages. As to the freight paid the findings do not disclose but what this expense was incurred after notice of repudiation operated to check further performance. That defendant did not observe it, if the freight expense was incurred thereafter, was at plaintiff's own election, and taken at the hazard that it could induce defendant to later perform the contract. It is in contemplation of law an enhancement of damages after notice of repudiation, and is not recoverable. Judgment affirmed.

On Petition for Rehearing.

Goss, J. Appellant's counsel has petitioned for a rehearing. They assert that §§ 5775, 5821, and 5824, Comp. Laws 1913, "preserve a right to defendant to withdraw his repudiation; the time within which such right to withdraw may be made expires only with maturity of the obligation; the right thus preserved is as valuable to defendant as

it is to plaintiff; the right thus preserved is merely the right which has been created or fixed by the contract." That these sections "together necessarily, obviously, and clearly provide that the contract remains in force." And (2) that these sections cover the subject under consideration to the exclusion of the common law.

The statutes cited constitute no guaranty to the repudiator of an executory contract that the other party *must,* in the face of notice given of a determined repudiation, nevertheless suffer the violator to remain in full enjoyment of all rights under the contract he would possess had he not repudiated. No such intent is manifest from the statutes in question. It is to the other party not in default to whom these statutes speak, and for whose benefit they stand. They have been in force since long before the decision of Stanford v. McGill, and will apply after the overruling of the doctrine of that case as fully as they did before. In fact, they have no application whatever to the subject under discussion, that of anticipatory breach. They support neither contention concerning it, nor aid in determining which of the two should be selected as the law of this jurisdiction.

As to the second contention, it is already answered by the statement that these statutes are not upon the subject under investigation. But if they were, the Codes are not exclusive where the statute is silent, but only where it speaks. A sufficient discussion of this question will be found in the decision of this court in Reeves & Co. v. Russell, 28 N. D. 265, 148 N. W. 654, where a similar contention, citing the same cases here relied upon, is treated at length.

Exception is taken by plaintiff to what counsel terms the overruling by *dictum* of Stanford v. McGill, as to the doctrine of anticipatory breach; and that this "should not be lightly done;" "that *eliminating freight,* there has been no enhancement or increase of damages." In answer it may be said that "eliminating freight," there would have been no necessity for counsel or the court to discuss anticipatory breach of contract; "eliminating freight," there would have been no issue made of enhancement of damages; "eliminating freight," there could have been no *"dictum"* concerning Stanford v. McGill. But there was no possibility of "eliminating freight" in considering the issues, as plaintiff has sued for its recovery, and assigned error on its

denial thereof. Necessity for its discussion is set forth in the opinion. There is no desire to lightly overrule any precedent, but at times it is as wise as it is necessary to recognize a mistake when convinced that it is such. Counsel concede, as they must, that the almost unanimous weight of authority and precedent support our action and the conclusions announced. It is deemed better to overrule this precedent, than by citing it indirectly affirm it. All other questions presented in the petition for a rehearing are but an additional argument to that presented before the opinion was written, and are already answered in the opinion. The petition is denied.

L. H. MILLER et al. v. J. M. THOMPSON.

(153 N. W. 390.)

Trial court — order denying new trial — time of appeal — expiration — new order after — no jurisdiction to make.

1. A trial court has no jurisdiction after expiration of the statutory period allowed for an appeal from an order denying a new trial, to make a second order denying a new trial.

Lapsed period — new order cannot be made to extend — original order final.

2. An attempted order so made cannot extend or revive the lapsed period for appeal that had fully run against the original order denying a new trial, and when that order had become final and conclusive.

Second or new order — appeal from — not appealable order — dismissed on motion.

3. The appeal from the second order so made is not taken from an appealable order, and is on motion dismissed; but without prejudice to an earlier appeal from the judgment.

Opinion filed June 15, 1915.

From the District Court of Ramsey County, *Buttz*, J.

Appeal dismissed.

William Anderson, of Devils Lake, for respondents.

Middaugh, Cuthbert, Smythe, & Hunt, of Devils Lake, for appellant.

Goss, J. This is the second opinion written in this case on matters of practice. The action was tried and July 7, 1914, judgment was entered against both appellant Thompson and a codefendant, the Devils Lake State Bank.

November 30th motion in the alternative was made by both said defendants for a vacation of the judgment or for a new trial. The trial court granted the motion as to the bank, and dismissed the action as to it. But as to defendant Thompson, both motions were denied by order of November 30th, directing that as to him "the judgment of July 7, 1914, stand."

On December 2, 1914, the sole remaining defendant and judgment debtor, Thompson, appealed from the judgment entered July 7, 1914, against him. He took no appeal from the order of November 30, denying him a new trial. On February 24, 1915, plaintiff and respondent on the appeal moved this court to dismiss that appeal on grounds which will be found discussed at length in the opinion filed April 24, 1915, in this entitled action, and reported in — N. D. —, 152 N. W. 279.

Pending decision on said motion to dismiss said appeal, and on March 17, 1915, in an attempt to remedy an apparent uncertainty in the order of November 30, the trial court entered a second order of the same legal effect as that of November 30th, reciting that the former order denying a new trial had not been entered or procured by Thompson's consent, and again denying him a new trial.

On May 7, an appeal was duly perfected from the order of March 17. Respondent has moved for a dismissal of this second appeal.

The fourth ground assigned on dismissal is well taken. It is urged that the order of November 30, denying Thompson a new trial, was an appealable order, from which within sixty days he should have appealed, and that by lapse of time without an appeal the order became final and conclusive, and rendered the trial court powerless to later, and after the expiration of the said sixty-day period for the appeal, amend it or make a subsequent order to the same effect from which an appeal might be taken. The attempted order of March 17 was a nullity as made without jurisdiction, and as such could confer no right of appeal therefrom, nor in any way extend the already lapsed period for appeal from the only appealable order, that of November 30. The attempted order made was not a correction of the previous

order. At the time when made the trial court was powerless to correct or amend it. The sixty-day limitation period of appeals from an order is analogous to statutory period for appeal from a judgment, and the reasoning in Grove .. Morris, ante, 8, 151 N. W. 779, and Higgins v. Rued, 30 N. D. 551, 153 N. W. 389, applies. This is so independent of the fact that the appeal first taken was from the judgment, and not from the order of November 30, denying a new trial. That defendant saw fit not to appeal from said order does not change the situation. For sixty days he had a right of appeal therefrom. In fact, at the time he appealed from the judgment on December 7th, he could have taken a joint appeal from both the judgment and order. Shockman v. Ruthruff, 28 N. D. 597, 149 N. W. 680, and cases there cited, including Kinney v. Brotherhood of American Yoemen, 15 N. D. 21, 106 N. W. 44, overruling earlier cases requiring separate appeals from a judgment and subsequent order directing a new trial. Whether the omission to appeal from said order will limit consideration of matters on the merits on the appeal as taken from the judgment will be determined when reached in that appeal. In passing it may be stated as an aid to briefing and presentation of that appeal from the judgment (that remains, notwithstanding dismissal of this second appeal) that, if it be true, as stated in the briefs on this motion, that this action is one properly triable in equity, but instead was tried to a jury as to issues of fact with the verdict returned under instructions given with the judgment subsequently entered, even though the jury findings were deemed merely advisory, nevertheless the appeal is a law appeal requiring specifications or error as in a law case; and the ordinary appeal in equity as upon a partial or entire demand for trial *de novo* in equity will not lie. Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 759; Merritt v. Adams County Land & Invest. Co. 29 N. D. 496, 151 N. W. 11; Thornhill v. Olson, ante, 81, 153 N. W. 442. And such a law appeal permits a review on appeal of errors of law only, and does not authorize a trial *de novo* in this court. It may also be observed that an omission to serve specifications of error with the notice of appeal, or insufficiency of specifications of error so served, presents no jurisdictional question. In other words, an appeal taken without service of specifications of error with the notice of appeal, nevertheless, is a valid appeal conferring jurisdiction thereby upon the

appellate court to permit the omission of specifications or their insufficiency, to be cured by the granting of leave to serve original or amended specifications of error after the appeal taken. Sec. 4, chap. 131, Laws 1913, is directory, not mandatory. Wilson v. Kryger, 26 N. D. 77, 51 L.R.A.(N.S.) 760, 143 N. W. 764, same case later in 29 N. D. 28, 149 N. W. 721. Thus, the second ground of the motion based upon absence of specifications of error was not well taken. This court may dismiss for absence or insufficiency of specifications; but is not required to dismiss as counsel assumes, as the appeal is valid without them. Nor was the first ground for dismissal of the appeal, urging that the second appeal could not stand because taken upon the same grounds as was the first, and in the same action, well taken. Had this been an appeal taken in time and from the order of November 30th, and otherwise regular, the two appeals could have been consolidated with the issues arising on them determined as one appeal. But as, for reasons stated, there was no valid second appeal, this court is without jurisdiction to do other than dismiss it. The appeal from the purported order of March 17, 1915, is ordered dismissed, but without prejudice to the appeal from the judgment.

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

CHICAGO, MILWAUKEE, & PUGET SOUND RAILWAY COMPANY v. BOWMAN COUNTY, NORTH DAKOTA.

(153 N. W. 986.)

Taxes — payment of, to avoid penalty — part legal — part illegal — payment of all for such purpose compulsory.

1. The payment of taxes to avoid a penalty, a portion of which taxes are

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Note.—That illegal taxes paid under protest or involuntarily can be recovered is in accord with the general doctrine as shown in discussion of similar cases in note in 45 Am. Dec. 164. As to rule where payments are made voluntarily, see authorities in note in 94 Am. St. Rep. 425.

There is a comprehensive discussion of claims for refunding money paid to state, in which are included cases of illegal taxes, in note in 42 L.R.A. 69.

illegal, but the legal portion of which taxes cannot be paid, or at any rate will not be received without the payment of the illegal part, and which penalty will be incurred upon the nonpayment of the taxes, is a payment under compulsion.

County treasurer — deliver list of delinquent taxes — to sheriff — statute requires — sheriff to distrain and sell — payment of taxes under protest — seizure of property — need not wait for — not voluntary payment — suit to recover illegal tax so paid.

2. Where the statute, as does that of North Dakota (§ 2166, Compiled Laws of 1913), requires the county treasurer to deliver a list of the delinquent taxes to the sheriff, and upon such delivery requires the sheriff to immediately proceed to collect the same, and to distrain and sell the property upon which the taxes are delinquent, and where neither the treasurer nor the sheriff has the authority to cancel or rebate the illegal taxes, a property owner may assume that the officers of the law will obey the statute, and can pay such taxes under protest, and need not wait until the seizure is actually made or threatened in order that his payment may be involuntary; and if such taxes are illegal may afterwards bring suit for the recovery of the amount so paid.

Opinion filed June 19, 1915.

Appeal from the District Court of Bowman County, *Nuessle,* J.

Action to recover taxes illegally levied, which were paid under protest. Judgment for plaintiff. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an action to recover excess taxes to the amount of $451.79, which were paid by the plaintiff railway company under protest to Bowman county, the excess levy being due to the levy of 20 mills for school purposes, when a levy of 17 mills would have produced more than the amount certified to the county auditor by the officers of said school district, and to the levy for general county purposes of a tax of 9 mills upon the dollar, in violation of the provision of § 1539, Rev. Codes 1905, § 2150, Comp. Laws 1913, which places the limit at 8 mills.

The illegality of the excess tax is conceded, and the only defense which is offered by the county is that such excess was voluntarily paid, and therefore cannot be recovered.

It appears from the testimony that when the assessment was first reported by the county auditor to the tax commissioner of the railway company, the 2-mill levy for the county poor was omitted; that when the tax levy was reported the 2-mill levy for the county poor was included; that immediately upon being notified of this 2-mill levy and the 20-mill school levy upon property within the village of Gascoyne, the tax commissioner reported to the county auditor his discovery that the taxation for county purposes exceeded the authorized levy of 8 mills, and that the levy upon the property inside of the village of Gascoyne for school purposes exceeded the amount required to raise the revenue needed for school purposes and exceeded the levy upon property within the same school district outside the village of Gascoyne; that in reply thereto and on January 16th, 1912, the county auditor advised the tax commissioner that he had no authority to make any change inasmuch as his books had been turned over to the county commissioner, and requested the company to correspond with the treasurer; that on January 22d, 1912, the tax commissioner wrote to the county treasurer as requested, and asked him to take the matter up with the county commissioners, and have the correction made, and that in this letter and with reference to the mode of paying the tax he said: "Will it be satisfactory to you if remittance is made of the entire amount of the taxes less the amount which should be canceled, pending the action thereon by the county commissioners? Of course it will be perfectly satisfactory to us to have on the receipts that the entire amount was not remitted. Making the corrections indicated, we make the total amount of all taxes $16,488, instead of $16,939.79 as shown by the statement received from the auditor;" that in answer to this letter the county treasurer, under date of February 17th, 1912, wrote the company that he had taken the matter up with the county commissioners and could do nothing with them, that he understood that the commissioners had directed the auditor to reply to the letter; that at this time the treasurer returned the statements without making the required corrections, and advised the company that he was giving the totals as they showed on his books and as the totals were charged to him, and that he could not accept anything less; that on February 9th, 1912, the auditor again wrote the railway company, advising that the commissioners had refused to make the corrections, because they felt that

if the company were released it would work an injustice upon other taxpayers in the county, and because the state's attorney had instructed the board that the taxes could be collected from the railway company; that thereafter and under date of February 19, 1912, a voucher check in payment of the full amount of the taxes demanded, payable to Bowman county, was mailed by the company to the county treasurer, who deposited the voucher check in the bank; that on this check or draft the following statement was indorsed: "Note.—This payment includes $451.79 paid under protest by said company as set forth in detailed statement referred to above;" that the detailed statement was the same statement of taxes which was sent by the treasurer as a receipt and consisted of a minute and detailed statement of the various amounts, taxes, levies, and rates thereof in each of the tax districts and for each of the funds; that said statement also contained the following explanation and receipt: "Note.—The above statement includes $451.79 which is paid by said company under protest, to wit: One mill on the entire valuation of $417,772, or $417.77, which said company claims is an illegal charge, for the reason that levies for ordinary county revenue, including the support of the poor, is limited to 8 mills by law, while the taxes as charged include levies for said purpose aggregating 9 mills, viz., county tax, 2 mills; county salary fund, 5 mills; county poor, 2 mills; and 3 mills on the valuation in the village of Gascoyne, $11,341, or $34.02, said company claiming that the levy extended against its valuation in said village should have been 17 mills for school purposes instead of 20 mills;" that the receipt proper was as follows: "$16,939.79. Bowman, North Dakota, February —, 1912. Received of the Chicago, Milwaukee, & Puget Sound Railway Company the sum of sixteen thousand nine hundred thirty-nine and 79-100 dollars in full payment of taxes for the year 1911, levied against the property of the said company in Bowman county, North Dakota, as per detailed statement above, including $451.79 paid under protest, as per memorandum above;" that subsequently and on April 16th, 1912, formal application for the refunding of the said sum of $451.79 was presented by the plaintiff to the board of county commissioners of the defendant county; that this application was acted upon on January 6th, 1913, and disallowed.

Theo. B. Torkelson, for appellant.

Before recovery back of taxes paid, it is necessary that it be shown that the taxes were paid involuntarily and under compulsion and protest. St. Anthony & D. Elevator Co. v. Bottineau County (St. Anthony & D. Elevator R. Co. v. Soucie) 9 N. D. 346, 50 L.R.A. 262, 83 N. W. 212.

The payment of taxes under mere protest is not sufficient; there must be compulsion. These taxes were paid while the county treasurer still had them in his hands for collection. Such officer has no authority to employ any form of compulsion. The payment was voluntary. Louisville v. Becker, 139 Ky. 17, 28 L.R.A.(N.S.) 1045, 129 S. W. 311; St. Louis v. Dreisoerner, 243 Mo. 217, 41 L.R.A.(N.S.) 177, 147 S. W. 998; Louisville v. Anderson, 79 Ky. 334, 42 Am. Rep. 220.

Payment of taxes to a mere passive agent who has no right or authority to *compel* payment is a voluntary payment, even though made *under protest.* Payment merely to avoid the penalty is also voluntary. Atchison, T. & S. F. R. Co. v. O'Connor, 28 Ann. Cas. 1052, and cases cited in note.

The rebate and penalty provisions of taxation laws are to induce and encourage property owners to pay their taxes before they become delinquent, or before the date fixed by law when the right of rebate is lost, or the penalty, as in this state, attaches. Louisville v. Becker, 28 L.R.A. (N.S.) 1045, and cases cited in note, 139 Ky. 17, 129 S. W. 311; St. Louis v. Dreisoerner, 243 Mo. 217, 41 L.R.A.(N.S.) 177, 147 S. W. 998.

Where part of a tax is legal and part illegal, the proper method is to pay or tender the legal portion, and resist payment of that portion which is illegal. Farrington v. New England Invest. Co. 1 N. D. 102, 45 N. W. 191; Bode v. New England Invest. Co. 1 N. D. 121, 45 N. W. 197; Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919; Orlando v. Equitable Bldg. & L. Asso. 45 Fla. 507, 33 So. 986; Rev. Codes 1905, § 5259, Comp. Laws, 1913, § 5815.

William G. Porter, Ed. L. Grantham, and *Emil Scow,* for respondent.

In this appeal there is no specification of errors; there is no specification of facts which appellant desires this court to review, nor is there a demand for a review of the entire case, or of any specified facts. Therefore all questions of fact are deemed to have been properly decided

by the trial court, and the sufficiency of the evidence is not before this court for determination. Ricks v. Bergsvendsen, 8 N. D. 578, 80 N. W. 768; Security Improv. Co. v. Cass County, 9 N. D. 553, 84 N. W. 477; State ex rel. McClory v. McGruer, 9 N. D. 566, 84 N. W. 363; Douglas v. Glazier, 9 N. D. 615, 84 N. W. 552; Teinen v. Lally, 10 N. D. 153, 86 N. W. 356.

The payment of an illegal tax to avoid an onerous penalty is generally held to make the payment involuntary. 28 Ann. Cas. 1052; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216.

The payment of the tax was not voluntary so as to estop the plaintiff to recover back. Plaintiff had no equitable remedy. Farrington v. New England Invest. Co. 1 N. D. 118, 45 N. W. 191; Schaffner v. Young, 10 N. D. 245, 86 N. W. 733; Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County, 11 N. D. 107, 90 N. W. 260; Chicago & N. W. R. Co. v. Rolfson, 23 S. D. 405, 122 N. W. 343; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Arkansas Bldg. & L. Asso. v. Madden, 175 U. S. 269, 44 L. ed. 159, 20 Sup. Ct. Rep. 119.

The right to pay and recover back is the remedy which precludes the right of injunction, or other proceedings in equity. Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65.

Taxes paid under protest may be recovered back. Erskine v. Van Arsdale, 15 Wall. 75, 21 L. ed. 63; Malin v. Lamoure County, 27 N. D. 140, 50 L.R.A.(N.S.) 997, 145 N. W. 582.

Payment to avoid onerous penalty is not voluntary, but if paid under protest, taxes may be recovered back. Maxwell v. Griswold, 10 How. 242, 13 L. ed. 405; Gaar, S. & Co. v. Shannon, 223 U. S. 470, 56 L. ed. 512, 32 Sup. Ct. Rep. 236; Robertson v. Frank Bros. Co. 132 U. S. 17, 33 L. ed. 236, 10 Sup. Ct. Rep. 5; Swift Co. v. United States, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671.

Immediate danger of levy or seizure is not necessary to render the payment involuntary. The laws of this state require the county treas-

urer to deliver a list of delinquent taxes to the sheriff on the first day of October following delinquency. They require the sheriff to immediately collect all such personal property taxes, and to distrain and sell sufficient goods and chattels of the persons charged to pay the taxes with interest, penalty, and costs. The mere lapse of time during which no action could be begun by the taxpayer to restrain collection, or to cancel the tax, or to avoid the acts of the taxing power, will not of itself require the taxpayer to await the arrival of such date at which penalties and interest are added; but at any time after delivery of the tax record to the treasurer, the taxpayer has all the remedies available to him prior to a distraint for such taxes. Stowe v. Stowe, 70 Vt. 609, 41 Atl. 1024; Kansas P. R. Co. v. Wyandotte County, 15 Kan. 587; Atchison, T. & S. F. R. Co. v. Atchison County, 47 Kan. 722, 28 Pac. 999; Atchison, T. & S. F. R. Co. v. Atchison, 47 Kan. 712, 28 Pac. 1000; Wyandotte County v. Kansas City, Ft. S. & M. R. Co. 4 Kan. App. 772, 46 Pac. 1013.

Payment under protest and action to recover back has all sanction of the courts. Gaar, S. & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Swift Co. v. United States, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65; Arkansas Bldg. & L. Asso. v. Madden, 175 U. S. 269, 44 L. ed. 159, 20 Sup. Ct. Rep. 119; Louisville v. Anderson, 79 Ky. 334, 42 Am. Rep. 220; Chicago & N. W. R. Co. v. Rolfson, 23 S. D. 405, 122 N. W. 343; Stowe v. Stowe, 70 Vt. 609, 41 Atl. 1024; Robertson v. Frank Bros. Co. 132 U. S. 17, 33 L. ed. 236, 10 Sup. Ct. Rep. 5; Harold v. Kahn, 86 C. C. A. 598, 159 Fed. 608; St. Anthony & D. Elevator Co. v. Bottineau County (St. Anthony & D. Elevator R. Co. v. Soucie) 9 N. D. 346, 50 L.R.A. 262, 83 N. W. 212; Preston v. Boston, 12 Pick. 7; Claflin v. McDonough, 33 Mo. 412, 84 Am. Dec. 54; Parcher v. Marathon Co. 52 Wis. 388, 38 Am. Rep. 745, 9 N. W. 23; Rumford Chemical Works v. Ray, 19 R. I. 456, 34 Atl. 814; Malin v. Lamoure County, 27 N. D. 140, 50 L.R.A.(N.S.) 997, 145 N. W. 582; Fourth Nat. Bank v. Greenville, 91 S. C. 81, 74 S. E. 126; Whittaker v. Deadwood, 12 S. D. 608, 82 N. W. 202; American Brewing Co. v. St. Louis,

and notes, 2 Ann. Cas. 825, 187 Mo. 367, 86 S. W. 129; 22 Am. & Eng. Enc. Law, 2d ed. 613, and cases cited; Cooley, Tax. 568, et seq.

BRUCE, J. (after stating the facts as above). The only question that is presented to us by the briefs of counsel for determination is whether the plaintiff was precluded from recovering by reason of the fact that it made a voluntary payment.

We are satisfied that the payment was not so far voluntary as to preclude a recovery. This is not a case where the illegal portion of the taxes was paid in order to obtain a statutory rebate on that portion of the tax which was paid under protest, and this even if we can look upon the penalty as a rebate, but to escape the penalty on that portion and the far larger portion which was admitted to be valid and which the plaintiff was ready and willing to pay. The county auditor and the county commissioners had refused to make any corrections, and the county treasurer had also refused. The treasurer also refused to accept any less than the amount charged on his books against the railway company, and as a matter of fact had no authority to receive any less. It is perfectly evident that the railway company did all that it could to obtain the correction, and everything that was possible in the way of a protest. The question, therefore, is, should it have tendered the amount which it admitted was due, and, if not accepted, deposited it in the bank, or should it have waited before paying the amount until the claim had been turned over to the sheriff for collection?

Was it necessary, in short, that it should wait until its property was actually being seized and distrained before it could claim that it paid not voluntarily but under duress?

If it had waited until the distraint it is quite clear that it would not have saved the penalty upon the large amount of taxes which it was willing to pay and which were legally due. It is perfectly clear that the plaintiff could not have enjoined the distraint or the collection of the taxes, as any such effort would have been met by the answer that there was a remedy at law to recover back the amount illegally collected. Farrington v. New England Invest. Co. 1 N. D. 118, 45 N. W. 191; Arkansas Bldg. & L. Asso. v. Madden, 175 U. S. 269, 44 L. ed. 159, 20 Sup. Ct. Rep. 119; Shaffner v. Young, 10 N. D. 245, 86 N. W. 733; Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County, 11

N. D. 107, 90 N. W. 260; Chicago & N. W. R. Co. v. Rolfson, 23 S. D. 405, 122 N. W. 343; Garr, S. & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Bismarck Water Supply Co. v. Barnes, 30 N. D. 555, 153 N. W. 454.

It is also now well established, we believe, that a payment to avoid a penalty which will be incurred upon the nonpayment of taxes, which cannot be paid or at any rate will not be received without the payment of an illegal part, is a payment under compulsion. Maxwell v. Griswold, 10 How. 242, 13 L. ed. 405; Gaar, S. & Co. v. Shannon, 223 U. S. 470, 56 L. ed. 512, 32 Sup. Ct. Rep. 236; Robertson v. Frank Bros. Co. 132 U. S. 17, 33 L. ed. 236, 15 Sup. Ct. Rep. 5; Swift Co. v. United States, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671.

Nor do we believe that plaintiff was compelled to wait until the danger of seizure was immediate or to tender and deposit the amount actually due. The North Dakota statute (chapter 300 of the Laws of 1911, amending § 1554, Rev. Codes 1905, being § 2166, Compiled Laws of 1913) requires the county treasurer to deliver a list of the delinquent taxes to the sheriff on the first day of October. It requires the sheriff to immediately proceed to collect such taxes and to distrain and sell the property upon which the taxes are delinquent at public vendue. Neither the sheriff nor the treasurer has the authority to cancel or rebate illegal taxes. The duty of the sheriff is peremptory and immediate. It is certainly a wise policy to encourage the payment under protest of disputed taxes, rather than withholding from the county the amount or waiting for the seizure to be actually made or threatened. "The proper administration of the fiscal affairs of the government," says the circuit court of appeals in Harold v. Kahn, 86 C. C. A. 598, 159 Fed. 608, "require that the payment of taxes should not be delayed by disputes as to their legality, but that the taxes should first be paid and all questions in regard to them be determined in suits brought for their refunding. It is a wise policy, therefore, that en-

courages the payment under protest." Again, in the case of Kansas P. R. Co. v. Wyandotte County, 16 Kan. 587, we find the following: "But here no warrant had issued. None could legally issue for seventeen days, nor could the company's property be in any manner disturbed before that time, so that there was no danger of instantaneous seizure. On the other hand, there was no further inquiry to be made by any officer or tribunal. The amount of the tax was fixed beyond any opportunity for review. There was no discretion with anyone as to whether a warrant should or should not issue, a levy should or should not be made. The machinery for adjusting the amount of the tax had completed its work and was at rest; only the machinery for collecting was in motion, and it moved with the certainty of fate and the rapidity of time to the finality of seizure and sale. Where the law is imperative, and, giving no discretion, commands the issue of a warrant at a definite time, and the levy under that warrant within a fixed time thereafter, must an individual wait until the last moment, and pay only just as the officer is seizing his property, or may he assume that the officers of the law will obey its precepts, and when all opportunity for consideration, correction, and change has passed, all discretion ended, and the tax roll is in the treasurer's hands, waiting only the lapse of a few days to ripen into a warrant and seizure, may he not then pay to the treasurer, protesting against the legality, and asserting his intention to contest? Does he not then pay to prevent an immediate seizure, one that is certainly and presently impending?" See also Atchison, T. & S. F. R. Co. v. Atchison County, 47 Kan. 722, 28 Pac. 999; Atchison, T. & S. F. R. Co. v. Atchison, 47 Kan. 712, 28 Pac. 1000; Wyandotte County v. Kansas City, S. & M. R. Co. 4 Kan. App. 772, 46 Pac. 1013; Rumford Chemical Works v. Ray, 19 R. I. 456, 34 Atl. 814; Fourth Nat. Bank v. Greenville, 91 S. C. 81, 74 S. E. 126.

The exaction before us was admittedly illegal. If the county retains it at all it will simply be retaining money to which it has no right. The case, indeed, is one to which the language of Mr. Justice Watts of the supreme court of South Carolina, in the case of Fourth Nat. Bank v. Greenville, 91 S. C. 81, 74 S. E. 126, is apt and pertinent: "It was," that learned judge said, "not a cheerful and voluntary payment on the part of the plaintiff, but more in the nature of extortion or a holdup under forms of law. It paid under protest, as under the laws it could

not stay the collection of taxes by application to the courts. In order to prevent the penalty that would have been added, and the issuance of execution to enforce the collection, the plaintiff exercised the remedy given it when an illegal tax was attempted to be exacted, paid it under protest, and brought suit at law."

We have carefully read the cases cited by counsel for appellant, but the reading of none of them tends to shake our confidence in the correctness of the conclusions that we have arrived at. The cases of Farrington v. New England Invest. Co. 1 N. D. 102, 45 N. W. 191; Bode v. New England Invest. Co. 1 N. D. 121, 45 N. W. 197; Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919; and Orlando v. Equitable Bldg. & L. Asso. 45 Fla. 507, 33 So. 986, were not actions to recover taxes illegally exacted, but to redeem from or set aside tax sales. They were equitable actions, and the doctrine was merely upheld that one who seeks equity must do equity and that the plaintiff in such actions must tender or offer to pay the amount of the legal tax as a condition precedent to obtaining relief. The cases are not in any way parallel.

The judgment of the District Court is affirmed.

JOHN WYNN v. R. D. COONEN.

(153 N. W. 980.)

Written lease — balance of rent due in action to recover — defense — new oral contract — evidence of — verdict — direction of by court.

1. In an action to recover a balance due as rent under a written lease, the sole defense interposed is that such contract, shortly after it was made, was modified and superseded by an oral agreement between the parties. *Held*, that there is no competent testimony in the record in support of this defense, and the trial court properly directed a verdict in plaintiff's favor.

Written lease — superseded by oral contract — without consideration — unexecuted.

2. Such alleged oral agreement was without consideration, and, further-

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Note.—The decision in this case that evidence of a subsequent unexecuted parol agreement is not admissible to vary the terms of a written contract is in accord with the general doctrine as shown by a review of the authorities in a note in 56 Am. St. Rep. 659.

more, a written contract, in so far as it is executory, cannot be modified or superseded by an unexecuted parol agreement.

Opinion filed June 19, 1915.

Appeal from District Court, Burleigh County; *W. L. Nuessle,* **J.** From a judgment in plaintiff's favor, defendant appeals.

Affirmed.

F. E. McCurdy, for appellant.

A written agreement may be subsequently abrogated, superseded, or modified by parol. First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362; Jones, Ev. 442.

Upon the trial of an action involving such issue, and where the evidence is conflicting, the question is one for the jury. Simmons v. McConville, 19 N. D. 787, 125 N. W. 304.

John Carmody and *Alfred Zuger,* for respondent (*B. F. Tillotson* and *J. E. Campbell,* of counsel).

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Comp. Laws, 1913, § 5938; Reeves v. Bruening, 13 N. D. 157, 100 N. W. 241; Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088; Annis v. Burnham, 15 N. D. 577, 108 N. W. 549; McCulloch v. Bauer, 24 N. D. 109, 139 N. W. 318.

A conflict in the evidence that prohibits the court from interfering with the verdict of the jury on a question of fact must be a substantial, and not an illusory, conflict. Fuller v. Northern P. Elevator Co. 2 N. D. 220, 50 N. W. 359; Fletcher Bros. v. Nelson, 6 N. D. 94, 69 N. W. 53.

Fisk, Ch. J. Plaintiff, who is the owner of certain real property in the city of Mandan, leased the same to the defendant for the period of one year at the agreed rental of $780 per year, payable at the rate of $65 per month in advance, and he seeks by this action to recover a balance claimed to be due him on such lease. He had judgment in the court below pursuant to a verdict directed by the court, and the defendant has appealed to this court alleging certain errors, all of

which challenge the correctness of the court's ruling in directing a verdict. The sole question for our determination, therefore, is whether there was any competent evidence in support of defendant's defense sufficient to require a submission thereof to the jury.

The facts are not seriously in dispute, and are briefly as follows: The lease was in writing and is dated April 6, 1912. It is in the usual form and contains, among other things, a stipulation that should the lessee fail to pay the rent as provided therein or fail to fulfil any of the covenants therein recited, the lessor shall have the right to re-enter and take possession of the premises and hold and enjoy the same without such re-entering working a forfeiture of the rents to be paid and the covenants to be performed by the lessee during the full term of the lease. Defendant took possession under such lease on April 10, 1912, and remained therein, paying the rent until June 1st, when he sold his furniture and assigned his lease to one H. H. Landers, who entered into possession and remained therein, paying rent for the months of July and August. Thereafter Landers turned the property over to one Nolton, who paid rent for a short time, after which he turned the premises over to one Young, who paid the rent from November 20th to December 1st, and $35 to apply on the December rent. The latter removed from the premises on January 12th, when plaintiff took possession and leased the same to one Messmer for the balance of defendant's term at the rate of $60 per month. After giving defendant credit for all sums received as rent, a balance remains due of $161.10, for which amount, with interest, a verdict was directed in plaintiff's favor.

The sole defense urged by defendant is that on or about the time defendant turned the premises over to Landers the terms of the written lease were modified by a parol agreement between the parties, whereby the defendant was released from his obligation to pay rent under such contract on condition that he should be held bound as a surety to pay the same only in the event Landers, or other tenants, defaulted and prompt notice of such default should be given to him, and he claims that plaintiff gave no such notice until about the date of the expiration of the lease. Defendant introduced certain testimony tending to prove the above facts, but the same was thus introduced over the plaintiff's objections, which we think were well taken.

We fail to discover any consideration to support such alleged parol agreement. Furthermore, it nowhere appears that the same was ever executed, and it is well settled that a written contract, in so far as its executory provisions are concerned, cannot be modified by an unexecuted parol agreement. This rule is statutory in this state. Sec. 5938, Comp. Laws 1913. Moreover, the testimony of the defendant himself discloses that plaintiff expressly refused to release him from his obligation to pay rent under the contract, for he says that he offered plaintiff $40 if he would do so, which offer plaintiff refused.

Even if appellant's contention that there was a parol modification of the written lease could be upheld, we do not see how it would avail him, for under such alleged modification defendant was still to be held responsible for the payment of the rent, and the fact that his responsibility was to be that of a surety merely would not operate to exonerate him. It is undisputed that default was made in the payment of the amount sued for, and it nowhere appears that plaintiff did or failed to do any act which would operate to release defendant from his obligation to pay such rent.

In conclusion, we find no merit in appellant's contentions, and we think the trial court, in view of the record, was amply justified in directing a verdict.

The judgment is accordingly affirmed.

CHRISTINA M. MESSERSMITH v. SUPREME LODGE, KNIGHTS OF PYTHIAS.

(153 N. W. 989.)

Life insurance policy — action on — proof of death — suicide — issue for jury — evidence — spirits, health, domestic relations — proper evidence.

Action upon life insurance policy. The existence of the policy and death

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Note.—Suicide as a defense to an insurance policy has been the subject of much litigation. For general discussions of the subject, see notes in 59 Am. Dec. 487, 3 Am. Rep. 454; 19 Am. Rep. 628; and 84 Am. St. Rep. 539.

That statements as to cause of death in proofs of loss are prima facie evidence but are not conclusive, see note in 44 L.R.A. 853.

of insured admitted. Defendant offered no evidence excepting the proofs of death, which are alleged to contain admission of suicide.

1. The issue for the jury was whether or not the insured had in fact suicided. The proofs of death were admitted merely as evidence upon that point. Certain evidence, tending to show the spirits, health, and domestic relations of the insured just prior to his death, was properly admitted.

Evidence that insured was father of first child — statements of attorney — domestic life and health of insured.

2. Evidence that the insured was the father of his first child, two months of age, was properly admitted. There was no error in the statement of plaintiff's attorney to the court, in answer to an objection to said evidence, as follows: "I have a right to show that his domestic life was happy; that he was a young married man; that he was in superb health."

Successful in business — man of attainments — evidence of — proper.

3. There was no error in admitting evidence that insured was successful in business, and was a man of scholarly attainments.

Res gestæ — statements of insured — immediately before leaving home — part of.

4. Statements made by insured immediately before he left his family, and almost immediately before his death, are admissible as part of the *res gestæ*.

Letter written by defendant — to its local secretary — rejection of — plaintiff had not seen same.

5. There was no error in rejection of a letter written by the defendant to its local secretary, which letter plaintiff denied having ever seen.

Evidence — jury — verdict — sufficient to support.

6. Evidence examined, and found sufficient to justify its submission to the jury; and supports the verdict.

Opinion filed June 22, 1915.

Appeal from the District Court, Stark County, *Crawford*, J.

Affirmed.

Thomas H. Pugh, for appellant.

The proofs of loss are competent evidence against the party furnishing them, of the cause or extent of a loss, or the cause of death of an insured person, or of any other material fact therein recited; and ordinarily the rule extends to certificates and affidavits of physicians and others, and verdicts of coroners' juries. 7 Enc. Ev. 594; Dennis v. Union Mut. L. Ins. Co. 84 Cal. 570, 24 Pac. 120; Nelson v. Nederland L. Ins. Co. 110 Iowa, 600, 81 N. W. 807; 7 Enc. U. S.

Sup. Ct. Rep. 193; Mutual Ben. L. Ins. Co. v. Newton, 22 Wall. 32, 22 L. ed. 793; Mutual Ben. L. Ins. Co. v. Higginbotham, 95 U. S. 380, 24 L. ed. 499; Buffalo Loan, Trust & S. D. Co. v. Knights Templar & Masonic Mut. Aid Asso. 126 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942; Hanna v. Connecticut Mut. L. Ins. Co. 150 N. Y. 530, 44 N. E. 1099; Modern Woodmen v. Von Wald, 6 Kan. App. 231, 49 Pac. 782; Travelers' Ins. Co. v. Melick, 27 L.R.A. 629, 12 C. C. A. 544, 27 U. S. App. 547, 65 Fed. 178; McMaster v. Insurance Co. of N. A. 55 N. Y. 228, 14 Am. Rep. 239; Hassencamp v. Mutual Ben. L. Ins. Co. 56 C. C. A. 625, 120 Fed. 475.

The general rule as to character evidence is applicable here. The proof of the fact of suicide of the insured emanated from the plaintiff, and evidence of disposition, character, mental attainments, or family relations was incompetent and immaterial, as not within the issues. State v. Magill, 19 N. D. 131, 22 L.R.A.(N.S.) 666, 122 N. W. 330; State v. Thoemke, 11 N. D. 387, 92 N. W. 480; 5 Am. & Eng. Enc. Law, 2d ed. 879, 880.

In all proceedings, where the character or particular traits of character are allowed to be shown or proved, the general reputation, the reflex of the community only, may be shown, and not the individual opinion of the witness. Munkers v. Farmers' & M. Ins. Co. 30 Or. 211, 46 Pac. 850; Abbott, Trial Brief, 236.

L. A. Simpson, for respondent.

The proofs of death, which are the work of the defendant, even though they showed that death was by suicide, would not be binding on plaintiff, but were subject to corrections of honest mistakes, and such corrections and explanations could properly be made at and upon the trial. Dischner v. Piqua Mut. Aid & Acci. Asso. 14 S. D. 436, 85 N. W. 998; Supreme Tent, K. M. v. Stensland, 206 Ill. 124, 99 Am. St. Rep. 137, 68 N. E. 1098.

Where the *cause* of death is called in question, the proofs of death are not binding upon either party. Knights Templars & M. Life Indemnity Co. v. Croyton, 209 Ill. 550, 70 N. E. 1066.

Suicide or self-destruction must be intentional, in order to defeat recovery, under the usual stipulation in such policies of insurance. 25 Cyc. 878, ¶ "D;" Paulsen v. Modern Woodmen, 21 N. D. 235, 130

N. W. 231; Soules v. Brotherhood of American Yeomen, 19 N. D. 23, 120 N. W. 760.

The presumption is that the insured did not commit suicide, and the burden is upon the defendant to overcome such presumption. Ordinarily, the question is strictly one for the jury. Any inferences to be drawn from the evidence would not justify the jury in finding that death was caused by suicide. Mutual L. Ins. Co. v. Wiswell, 56 Kan. 765, 35 L.R.A. 258, 44 Pac. 996; Mutual L. Ins. Co. v. Daviess, 87 Ky. 541, 9 S. W. 812; Standard Life & Acci. Ins. Co. v. Thornton, 49 L.R.A. 116, 40 C. C. A. 564, 100 Fed. 582.

The law fixes upon the defendant claiming suicide the burden of proving such fact by a preponderance of the evidence. Brown v. Sun L. Ins. Co. — Tenn. —, 51 L.R.A. 252, 57 S. W. 415; Boynton v. Equitable Life Assur. Soc. 105 La. 202, 52 L.R.A. 687, 29 So. 490.

Where the evidence as to the cause of death is conflicting, and is such that different minds might reasonably come to different conclusions, the question is for the jury. Courtemanche v. Supreme Court, I. O. F. 136 Mich. 30, 64 L.R.A. 668, 112 Am. St. Rep. 345, 98 N. W. 749; Modern Woodmen v. Kozak, 63 Neb. 146, 88 N. W. 248.

The defense of suicide is an affirmative one, and the burden was upon defendant to substantiate it by a preponderance of the evidence. Leman v. Manhattan L. Ins. Co. 46 La. Ann. 1189, 24 L.R.A. 589, 49 Am. St. Rep. 348, 15 So. 388; Travelers' Ins. Co. v. Melick, 27 L.R.A. 629, 12 C. C. A. 544, 27 U. S. App. 547, 65 Fed. 178.

BURKE, J. This is an action upon a life insurance policy. The defense is that the insured suicided. Plaintiff had judgment. Defendant appeals. The errors claimed relate to the admission of testimony relative to deceased's family and business affairs, and to the refusal of the trial court to direct a verdict for defendant. The beneficiary, the wife of the insured, submitted written proofs, in which the cause of death was given as "gunshot wound, self-inflicted." Upon the trial, said beneficiary was a witness, and denied that she knew said answer was in the proofs of death at the time her signature was attached. The physician, likewise, receded somewhat from his earlier certificate, and it was conceded by both parties that the question of whether or not deceased was a suicide was the gist of the action. It is con-

ceded that the proofs of death were properly admitted as prima facie evidence of the material facts therein shown, but that such evidence is not conclusive, but might be rebutted.

(1) While upon the stand as a witness in her own behalf, plaintiff was asked the following questions by her attorney:

"Q. You and your husband were happy together up to the time of his death, Mrs. Messersmith?" Also: "Q. I will ask you to state, Mrs. Messersmith, whether your husband during all that time, and while in your presence, was in his usual good spirits?" Also: "Q. I will ask you to state whether or not you observed anything unusual in his manner." The witness, Reichert, was also asked: "Q. Whether he appeared in his usual spirits." And, "Q. Whether you noticed anything unusual in his manner or action that day." The witness, Mrs. Carroll, was also asked some questions: "Q. Do you know whether or not his domestic relations were happy?" The witness, Mrs. Simpson, was asked: "Q. Whether or not your brother upon that occasion (a few hours before his death) appeared in his usual frame of mind?" And, "Q. Can you tell us whether his domestic relations were happy always up to the time of his death, and *if so, state whether they were or not.*" Also: "Now, I will ask you to state whether or not he was in his usual frame of mind when he left the house, or usual spirits?" All of this testimony is objected to, upon the grounds that it did not bear upon the general reputation of the deceased, nor upon his character, those being not in issue; that the testimony sought to draw out special instances of the temperamental disposition of the deceased, and is the opinion of the witness testifying, and not the reflex of the community in which he lived; and that the fact to be found was whether or not deceased suicided, and the temperamental disposition, character, and mental attainments of the assured were not pertinent to the issues. Appellant contends that, inasmuch as the proofs of loss which were in evidence stated that death had resulted from suicide, the direct issue was rebuttal of said proofs, and that the questions complained of could only be relevant in the event the defendant had first undertaken to show a motive for the suicide. We do not believe there was any error in the admission of the questions before mentioned. The incidents related occurred the afternoon of his death. They all tended to show his mental condition, and had

a direct bearing upon the probability of suicide. As we view the matter, the insurance policy and the death were conceded. The burden, then, was upon the defendant, to prove the exemption from liability afforded them if the insured had in fact committed suicide. This burden they met by an offer in evidence of the proofs of death, signed by the beneficiary, who in her turn had a right to rebut this testimony; and this she attempted to do by showing facts and circumstances to lead the jury to believe suicide was impossible. We believe the evidence was properly admitted.

(2) Plaintiff was asked: "Q. How old was your baby at the time of your husband's death?" And was allowed to answer, over objection, that it was about two months old. During the argument upon this objection, plaintiff's counsel stated to the court in the hearing of the jury: "I have the right to show that his domestic life was happy That he was a young married man; that he was in superb health." This remark of counsel was objected to as being prejudicial, and an attempt to prejudice the jury, and was "the heaping of fuel upon the sympathies and sentiments of the jurors, who were sitting to determine a way to compel the insurance company to pay." It will be noticed that the remark was not made to the jury, but to the court, in argument upon objection interposed to a question which he had just asked the witness. We fail to see the slightest indication of any attempt to bias or prejudice the jury. There is no error in the incident.

(3) Appellant complains of the following questions propounded to the plaintiff: "Q. Was your husband enjoying a successful and prosperous practice in his profession at this time?" (Objection.) And also the following question, asked of the witness Reichert: "Q. Mr. Reichert, you have stated that you knew Mr. Messersmith very well; I will ask you to state whether or not he was a scholarly or an illiterate men." Practically the same objection disposed of in paragraph (1) was made to those questions. They both have their bearing, though possibly slight, upon the probability of the suicide, and were admissible.

(4) This assignment challenges two questions, one asked of the witness, Mrs. Carroll, and relates to the time deceased left his sister's home, a few moments before his death. The questions are: "Q. What did Mr. Messersmith say, if you remember, as to what he was

going to do when he left the house? A. He said that he was going down to the house, to fix the fire so the house would be warm, and he would come back and get his wife and baby." The other question was asked of Mrs. Simpson: "Q. As he left the house, if you heard and know, please state what reason was assigned for his leaving? A. He went down to his little house for the purpose of rebuilding the fires, or looking after the fires, so it would be warm for his wife and baby." Appellant in his brief says: "We submit that, unless it were shown that the statements were made by the deceased in the belief that he was in imminent danger of losing his life, or that death was rapidly approaching, the testimony is not competent to the issues in this case, as part of the *res gestæ*." Appellant is invoking an entirely foreign rule. The statement of deceased was not sought for its substance—to prove or disprove any fact. They did not care for the substance of his remarks, but desired to know the condition of his mind. What he said, like his action and general demeanor, had a bearing upon his mental condition, and was admissible. Plaintiff had the right to disprove not only the admission of proofs of death, but to disprove the fact of suicide itself.

(5) The fifth assignment of error relates to the rejection of the following question asked of the witness Harleman, who was apparently the secretary of the local Knights of Pythias lodge, and who as such had helped prepare the proofs of death. The question is: "Q. I show you exhibit W and ask you if that is the letter that you received, and that you read or permitted Mrs. Messersmith to read, relative to the matters you testify to?"—exhibit W being a letter from the defendant to its local secretary, which called attention to the statement in the proofs of death relative to the gunshot wound, and allowing her to make further proof if she desired. The plaintiff had already denied that said letter had been either shown or read to her, or in any manner called to her attention. The witness, Harleman, was allowed to testify that he had shown her the letter, and read it to her, and had informed her that she might make such further proof. This was gone into fully.

We quote from the record:

Q. And did you show her the letter, or read it to her?

A. I read it to her.

Q. And you informed her she might make such further proof as she desired?

A. I read the entire letter to her that I received from them.

Q. About how long was that after the first proof was sent in, after these proofs had been sent in?

A. It was a very few days,—I cannot recall just how long,—as soon as I could get an answer from Chicago. I received a letter after a very short delay.

Q. What was the nature of that communication by you to Mrs. Messersmith,—relative to what part of the proof she had already furnished?

A. It was relative to the suicide clause.

Q. Was permission given her to furnish such other evidence as she desired?

A. The permission was contained in the letter that was read to her.

Q. And that was in reference to furnishing proof, and additional proof, if she desired, in reference to the suicide?

A. It was.

Q. And now, at that time did you tender her any amount of money?

A. I did not.

Q. Did you at a later day?

A. No, sir.

Q. Have you forgotten it?—Mrs. Messersmith says you offered her a check.

A. I had no check, and never received any check from the insurance company, to pay Mrs. Messersmith.

Q. Did you tell her the amount that they would pay?

A. I did. They authorized me to make a statement to her. That they would pay her so much if she would surrender the policy; but I never received any money from the company to pay.

Then follows the question upon which error is predicated:

Q. I show you exhibit W, and ask you if that is the letter that you received, and that you read or permitted Mrs. Messersmith to read, relative to the matters you testify to?

To this objection was made, that it was clearly self-serving, and in no manner binding upon the plaintiff. The objection was properly

sustained. The contents of the letter were in no manner in dispute. Plaintiff insisted that she had never seen or heard of the letter, and that was the matter in dispute. The letter itself contained no evidence that plaintiff had seen it. The ruling was therefore correct.

(6) The last assignment challenges the sufficiency of the evidence as a whole, defendant contending that it was entitled to a directed verdict. A consideration of this question necessitates a short résumé of the evidence offered at the trial. Defendant offered no direct or positive evidence that the insured came to his death through suicide. Not an iota of evidence upon this phase was offered, excepting the admission of plaintiff in the proofs of death. Nor are those a positive admission. The exact language of plaintiff's statement is as follows: "13. (a) Q. Was death caused by suicide or violence or any causes other than disease? State which, and give fully the facts. A. Gunshot wound, self-inflicted. (b) Q. Did deceased ever attempt suiside? If so, give fully details, dates, etc. A. No." The statement from which the above questions are taken consists of four pages, containing something over fifty questions, and answered, signed, and verified by plaintiff, but upon blanks prepared by the defendant. The evidence discloses that Harleman, local secretary of the Knights of Pythias, received the blank proofs from the board of control of the defendant, and arranged to meet plaintiff in a law office at Dickinson, where her signature was obtained.

Plaintiff testified as follows:

Q. Have you ever read that paper, Mrs. Messersmith?

A. Not until just a few days ago.

Q. Had you ever read that paper at the time your signature was placed upon it?

A. No.

Q. Was it read to you?

A. It was not.

Q. Was any oath ever administered to you at the time you signed that paper?

A. No. . . .

Q. Who called you to the office?

A. Mr. Harleman.

Q. How did he call you?

A. By telephone. . . .

Q. When you went to the office, Mrs. Messersmith, whom did you find there?

A. Mr. Harleman and Dr. Davis.

Q. Had you requested Dr. Davis to come there?

A. I had not. . . .

Q. Was this paper ever in you possession, prior to the commencement of this action?

A. Never.

Q. Did you ever see it, so far as you know, prior to this suit being instituted?

A. No.

Q. Did you send any papers to the defendant, Supreme Lodge, Knights of Pythias?

A. No.

Q. Did you know where they were located?

A. I did not. . . .

Q. Was Dr. Davis at your house the night of your husband's death, at your request?

A. No. . . .

Q. Do you know how your husband came to his death?

A. Gunshot wound. . . .

Q. You were not present at the time your husband died?

A. No.

Q. And have no knowledge of how his death ensued, excepting from the gunshot wound?

A. No.

Q. Mrs. Messersmith, in this paper, exhibit Y 2, and in question No. 13 of the letter (a), I find as follows: "Was death caused by suicide, or violence, or any cause other than disease? State which, and give fully the facts." And I find the language written in answer: "Gunshot wound. Self-inflicted." Do you know whose language that is?

A. Yes.

Q. Is that your language?

A. Most emphatically, no. . . .

Q. What did Harleman say, if you remember, when he asked you to sign it?

A. Why, when he telephoned me, and also when I reached the office, he said that he had the insurance papers ready for me to sign, so that I could get my insurance. He also stated that there would be no question but that I would get the insurance.

It will be noticed that plaintiff contends that the answer was written without her knowledge, and that it never represented her true belief. If those are the facts, we see no reason why they should not go to the jury for what they are worth, and they might justify the jury in finding the admissions of the statement entirely worthless, which would leave the case as though no evidence had been interposed by the defendant. Under such circumstances, of course, plaintiff, and not defendant, would be entitled to a verdict.

Furthermore, it will be noted from the language that there is no assertion of suicide. The words "gunshot wound, self-inflicted," do not contain any positive allegation of suicide. The wound might have been self-inflicted, but by accident, in which case it would be a gunshot wound, self-inflicted, but not suicide. This question is treated rather fully in Paulsen v. Modern Woodmen, 21 N. D. 235, 130 N. W. 231. Also see note in 35 L.R.A. 263; Mutual Ben. L. Ins. Co. v. Daviess, 87 Ky. 541, 9 S. W. 812; Knights Templars & M. Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066; Standard Life & Acci. Ins. Co. v. Thornton, 49 L.R.A. 116, 40 C. C. A. 564, 100 Fed. 582; Brown v. Sun L. Ins. Co. — Tenn.—, 51 L.R.A. 252, 57 S. W. 415; Cox v. Royal Tribe, 42 Or. 365, 60 L.R.A. 620, 95 Am. St. Rep. 752, 71 Pac. 73; Courtemanche v. Supreme Court, I. O. F. 136 Mich. 30, 64 L.R.A. 668, 112 Am. St. Rep. 345, 98 N. W. 749; Modern Woodmen v. Kozak, 63 Neb. 146, 88 N. W. 248; Stevens v. Continental Casualty Co. 12 N. D. 463, 97 N. W. 862; Clemens v. Royal Neighbors, 14 N. D. 116, 103 N. W. 402, 8 Ann. Cas. 1111; Kephart v. Continental Casualty Co. 17 N. D. 380, 116 N. W. 349; note in 4 L.R.A.(N.S.) 637; Puls v. Grand Lodge, A. O. U. W. 13 N. D. 559, 102 N. W. 165 (holding physician's report of death, verdict of coroner's jury, and testimony of physician making post-mortem examination, not conclusive on question of cause of death); Soules v. Brotherhood of American Yeomen, 19 N. D. 23, 120 N. W. 760.

Another statement in the proofs of death was made by Dr. Davis, who answered the following questions: "12. Was death caused by violence, or other than natural causes? If so, state particulars. A. Gunshot wound, self-inflicted." This leaves the suspicion, at least, that the doctor wrote both answers, corroborating plaintiff in her testimony that she did not know what was in the paper signed by her, and that the same was prepared by others. It appears from the doctor's testimony that he was not present at the time of the shooting, although a witness at the trial, and gave no evidence tending to prove that it was a case of suicide, and even seemed to have some doubt at least, of the correctness of the answer formerly made. For instance, he says:

I suppose, Judge Crawford, that under the rules and customs which govern court processes, it is not possible or right for a man to explain, if a man has made out a paper like this, to say where he thinks he made an error in it, or anything of that kind?

The court: Well, if they inquire into that, why, you may.

Q. Well, by that remark do you mean there is some error in here that you would like to correct?

A. No error, except in one particular. That definite, positive statement is made, where it should have been described as being possible or likely, probably.

Q. What question did you refer to?

A. Where the question is made as to the manner of the infliction of the wound. Self-inflicted. Any intelligent, thinking man would have put, *"probably self-inflicted."* With that word inserted there, I would be absolutely satisfied with the paper.

The other statements in the proof of death upon this question were by persons who had absolutely no means of knowing whether it was suicide or not. Under the authorities above cited, it is plain that the burden of proof was upon the defendant to establish the fact of suicide. In addition to the rebuttal of the proofs of death aforesaid, plaintiff introduced evidence, showing absence of motive for suicide.

The question of the manner of death was one of fact for the determination of the jury, and a verdict should not have been directed, if there was any substantial conflict in the evidence. We believe there was such a conflict, and the trial court was right in submitting the case. Judgment affirmed.

DR. R. D. EATON CHEMICAL COMPANY, a Corporation, v. J. P. DOHERTY, Ed. Evoy, and Steve Coliton (Ed. Evoy and Steve Coliton, Appellants).

(153 N. W. 966.)

Merchandise sold — suit to recover under contract — books of account — value of goods sold — proof of — testimony as to contents of books — not offered in evidence — incompetent.

Plaintiff sought to recover from the defendants for the value of certain merchandise, which plaintiff claimed to have sold and delivered to the defendant, Doherty, under a written contract, the performance of which was guaranteed by the defendants, Evoy and Coliton. One Collins, an officer of the plaintiff corporation, was permitted to testify, over objection, to his conclusions as to the value and delivery of such goods, based upon alleged entries made against Doherty in plaintiff's books of account. The books were not produced or offered in evidence, although they concededly were in the possession of the plaintiff. It is *held:*

1. That the testimony of Collins as to the contents of such book entries was incompetent, and should have been excluded.

Refreshing memory — witness — use of books — memoranda — not offered.

2. That, for the reasons stated in the opinion, such testimony was not admissible on the theory that such books constituted memoranda used by Collins to refresh his recollection.

Books of account — best evidence of contents.

3. That the books of account were the best evidence of the contents of the entries made therein.

Sale and delivery of goods — value — burden of proof.

4. That the burden of proof was upon the plaintiff to establish the sale and delivery by it to Doherty of the goods for which recovery was sought, and, also, the value thereof.

Competent evidence — facts — directing verdict.

5. For the reasons stated in the opinion, it is *held*, that such facts were not proven by any competent evidence, and that the trial court erred in directing verdict in plaintiff's favor.

Opinion filed June 22, 1915.

Note.—As a general rule, oral evidence of the contents of books of account is not competent, except upon proper foundation being first laid therefor. For other cases on admissibility of secondary evidence of absent books, see note in 52 L.R.A 604.

From a judgment of the District Court of Bottineau County, *Burr*, J., defendants Evoy and Coliton appeal.

Reversed and remanded.

Soule & Cooper, for appellants.

Books of account, kept in the usual course of business, are the best evidence of their contents. In an action to recover for goods sold and delivered, where account of same was properly kept, a witness cannot testify as to such account, and as to the value of the goods, by merely using such books, not in evidence, to refresh his memory. Such evidence is hearsay. Starkie, Ev. (1824) 79, 127; Greenl. Ev. § 98.

Weeks & Moum, for respondent.

Oral evidence of persons having personal knowledge of the transactions is the best evidence of the items. The fact that one or both of the parties kept a book account of their transactions does not affect the rule, and such evidence is still primary. The books themselves are secondary or supplementary evidence. Cowdery v. McChesney, 124 Cal. 363, 57 Pac. 221.

Books of account are not the best evidence, so as to render inadmissible oral testimony as to payments credited therein. Christman v. Pearson, 100 Iowa, 634, 69 N. W. 1055.

Where parties are allowed to testify as to all facts for which the books were formally offered, their testimony constitutes primary evidence of such facts, and the books merely secondary evidence. 2 Enc. Ev. 687; Davis v. Field, 56 Vt. 426.

CHRISTIANSON, J. The plaintiff is a Minnesota corporation, whose place of business is located in Minneapolis, Minnesota. It is engaged in the business of manufacturing and selling veterinary and other remedies. On June 3, 1910, the plaintiff entered into a written contract with the defendant, J. P. Doherty, whereby the plaintiff agreed "to fill and deliver on board cars at Minneapolis, Minnesota, his reasonable orders, provided his account is in satisfactory condition, and to charge all goods shipped him under this contract to his account at current wholesale prices." The defendants, Ed. Evoy and Steve Coliton, signed a written guaranty attached to said contract, whereby they jointly and severally guaranteed the performance by said Doherty of said

contract. The plaintiff's complaint sets forth the contract, and the guaranty in full, and further alleges, "that under and pursuant to said contract, the plaintiff sold and delivered to the said J. P. Doherty, goods and merchandise as described in said contract on the 23d day of June, 1910, at the agreed price of four hundred sixty-six and 10/100ths dollars ($466.10), and on the 2d day of July, 1910, at the agreed price of four hundred twenty-four and 60/100ths dollars ($424.60); and that no part of the same has been paid, except the sum of three and 25/100ths dollars, paid April 15th, 1910, and the sum of five and 55/100ths dollars, paid Nov. 15th, 1911, and the further sum of three hundred forty-one and 55/100ths dollars ($341.55), paid Nov. 30th, 1912, and the further sum of one hundred dollars ($100.00), paid Dec. 17, 1912." The complaint further alleges that the defendant, Doherty, failed to pay for said goods and merchandise, although payment was demanded from the defendants, Coliton and Evoy, and that subsequently the contract with Doherty was canceled by the plaintiff, on account of Doherty's failure to comply with its terms. The defendant, Doherty, defaulted; and the defendants, Evoy and Coliton, answered, specifically denying the sale and delivery to the defendant, Doherty, of the goods and merchandise described in the complaint; and alleging that an additional payment of $400 was made to the plaintiff, on or about November 30, 1912; that at the time the defendants signed the guaranty, the original contract had not been signed by the defendant, Doherty; that they received no consideration for the execution thereof; and that the same was delivered to the plaintiff by Doherty, without the knowledge and consent of the defendants, Coliton and Evoy.

Upon the trial of the action, the plaintiff offered in evidence the written contract and guaranty, and the execution and delivery of such instrument was clearly established. The only testimony offered by the plaintiff to prove a sale and delivery to Doherty by the plaintiff of any goods, and the value thereof, was the testimony of Frank Collins, which was as follows:

Q. What is your name?
A. Frank Collins.
Q. Where do you live?
A. Minneapolis.

Q. Are you an officer of the plaintiff, Dr. Eaton Chemical Company?

A. Yes, sir.

Q. What officer?

A. President and treasurer.

Q. How long have you been connected with the plaintiff as an officer?

A. I was secretary first. I have been with the company nearly four years as an officer.

Q. Do you know whether or not this contract was accepted on behalf of, or by, the plaintiff, Eaton Chemical Company?

A. Yes, sir.

Q. And do you know about the time—the date of the acceptance of it?

A. About June 3d, I think.

Q. About June 3d, 1910?

A. About June 3d, 1910.

Q. Do you know whether the goods were furnished under this contract to the defendant, Doherty, at that time?

A. Yes, sir.

Q. Do you know how much, or at what price?

A. Yes, I have the amounts here, and shipments.

Q. You may state what quantity and what price goods were furnished to this man Doherty.

Mr. Soule: That is objected to as incompetent, irrelevant, and immaterial, and out of the order of proof.

The Court: Overruled.

Mr. Soule: Exception.

A. The amounts?

Q. Yes.

A. On June 23d, 1910, $466.10, and July 2d, 1910, $424.60.

Q. Was that at the regular wholesale price of these goods at that time?

Mr. Soule: Objected to as incompetent, irrelevant, and immaterial; the pleadings having set forth a specific agreed price.

The Court: Overruled.

Mr. Soule: Exception.

A. Yes, a wholesale price.

Cross-examination by Mr. Soule:

Q. How do you know there was $890.70 worth of goods furnished?

A. *Because that was according to our books.*

Q. You don't know anything about it yourself, personally?

A. Oh, yes, I am in the office all the time.

Q. You see the books right along?

A. Yes, sir.

Q. And the knowledge which you have regarding the furnishing of these goods comes from your inspection of the books?

A. Yes, sir, and from seeing the goods shipped out.

Q. You saw these goods shipped, did you?

A. Part of them, not all of them.

Q. What part did you see shipped—what part did you see shipped?

A. Practically all of the first shipment.

Q. Where did you see it?

A. At our place of business in Minneapolis.

Q. Where is that?

A. We were at 709 First avenue, South, then.

Q. Have you got a side track in there from the railway?

A. No, sir.

Mr. Weeks: That is objected to as immaterial and improper cross-examination.

The Court: Overruled.

Mr. Soule: Read the question.

(The last question read to the witness.)

A. No.

By Mr. Soule:

Q. You testified that you only knew about the shipment of part of the goods. What portion of the first shipment did you know about?

A. I don't do all the shipping and packing, but I supervise the business, and know what is going on. I have men to work there.

Q. Well, what portion of that first shipment can you testify positively about?

Mr. Weeks: Objected to as improper and cross-examination, already gone over and immaterial.

The Court: Overruled.

Mr. Weeks: Exception.

A. Why, I superintend the general business, and we have help in shipping; I am positive the goods were all shipped, but I did not handle every box in the shipment, or every package.

Q. Your duties are confined to the postage stamps and envelops, then?

A. No, sir; my business—my duties are confined to the general supervision of that business.

Q. You are willing to testify positively to the shipment of any portion of the first invoice?

A. Why, certainly, I testify that it was all shipped *that we have charged him with.*

Re-direct examination by Mr. Weeks:

Q. Mr. Collins, your company keep a set of books, do they?

A. Yes, sir.

Q. Do they keep an invoice book?

A. Yes.

Q. Do you know whether or not these books—these books or records—are correctly kept?

A. Yes, sir.

Q. Have you recently examined the books with reference to the account against J. P. Doherty, which you have testified to?

A. Yes.

Q. And do you know that that amount is correct?

A. Yes.

Q. *Does that account show the items that you have testified to here as charged to Doherty?*

A. Yes.

Mr. Soule: Objected to, as not the best evidence.

The Court: Sustained.

Mr. Weeks: Exception.

Q. When did you examine these books, Mr. Collins?

A. Oh, I see the books right along, and I have examined them just before I come up here.

Q. Where are those books now?

A. In the safe in Minneapolis.

Q. Was it possible to have these books here?

A. We are using them right along, and keep them in the safe.

Q. Would it be possible, that is, would it be interfering with your business, to take these books away from Minneapolis?

Mr. Soule: Objected to, as incompetent, irrelevant, and immaterial.

The Court: Overruled.

Mr. Soule: Exception.

A. Yes.

Q. Now, outside of your personal knowledge of this transaction, can you refresh your memory from an examination of the books, and state whether or not the statements you have given are correct, as to this account?

A. Yes.

Q. And are they?

A. Yes.

Mr. Soule: Objected to, as incompetent, irrelevant, and immaterial, and not the best evidence; no proper foundation laid.

The Court: Overruled.

Mr. Soule: Exception.

At the close of plaintiff's case, the defendant moved for a dismissal of the action, on the ground that no evidence had been introduced, sufficient to sustain the allegations of the complaint, and sufficient to constitute a cause of action; that it had not been shown that the goods specified in the plaintiff's complaint were sold or delivered to the defendant, Doherty. This motion was denied. At the close of the entire case, plaintiff moved for a directed verdict, which was granted. Judgment was entered pursuant to the verdict, and this appeal is taken from the judgment.

While several errors are alleged, still, the principal question presented on this appeal relates to the sufficiency of the evidence to sustain the verdict. As already stated, the only testimony offered by the plaintiff to prove a delivery to the defendant, Doherty, of any goods, and the amount and value of such goods, consisted solely of the testimony of the witness, Collins. And while he testifies positively that the goods were all furnished, still, it is obvious, from all of his testimony, that his conclusions as to the amount and value of such goods are based upon the books of the plaintiff. It will be observed that the books were

not produced. The original orders transmitted by Doherty were not produced, nor were any of the invoices, as shipping bills for the alleged shipments. There is no testimony on the part of the plaintiff, showing when or to what common carrier the goods were delivered; nor is there any testimony that proper shipping directions were given to the carrier, to forward and deliver the goods to Doherty; nor is there any testimony showing that such shipments were ever delivered to any common carrier, except such presumption of delivery as would arise from the fact that the goods were charged against the defendant, in an account on the books of the plaintiff. The contentions are made on the part of the plaintiff that the witness, Collins, testified from his own personal knowledge as to the sale and delivery of the goods, and that, hence, this testimony was the best evidence, and no necessity existed to produce the books; that the books were merely memoranda of the transactions, of which Collins had personal knowledge, and might be used by him for the purpose of refreshing his memory, and that the only purpose for which Collins used the books under this evidence was to refresh his memory. We do not believe that these contentions are borne out by a fair construction of the evidence. It is true that Collins testifies: "Why, I superintend the general business, and we have help in shipping; I am positive the goods were all shipped, but I did not handle every box in the shipment, or every package." And again: "Why, certainly, I testify that it was all shipped, that we have charged him with." Still, after enumerating the quantities and prices of goods involved in this action, when asked how he knows that there was $890.70 worth of goods furnished, his answer is: "Because that was according to our books." While Collins probably had some personal knowledge, in a general way, of the transactions with Doherty, still, it is obvious from his testimony that, so far as the quantity and value of goods furnished is concerned, Collins bases his testimony entirely on the book entries. Collins does not say that he made the entries, nor is it shown when or by whom they were made. No excuse is offered for the failure to produce the books, except that the books were used right along in the business, and that it would be a matter of inconvenience to bring them up there. The testimony of Collins shows that the books were in existence, and in the possession of the plaintiff.

In this state, the rules governing the admission in evidence of books

of account are prescribed by statute: "Any entries in a book or other permanent form, in the usual course of business, contemporaneous with the transactions to which they relate, and as a part of or connected with such transactions, made by persons authorized to make the same, may be received in evidence when shown to have been so made upon the testimony either of the person who made the same, or if he be beyond the reach of a subpœna of the trial court or insane, of any person having custody of the entries and testifying that the same were made by a person or persons authorized to make them in whose handwriting they are, and that they are true and correct to the best of his knowledge and belief. In case such entries are, in the usual course of business, also made in other books and papers as a part of the system of keeping a record of such transactions, it shall not be necessary to produce as witnesses all of the persons subject to subpœna who were engaged in the making of such entries; but before such entries are admitted the court shall be satisfied that they are genuine and in other respects within the provisions of this section." Comp. Laws, § 7909.

In Jones's Commentaries on Evidence, in consideration of the question of the degree of credit to be given to books of account as evidence, it is said: "The courts have frequently expressed the opinion that evidence of this character is quite unsatisfactory, and that it should be subjected to close *scrutiny*. It has been said that books of account are received in evidence, only upon the presumption that no other proof exists. They are justly regarded as the weakest and most suspicious kind of evidence. The admission of them at all is a violation of one of the first principles of the law of evidence, which is, that a party shall not himself make evidence in his own favor. The practice of admitting such evidence is, however, universally adopted. It is said that it had its origin in a kind of 'moral necessity,' and that 'such is the general course of business, that no proof could be furnished of the frequent small transactions between men, without resorting to the entries which they themselves have made in this form of accounts.' But to make them evidence at all, the books must have been kept in a manner so cautious as, in a great degree, to furnish a guaranty against abuse. . . . Books of account of either party, in which charges and entries have been originally made, are admissible in evidence, their credibility to be judged by the jury; but before such books are admis-

sible in evidence, they are to be submitted to the inspection of the trial judge, accompanied with proof that the entries therein were made by the party contemporaneous with the transactions therein recorded, in due course of business; and if they exhibit a fair register of the daily business of the party, and appear to have been honestly and regularly kept, they should be submitted in evidence, to be considered by the jury. . . . In most states, by force of statutes or decisions of the courts, books of account, when kept in compliance with the rules above given, and properly verified, are prima facie evidence of the facts therein stated. The admissibility is, of course, for the court; *the weight of evidence for the jury. It is for them to place the value of the books as evidence, according to the appearance of the entries, the manner of the bookkeeping, the general correctness of the charges, and the innumerable and varying circumstances called into existence by the character of the entry and the particular business transaction submitted to them.*" Jones, Ev. § 575.

"As we have stated, the question of *admissibility* or competency is for the *determination of the court,* upon the preliminary proof required by the statute or other law of the forum, while the degree of credit to be given is *for the jury. If the book is not found to be a book of original entries, or if for other reasons it fails to conform to the rules regulating its admission, the court will reject the evidence as incompetent. But if this is left in doubt, the book may be submitted to the jury with the instruction that it should be disregarded, if they find against it.* Book entries are not necessarily excluded because there may be alterations or erasures or mistakes, such as those in the name of the party. These are matters which may be explained to the satisfaction of the court. But if the entries show that they were all made at the same time, though relating to separate transactions, or if by reason of alterations or erasures or other cause they have a suspicious and fraudulent appearance, and are not explained, they should be rejected, although *in some cases it has been held that books of this character should be submitted to the jury under proper instructions.*" Jones, Ev. § 576. In this case neither the jury, nor the trial judge, had an opportunity to pass judgment upon the entries in plaintiff's books, but the testimony of Collins as to what was shown thereby was received as conclusive evidence against the defendants.

The law requires a party to produce the best evidence within his power or control. In other words, a moral certainty should exist that the court has had every opportunity for examining and deciding the cause, upon the best evidence which it was within the power or ability of the litigant to produce. United States v. Sutter, 21 How. 170, 16 L. ed. 119. The entries made upon the books of the plaintiff, in this case, furnished the best evidence of such charges. The testimony of Collins, as to the contents of such entries, was therefore inadmissible. 2 Enc. Ev. 688. In considering this question in Great Western Life Assur. Co. v. Shumway, 25 N. D. 268, 271, 141 N. W. 479, this court said: "The bond sued on provides 'that the company's books shall, from time to time, and at all times, be accepted and received, and shall in fact be, as against the agent and sureties, prima facie evidence of the amount of the indebtedness of the agent to the company, and of his accounts, dealings, and transactions with the company, or on its behalf.' The books of the company, therefore, were competent evidence, as against these defendants, of the state of the account between Shumway and the plaintiff, provided a proper foundation was first laid for their introduction. Such books were not offered, however; but instead of so doing, plaintiff sought to prove the vital fact in issue, to wit, that Shumway was indebted to the company, by the deposition of its secretary, wherein such witness, without any foundation being first laid as to his qualifications to thus testify, other than showing that he was secretary of the company, testified to the conclusion that 'the defendant, Shumway, is now indebted to the plaintiff company in the sum of $454.39.' Defendants objected thereto, and moved to strike the testimony out as incompetent, and a mere conclusion, and no foundation having been laid, which objection was sustained, and the motion granted. We think such rulings were clearly correct. The fact that the witness was plaintiff's secretary would not of itself qualify him to thus testify. Furthermore, such testimony was a naked conclusion of the witness: *and, moreover, the record discloses that Shumway's account was kept in books of the company, and therefore such books were manifestly the best evidence of the state of the account.*

"*In the face of the fact that Shumway's account was kept by plaintiff in its books of account, we cannot understand on what possible theory counsel for the appellant can properly contend that the court erred in*

excluding exhibits C and D, the former purporting to be a mere copy of the company's ledger account with Shumway, and the latter merely a detailed statement of said account, claimed to have been taken from plaintiff's books. Such testimony was clearly incompetent."

It is contended, however, that the books of account were used by Collins merely as memoranda to refresh his memory, and that his testimony was based upon personal knowledge, and not upon the information given in the books. A consideration of Collins's testimony as a whole shows that this contention is not well founded. While Collins testified that he could refresh his recollection from an examination of the books, yet it is evident from his testimony that he never had any personal knowledge of the second shipment, or of more than a part of the first shipment; so that he had no personal recollection that was refreshed by the book entries, but the information he got from the books, as to the sale and delivery of certain goods at certain prices by plaintiff to Doherty, was rather in the nature of original information. He might have believed that the books had been correctly kept, and that goods of the amount disclosed by the books had been actually shipped; but his only knowledge as to the amount and value of goods so shipped was not dependent upon any former knowledge on his part, but was derived solely from the books. While it is true that there is a tendency to permit the use of memoranda under conditions where this formerly was not permissible, still, it is self-evident that, in order to permit a witness to refer to memoranda for the purpose of refreshing his recollection, it must appear that the witness, at some prior time, had personal knowledge of the facts to which the memoranda relate. A witness cannot be permitted to consult memoranda for the purported purpose of refreshing the recollection, and obtain original knowledge therefrom, and thereafter relate the information thus obtained. The terms "refreshing memory" and "refreshing recollection" are self-explanatory, and directly negative the use of such memoranda, except for the purpose of "refreshing" the recollection of the witness, and recalling to his mind facts, which at one time were personally known to him, but which by reason of lapse of time have in a greater or lesser degree passed out of his mind. It seems obvious, however, that there can be no refreshing of the recollection concerning matters of which the witness never had any actual personal knowledge. It also seems

obvious that such memoranda cannot be used, unless it is shown that the memoranda are competent for the purpose for which they are used.

In a discussion of this subject, it is said, in Elliott on Evidence, § 865: "It is not necessary that the memorandum referred to by the witness should be written by the witness himself, especially where, on seeing it, he has a present recollection of the facts. It may have been written by another, since it is the recollection, and not the memorandum, which is evidence. *It is essential, however, that, upon referring to it, his recollection should be so refreshed that he can speak to the facts from memory; that is, after referring to it he should be able to testify from his own recollection, or that he remembered having seen it when his memory as to the facts was still fresh, and that he remembers that when he saw it he knew the matters therein stated to be correct. For, if the witness is unable to recall the fact or the truth of the fact recorded, and the memorandum was made by another, his evidence, so far as it is established by the memorandum, is objectionable, as mere hearsay, it being his inference from what a third person has written.*"

In the case of Putnam v. United States, 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. Rep. 923, the Supreme Court of the United States, in an opinion by the present Chief Justice White, said: "It is also clear that, where a memorandum or writing is presented to a witness for the purpose of refreshing his memory, it must either have been made by the witness or under his direction, or he must be connected with it in such a way as to make it competent for the purpose for which it is proposed to use it."

It is elementary that the memory of a witness may be refreshed by calling his attention to a proper writing or memorandum. The rule is thus stated by Greenleaf (1 Greenl. Ev. 436):

"Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory by the use of a written instrument, memorandum, or entry in a book, and may be compelled to do so if the writing is present in court. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection. So, also, where the witness recollects that he saw the paper while the facts were fresh in his memory, and remembers

that he then knew that the particulars therein mentioned were correctly stated. And it is not necessary that the writing thus used to refresh the memory should itself be admissible in evidence; for, if inadmissible in itself, as for want of a stamp, it may still be referred to by the witness."

The very essence, however, of the right to thus refresh the memory of the witness is that the matter used for that purpose be contemporaneous with the occurrences as to which the witness is called upon to testify. *Indeed, the rule which allows a witness to refresh his memory by writings or memoranda is founded solely on the reason that the law presupposes that the matters, used for the purpose, were reduced to writing so shortly after the occurrence, when the facts were fresh in the mind of the witness, that he can with safety be allowed to recur to them in order to remove any weakening of memory on his part, which may have supervened from lapse of time.*

In Maxwell v. Wilkinson (Parsons v. Wilkinson) 113 U. S. 656, 658, 28 L. ed. 1037, 1038, 5 Sup. Ct. Rep. 691, speaking through Mr. Justice Gray, the court said: "Memoranda are not competent evidence by reason of having been made in the regular course of business, unless contemporaneous with the transaction to which they relate. Nicholls v. Webb, 8 Wheat. 326, 337, 5 L. ed. 628, 630; Ætna Ins. Co. v. Weide, 9 Wall. 677, 19 L. ed. 810, and Insurance Cos. v. Weide, 14 Wall. 375, 20 L. ed. 894; Chaffee v. United States, 18 Wall. 516, 21 L. ed. 908. It is well settled that memoranda are inadmissible to refresh the memory of a witness, unless reduced to writing at or shortly after the time of the transaction, and while it must have been fresh in his memory. The memorandum must have been 'presently committed to writing,' Lord Holt in Sandwell v. Sandwell, Comb, 445, Holt, 295: 'while the occurrences mentioned in it were recent, and fresh in his recollection,' Lord Ellenborough in Burrough v. Martin, 2 Campb. 112: 'written contemporaneously with the transaction,' Chief Justice Tindal in Steinkeller v. Newton, 9 Car. & P. 313; or 'contemporaneously or nearly so with the facts deposed to,' Chief Justice Wilde (afterwards Lord Chancellor Truro) in Whitfield v. Aland, 2 Car. & K. 1015."

In this case there is nothing to show when the book entries were made, or by whom. There is no contention that they were made by Collins, or under his direction; or that Collins saw the book entries

at the time they were made, or shortly thereafter. It was also incumbent upon the plaintiff to produce such memoranda in court, so that the witness might be properly cross-examined concerning the same. Jones, Ev. § 882; see also Wigmore, Ev. §§ 762, 749. In consideration of this question, in the case of Duncan v. Seeley, 34 Mich. 369, in an opinion written by the distinguished jurist, Judge Cooley, it was said: "The other party had a right to know what the memorandum was on which he relied, and whether it had any legitimate tendency to bring the fact in controversy to mind. It would be a dangerous doctrine which would permit a witness to testify from secret memoranda, in the way which was permitted here. The error was not cured in this case by the plaintiff offering on the next day, on the conclusion of his testimony, to produce the memorandum. The defendant was entitled to see it at the time, in order to test the candor and integrity of the witness; and the opportunity for such a test might be lost by a delay, which an unscrupulous witness might improve by preparing to procure something to exhibit."

The burden of proof was upon the plaintiff, to prove, among other things, a sale and delivery by the plaintiff to Doherty of the goods set forth in the complaint, as well as the value thereof. 11 Enc. Ev. 576.

The only evidence offered to establish these facts, as already stated, was the testimony of Collins, set forth above. It will be observed that even he did not testify to any personal knowledge of the second shipment—the one in issue. He says he saw practically all of the first shipment shipped out; but he made no claim that he saw any part of the second shipment either prepared or delivered for shipment. It is true he stated that he is positive that the goods were all shipped; but this was a mere conclusion, and his answers to specific questions show that he had no actual knowledge as to whether the second shipment was ever sent out. Even Collins did not testify that the goods were delivered to any particular common carrier, nor is any explanation made of the failure to produce the invoices or shipping bills for the shipments. The only evidence, therefore, of the delivery of such goods is the presumption which arises from the fact that they were charged to the defendant, Doherty, upon the plaintiff's books. The only part of the testimony of Mr. Collins which in any manner tended to establish the amount and value of the goods claimed to have been shipped

to the defendant, Doherty, as well as the fact of such delivery, was based upon entries made in the books of the plaintiff; and hence it seems obvious that the books themselves, and not Mr. Collins's statement of the contents of the entries therein, constituted the best evidence. The evidence of Mr. Collins as to the contents of such book entries should have been excluded. And as there was no competent evidence before the court to establish plaintiff's cause of action, it follows that it was error to grant the motion for a directed verdict. The judgment is therefore reversed, and the cause remanded for further proceedings.

Mr. Chief Justice FISK did not participate, COOLEY, District Judge, sitting in his stead.

W. G. SANFORD v. EDWARD H. SANFORD, Appellant, Frank Sanford, Ella R. Sanford, J. E. Baker, A. G. Pettingill, and W. O. Thompson.

(153 N. W. 412.)

Action to quiet title — heirs — partition — exclusive ownership — real estate — title to — trial de novo — findings and conclusions — title held in trust for heirs.

Action to quiet title to real property, and to partition same among certain heirs at law of one S., deceased. Appellant, who is one of such heirs, asserts exclusive ownership in one of the quarters involved, and the sole controversy relates to the title to such quarter. Upon a trial *de novo* in the supreme court, it is *held*, in accordance with the findings and conclusions of the trial court, that such land belongs to the heirs, and that any title acquired by appellant thereto is held by him in trust for such heirs.

Opinion filed May 12, 1915. Petition for rehearing June 23, 1915.

Appeal from District Court, Dickey County, *Frank Allen*, J.

Action to quiet title to real property and to partition the same among certain heirs. From a judgment in plaintiff's favor, defendant Edward H. Sanford appeals.

Affirmed.

Watson & Young and *E. T. Conmy* and *Webb & Brouillard,* for appellant.

To establish a resulting trust in real estate by parol testimony, the evidence must be clear, convincing, and satisfactory, and of such a character as to leave in the mind of the judge no hesitation or substantial doubt. Carter v. Carter, 14 N. D. 66, 103 N. W. 425; Rev. Codes 1899, § 3386; Smith v. Security Loan & T. Co. 8 N. D. 451, 79 N. W. 981; Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; Riley v. Riley, 9 N. D. 580, 84 N. W. 347; McGuin v. Lee, 10 N. D. 160, 86 N. W. 714; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576.

There was no writing—therefore no express trust. Carter v. Carter, 14 N. D. 66, 103 N. W. 425; Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088.

The deed names a grantee and the record identifies this appellant as the person intended to be named. Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623; Donovan v. Welch, 11 N. D. 113, 90 N. W. 262; Rogers v. Manley, 46 Minn. 403, 49 N. W. 194; Lyman v. Gedney, 114 Ill. 388, 55 Am. Rep. 871, 29 N. E. 282; Chandler v. Wilson, 77 Me. 76; Parker v. Chancellor, 78 Tex. 524, 15 S. W. 157; Smith v. Gillum, 80 Tex. 120, 15 S. W. 794; Begg v. Anderson, 64 Wis. 207, 25 N. W. 3; Newton v. McKay, 29 Mich. 1; Henniges v. Paschke, 9 N. D. 489, 81 Am. St. Rep. 588, 84 N. W. 350; Thompson v. Speck, 2 Tenn. Ch. App. 759.

Deeds have been held good where the Christian name was entirely omitted, the grantee being allowed to show *aliunde* that he was the person intended. Webb v. Den, 17 How. 576, 15 L. ed. 35; Fletcher v. Mansur, 5 Ind. 267; Newton v. McKay, 29 Mich. 1.

A mistake in the Christian name does not invalidate the deed. Middleton v. Findla, 25 Cal. 81; Nixon v. Cobleigh, 52 Ill. 387; Merchants' Bank v. Spicer, 6 Wend. 443; Fanshawe's Case, F. Moore, 228; Zann v. Haller, 71 Ind. 136, 36 Am. Rep. 193; Irwin v. Longworth, 20 Ohio, 581; Salmer v. Lathrop, 10 S. D. 216, 72 N. W. 570; Morse v. Carpenter, 19 Vt. 615; 9 Am. & Eng. Enc. Law, 133.

E. E. Cassels, for respondent; *G. N. Williamson* (of counsel), for Frank and Ella Sanford.

The deed was held in trust by appellant, for E. Sanford and his heirs. Gates v. Kelley, 15 N. D. 639, 110 N. W. 770.

The deed was taken in lieu of foreclosure of the mortgage. If the intention at the time was to take the deed in the name of E. Sanford, then it, in effect, runs to and in his name, and must be so held. Comp. Laws 1913, § 6280; Brookings Land & T. Co. v. Bertness, 17 S. D. 293, 96 N. W. 97; Gates v. Kelley, 15 N. D. 639, 110 N. W. 770; Widman v. Kellogg, 22 N. D. 396, 39 L.R.A.(N.S.) 563, 133 N. W. 1020.

Appellant never made any claim to this tract until suit was commenced. Comp. Laws 1913, § 5365; Dalrymple v. Security Loan & T. Co. 9 N. D. 306, 83 N. W. 245; Smith v. Security Loan & T. Co. 8 N. D. 451, 79 N. W. 981; Fleischer v. Fleischer, 11 N. D. 221, 91 N. W. 51.

The title of E. Sanford for twenty-seven years, and the payment by him of the taxes, shows good title. Comp. Laws 1913, § 5471; Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737.

The title being in him, his possession is presumed. Comp. Laws 1913, § 7365.

Appellant is estopped to set up or claim title at this late date. Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35; Kenny v. McKenzie, 25 S. D. 485, 49 L.R.A.(N.S.) 782, 127 N. W. 597.

Fisk, Ch. J. This litigation arose in the district court of Dickey county and is a suit to quiet title to four tracts of land, and to partition the same between the four heirs of one E. Sanford, deceased. But one quarter, to wit, the northwest quarter (N. W. ¼) of section seven (7), township one hundred thirty-one (131), range sixty-three (63), is involved on this appeal, it being conceded that the other three tracts belong to the four heirs who are parties to this action. Plaintiff contends that the tract in dispute belonged to Edward Sanford, deceased, at the time of his death, and that, such decedent having died intestate, the same now belongs to his heirs. The defendant E. H. Sanford contends, on the contrary, that he is the owner of this tract, and the sole question in controversy is as to which of these contentions is correct. Plaintiff had judgment in the court below, and defendant

E. H. Sanford has appealed therefrom and demands a trial *de novo* in this court.

A more detailed statement of the facts is deemed advisable. Edward Sanford, who died intestate in March, 1900, was the husband of Mary S. Sanford (who departed this life in June, 1905), and the father of the plaintiff, W. G. Sanford, and of the defendants Ella R. Sanford, Frank Sanford, and Edward H. Sanford (the appellant). He left a large estate consisting of about 120 quarter sections of land lying in the states of South Dakota, Nebraska, Iowa, and three or four quarters in North Dakota, and other property. In lieu of a will he left the distribution of his property to the probate court to be distributed according to the law of descent. After his death the heirs discovered among his papers a written document designated as "Exhibit 9," which reads as follows:

This is to show that all things pertaining to my home property, consisting of house, lots, barn, outbuildings, and all in the house and buildings, pictures, books, furniture, clothes, provisions, horses, carriages, cow, and every article in said building or on said premises, belong to my wife, Mary S. Sanford; also loan 3416 belongs to my daughter Ella, also 3417 belongs to my son W. G., also loan 3391 belongs to my son Frank.

This was thus done to make them equal to what I have given to my son E. H.,—who has received schooling in Europe,—in Dakota, and $2,400 I recently paid for him in Hogue estate, much more than any other child including the above loan.

I have left no will, the court will distribute equitably.

(Signed) E. Sanford.

The heirs gave full effect to the intention of the decedent as thus expressed by turning over to the heirs mentioned the items of property thus enumerated. The widow, Mary S. Sanford, left a will devising and bequeathing her entire estate to the four children.

The plaintiff, W. G. Sanford, brought this action, as before stated, to partition the four tracts in Dickey county among the four heirs. The defendants Baker, Pettingill, and Thompson were joined as de-

fendants for the purpose of clearing the record title. These defendants make no claim in this action.

The appellant, E. H. Sanford, answered separately, admitting that the three other heirs are equal owners with him in three of the tracts, but that as to the quarter above described he denied that they possessed any interest therein, and by way of counterclaim he alleges that he is the owner in fee under a conveyance from one Levi Wolfersberger of date December 2, 1885, and he asks that the title to said tract be quieted in him.

Defendants Frank and Ella R. Sanford answered jointly, denying that their codefendant E. H. Sanford was the owner of said tract, and alleging that the same belonged to the estate of their father, and further, that any title acquired by E. H. Sanford was in trust for his father, E. Sanford, the deceased, and they pray that judgment be entered as prayed for in the complaint.

The proof shows that E. Sanford, the deceased, earlier in his career, was a practising attorney, and that from 1892 until the time of his death, in 1900, he was engaged principally in negotiating mortgage loans. His residence and place of business were at Morris, Illinois. He was assisted in his business at various times by different members of his family and he also had outside clerical assistance. Up to 1884 he transacted a mortgage loan business with a man by the name of Holmes, who was located in Aberdeen, Dakota, under the firm name of Sanford & Holmes. In 1883 or 1884 the appellant, E. H. Sanford, who was the eldest son, established himself, or was established by his father, in Aberdeen, where he engaged in the mortgage loan business in conjunction with his father. He solicited the loans and forwarded the loan papers to his father in Illinois, who negotiated the same, and the profits or commissions arising therefrom were divided equally between the father and the son. Among the loans thus negotiated was one for a man by the name of Wolfersberger, which loan was negotiated by the father to one William Hogue. After such loan was made Wolfersberger left the country and defaulted in the payment of such loan, as well as on the taxes upon the property, which is the tract here in dispute. The father, E. Sanford, thereafter paid and took up the loan from Hogue, and forwarded the papers to his son, the appellant, in Aberdeen, for foreclosure. Later, the son procured from Wolfers-

berger a warranty deed of the premises running to "C. H. Sanford," but which we shall assume, for the purposes of this case, was an error, and that it was the intention that such deed should run to the appellant.

It appears that appellant in the course of his business conceived the idea of purchasing some of these quarters as an investment on his own account, and to this end he borrowed from one Isaac Hogue certain moneys with which to make such purchases, and the proof shows that he executed and delivered four promissory notes of $800 each, secured by mortgages upon as many quarter sections of land in Brown county, South Dakota. Appellant's father procured these loans for his son, and the proceeds thereof were left in his custody to be paid out as appellant needed them, and the latter testified that but $2,800 thereof was accounted for by his father to him. It is also undisputed that of this sum appellant's father paid and satisfied three of such notes and mortgages, amounting to $2,400, which is the sum mentioned in "Exhibit 9" as having been advanced to the appellant. The proof is not entirely clear as to the state of the account between the appellant and his father at the time of the latter's demise, but appellant testifies that he thinks such accounts would about balance. He says, "I owed my father money at that time and he owed me money. I do not know what the result of an accounting would have been between us,—whether there would be a balance in my favor or a balance in his favor. One would be about equal to the other."

It is appellant's contention that he purchased and paid for the tract in controversy out of his own funds procured from the moneys borrowed from Isaac Hogue; but of this the evidence is not at all satisfactory, and the learned trial court, who had an opportunity of seeing and hearing the witnesses testify, made findings of fact adverse to appellant's contention, and such findings have strong support in the record. The proof is quite clear and satisfactory that appellant's father paid to the estate of William Hogue, who held the Wolfersberger loan, the sum of $463 in satisfaction thereof, and it nowhere appears that this money was furnished by appellant. Indeed, the correspondence between appellant and his father which is contained in the record quite strongly negatives this fact, and tends to show that in procuring the deed from Wolfersberger the appellant was acting

for his father or for the William Hogue estate. If appellant's contention is correct it is strange that nothing is disclosed in the correspondence between himself and his father, or in his father's books of account, corroborating him. The gist of such correspondence with reference to the Wolfersberger loan is as follows: In a letter from appellant to his father he writes: "Wolfersberger is in Pennsylvania, and two or three weeks ago I heard from him to the effect that he would execute a deed to the place if I would assure him that there would be no extra costs or expenses on him for so doing. I expect everyday to receive the deed from him. If it don't come within a short time, I shall foreclose; but I much prefer a deed which cuts off equity of redemption, and which furthermore saves the expense of advertising and sheriff's fees."

Appellant received a letter from his father as follows:

Dear Son:—

Yours of the 3d inst. is received concerning the above loan. I had supposed that this was already in process.

They were in Saturday asking about it. Of course, if you can avoid the expense of ad. and sheriff's fees better do so.

Appellant again wrote his father: "As I have a warranty deed from Wolfersberger for his claim, it is therefore unnecessary to foreclose on this."

And again:

Dear Father:—

Replying to yours of February 2d asking what further had been done in above loan. After you sent me the papers for foreclosure, I got a warranty deed from Wolfersberger by paying him about $5 in cash.

If it was appellant's money that was used in satisfying the Wolfersberger loan to the William Hogue estate, as he would have us believe, it is somewhat strange that such loan papers were not delivered to him. The undisputed proof shows that they were found in the safe of his father after the latter's death, and plaintiff testified that he

thinks appellant was present when they were thus found, and that appellant made no claim to that land or to those papers at that time. The plaintiff, as well as his sister and brother Frank, all testify that appellant never made claim to this tract of land until after the commencement of this action. Moreover, the testimony discloses that appellant assisted his brother and sister in making a list of the lands of their father after his death, and that the tract in controversy was included in such list, and that appellant made no claim as owner thereof. The proof also discloses that the father, for many years prior to his death, paid the taxes on this quarter, and that after his death the heirs or the administrator of the estate paid such taxes for many years. It is also a significant fact that appellant attempted, through a friend of his in Chicago, to procure a tax deed of the quarter in dispute. This is inconsistent with his claim of ownership through the Wolfersberger deed. Appellant testified, first, that such friend, one W. O. Thompson, purchased that land at a tax sale for himself. But he afterwards admitted that it was purchased under his direction, and that the subsequent taxes were paid by Thompson with money furnished by appellant. He testified: "In other words, I was trying to get him a tax deed on the lands which I claimed to own at that time. I claimed to own it and did own, but I did not object to him taking a tax deed on it." And appellant admits that the property was redeemed by the estate out of moneys belonging to it. "Exhibit 10" contained in the record is a letter written by appellant to the treasurer of Dickey county, dated January 25, 1901, in regard to taxes upon three different tracts of land, including the tract in controversy. The letter indicates that a check was inclosed to pay taxes on these tracts, and among other things the letter states: "Kindly issue your receipts for said tracts in the name of 'The heirs of Edward Sanford, deceased,' and return said receipts to me at your early convenience." The record also discloses a letter written by appellant to "Dear Mr. Thompson" as follows: "Herewith inclosed find Chi. draft payable to your order for $23.90. Will you kindly send Hon. Hans Lee, treasurer of Dickey county, at Ellendale, North Dakota, the 1907 taxes (sale of December, 1908) $21.92, plus $1.98 penalty for delinquency, on N. W. ¼ of Sec. 7, T. 131, N. R. 63, Dickey county, N. Dak., being particular to state that you pay said taxes as subse-

quent, *i. e.,* to protect your tax sale certificate upon the same land for the 1906 taxes (sale of December, 1907). When you get returns from him kindly let me know."

Another circumstance disclosed by the testimony which tends to refute appellant's contention that he purchased such tract from Wolfersberger on his own account is his testimony to the effect that as soon as he saw the statement in "Exhibit 9," which his father left, he immediately concluded that his father had made him a present, not only of the $2,400, *but had given him the Dakota lands that stood in his name.* Why should he have arrived at such a conclusion if he owned in his own right the quarter in controversy? He testified: "I made the remark as soon as I saw that statement of $2,400 that father had made me a present of that; that he had now given me the Dakota lands that were in my name."

There are other circumstances disclosed in this record which strongly tend to refute appellant's contention, but we shall not take the time nor the space necessary to refer thereto. Suffice it to say that we are convinced to a moral certainty from this record that the findings of the trial court to the effect that appellant acquired title to this tract from Wolfersberger in trust for his father are correct.

In conclusion, we are agreed that appellant took the deed from Wolfersberger in trust for his father in order to obviate the expense of a foreclosure of the mortgage. Under these facts he became a trustee of the title by operation of law. In brief, the principle recognized in Gates v. Kelley, 15 N. D. 639, 110 N. W. 770, is controlling of the case at bar.

Judgment affirmed.

On Petition for Rehearing.

FISK, Ch. J. A voluminous petition for a rehearing has been filed by appellant which in the main is merely a rehash of the points raised in his brief. We have duly considered the same and fail to discover any sufficient reason for granting a rehearing.

Our attention is therein directed to a few errors in our statement of facts in the opinion, but as we view it these are not of controlling importance as they in no manner materially affect the result. It is no

doubt true, as stated in the petition, that we were in error in saying that "E. Sanford *thereafter* paid and took up the loan from Hogue, and forwarded the papers to his son, the appellant, in Aberdeen, for foreclosure. *Later,* the son procured from Wolfersberger a warranty deed of the premises," etc. The record appears to disclose that the Hogue estate still held the first mortgage at the time foreclosure proceedings were directed by appellant's father, and that the deed was obtained from Wolfersberger by appellant prior to the time his father paid and took up the loan. However, the action was tried and the appeal argued upon the theory that, assuming the Wolfersberger deed was intended to run to appellant, it conveyed the title, either to him in his own right or to him in trust for his father, and not to the Hogue estate. In other words, the court was asked to decide merely whether appellant or his father was the owner of the tract. The overwhelming weight of the testimony tends to show that appellant's contention is not true. The Hogue estate is not a party and makes no claim of title, and when appellant's father paid and satisfied the first mortgage running to the Hogue estate, it left him the holder not only of the second mortgage, but he was subrogated to the estate's interest under the first mortgage.

Another error which crept into the opinion in the statement of facts is that wherein it is stated that "the plaintiff, as well as his sister *and brother Frank*, all testify that appellant never made claim to this tract of land until after the commencement of this action." We were in error in including the name of the brother Frank in the above statement, as it appears he did not testify as a witness, and the opinion is modified accordingly.

The petitioner is mistaken in thinking that we overlooked the rule announced in Carter v. Carter, 14 N. D. 66, 103 N. W. 425. We decided the case in the light of the presumption in appellant's favor which arose from the fact that the deed runs to him, but we think such presumption was clearly overcome by the evidence which satisfied us to a moral certainty of the truth of respondent's contention.

There may be one or two other minor misstatements of fact in the opinion, but if so they are of no controlling importance, and need not be noticed.

The fact that we did not expressly refer to the last contention in

appellant's brief, to the effect that a partnership existed between appellant and his father and that in any event it should be held that the deed was taken by appellant from Wolfersberger in trust for such partnership, and consequently that appellant is the owner of one half of the tract as such former partner, and that he inherited one eighth as heir, is because such contention was not urged here with much seriousness, and we deemed it unnecessary to specially refer thereto. Even if such partnership existed, which fact is denied by respondent, it appears that such partnership related merely to the negotiating of loans, and the act of purchasing this Wolfersberger title was not within the scope of the partnership business. Again, appellant's main contention, that he took this deed in his own right, is, of course, wholly inconsistent with his later contention that it was taken on behalf of the alleged partnership aforesaid.

The petition for a rehearing is denied.

STATE OF NORTH DAKOTA v. OLIVER MACKEY.

(153 N. W. 982.)

Rape — statements of prosecutrix — to school teacher and others — private investigation — not voluntary — not under oath and are hearsay.

Defendant appeals from conviction for statutory rape. Fifty-seven assignments of error appear, but only enough thereof are discussed to entirely destroy plaintiff's case.

1. The testimony of prosecutrix's teacher, the principal of the school, and a lady member of the school board, as to statements made to them by prosecutrix during a private investigation, was improperly admitted upon the trial. Such statements were not voluntary, and, not being under oath, were hearsay.

Rape — testimony by prosecutrix — weak-minded person — memory — times and places — contradictory — unreasonable — conviction on.

2. The only remaining testimony properly admitted was given by the prosecutrix. She was so weak-minded that she had no memory of dates nor conception of time. Her testimony in many material particulars is contradicted by the state's own witnesses, and is so unreasonable that it cannot support a conviction.

Admission of evidence — errors.

3. Other errors, while not necessary to a disposition of the case, set forth in explanation of the action of the jury in convicting the defendant.

Opinion filed June 23, 1915.

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

Reversed.

A. P. Paulson, for appellant.

It is the universal holding of the authorities that each act of carnal intercourse testified to by the prosecutrix constitutes a separate, distinct, and substantive offense. This is elementary. State v. Brown, 58 Iowa, 298, 12 N. W. 318; State v. King, 117 Iowa, 484, 91 N. W. 768; People v. Clark, 33 Mich. 112, 1 Am. Crim. Rep. 660; State v. Bonsor, 49 Kan. 758, 31 Pac. 736; State v. Hilberg, 22 Utah, 27, 61 Pac. 215; State v. Masteller, 45 Minn. 128, 47 N. W. 541; State v. Acheson, 91 Me. 240, 39 Atl. 570; State v. Parish, 104 N. C. 679, 10 S. E. 457; People v. Castro, 133 Cal. 11, 65 Pac. 13; Stone v. State, 45 Tex. Crim. Rep. 91, 73 S. W. 956; People v. Williams, 133 Cal. 165, 65 Pac. 323; People v. Flaherty, 162 N. Y. 532, 57 N. E. 73.

Evidence of prior acts of intercourse is only admissible for the purpose of tending to show the commission of the act upon which a conviction is sought. State v. Scott, 172 Mo. 536, 72 S. W. 897; State v. Patrick, 107 Mo. 147, 17 S. W. 666; note to People v. Molineux, 62 L.R.A. 329; Grabowski v. State, 126 Wis. 447, 105 N. W. 805; Blair v. State, 72 Neb. 501, 101 N. W. 17; People v. Abbott, 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W. 862; State v. Trusty, 122 Iowa, 82, 97 N. W. 989; State v. Palmberg, 199 Mo. 233, 116 Am. St. Rep. 477, 97 S. W. 566; Sykes v. State, 112 Tenn. 572, 105 Am. St. Rep. 972, 82 S. W. 185; Batchelor v. State, 41 Tex. Crim. Rep. 501, 96 Am. St. Rep. 791, 55 S. W. 491; State v. Schueller, 120 Minn. 26, 138 N. W. 937.

Evidence of such acts occurring subsequent to the one on which the prosecution is based is not competent or admissible. Lunn v. State, 44 Tex. 85; Fisher v. State, 33 Tex. 792.

Where separate acts of intercourse are shown or sworn to by the prosecutrix, defendant should not be called upon to defend himself against each of such acts, extending over a period of several months;

the information charges but one act, and the state should have been compelled to elect, and to stand or fall, upon the information. People v. Castro, 133 Cal. 11, 65 Pac. 13; State v. Hilberg, 22 Utah, 27, 61 Pac. 215; People v. Williams, 133 Cal. 165, 65 Pac. 323.

No request of the defendant that the state elect as to which act it would seek conviction on, until after the state had rested. The prosecutrix designated the *time* of the *first* act of sexual intercourse, and then testified as to other acts. It seems settled that the law would imply an election of the first act as the one upon which a conviction would be sought, without the necessity for any request. People v. Jenness, 5 Mich. 305; State v. Acheson, 91 Me. 240, 39 Atl. 570; State v. Hilberg, 22 Utah, 27, 61 Pac. 215; People v. Williams, 133 Cal. 165, 65 Pac. 323; People v. Clark, 33 Mich. 112, 1 Am. Crim. Rep. 660; State v. Palmberg, 199 Mo. 233, 116 Am. St. Rep. 477, 97 S. W. 566; People v. Flaherty, 162 N. Y. 532, 57 N. E. 73.

The only purposes of cross-examination of a defendant charged with crime are to show motive, and to test his credibility. No evidence is competent which is not of a character to throw light on the *issue*. It is never competent to prove, against the defendant on trial for crime, the commission of another crime, simply to show that he is of a criminal disposition. Proof of one crime has no tendency to prove the commission of another crime, unless the two are so connected or related that proof of one has a direct bearing upon the other,—in other words, that such proof tends to show or furnish *motive*. State v. Hazlet, 16 N. D. 444, 113 N. W. 374; State v. LaMont, 23 S. D. 174, 120 N. W. 1104; Com. v. Jackson, 132 Mass. 16; State v. Carson, 66 Me. 116, 2 Am. Crim. Rep. 58; People v. Crapo, 76 N. Y. 288, 32 Am. Rep. 302; People v. Brown, 72 N. Y. 571, 28 Am. Rep. 183; Gifford v. People, 87 Ill. 210; Hayward v. People, 96 Ill. 492; Rice, Crim. Ev. 215; State v. Apley, 25 N. D. 298, 48 L.R.A.(N.S.) 269, 141 N. W. 740; Richardson v. Gage, 28 S. D. 390, 133 N. W. 692, Ann. Cas. 1914B, 534; Carroll v. State, 32 Tex. Crim. Rep. 431, 40 Am. St. Rep. 786, 24 S. W. 100; Owens v. State, 39 Tex. Crim. Rep. 391, 46 S. W. 240; Ball v. State, 44 Tex. Crim. Rep. 489, 72 S. W. 384; Dabney v. State, 82 Miss. 252, 33 So. 973; State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; Holder v. State, 58 Ark.

473, 25 S. W. 279; People v. Molineux, 168 N. Y. 291, 62 L.R.A. 193, 61 N. E. 286.

Impeaching witnesses are not required, in fact, they are not allowed, to speak from their own knowledge as to acts and transactions from which the character or reputation of the other witness has been derived. They must speak from their own knowledge only of what is generally said of the other by those among whom he resides and associates. Crabtree v. Kile, 21 Ill. 180; Crabtree v. Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324.

The evidence must be confined to general reputation, and it cannot be permitted as to particular facts. Taylor v. Ryan, 15 Neb. 573, 19 N. W. 475; Gilliam v. State, 1 Head, 38, 73 Am. Dec. 161; Blue v. Kirby, 1 T. B. Mon. 195, 15 Am. Dec. 95; Shaw v. Emery, 42 Me. 59; Root v. Hamilton, 105 Mass. 22; Foster v. Newbrough, 58 N. Y. 481; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; Rudsdill v. Slingerland, 18 Minn. 380, Gil. 342; Newman v. Mackin, 13 Smedes & M. 383; Spears v. Forrest, 15 Vt. 435; Thurman v. Virgin, 18 B. Mon. 792; People v. Yslas, 27 Cal. 631; State v. Morse, 67 Me. 428; Kilburn v. Mullen, 22 Iowa, 498; People v. Josephs, 7 Cal. 129.

A statement made by the complainant, within meaning of the law, must be a voluntary act of the injured party; it is the voluntary recital of a wrong that is received, to strengthen the testimony of a woman who claims that she has been ravished. State v. Bebb, 125 Iowa, 494, 101 N. W. 189; State v. Werner, 16 N. D. 83, 112 N. W. 60; People v. Wilmot, 139 Cal. 103, 72 Pac. 838; Cunningham v. People, 210 Ill. 410, 71 N. E. 389; Parker v. State, 67 Md. 329, 1 Am. St. Rep. 387, 10 Atl. 219; State v. Pollard, 174 Mo. 607, 74 S. W. 969; State v. Peres, 27 Mont. 358, 71 Pac. 162; 33 Cyc. 1468.

The statement must be a part of *res gestæ*. It was not so in this case. State v. Murphy, 17 N. D. 58, 17 L.R.A.(N.S.) 609, 115 N. W. 84, 16 Ann. Cas. 1133; Rice, Ev. §§ 212 et seq.; People v. Lane, 100 Cal. 379, 34 Pac. 856; People v. Tucker, 104 Cal. 440, 38 Pac. 195; Cole v. State, 125 Ga. 276, 53 S. E. 958; Warrick v. State, 125 Ga. 133, 53 S. E. 1027; Johnson v. State, 129 Wis. 146, 5 L.R.A. (N.S.) 809, 108 N. W. 55, 9 Ann. Cas. 923; Stevison v. State, 48 Tex. Crim. Rep. 601, 89 S. W. 1072; State v. Mickler, 73 N. J. L. 513, 64 Atl. 148; 2 Jones, Ev. §§ 347, 348 and notes.

If not a part of the *res gestæ,* such statements are never admitted as original declarations. They are only for the purpose of corroboration. Lawson v. State, 17 Tex. App. 292; Thompson v. State, 38 Ind. 39; Phillips v. State, 9 Humph. 246, 49 Am. Dec. 709; Griffin v. State, 76 Ala. 29; Laughlin v. State, 18 Ohio, 99, 51 Am. Dec. 444; State v. Emeigh, 18 Iowa, 122; State v. Mitchell, 68 Iowa, 116, 26 N. W. 44; State v. De Wolf, 8 Conn. 93, 20 Am. Dec. 90.

If the injured female is not produced as a witness, or is incompetent by reason of immature age, evidence of her statements made soon after the commission of the deed cannot be admitted. People v. McGee, 1 Denio, 19; Weldon v. State, 32 Ind. 81; People v. Graham, 21 Cal. 261; Com. v. Gallagher, 2 Clark (Pa.) 297; State v. Emeigh, 18 Iowa, 122.

Such evidence is confined to corroboration, and cannot be used to supply additional facts not otherwise proved. State v. Wheeler, 116 Iowa, 212, 93 Am. St. Rep. 236, 89 N. W. 978; Scott v. State, 48 Ala. 420; State v. Shettleworth, 18 Minn. 208, Gil. 191; Reg. v. Guttridge, 9 Car. & P. 471; State v. Dudley, 147 Iowa, 645, 126 N. W. 813; State v. Wheeler, 116 Iowa, 212, 93 Am. St. Rep. 236, 89 N. W. 978; State v. Pollard, 174 Mo. 607, 74 S. W. 969; Cunningham v. People, 210 Ill. 410, 71 N. E. 389.

The court clearly erred in admitting all the evidence of the several acts of intercourse as testified by the complaining witness. State v. Acheson, 91 Me. 240, 39 Atl. 570; People v. Williams, 133 Cal. 168, 65 Pac. 323; State v. Palmberg, 199 Mo. 233, 166 Am. St. Rep. 476, 97 S. W. 566.

While an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond doubt that the error of which complaint is made did not and could not have prejudiced the rights of the objecting party. Derry v. Cary, 5 Wall. 795, 18 L. ed. 653; Norfolk & P. Traction Co. v. Miller, 98 C. C. A. 453, 174 Fed. 607; Gilmer v. Higley, 110 U. S. 47, 28 L. ed. 62, 3 Sup. Ct. Rep. 471; Taggart v. Bosch, 5 Cal. Unrep. 690, 48 Pac. 1092; Thomas v. Carey, 26 Colo. 485, 58 Pac. 1093; Norfolk & W. R. Co. v. Briggs, 103 Va. 105, 48 S. E. 521; Henry v. Colorado Land & Water Co. 10 Colo. App. 14, 51 Pac. 90; Cooke v. McAleena, 18 Misc. 219, 41 N. Y. Supp. 479; Comaskey v. Northern P. R. Co. 3 N. D. 279, 55 N. W. 732; Moore

v. Booker, 4 N. D. 558, 62 N. W. 607; Hegar v. De Groat, 3 N. D. 354, 56 N. W. 150; McKay v. Leonard, 17 Iowa, 569; Freeman v. Rankins, 21 Me. 446; Hayne, New Trial, § 287.

M. J. Englert, State's Attorney, and *H. A. Olsberg,* Assistant State's Attorney, for respondent.

The courts are becoming more unanimous in the view that statutory rape cases form an exception "to the general rule that, upon a trial for an alleged offense, the commission of another offense cannot be shown." State v. Allison, 24 S. D. 622, 124 N. W. 747.

In prosecution for rape committed upon a girl under the age of consent and without force, evidence is admissible of other acts of intercourse between defendant and the prosecuting witness. State v. Reineke, 89 Ohio St. 390, L.R.A. 1915A, 138, 106 N. E. 52; People v. Thompson, 212 N. Y. 249, L.R.A. 1915D, 236, 106 N. E. 78, Ann. Cas. 1915D, 162; People v. Neely, 171 Mich. 249, 137 N. W. 150; People v. Duncan, 261 Ill. 339, 103 N. E. 1043; State v. Sysinger, 25 S. D. 110, 125 N. W. 879, Ann. Cas. 1912B, 997; State v. Rash, 27 S. D. 185, 130 N. W. 91, Ann. Cas. 1913D, 656; Evers v. State, 84 Neb. 708, 121 N. W. 1005, 19 Ann. Cas. 96; State v. Cannon, 72 N. J. L. 46, 60 Atl. 177; State v. Willett, 78 Vt. 157, 62 Atl. 48; State v. Sargent, 62 Wash. 692, 35 L.R.A.(N.S.) 173, 114 Pac. 868; State v. Borchert, 68 Kan. 360, 74 Pac. 1108; People v. Soto, 11 Cal. App. 431, 105 Pac. 420; State v. Coss, 53 Or. 462, 101 Pac. 193; State v. Trusty, 122 Iowa, 82, 97 N. W. 989; State v. Brown, 85 Kan. 418, 116 Pac. 508; State v. Schueller, 120 Minn. 26, 138 N. W. 937; People v. Nichols, 159 Mich. 355, 124 N. W. 25; Morris v. State, 9 Okla. Crim. Rep. 241, 131 Pac. 731; Sykes v. State, 112 Tenn. 572, 105 Am. St. Rep. 972, 82 S. W. 185; State v. Richey, 88 S. C. 239, 70 S. E. 729; State v. Peres, 27 Mont. 358, 71 Pac. 162; Boyd v. State, 81 Ohio St. 239, 135 Am. St. Rep. 781, 90 N. E. 355, 18 Ann. Cas. 441; State v. Hardin, 63 Or. 305, 127 Pac. 789; State v. Lancaster, 10 Idaho, 410, 78 Pac. 1081; State v. Scott, 172 Mo. 536, 72 S. W. 897.

The courts are admitting evidence of subsequent acts of intercourse. People v. Soto, 11 Cal. App. 431, 105 Pac. 420; State v. Henderson, 19 Idaho, 524, 114 Pac. 30; Woodruff v. State, 72 Neb. 815, 101 N. W. 1114; Leedom v. State, 81 Neb. 585, 116 N. W. 496; Morris v.

State, 9 Okla. Crim. Rep. 241, 131 Pac. 731; Sykes v. State, 112 Tenn. 572, 105 Am. St. Rep. 972, 82 S. W. 185; State v. Hardin, 63 Or. 305, 127 Pac. 789; State v. Brown, 85 Kan. 418, 116 Pac. 508; State v. Sebastian, 81 Conn. 1, 69 Atl. 1054; Levy v. Territory, 13 Ariz. 425, 115 Pac. 415; State v. Richey, 88 S. C. 239, 70 S. E. 729; State v. Henderson, 243 Mo. 503, 147 S. W. 480; Battles v. State, 63 Tex. Crim. Rep. 147, 140 S. W. 783; Smith v. State, 64 Tex. Crim. Rep. 454, 142 S. W. 1173; Lott v. State, — Tex. Crim. Rep. —, 146 S. W. 544; Cain v. State, — Tex. Crim. Rep. —, 153 S. W. 147; Proper v. State, 85 Wis. 615, 55 N. W. 1035; People v. Neely, 171 Mich. 249, 137 N. W. 150; Harmon v. Territory, 15 Okla. 147, 79 Pac. 765; People v. Abrams, 249 Ill. 619, 94 N. E. 985.

The state directed its main proof to the first alleged act of intercourse, and, by so doing, elected as to the charge upon which it would seek conviction. This is apparent, and all that was necessary. State v. Rash, 27 S. D. 185, 130 N. W. 91, Ann. Cas. 1913D, 656.

Upon this point also, in such cases, courts are very liberal. State v. Sysinger, 25 S. D. 110, 125 N. W. 879, Ann. Cas. 1912B, 997; State v. Scott, 172 Mo. 536, 72 S. W. 897; State v. Higgins, 121 Iowa, 19, 95 N. W. 244; Bishop, Statutory Crimes, § 682.

The sole purpose of the evidence of prior acts of intercourse was to *prove the offense charged.* An election is presumed under such circumstances. State v. Acheson, 91 Me. 240, 39 Atl. 570; State v. Smith, 22 Vt. 74; State v. Crimmins, 31 Kan. 376, 2 Pac. 574.

The statements of the prosecuting attorney made in court, with reference to the time, the evidence given, and the charge of the court, all taken together, amount to an election. Wells v. State, 52 Tex. Crim. Rep. 153, 105 S. W. 820; Cox v. State, — Tex. Crim. Rep. —, 86 S. W. 1021; Leedom v. State, 81 Neb. 585, 116 N. W. 496; State v. Hasty, 121 Iowa, 507, 96 N. W. 1115.

This state is committed to the rule that a very liberal cross-examination of the defendant is permitted, when he takes the witness stand in his own behalf. State v. Apley, 25 N. D. 298, 48 L.R.A.(N.S.) 269, 141 N. W. 740; State v. Kent (State v. Pancoast) 5 N. D. 551, 35 L.R.A. 518, 67 N. W. 1052; State v. Rozum, 8 N. D. 557, 80 N. W. 477; State v. Ekanger, 8 N. D. 559, 80 N. W. 482; Territory v.

O'Hare, 1 N. D. 30, 44 N. W. 1003; State v. Malmberg, 14 N. D. 523, 105 N. W. 614.

The defendant may show that the prosecuting witness has been an inmate of a house of prostitution. Such evidence goes to the credibility of the witness. The rule is no different when the defendant himself assumes the role of witness in his own behalf. Yanke v. State, 51 Wis. 464, 8 N. W. 276; Tla-Koo-Yel-Lee v. United States, 167 U. S. 274, 42 L. ed. 166, 17 Sup. Ct. Rep. 855; De Lucenay v. State, — Tex. Crim. Rep. —, 68 S. W. 796; State v. Boyd, 178 Mo. 2, 76 S. W. 979; Flohr v. Territory, 14 Okla. 477, 78 Pac. 565; Rhea v. State, 104 Ark. 162, 147 S. W. 463; Wilson v. State, 71 Tex. Crim. Rep. 426, 160 S. W. 967; Leonard v. State, 106 Ark. 449, 153 S. W. 590; Miller v. Journal Co. 246 Mo. 722, 152 S. W. 40, Ann. Cas. 1914B, 679; State v. Harris, 150 Mo. 56, 51 S. W. 481; State v. Sysinger, 25 S. D. 110, 125 N. W. 879, Ann. Cas. 1912B, 997; State v. Denny, 17 N. D. 519, 117 N. W. 869.

The state qualified its impeaching witnesses by showing acquaintance, —acquaintance with those with whom they had talked, and in the community where the witnesses all resided, and by showing the opportunity to know of the general reputation of the witnesses whose testimony was sought to be impeached. Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; Heath v. Scott, 65 Cal. 548, 4 Pac. 557; Robinson v. State, 16 Fla. 835; Phillips v. Kingfield, 19 Me. 375, 36 Am. Dec. 760; French v. Millard, 2 Ohio St. 44; Bucklin v. State, 20 Ohio, 18; State v. Madison, 23 S. D. 584, 122 N. W. 647; Fisher v. Conway, 21 Kan. 18, 30 Am. Rep. 419.

The complaints and recitals made by the prosecutrix to her teachers, in answer to questions, were properly received in evidence. State v. Dudley, 147 Iowa, 645, 126 N. W. 813; State v. Peres, 27 Mont. 358, 71 Pac. 162; People v. Gage, 62 Mich. 271, 4 Am. St. Rep. 854, 28 N. W. 835; Rex v. Osborne [1905] 1 K. B. 551, 74 L. J. K. B. N. S. 311, 69 J. P. 189, 53 Week. Rep. 494, 92 L. T. N. S. 393, 21 Times L. R. 288, 2 Ann. Cas. 830; People v. Brown, 53 Mich. 531, 19 N. W. 172.

Such evidence was properly admitted under the law of this state. State v. Werner, 16 N. D. 83, 112 N. W. 60; Territory v. Keyes, 5

Dak. 244, 38 N. W. 440; State v. Werner, 16 N. D. 83, 112 N. W. 60; State v. Dudley, 147 Iowa, 645, 126 N. W. 813.

BURKE, J. Defendant appeals from conviction for statutory rape. There are fifty-seven assignments of error, but we will discuss only those assignments which, in our opinion, result in the total destruction of the state's evidence, and necessitate a dismissal of the action. The facts will appeal more fully in the opinion. For the purposes of this statement, it suffices to say that defendant is a married man living with his family, and engaged in the plumbing and boiler-making business at Valley City, where he has resided for more than thirty years. At the time of his arrest he was over fifty-six years of age, and was serving as an alderman of that city. The complaining witness, Bertha Bonen, was twelve years of age at the time of the alleged offense, and is concededly very backward in mental development. Respondent describes her as follows: "Her mind was so lacking in intelligence that she could only give physical facts. The girl, though of more than average size physically for a girl of her age, had the mind of a child of about six, seven, or eight years old. It was a literal impossibility for her to fix any dates." The trial court in his memorandum opinion says, "(she is) rather large, with a mind of a child four or five years of age in certain respects, advanced to the third grade in her studies." During the year 1913, she attended the Valley City public schools. About the last of October, her teacher took from her possession a note of such indecent nature that it was referred to the principal of the school, who summoned the prosecutrix, and examined her as to her moral conduct. As a result of this investigation, prosecutrix admitted immoral relations with several young boys, to one of whom the note was addressed; but she did not mention defendant. A series of investigations, by a member of the school board, the principal of the school, and the teacher, followed, whereat the prosecutrix, in response to questions, implicated defendant and another business man of Valley City. Arrests followed, resulting in the conviction of defendant and the acquittal of the other business man, who, however, was tried before another judge and in a different county. Upon this appeal, defendant seeks to destroy all of the evidence offered by the state, which consists, by the way, entirely of statements by the prosecutrix upon the trial,

and her statements to the teacher and school board above mentioned. It is contended that the testimony of the prosecutrix is so self-impeached and impossible of belief that the court should have advised the jury to return a verdict of not guilty.

(1) Before taking up the question of the sufficiency of the evidence, we will discuss a few assignments of error, which dispose of the testimony of all witnesses, except the prosecutrix. As already intimated, prosecutrix was given a severe examination by the teacher, the principal, and the lady member of the school board. This investigation of itself was entirely proper, and well within the duties of the three ladies who conducted the same, whose motives were the highest. They performed a duty they owed to the child, the school, and the community, and are entitled to the highest praise. Whether or not they should have been allowed to narrate the unsworn statements made to them by the girl is an entirely different question. Prosecutrix's teacher says that at these meetings, prosecutrix was requested to come, and did not come voluntarily. That all of the statements made by her were in response to questions. The principal says that there had been four meetings with the prosecutrix.

She testifies in response to questions:

Q. She was put through a pretty fair system of cross-examination, was she not?

A. No, it was not. Questions put in a general way.

Q. Inquired as to who the different parties were, etc.?

A. Yes.

Q. Did you suggest any of these?

A. No.

Q. Did you not tell her it was better for her to tell everything as it was, not to keep back anything at any one of the meetings?

A. There may have been something said to that effect, just simply telling her it was always better to tell the truth. She talked quite freely. She simply added a few more names, that is all, at the second meeting.

Q. But the third time?

A. She added this one other name. (The defendant's was the name added at the third meeting.)

Mrs. W., the member of the school board, testifies:

A. The answers were in response to questions. She did not appear before us at the meeting under any suggestions coming from her and indicating to us that she wanted to discuss the subject with us. She came in response to our request. We asked her questions.

All of those witnesses were allowed to testify that prosecutrix at the third meeting, and in response to questions, stated to them that she had sexual intercourse with the defendant five times, the last time being November 8th. The evidence was offered as corroboration of the girl's testimony, and for the purpose of fixing the date of the last act of intercourse. It is apparent that the statement of the prosecutrix to these persons was not spontaneous, nor voluntary, but, in fact, made only after repeated questionings, and was in no sense part of the *res gestæ*. It is apparent that the teachers and school board were making repeated and thorough investigations, and using considerable moral force upon the girl to arrive at the bottom of the whole affair. The statement was made more than a year after the first act of intercourse, and at least six days after the last claimed by the state, and at the third meeting, at least, of such investigation. If the statements were admissible at all, it was not as original evidence, but for the purpose of corroboration. The reason for this exception to the general hearsay rule is that the outraged female is prompted by instinct to make known her wrongs and to seek sympathy and assistance. When given spontaneously and promptly, her unsworn statements are received in evidence with the same force as though given under the sanctity of an oath. In State v. Werner, 16 N. D. 83, 112 N. W. 60, this court says: "Appellant's seventh assignment of error is predicated upon the ruling of the court in permitting the mother of the child to testify as to statements made to her by such child. The testimony complained of related to statements made by Lena to her mother on June 16, being three days after the offense was committed, in which she told her mother, in effect, that defendant had taken indecent liberties with her person. These statements were merely hearsay, and were incompetent, therefore, in chief, to prove the commission of the offense, unless they come within some exception to the general rule as to hearsay testimony. The courts hold quite generally, however, that it is proper to prove that the

prosecutrix, recently after the commission of the offense, made complaint to others as to the commission of such offense, basing their decision upon the ground that such testimony is admissible as being in corroboration of her testimony in court. Other courts base their decisions, sustaining the admissibility of such testimony, upon the ground that such statements are a part of the *res gestæ;* while others give as a reason for the rule that the failure to complain of the outrage is a circumstance indicating that the female was a consenting party to the act. The latter reason does not appeal to us with much force; for, if such is the reason upon which the rule is based, then such rule could not well apply to a case such as this, where the outraged female is but eight years of age, and hence below the age of consent. If the rule is to apply at all, we think it certainly should apply in a case of this kind. We think the better rule is that such proof may be admissible as part of the *res gestæ, if the statement was made immediately following the commission of the crime, in which event the particulars of the complaint may be proved as part of the state's case in chief, the same as any facts which are a part of the res gestæ.* [Italics ours.] . . . In most jurisdictions, such testimony in the first instance is restricted to a mere statement of the fact that a complaint was made, without disclosing the particulars thereof." At 33 Cyc. 1462, it is said: "Nor, as a rule, are her declarations admissible as proof of the crime charged, or as corroborating evidence, unless they are part of the *res gestæ,* or unless they are admissible under the rules in the particular jurisdiction as to the admissibility of complaints. But her declarations immediately after the outrage are admissible as part of the *res gestæ.*" And at page 1466: "So, also, if the statements are made immediately after the commission of crime, they are admissible as part of the *res gestæ.* . . . The force of the testimony as corroboration does not depend entirely on the lapse of time between the commission of the crime and the complaint, but the jury should consider it in connection with surrounding circumstances, such as intimidation by threats, or lack of opportunity; but if the complaint is long delayed, and no reason for the delay is shown, the particulars of the complaint lose all force as corroboration, and are not admissible. As a rule, statements made in answer to questions, or otherwise involuntarily elicited, do not constitute such *complaint* as is admissible under the rules above stated."

State v. Hazlett, 14 N. D. 490, 105 N. W. 617; People v. Wilmot, 139 Cal. 103, 72 Pac. 838; Cunningham v. People, 210 Ill. 410, 71 N. E. 389; State v. Bebb, 125 Iowa, 494, 101 N. W. 189; Parker v. State, 67 Md. 329, 1 Am. St. Rep. 387, 10 Atl. 219; State v. Pollard, 174 Mo. 607, 74 S. W. 969; State v. Peres, 27 Mont. 358, 71 Pac. 162; State v. Dudley, 147 Iowa, 645, 126 N. W. 812; Conger v. State, 63 Tex. Crim. App. 312, 140 S. W. 1112; State v. Burgess, 259 Mo. 383, 168 S. W. 740; 2 Jones, Ev. §§ 347, 348.

It is evident, in the case at bar, the statements were not voluntary nor spontaneous, nor in any manner part of the *res gestæ*. They are, therefore, inadmissible even as corroboration of the girl's testimony.

(2) But more than this, the state frankly concedes that the testimony was not offered solely as corroboration, but for the purpose of fixing the date of the last act of intercourse. In other words, this hearsay testimony was absolutely necessary to their case, and without it the prosecution must fail. It is too plain for argument, that the evidence was wrongly admitted for that purpose. Holding, as we do, that the testimony of the three women mentioned was improperly received, we turn to the consideration of the evidence remaining. This consisted entirely of the testimony of prosecutrix. To rely upon a conviction, the state must maintain both the truthfulness of the girl, and a mental strength to remember and narrate the facts. We have already set out the state's attorney's candid opinion of the girl. He says: "She had the mind of a child of about six, seven, or eight years of age." The trial judge corroborates this view. Her testimony proves it. She admits upon the stand, though but thirteen years of age, to have been morally delinquent for nearly two years. She says: "I was in trouble with the boys before I told the teachers. Two of them I know. A whole lot of them I do not know. I do not know their names. There was a great many of them. Too many to count." Dr. Pray, the state's own witness, testifies as follows: "She could have had sexual intercourse with a grown man without any pain on her part. The parts were large. I was able to insert my three fingers without the least show of pain on her part. The condition I found her in could not be produced by any intercourse on five different occasions. The organs showed repeated intercourse. The parts resembled those usually found on immoral women. They were ballooned, large, and flabby. That

condition is not likely to develop rapidly. It usually takes years, and is due to continued and repeated sexual intercourse." Prosecutrix upon the stand remembered no dates, and the state's attorney was compelled to admit that the same must be supplied by the testimony of the teachers. The prosecutrix testified that she had had only five acts of intercourse with the defendant, and that on four of these occasions she was accompanied by one Esther Hanson; that upon all of such occasions the defendant had sexual intercourse with both herself and Esther Hanson, and upon at least three of these occasions the acts took place in the presence of both girls. That she falsified as to Esther Hanson is conclusively established by the testimony of Dr. Pray, who, as we have already said, was called as a witness upon the part of the state. The doctor says: "I am acquainted with Esther Hanson. I examined her early in November, last year, 1913. The examination was made to the extent of the genital organs. Made at the request of Mrs. M., one of the juvenile officers. The condition of things were just these. I had a reason to expect a certain thing, and was surprised to find that she had unusually small parts, and it is my opinion that she never completed sexual intercourse. That was my judgment at that time, based upon examination." Cross-examination: "I made just as careful an examination as possible. I was not looking for venereal diseases. I do not think it would have been possible to have had sexual intercourse, in the condition I found her vagina, except with a boy. The parts were unusually small. The entrance would barely admit my little finger with some inconvenience. I was long enough in making the examination to satisfy myself. I did not make the examination at the request of the state, only so far as Mrs. M. may represent the state, or yet on your part. It would not be impossible to make penetration. She was very small. It would require force. She had a marginal hymen and it was not ruptured. . . . It was a narrow hymen and did not show evidence of rupture."

Prosecutrix testified that the acts were committed in the front room of a public office building upon one of the main streets in Valley City. She says: "He did not pull down the curtains. It was in the afternoon, about 4 o'clock. Esther was there all the time. The door was unlocked all the afternoon. The public came in and out. He did not say anything to me before he did this. I do not remember that he

talked about it. About 3 o'clock he laid Esther on the floor and did it to her, and after he got through with Esther, he laid me down on the floor and did it to me. Both of us at the same time. That was the first fall I was here, 1913. It was after the snow fell. After the snow was on the way. The grass was still green. Shortly after school started." She further testified: "There was a glass front on the building, and you could see all parts of the room from the sidewalk by looking through the glass. We did this on the side of the safe, work bench, away from the door." In contradiction of this testimony, defendant called the chief of police of Valley City and other witnesses, to testify to the public location of the room in question. The general nature of such testimony is reflected in the following extract from the testimony of the chief of police: "I would say that I go by Mr. Mackey's office about twelve or fifteen times a day. I am familiar with the office and the arrangements of the furniture. You can see from the southwest corner clear to the desk. Looking in from the west window, at the south of the door, you can see into the building nearly all, except the northwest corner; about 2 feet in that corner cannot be seen. You can see under the table, and through where the desk is, on the north side of the room. You can see into the building most easily from 10 o'clock on until sunset." That a man in his sane mind would attempt a crime of this nature in a public place of business, with the door unlocked and the curtains up, facing upon one of the business streets of the city, at 4 o'clock in the afternoon, is absolutely unbelievable. That this man of fifty-six years of age had even the physical ability to have intercourse with the two girls immediately following each other is highly improbable. Taken in connection with the testimony of the doctor, that the other girl had never had intercourse with a man, it places prosecutrix's testimony outside of the pale of belief. No human being should be convicted upon such testimony. Defendant's testimony is to the effect that the prosecutrix, with other children, sometimes frequented his place of business. That he was fond of children, and often gave them small sums of money to buy candy. He says: "The first time I saw her was about a year ago. This little girl and her brother came into the office. She said she was taking dinner to her father, up at the livery barn. Page Persons, now deceased, who officed with me, gave them both some money. She came in quite often in January. Her

little brother was with her most of the time. At last they began to ask me to give them a little money. She was dressed very poorly. The side was out of her shoes, just the same as no shoes at all. They were full of holes. She had no overshoes. . . . I gave her money, because I knew she was hard up, and I wanted to help her. . . . I only tried to help her what she needed." He further testifies that she sometimes delivered washing, that her mother had done for other persons officing near him. He absolutely denies having intercourse with the prosecutrix. The state offered some further testimony, but none of it in any way relating to the commission of the crime. The witness, Henry, testified that he had seen prosecutrix in defendant's place of business. This was not denied by the defendant. Will Bonen, father of the prosecutrix, testified as to her age. Dr. Pray, called by the state, gives the testimony relative to prosecutrix's physical condition, already mentioned. Two other witnesses testified that Esther Hanson's reputation for truth and veracity was poor. This is, we believe, immaterial, in view of the testimony of the doctor, that she was truthful when she denied having had intercourse with the defendant. Davidson, a member of the school board, related a conversation with defendant, but not in any manner showing his guilt.

Many states have statutes forbidding conviction unless the prosecutrix is corroborated; under our laws, the conviction would stand if the testimony of the prosecutrix was entitled to belief. It is, however, so inherently unreasonable, that a conviction should not be allowed to stand. The trial court should have advised the jury to acquit.

(3) It is unnecessary to a decision that other errors be discussed. But in view of the fact that the jury has found the defendant guilty, we might mention a few of those errors which, undoubtedly, had much to do with the conviction. While defendant was upon the stand and had merely denied the offense, he was given a cross-examination which, while skilful, was illegal, and highly prejudicial to his rights. For instance, he was asked about his marriage in 1884, almost thirty years before the offense charged.

We give a sample of the examination:

The first time I was married in Oriska, North Dakota, the second time in Moorhead, Minnesota. The first time I married was in 1884, I think, or 1886. . . .

Q. How long did you live with the woman you claim to have married without a license, the first time? (Objection.)

A. I do not know. Four or five years. Something like that.

Q. But you never finally married the first woman, did you?

A. I did.

Q. Finally married her, too?

A. I do not know whether I married the first woman according to law; did not know I was required to have a license.

Q. You were married in this state?

A. Went to the officer. Had to do what the officer told me.

Q. Do you mean to tell us any officer ever told you, Mr. Mackey, you could not get a license to marry a woman? (Objection.)

Q. Now, did you ever secure a marriage license to marry the first woman?

A. I never did.

Q. You finally left her, did you not, Mr. Mackey?

A. I did not. She left me. We had trouble between us, and we agreed to separate. We got a divorce. I started divorce proceedings here, but I got notice out in Washington that she had got a divorce out there, and I dropped the proceedings here, and let her get the divorce. She married again, and has been married a long time. We got a divorce a great many years ago.

What bearing this testimony had upon the offense for which defendant was tried is not clear to us. The state contends that it was asked to test his credibility as a witness, and cites us to State v. Apley, 25 N. D. 298, 48 L.R.A.(N.S.) 269, 141 N. W. 740. This ruling is not sustained by that case. In fact, it holds the contrary. The rule is stated in a note to said case, in the L.R.A. citation at page 273, where it is said: "The right of cross-examination is not a privilege to turn the searchlight of inquiry upon all the indiscretions of a witness's past life, but it is a right which must be exercised within reasonable limitations, and subject, to some extent, to control under the discretion of the trial judge. The question asked should have some immediate relation to the subject under inquiry, and should be of such a nature as to show whether or not the witness was entitled to be believed. Such evidence is ordinarily called impeachment by cross-examination, and when per-

missible for that purpose, the inquiry should relate to such subjects as would influence the judgment of an unbiased person in determining whether or not the witness is entitled to be believed, and has probably told the truth on the witness stand. When such questions relate to specific acts in the life of a witness, they should be confined to such matters, in point of time, as would produce a reasonable inference from an admission on the part of the witness, that he was not entitled to be believed, or as necessarily impaired his credit." In the case at bar, the witness is held up to scorn before the jury for having failed to obtain a marriage license to marry his first wife, in 1884. When we remember that those questions were asked in apparent ignorance of the fact that the earliest requirement of a marriage license in Dakota is found in chapter 91, Sess. Laws 1890, six years after the marriage of defendant, and that if defendant at the time of his first marriage had searched the entire territory he could have found no officer to give him a license, we see something of the injustice that has been done in this instance. There are other instances which we will not take the time to discuss, which show to our mind that defendant did not have a fair trial. In view of our conclusions above announced, they will not be discussed. Judgment of the trial court is reversed.

FISK, J.: I think a new trial should be granted for several reasons stated in the opinion, and concur in the result.

JAMES McDOWALL, John McDowall, William McDowall, Janet Farley, Barbara Jane McDowall, Elizabeth Radcliffe, Mary McLean, Peter Cameron, and David T. McDowall v. JOHN HERBERT, Edward I. Donovan, Mary Donovan, Isaac Ullyot, and Ambrose Ullyot.

(153 N. W. 464.)

Action to quiet title — trial de novo — heirs at law — deceased fee holder — mortgage foreclosure — sheriff's deed on — tax deeds — possession under.

Action to quiet title to land. Trial *de novo*. Plaintiffs, heirs at law of deceased fee title holder, and the grantee of a sheriff's deed on mortgage

foreclosure, bring action for the use and benefit of their grantee against the holder of certain tax deeds who has been for many years in possession of the land.

1. Following Munroe v. Donovan, post, 228, just decided by this court, it is held that the tax deed issued upon tax sale for the year 1894 is valid, and title is quieted in the defendants.

Opinion filed April 23, 1915. Rehearing denied July 1, 1915.

Engerud, Holt, & Frame and *W. A. McIntyre,* for plaintiffs and appellants, and for defendant and appellant, *John Herbert.*

The deeds from Herbert and from the McDowalls to Champine are void, but actions can be brought and maintained in the names of the grantors for the benefit of Mr. Champine. Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258.

Courts will presume that the common law prevails in a sister state, and such is our statute. Rev. Codes 1905, § 7317, subdiv. 41, Comp. Laws 1913, § 7936; Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308.

In theory of the law, change in the name of a corporation has no effect on the identity of the corporation. 7 Am. & Eng. Enc. Law, 687; Welfley v. Shenandoah Iron, Lumber Min. & Mfg. Co. 83 Va. 768, 3 S. E. 376.

A change in the name of a corporation does not change its identity, or affect its title to property. Girard v. Philadelphia, 7 Wall. 1, 19 L. ed. 53.

A change of corporate name does not exonerate it from liability previously created, if it is substantially the same. Northwestern College v. Schwagler, 37 Iowa, 577; Wilhite v. Convent of Good Shepherd, 117 Ky. 251, 78 S. W. 138; South Carolina Mut. Ins. Co. v. Price, 67 S. C. 207, 45 S. E. 173; Peever Mercantile Co. v. State Mut. F. Asso. 23 S. D. 1, 119 N. W. 1008, 19 Ann. Cas. 1236.

Such change does not amount to the creation of a new corporation. 7 Am. & Eng. Enc. Law, 686, 687; 1 Thomp. Corp. § 289; McCloskey v. Doherty, 97 Ky. 300, 30 S. W. 649.

Whatever is notice enough to excite attention, and put the party on guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to

lead him to a fact, he shall be deemed conversant with it. Wetzler v. Nichols, 53 Wash. 285, 132 Am. St. Rep. 1075, 101 Pac. 867; Shauer v. Alterton, 151 U. S. 607, 38 L. ed. 286, 14 Sup. Ct. Rep. 442; Johnson v. Erlandson, 14 N. D. 521, 105 N. W. 722; Hingtgen v. Thackery, 23 S. D. 329, 121 N. W. 839; Webb v. John Hancock Mut. L. Ins. Co. 162 Ind. 616, 66 L.R.A. 632, 69 N. E. 1006.

The notice of the foreclosure of the mortgage was sufficient to apprise any and all persons interested, not only of the foreclosure of a certain specified mortgage, the names of the parties, the amount claimed to be due, the time and place of sale, and full description of the premises, but of the identity of the corporation. Iowa Invest. Co. v. Shepard, 8 S. D. 332, 66 N. W. 451; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132.

The laws of 1895 were wholly prospective, and did not affect the issuance of deeds under the 1890 revenue law; and the county auditor was the proper and necessary officer to execute deeds under tax sales made under the 1890 law. Fisher v. Betts, supra.

The deed here in question is void, for the further reason that it does not conform to the form or deed provided by the laws of 1891, and is of no force. Beggs v. Paine, 15 N. D. 438, 109 N. W. 322.

The recitals in such deeds must conform to the requirements of the law. Batelle v. Knight, 23 S. D. 161, 120 N. W. 1102, 20 Ann. Cas. 456; King v. Lane, 21 S. D. 101, 110 N. W. 37; Battelle v. Wolven, 22 S. D. 39, 115 N. W. 99; Youker v. Hobart, 17 N. D. 299, 115 N. W. 839.

A deed void on its face does not set in motion the statute of limitations. Beggs v. Paine, 15 N. D. 436, 109 N. W. 322; Sweigle v. Gates, 9 N. D. 538, 84 N. W. 481; Hegar v. DeGroat, 3 N. D. 354, 56 N. W. 150; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357.

In order to constitute a valid tax sale, there must be a valid assessment forming the basis of the tax, and it must be verified by the assessor. Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188; Lee v. Crawford, 10 N. D. 482, 88 N. W. 97; Sheets v. Paine, 10 N. D. 103, 86 N. W. 117; Grand Forks County v. Frederick, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839.

All the essential steps in levying a tax must appear by some record,

and this means a record kept by some county official. O'Neil v. Tyler, 3 N. D. 55, 53 N. W. 434; Power v. Larabee, 2 N. D. 141, 49 N. W. 724.

The making of an itemized statement of estimated expenditures is an essential element in the levying of a tax. Engstad v. Dinnie, 8 N. D. 8, 76 N. W. 292; Shuttuck v. Smith, 6 N. D. 56, 69 N. W. 5.

No notice of the time of redemption from the sale was ever given, published, or served by any county official, and therefore no officer had authority to execute or deliver a tax deed upon such sale. Blakemore v. Cooper, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; O'Neil v. Tyler, 3 N. D. 55, 53 N. W. 434; Power v. Larabee, supra.

The sale was contrary to the provisions of the law in force at the time, and is therefore void. Batelle v. Knight, 23 S. D. 161, 120 N. W. 1102, 20 Ann. Cas. 456; King v. Lane, 21 S. D. 101, 110 N. W. 37; Battelle v. Wolven, 22 S. D. 39, 115 N. W. 99.

And the deed issued on such sale is void, and insufficient to set in motion the special limitation statute. Beggs v. Paine, 15 N. D. 436, 109 N. W. 322; Sweigle v. Gates, 9 N. D. 538, 84 N. W. 481; Hegar v. DeGroat, 3 N. D. 354, 56 N. W. 150; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Engstad v. Dinnie, 8 N. D. 8, 76 N. W. 292; Shuttuck v. Smith, 6 N. D. 56, 69 N. W. 5.

The notice of the expiration of the time to redeem from a tax sale must set forth the true amount necessary to redeem. Reed v. Lyon, 96 Cal. 501, 31 Pac. 619; State ex rel. National F. Ins. Co. v. Scott, 92 Minn. 210, 99 N. W. 799; Midland Co. v. Eby, 89 Minn. 27, 93 N. W. 707.

So, also, must the time be correctly stated in such notice. State Finance Co. v. Beck, 15 N. D. 383, 109 N. W. 357; Kipp v. Nord, 73 Minn. 1, 72 Am. St. Rep. 590, 75 N. W. 760; State ex rel. Kipp v. Robinson, 75 Minn. 1, 77 N. W. 414; Clary v. O'Shea, 72 Minn. 105, 71 Am. St. Rep. 465, 75 N. W. 115.

The laws are mandatory in all their requirements. State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Blakemore v. Cooper, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; Clary v. O'Shea, 72 Minn. 105, 71 Am. St. Rep. 465, 75 N. W.

115; Walker v. Martin, 87 Minn. 489, 92 N. W. 336; Gahre v. Berry, 82 Minn. 200, 84 N. W. 733; Kipp v. Johnson, 73 Minn. 34, 75 N. W. 736.

Such defects as are here stated are jurisdictional. Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Miller v. Miller, 96 Cal. 376, 31 Am. St. Rep. 229, 31 Pac. 247; Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188; Lee v. Crawford, 10 N. D. 482, 88 N. W. 97; Grand Forks County v. Frederick, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839.

The law in force at the time of a tax sale, and at the time of the issuance of a deed thereon, becomes a part of the contract between the state and the purchaser, and also the owner of the equity of redemption. Cole v. Lamb, 81 Minn. 463, 84 N. W. 329; Kenaston v. Great Northern R. Co. 59 Minn. 35, 60 N. W. 813; State ex rel. Kipp v. Nord, 73 Minn. 1, 72 Am. St. Rep. 594, 75 N. W. 760; Kipp v. Johnson, 73 Minn. 34, 75 N. W. 736; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Blakemore v. Cooper, 15 N. D. 17, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; Fisher v. Betts, 12 N. D. 198, 96 N. W. 132; State ex rel. Davenport v. McDonald, 26 Minn. 145, 1 N. W. 832; Fleming v. Roverud, 30 Minn. 273, 15 N. W. 119; State ex rel. Wheeler v. Foley, 30 Minn. 350, 15 N. W. 375; Cooley, Taxn. 350; Gaston v. Merriam, 33 Minn. 271, 22 N. W. 614; Merrill v. Dearing, 32 Minn. 479, 21 N. W. 721; Johnson v. Taylor, 150 Cal. 201, 10 L.R.A.(N.S.) 818, 119 Am. St. Rep. 181, 88 Pac. 903.

A statement, in a tax deed, that the land was offered for sale "in accordance with law," is a mere conclusion, and can impart no validity to the deed. Rush v. Lewis & C. County, 37 Mont. 240, 95 Pac. 836; 37 Cyc. 1436; Duncan v. Gillette, 37 Kan. 156, 14 Pac. 479.

A failure to state the place of sale, in a notice, renders the deed void. Ludden v. Hansen, 17 Neb. 354, 22 N. W. 766; McGrath v. Wallace, 116 Cal. 548, 48 Pac. 719; 37 Cyc. 1436; Rush v. Lewis & C. County, 37 Mont. 240, 95 Pac. 836.

The county auditor's deed was issued under a sale made under a different statute or revenue law, and renders the deed void on its face. Youker v. Hobart, 17 N. D. 299, 115 N. W. 839; King v. Lane, 21 S. D. 101, 110 N. W. 37.

It is necessary that a tax deed show on its face that all the requirements of the law have been met, or the deed is void. Batelle v. Knight, 23 S. D. 161, 120 N. W. 1102, 20 Ann. Cas. 456; King v. Lane, supra; Battelle v. Wolven, 22 S. D. 39, 115 N. W. 99; Grimm v. O'Connell, 54 Cal. 522; 37 Cyc. 1434; Cogel v. Raph, 24 Minn. 198; Sheehy v. Hinds, 27 Minn. 259, 6 N. W. 781; Madland v. Benland, 24 Minn. 376; Duncan v. Gillette, 37 Kan. 156, 14 Pac. 479; Bonham v. Weymouth, 39 Minn. 92, 38 N. W. 805; Beggs v. Paine, 15 N. D. 439, 109 N. W. 322; Sweigle v. Gates, 9 N. D. 538, 84 N. W. 481; Hegar v. DeGroat, 3 N. D. 354, 56 N. W. 150; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357.

The right to a deed of specific form is a contractual one, and cannot be taken away by the legislature, and no subsequent act of the legislature can change the effect of it as evidence. Fisher v. Betts, 12 N. D. 197, 96 N. W. 132.

Any law or act in derogation of such right would be unconstitutional. Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227; Sweigle v. Gates, 9 N. D. 543, 84 N. W. 481; Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; State Finance Co. v. Mather, 15 N. D. 393, 109 N. W. 350, 11 Ann. Cas. 1112.

The principles of law governing the redemption from mortgage foreclosures are applicable to redemption from tax sales and certificates. McDonald v. Beatty, 10 N. D. 517, 88 N. W. 281; North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 475, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453.

Defendant Donovan was not in possession under color of title, and therefore any expenditures he made by way of improvements were voluntary, and he is not entitled to recover them back. McLellan v. Omodt, 37 Minn. 157, 33 N. W. 326; Seigneuret v. Fahey, 27 Minn. 60, 6 N. W. 403; O'Mulcahy v. Florer, 27 Minn. 449, 8 N. W. 166; Cook v. Bertram, 86 Mich. 356, 49 N. W. 42; 37 Cyc. 1540.

Color of title is that which in appearance is title, but which in reality is not title. Wright v. Mattison, 18 How. 56, 15 L. ed. 283; Miller v. Clark, 56 Mich. 337, 23 N. W. 35.

The title conveyed by the sheriff's deed vested in Herbert, and not

as trustee. Perry, Tr. § 334; Greenwood Lake & P. J. R. Co. v. New York & G. L. R. Co. 134 N. Y. 435, 31 N. E. 874; Towar v. Hale, 46 Barb. 361; People v. Open Board of Stock Brokers Bldg. Co. 49 Hun, 349, 2 N. Y. Supp. 113, 112 N. Y. 670, 20 N. E. 414; Van Schaick v. Lese, 31 Misc. 610, 66 N. Y. Supp. 64; Kanenbley v. Volkenberg, 70 App. Div. 97, 75 N. Y. Supp. 8; Title Guaranty & T. Co. v. Fallon, 101 App. Div. 187, 91 N. Y. Supp. 497; Hart v. Seymour, 147 Ill. 598, 35 N. E. 246.

Geo. M. Price and *Scott Rex,* for respondents.

The statute requires each defendant to set out his claim of title; it is also true that the statute requires that the plaintiff shall recover upon the strength of his own title, and shall assert as plaintiff all the title he has or claims, and failing to recover as plaintiff, he cannot recover as defendant.

The deeds from the McDowall heirs to Donovan were valid, and passed title to Donovan, to the extent of their interest. Jackson v. Demont, 9 Johns. 55, 6 Am. Dec. 259; Dever v. Hagerty, 169 N. Y. 481, 62 N. E. 586; Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258; Burke v. Scharf, 19 N. D. 227, 124 N. W. 79; Hanitch v. Beiseker, 21 N. D. 290, 130 N. W. 833.

The laws in existence and controlling, at the time of the foreclosure of the mortgage in question, required that the records in the office of the register of deeds of the county show that the person assuming to foreclose by advertisement is the record owner of the mortgage to be foreclosed; that the power of sale must be exercised by the record owner. Thorp v. Merrill, 21 Minn. 336.

The mere assignee and holder of a note secured by mortgage upon real estate could not have foreclosed the mortgage by advertisement; a properly executed and recorded assignment of the mortgage was necessary. Hickey v. Richards, 3 Dak. 345, 20 N. W. 428; Hayes v. Lienlokken, 48 Wis. 509, 4 N. W. 584; Bausman v. Kelley, 38 Minn. 197, 8 Am. St. Rep. 661, 36 N. W. 333; Miller v. Clark, 56 Mich. 337, 23 N. W. 35; Benson v. Markoe, 41 Minn. 112, 42 N. W. 787; Morrison v. Mendenhall, 18 Minn. 232, Gil. 212.

The power of sale by advertisement contained in a mortgage can only be executed by the owner, or by the person who by assignment becomes

entitled to the money secured to be paid. Morris v. McKnight, 1 N. D. 266, 47 N. W. 375.

The identity of assignors of a mortgage cannot be established by *an ex parte* statement of their identity in a notice of sale. The Globe Investment Company here tried to do this, by a *statement* that it and the Dakota Mortgage Loan Corporation are the same. Benson v. Markoe, 41 Minn. 112, 42 N. W. 787; Morris v. McKnight, supra.

The power of sale shall be exercised by the person in whom it resides, when the records show complete evidence of the same, and the notice of sale shall recite such record. Dunning v. McDonald, 54 Minn. 1, 55 N. W. 864; Backus v. Burke, 48 Minn. 260, 51 N. W. 284.

Not only is this true, but the instrument granting the power should be one entitled to be recorded. 27 Cyc. 1464, 1466; Dohm v. Haskin, 88 Mich. 144, 50 N. W. 108.

Such instrument must be executed and acknowledged as by law provided; and where such instrument or assignment is not so executed, its record, and the exercise of the power of foreclosure under it, are mere nullities. Lowry v. Mayo, 41 Minn. 388, 43 N. W. 78; Langmaack v. Keith, 19 S. D. 351, 103 N. W. 210; Hebden v. Bina, 17 N. D. 235, 116 N. W. 85, 138 Am. St. Rep. 700.

The record of an instrument not entitled to be recorded does not constitute constructive notice to the public. Cannon v. Deming, 3 S. D. 421, 53 N. W. 863; American Mortg. Co. v. Mouse River Live Stock Co. 10 N. D. 290, 86 N. W. 965; Donovan v. St. Anthony & D. Elevator Co. 8 N. D. 585, 46 L.R.A. 721, 73 Am. St. Rep. 779, 80 N. W. 772.

Herbert and the McDowall heirs had abandoned the land; Donovan bought in the taxes for seven years; he was also in possession under deeds from the McDowall heirs; Champine took the deed from Herbert while Donovan was in possession under color of title, and this action was not begun for six years after Donovan paid the old taxes and secured deed from McDowall heirs. Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258; Dever v. Hagerty, 169 N. Y. 481, 62 N. E. 586; Burke v. Scharf, 19 N. D. 227, 124 N. W. 79; Hanitch v. Beiseker, 21 N. D. 290, 130 N. W. 833; Jackson v. Demont, 9 Johns. 55, 6 Am. Dec. 259.

The absence of an assessor's oath to the assessment roll is not fatal to the tax, in an equitable action like this one. Farrington v. New England Invest. Co. 1 N. D. 102, 45 N. W. 191; Grand Forks County v. Fredericks, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839; State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112; Graham v. Mutual Realty Co. 22 N. D. 423, 134 N. W. 43.

The failure of the board of county commissioners to make the itemized statement of expenses for the ensuing year is not a jurisdictional defect. Scott & B. Mercantile Co. v. Nelson County, 14 N. D. 407, 104 N. W. 528; Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919; Engstad v. Dinnie, 8 N. D. 8, 76 N. W. 292.

Where any tax proceedings are not required by law to be made matter of record, a record is not necessary to the validity of the tax. The law only requires substantial compliance with the statute. Proceedings relative to the giving of notice of expiration of redemption on tax sales were not required to be made matter of record, at the time of the transactions in question. Laws of 1890, § 103, chap. 132.

The deed is in itself evidence of the fact that notice of expiration of redemption was given. The statutory presumption of the discharge of official duty, and the evidentiary character of the recitals in the deed, were sufficient to establish the giving of a legal notice of the expiration of redemption, in the absence of direct proof to the contrary. Fisher v. Betts, 12 N. D. 209, 96 N. W. 132.

Statutory provisions as to the time of levying a tax are directory only. Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; Wingate v. Ketner, 8 Wash. 94, 35 Pac. 591; Sharpe v. Engle, 2 Okla. 624, 39 Pac. 384; Sweet v. Boyd, 6 Okla. 699, 52 Pac. 939.

Curative statutes act retrospectively, and operate to cure defects in mere form and procedure. It is competent for the legislature to correct and cure defects and informalities, and to make that valid which was void when done, where vested rights are not destroyed. 36 Cyc. 1221; Black, Tax Titles, 1st ed. § 271; Cooley, Const. Lim. p. 371; Beggs v. Paine, 15 N. D. 449, 109 N. W. 322.

Statutes of limitation have a much wider scope than mere curative laws. Persons having grievances must seasonably assert them, or be precluded from making complaint. Saranac Land & Timber Co. v.

Comptroller (Saranac Land & Timber Co. v. Roberts) 177 U. S. 330, 44 L. ed. 792, 20 Sup. Ct. Rep. 642; Meigs v. Roberts, 162 N. Y. 371, 76 Am. St. Rep. 322, 56 N. E. 838; Bryan v. McGurk, 200 N. Y. 332, 93 N. E. 989.

And this is true, whether the defects of which complaint is made are jurisdictional, or mere irregularities. Carlisle v. Yoder, 69 Miss. 384, 12 So. 255; Ross v. Royal, 77 Ark. 324, 91 S. W. 178; McKinnon v. Fuller, 33 S. D. 582, 146 N. W. 910; Bandow v. Wolven, 20 S. D. 445, 107 N. W. 204; Pence v. Miller, 140 Mich. 205, 103 N. W. 582; Hamner v. Yazoo Delta Lumber Co. 100 Miss. 349, 56 So. 466; Oconto County v. Jerrard, 46 Wis. 317, 50 N. W. 591.

The statute leaves such parties estopped to speak the truth, because they did not speak it when they might and should have done so. Dupen v. Wetherby, 79 Wis. 203, 48 N. W. 378; Ward v. Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285; Baylis v. Kerrick, 64 Wash. 410, 116 Pac. 1082; Fish v. Fear, 64 Wash. 414, 116 Pac. 1083; Williams v. Conroy, 35 Colo. 117, 83 Pac. 959; Bennet v. North Colorado Springs Land & Improv. Co. 23 Colo. 470, 50 Am. St. Rep. 281, 48 Pac. 812; Bardon v. Land & River Improv. Co. 157 U. S. 327, 39 L. ed. 719, 15 Sup. Ct. Rep. 650; McKone v. Fargo, 24 N. D. 53, 138 N. W. 967; Rev. Codes 1905, § 2790, Comp. Laws, 1913, § 3715; Scott & B. Mercantile Co. v. Nelson County, 14 N. D. 407, 104 N. W. 528; State Finance Co. v. Mather, 15 N. D. 390, 109 N. W. 350, 11 Ann. Cas. 1112; Nind v. Myers, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335.

Courts do not construe tax laws and limitation statutes in such manner as to place a premium upon the failure of property owners to pay their taxes. Oconto County v. Jerrard, 46 Wis. 317, 50 N. W. 591; Bandow v. Wolven, 20 S. D. 445, 107 N. W. 204; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049.

BURKE, J. Trial *de novo*. The facts were stipulated in the court below, and therefrom it appears that one David McDowall was in 1885 the owner of the southwest quarter, section 23, township 162, range 59, and during that year he and his wife duly executed a mortgage thereon in the sum of $400, which mortgage was thereafter fore-

closed, and sheriff's deed issued to one John Herbert, trustee. McDowall moved from the premises and died intestate, in 1887. The taxes for the year 1892 were unpaid, and went to tax deed to the defendant Donovan. Thereafter the taxes were allowed to go to sale, and various tax deeds thereunder were issued to the defendants, Edward I. Donovan and Mary Donovan. Donovan took possession of the land in December, 1896; and there has ever since been in open, continuous, exclusive, and adverse possession thereof, and has made improvements thereon, and has paid directly and indirectly all taxes thereon, excepting that the use plaintiff, Champine, redeemed from the tax sales in the years 1907, 1908, 1909, and 1910. In the year 1902, Champine obtained a quitclaim deed from the plaintiffs, James, John, William, Jane, Ellen, and David McDowall, and other heirs at law of said David McDowall, deceased, which quitclaim deed shows on its face a consideration of $1. He also obtained a quitclaim deed from Herbert, as trustee, the holder of the sheriff's deed aforesaid. Champine, being unable to maintain an action in his own name against the defendant Donovan, owing to the champertous nature of his deeds, brings the action in the name of his grantors, for his use and benefit. The defendants, answering, set forth the tax deeds aforesaid, pleading the short-term statute of limitations and other defenses made in the case of Munroe v. Donovan, post, 228, 153 N. W. 461, just decided by this court. Among the deeds so offered is one for the taxes for the year 1894, which is similar to the tax deed which was held good in the last mentioned case; and a further discussion of the merits of the case will not be undertaken. Following such decision, we hold this tax deed to be good, and vests title in the defendant, Mary Donovan, for the use and benefit of Edward I. Donovan, as per the stipulation between those defendants. The judgment of the trial court is affirmed.

Goss, J. did not participate, HON. A. G. BURR, Judge of the Ninth Judicial District, sitting in his stead, by request.

GEORGE H. MUNROE, Annie Munroe, Jessie Munroe, William Munroe, and Gilbert Munroe v. EDWARD I. DONOVAN and Cornelius Jordan.

(Two Cases.)

(153 N. W. 461.)

Action to quiet title to land. Trial *de novo*. Plaintiffs, heirs at law of deceased fee title holder, bring action against the holder of five tax deeds, whose grantee is in possession of the land. Evidence examined, and, *held*, that the tax deed issued for the 1894 taxes is valid, for reasons stated in the opinion.

Tax deed — validity — redemption from tax sale — expiration — notice of — necessary recitals — defects.

1. It is urged against the validity of said tax deed, that the notice of the expiration of time of redemption incorrectly stated the amount necessary, and time allowed for, such redemption. *Held*, that such defects do not go to the extent of entirely vitiating the notice.

Estimated expenditures — itemized statement — record — county commissioners — failure to make — defect — not jurisdictional — curative laws.

2. The fact that no record of an itemized statement of the estimated expenditures for said year exists is a minor defect, not jurisdictional, and is cured by § 72, chapter 132, Sess. Laws 1890, the law in effect at the time of such sale.

Redemption — expiration of time — notice of — served on person assessed — fee owner not served — validity of.

3. The notice of expiration of the time of redemption was served upon the person in whose name the land was assessed, and not upon the fee owner of the land. *Held*, that this is in compliance with § 103, chapter 132, Sess. Laws 1890, the law under which such service was made.

Opinion filed April 23, 1915. Rehearing denied July 1, 1915.

Appeal from the District Court of Cavalier County, *Cooley*, J. Affirmed.

Note.—The matter of redemption from tax sales is entirely statutory, and cases must be decided under the local statute. For authority as to how particular statutes have been construed, on the subject of who is entitled to notice to redeem, see note in 44 L.R.A.(N.S.) 666. Statutory requirements of notice to one in whose name land is taxed or assessed are discussed on page 677 of this note.

Engerud, Holt, & Frame, and *W. A. McIntyre,* for plaintiffs and appellants.

Scott Rex and *George M. Price,* for defendants and respondents.

BURKE, J. This case was tried to the court below upon stipulated facts. Plaintiff appeals, demanding trial *de novo.* One Alexander Munroe was the patentee from the government for the southeast quarter section 17, township 161, range 58. He died in October, 1889, without having transferred or conveyed said premises in any manner. At the time of his death, his sole heirs at law consisted of three brothers, George, William, and Gilbert, and two sisters, Annie and Jessie, and the unknown heirs of a brother and sister who had previously died. At the time of the death of the said Alexander Munroe, he had moved away from said premises, and resided in Brandon, Manitoba. The taxes upon said premises for the year 1888 were not paid, and in August, 1892, went to tax deed, running to the Bank of Langdon. Said bank thereafter deeded the land to the defendant Donovan for the expressed consideration of $1,000, Donovan in this transaction acting for the defendant Jordan, to whom the land was sold upon crop contract. Both defendants have the same interest, however, and will be treated as one in the further discussion of the case. Donovan evidently wished to reinforce his title, and allowed the land to go to tax sale for the years 1889–90–94 and 95, and became the purchaser at the sale each year, receiving the tax deed at each of said sales. He thus became the holder of title under five different tax deeds, the first of which ran to the Bank of Langdon, and the last four to himself. The defendant Jordan went into possession of the premises in the fall of 1894, and has been in such possession ever since. In 1900, one L. S. Champine secured a quitclaim deed to said premises from the three brothers and two sisters of the said Alexander Munroe, deceased, purporting to convey the premises aforesaid, which deed was recorded in February, 1900, the consideration being the sum of $100. The grantors having been out of possession of the land for many years, and the defendant Jordan having been in possession, the said deed to Champine was champertous and void as to Jordan (Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258). Champine therefore had action brought in the name of the Mun-

roes for his use and benefit. The equities of the case, therefore, will be counted between the Munroes, and Donovan and Jordan.

We find the Munroes abandoning said land and paying no taxes thereon, from the year 1888 to the present time, during which time said taxes have been paid and improvements made by the defendants. After a period of about twenty years, during which time the land has become valuable, plaintiffs bring an action for the recovery of the premises, and seek to have all of the taxes set aside as void, and in addition seek to recover from these defendants the sum of $2,000 for the use and occupation of said premises. However, there was filed with the trial judge on the 11th of April, 1913, an offer, in writing, of the "use plaintiff to pay into court such sums as the court may find and determine that said use plaintiff should in equity pay into court to discharge any taxes upon the premises described in the complaint, which may have been paid by the defendants, as the basis of relief herein."

The defendants, in their answer, set forth their various tax deeds, and in addition allege that the action was not commenced within three years after the execution, delivery, and recording of the tax deeds, and defendant Jordan in addition alleges that plaintiffs had not been in possession of the land within a period of twenty years before the commencement of this action, and that, therefore, said action was barred under § 7362, Comp. Laws 1913.

In view of the ultimate decision in the case, we will not take time to discuss the question, or whether plaintiffs in any event could recover in this action. The defendants, upon their part, have asked to have title quieted in them under one or more of the various tax deeds, and it is apparent that if one of said tax deeds is valid, defendant must recover and plaintiff be defeated. We will confine our discussion entirely to exhibit 4, the tax deed issued to Donovan for the delinquent taxes for the year 1894. In discussing this tax deed, we turn again to the stipulated statement of facts. It is stipulated that the premises in question have at all times since the year 1884 been subject to taxation in Cavalier county, and situated in the organized civil township of Loam. The lands therefore were subject to taxation in the year 1894. It is stipulated that the defendant Donovan became the purchaser at such sale, and received a tax deed valid on its face. Plaintiffs, however, insist that the deed was void, for the reason that the auditor

had no jurisdiction to issue the same, because the notice of expiration of the time for redemption was not properly given. We quote from their brief: "Appellants contend that this notice is defective for the following reasons: First, that it is not addressed to, and was not served upon, the person contemplated by the statute; second, the amount required to redeem the land from the sale is incorrectly stated, and the time when the redemption period shall expire is erroneously given. . . . It is our contention that the requirement, that a proper notice of expiration of time for redemption be given and served, is a jurisdictional one. . . . That in addition to an assessment and sale for delinquent taxes, it was necessary that a proper notice of expiration of time for redemption must have been given; otherwise the right to redeem has not been cut off, and the tax deed conveyed nothing. . . . The tax sale on this trade . . . is also void, for the reason that there is no record of any itemized statement of estimated expenditures of Cavalier county for the ensuing year, made by the county commissioners as a basis for the tax levy made in 1894." Respondent, among other things, relies upon the various three-year statutes of limitations, and cites § 72, chapter 132, Sess. Laws 1890, later re-enacted as § 78, chapter 126, Sess. Laws 1897, being now incorporated in § 2193, Comp. Laws, 1913, which reads: "Such certificates shall in all cases be prima facie evidence that all requirements of law with respect to the sale have been duly complied with, and that the grantee named therein is entitled to a deed therefor after the time of redemption has expired; and no sale shall be set aside or held invalid, unless the party objecting to the same shall prove either that the property upon which the tax was levied was not subject to taxation, or that the taxes were paid prior to such sale, or that notice of such sale as required by law was not given; or that the piece or parcel of land was not offered at said sale to the bidder who would pay the amount for which the piece or parcel was to be sold, in which cases, but in no other, the court may set aside the sale or reduce the amount of taxes upon such land, rendering judgment accordingly." Which statute has been construed in Beggs v. Paine, 15 N. D. 436, 109 N. W. 322; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112. These sections, and the holdings thereunder, are alleged to be authority in this case for holding that plain-

tiffs have waived by their conduct all the defects mentioned, relative to the amount stated in the notice, and the time within which redemption might be made. Respondent further insists that § 79, chapter 126, Sess. Laws 1897, being § 2194, Comp. Laws 1913, is an effective bar to plaintiff's suit in its entirety. Said section reads as follows: "Limitation of action to quiet title. Any person having or claiming title to or lien or encumbrance upon any land, whether in his possession or the possession of another, or vacant or unoccupied, may commence and maintain an action, either in law or in equity, at any time before or after the issuing of a tax certificate, and within three years after the execution and delivery of a deed, or in case of deeds heretofore issued, then within three years after the taking effect of this section, against any party, person, county, state or corporation claiming any title to or interest in such lands, or lien upon the same adversely to him by or through such tax sale, tax certificate or tax deed heretofore or hereafter made, to test the validity of the tax sale, tax certificate or tax deed, or to quiet the title to said lands as against such claims of such adverse claimant, or to remove the cloud from the title arising from such tax sale, tax certificate or tax deed, and if no action is commenced within the time aforesaid such tax deed shall vest in the grantee a fee simple title to the lands and premises described in such deed, free from all liens and encumbrances made or accrued at or prior to the date of the execution and delivery of such deed, except taxes, and such grantee may at any time thereafter maintain an action against any and all parties for the possession of such premises, and the rights of action herein given shall be governed by the same rules of procedure as rights of action given by § 8044; provided, that nothing in this section shall be construed to prevent any person holding a tax deed from beginning an action against parties claiming title to or lien upon such premises at any time after the execution of the deed, to obtain possession of such premises, or to quiet the title to such lands as against such adverse claimants." The tax deed in question was issued under the provisions of § 103, chapter 132, Sess. Laws 1890, which reads: "Notice when time for redemption will expire.—Duties of certificate holders and auditors. Every person holding a tax certificate, shall, at least ninety days before expiration of the time for the redemption of the lands therein described, present such certificate to the county

auditor, and thereupon the auditor shall prepare, under his hand and official seal, a notice to the persons in whose name such lands are assessed, specifying the description of such lands, the amount for which the same were sold, the amount required to redeem such lands from sale, exclusive of the cost to accrue upon such notice, and the time when the redemption period will expire, which notice the auditor shall cause to be published once in each week for three consecutive weeks in some newspaper printed and published in the county where such lands are situated, if there be one; if none, then in some newspaper printed and published at the capital of the state. The fees of the sheriff for serving and the printer's fees for publishing such notice shall be added to the amount required to redeem such land, and shall be paid by the party offering to redeem such land before any certificate of redemption shall be issued. In case of failure on the part of the holder of any tax certificate to present the same to the auditor at the time hereinbefore provided, the same may be so presented at any time thereafter; and thereupon such notice shall be issued and served as hereinbefore provided, and the time for redemption of such lands shall expire sixty days after such notice: *Provided,* That the county shall not become liable for any expenses incurred under the provisions of this section."

However, appellant insists that said short statute of limitations, found in § 2194, Comp. Laws 1913, in no manner cures the insufficient notice of expiration of redemption, and refers us to the cases above enumerated, as holding that said curative statute applies only to defects which existed *before the sale;* but the defects in the notice of time for expiration of the period of redemption, coming later than the sale, are not cured thereby. It is pointed out that the Revised Codes of 1895, which went into effect January 1st, 1896, repealed § 72, chapter 132, Sess. Laws 1890, excepting as to vested rights, citing Blakemore v. Cooper, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; and that the said 1895 Code contained no provision to cover the subject matter repealed, until the enactment of § 79, chapter 126, Sess. Laws 1897. This interim of two years, appellant insists, precludes defendants from invoking the statutes upon this particular tract, as it would be a violation of the owner's contract rights, and a violation of the 14th Amendment of the Constitution of the United States. Appellant further contends that respondent misconstrues the three North

Dakota cases above stated, beginning with Beggs v. Paine, as also does the L.R.A. note writer, at the case note in 8 L.R.A.(N.S.) 157; and that they, upon a correct reading thereof, will be found in harmony with Marx v. Hanthorn, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508; Saranac Land & Timber Co. v. Comptroller (Saranac Land & T. Co. v. Roberts) 177 U. S. 318, 44 L. ed. 786, 20 Sup. Ct. Rep. 642; and King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925. We will discuss the objections Nos. 2, 3, and 4 before the other, which we consider the principal one.

(1) Under this heading, we will consider the point argued that, owing to inaccuracies in the amount demanded for redemption, and in the time allowed for redemption, the notice of redemption served is so defective that it is a nullity. We do not think there is any merit in this contention. The amount stated as necessary for redemption is probably 12 cents less than the amount due. This difference arose because the auditor did not include the cost of printing the notice, evidently believing that this cost would follow as a matter of course. The time stated in the notice as a limit for the redemption was more, not less, than the legal period. Thus, both of the alleged defects favor the redemptioner. These defects do not go to the extent of entirely vitiating the notice. If appellant's attack is directed towards the notice itself, it is probably barred by the before-mentioned statute of limitations. See Shuttuck v. Smith, 6 N. D. 56, 73, 69 N. W. 5; Blakemore v. Cooper, 15 N. D. 5, 16, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; State Finance Co. v. Beck, 15 N. D. 374, 383, 109 N. W. 357. The notice, therefore, was sufficient to start running the statute of limitations against attacks upon prior proceedings.

(2) We take up next the fact that there was no record of any itemized statement of estimated expenditures for the ensuing year, levied by the county commissioners prior to this tax. This, likewise, is a minor defect, not jurisdictional, and cured by the provisions of said § 72, chapter 132, Sess. Laws 1890, which were in force at the date of the tax sale, on December 3, 1895, some three weeks before the repeal of said section by the enactment of the 1895 Code. The defense is also barred by the provisions of § 2174, Comp. Laws 1913.

(3) We now reach the last and most serious objection to the validity of said tax deed, namely, that the notice of the expiration of the time

for redemption was not served, as contemplated by law, upon the fee owners of the land, but was in fact served upon Donovan himself, in whose name the land was apparently assessed as holder of the previous tax deed. Appellant refers us to State Finance Co. v. Mulberger, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986, and Hodgson v. State Finance Co. 19 N. D. 139, 122 N. W. 336, as authority for the proposition that the service of this notice upon one who is the holder of a void tax deed is not service upon the owner of the land. We do not believe those cases in point. In the Mulberger Case the court says: "The notice of expiration of the redemption period was not directed to, nor served upon, the *owner* of the land. It was served upon H. Mulberger, who claimed to own the land. His title, however, was based on a void tax deed. He was not the actual *owner.*" (Italics ours.) It was the view of the court, in that case, that the statute required the notice to be served upon the *owner* of the land. Likewise in the Hodgson Case, the court says: "There was no proper service of the notice of the expiration of redemption. Section 1289 of the Revised Codes of 1899 requires notice to be addressed to the person in whose name the land was assessed, and it requires that this notice be served upon the *owner* of the land, personally. . . . The only service made, or attempted to be made by registered mail, was upon John H. Devenney. The auditor, in serving, or attempting to serve, the notice on John H. Devenney, by registered mail, undoubtedly proceeded on the theory that he, having the tax deed, was the *owner* of the land, and the only person entitled to notice. His tax deed was void on its face, and notice to him was insufficient." (Italics ours.) The statute before us is altogether different. It requires, not service upon the owner of the land, but *"notice to the persons in whose name such lands are assessed."* In the absence of proof to the contrary, it must be assumed from the recitals of the notice and deed that the land was assessed in the name of Donovan. Literal compliance was therefore had with this statute, and consequently the service was sufficient. It is conceded, we believe, that the legislature might, had it desired, have omitted any provision for service of notice of the expiration of the time for redemption. That being true, it certainly was within the power of the legislature to provide that such notice be served upon the person in whose name said lands were assessed, and, if compliance be had therewith, the deed

thereafter issued will not be subject to attack upon this phase of the question.

It is unnecessary to review evidence relative to the other tax deeds. The judgment of the trial court is in all things affirmed.

BURR, District Judge, sitting for GOSS, J., not participating.

On Petition for Rehearing.

BURKE, J. Appellant, in a petition for rehearing, challenges the holding in ¶ (1) of the opinion. We are satisfied with the correctness of said holding, but believe we can make somewhat plainer the meaning of the same. We do not hold that the statute of limitations will bar an attack upon the tax deed where there is a total absence of the notice of expiration of redemption. In the present case, we have held that there was a good and valid notice of expiration of redemption. To be sure, there were two minor defects in such notice; but these did not entirely vitiate the notice, but were mere irregularities, and, being irregularities, are themselves barred by the statute of limitations. In other words, the notice was sufficient to start running the statute of limitations. The petition for rehearing is denied.

STATE OF NORTH DAKOTA v. GEORGE TAYLOR.

(153 N. W. 981.)

Complaint in justice court — information — common nuisance — preliminary hearing — offense charged — difference in time — setting aside information — motion for — objection waived — appeal — issue first presented on.

The information included a greater period of time than was charged in the complaint in justice court as the time during which a common nuisance was maintained. A preliminary examination was waived. Defendant moved to quash the information upon the ground specified, that he had not had or waived a preliminary examination for the offense charged in the information, but without pointing out or stating as grounds for the motion that the information included additional time to that stated in the criminal complaint. The record does not affirmatively disclose that, in denying said

motion, such variance in time was known to the court, or was presented as the grounds for the motion made.

Held, that under § 10729, Comp. Laws 1913, requiring that a motion "to set aside the information must specify clearly the grounds of objection to the information," or the objection be waived, that the objection based upon such variance in time was not raised and was waived, and this court will not pass upon an issue not presented below.

Opinion filed July 1, 1915.

An appeal from the judgment of conviction in the County Court of Increased Jurisdiction of Ward County, *William Murray*, J.

Affirmed.

Greenleaf, Bradford, & Nash, for appellant.

The "oath" or "affirmation" referred to in the organic act means a positive oath or affirmation, not one on information and belief. State ex rel. Register v. McGahey, 12 N. D. 535, 97 N. W. 865, 1 Ann. Cas. 650, 14 Am. Crim. Rep. 283.

Proceedings based upon an information not supported by such an oath or affirmation, if timely objection is made, deprive defendant of his liberty without due process. Myers v. People, 67 Ill. 503; Lustig v. People, 18 Colo. 77, 32 Pac. 275; Thornberry v. State, 3 Tex. App. 36; United States v. Tureaud, 20 Fed. 621; United States v. Maxwell, 3 Dill. 275, Fed. Cas. No. 15,750; United States v. Polite, 35 Fed. 58; United States v. Smith, 40 Fed. 755.

R. A. Nestos, State's Attorney, *Dorr Carroll* and *O. B. Herigstad*, Assistant State's Attorneys, and *H. J. Linde*, Attorney General, for respondent.

After defendant's motion to quash the information had been denied, and after his demurrer had been overruled, he entered a plea of not guilty, and by so doing, he waived all irregularities in the record, and gave the court complete jurisdiction over the entire case. State v. Gottlieb, 21 N. D. 179, 129 N. W. 460; State ex rel. Poul v. McLain, 13 N. D. 368, 102 N. W. 407.

The information, verified by the state's attorney on information and belief, was sufficient. State v. Gottlieb, 21 N. D. 179, 129 N. W. 460; State v. Blackman, 32 Kan. 615, 5 Pac. 173; State v. Cropper, 4 Kan. App. 245, 45 Pac. 131.

Goss, J. A criminal complaint, sworn to December 31, 1913, on positive knowledge, was laid before a magistrate, charging defendant with keeping and maintaining a common nuisance at a place described. "at divers times between the 1st day of January, 1912, and the 28th day of December, 1913." Defendant appeared in justice court, waived preliminary examination, and was held to answer at the next term of the county court of increased jurisdiction, and admitted to bail. On January 6th, 1914, state's attorney filed in county court a criminal information, with statutory verification thereto, charging defendant with keeping and maintaining a common nuisance at said place, "at divers times and days between the 7th day of January, 1912, and the 6th day of January, 1914." Upon arraignment, appellant filed the following motion: "Comes now the above named defendant and moves to set aside the information for the following reasons: (1) That defendant was entitled to a preliminary examination before a magistrate, before the filing of such information, and said defendant has not had such examination, and has been held to answer before the above court: and said defendant has not waived such examination in writing, or orally before a magistrate. (2) That such information is not verified in the manner provided for the verification of informations, and is not verified in the manner provided for the verification of informations to be filed in the county court when a preliminary hearing has not been had." This motion was denied, whereupon a demurrer to the information was interposed and overruled. Defendant then pleaded not guilty. He was convicted. When called for judgment, a motion in arrest of judgment was interposed. Sentence was pronounced, and final judgment thereon entered. This appeal is taken therefrom. Error is assigned upon these rulings. Everything urged on the demurrer and motion in arrest of judgment and exceptions taken to the instructions are predicated upon the same question sought to be raised by the motion to quash. Hence, if the motion to quash was properly denied, all other assignments urged are without merit.

From the record above stated, the reader would be wholly in the dark concerning, as well as surprised to learn, the question sought to be urged for consideration here. The information is in regular form with statutory verification, and in fact is based upon a preliminary examination waived as disclosed by the record. There is nothing irregu-

lar in the record apparent from a casual examination. The reasons stated in the motion appear groundless, inasmuch as, contrary to the statement made there, defendant was afforded a preliminary examination, and, according to the return of the magistrate, appeared and waived such examination, and was held for trial before the county court, and furnished bail pending trial. This constituted an exact compliance with the statute. The state saw fit to proceed in a manner affording defendant an opportunity for a preliminary examination, but which he waived.

But it is here contended that defendant was not afforded a preliminary examination for the crime charged, and that he did not waive one, because the information filed in county court contained, as a part of the period therein charged, the period from December 28, 1913, to January 6, 1914, inclusive, not included within the period charged in the complaint filed in the magistrate's court. And appellant cites the opinion in State v. Winbauer, 21 N. D. 161, 129 N. W. 97, wherein it was held, under a motion to quash the information upon the ground that the defendant had not had a preliminary examination for such an added period of time beyond that for which he waived a preliminary examination, that the information so attacked charges two criminal offenses, for one of which no preliminary examination had been had or waived, and that the information should have been quashed, under the first subdiv. of § 10728, Comp. Laws 1913. Appellant confidently asserts that holding to be here controlling; that this information must be held to charge an offense for which defendant has had no preliminary examination, and that it is vulnerable to the motion made. See also State v. Riley, 26 N. D. 236, 144 N. W. 107.

But the trouble with respondent's argument is that he is presenting here a contention that we have no assurance of record was presented to the trial court. With knowledge of what was said and the reasoning of the court in State v. Winbauer in this motion, blind upon its face and presenting no issue except the question of whether this defendant was afforded a preliminary examination (a conceded fact upon the record), a basis was attempted to be made for the argument here advanced; and this, too, without compliance with § 10729, Comp. Laws 1913, requiring that a motion to set aside an information "*must* specify clearly the ground of objection to the information." The attention

of the trial court was not directed by this motion to the difference in period of time charged in the information to that specified in the complaint. Instead, the motion, in the form in which it is phrased, would rather tend to obscure, than to direct the attention of the court to, the question here presented. It is the duty of counsel to "specify clearly the ground of objection to the information." Had he done so, and the court denied his motion, he would have been in a position to have presented the ruling on appeal as error. As it is, he has invoked no such ruling, and, not having invoked it, so far as the record shows, he has waived it; as under the statute, § 10729, the objection must be specified, and the motion to quash must be made upon explicit and stated grounds, and that, too, before demurrer or plea entered; otherwise, any objection upon which the information might have been set aside is waived. Appellant, then, is in the position of demurring and subsequently pleading to, and going to trial upon, a valid information, charging him with the commission of a public offense, without having moved to quash such information upon sufficient grounds; nor is the information demurrable. The judgment is accordingly affirmed.

SECURITY STATE BANK, a Corporation, v. MARGARETHA RETTINGER and Mathias Rettinger.

(153 N. W. 971.)

Real estate mortgage — setting aside — action for — evidence — must be clear and convincing.

It being conceded that the evidence necessary to set aside a real estate mortgage must be clear, satisfactory, and convincing, the evidence in this case is examined, and found not to be of that nature.

Opinion filed July 2, 1915.

Appeal from the District Court of Stark County, *Crawford,* J. Reversed.

Harvey J. Miller and *Pugh & Rigler,* for appellant.

The evidence upon which to base a judgment for the setting aside

and annulment of a mortgage must be clear, satisfying, and convincing. Anderson v. Anderson, 17 N. D. 275, 115 N. W. 836.

The presumption is that the deed is valid and binding, and this will not be overcome by barely preponderating circumstances. Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454.

The proof, to warrant the setting aside of a mortgage, must be so clear and of such positive character as to leave in the mind of the chancellor no hesitation or substantial doubt. McGuin v. Lee, 10 N. D. 160, 86 N. W. 714.

The apparent consent carried by such an instrument, duly executed and delivered, will be deemed real, free, and voluntary, unless it is affirmatively shown to have been overcome by duress, menace, or fear, or undue influence. Anderson v. Anderson, 17 N. D. 275, 115 N. W. 836; Smith v. Jensen, 16 N. D. 408, 114 N. W. 306; Englert v. Dale, 25 N. D. 587, 142 N. W. 169; Schinzer v. Wyman, 2 N. D. 489, 146 N. W. 898.

The threats alleged and relied upon must come within the definitions of the statute, or there is no duress or menace. Englert v. Dale, 25 N. D. 587, 142 N. W. 169; Beath v. Chapoton, 115 Mich. 506, 69 Am. St. Rep. 589, 73 N. W. 806; McCormick Harvesting Mach. Co. v. Miller, 54 Neb. 644, 74 N. W. 1061; Wolff v. Bluhm, 95 Wis. 257, 60 Am. St. Rep. 115, 70 N. W. 73; Hilburn v. Bucknam, 78 Me. 482, 57 Am. Rep. 816, 7 Atl. 272; Ingebrigt v. Seattle Taxicab & Transfer Co. 78 Wash. 433, 139 Pac. 188; Bodine v. Morgan, 37 N. J. Eq. 426; Thorn v. Pinkham, 84 Me. 101, 30 Am. St. Rep. 335, 24 Atl. 718; Buchanan v. Sahlein, 9 Mo. App. 552; Sulzner v. Cappeau-Lemley & M. Co. 234 Pa. 162, 39 L.R.A.(N.S.) 421, 83 Atl. 103.

Threats must be made under such circumstances as to excite real fear of immediate imprisonment. Moyer v. Dodson, 212 Pa. 344, 61 Atl. 937; Harmon v. Harmon, 61 Me. 227, 14 Am. Rep. 556; Higgins v. Brown, 78 Me. 473, 5 Atl. 269; Hilborn v. Bucknam, 78 Me. 482, 57 Am. Rep. 816, 7 Atl. 272; Sieber v. Weiden, 17 Neb. 582, 24 N. W. 215; Wilkerson v. Hood, 65 Mo. App. 491; Russell v. McCarty, 45 Ga. 197; Gregor, Real Estate (Deeds) §§ 81, 82; 5 Enc. U. S. Sup. Ct. Rep. 683; Brown v. Pierce, 7 Wall. 205, 215, 19 L. ed. 134, 137; Harris v. Cary, 112 Va. 362, 71 S. E. 551; Ann. Cas. 1913A, 1350.

The note and mortgage are, in themselves, prima facie evidence of due consideration. The burden of proof is upon defendants to show the contrary. First Nat. Bank v. Lamont, 5 N. D. 393, 67 N. W. 145; Red River Valley Nat. Bank v. Barnes, 8 N. D. 438, 79 N. W. 880; First Nat. Bank v. Golder, 89 Neb. 377, 131 N. W. 600; 32 Cyc. 30; Brandt, Suretyship, 3d ed. § 25.

H. J. Blanchard and *W. F. Burnett,* for respondents.

To constitute duress by threats of imprisonment, it is necessary that they should proceed from the mortgagee; but it is immaterial by whom they are communicated to the mortgagors. 77 Cyc. 1125; State Bank v. Hutchinson, 62 Kan. 9, 61 Pac. 443.

Threats of imprisonment of the husband for alleged crimes, duly communicated to the wife, are sufficient to constitute duress. Schultz v. Catlin, 78 Wis. 611, 47 N. W. 946; Giddings v. Iowa Sav. Bank, 104 Iowa, 676, 74 N. W. 21; 27 Cyc. 1125, note 97; National Bank v. Cox, 47 App. Div. 53, 62 N. Y. Supp. 314; Taylor v. Jaques, 106 Mass. 291.

"If the threats of arrest and prosecution of a son operate to deprive the father of his *free-will power,* and constrain the execution of the mortgage, the actual guilt or innocence of the son upon the charge of embezzlement was not material, in determining whether or not there was duress." Williamson, Hallsell Frazier Co. v. Ackerman, 77 Kan. 502, 20 L.R.A.(N.S.) 484, 94 Pac. 807; Wheeler v. Pettyjohn, 14 Okla. 71, 76 Pac. 117; Heaton v. Norton County State Bank, 59 Kan. 281, 52 Pac. 876.

BURKE, J. This is an action to foreclose a mortgage upon a quarter section of land in Stark county, securing a $4,600 note signed by the Rettingers, husband and wife. The wife answered, alleging that she was the owner of said land; that on the 9th day of August, 1912, one Otto Thress, acting as agent for the plaintiff, procured and caused her to execute and deliver said mortgage, by means of threats that, if she did not so do, plaintiff would cause the arrest of her husband for obtaining money or property under false pretenses, which said threats were false and groundless. Trial was had in the court below, where defendants prevailed. Plaintiff appeals, demanding a trial *de novo.* There is but one question involved—duress. A decision of

the issue involves a somewhat brief résumé of the testimony. There were but three witnesses—Mr. and Mrs. Rettinger and Otto Thress. Mrs. Rettinger's testimony was given through an interpreter, and is hard to reproduce in this opinion. In substance, she testified that Mr. Thress said that he would "put her man in jail." That he told her that two or three times; that she would be confined in two months, and was scared and was sick immediately after the conversation; that her husband was her only means of support, and that was the reason she had signed the mortgage; that she could not read nor speak English; that she was sixteen years of age. Upon cross-examination, she stated that Thress had spoken to her in German; admitted her signature to the mortgage, and stated that she had gone to the office of an attorney in Glendive, where the notary public had put a seal on the mortgage. She also stated that she did not know what she was signing, and that the mortgage was never read to her. She also testifies that the time she was informed that there was a mortgage against her land was on the following January, when her mother told her the bank had begun foreclosure. Mr. Rettinger testified that Mr. Thress came to Glendive, and went to the power house, where witness was unloading a car of coal, and had a paper there, and told him that if he and his wife did not sign the note and mortgage he would have to take the witness back with him.

Upon cross-examination he testified:

Q. Isn't it a fact, Mr. Rettinger, that you then made the statement that you would not secure it, and you would not care if they put you in jail; that you would just as soon be in jail—sooner than where you are now?

A. He told me that I did not care, and he said that he would take me with him right away.

Q. After stating that you did not care, isn't it a fact that I told you there was no satisfaction to us to see you in jail? That what we wanted was the money, or the security for the money?

A. Yes. That is what you said.

Q. Then, Mr. Rettinger, isn't it a fact that I told you, at that time, on the coal car, that it was immaterial whether you and your wife made that mortgage and note, or not; that I would guarantee you absolutely,

that the Security State Bank would not prosecute you at any time you wanted to come to Hettinger county?

A. Yes, he told me that there, but he said all that he wanted was to have my wife sign. He said he did not care whether we signed or not, but he would take me with him right away. Before we parted for dinner, I told him I would ask my wife what she would do.

Q. When we were up in the lawyer's office, did I threaten you or your wife at that time with arrest?

A. He never said it up there, but he told me that before we went up there.

Upon cross-examination relative to the debt secured by the mortgage, Rettinger states that he owed every cent of it. That this note was given in payment of other notes which he owed the Security State Bank, and which were secured by mortgages upon an engine and horses.

The testimony proceeds:

Q. Mr. Rettinger, how many horses were included in that mortgage?

A. I could not say for sure. Seven or eight.

Q. In fact, it was ten, Mr. Rettinger?

A. Somewhere about eight or nine.

Q. Did you own the horses that were mortgaged?

A. Yes, they were my horses.

Q. Isn't it a fact that your father owned those horses?

A. My father used to own them, but I was the owner later on.

Q. When did you become the owner, Mr. Rettinger?

A. About four years ago; I paid the taxes.

Q. Isn't it a fact that these same horses were claimed by your father, and your father refused to deliver those horses in the mortgage foreclosure?

A. Yes. My father told him, but they never paid any attention. They just went and took the outfit.

Q. Who did?

A. Julius Hollst took it.

Q. Did you ever pay anything on this note?

A. On which note?

Q. The note we are suing on.

A. No.

Q. And you owe the face value of the note to-day to the Security State Bank,—is that a fact?

A. Yes, I owe every cent of it.

Upon redirect examination, he testifies that he went home and repeated the threats to his wife.

Upon the part of the plaintiff, Mr. Thress testifies that he went to Glendive to secure, if possible, a settlement of the accounts between the plaintiff and defendants, and had asked Mr. Rettinger what he could do. That he started off by saying that he did not care whether or not they put him in jail; that he told Rettinger at that time there was absolutely no satisfaction in putting him in jail; that they wanted the money, or security; and that he absolutely guaranteed him that no criminal prosecutions would be started against him, if he wanted to go back to Hettinger county, North Dakota. That Mr. Rettinger agreed to give security if his wife would sign. That he made no threat at that time to Mr. Rettinger, nor to his wife. That after dinner both came to the office of a local attorney; that the wife was cheerful at all times, and participated in the conversation for about two hours. He then proceeds to state that at a prior time, while the Rettingers were still in North Dakota, and about the 31st of May, 1912, he had threatened them with criminal prosecution for obtaining money under false pretenses, in mortgaging horses that belonged to the father, and which horses the father had already mortgaged to somebody else. He further testifies that, at the time of the execution of the mortgage in question, the Security bank had pending against the defendant certain actions, one of which was an attachment, and that the same were dismissed in consideration of the giving of the security aforesaid.

(1) We believe it is conceded that, to set aside the mortgage, the evidence must be clear, satisfactory, and convincing. In Anderson v. Anderson, 17 N. D. 275, 115 N. W. 836, it is said: "The burden is upon her to show that the deed was not her free and voluntary act. The presumption is that the deed is valid and binding, and this presumption will not be overcome by barely preponderating circumstances. On the contrary, duress, menace, or undue influence must be shown by evidence of the clearest, of the most satisfactory character, before the deed will be set aside. In Jasper v. Hazen, 4 N. D. 1, 23 L.R.A.

58, 58 N. W. 454, the court said: 'Hence courts have, with great uniformity, in this class of cases, required the proof that should destroy the recital in a solemn instrument to be clear, satisfactory, and specific, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt.' McGuin v. Lee, 10 N. D. 160, 86 N. W. 714. It must appear that the deed would not have been given if the threats or undue influence had not been used. Unless it is clearly shown that the deed was given under the influence of fear, it will be deemed to have been given freely and voluntarily. The apparent consent will be deemed real unless affirmatively shown to have been overcome by duress, menace, or fear, or undue influence." See also: Smith v. Jensen, 16 N. D. 408, 114 N. W. 306; Englert v. Dale, 25 N. D. 587, 142 N. W. 169; Schinzer v. Wyman, 27 N. D. 489, 146 N. W. 898; Comp. Laws 1913, §§ 5842–5852; Beath v. Chapoton, 115 Mich. 506, 69 Am. St. Rep. 589, 73 N. W. 806; McCormick Harvesting Mach. Co. v. Miller, 54 Neb. 644, 74 N. W. 1061, holding that the fear must be of an unlawful imprisonment, and that threat of a lawful arrest is not grounds for vitiating the instrument. Also: Wolff v. Bluhm, 95 Wis. 257, 60 Am. St. Rep. 115, 70 N. W. 73; Hilborn v. Bucknam, 78 Me. 482, 57 Am. Rep. 816, 7 Atl. 272, where it is held that one who believes he has been wronged may threaten the wrongdoer with a criminal prosecution, and that the same will not vitiate security obtained thereby. Also: Ingebrigt v. Seattle Taxicab & Transfer Co. 78 Wash. 433, 139 Pac. 188; Bodine v. Morgan, 37 N. J. Eq. 426; Sulzner v. Cappeau-Lemley & M. Co. 234 Pa. 162, 39 L.R.A.(N.S.) 421, 83 Atl. 103. See also notes in 26 L.R.A. 48; 20 L.R.A.(N.S.) 484; and 37 L.R.A.(N.S.) 539. Without going further into the authorities, upon which there seems to be little or no conflict between the attorneys in this case, we announce our conclusion, from a careful perusal of the evidence, that the defendants have not established the threat of an arrest, and especially of an *unlawful* arrest, by evidence of that clear, satisfactory, and convincing nature required in such cases. Respondent insists that the presumption of innocence supplies the proof that the arrest threatened was unlawful. This we do not believe. The burden was upon them to show that the mortgage was executed by threats of an *unlawful* arrest. Simple proof of a threat of arrest is not enough. They must also

prove that it was unlawful. Moreover, in this case, there is evidence introduced by the plaintiff, showing that there were some grounds at least for a lawful arrest. Judgment of the District Court is reversed, and the mortgage will be reinstated and foreclosure ordered.

JOHN F. BEYER v. INVESTORS' SYNDICATE, North American Coal & Mining Company, and Producers & Consumers Co-operative Company.

(153 N. W. 476.)

This litigation is also the continuance of Investors' Syndicate v. Letts, 22 N. D. 452, and Investors' Syndicate v. North American Coal & Min. Co. post, 259. Action to establish a lien for taxes, mortgages, and other expenditures by plaintiff upon the land which constitutes the assets of the coal company. Trial *de novo*.

Lien for taxes — action to establish — title — asserting — United States district court — advance decision in.

1. Plaintiff cannot assert title to the premises in himself, the same issues having been determined against this contention in an action in the United States district court in the year 1909.

Subrogation—county—taxes—company—assets of.

2. Under the circumstances of this case, plaintiff will be subrogated to the interests of the county in the taxes which he paid to protect the assets of the coal company.

Stock in company — purchase of — action to rescind — evidence — bad faith — corporation — assets of.

3. Bringing an action to rescind his original purchase of stock in the coal company is not evidence of plaintiff's bad faith in the present action, nor of an attempt upon his part to wrongfully absorb the assets of the corporation.

Note.—The general rule was laid down in Title Guarantee & T. Co. v. Haven, 196 N. Y. 487, 25 L.R.A.(N.S.) 1308, 89 N. E. 1082, 1085, 17 Ann. Cas. 1131, that there is nothing in the nature of a lien for taxes or assessments, or in the fact that such lien exists in favor of a sovereign taxing power, to prevent the application of the equitable doctrine of subrogation, when justice demands it. This case, cited above in the opinion, is also found included in the discussion of authorities in note in L.R.A. 1915D, 697, on the right of one who voluntarily advances money to pay the taxes on the property of another to be subrogated to the rights of the public.

Taxes—proof of payment—treasurer's receipt—burden of proof.

4. The proof of payment of the taxes by production of the official receipt, signed by the treasurer, is sufficient to meet the burden of proof imposed upon plaintiff in this action.

Taxes—payment—lien.

5. The particular taxes for which plaintiff is entitled to a lien upon the premises are enumerated in the opinion.

Opinion filed June 4, 1915. Rehearing denied July 2, 1915.

Appeal from the District Court of Stark County, *Crawford*, J. Judgment modified and affirmed.

Bangs, Netcher & Hamilton and *W. F. Mayer* for appellants. (*Charles E. Purdy* of counsel).

"The presumption of regularity of an official act does not extend to acts involving the forfeiture of an individual's rights, the depriving him of his property, or the placing of a charge or lien thereon." 16 Cyc. 1078, 1079; 37 Cyc. 976, 977.

The proper and legal assessment is an indispensable prerequisite to the validity of the tax to follow. Without a valid assessment there can be no lawful attempt to collect the tax, or enforce it against any specific property. 37 Cyc. 987, c. 1139, 2, 1251, 1252, 1516; 2 Cooley, Taxn. 3d ed. 1004.

The treasurer's receipt for taxes paid is no evidence of a levy or assessment. Swenson v. Greenland, 4 N. D. 534, 62 N. W. 603; Brown v. Corbin, 40 Minn. 510, 42 N. W. 481; Howes v. Gillett, 23 Minn. 232; Fleckten v. Spicer, 63 Minn. 458, 65 N. W. 926; Weimer v. Porter, 42 Mich. 569, 4 N. W. 306; Hanna v. Fisher, 95 Ind. 384; Merrill v. Wright, 41 Neb. 355, 59 N. W. 787; Adams v. Osgood, 55 Neb. 768, 76 N. W. 446; Clark v. Blair, 4 McCrary, 311, 14 Fed. 812; People ex rel. Seale v. Doane, 17 Cal. 486; Allen v. McKay, 139 Cal. 100, 72 Pac. 713; Hopper v. Malleson, 16 N. J. Eq. 384.

All the essential steps leading up to a valid tax must be alleged and proved, in cases of this character. United States v. Ross, 92 U. S. 281, 23 L. ed. 707; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; 25 Am. & Eng. Enc. Law, 320, 321, and notes 1 and 2.

It is not necessary to pay taxes before they are delinquent, in order

to be protected. One having a lien on land has the right to suppose that the title holder will pay the taxes, and he has no right to intervene and pay the taxes himself, until it is manifest that the owner will not do so. Jaggard, Taxn. p. 633; 37 Cyc. 1154, note 5; 1182, 1183, note 74; Pond v. Drake, 50 Mich. 302, 15 N. W. 466; Young v. Omohundro, 69 Md. 429, 6 Atl. 120; Loughridge v. Northwestern Mut. L. Ins. Co. 180 Ill. 267, 54 N. E. 153; Iowa R. Land Co. v. Davis, 102 Iowa, 138, 71 N. W. 229.

The personality of the corporation is wholly distinct from that of a share holder, and the latter has no title to, or direct interest in, the corporate property, nor any authority to act for the company; nor is he liable for its taxes. 10 Cyc. 373, et seq. 649, A; 26 Am. & Eng. Enc. Law, 899–901, 945, 947; 1 Cook, Corp. 5th ed. chap. 1, § 11, pp. 35–42; Smith v. Hurd, 12 Met. 384, 46 Am. Dec. 690; Humphreys v. McKissock, 140 U. S. 304, 312, 35 L. ed. 473, 475, 11 Sup. Ct. Rep. 779.

The ownership of property is in the corporation, and not in the holders of its stock. Gibbons v. Mahon, 136 U. S. 549, 557, 34 L. ed. 525, 526; Hyatt v. Allen, 56 N. Y. 557, 15 Am. Rep. 449; Jenks v. Brewster, 96 Fed. 629; Lee v. Sturges, 46 Ohio St. 161, 2 L.R.A. 556, 19 N. E. 560.

There is no privity of contract between a stockholder as such and his corporation, in regard to the payment of taxes. Gorder v. Conner, 56 Neb. 783, 77 N. W. 383; Western Dist. Warehouse Co. v. Hayes, 97 Ky. 18, 29 S. W. 738; Sargent v. Webster, 13 Met. 505, 46 Am. Dec. 743; Central R. & Bkg. Co. v. Claghorn, Speers, Eq. 562; Sanborn v. Lefferts, 58 N. Y. 184; Wausau Boom Co. v. Plumer, 35 Wis. 281; Barnsted v. Empire Min. Co. 5 Cal. 299; Reichwald v. Commercial Hotel Co. 106 Ill. 439; Gordon v. Preston, 1 Watts, 388, 26 Am. Dec. 75; 37 Cyc. 1182, note 74.

There was no contractual relation between the parties. 37 Cyc. 1152–1154; 27 Am. & Eng. Enc. Law, 749, 750; Bryant v. Nelson-Frey Co. 94 Minn. 307, 102 N. W. 859; Scharffbillig v. Scharffbillig, 51 Minn. 349, 53 N. W. 713; Janeway v. Burn, 91 App. Div. 171, affirmed in 180 N. Y. 560, 73 N. E. 1125.

There must be privity of contract or compulsion, before any right to a lien can be recognized. William Ede Co. v. Heywood, 153 Cal.

617, 22 L.R.A.(N.S.) 562, 96 Pac. 81; Doughty v. Miller, 50 N. J. Eq. 536, 25 Atl. 153; Exall v. Partridge, 8 T. R. 308, 3 Esp. 8, 4 Revised Rep. 656; Ætna L. Ins. Co. v. Middleport, 124 U. S. 534, 547–551, 31 L. ed. 537, 541–543, 8 Sup. Ct. Rep. 625; Suddath v. Gallagher, 126 Mo. 403, 28 S. W. 880; Mercantile Trust Co. v. Hart, 35 L.R.A. 352, 22 C. C. A. 473, 40 U. S. App. 559, 76 Fed. 676; Montgomery v. Charleston, 48 L.R.A. 503, 40 C. C. A. 108, 99 Fed. 825.

When a sale has been made the tax has been paid, and no tax remains. The statute relates to payment of taxes. A party paying taxes may be subrogated to the lien of the state. Rev. Codes 1905, § 1595, Comp. Laws 1913, § 2210; 2 Cooley, Taxn. 3d ed. 1043, 1048; 37 Cyc. 1383, 1388; 27 Am. & Eng. Enc. Law, 851, 852; Pond v. Drake, 50 Mich. 304, 15 N. W. 466.

Where a mortgagor redeems from a tax sale, the mortgagee cannot be compelled to reimburse therefor. 27 Cyc. 1254, note 14, 1255–1258.

M. A. Hildreth, for respondent.

The taxes assessed and paid were liens upon the lands, superior to the rights of all other parties concerned. Jacobs v. Union Trust Co. 155 Mich. 233, 118 N. W. 921.

An interested party, such as the plaintiff here, has the right to pay taxes on the property in which he is interested, and to protect and conserve the same, and to be subrogated to the rights of the state, after such property has been sold for taxes, and payment thereof has been made by him. Title Guarantee & T. Co. v. Haven, 196 N. Y. 487, 25 L.R.A.(N.S.) 1308, 89 N. E. 1082, 1085, 17 Ann. Cas. 1131; McNish v. Perrine, 14 Neb. 582, 16 N. W. 837; John v. Connell, 61 Neb. 267, 85 N. W. 82.

Courts will protect persons in the payment of taxes, in instances like the one before us. Farmers' Loan & T. Co. v. Stuttgart & A. River R. Co. 92 Fed. 246.

The doctrine is applied that, in the sale of property under foreclosure, the court will see to it that taxes, which are a paramount lien to all others, are satisfied out of the property, and that those paying the same should be protected. Goodnow v. Litchfield, 63 Iowa, 275, 19 N. W. 226, 59 Iowa, 226, 9 N. W. 107, 13 N. W. 86; Goodnow

v. Stryker, 61 Iowa, 261, 16 N. W. 486, 62 Iowa, 221, 14 N. W. 345, 17 N. W. 506; Goodnow v. Wells, 54 Iowa, 326, 6 N. W. 527.

The court made these taxes a lien on the property. If any person in good faith, because of a statutory obligation resting upon him, or because public policy so requires, pays money another is under obligation to pay, assent of such other is presumed, and the person so paying will be protected. Goodnow v. Moulton, 51 Iowa, 555, 2 N. W. 395.

Such a person, or Mr. Beyer in this case, was not a mere volunteer or intermeddler in the payment of the taxes. Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40.

A stockholder in a corporation, in paying taxes of the corporation, is not a volunteer. Harrison, Law of Subrogation, 322, 323; 3 Cook, Corp. 6th ed. § 850, pp. 2996, 2997; Cooley, Taxn. 2d ed. 466; Rice v. Jerome, 38 C. C. A. 388, 97 Fed. 721; Re Bruce, 158 Fed. 123; 23 Am. & Eng. Enc. Law, 776; Pease v. Egan, 131 N. Y. 262; Wright v. Oroville Gold, S. & C. Min. Co. 40 Cal. 20, 3 Mor. Min. Rep. 558; Bush v. Wadsworth, 60 Mich. 255, 27 N. W. 532, 27 N. W. 532.

The payments made by plaintiff were for the benefit of the corporation, and he stood in the place of the corporation. Jacobs v. Union Trust Co. 155 Mich. 233, 118 N. W. 921; Home Invest. Co. v. Clarson, 15 S. D. 513, 90 N. W. 153; Farmers' Loan & T. Co. v. Stuttgart & A. River R. Co. 92 Fed. 246; Dalgardno v. Trumbull, 61 Wash. 659, 112 Pac. 928; Foley v. Oberlin Congregational Church, 67 Wash. 280, 121 Pac. 65.

Plaintiff's right to have the taxes paid back to him rests upon principles of equity and conscience. 3 Cook, Corp. p. 800; First Nat. Bank v. Ewing, 43 C. C. A. 150, 103 Fed. 168; Appleton Waterworks Co. v. Central Trust Co. 35 C. C. A. 302, 93 Fed. 286; Rice v. Jerome, 38 C. C. A. 388, 97 Fed. 719; Farmers' Loan & T. Co. v. Stuttgart & A. River R. Co. 92 Fed. 246; Georgia v. Atlantic & G. R. Co. 3 Woods, 434, Fed. Cas. No. 5,351; McLellan v. Detroit File Works, 56 Mich. 579, 23 N. W. 321; West St. Louis Sav. Bank v. Shawnee County Bank, 95 U. S. 557, 24 L. ed. 490.

The giving of a corporate note for an individual obligation is presumably *ultra vires*. The property of a corporation is a trust fund

for the payment of its debts, and no matter into whose hands it goes, it remains charged with such trust, which a court of equity will enforce. Domestic Teleg. & Teleph. Co. v. Metropolitan Teleph. & Teleg. Co. 39 N. J. Eq. 163; Bartlett v. Drew, 57 N. Y. 587; Lawrence v. Nelson, 21 N. Y. 158; Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731; Ft. Worth City Co. v. Smith Bridge Co. 151 U. S. 301, 38 L. ed. 169, 14 Sup. Ct. Rep. 339; Nathan v. Whitlock, 9 Paige, 152, 3 Edw. Ch. 215.

Plaintiff, having advanced the payment of the taxes in good faith and to preserve the corporate property, is entitled to be reimbursed from the proceeds of the property, or to have a lien declared on the property. Sant v. Perronville Shingle Co. 179 Mich. 42, 146 N. W. 212; Central R. Bkg. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915, 5 Sup. Ct. Rep. 387; Miner v. Belle Isle Ice Co. 93 Mich. 97, 17 L.R.A. 413, 53 N. W. 218; Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Atty. Gen. ex rel. Islington v. Brewers' Co. 1 P. Wms. 376.

In actions to determine adverse claims, the court will decree the payment of taxes. Fenton v. Minnesota Title Ins. & Trust Co. 15 N. D. 373, 125 Am. St. Rep. 599, 109 N. W. 363; State Finance Co. v. Beck, 15 N. D. 375, 109 N. W. 357; Powers v. First Nat. Bank, 15 N. D. 466, 109 N. W. 361.

Defendants claim that they are the owners in fee of the land in question. This, if true, does not deprive the court of the power to require them to repay these taxes, as a condition to the granting of any relief. Powers v. First Nat. Bank, 15 N. D. 466, 109 N. W. 361; Blessett v. Turcotte, 20 N. D. 151, 127 N. W. 505.

BURKE, J. This is a trial *de novo*. The litigation is a continuation of the controversy reported in Investors' Syndicate v. Letts, 22 N. D. 452, 134 N. W. 317, and closely allied to Investors' Syndicate v. North American Coal & Min. Co. post, 259, 153 N. W. 472, just decided by this court. The case at bar arises upon a complaint to determine adverse claims filed by Beyer against the North American Coal & Mining Company, Producers' & Consumers' Co-operative Company, Williams, his wife, Tappen, the administrator of the estate of the deceased Letts, and all persons unknown and their unknown heirs,

claiming any estate, or interest, or lien, or encumbrance upon the property described in the complaint, being the north half of twenty-one, 139–94, and the southeast one-quarter and northwest one-quarter of sixteen, 139–94, the lands upon which the coal mine is situated. In ¶ 3 of his complaint, plaintiff says: "The defendants above named claim certain estate or interest in, or lien or encumbrance upon, the same, adverse to the plaintiff herein, who is the owner in fee of the above described premises as aforesaid, and claim and allege title and interest in the same and whole thereof." In ¶ 4: "And plaintiff further alleges and charges the facts to be, that he has paid on the account of the said land and premises above described, the following amount of taxes, to wit: . . . And plaintiff has paid, or caused to be paid, on said premises, large sums of money in the way of redemption of mortgages, liens, and encumbrances upon the lands and premises, amounting to the sum of $3,500." ¶ 5: "And plaintiff further alleges and charges the facts to be, that he holds an assigned judgment amounting to $320, with interest thereon from March 13, 1906, which judgment was assigned by the Investors' Syndicate and defendant above to plaintiff on the aforesaid date." As relief, he asks that the defendants be required to set forth their adverse claims; that the same be adjudged null and void and that the several defendants be decreed to have no estate, or interest in, or lien or encumbrance upon, said property; that the title be quieted as to said claim, and that the defendants above named be forever debarred and enjoined from asserting title to said lands; that the plaintiff recover possession of the premises above described, and that he recover the full amount of his claims, with interest thereon, and that he recover in the sum of $500 yearly for the use and occupation of said land; and that he have such further relief as may be just and equitable, together with costs and disbursements. After the case was fully tried, plaintiff served an amended complaint, which is voluminous, and largely a recital of plaintiff's evidence adduced at the trial. In this amended complaint, plaintiff alleges that on the 15th of February, 1912, Arthur B. Robinson, as administrator of the estates of Elizabeth W. and Jeremiah S. Letts, deceased, for a valuable consideration, executed and delivered to the plaintiff certain deeds to the 4 quarters of land, which deeds are set forth in full in the complaint. The prayer for relief is prac-

tically the same as in the original complaint. As throwing light upon the intention of the plaintiff, we quote from his brief, wherein he says: "The cause of action on the part of the plaintiff is predicated upon his right and interest in and to the lands and premises that form the assets of the North American Coal & Mining Company. The plaintiff claims to have paid for many years the taxes assessed against these lands, in good faith, to protect the assets of the company. The evidence discloses the fact that the North American Coal & Mining Company have done nothing, except to answer in this case by the same attorneys who failed to answer for them in other cases." The only defendants to answer are the Investors' Syndicate, North American Coal & Mining Company, Producers' & Consumers' Co-operative Company. By reference to the case reported in 22 N. D. 452, 134 N. W. 317, it will be noted that, prior to the taking of Beyer into the corporations, an old corporation had been organized, which, however, had never exercised any of its powers. The reference was to the Producers' & Consumers' Co-operative Company, one of the answering defendants herein. They allege that they are the owners of one of the quarter sections of land; the North American Coal & Mining Company alleges that it is the owner of the remaining three quarters, while the Investors' Syndicate sets up the mortgage given by the Letts upon one quarter and the mortgage given by the Coal Company upon the three remaining quarters. They all plead the judgments in the prior suits as *res judicata*. The three corporations answer by the same attorneys, ask that the plaintiff's action be dismissed, that he recover nothing herein, and that he be restrained from further asserting any interest in or title to the premises adverse to the defendants. Plaintiff recovered judgment in the court below, and the three above mentioned defendants appeal, demanding a trial *de novo*.

As will be gathered from the foregoing statement of the case, it is difficult to locate plaintiff's theory of the case; and we are forced, in the interest of justice, and to end, if possible, this protracted litigation, to cover all possible theories of the complaint.

(1) If it is the intention of plaintiff to assert title to the premises in himself, as is evidenced by his plea of ownership and demand for relief, as well as his introduction in evidence of the deeds from the administrator of the Letts' estates, such claim has been successfully

met by the plea of *res judicata*. The decree entered by the United States district court in the year 1909, wherein Beyer and the Letts were joint plaintiffs in the action to rescind the contract whereby the coal companies were formed, and recover the lands, being decided adverse to them, prevents the assertion now by Beyer either of title in his own name directly, or through the Letts.

(2) If the complaint be treated as an effort by Beyer to subrogate himself to the interests of the county, as seems to have been adopted by the trial court, we have other and more important matters to consider. We are cited to the case of Title Guarantee & T. Co. v. Haven, 196 N. Y. 487, 25 L.R.A.(N.S.) 1308, 89 N. E. 1082, 1085, 17 Ann. Cas. 1131, wherein the trust company honored a forged check, and with the proceeds paid the taxes upon a piece of land. In allowing the trust company to be subrogated to the interests of the county, the court says: "There is nothing in the nature of a lien for taxes or assessments . . . to prevent the application of the equitable doctrine of subrogation when justice demands it. We think that justice demands its application here. Subrogation is not permitted (1) where the party seeking it has intermeddled with the affairs of the defendant; or (2) where it would prejudice the rights of innocent third parties." The next case cited by respondent is Farmers' Loan & T. Co. v. Stuttgart & A. River R. Co. 92 Fed. 246, wherein the court, after announcing the law about as given in the New York case, says: "I think there is sufficient evidence in the record to show that the company made Barstow its agent for the payment of these taxes, and that he paid them, and thus preserved the interest of the bondholders." Barstow was given judgment for the amount paid, with 6 per cent interest, and was given a lien superior and paramount to other encumbrances upon the railway. See also Goodnow v. Stryker, 61 Iowa, 261, 16 N. W. 486, where it is held that, where a person has paid taxes on land under the impression that he is legal owner thereof, and the true owner adopts such payments and claims the benefit thereof, the party making such payments is entitled to be reimbursed therefor by the owner, and a lien therefor upon the land. See also: Goodnow v. Wells, 54 Iowa, 326, 6 N. W. 527; Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40, wherein it is said: "It is true that the doctrine of subrogation 'is not to be applied in favor of one who has officiously,

and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay,' nor where 'it would work injustice to the rights of others'. . . . It is also true that the plaintiff was not directly liable to pay defendant's proportion of the debts of the corporation; but as a stockholder he had a common, well-defined, beneficial interest, with all other stockholders, in the fund . . . from which defendant's proportion of the debts must have been paid, if not paid by defendant. . . . There can be no doubt that the plaintiff was entitled to contribution from the defendant, to the extent of defendant's proportion of the debt paid. . . . It follows that the payment was not voluntary, since contribution no more than subrogation is allowed in favor of a mere volunteer. But in this case the plaintiff, in addition to contribution, asks to be subrogated to the rights and remedies of Redington & Co. against the defendant, 'for the purpose of compelling contribution.'" The court then goes on to hold subrogation proper. See: 3 Cook, Corp. 6th ed. § 850; Cooley, Taxn. 2d ed. 466; Pease v. Egan, 131 N. Y. 262, 30 N. E. 102; Wright v. Oroville Gold, S. & C. Min. Co. 40 Cal. 20, 3 Mor. Min. Rep. 558; Bush v. Wadsworth, 60 Mich. 255, 27 N. W. 532, wherein the president, to preserve the property, paid interest notes due upon a mortgage, for which he was allowed to be subrogated to the rights of the mortgagee; Jacobs v. Union Trust Co. 155 Mich. 233, 118 N. W. 921; Home Invest. Co. v. Clarson, 15 S. D. 513, 90 N. W. 153. From the authorities above mentioned, it is apparent that, if Beyer in good faith paid the taxes upon the lands of the coal companies to preserve their property, he would undoubtedly be entitled to recover the sum so paid, with interest, and equity might subrogate him to the interests of the county. Appellant does not strenuously oppose this doctrine, but does insist that the payments made by Beyer were not in good faith. That they were made rather in an effort to himself absorb the assets of the corporations.

(3) Upon this phase of the question, we have to refer again to the history of the case. In 1902, Beyer brought his action to rescind his transaction with the coal company and to recover the land upon which the mine is situated. A few months thereafter he dismissed this action, and began another for the same purpose. This case was

decided by the United States District Court for North Dakota in 1909. Before the decision in the United States court aforesaid, foreclosure proceedings had been begun upon the Dana mortgage. Beyer, intervening therein, positively denied that he was a stockholder in either of the coal companies, claiming that he had rescinded his transaction by which he had obtained his stock, and claimed to be the owner of the mortgage. That litigation was finally decided in 1912. Eighteen days after the final disposition of the said case the present action was begun, based, in part at least, upon quitclaim deeds given by the administrator of the Letts estate to Beyer, which deeds are dated March 23, 1911, and February 15, 1912. Appellant further points out that all of the payments made for taxes were made pending litigation wherein Beyer was attempting to take away from the coal company the lands in question; and they insist that this fact is inconsistent with his present contention, that the payments were made in good faith, to preserve the assets of the company. This is a matter calling for the exercise of the broadest equitable principles. So far as the Investors' Syndicate is concerned, we have, in the foreclosure case just decided by this court, held them a party to an attempt to loot the coal company of its assets. Beyer, while speculating in his original investment, has, nevertheless, been free from any fraud in his transactions. Admitting all that appellants say about him, he is honesty personified, in comparison with Williams and his associates. Considering his provocation, we do not consider the actions to rescind evidence of bad faith upon his part; and we therefore conclude, that equity and good conscience require that the coal companies pay to him the taxes paid by him upon the property at a time when he believed himself to be the owner thereof. All such sums, with interest at the rate of 7 per cent from the date of payments, are hereby declared to be a lien upon the premises, to be enforced according to law by execution sale, if necessary.

(4) Appellants, in anticipation of this situation, claim that the proof is insufficient to show that Beyer paid such taxes. They concede that he has receipts signed by the treasurer of the county for such sums; but claim that the treasurer's receipt is not sufficient, but, in addition, there should have been proof of assessment and levy of the taxes themselves; and we are cited to Swenson v. Greenland, 4 N. D.

532, 62 N. W. 603. However, in the case of Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029, this court held that, in actions to quiet title to land, the form of a complaint is authorized and prescribed by statute, and the rule announced in Swenson v. Greenland, supra, did not apply to such cases. We do not think any of the corporations named are in a position at this time to make an attack upon the validity of those taxes. Under the circumstances, therefore, the proof of payment is sufficient.

(5) It only remains to state that the taxes paid by Beyer, at the time he received his stock and deeded the land to the coal company, being up to and including the year 1894, cannot be allowed to him in this action. No taxes paid upon the northwest one quarter of sixteen, covered by the Dana mortgage, can be recovered, because Beyer's interest in this land has been adjudicated in the case of Investors' Syndicate v. Letts, 22 N. D. 452, 134 N. W. 317. The southeast one quarter of sixteen was never formally transferred to the North American Coal & Mining Company, of which Beyer was a stockholder, but the title remained in the Producers' & Consumers' Co-operative Company; but, as those companies are identical, our conclusion is, therefore, that Beyer should recover the amounts paid for taxes upon the southeast one quarter of sixteen and the north half of twenty-one, for the years 1895 and subsequent, and interest thereon at the rate of 7 per cent after each payment, and that he have a lien upon those three quarter sections for the same; and the trial court will enter judgment, authorizing execution sale of said premises to pay said sums according to law. This necessitates a slight modification of the judgment of the trial court, and, as so modified, said judgment is affirmed.

INVESTORS' SYNDICATE v. NORTH AMERICAN COAL & MINING COMPANY, a Corporation, Herbert Williams, and Producers & Consumers Co-operative Company, a Corporation, John F. Beyer, Intervener.

(153 N. W. 472.)

This suit is a continuation of the litigation mentioned in Investors' Syndicate v. Letts, 22 N. D. 452, where a statement of the facts may be found.

Intervention — pleading — right to answer — or defend.

1. Intervener has the right, under the facts of this case, to answer upon behalf of the coal company, having shown that the officers thereof had refused to defend.

Intervener — laches.

2. Intervener is not guilty of laches in the premises.

Intervener's claim — limitations — statute of.

3. Intervener's claim is not barred by the statute of limitations.

Trial court — findings — mortgage — contract — ultra vires — evidence — trial de novo.

4. Findings of the trial court that the mortgage in question was fraudulently issued and *ultra vires*, and that this fact was known to the Investors' Syndicate before its execution have ample support in the evidence, and are adopted upon trial *de novo* by this court.

Opinion filed June 4, 1915. Rehearing denied July 2, 1915.

Appeal from the District Court of Stark County, *Crawford*, J.

Affirmed.

Bangs, Netcher, & Hamilton, and *W. J. Mayer* (*Charles E. Purdy*, of counsel), for appellant.

The intervener has no interest in the subject-matter of this litigation, other than that of a mere stockholder. He has no right to participate

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Note.—That a stockholder in a corporation is entitled to intervene in actions against the corporation is in accord with the general rule. The whole matter of intervention is the subject of an exhaustive note in 123 Am. St. Rep. 280, particularly p. 305. See also note in 15 Am. Dec. 162, as to who may intervene in an action, and in 16 Am. Dec. 177, on the general subject of intervention.

in the management of the affairs of the corporation of which he is a mere stockholder. 26 Am. & Eng. Enc. Law, pp. 947, 970, §§ 3, 18.

A person has an "interest in the matter in litigation" only when he has a claim or demand, or a claim to a lien upon the property which is the subject of the litigation. The case of the intervener here does not even approximate this condition. Yetzer v. Young, 3 S. D. 267, 52 N. W. 1054; McClurg v. State Bindery Co. 3 S. D. 363, 44 Am. St. Rep. 799, 53 N. W. 428; Horn v. Volcano Water Co. 13 Cal. 70, 73 Am. Dec. 569; Smith v. Gale, 144 U. S. 509, 518, 36 L. ed. 521, 524, 12 Sup. Ct. Rep. 674. Note distinction drawn in Dizonno v. Great Northern R. Co. 103 Minn. 120, 114 N. W. 736; Bray v. Booker, 6 N. D. 526, 72 N. W. 933; Wightman v. Evanston Yaryan Co. 217 Ill. 376, 108 Am. St. Rep. 258, 75 N. E. 502, 3 Ann. Cas. 1089; 17 Am. & Eng. Enc. Law, 181 (note 2); Bennett v. Whitcomb, 25 Minn. 153; Goodrich v. Williamson, 10 Okla. 599, 63 Pac. 974; Dickson v. Dows, 11 N. D. 407, 92 N. W. 798.

An intervener must bring himself strictly within the provisions of the statute. Bank of Commerce v. Timbrell, 113 Iowa, 714, 84 N. W. 519; Harlan v. Eureka Min. Co. 10 Nev. 92; Steele v. Taylor, 1 Minn. 285, Gil. 210; Hoe v. Wilson, 9 Wall. 501, 504, 19 L. ed. 762, 762; Wightman v. Evanston Yaryan Co. 217 Ill. 371, 108 Am. St. Rep. 258, 75 N. E. 502, 3 Ann. Cas. 1089.

Intervention offers not a mere defense, but proposes to litigate a new issue requiring new parties. This intervener does not "join" either plaintiff or defendant, nor does he demand a right adverse to either or both. He does not unite with plaintiff in claiming, nor does he join defendants in resisting. He seeks judgment on an independent issue. He is not within the statute. Mayer v. Stahr, 35 La. Ann. 57; Clapp v. Phelps, 19 La. Ann. 461, 92 Am. Dec. 545.

Neither has he served his complaint upon all of the original parties. 29 Cyc. 1119, notes 55, 59; 32 Cyc. 448, 455 notes 41, 44; First Nat. Bank v. Holmes, 12 N. D. 38, 94 N. W. 764.

A stockholder may only sue for the benefit of the corporation, and the fruits of such suit belong to the corporation. 26 Am. & Eng. Enc. Law, 970, 972, subdiv. B.

A mere stockholder cannot rescind a corporate act, though such act be voidable; contracts affected by fraud are not void, but voidable.

2 Pom. Eq. Jur. 3d ed. § 915; Pearsoll v. Chapin, 44 Pa. 13; Kearney v. Vaughan, 50 Mo. 287; Alexander v. Nelson, 42 Ala. 469; National Bank v. Wheelock, 52 Ohio St. 550, 49 Am. St. Rep. 738, 40 N. E. 636.

If Beyer proposes to substitute a minority stockholders' bill in equity for rescission and cancelation, for a defense in intervention, he must conform to equitable rules as to parties and issues. Shields v. Barrow, 17 How. 130, 139, 15 L. ed. 158, 160; Russell v. Clark, 7 Cranch, 69–98, 3 L. ed. 271–281; Barney v. Baltimore, 6 Wall. 280, 286, 18 L. ed. 825, 826; Mallow v. Hinde, 12 Wheat. 193, 198, 6 L. ed. 599, 600; 16 Cyc. 183, 189, 190; 15 Enc. Pl. & Pr. 611–615, 687–689; Minnesota v. Northern Securities Co. 184 U. S. 199, 46 L. ed. 499, 22 Sup. Ct. Rep. 308; Donovan v. Champion, 29 C. C. A. 30, 56 U. S. App. 388, 85 Fed. 71, 19 Mor. Min. Rep. 247; Mahr v. Norwich Union F. Ins. Soc. 127 N. Y. 452, 28 N. E. 391; Miller v. Mahaffy, 45 Iowa, 289.

The board of directors and all parties taking part in the proceedings, or charged by the intervener with conspiracy, would be necessary parties. 10 Cyc. 997, C; Ribon v. Chicago, R. I. & P. R. Co. 16 Wall. 446, 450, 451, 21 L. ed. 367, 368, 369; Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Griffin v. St. Louis Vine & Fruit Growers' Asso. 4 Mo. App. 596; Slattery v. St. Louis & N. O. Transp. Co. 91 Mo. 217, 60 Am. Rep. 245, 4 S. W. 79; 20 Enc. Pl. & Pr. 771; 10 Cyc. 994; Davis v. Peabody, 170 Mass. 397, 49 N. E. 750; Westcott v. Minnesota Min. Co. 23 Mich. 151, 6 Mor. Min. Rep. 336; Hersey v. Veazie, 41 Am. Dec. 370, note.

An intervener cannot inject into a case, or litigate, questions calling for new parties. He must take the case, or come into it, as he finds it, not disturbing or delaying the orderly course of the action in which he intermeddles, but subject to all the rules of law and practice. Mayer v. Stahr, 35 La. Ann. 57; Ragland v. Wisrock, 61 Tex. 391; Tompkins v. Continental Nat. Bank, 71 App. Div. 330, 75 N. Y. Supp. 1099; Cahn v. Ford, 42 La. Ann. 965, 8 So. 477; 11 Enc. Pl. & Pr. 509; 31 Cyc. 518; Osterhoudt v. Ulster County, 98 N. Y. 239; Steinbach v. Prudential Ins. Co. 172 N. Y. 471, 65 N. E. 281; McDougald v. New Richmond Roller Mills Co. 125 Wis. 121, 103 N. W. 244; O'Connor v. Irvine, 74 Cal. 435, 16 Pac. 236; 15 Enc. Pl. & Pr. 688; Hoe v. Wilson, 9 Wall. 501, 19 L. ed. 762; 11 Enc. Pl. & Pr. 509; 31 Cyc.

522; 17 Am. & Eng. Enc. Law, 185, notes 14 and 15; Gillis v. Carter, 29 La. Ann. 700; Kenner v. Holliday, 19 La. 154; Cahn v. Ford, 42 La. Ann. 965, 8 So. 477; Van Gorden v. Ormsby Bros. 55 Iowa, 657, 8 N. W. 625; Carraby v. Morgan, 5 Mart. N. S. 499; Kassing v. Walter, — Iowa, —, 65 N. W. 832.

One cannot secure the rescission of a contract fully executed, without placing or offering to place his obligation *in statu quo*. 16 Cyc. 143, note 78; 2 Pom. Eq. Jur. 3d ed. § 915; Gardner v. Butler, 30 N. J. Eq. 702; Lynch v. Burt, 67 C. C. A. 305, 132 Fed. 417; Pickett v. School Dist. 25 Wis. 551, 3 Am. Rep. 105; Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271, and cases cited; Harts v. Brown, 77 Ill. 226, 4 Mor. Min. Rep. 1; Rev. Codes 1905, § 5378, Comp. Laws 1913, § 5934; Rev. Codes 1905, § 5380, subdiv. 1, Comp. Laws 1913, § 5936.

Neither of the parties hereto has rescinded, and Beyer has no such power or authority. Any such relief sought by him is now barred by the statute of limitation. N. D. Rev. Codes 1905, § 6787, subdiv. 6, Comp. Laws 1913, § 7375; 25 Cyc. 1186; 26 Am. & Eng. Enc. Law, 986, note 2; 13 Enc. Pl. & Pr. 243–245; Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807; Dannmeyer v. Coleman, 8 Sawy. 51, 11 Fed. 97, 5 Mor. Min. Rep. 474; Morrill v. Little Falls Mfg. Co. 53 Minn. 371, 21 L.R.A. 174, 55 N. W. 547; Brasie v. Minneapolis Brewing Co. 87 Minn. 456, 67 L.R.A. 865, 94 Am. St. Rep. 709, 92 N. W. 340; Howard v. Farr, 115 Minn. 86, 131 N. W. 1071.

Beyer sought affirmative relief years ago, on the same grounds as he now defends upon, and both he and his counsel knew of all the existing facts and conditions. 25 Cyc. 1192, note 87; New Albany v. Burke, 11 Wall. 96, 20 L. ed. 155; Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240, 561; 4 Cyc. 933, note 98 and 99; Galbes v. Girard, 46 Fed. 500; Bater v. A. E. Johnson Co. 79 Minn. 354, 82 N. W. 649; Riley v. Pearson, 120 Minn. 210, L.R.A.—, —, 139 N. W. 361; 16 Cyc. 172.

It is immaterial whether or not the property in question represents all the assets of the company. Beyer's rights are not affected or enlarged by such fact. 26 Am. & Eng. Enc. Law, 970, § 18.

Mere failure to pay for the stock subscribed does not render the subscriber any the less a stockholder. 26 Am. & Eng. Enc. Law, 895.

Directors of a corporation may vote a salary to an officer though he is one of their number. Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Cook, Corp. 6th ed. § 657.

A corporation has the power to incur indebtedness and to mortgage, unless its charter expressly forbids it. Cook, Corp. 6th ed. §§ 709, 725, 779 and 808; Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817.

There is no better established doctrine in equity than that of the immunity of a bona fide purchaser. 23 Am. & Eng. Enc. Law, 475.

Purchases for value and without notice have been pronounced as raising "an absolute, unqualified, unanswerable defense." Pilcher v. Ralins, L. R. 7 Ch. 259, 41 L. J. Ch. N. S. 485, 25 L. T. N. S. 921, 20 Week. Rep. 281, 21 Eng. Rul. Cas. 729; 23 Am. & Eng. Enc. Law, 475; Braxton v. Bell, 92 Va. 229, 23 S. E. 289; Cogel v. Raph, 24 Minn. 194; United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; Woolridge v. Thiele, 55 Ark. 45, 17 S. W. 340; 39 Cyc. 1687; 23 Am. & Eng. Enc. Law, 476; 20 Cyc. 653; 14 Am. & Eng. Enc. Law, note 1, 23 Am. & Eng. Enc. Law, 476; 1 Jones, Mortg. 6th ed. § 459; Willoughby v. Willoughby, 1 Term Rep. 763, 1 Revised Rep. 397; Porter v. Green, 4 Iowa, 571; Evans v. Greenhow, 15 Gratt. 153; New Orleans Canal & Bkg. Co. v. Montgomery, 95 U. S. 16, 24 L. ed. 346.

The burden of proof rests upon the intervener to show plaintiff had notice of fraud. Mehlhop v. Pettibone, 54 Wis. 652, 11 N. W. 553, 12 N. W. 443; Jones v. Dunbar, 52 Neb. 151, 71 N. W. 976; Thorington v. Montgomery, 88 Ala. 548, 7 So. 363; Evans v. Mansur & T. Implement Co. 30 C. C. A. 640, 58 U. S. App. 261, 87 Fed. 275; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847; Johnson v. Erlandson, 14 N. D. 518, 105 N. W. 722; Anderson v. Blood, 152 N. Y. 285, 57 Am. St. Rep. 515, 46 N. E. 493; 20 Cyc. 265; 29 Cyc. 1115; 21 Am. & Eng. Enc. Law, 585; 23 Am. & Eng. Enc. Law, 496; 1 Bigelow, Fr. p. 388; 21 Am. & Eng. Enc. Law, 589, note 6; Morris v. Daniels, 35 Ohio St. 406; Bartlett v. Varner, 56 Ala. 580; State use of Salomon v. Mason, 112 Mo. 374, 34 Am. St. Rep. 390, 20 S. W. 629 and cases cited.

M. A. Hildreth, for respondent John F. Beyer.

The Investors' Syndicate, through Tappen, its authorized agent,

knew the exact situation of Beyer with the Coal & Mining Company, and in negotiating the blanket mortgage and taking the assignment of the Dana mortgage, it did so as a part of the scheme to aid Williams in defrauding Beyer out of his interest in the property, and took it under the guise of getting money to operate the mines. Murray v. Ballou, 1 Johns. Ch. 566; Heatley v. Finster, 2 Johns. Ch. 158; 2 Cook, Corp. pp. 1924, 1927 and authorities; Bayliss v. Lafayette M. & B. R. Co. 8 Biss. 193, Fed. Cas. No. 1,140; Davis v. Rock Creek Lumber, Flume & Min. Co. 55 Cal. 359, 36 Am. Rep. 40; Jones v. Morrison, 31 Minn. 140, 16 N. W. 854.

Equity will relieve a party from a contract which is grossly unreasonable in respect to consideration. Relf v. Eberly, 23 Iowa, 467; Hoitt v. Holcomb, 23 N. H. 535; Griffin v. Sketoe, 30 Ga. 300; Barnett v. Spratt, 39 N. C. (4 Ired. Eq.) 171.

Plaintiff has no title to the mortgage in question. It must have parted with something of value by way of payment before receiving notice. Union College v. Wheeler, 61 N. Y. 88; Borell v. Dann, 2 Hare, 440; Kilcrease v. Lum, 36 Miss. 569; Doswell v. Buchanan, 3 Leigh, 365, 23 Am. Dec. 280; Hardingham v. Nicholls, 3 Atk. 304; Parkinson v. Hanna, 7 Blackf. 400; Padgett v. Lawrence, 10 Paige, 170, 40 Am. Dec. 232; Ratcliffe v. Sangston, 18 Md. 388; Servis v. Beatty, 32 Miss. 52; Ely v. Scofield, 35 Barb. 330.

If plaintiff made the loan, and secured the note in question for a purpose other than a corporate purpose, it was a fraud on the stockholders; and the burden of proof shifts from the intervener to the plaintiff to show good faith in the transaction. First Nat. Bank v. Flath, 10 N. D. 283, 86 N. W. 867; Mooney v. Williams, 9 N. D. 329, 83 N. W. 237.

The directors of a corporation act in a fiduciary capacity. In every case where the interest of the corporation is involved, or the individual interest of the directors is in conflict, they act as trustees, and are strictly accountable to the creditors or stockholders for their action. Continental Securities Co. v. Belmont, 206 N. Y. 7, 51 L.R.A.(N.S.) 112, 99 N. E. 138, Ann. Cas. 1914A, 777; Duncomb v. New York, H. & N. R. Co. 84 N. Y. 198; Pollitz v. Wabash R. Co. 207 N. Y. 113, 100 N. E. 721; Hoyle v. Plattsburgh & M. R. Co. 54 N. Y. 324, 13 Am. Rep. 595; Bulkley v. Whitcomb, 121 N. Y. 107, 24 N. E. 13;

People ex rel. Manice v. Powell, 201 N. Y. 200, 94 N. E. 634; Jacobson v. Brooklyn Lumber Co. 184 N. Y. 152, 76 N. E. 1075; 1 Thomp. Corp. 2d ed. §§ 1215, 1216, 1220.

Neither the president nor any director of a corporation is entitled to any salary unless there is an authoritative vote granting it and fixing the amount thereof. Hayes v. Canada, A. & P. S. S. Co. 104 C. C. A. 271, 181 Fed. 289.

The note and mortgage in suit were given for the purpose of paying the indebtedness of one of the stockholders, Williams, and are void. McLellan v. Detroit File Works, 56 Mich. 579, 23 N. W. 321; 1 Beach, Corp. 276; Smith v. Los Angeles Immigration & Land Co.-op. Asso. 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; San Diego v. San Diego & L. A. R. Co. 44 Cal. 113; Thomas v. Brownville, Ft. K. & P. R. Co. 1 McCrary, 392, 2 Fed. 877; Wardell v. Union P. R. Co. 4 Dill. 330, Fed. Cas. No. 17,164; Butts v. Wood, 37 N. Y. 317; Coleman v. 2d Ave. R. Co. 38 N. Y. 201; United States Rolling Stock Co. v. Atlantic & G. W. R. Co. 34 Ohio St. 450, 32 Am. Rep. 380; Flagg v. Manhattan R. Co. 20 Blatchf. 142, 10 Fed. 413; Copeland v. Johnson Mfg. Co. 47 Hun, 235; Kelsey v. Sargent, 40 Hun, 151; Davis v. Memphis City R. Co. 22 Fed. 883; Sellers v. Phœnix Iron Co. 13 Fed. 20, 15 Mor. Min. Rep. 388; Currier v. New York, W. S. & B. R. Co. 35 Hun, 355; Jackson v. McLean, 36 Fed. 213; Miner v. Belle Isle Ice Co. 93 Mich. 97, 17 L.R.A. 412, 53 N. W. 218; Doe v. Northwestern Coal & Transp. Co. 78 Fed. 67; Wilbur v. Lynde, 49 Cal. 290, 19 Am. Rep. 645; Gilbert v. Seatco Mfg. Co. 98 Fed. 211; Koehler v. Black River Falls Iron Co. 2 Black, 715, 2 L. ed. 339; Frederick Mill. Co. v. Frederick Farmers' Alliance Co. 20 S. D. 335, 106 N. W. 298; Small v. Minneapolis Electric-Matrix Co. 45 Minn. 264, 47 N. W. 797.

A court of equity will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts, even within the scope of corporate authority, if such acts would amount to a breach of trust upon which the authority had been conferred. Beyer properly intervened. Shaw v. Saranac Horse Nail Co. 144 N. Y. 224, 39 N. E. 73; Bosworth v. Allen, 168 N. Y. 159, 85 Am. St. Rep. 667, 61 N. E. 163; Faricy v. St. Paul Invest. & Sav. Soc. 110 Minn. 311, 125 N. W. 676; Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co. 136 Fed. 710.

Plaintiff is in no better condition or position with reference to the note and mortgage than it would have been had the note and the mortgage been made direct to Williams. The loan was not for the benefit of the corporation. Gilbert v. Seatco Mfg. Co. 98 Fed. 211; Green's Brice's Ultra Vires, p. 252; 7 Am. & Eng. Enc. Law, 2d ed. p. 793; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

A person cannot be agent of the vendor of property, and at the same time the purchaser thereof. Marsh v. Whitmore, 21 Wall. 178, 22 L. ed. 482; Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. R. Co. 67 Fed. 49; Sage v. Culver, 147 N. Y. 245, 41 N. E. 513.

A pleading will be held to state all the facts that can be implied from the allegations by reasonable and fair intendment, and facts so impliedly averred are traversable in the same manner as though directly stated. Zabriskie v. Smith, 13 N. Y. 330, 64 Am. Dec. 551; Sanders v. Soutter, 126 N. Y. 193, 27 N. E. 263; Brinkerhoff v. Bostwick, 88 N. Y. 52; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; Leslie v. Lorillard, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363; Cowee v. Cornell, 75 N. Y. 100, 31 Am. Rep. 428; Crowe v. Ballard, 1 Ves. Jr. 221, 2 Cox, Ch. Cas. 253, 3 Bro. Ch. 117, 1 Revised Rep. 22; Gibson v. Jeyes, 6 Ves. Jr. 278, 5 Revised Rep. 295; Michoud v. Girod, 4 How. 553, 11 L. ed. 1098; Butts v. Wood, 37 N. Y. 317; Ogden v. Murray, 39 N. Y. 207; Gardner v. Ogden, 22 N. Y. 332, 78 Am. Dec. 192; Zebley v. Farmers' Loan & T. Co. 139 N. Y. 461, 34 N. E. 1067.

The Coal & Mining Company defaulted in this case after Williams had, by his acts, invited the service of process; and under these circumstances, Beyer properly intervened to protect not only his own interests, but those of the company as well. Cook, Stock & Stockholders, § 659; Bronson v. La Crosse & M. R. Co. 2 Wall. 283, 17 L. ed. 725; Bayliss v. Lafayette R. Co. 8 Miss. 193, Fed. Cas. No. 1,140; Morrill v. Little Falls Mfg. Co. 46 Minn. 260, 48 N. W. 1124; 4 Am. & Eng. Enc. Law, 280–283 and cases cited; Bronson v. La Crosse & M. R. Co. 2 Wall. 283, 17 L. ed. 725; Baldwin v. Canfield, 26 Minn. 48, 1 N. W. 261; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Pond v. Vermont Valley R. Co. 12 Blatchf. 280, Fed. Cas. No. 11,265; Rogers v. Lafayette Agri. Works, 52 Ind. 296; Morawetz, Priv. Corp. §§ 270, 271; Gamble v.

Queens County Water Co. 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201; Pondir v. New York, L. E. & W. R. Co. 72 Hun, 385, 25 N. Y. Supp. 560; Barr v. New York, L. E. & W. R. Co. 96 N. Y. 444; Sage v. Culver, 147 N. Y. 241, 41 N. E. 513; Meyer v. Staten Island R. Co. 7 N. Y. S. R. 245; Irvin v. Oregon R. & Nav. Co. 22 Blatchf. 187, 27 Fed. 630; Wright v. Oroville Gold, S. & C. Min. Co. 40 Cal. 20, 3 Mor. Min. Rep. 558; Meeker v. Winthrop Iron Co. 17 Fed. 48; Goodin v. Cincinnati & W. Canal Co. 18 Ohio St. 169, 98 Am. Dec. 95; Jackson v. Ludeling, 21 Wall. 616, 22 L. ed. 492; Menier v. Hooper's Teleg. Works, L. R. 9 Ch. 350, 43 L. J. Ch. N. S. 330, 30 L. T. N. S. 209, 22 Week. Rep. 396; Gregory v. Patchett, 33 Beav. 595; Barr v. New York, L. E. & W. R. Co. 96 N. Y. 444.

A note that shows on its face that it was executed by the president of a corporation on behalf of the corporation, and running to himself as payee, is sufficient to charge his assignee with notice of want of authority to execute it, and is a badge of fraud; and a stockholder of such corporation may, on his own behalf and in the interest of the corporation, resist it and show fraud. San Diego v. San Diego & L. A. R. Co. 44 Cal. 106; Bill v. Western U. Teleg. Co. 16 Fed. 14; Copeland v. Johnson Mfg. Co. 47 Hun, 235; Hayes v. Canada, A. & P. S. S. Co. 104 C. C. A. 271, 181 Fed. 289; Wickersham v. Brittan, 93 Cal. 19, 15 L.R.A. 106, 28 Pac. 792, 29 Pac. 51; Butts v. Wood, 37 N. Y. 317; Kelsey v. Sargent, 40 Hun, 155; Copeland v. Johnson Mfg. Co. 47 Hun, 235; Gardner v. Butler, 30 N. J. Eq. 702; Ward v. Davidson, 89 Mo. 445, 1 S. W. 846; Chamberlain v. Pacific Wool-Growing Co. 54 Cal. 103; Davis v. Memphis City R. Co. 22 Fed. 883; Sellers v. Phœnix Iron Co. 13 Fed. 20, 15 Mor. Min. Rep. 388; Currier v. New York, W. S. & B. R. Co. 35 Hun, 355; Jackson v. McLean, 36 Fed. 213; Miner v. Belle Isle Ice Co. 93 Mich. 97, 17 L.R.A. 412, 53 N. W. 218.

The transaction from its inception was fraudulent and void. The company had no power to borrow money to pay the debts of Williams, and such contract was *ultra vires*. Green's Brice's Ultra Vires, 253; 7 Am. & Eng. Enc. Law, 2d ed. 793; Waymire v. San Francisco & S. M. R. Co. 112 Cal. 650, 44 Pac. 1086.

Where there is fraud or lack of consideration, proof of these may be given, and the burden then shifts to the plaintiff to show that he is a holder in due course and for value. McNight v. Parsons, 136 Iowa,

390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665; Rochford v. Barrett, 22 S. D. 83, 115 N. W. 522; Neyens v. Worthington, 150 Mich. 580, 18 L.R.A.(N.S.) 142, 114 N. W. 404.

The directors in voting a salary to Williams and wife acted in bad faith. They were chargeable with knowledge of all the facts known to Tappen; and as to this intervener, their acts were fraudulent. Gardner v. Butler, 30 N. J. Eq. 702; Excelsior Pebble Phosphate Co. v. Brown, 20 C. C. A. 428, 42 U. S. App. 55, 74 Fed. 323; Tazewell County v. Farmers' Loan & T. Co. 12 Fed. 753; Harrison v. Thomas, 50 C. C. A. 98, 112 Fed. 29.

Such act was in effect the giving away of the assets of the corporation. Bennett v. St. Louis Car Roofing Co. 19 Mo. App. 349; Blatchford v. Ross, 54 Barb. 42; Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Maux Ferry Gravel Road Co. v. Branegan, 40 Ind. 361; Accommodation Loan & Sav. Fund Asso. v. Stonemetz, 29 Pa. 534; Holder v. Lafayette, B. & M. R. Co. 71 Ill. 106, 22 Am. Rep. 89.

The president of a corporation cannot claim salary for his services as such, where none was properly voted to him before the services were rendered. St. Louis, A. & S. R. Co. v. O'Hara, 177 Ill. 525, 52 N. E. 734, 53 N. E. 118; Henry Wood's Sons Co. v. Schaefer, 173 Mass. 443, 73 Am. St. Rep. 305, 53 N. E. 881; Metropolitan Elev. R. Co. v. Kneeland, 120 N. Y. 134, 8 L.R.A. 253, 17 Am. St. Rep. 619, 24 N. E. 381; Barril v. Calender Insulating & Water Proofing Co. 50 Hun, 257, 2 N. Y. Supp. 758; Chamberlain v. Pacific Wool-Growing Co. 54 Cal. 103; Strouse v. Sylvester, — Cal. —, 66 Pac. 660; Doe v. Northwestern Coal & Transp. Co. 78 Fed. 62.

When the salary of Williams and wife was allowed, both were directors, and voted to themselves such salary. This was constructive fraud, from which a court of equity will grant relief. Butts v. Wood, 38 Barb. 181, 37 N. Y. 317; Steele v. Gold Fissure Gold Min. Co. 42 Colo. 529, 126 Am. St. Rep. 177, 95 Pac. 349; Gardner v. Butler, 30 N. J. Eq. 702; Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Kelsey v. Sargent, 40 Hun, 150; Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 581, 110 N. W. 798; Schaffhauser v. Arnholt & S. Brewing Co. 218 Pa. 298, 67 Atl. 417, 11 Ann. Cas. 772; Hardee v. Sunset Oil Co. 56 Fed. 51; Bliss v. Seaman, 165 Ill. 427; Copeland v. John-

son Mfg. Co. 47 Hun, 235; MacNaughton v. Osgood, 41 Hun, 109; Beers v. New York L. Ins. Co. 66 Hun, 75, 20 N. Y. Supp. 788; Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788, 106 Cal. 327, 39 Pac. 602, 110 Cal. 332, 43 Pac. 893; 2 Cook, Corp. 6th ed. pp. 1934, 1935; Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487; Blatchford v. Ross, 54 Barb. 42; Ziegler v. Hoagland, 52 Hun, 385, 5 N. Y. Supp. 305; Adams v. Burke, 201 Ill. 395, 66 N. E. 235; Davis v. Memphis City R. Co. 22 Fed. 883; Hubbard v. New York, N. E. & W. Invest. Co. 14 Fed. 675; Greathouse v. Martin, — Tex. Civ. App. —, 91 S. W. 385, 100 Tex. 99, 94 S. W. 322; Sellers v. Phœnix Iron Co. 13 Fed. 20, 15 Mor. Min. Rep. 388; Miner v. Belle Isle Ice Co. 93 Mich. 97, 17 L.R.A. 412, 53 N. W. 218.

The law forbids directors to profit individually out of the corporate assets, or to do any act the result of which is detrimental to the best interests of the corporation, when such act is for personal gain or advantage. Faricy v. St. Paul Invest. & Sav. Soc. 110 Minn. 311, 125 N. W. 676; Perry v. Tuskaloosa Cotton Seed Oil Mill Co. 93 Ala. 364, 9 So. 217; Finch v. Riverside & A. R. Co. 87 Cal. 597, 25 Pac. 765; Santa Ana Water Co. v. San Buenaventura, 65 Fed. 324; Nunemacher v. Louisville, 98 Ky. 334, 32 S. W. 1091; Sims v. Petaluma Gaslight Co. 131 Cal. 656, 63 Pac. 1011; Edison v. Gilliland, 42 Fed. 205; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170; Michelson v. Pierce, 107 Wis. 85, 82 N. W. 707; Currier v. New York, W. S. & B. R. Co. 35 Hun, 355; Goodell v. Verdugo Canon Water Co. 138 Cal. 308, 71 Pac. 354; Pepper v. Addicks, 153 Fed. 383.

Where third persons have defrauded a corporation by collusion with the corporate officers or stockholders, action as against both the officers and such third persons, and such third parties held liable, the corporation itself is in no position to complain. Or when the directors have turned over the property to an assignee to pay illegal debts, the stockholders may file a bill to have the transaction annulled and set aside. Farmers' Loan & T. Co. v. New York & N. R. Co. 150 N. Y. 426, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. R. Co. 67 Fed. 57; Whitney v. Hazzard, 18 S. D. 491, 101 N. W. 346.

It was not only Beyer's right, but his duty as a stockholder, to inter-

vene and do all proper acts to protect his own and the interests of the corporation,—especially when those who were involved in the transaction were made defendants, but had defaulted and declined to resist the illegal claims. Exchange Bank v. Bailey, 29 Okla. 246, 39 L.R.A. (N.S.) 1032, 116 Pac. 812; Central Trust Co. v. California & N. R. Co. 110 Fed. 70; Steele v. Branch, 40 Cal. 10; Bayliss v. Lafayette, M. & B. R. Co. 8 Biss. 193, Fed. Cas. No. 1,140; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Pond v. Vermont Valley R. Co. 12 Blatchf. 280, Fed. Cas. No. 11,265; Brewer v. Boston Theatre, 104 Mass. 378; Gregory v. Patchett, 33 Beav. 595; Peabody v. Flint, 6 Allen, 55; March v. Eastern R. Co. 40 N. H. 567, 77 Am. Dec. 732; Mason v. Harris, L. R. 11 Ch. Div. 97, 48 L. J. Ch. N. S. 589, 40 L. T. N. S. 644, 27 Week. Rep. 699; Atwool v. Merryweather, L. R. 5 Eq. 464; Ervin v. Oregon R. & Nav. Co. 23 Blatchf. 517, 27 Fed. 629; Allen v. Curtis, 26 Conn. 456; Hersey v. Veazie, 24 Me. 9, 41 Am. Dec. 364; Livingston v. Lynch, 4 Johns. Ch. 573; Kean v. Johnson, 9 N. J. Eq. 401; Rollins v. Clay, 33 Me. 132; Clearwater v. Meredith (Ferguson v. Meredith) 1 Wall. 25, 17 L. ed. 604; Maux Ferry Gravel Road Co. v. Branegan, 40 Ind. 361; Holder v. Lafayette, B. & M. R. Co. 71 Ill. 106, 22 Am. Rep. 89; Jackson v. New York C. R. Co. 2 Thomp. & C. 653; Sant v. Perronville Shingle Co. 179 Mich. 42, 146 N. W. 212; Koehler v. Black River Falls Iron Co. 2 Black, 721, 17 L. ed. 342; Davis v. Rock Creek Lumber, Flume & Min. Co. 55 Cal. 359; Whittlesey v. Delaney, 73 N. Y. 571; Kelsey v. Sargent, 40 Hun, 156; Bixler v. Summerfield, 195 Ill. 147, 62 N. E. 849; Code Civ. Proc. § 6825; Farmers' Loan & T. Co. v. New York & N. R. Co. 150 N. Y. 426, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; Vilas v. Plattsburgh & M. R. Co. (Vilas v. Butler) 123 N. Y. 444, 9 L.R.A. 844, 20 Am. St. Rep. 771, 25 N. E. 941; Sage v. Culver, 147 N. Y. 241, 41 N. E. 513; Wright v. Oroville Gold, S. & C. Min. Co. 40 Cal. 20, 3 Mor. Min. Rep. 558; Meeker v. Winthrop Iron Co. 17 Fed. 48; Menier v. Hooper's Teleg. Works, L. R. 9 Ch. 350, 43 L. J. Ch. N. S. 330, 30 L. T. N. S. 209, 22 Week. Rep. 396; 2 Cook, Stock & Stockholders, 3d ed. § 662, p. 945; 2 Cook, Corp. 6th ed. p. 1926; 1 Beach, Priv. Corp. § 70; 2 Bigelow, Fr. § 645; Coffey v. Greenfield, 55 Cal. 382; Ah Goon v. Superior Ct. 61 Cal. 556; 3 Kerr's Cyc. Code of Cal. pt. 1, p. 435, and cases cited in footnotes; Andrews v. Pratt, 44 Cal. 309; Wilbur

v. Lynde, 49 Cal. 290, 19 Am. Rep. 645; Pickett v. School Dist. 25 Wis. 552, 3 Am. Rep. 105; Cumberland Coal & I. Co. v. Sherman, 30 Barb. 553.

It is proper for stockholders and bondholders to intervene in foreclosure suits. Central Trust Co. v. Washington County R. Co. 124 Fed. 813; Farmers' Loan & T. Co. v. New York & N. R. Co. 150 N. Y. 410, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; Majors v. Taussig, 20 Colo. 44, 36 Pac. 816; Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. R. Co. 67 Fed. 49; Morrill v. Little Falls Mfg. Co. 46 Minn. 260, 48 N. W. 1124; Re Fontana, 85 Hun, 219, 32 N. Y. Supp. 956; Henry v. Travelers' Ins. Co. 16 Colo. 179, 26 Pac. 318; Whitney v. Hazzard, 18 S. D. 490, 101 N. W. 346.

Beyer has an indivisible right to the assets and property of the Coal & Mining Company, and the right rests in him to bring an action, or to defend this action and to attack the foreclosure proceedings. Pollitz v. Gould, 202 N. Y. 11, 38 L.R.A.(N.S.) 988, 94 N. E. 1088, Ann. Cas. 1912D, 1099; Coffey v. Greenfield, 55 Cal. 382; Central Trust Co. v. Washington County R. Co. 124 Fed. 813; Heyman v. Swift, 91 App. Div. 352, 86 N. Y. Supp. 584; Farmers' Loan & T. Co. v. New York & N. R. Co. 150 N. Y. 410, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; Mussina v. Goldthwaite, 34 Tex. 125, 7 Am. Rep. 281; Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. R. Co. 67 Fed. 49; Morrill v. Little Falls Mfg. Co. 46 Minn. 260, 48 N. W. 1124; Henry v. Travelers' Ins. Co. 16 Colo. 179, 26 Pac. 318; Whitney v. Hazzard, 18 S. D. 490, 101 N. W. 346; Chamberlain v. Pacific Wool-Growing Co. 54 Cal. 103; Doe v. Northwestern Coal & Transp. Co. 78 Fed. 62.

Where a party by his own fraud has prevented the other party from coming to a knowledge of his own rights, he cannot, in good conscience, avail himself of the statute of limitations. Authorities cited in Michoud v. Girod, 4 How. 561, 11 L. ed. 1102; First Massachusetts Turnp. Corp. v. Field, 3 Mass. 201, 3 Am. Dec. 124; Welles v. Fish, 3 Pick. 74; Bishop v. Little, 3 Me. 405; Gates v. Andrews, 37 N. Y. 657, 97 Am. Dec. 764; Mayne v. Griswold, 3 Sandf. 465; Taft v. Wright, 47 How. Pr. 1; Kent v. Kent, 62 N. Y. 560, 20 Am. Rep. 502; Higgins v. Crouse, 63 Hun, 134, 17 N. Y. Supp. 696; Tarke v. Bingham, 123 Cal. 163, 55 Pac. 759; Bank of Mendocino v. Baker, 82 Cal. 114, 6

L.R.A. 833, 22 Pac. 1037; Prouty v. Devin, 118 Cal. 258, 50 Pac. 380; Lady Washington Consol. Co. v. Wood, 113 Cal. 487, 45 Pac. 809; Authorities cited under ¶ 96, vol. 3, Kerr's Cyc. Code (Cal.) p. 297; Dunne v. Stotesbury, 16 Colo. 89, 26 Pac. 333; Brush v. Manhattan R. Co. 26 Abb. N. C. 73, 13 N. Y. Supp. 908; Neppach v. Jones, 20 Or. 491, 23 Am. St. Rep. 145, 26 Pac. 569, 849; Gay v. Havermale, 27 Wash. 390, 67 Pac. 804.

BURKE, J. This is a continuation of the litigation mentioned in Investors' Syndicate v. Letts (Beyer, intervener), reported in 22 N. D. 452, 134 N. W. 317. As will appear from the statement of facts given in the above-mentioned opinion, the intervener Beyer, the Letts, and one Williams organized a company known as the North American Coal & Mining Company, of which Beyer received $10,000, the Letts $10,000, and Williams $30,000, in stock. No money was paid for any part of this stock, excepting by Beyer as hereinafter mentioned. The Letts owned their homestead, the N. W. ¼ 16–139–94, encumbered by a mortgage of $500 given to one Dana, and the S. E. ¼ of same section. In the organization of the company, the Letts turned over this land subject to the mortgage in return for their stock in the company. Beyer obtained his stock by paying up the various mortgages against this and other lands, paying the taxes, and contributing enough cash to make up the total sum of $3,440. All of this was turned over to the company for the $10,000 stock which he received. In making the transfers aforesaid, he took in his own name the $500 mortgage upon the Letts homestead, and also took in his own name the N. ½ section 21–139–94. The mortgage he assigned to the coal company by an instrument in writing, and the land he deeded to them by warranty deed. In this manner the company became the owner of the mortgage upon the quarter section in section 16, and the absolute owner of the half section in 21. Williams upon his part donated his services as promoter, and received $30,000 worth of stock. As recited in the former opinion, the coal company executed a mortgage upon the S. E. ¼ of 16 and the half section in 21 and assigned the $500 mortgage upon the N. W. ¼ of 16 to the Investors' Syndicate. Beyer served as treasurer and director of the coal company for several years, when he resigned on account of a disagreement with Williams. About five years after the

organization of the coal company, Beyer brought an action against it and Williams to have the entire transaction rescinded upon the ground of fraud in its inception, offering to return his $10,000 stock, and asking for a return to him of the land and the $500 mortgage. After a trial upon the merits in the United States district court, Beyer was defeated, the court holding that no fraud had been practised upon him which would justify a rescission, the language of the opinion being found at page 454 of 22 N. D. No appeal was taken from this decree. The Investors' Syndicate thereupon began foreclosure of the $500 mortgage, naming the Letts as defendants. Beyer intervened, alleging that he had been defrauded in assigning the mortgage, and asked for rescission and to have the title thereto restored to him. In this action Beyer was again defeated, as will be seen from the opinion already mentioned, this court holding the decision of the United States district court *res judicata* of the controversy. Later the Investors' Syndicate Company started the case at bar to foreclose the mortgage which had been given to it by the coal company upon the S. E. ¼ of 16, and the N.½ of 21. No defense being made by the coal company, Beyer again intervened, claiming that the mortgage given by the coal company to the Investors' Syndicate was fraudulent and *ultra vires*.

He alleges that he has demanded of the officers of the coal company that they interpose a defense to the action of foreclosure, but such officers have neglected to do so, and are in a conspiracy with the plaintiffs to prevent a defense being interposed, wherefore he, the intervener, prays that the plaintiff's complaint be dismissed on the merits and for costs. In his brief he states his position as follows: "We may maintain: (1) that John F. Beyer has a right to intervene in the action pending; (2) that his petition in intervention, and complaint in intervention, state a good defense to the foreclosure of the mortgage and suit on the notes set out in plaintiff's complaint. (3) That it appears upon the face of the complaint in intervention that the resolutions that were passed by the North American Coal & Mining Company were attended by Williams and his wife, who were directors. That they had voted themselves under the resolutions large salaries which they have never earned. That they thereupon, in fraud of the rights of Mr. Beyer and the other stockholders, mortgaged the assets of the company, and, upon securing the assets, paid their personal debts to the plaintiff

corporation. That the action of Williams and his wife was a fraud in law against Beyer, and is sufficient in itself to defeat the plaintiff to maintain his action on the note and for a foreclosure of the mortgage." The trial court found that the notes and mortgages given by the coal company were fraudulent and *ultra vires,* and that those facts were known to the Investors' Syndicate at the time of their execution, and judgment was entered nullifying the same, with costs in favor of Beyer. The Investors' Syndicate appeals, demanding a trial *de novo* in this court.

(1) Appellant attacks the right of the intervener to answer upon behalf of the company, claiming that he has no direct interest; that he does not offer a mere defense, but purposes to litigate new issues requiring new parties to the action; that he does not join either the plaintiff or the defendant, and that he has not served his complaint upon all the parties to the original action. It is true that the intervener has denominated his pleading a complaint; that he filed an amended complaint in intervention which seems to lose sight of the defensive character of his first pleading, and has been guilty of other irregularities and inaccuracies of pleading. But in the interests of justice, this court can overlook these, more especially so in view of the fact that the plaintiff could in no manner have been misled by any allegations therein contained. We will therefore treat the intervener's pleading as an answer and defense to the foreclosure suit made by himself as intervener, but upon behalf of the coal company, of which he was a stockholder, whose officers had refused, after due request, to defend the foreclosure action. That Beyer could intervene under those circumstances is clear under all the authorities. We quote from Cook on Corporations, 6th ed. vol. 3, § 848: "But where good defense to a mortgage actually exists, and the corporation as defendant in the foreclosure suit fails to set them up, or where the trustee as complainant is not protecting the interests of the mortgaged bondholders whom he represents, then difficult questions arise, and they are peculiar to corporative law. The question then arises: Who can complain, and what is his remedy? The clearest method of treating this subject is perhaps to consider the status of each party separately from the others as follows: § 848 (a) The trustee. . . . (b) Bondholders. . . . (c) . . . (i) The remedy of stockholders against a collusive or fraudu-

lent foreclosure of a corporate mortgage has been a prolific source of litigation. A frequent fraud on stockholders, and one which it is difficult to detect and prove, is where there is a valid defense to the mortgage, but the directors collusively neglect to defend against a suit of foreclosure, in consequence of which a default is taken and the corporation speedily deprived of all its assets. It is a fraud difficult to detect, since ordinarily there is no defense to foreclosure suits, and the defenses which should have been set up by the corporation are difficult of proof themselves. At an early day the leading case of Koehler v. Black River Falls Iron Co. 2 Black. 715, 17 L. ed. 339, established the principle that a stockholder in such a case may be allowed to go in as a defendant, and set up the defenses which the corporation ought to have set up. . . . Stockholders will be allowed to intervene and defend where a default has been allowed, and the stockholders allege collusion and show an apparently good defense. [Cases cited.] . . . A stockholder's remedy during the pendency of the foreclosure suit is in that suit, and not by an independent suit. . . . The proper remedy is for the corporation to set up this defense, and if it declines to set it up, then the stockholder may intervene." At 10 Cyc. page 999, it is said: "As a general rule a corporation can appear to defend litigation only in its corporative capacity, represented by its properly constituted officers. But if a suit is brought against the corporation, and the directors, in breach of their trust, fail or refuse to make defense to the same in the name of the corporation, shareholders will be permitted so to do." Of course this intervention can only be after the corporation has refused to defend, or showing is made that its officers should not be intrusted with such defense. We reach the conclusion, therefore, that Beyer was entitled to intervene, and that his complaint in intervention should be, and will be, treated by this court as an answer. This can easily be done by disregarding immaterial matter therein contained, and looking only to those portions which assert that the mortgage given by the coal company was *ultra vires,* fraudulent, and void; that these facts were known to the Investors' Syndicate at the time the mortgage was given to them; that intervener has requested the officers of the coal company to urge this defense against the foreclosure proceedings; that they have refused to so defend, and therefore intervener as a minority stockholder is entitled to make such defense

for the company. Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; 9 Mod. Am. Law, pp. 256–262, § 201.

(2) Appellant next insists that the intervener, as well as the stockholders generally of the coal company, are guilty of such laches in their attack upon the mortgage aforesaid that they should not be heard in a court of equity. In appellant's brief it is said: "Proof shows that Beyer made the same charges ten years ago. It is preposterous, in the face of the record in the Federal court, for him to deny knowledge of the so-called fraud, since he charged it then and sought similar relief affirmatively, as now by way of defense." While it cannot be denied that Beyer has been in possession of some of the facts since 1903, yet we do not believe such knowledge should preclude him from his defense at this time. The status of the parties is the same to-day as it was in 1895. The mortgage has not been assigned by the Investors' Syndicate, and there has been no change in the ownership of the stock of the coal company; therefore there are no new parties to be misled by the acquiescence of the intervener during the years that the mortgage has been allowed to stand of record. So long as no effort was made to foreclose the mortgage, Beyer might not be expected to act. As already noted, he had on two occasions attempted to recover the land for himself, and had failed. Thereafter his only hope was that the coal company might preserve its assets so his stock therein might not be impaired in value. As early as 1906 the United States district court in so many words told Beyer that his only remedy was to bring an action of dissolution against the coal company, and to impound its assets for the benefit of the persons who had actually contributed; but Beyer has so far failed to follow this advice, and appears in this case at great expense, with the only hope of defeating the foreclosure, and with no possibility of obtaining any affirmative personal relief. But the fact that he has been in constant though fruitless litigation should be considered in determining whether or not he has been guilty of laches. The records of this court bear evidence that during the past ten years Beyer has not been sleeping upon his rights, although he has many times mistaken his remedy. We cannot agree with appellant when he says that he has been indifferent, and has neglected his duty in the premises. In this connection, we should also remember that during

all of those years Beyer was trying to get possession of the books of the company for the purposes of obtaining direct information upon which, as he says, he intended to base the proper action later on. In Townsend v. Vanderwerker, 160 U. S. 172, 40 L. ed. 383, 16 Sup. Ct. Rep. 258, the Supreme Court of the United States says: "The question of laches does not depend, as does the statute of limitations, upon the fact that certain definite time has elapsed since the cause of action accrued, but whether under all of the circumstances of the particular case plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did. In this case, we think the delay is fully explained." We think the same conclusion should be reached in this case. The defendant has excused his failure to bring an action to set aside this mortgage on behalf of the corporation. See also Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554, decided in December, 1913.

(3) Appellant next urges that Mr. Beyer's claim is barred by the statute of limitations, citing § 7375, Comp. Laws 1913, subd. 6, which reads: "An action for relief on the ground of fraud in cases which heretofore were solely cognizable by the court of chancery, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud" must be commenced within six years. Appellant strenuously insists that Beyer made the identical charges in a verified complaint more than ten years before the institution of the present foreclosure suit, and says: "From this it plainly appears that both Beyer and his counsel were perfectly familiar with the situation as early as 1904, and were urging the same matters in the court then as now." Several answers can be made to this contention. First, the facts alleged by Beyer, if true, render the mortgage absolutely void, and the intervener is not asking any affirmative relief, but rather defending the coal company against the wrongful imposition of a void instrument upon the assets of the company. It is the Investors' Syndicate that is asking the relief, and not the intervener. This matter is so well treated in Schoener v. Lissauer, 107 N. Y. 111, 13 N. E. 741, that we will quote from that opinion as an answer to appellant's contention. In such case the New York court says the court found that the execution of the mortgage was made under fraud and duress. An action was then brought to cancel the

mortgage as a cloud on the title. The defendant set up the statute of limitations, and claimed that inasmuch as the action was not brought within six years that therefore the plaintiff is entitled to no relief. The court held the statute of limitations had no application, and in the opinion said: "We are of opinion that this limitation does not apply to an action, like the present one, to remove a cloud upon the title to land The action is not brought to recover the land, that being already in the possession of the plaintiffs, but to compel the cancelation of an instrument to which they have a good defense, but which constitutes an apparent lien, and, so long as it remains outstanding, injuriously affects their title, and their defense to which, resting on extrinsic facts to be established by evidence, may be imperiled by the lapse of time and the consequent loss of testimony. Should the defendants ever seek to enforce their mortgage, the plaintiffs could not, by any lapse of time, be barred of the right to prove the facts which constitute their defense to it, although they might be seriously embarrassed in the practical exercise of that right. It is an acknowledged head of equity jurisdiction, resting on these grounds, to remove clouds upon the title to land at the suit of the owner of the fee. Such owner has a right to invoke this aid; and to have an apparent, though not real, encumbrance, discharged of record at any time while he continues to be owner. This right, as said in some of the authorities, is never barred by the statute of limitations, so long as the cloud continues to exist." See also Miner v. Beekman, 50 N. Y. 337, where it is said: "It is an acknowledged branch of equity jurisdiction to remove clouds from the title at the suit of the owner of the fee. Such owner has a right to invoke this aid, but must he do it within ten years after the commencement of the cloud, or may he do it at any time during its existence, while he continues such owner? My conclusion is that this is a continuing right that may be asserted at any time during the existence of the cloud; never barred by the statute of limitations while the cloud continues to exist. . . . While the owner of the fee continues liable to an action for the foreclosure of a mortgage . . . he has a continuing right to the aid of equity to determine the amount, if uncertain, and to compel its discharge upon payment, and an action to enforce this continuing right cannot be barred by the statute of limitations, for the reason that it is continuing. This is analogous to the rule as to

private nuisances, which are regarded as continuing injuries, and although damages sustained therefrom cannot be recovered for more than six years prior to the commencement of the action, yet a recovery may be had for this period, although the nuisance had its origin before such time." See also Wood, Limitations, 3d ed. p. 139; Stevens v. Union Trust Co. 57 Hun, 498, 11 N. Y. Supp. 268; Wait, Fraud. Conv. & Creditors Bills, § 148; Traer v. Clews, 115 U. S. 528, 29 L. ed. 467, 6 Sup. Ct. Rep. 155; Kirby v. Lake Shore & M. S. R. Co. 120 U. S. 130, 30 L. ed. 569, 7 Sup. Ct. Rep. 430.

Another reason for our conclusion that the statute of limitations did not run in this case is that all of the facts constituting the fraud were not known to the intervener at the time of bringing the action in the United States court. He claims, for instance, that he did not learn that Tappen, the secretary of the Investors' Syndicate, had been at one time a stockholder and secretary of the coal company and a former partner in business of Williams, until a much later period; that he did not know that the meeting of the coal company authorizing the execution of the mortgage was held at the private home of Mr. Williams, until 1913, and there is considerable corroboration of this claim. The authorities seem to be unanimous, and our Code specifically provides that the statute shall not begin to run until the fraud is discovered. In Gates v. Andrews, 37 N. Y. 658, 97 Am. Dec. 764, the court says: "In case of fraud the statute of limitations does not begin to run until there is perfect right to sue and the fraud was previously discovered." Tarke v. Bingham, 123 Cal. 163, 55 Pac. 759; Wood, Limitations, § 62.

The statute of limitations has not run against the defense interposed.

(4) The next complaint of appellant is that the findings of fact made by the trial court are not supported by the evidence, especially the finding that the mortgage in question was fraudulently issued, *ultra vires,* and void, and those facts were known to the Investors' Syndicate. The findings of the trial court are lengthy and the evidence voluminous. To produce both would fill a volume of the North Dakota Reports; so we will have to give the briefest resumé, or our conclusion of the effect of such testimony after a careful perusal thereof. There is testimony which, to our mind, shows the following in part to be the facts: Williams, the promoter and president of the coal company, and Tappen, the secretary of the Investors' Syndicate, were business associates before

the organization of the coal company, and at one time officed together. That when the coal company was first organized, stock therein was issued to Tappen for which he never paid, and which was canceled from the books of the company, and that at one time Tappen was elected an officer of the coal company. That Williams took three fifths of the stock of the coal company for practically nothing except his services, and did nothing whatever towards developing a coal mine. That he either borrowed or pretended to borrow $1,118.43 of the Investors' Syndicate, of which Tappen was secretary, and assigned some of his stock in the coal company as collateral; that, thereafter, a meeting of the coal company was held at Williams's house, at which Beyer was not present nor invited; and at such meeting a mortgage in this sum was authorized to be given by the coal company upon its entire assets; and at the same meeting Williams and his wife voted themselves back salary which had not theretofore been authorized by the company. That upon the execution of the mortgage, Williams took the entire proceeds, even to the last cent, from the Investors' Syndicate Company, and a few hours later paid it back to said Investors' Syndicate Company to pay his own personal note and to take down the stock which he had put up as collateral. That the coal company itself did not get a cent of this money, unless it might be said that the same had been spent in paying back salaries to Williams and his wife. Without setting forth more of the testimony, which, as we have already said, is voluminous, we announce it our opinion that the Investors' Syndicate Company through its secretary, Tappen, and the officers of the coal company, principally Williams, entered into a fraudulent agreement to rob the coal company of its entire assets, for the purpose of defeating the rights of the minority stockholders. We are further of the opinion that in so doing the officers of the coal company exceeded their authority in the issuance of the mortgage, and that the same is absolutely void, and was so known to the Investors' Syndicate Company at the time they pretended to have purchased it. This was also the conclusion of Judge Amidon, who tried the rescission case more than ten years ago, in which opinion he said: "As to the advancements of money by the Investors' Syndicate, there are some suspicious circumstances there. . . . I think the evidence would justify the belief that Tappen . . . and Williams

had a full understanding in regard to it. . . . That the transaction that has been disclosed here was developed for the purpose of putting the Investors' Syndicate in a better position in respect to those loans by a mortgage on the property. I do not find it necessary, however, to pass a decree upon that subject." (Found at page 454, 22 N. D.) The loans being, in our opinion, entirely fictitious, it follows that the mortgage given to secure the same was a nullity. For similar holdings, see Davis v. Rock Creek Lumber, Flume & Min. Co. 55 Cal. 359, 36 Am. Rep. 40; Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; 2 Cook, Corp. pp. 19, 24 and 27; Vickery v. Burton, 6 N. D. 249, 69 N. W. 193; First Nat. Bank v. Flath, 10 N. D. 281, 86 N. W. 867; 1 Thomp. Corp. 2d ed. §§ 1215–1220.

The effect of the fact that both Williams and his wife voted for their own salaries, and that the same could not have been passed without their vote, is treated in Re McCarthy Portable Elevator Co. 196 Fed. 247; Hayes v. Canadian, A. & P. S. S. Co. 104 C. C. A. 271, 181 Fed. 289.

Upon the question of the money being used to pay the personal debt of one of the officers and a director see McLellan v. Detroit File Works, 56 Mich. 579, 23 N. W. 321; 1 Beach, Corp. § 276; Smith v. Los Angeles Immigration & Land Co-op. Asso. 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; Doe v. Northwestern Coal & Transp. Co. 78 Fed. 67; Wilbur v. Lynde, 49 Cal. 290, 19 Am. Rep. 645; Frederick Mill. Co. v. Farmers' Alliance Co. 20 S. D. 335, 106 N. W. 298.

The fact also that the coal company has refused to answer in this case, although answering in another case argued before this court upon the same day, confirms us in our belief. Under those circumstances, nothing remains for us but to declare the mortgage absolutely void, and this we do, affirming the judgment of the trial court in all particulars.

RICHARD WYLDES, an Infant, by J. M. McLaughlin, his Guardian, v. E. G. PATTERSON.

(153 N. W. 630.)

Mathematical demonstration — facts proved by — photographs — testimony.

1. Where a fact may be positively and accurately proved by a simple mathematical demonstration and computation, it is not error to exclude photographs, and other testimony which seeks to controvert the established laws of mathematics.

Distance — position — mathematically established — certainty — judicial notice — results of such calculations.

2. The distance back upon the roof of a building where a man standing on such roof comes within the range of vision of a person standing in the street can be mathematically demonstrated to a certainty; and the court may take judicial notice of what the results of the mathematical computation necessary to establish the fact would be.

Risk — assumption of risk — doctrine of — application of.

3. The doctrine of the assumption of the risk applies only to risks which the plaintiff knows and appreciates, or which in the exercise of due care he should have known and appreciated.

Note.—In addition to the notes in 2 L.R.A.(N.S.) 647, on the master's liability for injury to employee caused by defective elevator and negligence of fellow servant, and in 16 L.R.A. 19, on the relation of proximate cause doctrine to master's liability for injuries to servants from combined negligence of himself and fellow servant, which are cited in the opinion, the following notes will be of value in connection with this case:

Facts of which the court will take judicial notice, notes in 89 Am. Dec. 663, and 124 Am. St. Rep. 20.

Use of photographs in evidence, notes in 35 L.R.A. 802; 15 L.R.A.(N.S.) 1162; 51 L.R.A.(N.S.) 843; 75 Am. St. Rep. 468, and 114 Am. St. Rep. 437.

Liability of owners of elevators for injuries to employees, notes in 41 L.R.A. (N.S.) 156, and 56 Am. St. Rep. 806.

The general doctrine of assumption of risk, notes in 13 L.R.A. 374, and 52 Am. Rep. 737.

Burden of proof as to contributory negligence, notes in 33 L.R.A.(N.S.) 1085, and 28 Am. Rep. 563.

Application of doctrine of *res ipsa loquitur* as between master and servant, notes in 6 L.R.A.(N.S.) 337; 16 L.R.A.(N.S.) 214, and 28 L.R.A.(N.S.) 586, 591.

Accident — elevators — raising and lowering — engineer — signals — precaution — master — instructions.

4. Where an accident occurs through the premature lowering of an elevator, upon which the plaintiff is placing a wheelbarrow, and the evidence shows that the engineer who operated the engine which raised and lowered the elevator relied upon a system of signals, which the foreman in control of the plaintiff had, a short time prior to the accident, ordered discontinued, and the plaintiff himself was led to believe that such system was not in operation, and that the engineer would not rely thereon, but would use every precaution to give him ample time to draw back from said elevator, it cannot be said, as a matter of law, that such employee assumed the risk of the confusion of methods of operation which arose from the failure of the master to arrange for a common system, and to make it known to all of the parties concerned.

Photographs — evidence — offer of — denial — location of premises.

5. It is not error to refuse to allow photographs to be introduced in evidence, where the premises involved are within three blocks of the courthouse, and an inspection is both practicable and possible.

Photographs — admission or rejection — largely discretionary — purpose of — useful to jury.

6. The admission or rejection of photographs is largely within the discretion of the trial court; and whether they are sufficiently verified or whether they may be useful to the jury are preliminary matters, which are addressed to him.

Photographs — evidence — purpose and application of rule — aid to jury.

7. Photographs are received, as merely an aid to the jury in applying the evidence, and if they tend to confuse rather than aid the jury, they should be excluded.

Photographs — admissibility — must only show true conditions — time of accident.

8. To be admissible in evidence, photographs should simply show conditions existing at the time in question, and photographs which show more than this, and with men in various assumed situations, in order to illustrate the claims and contentions of the parties, should not be admitted.

Doctrine of res ipsa loquitur — application of — accident — action — time of bringing — apparatus used not produced — excuse.

9. The doctrine of *res ipsa loquitur* will apply, where the accident occurs through the breaking of a steel cable 300 feet in length, and where such cable is not produced upon the trial by the defendant, nor is any proof introduced of its condition or inspection prior to the accident, and the action was begun within three months of the time when such accident occurred, and the only excuse for its nonproduction is that counsel does not know where it is.

Negligence — master — injury — proximate cause — mingling with negligence of others — rule.

10. If the negligence of the master, or of one for whose conduct the master is answerable, mingles with that of one who stands in the relation of a fellow servant to the servant receiving the injury, or if the negligence of the master or his representative is the proximate or efficient cause of the injury, the master will be liable, and will not be allowed to escape liability on the ground that the injury also proceeded from the negligence of one for whose conduct he was not answerable.

Evidence — withholding — failure to produce — available — presumption — inference by court.

11. The mere withholding or failure to produce evidence, which under the circumstances would be expected to be produced, and which is available, gives rise to a presumption against the party withholding it. The courts recognize and act upon the natural inference that the evidence is held back under such circumstances because it would be unfavorable.

Pleadings — elimination of questions raised by — request — failure to make — effect.

12. Where the defendant does not ask the court to eliminate questions which are raised in the pleadings from the jury's consideration, he cannot complain that an issue raised by such pleadings is improperly submitted to the jury.

Contributory negligence — assumption of risk — defense of — burden of proof.

13. The burden of establishing the defenses of contributory negligence and the assumption of the risk is upon the defendant.

Charge of court — reasonable interpretation — as a whole — presumption — must present law fairly.

14. The charge of a court to a jury is entitled to a reasonable interpretation. It is to be construed as a whole, in the same connected way in which it is given, and upon the presumption that the jury did not overlook any portion that gave due weight to it as a whole. If, when so construed, it presents the law fairly and correctly, and in a manner not calculated to mislead the jury, it will afford no ground for reversing the judgment, although some of its expressions if standing alone might be regarded as erroneous, because there may be an apparent conflict between isolated sentences, or because some one of them, taken abstractly, may have been erroneous.

Opinion filed April 29, 1915. Rehearing denied July 2, 1915.

Appeal from the District Court of Burleigh County, *Nuessle*, J.

Action for personal injuries. Judgment for plaintiff. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J.

This action was brought to recover damages for personal injuries sustained by the plaintiff, while in the defendant's employ in the construction of the McKenzie Hotel in Bismarck, in the month of November, 1910. The case was first tried before a court and a jury in June, 1911. At the conclusion of the evidence and on the defendant's motion, a verdict was directed in his favor. On an appeal being taken, this judgment was reversed. (See Wyldes v. Patterson, 24 N. D. 218, 139 N. W. 577.) The case was retried in June, 1913. At the conclusion of the evidence, the defendant again moved the court to direct a verdict in his favor, on the grounds that: "(1) The evidence fails to disclose actionable negligence on the part of the defendant; (2) it conclusively appears from the evidence that the plaintiff assumed the risk, and was guilty of contributory negligence; (3) it conclusively appears from the evidence that, if the plaintiff did not assume the risk and was not guilty of contributory negligence, the injuries were caused either by unavoidable accident or by the negligence of the engineer, who was a fellow servant."

This motion was denied and the case submitted to the jury, which found a verdict in favor of the plaintiff, and assessed his damages at the sum of $2,500, with interest. From the judgment entered upon this verdict, this appeal is taken.

P. J. McLaughlin and *H. C. Bradley,* for appellant.

The mere fact that an injury is caused by defective appliance does not prove negligence, unless the defect is of such a nature that reasonable prudence and ordinary care ought to have discovered it. Meehan v. Great Northern R. Co. 13 N. D. 432, 101 N. W. 183.

When the master has performed his whole duty to the servant, recovery is denied for an injury to the servant in the employment, not because of his assumption of the risk, but because he never had any cause of action, for his cause of action would necessarily be based upon his employer's negligence, and where there is no negligence, there can

be no recovery. Naylor v. Chicagc & N. W. R. Co. 53 Wis. 661, 11 N. W. 24; Stephenson v. Duncan, 73 Wis. 406, 9 Am. St. Rep. 806, 41 N. W. 337; Gilbert v. Guild, 144 Mass. 601, 12 N. E. 368; Sullivan v. India Mfg. Co. 113 Mass. 398, 15 Am. Neg. Cas. 527.

Railroad companies are negligent when they fail to block frogs; but where a brakeman or switchman knows of the failure in that respect, he assumes the risk, and cannot recover. Mayes v. Chicago, R. I. & P. R. Co. 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; Appel v. Buffalo, N. Y. & P. R. Co. 111 N. Y. 550, 19 N. E. 93; Ireland v. Gardner, 54 Hun, 634, 7 N. Y. Supp. 609; St. Louis, I. M. & S. R. Co. v. Davis, 54 Ark. 389, 26 Am. St. Rep. 48, 15 S. W. 895; Grand v. Michigan C. R. Co. 83 Mich. 564, 11 L.R.A. 402, 47 N. W. 837; Way v. Illinois C. R. Co. 40 Iowa, 341, 14 Am. Neg. Cas. 621; Anderson v. Minnesota & N. W. R. Co. 39 Minn. 523, 41 N. W. 104; O'Keefe v. Thorn, 2 Monaghan (Pa.) 73, 16 Atl. 737; Crowley v. Pacific Mills, 148 Mass. 228, 19 N. E. 344; Townsend v. Langles, 41 Fed. 919; Hickey v. Taaffe, 105 N. Y. 26, 12 N. E. 286; Clark v. St. Paul & S. C. R. Co. 28 Minn. 128, 9 N. W. 581, 16 Am. Neg. Cas. 280; Raines v. St. Louis, I. M. & S. R. Co. 71 Mo. 164, 36 Am. Rep. 459; Brossman v. Lehigh Valley R. Co. 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226; Hughes v. Winona & St. P. R. Co. 27 Minn. 137, 6 N. W. 553; Larson v. St. Paul, M. & M. R. Co. 43 Minn. 423, 45 N. W. 722; Larson v. Knapp, S. & Co. 98 Wis. 178, 73 N. W. 992; Cleary v. Dakota Pkg. Co. 71 Minn. 150, 73 N. W. 717, 1099; Powell v. Ashland Iron & Steel Co. 98 Wis. 35, 73 N. W. 573; Walsh v. St. Paul & D. R. Co. 27 Minn. 367, 8 N. W. 145; Hayball v. Detroit, G. H. & M. R. Co. 114 Mich. 135, 72 N. W. 145; Soderstrom v. Holland Emery Lumber Co. 114 Mich. 83, 72 N. W. 13; Lundberg v. Minneapolis Iron Store Co. 115 Minn. 174, 131 N. W. 1016; Olson v. McMullen, 34 Minn. 94, 24 N. W. 318; Martin v. Chicago, R. I. & P. R. Co. 118 Iowa, 148, 59 L.R.A. 698, 96 Am. St. Rep. 371, 91 N. W. 1034, 10 Am. Neg. Rep. 592; Swanson v. Great Northern R. Co. 68 Minn. 184, 70 N. W. 978, 2 Am. Neg. Rep. 578; Quick v. Minnesota Iron Co. 47 Minn. 361, 50 N. W. 244; Scharenbroich v. St. Cloud Fibre-Ware Co. 59 Minn. 116, 60 N. W. 1093; McCutcheon v. Virginia & Rainy Lake Co. 114 Minn. 226, 130 N. W. 1023; Mackin v. Alaska Refrigerator Co. 100 Mich. 276, 58 N. W. 999; Com. v. Pierce, 138 Mass. 176, 52 Am. Rep. 264, 5 Am. Crim. Rep. 391.

Conceding that there were well-known instrumentalities for his protection, whatever the ethical obligation of the employer might be to furnish them, under the law, the servant may waive that performance by engaging to do the work without the same. Nelson v. Kelso, 91 Minn. 77, 97 N. W. 459; Williams v. Bunker Hill & S. Min. & Concentrating Co. 190 Fed. 79; Wilson v. Lake Shore & M. S. R. Co. 145 Mich. 509, 108 N. W. 1021; Beleal v. Northern P. R. Co. 15 N. D. 318, 108 N. W. 33, 20 Am. Neg. Rep. 453, 11 Ann. Cas. 921; Carlson v. Sioux Falls Water Co. 8 S. D. 47, 65 N. W. 419; Hunt v. Kile, 38 C. C. A. 641, 98 Fed. 49; Bartley v. Howell, 82 Minn. 382, 85 N. W. 167; Buckley v. Gutta Percha & Rubber Mfg. Co. 113 N. Y. 540, 21 N. E. 717, 16 Am. Neg. Cas. 842; Berger v. St. Paul, M. & M. R. Co. 39 Minn. 78, 38 N. W. 814, 16 Am. Neg. Cas. 251; Hefferen v. Northern P. R. Co. 45 Minn. 471, 48 N. W. 1, 526, 16 Am. Neg. Cas. 254; Mississippi River Logging Co. v. Schneider, 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. 195; Dunn v. Great Lakes Dredge & Dock Co. 161 Mich. 551, 126 N. W. 833; Kraczek v. Falk Co. 142 Wis. 570, 126 N. W. 30; Ward v. Scott, 182 Mass. 170, 64 N. E. 968; Bauer v. American Car & Foundry Co. 132 Mich. 537, 94 N. W. 9; Sweet v. Ohio Coal Co. 78 Wis. 127, 9 L.R.A. 861, 47 N. W. 182; Johnson v. Hovey, 98 Mich. 343, 57 N. W. 172; Williams v. J. G. Wagner Co. 110 Wis. 456, 86 N. W. 157; Upthegrove v. Jones & A. Coal Co. 118 Wis. 673, 96 N. W. 385, 14 Am. Neg. Rep. 670; McCarthy v. Mulgrew, 107 Iowa, 76, 77 N. W. 527; Vanderpool v. Partridge, 79 Neb. 165, 13 L.R.A.(N.S.) 668, 112 N. W. 318; Porter v. Ocean S. S. Co. 113 Ga. 1007, 39 S. E. 177; Evans Laundry Co. v. Crawford, 67 Neb. 153, 93 N. W. 117, 94 N. W. 814, 13 Am. Neg. Rep. 355; Martin v. Detroit Lumber Co. 141 Mich. 363, 104 N. W. 692; Thompson v. Missouri P. R. Co. 51 Neb. 527, 71 N. W. 61, 3 Am. Neg. Rep. 53; New Omaha Thompson-Houston Electric Light Co. v. Rombold, 73 Neb. 272, 102 N. W. 475, 106 N. W. 213; Yess v. Chicago Brass Co. 124 Wis. 406, 102 N. W. 932; Brazil Block Coal Co. v. Hoodlet, 129 Ind. 327, 27 N. E. 741; Cudahy Packing Co. v. Marcan, 54 L.R.A. 258, 45 C. C. A. 515, 106 Fed. 645, 9 Am. Neg. Rep. 670; Storrs v. Michigan Starch Co. 126 Mich. 666, 86 N. W. 134; Boss v. Northern P. R. Co. 2 N. D. 136, 33 Am. St. Rep. 756, 49

N. W. 655; Songstad v. Burlington, C. R. & N. R. Co. 5 Dak. 522, 41 N. W. 755.

The engineer, in doing the work in which he was engaged at the time of the accident, was a fellow servant, for whose negligence the defendant is not responsible. The rule which makes the master liable under such circumstances is harsh and technical, and without the basis of inherent justice. Ames v. Lowry, 30 Minn. 285, 15 N. W. 247; Brown v. Winona & St. P. R. Co. 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484; Foster v. Minnesota C. R. Co. 14 Minn. 360, Gil. 277; O'Neil v. Great Northern R. Co. 80 Minn. 27, 51 L.R.A. 532, 82 N. W. 1086; Collins v. St. Paul & S. C. R. Co. 30 Minn. 31, 14 N. W. 60; Jemming v. Great Northern R. Co. 96 Minn. 302, 1 L.R.A.(N.S.) 696, 104 N. W. 1079; Doerr v. Daily News Pub. Co. 97 Minn. 248, 106 N. W. 1044; Lindvall v. Woods, 41 Minn. 212, 4 L.R.A. 793, 42 N. W. 1020, 16 Am. Neg. Cas. 200; Reed v. Stockmeyer, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186; Lundquist v. Duluth Street R. Co. 65 Minn. 387, 67 N. W. 1006.

A question put to an expert, which requires his opinion upon the exact question which is for the jury to determine, is improper. Taylor v. Grand Ave. R. Co. 185 Mo. 239, 84 S. W. 873; Roscoe v. Metropolitan Street R. Co. 202 Mo. 576, 101 S. W. 32.

The photographs, and testimony in relation thereto, should have been received in evidence, and their rejection was prejudicial error which entitles defendant to a new trial. Mitton v. Cargill Elevator Co. 124 Minn. 65, 144 N. W. 434.

An instruction which gives the jury the right to find a verdict for plaintiff, "if they find that plaintiff has established to their satisfaction that his injury was caused by the defendant's negligence, on any of the grounds charged in the complaint," is erroneous and misleading. It was clearly shown that a signal system was necessary to do the work. The attention of the jury should have been specifically directed to this, and to nothing else. Hunt v. Kile, 38 C. C. A. 641, 98 Fed. 49.

Andrew Miller and *W. P. Costello,* for respondent.

Whether the lack of signal system was or was not the proximate cause of the injury was a question for the jury. Before the judge can take the question from the jury and determine it himself, the facts must not only be undisputed, but the inference to be drawn from these

facts must be such that fair-minded men ought not to differ about them. 1 Thomp. Neg. § 161; 21 Am. & Eng. Enc. Law, 508.

If the engineer knew of such condition and was guilty of negligence in acting as he did, knowing the plaintiff's perilous position, this fact would not relieve defendant from liability, because it would simply amount to the *combined* negligence of the engineer and the defendant. Bode v. New England Invest. Co. 1 N. D. 128, 45 N. W. 197.

It is well settled, that it is the absolute duty of the master to furnish reasonably safe instrumentalities, and that the servant assumes no risks incident to the failure of the master to perform such duty. Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Cook v. St. Paul, M. & M. R. Co. 34 Minn. 45, 24 N. W. 311, 16 Am. Neg. Cas. 247.

The burden of proving that the injured servant assumed such risks is upon the defendant, and it is a question for the jury. Dowd v. New York, O. & W. R. Co. 170 N. Y. 459, 63 N. E. 541; Johnson v. Griffiths-Sprague Stevedoring Co. 45 Wash. 278, 8 L.R.A.(N.S.) 432, 88 Pac. 193.

The fellow-servant doctrine is here immaterial, because there is ample evidence of defendant's negligence, and that this was the proximate cause of the injury, and was properly submitted to the jury. Ness v. Jones, 10 N. D. 587, 88 Am. St. Rep. 755, 88 N. W. 706; Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960.

An objection must state the ground thereof, and point out specifically the errors of which complaint is made, in order to give opportunity to correct them, in order to be availing. 8 Enc. Pl. & Pr. 163.

It is no objection to a hypothetical question that the state of facts which it assumes is erroneous, if within the probable, or even possible, range of the evidence, since the judge cannot decide, as a preliminary question, an objection to the evidence, whether it is erroneous or not, such question being for the jury. Thomp. Trials, § 608; Harnett v. Garvey, 66 N. Y. 641.

Further, the incompetency of such a question may be remedied by cross-examination. Davis v. State, 35 Ind. 496, 9 Am. Rep. 760.

Opinion evidence from nonexpert witnesses is admitted from necessity, where the facts and conditions upon which the opinion is based

cannot be adequately described. Enos v. St. Paul F. & M. Ins. Co. 4 S. D. 639, 46 Am. St. Rep. 796, 57 N. W. 919.

Instructions should be based upon the evidence rather than upon the pleadings. Hughes, Instructions to Juries, §§ 85, 95; Quinn v. People, 123 Ill. 342, 15 N. E. 46.

An instruction, defective when considered alone, will not be considered erroneous when the charge as a whole states the law fairly. Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841.

BRUCE, J. (after stating the facts as above). The facts in this case as disclosed upon the second trial are not materially different from those disclosed upon the former hearing. (See Wyldes v. Patterson, 24 N. D. 218, 139 N. W. 577.) The only material difference seems to be that the height of the building is more definitely fixed, and is now, excluding the scroll work of the cornice, which was put on after the accident, put at 78 feet, 2½ inches, instead of at 70 feet, as upon the former trial, and in the former appeal. The distance of the west wall of the engine house from the base of the building is more accurately measured, but is practically the same as was assumed at the former hearing, that is to say, 20 feet from the base line of the building. The size of the frame building is the same as before, namely, 12 or 14 feet in width and 16 or 18 feet in length; and as the evidence shows that the engineer must have stood somewhere in the northeast corner of the engine house, and the engine house was lengthwise and parallel with the hotel building on Fifth street, such engineer must have stood somewhere within this distance of 14 feet, that is to say, at the most 34 feet from the base of the building, and probably from 30 to 32 feet therefrom. The length of the engine is shown to have been 10 or 12 feet. The fire box was on the south side of the house, and the drum was north of the engine. It was 10 feet from the top of the engine to the top of the boiler. The engine was placed in the southeast corner of the building, and 25 or 30 feet from the east end of the building line. The levers which operated the brake were on the west side of the engineer, "right in front of him," as he was facing west. The engineer was about 5 feet, 10 inches, tall. In operating the levers he would face the main building, as a general rule. The gangway or runway leading from the elevator back onto the roof of the

building was about 3 feet in width, and projected over the edge of the cornice about 6 or 8 inches, so that when the elevator was brought up to the roof, its edge connected closely with the projecting end. It seems to have been level from the elevator platform back onto the roof for some 4 feet, 8 inches, or 4 feet, 10 inches.

Defendant bases his argument as to the insufficiency of the evidence largely upon the proposition that the evidence shows that the plaintiff could have been easily seen upon the platform of the elevator, and, in turn, could have easily seen the engine house. Much confusion, however, has been interjected into the case by counsel for appellant failing to distinguish between the inability to see the platform of the elevator and the landing or top of the roof of the building. When the words "landing" or "platform" are spoken of, they cannot possibly be the few inches of boarding which extended between the roof and the elevator, for that in no sense was a "landing." The evidence of the witness O'Connor directly supports the theory of the plaintiff in this case, for he positively states that, standing even a little further away from the building than the engineer must have stood, he could see a man on the elevator or standing on the roof waiting for the elevator, but could not see a man while about to push a wheelbarrow upon the elevator. This fact is borne out also, conclusively, by the testimony of the witness Bliss, and by the established rules of optics and mathematics, which counsel for appellant seeks to ridicule in his brief and in his argument, but which, after all, constitute the only sure and certain method of proof. All the witnesses and photographs in the world, indeed, cannot change mathematical truths. As a matter of fact, no testimony was necessary at all, as to the distance back upon the roof-top that the plaintiff could have been seen. The height of the building, and the height of the plaintiff, and the distance of the engineer from the building, are established factors in the case, and the court could have taken judicial notice of the established truths of mathematics, and could have instructed the jury upon the proposition. It would really have been better for counsel to have sought to prove an error in the mathematical computations, if such he could have done, rather than to have wasted his efforts in sarcasm and in the introduction of testimony which was necessarily inaccurate. The witness Bliss, an experienced

civil engineer, and the state engineer of the state of North Dakota, testified as follows:

Q. Now, if you are given a height, the height of say a building, and the distance from that building a man is standing on the ground, and given the height of the man, and you are further given the distance back from the roof line of the building, on the roof of which an object is placed, can you determine mathematically the height it is necessary that that object be before it can be seen by the man?

A. I can.

Q. Suppose, Mr. Bliss, that a man is standing on a building 79 feet and 5 inches high, and is standing back 2 feet from the roof line, and on the ground below him is standing another man exactly 20 feet out from this roof line, the man is 5 feet, 10 inches, high, giving him a line of vision of about 5 feet and 6 inches, how high would the object on the roof have to be before it would come within the range of his vision?

A. Seven feet and 5 inches.

Q. If the man was standing out from that roof line 25 feet, how high would he have to be before he came within the range of vision of the man on the street? How high would the man on the roof have to be?

A. The conditions being the same, except that he was 25 feet out, the height would be 5 feet, 11 inches.

Q. As I understand it, in order to see the top of his head, he would have to be in one case 7 feet and 5 inches, and in the other case 5 feet and 11 inches. Now, suppose that the man standing on the top of the roof stood 1 foot back of the roof line, instead of 2, and the man on the street was 20 feet out, how high would he have to be?

A. Three feet, 8½ inches.

Q. So it would appear that whether the man stood 1 foot back or 2 feet back from the roof line would make a great deal of difference?

A. It would.

Q. Make a difference of from 7 feet, 5, to 3 feet, 8½?

A. Yes.

Q. Now, if the man on the roof stood 2½ feet back from the edge of

the roof line, and the man on the street stood 20 feet out from the roof line, how high would a man have to be?

A. Nine feet and 3 inches.

Q. Now, assume that the man on the street was 25 feet out from the roof line, and the man on top was back 2½ feet?

A. Seven feet and 10 inches.

Q. Now assume that the man on the roof was 2 feet back from the roof line, and the man on the street was 30 feet out?

A. Four feet, 11 inches.

Can you tell the jury, briefly, the process and method of determining the facts you have testified to?

A. Could I refer to the chart?

Q. Yes. I show you plaintiff's exhibit E, and ask you to tell what it is briefly. Tell what it is.

A. A diagram, drawn to scale, representing the line of vision of a man looking up the side of a building.

Q. And prepared, is it, mathematically, according to the rules of mathematics in which you determine proportions and angles? By reference to that exhibit can you briefly illustrate to the jury the method and manner in which you arrived at the facts you have testified to?

A. I can.

Q. You may do so.

Objection by counsel. Sustained.

Cross-examination: Q. Assuming a building, the height that has been mentioned, 100 feet in length along the sides, and assume a line, drawn at a distance on the street or ground, of 20 feet, parallel with the building itself. Would it make any difference what part of that line the person on the ground should stand on, in making observations of any point on the top of the building?

A. The line is drawn parallel to the building, 20 feet out?

A. So long as a person's height of vision remains unchanged, the result is the same.

Q. So far as the location of the person on the ground is concerned, provided he is 20 feet out from the building itself, his line of vision would be precisely the same?

A. His line of vision would change in a plane in this manner, but the height of the object will be absolutely the same.

Q. What difference, if any, would there be, so far as the man is concerned, what difference would there be in his powers of observation of the man on the roof?

A. He might be farther away in one case than in the other.

Q. If he were standing directly out 20 feet, he would be nearer than if he stood on the same line 100 feet away?

A. That is what I mean.

Q. But that is only limited to the power of observation, and not to the scope? What I mean is, does it limit in any way the scope of the observation?

A. It does not.

Q. So what you mean is simply a limitation of the power of the eye?

A. That is all.

Q. And if you take a building 100 feet in length, and draw this line parallel with the building, 20 feet out from the building line, the power of the eye would not be affected in viewing it from any angle along that line?

A. I should not think so—materially.

Q. It makes no appreciable difference, so you could fairly say that so far as the location is concerned out from the building it makes no difference, say for a distance of 100 feet, whether you are viewing it 20 feet north or south of the given point, and assuming now that the building runs in a northerly and southerly direction?

A. It would make no difference in the height of the man on the top.

Q. You work the problem by a system of angles, do you?

A. A system of proportion.

Q. In order to get the proportion, what do you do with your angles?

A. I have similar angles, equal angles, I have the geometrical—

Q. What angles did you use in your computation?

A. I have a straight line cut by two parallel lines giving me equal angles, right angles. Right angled triangles having one angle equal are similar triangles.

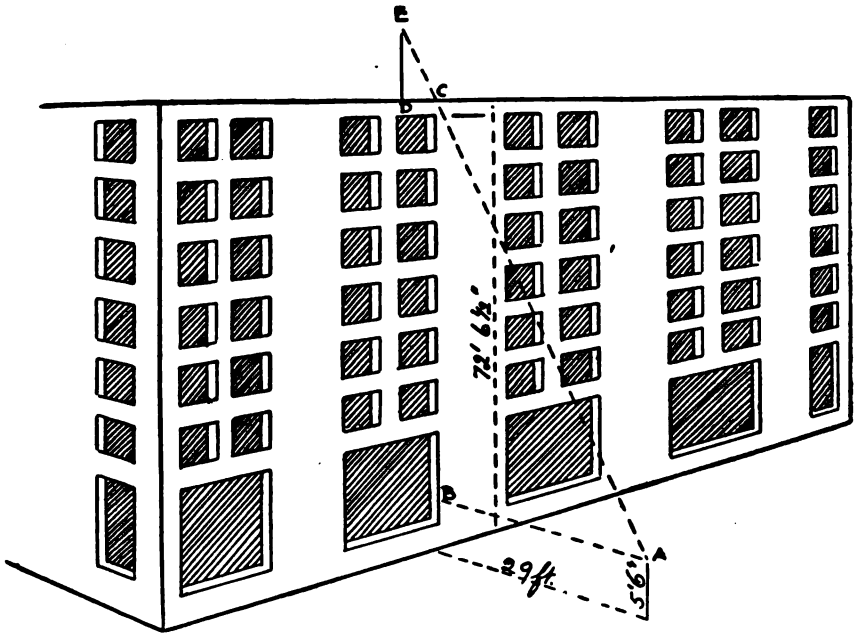
Q. Now, in addition to what you have now stated, the explanation you made to the jury shows exactly how you arrived at the figures that you gave us?

A. Yes, sir.

Q. There is not anything that you have omitted?
A. No, sir. I have omitted nothing.

It is true that this testimony is limited to a building of the height of 79 feet and 5 inches, while there is evidence that the scroll work, 1 foot, 2½ inches in height, was not put on until after the accident, and the height was, therefore, probably then only 78 feet, 2½ inches. It is also true that there is some evidence that the east wall of the engine house was 34 feet from the base of the building, and that the engineer must have stood somewhere in the southeast corner of that building. It is, however, true, that the cornice projected 3 feet from the building and out from the base thereof, and that therefore the east wall of the engine house could at the most have only been 31 feet from the line of the cornice, and the engineer, if standing as he said he did, in front of his engine, must have been at least 2 feet from that wall, and that therefore, at the very most, we have the problem of the range of vision of a man 5 feet, 10 inches, high, standing 29 feet from the base of the line of a building which is 78 feet, 2½ inches, in height; and as to the results of that problem, and as to its mathematical conclusions, both this and the trial court could and must take judicial notice. These conclusions point inevitably to the fact that the witnesses for the defendant were careless in their measurements and observations, and were radically mistaken, and that the photographs are absolutely unreliable. It seems hardly necessary, in this age of universal education, to go further into detail; but counsel for appellant appears to so strenuously favor guesswork as a right and rule of law, as opposed to mathematical truths, and to so scrupulously refuse to enter into any mathematical computation himself, that it seems necessary that the figures should be given. The problem is an easy one; and unless it be contended that one can look through a brick wall, its conclusions are irresistible.

Let us suppose first that the plaintiff, when bending down to his wheelbarrow, was standing 3 feet from the edge of the cornice.



The height of the building is 78 feet, 2½ inches. The line of vision of a man 5 feet, 10 inches, tall upon the ground would be about 5 feet, 6 inches. C B therefore=78 feet, 2½ inches—5 feet, 6 inches=72 feet, 8½ inches. C D=3 feet. A B=29 feet. The triangles C D E and A B C are similar. $\therefore \frac{E\ D}{C\ D} = \frac{C\ B}{A\ B} \therefore \frac{E\ D}{3\text{ ft.}} = \frac{72\text{ ft. }8\frac{1}{2}\text{ in.}}{29\text{ feet}} \therefore$ E D= 3 ft. $\times \frac{72\text{ feet }8\frac{1}{2}\text{ in.}}{29\text{ feet}} \therefore$ E D=7 feet, 6¼ inches.

If we take the distance of the man from the edge of the roof as being 2 instead of 3 feet, and follow the same method of computation, we find that E D (the height that such man must be in order to be seen) is 5 feet, 4 inches. If we take the distance at 1 foot, we find that the height must have been 2 feet, 6 inches. It goes without saying that, if the distance from the base of the building was less than 29 feet, the height of the man on the roof must have been correspondingly greater. It is also well to observe how much difference even a foot upon the roof makes in the result of the problem. Stewart v. St. Paul City R. Co. 78 Minn. 110, 80 N. W. 855, 7 Am. Neg. Rep. 80.

Counsel, we know, seeks to discredit these plain mathematical truths and the value of mathematical computation, by stating that there is a discrepancy between the results of the state engineer and those given in the former opinion. If this were so, it would have been an easy thing for counsel and the trial judge to have figured out the true solution. We think, however, that if he will allow 3 feet for the projecting cornice, which we did in our former opinion, and which the state engineer was not asked to allow for in the hypothetical questions put to him, he will find that no material discrepancy exists. We thus have an absolute mathematical demonstration of the fact that the down signal on which the engineer relied was entirely inadequate, and this for the simple reason that it could not be seen. It is also clear that the engineer relied upon this imagined signal, for he positively testifies that he lowered the elevator in response thereto. It is also clear that the plaintiff knew nothing of the signal, and that the foreman on the roof positively testified that it had been discontinued as the building rose in height. It, too, is clear, that this reliance of the engineer on the imagined down signal, and the confusion which resulted therefrom, was the fault of the master, in not providing a definite system of signals, and making them known to those concerned. These facts totally negative any defense which could have been based upon the doctrine of the assumption of the risk. It is well established that a servant only assumes those risks of which he is aware and appreciates. The plaintiff, indeed, had the right to believe that, no system of signals being provided, the engineer would give him plenty of time to get clear of the elevator, and would not lower the elevator until this opportunity had been afforded. The engineer, on the other hand, imagined that a system of signals was provided for, and naturally would take any real or imagined lowering of the hand as such signal. This risk and confusion the plaintiff did not assume.

We, no doubt, as has been argued by counsel for appellant, overstated the rule as to the assumption of the risk, when, in our former opinion (see Wyldes v. Patterson, 24 N. D. 218, 139 N. W. 577), we said that "the employee is not under any of the cases held to assume the risk of a breach of duty which is personal to the employer," and should have qualified this statement by saying: "unless the servant knows, or in the exercise of due care should have known of the danger,

and voluntarily encounters it." It is no doubt true "that an employee must not rashly or deliberately expose himself to unnecessary and unreasonable risks, *which he knows and appreciates.*" See Cook v. St. Paul, M. & M. R. Co. 34 Minn. 45, 24 N. W. 311, 16 Am. Neg. Cas. 247, But where is there any evidence in the record, that the plaintiff knew of the fact that the cable was defective and that the foreman had ordered the discontinuance of signals, which *the engineer and the proprietor* of the building *still believed to be in operation,* or that he in any way assumed the risk of the conflict and confusion?

The evidence is clear, that it was the failure to provide for a system of signals, or to make it sufficiently understood that no system was provided for, that caused the plaintiff to fall upon the elevator. The engineer, Orcott, testified that he lowered the elevator in response to a down signal; while the evidence is also quite convincing that the man on the roof was justified in believing that no such signal was to be given, and that such engineer would wait until the barrow was completely placed upon the lift and he had stepped back therefrom, and that until then there was no danger of the elevator being lowered.

The engineer, Orcott, testifies:

Q. You may tell the jury in your own way what you know about the action, Mr. Orcott, coming down to the time of the accident.

A. Well, Mr. Larson went upon the building—up on the elevator—and as he stepped off the elevator and on to the runway and out of my sight, Mr. Wyldes hauled a wheelbarrow out on the elevator and stepped back where I could see him. He gave me the signal to go down, and stepped back out of my sight; and as I started down the top was just about even with the cornice, and he came rushing out there. I did not know what he was doing, or anything else. Didn't know whether he was going to jump off or not, and he grabbed around the corner of the elevator, and as he grabbed around the corner, he let go of that and grabbed on to the cable of the elevator, and, as he did that, I stepped on the brake. I stepped on the brake about the time his body struck the elevator.

Q. Did he fall?

A. Went over the cornice, right on to the elevator.

Q. That is the time you applied the brake?

A. Yes, sir.

Q. You applied your lever also, as well as the brake?
A. Yes, sir.
Q. And I think you have already testified that you stopped suddenly?
A. Yes, sir.
Q. You stopped the descent of the elevator?
A. Stopped the descent just the same as I would at any time.
Q. Then the break followed.
A. Yes.
Q. Now, did you plainly see the young man come with his wheelbarrow.
A. Yes, sir.
Q. Did you see him plainly—see him put it into the elevator?
A. Yes, sir.
Q. Did you plainly see him step back again?
A. Yes, sir.
Q. And give the signal?
A. Yes, sir.
Q. And then you operated your engine, in response to the signal?
A. I did.
Q. And that is how the accident happened?
A. Yes, sir.

We realize that counsel for appellant says that "considered from another point of view, it seems to us this court must be persuaded that the engineer could and did see the landing, and the man on the roof in attendance upon the elevator. . . . Is it believable," he asks, "that the engineer was located in a position where he could not see the landing, or the men putting material or wheelbarrows into or taking them from the elevator, so that he must of necessity hoist and lower blindly, and by chance or guess, without a signal, regardless of the consequences? Is not the mere statement of such an absurd proposition its best refutation? Can it be believed, that during the construction of the building the elevator was running amuck, without inflicting injury or death, hourly or daily, upon those who were called upon to use it? The engineer had successfully and safely operated the elevator up to the time of the accident, and for three weeks after the cornice was constructed. The man on the roof was putting material or wheel-

barrows into the elevator, passing from 6 to 8 inches out over the end on each occasion. In taking the wheelbarrows from the elevator, we have seen that it was necessary to pass over the wheelbarrow to the opposite side, in order to reach the handles and push it out, and these operations were performed every few minutes. If the engineer could not see the man place the wheelbarrow in the elevator, how could he know when or how to hoist or lower? If he was operating blindly, why did he not frequently lower the elevator when the man on the roof was in the act of stepping into or out of it? Was blind chance always responsible for the safety of a man on the roof? What prevented daily or hourly accidents? How could he stop the elevator on a level with the runway, as the complaint alleges, and the proof shows?" We, however, are led to the serious conclusion that blind chance was relied upon; and the questions submitted by counsel both ignore important factors in the case, and emphasize those which are unimportant.

The fact that in pushing a wheelbarrow off the elevator the plaintiff had to climb over it and on to the elevator, and in such a position would be clearly in view of the engineer, has nothing to do with the case at bar, or with the situation before us; though, on the other hand, this fact, and the half-security afforded thereby, might have furnished a reason for any alleged negligence and lack of precaution taken when the plaintiff was engaged in returning the empty wheelbarrow. Nor does the fact that the gangway protruded over the roof some 6 or 8 inches have any material effect on the case. The plaintiff was not taking the wheelbarrow off, but was putting it on. When putting it on, as a mathematical certainty, he could not be seen until he was within 2 feet of the elevator, even if he was standing upright, and not bending down as he must have been in pushing the wheelbarrow, and not until all of the wheelbarrow was fairly placed on the elevator. It is also clear that every inch that the plaintiff approached the edge of the roof made a material difference in the problem of the height at which he could be seen. This is not merely borne out by the mathematical computations, but is exactly the testimony of the witness O'Connor. He could see a man standing on the edge of the roof waiting for the elevator. When the wheelbarrow was being pushed upon the elevator, and the man was necessarily bending down and was necessarily standing some 2 or 3 feet at least back, as the evidence in this case shows that the

elevator was dropped before the wheelbarrow was fully placed thereon, he could not see the man. In other words, that on account of the distance from the edge of the roof and his decreased height, on account of his bending down, the man was outside of the range of vision. The testimony of the witness O'Connor is as follows:

Q. What was your view—standing inside of the engine house and looking up at the elevator, the top of the elevator at the roof; I will ask you to describe the view of the men working up there with the wheelbarrows, as far as you could see?

A. You mean the men putting the barrows on to send them down?

Q. The men who were putting them on and taking them off the elevator lift?

A. You could see the barrow come out with the big flange and elevator come down, and that is all you could see.

Q. Now, standing in that position, Mr. O'Connor, when a wheelbarrow was being placed on the lift, could you see the man placing it there?

A. Well, you couldn't, no; you could see it sometimes. You could see one waiting for the barrow to come up.

Q. I am speaking now of when a man came out and rolled an empty wheelbarrow, for instance, on the elevator, off the roof and on to the elevator and placed it there, could you see him placing the wheelbarrow on the elevator?

A. Not from the engine house, you couldn't.

Q. Now, you know the position occupied by the engineer in the engine house?

A. I know about—I don't know exactly, never was in there.

Q. Now, where you stood at the side of the building, in the position which you describe, how far were you at that time from where the engineer stood?

A. I should judge about probably 3 or 4 feet. He stood there by the drum, operating the levers. I was just outside. I used to look in at him once in a while.

Q. You were about 3 or 4 feet farther out from the main building?

A. No, I was standing against the building, and he was inside.

Q. You were 3 or 4 feet farther away from the main building of the hotel than the position occupied by the engineer?

A. More than that, probably.

This is also made perfectly clear by the testimony of the defendant's witness, Fred Swanson. He testifies that when he was standing on the roof and making the signals, he was only a foot from the edge of the cornice. He also testified that when he moved back another foot he could hardly see the camera; that he could barely see the top of it. This witness also testifies that no one but the engineer told him of the signals, and that the foreman said nothing about them. Nor is the evidence of the defendant Patterson in any way contradictory. Neither are the photographs themselves, if permitted in evidence, contradictory to the mathematical facts, or to the testimony of the witness O'Connor. Defendant testified as to what he could see from the street, but naturally could not testify as to the distance that Larson was standing back from the edge of the roof. All that he could say was, "I should judge about 2 or 3 feet," and this is purely guesswork. As we have before shown, the distance of a few inches makes a material difference in the line of vision. So, too, the photographs show a person standing up on the edge of the cornice, who is standing up, and not bending down, as the plaintiff must have been when he was placing the wheelbarrow in the elevator.

These facts disprove any presumption of error arising from refusing to admit in evidence the photographs which were offered by the defendant. The photographs could have served no other purpose than to illustrate the fact as to how far back the plaintiff could have been seen upon the roof. The mathematical demonstration that we have made absolutely establishes that fact. There was absolutely no necessity for the court and counsel to waste hours, in seeking to demonstrate that which could have been proved in five minutes by the use of a lead pencil, and that of which the court would have been justified in taking judicial notice. The photographs could have had no other purpose than to mislead the jury. They were certainly not accurate, and they were not taken at the time of the accident. The man on the roof was standing up instead of bending forward. The photograph of a man when standing 1 or 2 feet from the edge and in an upright position is not a photo-

graph of a man bending forward and 3 feet from the edge, as the plaintiff must have been; nor is a photograph of a man giving a signal a photograph of a man bending down and giving no signal; nor have we any assurance of the fact that the man on the roof when the photograph was taken actually maintained the position and distance from the edge which he was supposed to and should have maintained. Stewart v. St. Paul City R. Co. 78 Minn. 110, 80 N. W. 855, 7 Am. Neg. Rep. 80.

Not only is this so, but photographs are obviously secondary evidence. "Where an inspection of the object is proper, *but impracticable,* a photograph of it may be exhibited to the witnesses as an aid to identification, and may be admitted in evidence." Thomp. Trials, § 869. *"Where an inspection of the premises is proper, but impracticable* or impossible, a photographic view of it is admissible." Omaha Southern R. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557. The rule announced is merely an announcement of one of the most elementary and fundamental rules of evidence. Surely a photograph of an object is not admissible, unless the object itself would be admissible, if available; nor should a jury be permitted to see a photograph of certain premises, unless it were proper for the jury to inspect the premises, if it were practicable and possible to do so. In the case at bar, the photographs offered were not taken at the time of the accident, but were taken only the day before they were offered in evidence. The building photographed was in the same city where the suit was being tried, and only two blocks from the courthouse, where the court was held. Obviously, if defendant desired to have the jury get a correct view of the building as it then existed, the very best evidence would have been the building itself, and no application was made to have the jury view the premises, and apparently this was not desired. How can it be said that the trial court erred in excluding the photographs, when the building itself, the best evidence, was situated within 800 or 900 feet of where the court was being held? It seems to us that the answer is obvious. Assuming that a photograph of the plaintiff taken during the trial had been offered to show his physical appearance at that time, would any one dare to assert that the exclusion of such photograph would have been error? Here, however, it is asserted that the exclusion of a photograph of a building then in existence, and within sight of the court and jury

every time they stepped out of the courthouse, deprived the defendant of some substantial right. It seems to us that the contention is so wholly untenable as to be worthy of very little serious consideration.

The admission or rejection of photographs is largely within the discretion of the trial court. Whether they are sufficiently verified, and whether they may be useful to the jury, are preliminary questions addressed to him. Jameson v. Weld, 93 Me. 345, 45 Atl. 299; Whaley v. Vidal, 27 S. D. 642, 132 N. W. 248; Everson v. Casualty Co. 208 Mass. 214, 94 N. E. 459; Carey v. Hubbardston, 172 Mass. 106, 51 N. E. 521; Verran v. Baird, 150 Mass. 141, 22 N. E. 630. The accident took place on November 15, 1910; the photographs were taken in June, 1913. At the time of the accident the building was in process of construction. When the photographs were taken, the building was completed; a sidewalk had been constructed, and the street graded. The atmospheric conditions were entirely different. It seems clear to us that the photographs would have been of no aid to the jury, but rather would have misled them. Photographs are received in evidence, to aid the jury in applying the evidence. If they tend to confuse, rather than to aid, they should be excluded. Photographs showing the building in the course of construction,—as it was at the time of the accident,—with the scaffolding still there, were already in evidence. The photographs offered by the defendant could have been of no aid to the jury in determining the facts with reference to the accident, and hence were properly excluded. Iroquois Furnace Co. v. McCree, 191 Ill. 340, 61 N. E. 79; 17 Cyc. 419; Elliott, Ev. § 1263. See also Baustian v. Young, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921; Goldsboro v. Central R. Co. 60 N. J. L. 49, 37 Atl. 433, 2 Am. Neg. Rep. 408.

The photographs, also, were clearly inadmissible for another reason. They show, not only the building as completed, but they also show *a man standing on the roof.* The preliminary questions asked by defendant's counsel show that these photographs were offered, not for the purpose of presenting a view of the premises, but rather *for the purpose of illustrating a hypothetical situation, and to explain the theories of defendant's attorney with reference to the matter in controversy.* Among the preliminary questions asked of the photographer was: "Q. You may state whether you took the view of a man standing

back from the edge of the cornice with his hand outstretched or making signals?" It is not contended that the person in the photograph or the photographer saw the accident, and even if they had, they would not be permitted to prepare photographs illustrating a hypothetical situation. The rule is well settled that such photographs are inadmissible under any and all circumstances. "Photographs are not admissible in evidence merely to illustrate a hypothetical situation, or to explain the theories of a party as to the matter in controversy." 9 Enc. Ev. 779. As was said by the supreme court of Maine in the case of Babb v. Oxford Paper Co. 99 Me. 298, 302, 59 Atl. 290, 292: "To be admissible, photographs should simply show conditions existing at the time in question. *But photographs taken to show more than this, with men in various assumed postures, and things in various assumed situations, in order to illustrate the claims and contentions of the parties, should not be admitted. An examination of the excluded photographs shows that they fall within the latter class.* They would serve merely to illustrate certain theories of the defendant, as to how the accident happened. They were properly excluded as a matter of law." See also Fore v. State, 75 Miss. 727, 23 So. 710; Buck v. McKeesport, 223 Pa. 211, 72 Atl. 514; People v. Maughs, 149 Cal. 253, 86 Pac. 187. And in the case of Field v. Gowdy, 199 Mass. 568, 19 L.R.A. (N.S.) 236, 85 N. E. 884, in considering a somewhat similar question, it was said: "The defendant, having offered to show that, since the accident to the plaintiff, there had been no change in any of the material facts on the face of the earth, proffered a photograph taken in the course of the trial during a rainstorm of much greater severity than any occurring near the time of the accident, for the purpose of showing the direction taken by water thrown from the spout, and after it reached the defendant's walk, and that such water could not and did not flow to the public walk. To the exclusion of this evidence the defendant excepted. The ground of this ruling is not stated. A photograph of the place, when there was no storm, was admitted in evidence. That excluded was at best a photograph of an experiment. *A photograph has no higher character as evidence than the experiment itself.* Whether the conditions were sufficiently similar to make the observation of any value in aiding the jury to pass upon the issue submitted to them was *primarily for the trial judge to determine as a matter of*

discretion. His decision in this respect will not be interfered with, unless plainly wrong. Such observations and experiments, though sometimes admitted, have often been excluded, in the discretion of the presiding judge." In the case of Stewart v. St. Paul City R. Co. 78 Minn. 110, 80 N. W. 855, 7 Am. Neg. Rep. 80, the supreme court of Minnesota, in an opinion written by the distinguished jurist, Judge Mitchell, in discussing the admissibility of a photograph, said: "In this case, not only had the hole been filled up, but the car had been removed, and the defendant attempted to reproduce the former condition of things. The value, if any, of the photograph, depended upon the fact that the condition existing when it was taken was an exactly accurate reproduction of the condition existing when the accident occurred. *An error of a single foot in the location of the car or of the hole might render the photograph very misleading to the jury.* A photograph may be a correct representation of a place, and yet, from a variety of causes, be very misleading as to distances or to the relative size or location of objects. In this case, a photograph would have had no real value as demonstrative evidence. *Given the exact location of the hole and of the car at the time of the accident, the distance and direction of the one from the other was a mere mathematical problem, to be solved by a measurement on the face of the earth.* The photograph could in on way aid in this matter. Its only effect would be to possibly mislead the jury, and give them an erroneous impression of distance, resulting either from the manner in which it was taken, or from error in the evidence tending to show that the car and the crowbar constituted an exact reproduction of the condition existing at the time of the accident,—prone, as juries would naturally be, to accept any photograph as absolutely correct, not only as to the physical objects which it represents, but also as to the impressions which it conveys as to size and distance." We are clearly of the opinion that the trial court committed no reversible error in excluding the photographs offered by defendant.

We can see no reason why the judgment should be reversed on account of the alleged fact that there was no evidence that the cable was defective or that the accident was occasioned thereby. Nor do we think there was reversible error in refusing to instruct the jury, at the request of the defendant, that "some evidence has been introduced in connec-

tion with the cable used in the hoisting and lowering of the elevator here in controversy, and of its breaking and permitting the elevator to descend. I charge you, as a matter of law, that the breaking of the cable is in no way connected with the accident and resulting injury in this case, and that, in determining the question of whether the defendant was negligent, you must entirely disregard the strength or weakness of the cable, and no verdict can be based in favor of the plaintiff on the breaking of the cable."

How much of the injury, it is true, was occasioned by the breaking of the cable, is not clear; but it is clear that it did break, and it is also clear, that even if the accident in the first instance, that is to say, the falling on to the elevator, was not due to the negligence of the defendant, it was certainly the duty of the defendant to furnish a cable which would enable the elevator to be stopped when an accident happened, and which would not necessitate its falling to the ground. Even if the doctrine of *res ipsa loquitur* would not have applied if the cable had been forthcoming, we are of the opinion that it was made to apply by the failure of that production. Any other holding would simply mean that, in the case of the breaking of a cable or other appliance, all that the defendant has to do is to conceal the cable, and no relief can be obtained. Here we have a $\frac{5}{8}$ inch steel cable, that is 300 feet in length, and of a weight which must be very great. Strangely enough, this cable is lost, and though a demand is made for its production on both trials, and action was brought within three months of the accident, it is nowhere forthcoming. It is true that counsel for appellant states that he "has not the pleasure of living in Bismarck," and he, perhaps, could not have produced the cable. His client, however, should not be excused from producing this cable for that reason, nor for having lost or concealed it in the first instance. The accident happened in Bismarck, and the defendant lived in Bismarck, and a steel cable does not evaporate into the thin air in a few months or days.

Why, indeed, the breaking of the cable should not be held to be one of the operating causes, if not the proximate cause, of the injury, it is difficult for us to see; and it is clear to us that the plaintiff, Wyldes, could recover on this theory, if on no other, and that the instruction of the court was therefore not erroneous. Siegel, C. & Co. v. Treka,

2 L.R.A.(N.S.) 647, and note (218 Ill. 559, 109 Am. St. Rep. 302, 75 N. E. 1053, 19 Am. Neg. Rep. 166).

The testimony of the engineer, Orcott, is positive, that at the time the cable broke the elevator had only been lowered about 4½ feet, while one other witness gives even a lesser distance, and that he stopped the elevator at that point, and that the subsequent fall was due to the breaking of the cable. The testimony of the plaintiff shows that he was drawn on to the top of the elevator by the lowering of the elevator, he having his hands upon the handles of the wheelbarrow. It is true that much of the injury occasioned by the fall, therefore, must have occurred through the breaking of the cable. The engineer's testimony also tends to show that the sudden stopping of the elevator was not such as to have broken an ordinarily sufficient cable. He testifies:

Q. If you did not see the plaintiff at the time of the accident, how did you know that it broke at that particular time?

A. Well, all I know, he was on the elevator when it broke. Yes, sir, he was on the elevator—on the top of the elevator, yes, sir. Yes, sir, I saw him. It was before the accident—before it broke.

Q. What distance had the elevator been lowered before it broke?

A. The length of the elevator. The elevator from the platform was about four feet and a half. From the platform to the crosspiece where the cable hooked on. I stepped on my lever and stopped the elevator. He was on the top of the elevator, I stopped it as quick as I could.

Q. Would the stopping of the engine in the manner you did, and suddenly, cause a jerk upon the cable?

A. Not necessarily, I don't think.

Q. It was a sudden stop?

A. It probably was. I don't know, I am not sure. In stepping on my lever there is a clutch there, and I knew it would stop it as quickly as it could stop. I had started to lower the elevator down in the usual way. I had lowered it some 4 feet. Saw him make a break for the elevator, and, as he grabbed at the elevator, I stopped it. He grabbed the corner of the elevator like that, and swung around the cable. After I suddenly stopped the elevator, after I had lowered it some four feet and a half, or whatever distance it was, it was at that particular time that the cable broke. At that time Mr. Wyldes was on the

elevator, on the crosspiece at the top of the elevator. He was not on the platform, but on the crosspiece above it. When he was in that position I suddenly stopped the engine, and just as I made the sudden stop, the cable broke.

We have, indeed, in The Luckenbach, 144 Fed. 980, a case which is very much in point on all of the questions involved, *viz;* the presumption that arises from the concealment of the cable, the duty to furnish a cable which will stand an ordinary strain such as the sudden stopping of the elevator, and the effect of the negligence of a fellow servant when coupled with a defective appliance. The court says: "The libellant sues to recover damages for the death of his intestate, who fell overboard and was drowned while engaged in arranging to cast anchor on the steamship Luckenbach, as she was coming into Hampton Roads, near the mouth of the Elizabeth river, preparatory to anchoring at Lamberts Point; the contention being that the accident occurred because of the defective condition of the 'trip' line attached to the block used in connection with the lowering of the anchor by the davit to the hawse pipe, as the block and tackle was being drawn back after lowering the anchor. The case turns upon the question of whether or not the respondent furnished to the libellant's intestate a sound, safe, and suitable rope with which to perform the work required of him. The evidence for the libellant is clear and strong, that the attention of the ship's representative had been called, prior to the accident, to the defective condition of the rope furnished, that gave way and caused the accident; and that it was unsuitable and unfit for the work. The respondent disputes the correctness of this position, and claims that the rope was new, and became unfastened, and that there was no defect in it. Upon the whole case, the conclusion reached is that whatever doubt there is on the question should be solved in favor of the libellant, *since the ship failed to produce the rope, which was in her possession,* that would have settled the question of its safe or unsafe condition, and whether it broke, or was new and inflexible and became untied, thus causing the accident. Respondent insists that, assuming that the rope may have parted as contended by libellant, nevertheless recovery should not be had, because the trip line was not intended to be used for hoisting purposes, and that the accident arose from the negligent manner

in which the fellow servant of the libellant's intestate performed the work, by improperly seizing hold of or catching the fish line which supported the block, thereby placing the strain and weight on the trip line, which was not intended to be used for such purpose. *The conclusion reached respecting this matter is that it was incumbent upon the ship to furnish such a rope as would provide against this contingency;* that is to say, taking into account the manner in which it had been usually handled, they ought to have anticipated that in raising the block and fish line, *the weight might be thrown upon this trip rope; and hence that the negligence of the fellow servant in bringing about this condition, if true, would not serve to relieve the ship from liability. The negligence of the fellow servant will not serve to relieve the master from liability, where the accident arises as the result of the negligence of such servant concurring with that of the master in failing to furnish proper appliances.* Grand Trunk R. Co. v. Cummings, 106 U. S. 700–702, 27 L. ed. 266, 267, 1 Sup. Ct. Rep. 493; 10 Rose's Notes, 438, 439. The Phœnix (D. C.) 34 Fed. 760; Clyde v. Richmond & D. R. Co. (C. C.) 59 Fed. 394; The Joseph B. Thomas, 46 L.R.A. 58, 30 C. C. A. 333, 56 U. S. App. 619, 86 Fed. 658, 664, 4 Am. Neg. Rep. 105; Richmond & D. R. Co. v. George, 88 Va. 223, 228, 13 S. E. 429; Norfolk & W. R. Co. v. Thomas, 90 Va. 209, 44 Am. St. Rep. 906, 17 S. E. 884; Norfolk & W. R. Co. v. Ampey, 93 Va. 108, 130, 25 S. E. 226."

Generally speaking, too, we may say that the law is well settled that, "if the negligence of the master or of one for whose conduct the master is answerable mingles with that of one who stands in the relation of that of a fellow servant to the servant receiving the injury; and if the negligence of the master or his representative is a proximate or efficient cause of the injury,—the master will be liable, and will not be allowed to escape liability on the ground that the injury also proceeded from the negligence of one for whose conduct he was not answerable. A different statement of the doctrine is to say that, in order to relieve the master from liability for an injury to one of his servants, the negligence of a fellow servant must have been the sole cause of the injury, and not commingled or combined with the negligence of the master or of his representative." Thomp. Neg. §§ 4856, 4863; Siegel, C. & Co. v. Treka, 2 L.R.A.(N.S.) 647, and note (218 Ill. 559, 109 Am. St.

Rep. 302, 75 N. E. 1053, 19 Am. Neg. Rep. 166); Kern v. De Castro & D. Sugar Ref. Co. 24 N. Y. S. R. 748, 5 N. Y. Supp. 548; Shearm. & Redf. Neg. 5th ed. § 188; 2 Labatt, Mast. & S. § 184. See also note to Lutz v. Atlantic & P. R. Co. 16 L.R.A. 819.

Mr. Jones, in § 19 of his work on Evidence, says: "The mere withholding or failing to produce evidence, which under the circumstances would be expected to be produced and which is available, gives rise to a presumption against the party. It is a presumption less violent than that which attends the fabrication of testimony or the suppression of documents in which other parties have a legal interest; but the courts recognize and act upon the natural inference that the evidence is held back under such circumstances because it would be unfavorable. Said Lord Mansfield: 'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted.' "

It is undisputed that the cable broke, while it was being used for the purpose for which it was intended, and at a time when there was no load on the elevator. The only evidence in the record regarding the cable and its fitness for the work in question is that of the defendant, who testified that he purchased a 300-foot $\frac{5}{8}$ inch cable for the elevator hoist from the manufacturer in St. Paul, Minnesota; that the cable arrived in Bismarck about the 15th of August. Certain correspondence was offered in evidence by defendant, showing that the defendant, before purchasing the cable, made inquiries as to the price for which it could be obtained. On cross-examination, the defendant admitted that he obtained quotations of prices on the cable from different houses and accepted the best terms, although he states that he can't remember whether he accepted the cheapest possible terms or not. The record also contains an invoice, showing that the price of the cable after deducting all discounts was $17.55. There is absolutely no testimony of any kind, aside from this, to show that the cable was of sufficient strength or fitted for the work for which it was used, nor is there any evidence of any kind showing that any inspection was ever made. Appellant's counsel seems to rely implicitly on the proposition that he has conclusively established the sufficiency of this cable by showing that a new cable was purchased about August 15th, even though

the accident did not occur until November 15th. There is absolutely no evidence of the condition of the cable on November 15th, or any time after August 15th, and the testimony as to its condition on that date is limited to the matters above specified. The testimony shows that the cable broke while it was being used for the purpose for which it was intended, and at a time when there was no load on the elevator. If the approximate cause of plaintiff's fall in the first place was the failure on the part of the defendant to establish a system of signals, still, plaintiff's injuries would probably not have been very great if the cable had not broken. So, clearly, the breaking of the cable was directly a contributory cause to the injuries sustained by the plaintiff. The testimony of the foreman, Larson, is to the effect that no signals had been provided, and that he had ordered a discontinuance of all signals. The testimony of the engineer is to the effect that he recognized a certain system of signals. The testimony of the engineer is also to the effect that he had operated a hoisting engine only during a part of the last two summers. Does this testimony conclusively establish that the cable was free from defects, and that the engineer was sufficiently skilled to perform his labor, under the circumstances as disclosed by the evidence in this case?

At the time of the trial, the plaintiff's counsel demanded that the cable be produced. Defendant's counsel stated in reply that he "did not have the pleasure of living in Bismarck," and didn't know where it was. Clearly this was no sufficient explanation.

It is a well-settled rule of evidence, that the failure or refusal of a party to produce evidence particularly within his knowledge and control, and which would have an important bearing upon the facts in dispute, warrants the inference that it would be unfavorable to his contention. See Chamberlain on Evidence, § 1081a. In this state, this rule has been made a part of our statutory law. Section 7936, Compiled Laws, reads: "All other presumptions are satisfactory, if uncontradicted. They are denominational disputable presumptions, *and may be contradicted by other evidence.* The following are of that kind: . . . 5. That evidence wilfully suppressed would be adverse if produced. 6. That higher evidence would be adverse from inferior, being produced." The very best evidence of the condition of the cable, and whether or not it was defective, was the cable itself. This was the

property of the defendant. This action was commenced on February 11, 1911, or within three months after the accident occurred. The complaint charged the defective cable as one of the grounds of negligence. The defendant knew he would be called upon to answer this charge, and both he and his attorneys must have known that the cable itself would be evidence of the very highest degree, yet under those circumstances the cable is not produced, even upon demand of the plaintiff. Defendant could have been permitted to go on the stand as a witness and explain the absence of the cable, but this was not done. The only explanation offered was the statement of counsel, not under oath, and hence of absolutely no evidentiary value. Under the laws of this state, the failure to produce the cable, until rebutted by competent evidence, was of itself evidence of the fact that the cable was defective, and that if produced it would show such defect. It also seems to us that, under the facts in this case, the occurrence of the injury, in the manner and under the circumstances shown to exist, is of itself sufficient evidence of the defect of the cable and the negligence of the defendant in using a defective cable. Or, in other words, that the doctrine of *res ipsa loquitur* applies. In Griffin v. Boston & A. R. Co. 148 Mass. 143, 1 L.R.A. 698, 12 Am. St. Rep. 526, 19 N. E. 166, the court reasoned as follows: "The separation of a train in consequence of the spreading of a link, where nothing further appears, is more naturally to be attributed to an imperfection or defect in the link than to any other cause. Ordinarily such separation would not happen if the link was sound, and suitable for use. If the link was not sound, and suitable for use, the fact of its being used in that condition properly calls for explanation from the defendant; and if, under such circumstances, the defendant fails to put in any evidence, some inference against it may be drawn therefrom. The fact may be susceptible of an explanation sufficient to exonerate the defendant. But, in the absence of such explanation, we think the jury might properly infer negligence on the part of the defendant. Primarily, in such case, one may properly look to the railroad company itself, whose duty it is to use reasonable care to provide safe instruments and means for operating the railroad. In the absence of any explanation by the company, it is more probable that the separation of the train was from a cause for which it would be responsible, than that it was from a cause for which

it would not be responsible." And in Houston v. Brush, 66 Vt. 331, 29 Atl. 380, it appeared that, although a derrick which gave way owing to the working out of a pin was almost daily subjected to the strain of lifting heavy stones, it had not been inspected to see if it was safe in this respect, for about thirty days prior to the accident. The court said: "The working out of the pin was an accident which, in the ordinary course of things, does not occur if those who have the care and management of a derrick use proper care. The case standing thus, we think the jury had a right to consider the fact that the pin came out as it did, and from it draw the inference that the defendant had failed to exercise ordinary care." In the same case, the court also said: "There was no evidence that either the plaintiff or the defendants had any apprehension that an accident like this might happen, or knew that the tin was off. The case standing thus, *the plaintiff clearly had the right to go to the jury on the questions whether the tackle block in the first instance was reasonably fit for the use to which it was to be put, and, if so, whether the defendants had properly inspected it, and kept it in reasonably good repair, so that the plaintiff's injuries were not the result of a shortage of legal duty on their part.* But the defendants insist that the negligence, if any, in respect to the block was the negligence of Bailey, who had charge of it, and that he was a fellow servant of the plaintiff, and consequently there can be no recovery by the plaintiff against them. The master is liable for the negligence of his servant while discharging a duty which the master owes to a general workman in his employ. If the tackle block was unsafe and unfit for use, in the respect complained of, when it came from the manufacturer and was put upon the derrick, or subsequently became so by reason of the failure of the defendants to properly inspect it and keep it in repair, they are liable, whether this condition resulted from their own negligence, or from the negligence of some servant to whom they delegated the performance of the duty which the law imposed upon them. Davis v. Central Vermont R. Co. 55 Vt. 84, 45 Am. Rep. 590; Deering, Neg. 198." In Sullivan v. Reed Foundry Co. 207 Mass. 280, 93 N. E. 576, ¶ 2 of the syllabus reads: "The unexplained fact that a hook broke while holding a weight much less than a sound hook of the same size should hold is evidence of the hook's defective condition." And in discussing this matter in the opinion, the court said:

"It is strenuously urged, however, that there was no evidence that the hook was weak. So far as respects the testimony of the experts and of those who had made a personal examination of the hook, it must be said that there is a very strong case made out for the defendant on this point. But, after all, there was some conflict in this part of the evidence, and it was for the jury to say what credit they would give to Miller, the expert called by the plaintiff. Moreover, one salient fact must not be lost sight of. *The hook broke while holding a weight much less than a hook of that size, if sound, should have held. That fact unexplained is of itself evidence of* a defective condition. Doherty v. Booth, 200 Mass. 522, 86 N. E. 945, and cases cited. . . . The question of the soundness or suitableness of the hook was properly left to the jury. The defendant further says that, even if the hook was defective, there is no evidence that the defendant was negligent in not ascertaining that fact. The hook had been used several months. In view of the evidence as to the material of which the hook was made, as to the length of time it had been used, and the kind of use, including its exposure to fire, as to the effect reasonably to be expected therefrom upon it by way of crystallization or otherwise, and as to the lack of inspection, the question of the negligence of the defendant was for the jury."

It will be noted that in the case of Sullivan v. Reed Foundry Co. supra, defendant offered evidence to show that the hook was not defective. In the instant case, no evidence was offered by defendant to prove that the cable in the first instance was of sufficient strength, or that any inspection thereof was ever made; the cable was not produced. It is a far stronger case for the application of the maxim of *res ipsa loquitur* than the case cited above. The maxim of *res ipsa loquitur* is founded in justice and reason. As was said by the supreme court of Vermont in Houston v. Brush, 66 Vt. 331, 29 Atl. 380: "Without attempting to formulate a rule embracing every case to which the maxim is to be applied, we think it is clear from the authorities cited, that when the defendant owes a duty to the plaintiff to use a certain degree of care in respect to the thing causing the accident, to prevent the occurrence of such accident, and the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not occur if those who have the management

use proper care, it affords evidence, in the absence of evidence showing that it happened without the fault of the defendant, that the accident arose from the lack of the requisite care. In such case the occurrence itself, unexplained, shows prima facie a shortage of legal duty on the part of the defendant. This doctrine does not dispense with the rule that the party who alleges negligence must prove it; but, on the contrary, it only determines the mode of proving it, or what shall be prima facie evidence of negligence in a certain class of cases. In the case at bar the defendants owed the requisite duty to the plaintiff, to bring the case within the rule. It is evident that the accident would not have occurred if the pin had not worked out so as to cause the wheel to fall." In the instant case, how could plaintiff prove affirmatively by extrinsic evidence that the cable was defective or insufficient? The plaintiff was not required to inspect the cable; and such inspection doubtless would have been unavailing, as plaintiff was not presumed to be an expert in matters of that kind—his duties were of a different character. The cable was removed after it was broken, and not produced for the jury's inspection. It is obvious that plaintiff would be absolutely unable to prove any defect, except such as would be inferred from the happening of the accident itself. The defendant was in position to prove the fitness of the cable for its intended use, the inspection thereof from time to time, and its freedom from defect at the time of the accident, if such were the case. These were matters peculiarly within his knowledge, and upon which he could have furnished proof if he desired. The maxim of *res ipsa loquitur* sprang into existence by reason of the vast increase in modern times of the use of powerful machinery, harmless in normal operation, but capable of serious human injury if not constructed or managed in a certain mode. Wigmore, Ev. § 2509. And it was intended to apply to cases such as the one at bar. It is self-evident that if the cable on November 15th had been of sufficient strength and free from defect, it could not and would not have broken. That the breaking of the cable under these circumstances was of itself sufficient to raise a presumption of negligence is sustained by the overwhelming weight of authority. See also Jones on Evidence, § 19.

It has been held that the maxim of *res ipsa loquitur* applied, and that the jury would be justified in finding the defendant negligent and the plaintiff entitled to recovery, in the following cases:

Where a hook used to lift a smokestack straightened from the mere weight of the smokestack. El Paso Foundry & Mach. Co. v. De Guereque, 46 Tex. Civ. App. 86, 101 S. W. 814. Where a chain which was part of an elevator wholly under the control of the master fell. Konigsberg v. Davis, 57 Misc. 630, 108 N. Y. Supp. 595. Where an elevator fell. Fearington v. Blackwell Durham Tobacco Co. 141 N. C. 80, 53 S. E. 662. Where a safety clutch on an elevator failed to work. National Biscuit Co. v. Wilson, — Ind. App. —, 80 N. E. 33. Where an elevator in charge of defendant's engineer fell without fault on the part of the plaintiff, who was operating it. Dahlen v. New York L. Ins. Co. 109 Minn. 337, 123 N. W. 926. Where a belt creeps automatically from one pulley to another. Petrarca v. Quidnick Mfg. Co. 27 R. I. 265, 61 Atl. 648. Where a rope used to handle heavy timbers broke. Jefferys v. Nebraska Bridge Supply & Lumber Co. 157 Fed. 932.

Where a scaffold furnished by the master fell while being used in the manner intended. Cleary v. General Contracting Co. 53 Wash. 254, 101 Pac. 188.

Where a piece of timber fell during the construction of a building. Kain v. Roebling Constr. Co. 72 Misc. 34, 129 N. Y. Supp. 151.

Where a buffer iron fell off the bolt on which it was hung, because the split key holding it in place fell out. Sullivan v. Rowe, 194 Mass. 500, 80 N. E. 459.

Where a crowbar fell from upper story of a building where servants were at work, and fell upon the plaintiff, who was working below. Johnson v. Metropolitan Street R. Co. 104 Mo. App. 588, 78 S. W. 275.

Where a servant at her place of work is injured by the fall of a barrel from a platform above her. Armour v. Golkowska, 202 Ill. 144, 66 N. E. 1037, 14 Am. Neg. Rep. 13.

Where a brick falls from a portion of a building where only bricklayers employed by defendant are at work, and injures the plaintiff. Guldseth v. Carlin, 19 App. Div. 588, 46 N. Y. Supp. 357.

Where a brake chain broke, throwing a brakeman to the ground. Galveston, H. & S. A. R. Co. v. Harris, 48 Tex. Civ. App. 434, 107 S. W. 108.

Where a piece of timber, which has been left leaning against a post, falls. Sackewitz v. American Biscuit Mfg. Co. 78 Mo. App. 144.

Where a dumb-waiter, while unloaded, falls from the fifth floor of a warehouse and injures an employee, who has inclined his head within the shaft to hear orders given from another floor, as was customary. Winkelmann & B. Drug Co. v. Colladay, 88 Md. 78, 40 Atl. 1078, 4 Am. Neg. Rep. 645.

Where the place which a miner was required to pass over gave way in a sudden and unexplained way. Lentino v. Port Henry Iron Ore Co. 71 App. Div. 466, 75 N. Y. Supp. 755.

Where a rock fell from the roof of a tunnel into which the servant had been ordered to take the train. Louisville & N. R. Co. v. Cason, — Ky. —, 116 S. W. 716.

Where a bucket in which the plaintiff was being hoisted from a mine fell down the shaft because the cable ran off the drum. Texas & P. Coal Co. v. Daves, 41 Tex. Civ. App. 289, 92 S. W. 275.

Where an open window in the office of a railroad company falls on one who was presenting an order for payment, in accordance with a custom of the company to pay its employees through such window. Carroll v. Chicago, B. & N. R. Co. 99 Wis. 399, 67 Am. St. Rep. 872, 75 N. W. 176.

Where plaintiff, who was walking along a pathway outside of the railroad company's right of way, was struck by cross-ties, as they fell from a moving train. Howser v. Cumberland & P. R. Co. 80 Md. 146, 27 L.R.A. 154, 45 Am. St. Rep. 332, 30 Atl. 906.

Where an iron ear, which connected the trolley with a guy, broke, and fell on plaintiff's head. Uggla v. West End Street R. Co. 160 Mass. 351, 39 Am. St. Rep. 481, 35 N. E. 1126.

It should also be remembered that at the time the cable broke, it was being used for the purpose for which it was intended, and was not being subjected to any unusual strain. Under such circumstances the maxim of *res ipsa loquitur* is especially applicable. Hannan v. American Steel & Wire Co. 193 Mass. 127, 78 N. E. 749; Folk v. Schaeffer, 186 Pa. 253, 40 Atl. 401; Cleary v. General Contracting Co. 53 Wash. 254, 101 Pac. 888; Stewart v. Ferguson, 164 N. Y. 553, 58 N. E. 662, 9 Am. Neg. Rep. 132.

Generally speaking, and in connection with this and the other portions of the instructions which are complained of, we may add that the law of the case has been established by our former opinion in Wyldes v.

Patterson, 24 N. D. 218, 139 N. W. 577. We are still of the opinion that it was there correctly stated. That decision, at any rate, is controlling upon us here. See Hayne's New Trial & Appeal, vol. 2, page 1658 and cases cited. So, too, the instructions with which we are concerned are those to which exceptions were taken—all the other portions of the instructions will be regarded as the law of the case. 2 Cyc. 724; see also Appeal & Error, 1 Decen. Dig. § 263. (1) The trial court in its instructions outlined the issues as formed by the pleadings. This was the proper method of outlining the issues. Sackett, Instructions, § 155. The defendant did not ask the court to eliminate any question raised by the pleadings from the jury's consideration, with the single exception of the strength or weakness of the cable. A party should not be heard to complain that an issue raised by the pleadings is improperly submitted to the jury, where no request is made for an instruction to take same away from the jury's consideration. 2 Cyc. 701. Nor did the defendant except to that portion of the instructions outlining the issues; hence the correctness thereof is not before this court for determination, but they are the law of the case. The only instructions to which exceptions were taken are the following:

(a) "You will take into consideration all of the evidence bearing upon the question of negligence, and in the light of it all determine whether the defendant was in fact negligent as *charged,* and whether the plaintiff was in fact negligent in such a manner as to contribute to the injury."

(b) "The plaintiff must so establish the fact of the alleged injury, that such alleged injury was caused by and through the negligence of the defendant in some of the manners charged in the complaint."

(c) "I charge you, gentlemen of the jury, that it was the direct, personal, and absolute obligation of the defendant in this case to provide reasonably safe and suitable machinery and appliances for the business then in hand. This includes the exercise of reasonable care in furnishing such appliances. An employer must furnish a safe place in which his employee is to work."

(d) "I charge you that the plaintiff herein by his contract of employment with the defendant did not assume the risks arising from the want of sufficient and skilled labor, or from defective machinery, or other instruments with which he had to work."

(e) "I charge you that it was the duty of the defendant in this case to furnish the plaintiff with safe and suitable appliances with which to perform the work required of him, and also to see that the same were kept in proper repair, and if this duty was negligently performed and the plaintiff sustained any injury thereby, the defendant was responsible in damages."

The first instruction excepted to (a) is merely a portion of the instruction relative to the law of negligence. The entire instruction is as follows: "In determining the question of negligence, both on the part of the plaintiff and the defendant, you should consider all the circumstances under which the defendant caused the acts to be performed alleged in the complaint, and under which he failed to act, if you find that he did fail in such respect. You have a right to take into consideration the conditions surrounding the injury,—the situation of the parties, the character and location of the machinery and appliances and the building under construction, and their location with respect to each other, the fact that the employment of the plaintiff was or was not a dangerous one, the fact that the plaintiff was or was not aware of the nature of such employment, the fact of whether or not it was necessary that a code of signals be promulgated and enforced in order to insure the reasonably safe carrying out of the operations then in hand,—in fact, all of the facts and circumstances and conditions existing at the time of the alleged accident. You will take into consideration all of the evidence bearing upon the question of negligence, and, in the light of it all, determine whether the defendant was in fact negligent as charged, and whether the plaintiff was in fact negligent in such manner as to contribute to the injury." Will anyone seriously contend that this instruction, taken as a whole, is erroneous? It seems to us that such contention would be untenable.

In the case of the second instruction (b) also, appellant has selected a part of an instruction—in fact, a mere clause out of a sentence. It seems to us that there might be a question if such exception presents anything for this court to review. The entire instruction is as follows: "Furthermore, gentlemen of the jury, I charge you that the plaintiff in this case having set up those facts which he relies upon as giving him the right to recover here, the burden is upon him to establish to your satisfaction by a fair preponderance of the evidence—

that is, by a greater weight of evidence—the existence and truth of those facts, and if the plaintiff fails to so establish those facts, then, and in that case, your verdict here must be for the defendant; that is, the plaintiff must so establish the fact of the alleged injury, that such alleged injury was caused by and through the negligence of the defendant in some of the manners charged in the complaint, and the amount of the damage that the plaintiff suffered by reason of such injury. And if he fails to establish any or all of those facts, then he has failed to make out his case, and you must find against him." It will be observed this instruction relates to the burden of proof, and it is not contended that the law thus charged is erroneous. The only possible complaint relates to the reference made to the issues in the case. As already stated, no exception is taken to that part of the charge outlining the issues; hence the same will be regarded as the law of the case, and is not subject to review. The instruction was limited to the burden of proof, and clearly impressed upon the jury the fact that the plaintiff must prove his case before he could recover. This of itself was equivalent to an instruction to disregard allegations of negligence not proven, and this is especially so when taken in connection with the portion of the charge immediately following, which was as follows: "I charge you, as a matter of law, that you cannot infer that the defendant was negligent merely because of the happening of the accident. The plaintiff must prove by a fair preponderance of the evidence that the accident was caused by some default or neglect on the part of the defendant, irrespective of, and independent of, the happening of the accident."

In case of the third instruction (c) also, appellant merely selects a part of an instruction. The complete instruction was as follows: "I charge you, gentlemen of the jury, that it was the direct personal and absolute obligation of the defendant in this case to provide reasonably safe and suitable machinery and appliances for the business then in hand. This includes the exercise of reasonable care in furnishing such appliance. An employer must furnish a safe place in which his employee is to work. *But the defendant was not an insurer of the plaintiff's safety, nor of any of the appliances which the plaintiff was required to use, nor was he an insurer of the methods of the doing of the work, in which the plaintiff was engaged at the time of the accident.*

but the defendant was only required to exercise ordinary care; that is, such care as a man of ordinary prudence would exercise in the like or similar circumstances. The plaintiff assumed the risks naturally and ordinarily incident to the work in which he was engaged at the time of the accident and in the course of his employment." This is a correct statement of the law. As was said by this court in Cameron v. Great Northern R. Co. 8 N. D. 124, 130, 77 N. W. 1016, 5 Am. Neg. Rep. 454: "It is well settled that the master must furnish the servant with reasonably safe and suitable machinery and appliances, and if the master fails in this duty, and the servant is injured thereby while in the exercise of due care, the master will be liable for such injury. The master is bound to observe all the care which prudence and the exigency of the situation requires, with respect to furnishing instrumentalities adequately safe for the use of the servant, and when such instrumentalities are furnished, the master is required, further, *to exercise due care in keeping the same safe and serviceable;* and, with this end in view, the master is bound to make seasonable inspection of the condition of the instrumentalities furnished for the use of the servant. These rules are familiar, and are so frequently reiterated by the courts that authority in their support is unnecessary." See also Sackett on Instructions, §§ 1495, 1496.

The fourth instruction excepted to (d) is not even a complete sentence, but merely a qualifying clause qualifying the remainder of the sentence. The complete instruction is as follows: "Furthermore, I charge you, that he likewise assumed such risks connected with the method of doing the work in the manner in which it was being done, at the time he was injured, as he knew and appreciated, or in the exercise of ordinary care should have known and appreciated. The plaintiff was required to use reasonable care for his own safety. The law will not permit him to say he did not see that which was obvious, and that he did not know or appreciate things which should be known and appreciated by persons of ordinary intelligence. The plaintiff cannot be permitted to shut his eyes and say he did not see, nor to close his ears and say he did not hear; but I charge you that the plaintiff herein by his contract of employment with the defendant did not assume the risks arising from the want of sufficient and skilled labor, or from defective machinery or other instruments with which he had to work."

It must be observed that this is a negative instruction, and is limited expressly to the question of the assumption of risk. It is conceded that it is a correct statement of the law as an abstract proposition. Appellant's attack on this instruction is predicated on the erroneous assumption that this instruction authorizes the jury to return a verdict against the defendant on a ground of negligence not involved. This argument is wholly fallacious, and worthy of little consideration. The court had already carefully instructed on the questions of negligence, and contributory negligence, and assumption of risk. The instruction challenged related solely to the assumption of risk. It must be presumed that the jury applied it in accordance with the directions of the court, and to the subject to which its application was limited, and, this being so, it seems clear that defendant was not prejudiced by it. The argument that jurors will take isolated phrases of a charge and apply the same to matters wholly foreign to the subject to which they relate is not one which appeals to reason. The jurors are presumed to be men of ordinary intelligence, and to have acted as such. It is obvious that if qualifying clauses are read by themselves, they will convey a meaning radically different from that intended to be conveyed, and actually conveyed by the sentence as a whole. If the same method employed by appellant's counsel in this case be adopted in construing the state Constitution, some rather startling results will be obtained. Thus, the first clause of § 8 of the Constitution reads: "Until otherwise provided by law, no persons shall, for a felony, be proceeded against criminally." And the first clause of § 64 reads: "No bill shall be revised or amended," and the first clause of § 73 reads: "No person shall be eligible to the office of governor or lieutenant governor." Of course, the clauses so selected are no indication of the meaning conveyed by the respective sections from which they are quoted, but it demonstrates the unfairness of appellant's counsel in the exceptions taken to the charge to the jury in this case. He has adopted the method utilized by the atheist who invoked the aid of the Bible in proving that there was no God. He quoted the clause, "There is no God," from the 14th Psalm, when the complete sentence reads: "The fool hath said in his heart, *there is no God.*" So in this case appellant's counsel has selected, not complete instructions, nor even complete sentences, but isolated clauses. The unfairness of this seems to us to be entirely obvious.

The burden of establishing the defenses, not only of contributory negligence, but also of assumption of risk, was upon the defendant. Shebeck v. National Cracker Co. 120 Iowa, 414, 94 N. W. 930, 931; Nicholaus v. Chicago, R. I. & P. R. Co. 90 Iowa, 85, 57 N. W. 694; Thompson v. Great Northern R. Co. 70 Minn. 219, 72 N. W. 962; Nadau v. White River Lumber Co. 76 Wis. 120, 20 Am. St. Rep. 29, 43 N. W. 1135.

The fifth instruction challenged here (e), also, is only a part of a sentence, the complete instruction being as follows: "I further charge you that it was the duty of the defendant in this case to furnish the plaintiff with safe and suitable appliance with which to perform the work required of him, and also to see that the same were kept in proper repair, and if this duty was negligently performed and the plaintiff sustained any injury thereby, the defendant was responsible in damages; provided that such negligence of the defendant was the direct and proximate cause of the injury, and that the plaintiff did not contribute to the direct and proximate cause of the injury by his own negligence." The error urged with reference to this instruction—and this applies in part to the instruction considered under point (c) above —all goes to the question of the defect in the cable, and is fully covered by what we have said under point (d) above and in our previous discussion.

The trial court clearly was justified in refusing to instruct the jury to disregard all testimony relative to the breaking of the cable. This point has already been fully discussed. In our opinion, the defendant received far more favorable instructions from the court upon this feature of the case than he was entitled to receive. The court, among others, gave the following instruction: "I charge you, as a matter of law, that you cannot infer that the defendant was negligent, merely because of the happening of the accident. The plaintiff must prove by a fair preponderance of the evidence that the accident was caused by some fault or neglect on the part of the defendant, irrespective of, and independent of, the happening of the accident." We believe that the court would have been justified in instructing the jury that, under the evidence in the case, the breaking of the cable in the manner and under the conditions which it did raised a presumption that such cable was defective, and that the burden was upon the defendant to rebut such

presumption. See Uggla v. West End Street R. Co. 160 Mass. 351, 39 Am. St. Rep. 481, 35 N. E. 1126.

The court's instructions should be taken as a whole, and when this is done, we are unable to see where appellant has any cause to complain. "The charge is entitled to a reasonable interpretation. It is construed as a whole, in the same connected way in which it was given, upon the presumption that the jury did not overlook any portion, but gave due weight to it as a whole; and this is so, although it consists of clauses originating with different counsel and applicable to different phases of the evidence. If, when so construed, it presents the law fairly and correctly to the jury, in a manner not calculated to mislead them, it will afford no ground for reversing the judgment, although some of its expressions, if standing alone, might be regarded as erroneous; or because they may be an apparent conflict between isolated sentences; or because its parts may be in some respects slightly repugnant to each other, or because some one of them, taken abstractly, may have been erroneous. If, therefore, a single instruction is found which states the law incorrectly, and yet it is qualified by others in such a manner that the jury were probably not misled by it, it will not be ground for reversing the judgment." Thomp. Trials, § 2407. See also Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841.

But even though it be conceded that the instructions are in part erroneous (which we by no means do), this would not of itself justify a reversal. "Courts of error do not sit to decide moot questions, but to redress real grievances. It is, therefore, a rule of nearly all the courts, that no judgment will be reversed on account of the giving of erroneous instructions, unless it appear probable that the jury were misled by them. Expressions of this rule could be multiplied almost without limit. Thus, it is said that instructions faulty, or technically erroneous, will not work a reversal of the judgment, if the jury were not misled, or if, as a whole, the case was fairly presented to them, and especially if their verdict is obviously correct. So, although an instruction given to the jury contained matter technically erroneous, yet if the objectionable part was merely superfluous, and not calculated to mislead, the judgment will not be reversed because of the giving of it." Thomp. Trials, § 2401.

"There is a marked distinction between submitting to the jury an

instruction based upon a hypothetical state of facts which there is no evidence tending to prove, and what is termed an abstract instruction. As a general rule, the former will be error, and the latter not. By the giving of an abstract instruction is understood the statement of an abstract proposition of law, which is irrelevant to the issues on trial. *The general rule, perhaps, is that* this is not ground of reversal in a civil case, even where the *proposition of law may be erroneously stated, since it would not be likely to influence the jury either way.* 'Every charge of a court,' said Willie, Ch. J., 'must be tested by the facts to which it is applicable.' The announcement, therefore, of a general principle in a charge which in the abstract may be wrong, will not be cause for reversing the judgment, if it be so modified by the charge, in view of the facts of the case, that it could not affect the rights of the party complaining." Thomp. Trials, § 2321.

"Of course, it can never be said that the jury were misled by the giving of erroneous instructions, where they have reached the correct result by their verdict. Accordingly, it is the practice of most of the courts, before passing upon exceptions to instructions, to look into the evidence and see if the verdict was right; and if it is found to be so, the court will look no further. The rule of these courts is, that a good verdict cures all errors in the intermediate steps by which it was reached. In England, it is no ground for a new trial that the judge misdirected the jury, unless it is shown that the jury were thereby induced to form a wrong conclusion. If the revising court sees that justice has been done between the parties, they will not set aside the verdict, nor enter into a discussion of the questions of law." Thomp. Trials, § 2402. "We waste time in multiplying forms of expression, beyond saying that the courts which entertain this conception refuse to reverse judgments because of errors in giving or refusing instructions, where they can see from the whole record that substantial justice has been done, and that another trial ought to produce the same result." Thomp. Trials, § 2403.

The small amount of the damages found by the jury shows that it was not actuated by passion or prejudice. In our opinion, the verdict is just and right; and the judgment based thereon should be affirmed. It is so ordered.

FISK, Ch. J., dissenting. With all due deference to the judgment of my associates who join in the majority opinion herein, I most respectfully dissent from the conclusion reached, as well as from much that is announced therein. The majority opinion impresses the writer as a strained and wholly unwarranted effort to uphold plaintiff's recovery, regardless of prejudicial errors in the record. This may seem to be a rather strong statement; but I shall attempt, as briefly as possible, to substantiate my assertion. To start with, I take it for granted that every person is entitled to a fair trial, which means a trial free from prejudicial error (Hintz v. Wagner, 25 N. D. 110, 140 N. W. 729), and, as I construe this record, such a trial, with all due respect to the learned trial judge, was not accorded the defendant. I recognize the rule, as stated in the majority opinion, that a reversal will not be ordered for errors committed on the trial, where it clearly appears that the verdict is right, and in all likelihood no other result would be attained on another trial. This is but another way of stating that the errors were nonprejudicial. I fail to see how this rule can be invoked in the case at bar, for it must be conceded that at least the great weight of the testimony is against the plaintiff's contentions. If it can properly be said that the verdict is clearly right in this case, the same may likewise be said of every verdict, regardless of the testimony.

It would serve no useful purpose in this dissent to refer to all the pronouncements in the majority opinion which I deem indefensible, and I shall content myself by merely referring to a few.

It is stated in the majority opinion that "it is also clear that, even if the accident in the first instance, that is to say, the falling on to the elevator, was not due to the negligence of the defendant, it was certainly the duty of the defendant to furnish a cable which would enable the elevator to be stopped when an accident happened, and which would not necessitate its falling to the ground." This impresses me as a novel doctrine. The logical and inevitable result of such a rule is to make the master liable for the servant's injuries, even though occasioned either by mere accident or by his own carelessness. Must the master anticipate that the servant may be careless, and therefore furnish instrumentalities, not only sufficient for the uses intended, but also of sufficient strength to insure the servant against resulting injury occasioned by his

own carelessness? I cannot lend my assent to such an unheard-of doctrine.

Again, the majority say: "Why, indeed, the breaking of the cable should not be held to be one of the operating causes, if not the proximate cause, of the injury, it is difficult for us to see; and it is clear to us that the plaintiff, Wyldes, could recover on this theory, if on no other." While this seems to be clear to the majority of this court, it was evidently not so clear to plaintiff's able counsel, for at the argument they expressly disclaimed liability on such ground. Moreover, in their printed brief respondent's counsel say: "It was alleged in the complaint that the cable was weak and defective; but this was abandoned on the trial, and no proof introduced by plaintiff to substantiate this allegation of the complaint." Notwithstanding this, the majority opinion devotes much space in an effort to demonstrate that plaintiff's recovery may be sustained upon such ground of negligence. But it is a significant fact that this court, even on the former appeal, asserted no such ground of liability. On the contrary, the court there carefully refrained from so doing. In the light of the above, I ask how can it be properly said that the doctrine of *res ipsa loquitur* has any application? Why should defendant produce the cable at the trial, in the light of this express abandonment by plaintiff of such ground of negligence? Clearly, the *cause* of the accident cannot be attributed to the breaking of the cable, but, at the most, such breaking merely enhanced plaintiff's injury. Hence, in determining the question of primary liability in this case, the breaking of the cable should be ignored. The Illinois case cited in the majority opinion is not in point, and is easily differentiated from the case at bar, as are the other cases cited.

In addition to the above, I merely desire to say that the fact that such cable parted when subjected to the unusual strain disclosed by the evidence is no proof whatever that defendant was guilty of a want of due care in using the same. The majority opinion states that "it is undisputed that the cable broke while it was being used for the purpose for which it was intended, and at a time when there was no load on the elevator." As I read the record, such statement is unwarranted, and clearly contrary to the conceded facts. The purpose of the elevator was to raise building material to the various landings—not to afford a lighting place for those who might fall on to it.

Again, there is neither allegation nor claim that the engineer was not sufficiently skilled in his line of duty; yet the majority sustain an instruction telling the jury, in effect, that liability may be predicated on the ground of the lack of proper skill. As I shall hereafter point out, other equally erroneous and prejudicial instructions were given and upheld by the majority opinion. Before noticing them, I will advert to the issues as framed by the pleadings, and the proof offered in support thereof. The complaint alleges:

"1. That the elevator and scaffold used in the construction of the building *were improperly constructed and unfit for the purposes for which they were used.*

"2. That the cable and fastenings used to operate the elevator were weak and defective, and not of the proper strength and weight for the purpose for which they were used.

"3. That no *appliance* was used or supplied to prevent the cage of the elevator from falling in case of the parting of the cable, or the happening of any other contingency by which the cage might become loose or disconnected from its fastenings.

"4. That the elevator cable and fastenings were not properly *inspected, repaired,* or *replaced,* but were allowed to become *worn, weak,* and *defective,* and out of repair.

"5. That the steam engine used to operate the elevator was *so inclosed that the engineer or person operating the same could not see the landings where the elevator stopped.*

"6. That no electrical or other proper signal system was furnished or provided for the elevator."

It is further alleged that while the plaintiff was upon one of the landings of the elevator, which landing was not visible to the engineer operating the engine, the elevator cage was suddenly and without warning lowered from the front of the landing, and that he was at that time about to push a wheelbarrow on to the elevator, without negligence on his part; and that he was drawn forward on to the elevator with great force and violence. That when he was so drawn or thrown upon the elevator, the tacklings and fastenings gave way, and the elevator fell to the ground. That, solely by reason of the defendant's negligence, as alleged, he sustained the injury of which he complains.

The answer denies any negligence on defendant's part, and alleges

that the plaintiff's injury was caused by his own negligence or by the negligence of his coemployee, and that he assumed the risk.

At the last trial there was no evidence to sustain any of the grounds enumerated in ¶¶ 1–5 inclusive, above quoted, nor does respondent urge on this appeal that there is any evidence tending to support the verdict upon any of such grounds; but in lieu of the alleged negligence set forth in ¶ 5, respondent was permitted to offer testimony tending to show that the building in which the engineer who operated the elevator was stationed was in such close proximity to the hotel building as to preclude such engineer from having a clear vision of the landing at the roof of the building, so as to enable him to see the plaintiff while in the discharge of his duties in placing wheelbarrows upon the removing them from such elevator. In other words, as I understand respondent's contention on this appeal, he seeks to justify the verdict and judgment, upon the sole ground that it was culpable negligence on defendant's part not to have provided a system of signals for the information and guidance of the engineer in operating such elevator, and that such negligence was the proximate cause of plaintiff's injury. Such contention is of necessity predicated upon the assumption that without a code of signals for such purpose, it was impossible for the engineer to operate such elevator with a reasonable degree of safety to the plaintiff, by reason of the alleged fact that the engineer was so located and situated in the discharge of his duties as to be unable to have a reasonably clear vision of the plaintiff at the time of the accident causing his injury. There is much force in the statement by appellant's counsel, that obviously the complaint was framed on the theory that a signal system was necessary because the engine house was so *inclosed* that the engineer could not see the *landings,* and that the evidence wholly fails to substantiate such theory. Indeed, it is not contended by plaintiff that such signal system was necessary by reason of any alleged faulty construction of the engine house precluding the engineer from having a clear vision of the elevator and its landings; but his contention was, and is, that such signal system was rendered necessary by reason of the location of the engine house so near the building line as to preclude the engineer from having a clear vision of such landings after the cornice was built. There is also much merit in appellant's contention that this latter ground is not alleged in the complaint; but counsel do not seri-

ously urge such variance on this appeal, evidently because of our holding on the prior appeal, to the effect that liability may, if the evidence warrants it, be predicated upon such new theory of negligence. This question is no doubt foreclosed by such prior decision.

It is most strenuously insisted by appellant's counsel, however, that under the state of the evidence on this appeal there is no room for intelligent men to fairly differ in their conclusions upon any of the essential facts; that the evidence and the physical facts disclosed by this record demonstrate, to a moral certainty, that the engineer could see the landing and the plaintiff upon the roof at the time of the accident. Hence they contend, that it was error to submit to the jury the question as to defendant's negligence in failing to install a system of signals. It is, of course, true that if the engineer, from the place where he was located, could plainly see the elevator and the movements of the men about the elevator landings, there was no duty on defendant's part to provide a signal system, for reasons too obvious to mention. Under such conditions, all concerned in the movements of such elevator would have been furnished all the protection that could be afforded by such signal system.

In support of their contention that the engineer had a clear vision of the plaintiff at and just prior to the time of the accident, appellant's counsel have made an elaborate review of the testimony in their printed brief, and they have attempted to point out and emphasize the fact, that a material distinction exists between the testimony at the last trial and that at the former hearing. Among other things, they call attention to the fact that on the last trial the location of the engine house was not left to mere recollection, estimate, or guess, as at the first hearing; but it was shown, without contradiction and with conclusive certainty, that its west wall was from 19 to 21 feet east of the hotel building, which would bring the engineer, who was in the northeast corner of such engine house, about 33 feet east of the east line of the hotel building. This conclusion is based upon the undisputed testimony that a 16-foot cement sidewalk was laid between the hotel and the engine house before the latter was removed, and that a space of from 3 to 5 feet must have existed between the curb of such walk and the west line of the engine house; also, that the engine house was 14 feet in width. Attention is also directed to the fact that the landing where the accident occurred

was scant 3 feet in width, and projected over the outer edge of the cornice from 6 to 8 inches, so that when the elevator stopped its platform connected closely on a level with the projecting end of such landing; also, that the engine house was located about 60 feet south of the elevator; that such elevator or hoist consisted merely of an open platform, held by a beam on each end running upward to a height of 8 or 9 feet, where a crossbeam was fastened parallel with the platform, and such elevator was suspended and operated by tackle and cable attached to such crossbeam, which cable passed over wheels and pulleys set in the woodwork at the top of the tower, some 10 feet higher than the roof of the building, and which tower was a temporary structure built of 2x4 and 4x4 timbers. The height of the hotel building was given at the last trial as 79 feet, 5 inches; but to arrive at the height from the top of the cornice, there must be deducted 1 foot, 2½ inches for the scroll work, which the evidence shows was placed on the cornice after the accident, leaving the height 78 feet, 2½ inches. Such scroll work would, of course, be a material obstruction to the vision, at the time the observations were made and the photographic views taken during the last trial.

Upon the crucial question as to whether the engineer had a clear view at the time of the accident, I submit that the following résumé of the evidence at the last trial is correct. Defendant Patterson testified that there never was a time during the construction that a man could not be seen on the roof; that, after the cornice was put on the building, he was in the engine house very often, and had occasion to look; that a man could be plainly seen on the gangway or runway, approaching and placing a wheelbarrow upon the elevator.

Clarence Orcott, the engineer, testified that he was 5 feet, 10 inches tall. That at all times he could plainly see the men about the elevator, pushing off and on wheelbarrows. That the tower and cornice presented no obstructions to his view. That he experienced no difficulty in seeing the men place wheelbarrows on the elevator and then standing back on the runway.

Fred Swanson, a carpenter, who had worked all over the building, testified that the engineer could plainly see the men and the wheelbarrows. That he could plainly see the engineer while he was standing on the gangway or runway. That he stood on the runway and signaled the engineer; that he could see him; that after the cornice went on he

had occasion to stand on the runway; he could see the engineer. That he signaled the engineer, who responded to his signal. This witness was 5 feet, 8½ inches tall.

August Watts, a brick mason, who had worked on the building from top to bottom, testified that, after the cornice was put on, standing on the runway, he could see the engine house, the windows in front and on the roof, and the engineer himself.

Ben Goldader testified that he had worked on the building from the beginning; had worked on the roof after the cornice was put on. That, standing on the runway, he had motioned to the engineer with his hands, in plain sight, and that there was no difficulty in seeing the engineer.

John L. Larson, a witness on the part of the plaintiff, who at the time of the accident was the foreman in charge of construction, testified that at all times, and after the cornice was placed on the building, the engineer had a clear view of the operation—if the barrows were filled they would be turned one way, and if empty turned the other way, so that there could be no question about whether the elevator was to go up or down—and that for that reason signals were entirely unnecessary. That he knew the view was clear, of his own knowledge, by actual experiment. That he had operated the engine himself many times, after the cornice was put on.

M. J. O'Connor, a witness for the plaintiff, testified that, standing beside the engineer on the outside of the engine house, he could see the wheelbarrows come out from the roof and the elevator come down; that he could see the men waiting for the wheelbarrow to come up. He said he could see the wheelbarrow approach the elevator, but not the man behind it.

In addition to the above, a large mass of testimony was introduced from the lips of various witnesses, who were present at the scene of the accident, and who participated in making demonstrations during the last trial, to determine whether the engineer had a clear view of the roof landing after the cornice was built. I shall not attempt to reproduce such testimony at length. Suffice it to say, that it strongly tends to corroborate defendant's contention upon the issue as to whether the engineer had a clear vision of the landing at the time of such accident. I have no hesitation in concluding from the record as now presented,

when considered in the light of the known physical facts, that there is no such substantial conflict in the evidence as to warrant submitting to the jury the question of defendant's negligence in not providing a system of signals, as none were required. The evidence on the last trial bearing on this question differs so materially from that presented on the former appeal as to clearly differentiate the two records; and therefore the principles of law formerly announced are inapplicable, and not binding upon us under the rule of the law of the case. When we take into consideration the fact, as shown by the undisputed testimony given at the last trial, that when the loaded wheelbarrow was elevated to the landing the wheel faced towards the man on the runway, and to reach the handles he was required to step over the wheelbarrow into the elevator; and that when he returned the empty wheelbarrow from the roof to the elevator he was required to pass over such landing or runway, in order to place the wheelbarrow in the elevator with the handles thereof on blocks provided for that purpose; and when we consider the further undisputed fact that such landing projected from 6 to 8 inches over the outer edge of the cornice in order to bring the landing flush with the elevator platform, I am unable to see, under any possible construction of the evidence, how it can be legitimately claimed that this work was not in plain view of the engineer. It is nowhere contended that the elevator itself, or the tower thereof, presented any material obstruction to the view, for both the plaintiff and his witness, O'Connor, testified that before the cornice was built the man on the landing was in view of the engineer. It is wholly inconceivable that the engineer could successfully operate the elevator, as he did for weeks after the cornice was built, if his vision was materially obstructed. According to the plaintiff's own testimony, the accident was caused by the sudden lowering of the elevator while he was in the act of placing the empty barrow thereon, and that he had the same halfway on such elevator at that instant. He must therefore have been in close proximity to the outer portion of the runway, and in plain view of the engineer. Again, without a clear view of the landing, how could the engineer stop the elevator on a level with the projecting end of such landing? This had to be done, for otherwise wheelbarrows filled with mortar could not be transferred from the elevator to the landing. When the evidence

is all considered in its most favorable light for the plaintiff, it fails to sustain any of the charges of negligence alleged in the complaint.

In my opinion the above views are unanswerable, and should require a reversal of the judgment and a dismissal of the action.

In my judgment, the plaintiff should also be held to have assumed the risk. The undisputed testimony shows that he was about 19 years of age at the time of the accident, and of at least average intelligence. According to his own testimony, he voluntarily continued in the service of the defendant for a considerable time after the cornice was placed upon the building, and when, as he says, he could not see the engine house. He was therefore bound to know and did know, if his testimony is true, that the engineer could not see him. He therefore should be held to have known and fully appreciated the risk, if any, attendant upon this method of work. He swears positively that there was no such thing as signals and that the engineer operated the elevator mostly by guesswork, yet he continued in the service, making no complaint to the master. It is entirely clear, therefore, that he had the same opportunity of knowing the dangerous character of the work as the defendant had and must have appreciated the risk, for he had the same opportunity as others could possibly have had of knowing and appreciating the same. Assuming the truth of his testimony, he was therefore guilty of negligence as a matter of law, in continuing to work under such conditions.

I am also unable to concur in the holding that the rulings of the trial court were correct, in rejecting the testimony offered by defendant as to photographs taken during the last trial by the witness Holmboe. Questions tending to lay a foundation for the introduction of such photographs were objected to by plaintiff's counsel and the objections sustained, upon the ground that the surrounding conditions were not the same as when the accident occurred. Whereupon defendant's counsel made the following offer of proof: "The defendant offers to prove by a competent photographer, who took photographic views on yesterday at about 11 o'clock in the forenoon, and referred to in the testimony of the witnesses who were present, that at a distance of precisely 20 feet from the building line, and on a line directly east and west from where the engineer was standing when operating the engine, the lens was pointed in a northwesterly direction towards the roof of the building,

at a height of 63 inches from the ground, and that a view at that point was then taken and subsequently developed by the photographer, and that the photograph so taken is a correct and accurate view of what was then within the range of the lens so pointed.

"That on the same north and south line the camera was moved easterly, and then placed at a distance of 25 feet from the building line; that a view was taken from that point, with the lens placed at the same angle and at the same height from the street; that the view was developed by the photographer, and is a true and correct picture and photograph of what was within the range of the lens at that point.

"That the camera was then moved to a point 31 feet from the building line, and to the northeasterly corner of the outline of the engine house marked on the street, to which reference has been made in the testimony of the witness; that a view was taken from that standpoint, with the lens pointed in the same direction and angle, and at the same height from the street; that the view was developed by the photographer, and that a true, correct, and accurate picture of all that came within the range of the lens at that time is shown on the developed picture. And the photograph so developed and taken is marked 'defendant's exhibit 4,' and offered in evidence.

"That the photograph taken and developed at a distance of 25 feet from the building line, referred to in the testimony, is marked 'defendant's exhibit 5,' and is offered in evidence.

"That a photograph taken at the same time and under identically the same circumstances and conditions, with the lens at the same height and angle, taken by the same photographer at a distance of 31 feet from the building line, with the tripod located in the northeast corner of the outline of the building on the street, at the place where the engineer stood when operating the engine, as disclosed by the evidence in the case, is marked 'defendant's exhibit 7,' and is offered in evidence."

To these offers counsel for plaintiff objected, for the reason, as stated, "that they are incompetent, irrelevant, and immaterial in this, that the conditions under which the exhibits were taken, as appears in the offer, and the admission made, shows that they were taken under conditions that were not essentially the same as the conditions existing at the time of the accident."

I think it was palpable error to sustain such objection, and that such

ruling was clearly prejudicial. It should be borne in mind that the only obstruction claimed by plaintiff to the engineer's view was that caused by the cornice, and it is nowhere contended that a signal system was necessary, except on account of such cornice. The fact, therefore, that at the time such photographs were taken the surrounding conditions were not precisely the same as when the accident happened was not decisive, for they were in all essential respects substantially so. And when we consider the sharp conflict upon the crucial question at issue, and the further fact that the testimony on such issue largely preponderated in defendant's favor, no one can say that a different result might not have happened, had the jury been allowed the benefit of such excluded testimony. As to the weight that should be given to photographs as evidence, see Higgs v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 446, 15 L.R.A.(N.S.) 1162, 114 N. W. 722, and note to this case in 15 Ann. Cas. 98. See also Mitton v. Cargill Elevator Co. 124 Minn. 65, 144 N. W. 434, from which we quote:

"The trial court excluded photographs of the interior of the engine room. We are asked to determine the correctness of this ruling with reference to another trial. About all the photographs show is the stairway, the stove, and one of the fly wheels, which appeared greatly exaggerated in size. The trial court characterized the photograph that showed the fly wheel thus exaggerated in size as a monstrosity, and excluded both photographs. It is probable that the reason for the court's ruling was that it considered the photographs misleading, though the objection covered also the ground that a diagram of the engine room and steps was already in evidence, thus making the photographs unnecessary, or merely cumulative evidence. It is within the discretion of the court to restrict the undue introduction of evidence that is merely cumulative, whether it be the testimony of witnesses, or demonstrative evidence. But the photographs offered, leaving aside for the moment the question of their being misleading, showed the stairway in a way that no diagram could, and tended to explain and illustrate the testimony of the witnesses much more clearly than did the diagram. We are unable to say that their exclusion was justified on the ground that there was no necessity for their being before the jury.

"Was it for the court to say that the photographs were not true representations, or that they were misleading? The photographer was

called as a witness, and testified that the photographs were correct representations, after making due allowance for the enlargement of objects close to the lens. We think that it was for the jury, and not for the court, to say whether the photographs lied, just as it was for the jury, and not for the court, to decide upon the credibility of any witness. We concur in the statement made by Professor Wigmore on the subject. 1 Wigmore, Ev. § 792."

To my mind, the reasoning of the majority opinion, to the effect that the application of the law of mathematics and optics precludes any other proof, is unsound. It seems to me to be predicated upon the unwarranted assumption that plaintiff, while in the act of placing the wheelbarrow upon the elevator, could do so without any portion of his body or limbs extending out over the edge of the cornice. Just how plaintiff could perform this feat is not easy for me to comprehend, when I consider the established and conceded fact that the elevator platform was a distance of from 6 to 8 inches from the outer edge of such cornice, and the wheelbarrow had to be placed at such distance into the elevator as to permit its clearing the various landings as such elevator was raised and lowered. I submit that these physical facts alone outweigh the theory advanced with apparently so much confidence in the majority opinion. It is unbelievable that the engineer could see the wheelbarrow as it was being moved over the runway and into the elevator, and not be able to see any portion of the man behind it.

In the majority opinion it is erroneously assumed that plaintiff, at the time of the accident, must have been from 2 to 3 feet back from the edge of the cornice, and from this premise the majority apply the rule of mathematics and optics to show that the engineer could not have seen plaintiff, and hence a code of signals was necessary. Having started with an erroneous premise, it is, of course, easy to reach a false conclusion.

But even if I am in error in the foregoing views, I am firmly of the opinion that a new trial should be granted for manifest errors in the instructions, which I now will briefly notice.

At the beginning of the charge the court enumerated, in the language of the complaint, all the grounds of negligence alleged therein. In view of the fact that the sole ground of recovery relied on, and the only

act of negligence alleged which has any support whatever in the evidence, is the defendant's failure to install a system of signals, which it is contended was necessary because of the fact that the engineer was located in a place where he could not see the elevator landing or the roof sufficiently plain to enable him to operate such elevator with safety to the plaintiff, I think it was prejudicial error not to restrict the instructions to the one ground or act of negligence aforesaid. But later in the charge, the jury was told, in effect, that the plaintiff might recover if the injury "was caused by and through the negligence of the defendant *in some of the manners charged in the complaint.*" This had a tendency, at least, to mislead and confuse the jury, and, I think, constituted prejudicial error. Again, the jury was instructed "that the plaintiff herein by his contract of employment with the defendant did not assume the risks arising from the want of *sufficient and skilled labor, or from defective machinery or other instruments with which he had to work.*" Conceding that this is abstractly correct, it had no proper application to the evidence, and only tended to mislead the jury.

The same may be said of the following portion of the charge as given: "I further charge you that it was the duty of the defendant in this case to furnish the plaintiff with safe and suitable appliances with which to perform the work required of him, and also to see that the same were kept in proper repair, and if this duty was negligently performed and the plaintiff sustained any injury thereby, the defendant is responsible in damages; provided, that such negligence of the defendant was the direct and proximate cause of the injury, and that the plaintiff did not contribute to the direct and proximate cause of the injury by his own negligence." There was no basis in the evidence for such a charge. My criticism of these instructions is aptly expressed by Judge Jenkins of the circuit court of appeals in Hunt v. Kile, 38 C. C. A. 641, 98 Fed. 49, in the following words: "The charge to the jury contained an excellent exposition in general of the duty of the master to the servant with respect to furnishing fit and suitable appliances. It is subject, however, to just criticism in this, that it is general and not specific with reference to the facts upon which alone liability could properly be predicated. As before observed, the death was caused by the breaking of the anchor rope, all other appliances fitly and safely performing their respective functions. It was not

proper to submit to the jury the question of the sufficiency of those appliances that proved sufficient. The consideration of the jury should have been directed solely to the question of the sufficiency of that rope, its character and condition."

In Brickwood's Sackett on Instructions to Juries, 3d ed. vol. 1, § 179, it is stated:

"Instructions containing mere abstract legal propositions, without any evidence to support them, are calculated to mislead the jury, and should not be given," citing cases, amongst others, Chicago, M. & St. P. R. Co. v. O'Sullivan, 143 Ill. 48, 32 N. E. 398; and the court in such case said: "There should be evidence upon which an instruction given can be based, or the instruction should not be given."

In § 191, the same author says: "When a case is close in its facts, or when there is a conflict in the evidence on a vital point in the case, the rights of parties cannot be preserved unless the jury are accurately instructed." Citing Toledo, W. & W. R. Co. v. Shuckman, 50 Ind. 42.

And again: "An instruction which has a tendency to, and probably did, mislead the jury, when taken singly, is erroneous, even though the instructions when taken together embrace the law of the case." Citing Price v. Mahoney, 24 Iowa, 582; Pittsburgh, C. & St. L. R. Co. v. Krouse, 30 Ohio St. 223, 6 Am. Neg. Cas. 140; Murray v. Com. 79 Pa. 311. For an authority directly in point, see Remmler v. Shenuit, 15 Mo. App. 192.

I fully agree with the statement of respondent's counsel that prejudicial error cannot be predicated upon isolated portions of the charge, if the instructions when read as a whole contain a fair and accurate statement of the law. But I have carefully examined such instructions as a whole, and fail to discover anything therein which tends in the least to correct or render harmless the foregoing excerpts therefrom. Nor can I agree with respondent's contention, that appellant waived any objection to such instructions by failure to request correct instructions or by his failure to request a special verdict. He had a right to a general verdict upon proper instructions. It is not a case of a failure to instruct upon some point or feature of the evidence, but rather a misdirection of the jury, in view of the issues as narrowed by the evidence.

The court refused the following instruction requested by defendant: "Some evidence has been introduced in connection with the cable used in the hoisting and lowering of the elevator here in controversy, and of its breaking and permitting the elevator to descend. I charge you as a matter of law that the breaking of the cable is in no way connected with the accident and resulting injury in this case, and that in determining the question of whether the defendant was negligent you must entirely disregard the strength or weakness of the cable, and no verdict can be based in favor of the plaintiff on the breaking of the cable." I think such refusal was error, especially in view of the fact, as heretofore observed, that the court called the attention of the jury to all of the grounds of negligence alleged in the complaint, and nowhere restricted their consideration to the one ground covered by the evidence. In view of this, it would have been eminently proper to have charged the jury that they had no right to consider any of the grounds of negligence alleged, except that of a failure to install a signal system.

In conclusion, I desire to say that I have no quarrel with the authorities cited and quoted from at length in the very voluminous majority opinion. I merely say that such authorities are in most instances wholly misapplied.

I think the appellant is clearly entitled to a new trial, if not to a dismissal of the action.

I am authorized to say that Justice Goss fully concurs in this dissent.

On Petition for Rehearing, Filed July 2, 1915.

BRUCE, J. On the petition for rehearing, it is asserted that the claim that any negligence could be attributed to the breaking of the cable was abandoned by counsel for the plaintiff upon the trial, and that therefore the references of the court to the cable in his instructions to the jury constituted reversible error.

While it is true, as stated in the dissenting opinion and in the petition for rehearing, that a statement is made in respondent's brief on this appeal, to the effect that the allegation in the complaint regarding the weakness and defect of the cable was abandoned on the trial and no proof introduced by the plaintiff to substantiate the same, still this court is not bound by assertions in briefs of counsel. The duty of

this court is to review the actions of the trial court, the correctness of which are challenged by the appellant. Appellant has the burden of showing error. The fact that the sufficiency of the cable was deemed an element upon the trial of the action by both parties, as well as by the trial court, is clearly apparent from the record. As stated in the former opinion, plaintiff's counsel demanded a production of the cable; the defendant's counsel offered testimony to show when the cable was purchased, its size, and the price paid therefor. If defendant's counsel believed that the cable was not an element in the case, why did he offer such testimony after the plaintiff's counsel had demanded a production of the cable? Hence, it is clear that defendant's counsel deemed the cable an element to be considered in this case, even after plaintiff had rested without offering any evidence with reference thereto. That the trial court deemed the cable an element in the lawsuit is evident from the fact that it gave the instruction complained of, and also refused to give the instruction, requested by the defendant, eliminating the cable from the jury's consideration. The question of whether the trial court erred, in giving or refusing instructions with reference to the cable, must be determined upon the proceedings had in the court below, the allegations in the pleadings, and the evidence introduced by the parties, and not on statements contained in the briefs of counsel on this appeal. For the reasons given in our former opinion, we are entirely satisfied that the alleged ground of negligence regarding the weakness and defect of the cable had ample support in the evidence to justify the submission thereof to the jury.

Counsel has also pointed out a slight discrepancy or lack of completeness in our reference in the opinion to the testimony of the witness, Fred Swanson. He claims that we should have said that Swanson testified that "when he stood 1 foot back from the edge of the cornice, he saw the place where the engine house stood and the people standing on the street, including the man with the camera. Standing 2 feet back, he had practically the same view as before. When he stood 3 feet from the edge of the cornice, he could barely see the top of the camera." Even if counsel's statement in regard to the testimony is true, it is immaterial. The only purpose that we had in referring to this testimony was to show that the farther one stood from the edge of the roof, the greater would be the obstruction to the line of his vision. The re-

mainder of the petition is devoted to an argument of the propositions argued in the principal briefs, rather than to a citation of overlooked authorities or precedents.

The petition for rehearing is denied.

FISK, Ch. J., and GOSS, J., not participating in the above opinion.

A. M. SHEIMO v. NELS NORQUAL and Mrs. Rose Maddock.

(153 N. W. 470.)

Pleadings — amendment — usury — original pleadings — superseded by amended pleadings — error — cured.

Plaintiff sued upon a $110 note. Defendant answered, alleging usury. Defendant thereupon served amended complaint, alleging that said note should be for $100, but through mutual mistake was made to read $110. Defendant filed amended answer to said amended complaint, generally denying the allegations thereof. No objection was made to the condition of the pleadings at the time of the trial, and during the course thereof the trial court informed the attorney for plaintiff that defendant could rely upon both of the answers filed. At the close of all the testimony, plaintiff moved for a directed verdict, for the reason that the defense of usury was not properly pleaded. Trial court stated that he was not prepared to rule at that time. Before the ruling, application was made by defendant to file an amended answer, incorporating the plea of usury, if the same were not already contained in his pleadings. This motion was allowed, and the plaintiff was offered all the additional time he needed to prepare for trial upon the new answer, which was refused by him, and a demurrer to the amended complaint interposed. This was overruled, and the jury found for the defendant.

1. The court erred in holding that the original pleadings were in effect at the trial, but the same is cured.

Answer — amendment to — issues raised — time allowed to meet — prejudice.

2. It was not error to allow the amendment to the answer to be filed under the circumstances of this case, as plaintiff was allowed sufficient time within which to meet the issues, if any change were made therein, and the plaintiff was, therefore, in no manner prejudiced.

Opinion filed June 14, 1915. Rehearing denied July 2, 1915.

Appeal from the County Court of Benson County, *Liles*, J.

Affirmed.

J. E. Skulstad, for appellant.

The amended pleadings in a cause, being complete, supersede the original pleadings. By them the issues for trial are presented. First M. E. Church v. Fadden, 8 N. D. 164, 77 N. W. 615.

The service of amended pleadings as of course destroys the issues raised by the original pleadings. 31 Cyc. 366, f. and cases cited.

When a new answer is filed, the former answer is withdrawn, and ceases to be a part of the record. This is true of any pleading. Rev. Codes 1905, § 6682, Comp. Laws 1913, § 7269; Wells v. Applegate, 12 Or. 208, 6 Pac. 770; Hexter v. Schneider, 14 Or. 184, 12 Pac. 668; La Societe Francaise De Bienfaisance Mutuelle v. Weidmann, 97 Cal. 507, 32 Pac. 583; Schneider v. Brown, 85 Cal. 205, 24 Pac. 715; Mott v. Mott, 82 Cal. 413, 22 Pac. 1140; First Nat. Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473.

The court erred in admitting evidence over plaintiff's objection, tending to show usury, because such issue was not presented in the amended answer. Usury must be pleaded. Waldner v. Bowden State Bank, 13 N. D. 609, 102 N. W. 169, 3 Ann. Cas. 847; Yankton Bldg. & L. Asso. v. Dowling, 10 S. D. 540, 74 N. W. 438; Morford v. Davis, 28 N. Y. 481; Manning v. Tyler, 21 N. Y. 568; Gould v. Horner, 12 Barb. 603; Bowman v. Eppinger, 1 N. D. 21, 44 N. W. 1000; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145; 28 Cyc. 1565, and cases cited.

Plaintiff's request of the court, to instruct the jury to disregard any evidence tending to show usury, was proper, and should have been granted. It is for the court to say what is legal evidence. Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145; Bliss, Code Pl. ¶ 121; Jasper v. Hazen, 2 N. D. 401, 51 N. W. 583; First Nat. Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473; Hannas v. Hawk, 24 N. J. Eq. 126; Lane v. Losee, 2 Barb. 58; Taylor v. Morris, 22 N. J. Eq. 611; Bowman v. Eppinger, 1 N. D. 21, 44 N. W. 1000.

The amended answer was of no avail as to the question of usury. The further amendment raised a new defense, and new issues, and should not have been allowed. Rev. Codes 1905, § 6883, Comp. Laws

1913, § 7482; Barker v. More Bros. 18 N. D. 82, 118 N. W. 823; Barnes v. Berendes, 139 Cal. 32, 69 Pac. 491, 72 Pac. 406; Ramirz v. Murray, 5 Cal. 222; Lane v. Beam, 19 Barb. 51, 1 Abb. Pr. 65.

T. H. Burke and *E. J. McIlraith,* for respondents.

Where plaintiff's pleading shows on its face that the claim or contract is usurious, usury is available as a defense, although not pleaded. 39 Cyc. 1040, and authorities cited.

Under the general issue, or general denial, any evidence is admissible which contradicts, or directly tends to contradict, the allegations of the complaint, which plaintiff must prove, to sustain his case. 31 Cyc. 687, and authorities cited; 39 Cyc. 1056, and authorities cited.

The plaintiff has waived or lost his right to object to the defendant's amended pleading, because no timely objection was made, and because he has not shown that he was prejudiced. Wolfinger v. Thomas, 22 S. D. 57, 133 Am. St. Rep. 900, 115 N. W. 101; North Star Boot & Shoe Co. v. Stebbins, 3 S. D. 540, 54 N. W. 593.

An objection on the ground of variance is unavailing, unless the variance is of such a degree as to be a failure of proof. Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310; Meldrum v. Kenefick, 15 S. D. 370, 89 N. W. 863.

The power of amendment may be exercised, in a proper case, to the extent of changing entirely the cause of action, so long as the real controversy between the parties is not fully departed from. Hopf v. United States Baking Co. 21 N. Y. Supp. 589; Wolfinger v. Thomas, 22 S. D. 57, 133 Am. St. Rep. 900, 115 N. W. 101.

Defendant cannot justly claim prejudice, after the liberal action of the court in permitting the case to be reopened for further evidence, if prejudice was claimed. Maloney v. Geiser Mfg. Co. 17 N. D. 195, 115 N. W. 669.

BURKE, J. The plaintiff served his complaint in county court, alleging that the defendants executed and delivered to him their promissory note in the sum of $110, with interest at the rate of 12 per cent after date. For answer, defendants admit the execution and delivery of their note for $110; but allege that the note was given to secure the sum of $100 borrowed by defendant, and the charging of interest on the said sum of $110 is usurious, and that the said

charging of the said rate of interest on said note was knowingly done by plaintiff. Defendants admit that they are indebted to plaintiff in the sum of $92. After the service of this answer an amended complaint was served, wherein it was alleged that it was the intention of the parties to said note that the note should be for $100, but by mutual error it read $110, instead of $100. The defendants thereupon filed an amended answer to said amended complaint, which was in effect a general denial. When the case was reached for trial, no objection of any kind was made to the condition of the pleadings, and plaintiff was called as a witness to substantiate his theory of the execution of the note. Upon cross-examination, and in refutation of his theory thereof, some reference was made to a bonus. Plaintiff's counsel took exception to this, claiming that usury was not pleaded as a defense. The court thereupon called his attention to ¶ 4 of the original answer, and informed counsel that the case would be tried upon that pleading, as supplemented by the amended answer. At the close of all of the testimony, plaintiff moved for a directed verdict, upon the ground that the only defense interposed, that of usury, was not pleaded in the amended answer. The court stated that he was not prepared to rule at that time, and an adjournment was taken until the next morning. Upon convening, defendants' attorney stated that he still believed the original answer stood, but, if the court ruled otherwise, he would move for leave to file an amended answer; this was allowed, and both the original answer and the amended answer were consolidated into one pleading, whereupon the court denied the motion for a directed verdict. Thereupon plaintiff's attorney moved the court for a certain time within which to reply if a reply in his judgment should be made, or to file a demurrer. Whereupon the following proceedings were had:

The Court: You can ask the court to have the case reopened. How long would it take you to determine?

Mr. Skulstad: If it please the court, I want to demur to this answer.

The Court: What is going to be the ground of your demurrer? You know the statutory grounds for demurrer. Which are you going to urge?

Mr. Skulstad: For the reason that the same fails to set out an action or a defense to the complaint herein.

The Court: You may prepare your demurrer, and the demurrer will be denied. You can file it and put it in the record, and I will deny it without argument. You may prepare the demurrer subsequently, and file it so as to complete the record.

The case was submitted to the jury, who found for the defendant. Plaintiff appeals, alleging two groups of errors:

(1) Appellant alleges that "the court erred in holding, evidently, that the original pleadings were in effect at the trial." As will be gathered from the foregoing statement of facts, the original complaint was upon a promissory note for the sum of $110. This was answered with the plea of usury. Thereupon the plaintiff filed an amended complaint, claiming the note was for $100; but by mistake it had been written $110; and to this an amended answer was interposed, in the nature of a general denial. It was evidently the intention of the defendants that this amended answer should go merely to the new portions of the complaint; that is, it denied that the note was taken by mistake for $10 more than the amount borrowed. During the course of the trial, the trial judge and defendants' attorney clearly apprised plaintiff that this was their understanding of the pleadings. We believe the trial court erred in holding usury to be a plea at the time the ruling was made, but the same was cured as shown in paragraph two.

(2) Error is predicated on the allowance of the amendment to the answer to the amended complaint. We are satisfied that there is no error in this ruling. To begin with, usury was the defense at the beginning of the lawsuit. Defendants never intended to abandon the same, and never gave plaintiff to understand that such defense was abandoned. Filing of the general denial was intended to operate as a supplemental answer, denying the new matter set out in plaintiff's complaint. In this he was mistaken, but it is a circumstance showing lack of prejudice to plaintiff's rights. Section 7482, Comp. Laws 1913, provides that "the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim

or defense, by conforming the pleading or proceeding to the facts proved." A résumé of the holding of this court under this statute will be found in the case of Holler v. Amodt, ante, 11, 153 N. W. 465. From the same it will be noted that the court should show liberality in allowance of amendments, where it appears that the ends of justice will be promoted. Especially in point is the case of Martin v. Luger Furniture Co. 8 N. D. 220, 77 N. W. 1003. See also Webb v. Wegley, 19 N. D. 606, 125 N. W. 562; Barker v. More Bros. 18 N. D. 82, 118 N. W. 823; Anderson v. First Nat. Bank, 5 N. D. 80, 64 N. W. 114; Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855. In Martin v. Luger Furniture Co. supra, this court quotes from Kirstein v. Madden, 38 Cal. 162, in the following language: "From oversight of counsel, committed under pressure of business, pleadings are often defective. In such cases, when an offer to amend is made, at such a stage in the proceedings that the other party will not lose an opportunity to fully present his whole case, amendments should be allowed with great liberality." Also from Hayden v. Hayden, 46 Cal. 334: "Undoubtedly, courts should be liberal in allowing amendments, to the end that cases may be fully and fairly presented upon their merits, and that equal and exact justice may be done between the parties." A perusal of the cases cited from our own court shows, beyond any question, that this amendment should have been allowed, because it in no way prejudiced plaintiff's rights, as he was given every opportunity he desired to reopen his case. Courts will not require the idle ceremony of offering the same testimony to the jury that has just heard it. The order is in all things affirmed.

NORTHWESTERN MUTUAL SAVINGS & LOAN ASSOCIATION v. LIZZIE N. WHITE, and John F. White, Intervener.

(153 N. W. 972.)

The Whites, husband and wife, signed an agreement to separate, and in

Note.—The tendency of modern decisions is to broaden the application of the doctrines of equitable subrogation. The case above is in accord with this trend of

accordance with this agreement the husband tried to convey to the wife property standing in their joint names. This was attempted by both joining in a deed to a son, who in turn executed a deed to the mother. Neither of these deeds was recorded until two years later. In the meantime the wife applied to plaintiff for a loan upon said property in the sum of $10,000 to take care of prior encumbrances to said amount. In her written application she stated that the premises were her homestead, and that she was a married woman. Being unable to obtain the signature of the husband, plaintiff's agent conceived the plan of having the deed to the son recorded and taking the mortgage from him. This was done, but plaintiff demanded that the mother join in the note and ratify the acts of the son as to the mortgage. Plaintiff applied the full amount of the proceeds in liquidating the prior encumbrances (excepting $469.70 paid the wife). The $10,000 mortgage was foreclosed, and plaintiff obtained a sheriff's deed. This action is to quiet title. Defendant and her husband plead the homestead character of the premises, and attempt to set aside the $10,000 mortgage because the husband did not join in its execution. Trial *de novo* in this court.

Homestead — mortgage of — husband and wife — action to quiet title — complaint in.

1. The complaint was in statutory form, alleging ownership, and demanding that defendant set forth her claims of title so that an adjudication might be had. After the trial, at the suggestion of the trial court, an amended complaint was filed setting forth the details above enumerated and asking for an alternative judgment in the case mortgage was declared void, that the prior encumbrances be reinstated, and that plaintiff be subrogated to the interests of the holders thereof. There was no error in allowing this amendment, though it was unnecessary.

Findings — immaterial — attack.

2. Appellants attack five findings of fact, but, as stated in the opinion, the same are immaterial to a decision, and therefore not reviewed.

Defective mortgage — restoration — equity — encumbrances — subrogation to rights — interest — taxes — insurance — expenses.

3. Under the circumstances of this case, equity will not allow the Whites to receive the property clear of all encumbrance. Conceding the invalidity of the $10,000 mortgage, the prior encumbrances must be restored and plaintiff

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modern authority. The causes of the differences of opinions manifested by the courts as to the right of one advancing money to pay off a lien or encumbrance upon security which proves defective, to be subrogated to such lien or encumbrance, are discussed, with a review of the authorities, in comprehensive notes in 5 L.R.A.(N.S.) 838; 46 L.R.A.(N.S.) 1049; and 50 L.R.A.(N.S.) 489.

subrogated to the same, and will recover the interest, taxes, insurance, and other expenses incurred by reason of taking the defective mortgage.

Opinion filed July 2, 1915.

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

Affirmed.

W. J. Mayer, for appellants.

In actions of this character, plaintiff is invariably required to establish his title as pleaded. Defendant is not required to set forth his claims to the property until plaintiff shows his right, and his proof and pleading must conform. Merrill v. Dearing, 47 Minn. 137, 49 N. W. 693; Gibson v. Chouteau, 13 Wall. 103, 20 L. ed. 538; Groves v. Marks, 32 Ind. 319; Stuart v. Lowry, 49 Minn. 91, 51 N. W. 662; Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227; McClory v. Ricks, 11 N. D. 38, 88 N. W. 1042.

Plaintiff's complaint is defective in that it does not apprise defendants of its real claim or interest. "Estate or interest" does not mean the same as "lien or encumbrance." McHenry v. Kidder County, 8 N. D. 413, 79 N. W. 875; Power v. Bowdle, 3 N. D. 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404; Hooper v. Henry, 31 Minn. 264, 17 N. W. 476; Buxton v. Sargent, 7 N. D. 503, 75 N. W. 811.

An amendment introducing an entirely new cause of action is never justified. Mares v. Wormington, 8 N. D. 329, 79 N. W. 441; Reeder v. Sayre, 70 N. Y. 190, 26 Am. Rep. 567; Button v. Schuyler's Steam Towboat Line, 40 Hun, 422; Davis v. Iowa State Ins. Co. 67 Iowa, 494, 25 N. W. 745; Bruns v. Schreiber, 48 Minn. 366, 51 N. W. 120; Authorities in 1 Enc. Pl. & Pr. 548, 549.

The rule that pleadings may be amended to conform to proof does not apply when the evidence which it is claimed tends to establish a fact outside the issues was competent and relevant to actual issues in the case, unless such evidence was offered, to the knowledge of both parties, to prove the fact outside the issues. Buxton v. Sargent, 7 N. D. 503, 75 N. W. 811; 1 Enc. Pl. & Pr. 585.

The right to subrogation is not established. If the payment by a third person is voluntary, the debt (and its incidents) is extinguished as to all parties, and there is left neither the right to contribution nor to subrogation. Harvey v. Tama County, 53 Iowa, 228, 5 N. W. 130;

Wilson v. Brown, 13 N. J. Eq. 277; Pelton v. Knapp, 21 Wis. 64; Moran v. Abbey, 63 Cal. 56; Small v. Stagg, 95 Ill. 39; Conkling v. King, 10 N. Y. 440.

When a third party pays for protection, an equitable assignment results in his favor by virtue of the doctrine of subrogation, without the debtor's volition. Mosier's Appeal, 56 Pa. 76, 93 Am. Dec. 783; Cockrum v. West, 122 Ind. 372, 23 N. E. 140; Arnold v. Green, 116 N. Y. 566, 23 N. E. 1; Atlantic Ins. Co. v. Storrow, 5 Paige, 285; Weiss v. Guerineau, 109 Ind. 438, 9 N. E. 399; Wormer v. Waterloo Agri. Works, 62 Iowa, 699, 14 N. W. 331; Curry v. Curry, 87 Ky. 667, 12 Am. St. Rep. 504, 9 S. W. 831.

"If the payment is in the first instance at the request of the debtor, the law will imply a promise for reimbursement. 22 Am. & Eng. Enc. Law, 537.

Where one who has no interest to protect pays the debt of another or advances money for that purpose, and seeks to succeed to the rights of the creditor, there must be a convention or agreement to that effect. Subrogation must take place at time of payment. 27 Am. & Eng. Enc. Law, 250; Sewall v. Howard, 15 La. Ann. 400; Harrison v. Bisland, 5 Rob. (La.) 204; Gernon v. McCan, 23 La. Ann. 84; New Hampshire Sav. Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685; Sandford v. McLean, 3 Paige, 122, 23 Am. Dec. 773.

To entitle a third party, being merely a volunteer or stranger, to subrogation, the payment must be made upon an express agreement entered into at the time of payment. Swan v. Patterson, 7 Md. 164; Brice v. Watkins, 30 La. Ann. 21; Bank of United States v. Winston, 2 Brock. 254, Fed. Cas. No. 944; Virgin's Succession, 18 La. Ann. 42; Burr v. Smith, 21 Barb. 262; Mosier's Appeal, 56 Pa. 76, 93 Am. Dec. 783; Dillon v. Kauffman, 58 Tex. 696; Clark v. Moore, 76 Va. 262; National Bank v. Cushing, 53 Vt. 326; King v. Dwight, 3 Rob. (La.) 2; Baltimore v. Hughes, 1 Gill & J. 480, 19 Am. Dec. 243; Oury v. Saunders, 77 Tex. 278, 13 S. W. 1030; Dillon v. Kauffman, 58 Tex. 696; Flanagan v. Cushman, 48 Tex. 241; Fievel v. Zuber, 67 Tex. 275, 3 S. W. 273; Fuller v. Hollis, 57 Ala. 435; Owen v. Cook, 3 Tenn. Ch. 78; Mitchell v. Butt, 45 Ga. 162; New Jersey Midland R. Co. v. Wortendyke, 27 N. J. Eq. 658; Morgan v. Hammett, 23 Wis. 30; Caudle v. Murphy, 89 Ill. 352; Shreve v. Hankinson, 34 N. J.

Eq. 81; Sandford v. McLean, 3 Paige, 117, 23 Am. Dec. 773; Shinn v. Budd, 14 N. J. Eq. 234; Dorrah v. Hill, 73 Miss. 787, 32 L.R.A. 631, 19 So. 961; Meeker v. Larsen, 65 Neb. 158, 57 L.R.A. 901, 90 N. W. 958; Henry v. Henry, 73 Neb. 746, 103 N. W. 441, 107 N. W. 789; Bible v. Wisecarver, — Tenn. —, 50 S. W. 670; Brown v. Rouse, 125 Cal. 645, 58 Pac. 267; Campbell v. Foster Home Asso. 163 Pa. 609, 26 L.R.A. 117, 43 Am. St. Rep. 818, 30 Atl. 222; McCleary's Appeal, 9 Sadler (Pa.) 271, 20 W. N. C. 547, 12 Atl. 158; Bradshaw v. Van Valkenburg, 97 Tenn. 316, 37 S. W. 88; Doxey v. Western State Bank, 113 Ill. App. 442; Norris v. Woods, 89 Va. 873, 17 S. E. 552; Herr v. Denver Mill & Mercantile Co. 13 Colo. 406, 6 L.R.A. 641, 22 Pac. 770; Berry v. Bullock, 81 Miss. 463, 33 So. 410; Howell v. Bush, 54 Miss. 437.

When the right of subrogation is dependent upon fraud or mutual mistake, it is obvious that these prerequisites to the court's jurisdiction must be first pleaded and proved. To constitute fraud or deceit, there must be first a false representation or act. 14 Am. & Eng. Enc. Law, 2d ed. 33.

A mistake of law occurs when a party having full knowledge of the facts comes to an erroneous conclusion as to the legal effect. "Courts of equity do not sit to reverse or correct errors and mistakes of law, and cannot attempt to prevent or redress all wrongs." 20 Am. & Eng. Enc. Law, 807; Frost v. Flick, 1 Dak. 131, 46 N. W. 508.

A mortgage cannot be created in this state by an estoppel. A mortgage on real property can be created, renewed, or extended only by a writing executed with the formalities in the case of a grant of real property. Rev. Codes 1905, §§ 4951, 4968, 4973, 6149, Comp. Laws, 1913, §§ 5494, 5511, 5516, 6725.

An estoppel against the legal title to land will never lie unless actual fraud is shown, causing the other party to be deceived to his injury. Pom. Eq. Jur. 3d ed. 807.

The question of ratification is not here involved; nor are the principles of agency. Rev. Codes, 1905, § 5751, Comp. Laws, 1913, § 6319; 1 Am. & Eng. Enc. Law, 1035.

The land involved is the homestead not only of the defendant, but of defendant intervener and the minor children. "The husband may have a homestead right in property owned by the wife." Bremseth

v. Olson, 16 N. D. 242, 13 L.R.A.(N.S.) 170, 112 N. W. 1056, 14 Ann. Cas. 1155.

The homestead is for the benefit of the family, and the head of the family is merely the representative or agent of the family. Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684.

No claim for the homestead is necessary; it is absolutely exempt. Ibid.; Rev. Codes 1905, § 5052, Comp. Laws 1913, § 5608; Severtson v. Peoples, 28 N. D. 372, 148 N. W. 1054.

Scott Rex and *Spalding & Shure,* for respondent.

A statutory action to determine adverse claims may be either legal or equitable according as the issues are framed and as the proof may develop. Bausman v. Faue, 45 Minn. 416, 48 N. W. 13.

The amended complaint was, perhaps, unnecessary. In any event, its interposition upon the suggestion of the trial court was entirely without prejudice. Under our statute, no reply is permissible in a statutory action to determine adverse claims. "The statute dispenses with the necessity of framing issues by a proper pleading, as in other actions, and requires the court to determine the validity, superiority, and priority of the claims set up without a pleading asserting their validity." Spencer v. Beiseker, 15 N. D. 140, 107 N. W. 189.

There was no abuse of discretion in allowing the amended complaint. Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855; Anderson v. First Nat. Bank, 5 N. D. 80, 64 N. W. 114; Martin v. Luger Furniture Co. 8 N. D. 220, 77 N. W. 1003.

The mortgage in suit was a valid lien on the property. It is conceded that its foreclosure was regular. Therefore, the plaintiff is the owner of the property. The defendant is estopped by contract to deny the mortgage.

Where parties in making a contract agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands. 16 Cyc. 719.

Where one having the right to accept or reject a transaction takes and retains the benefits thereunder, he becomes bound by the transaction, and cannot avoid its obligations or effect by taking a position inconsistent therewith. Ford v. Ford, 24 S. D. 644, 124 N. W. 1108.

The mortgage in suit is a valid lien, notwithstanding the claimed homestead character of the property, and may be enforced by a sale

of the entire mortgaged property, the lien of the mortgage attaching only to the excess of the proceeds of sale, over and above the $5,000, homestead exemption value limit. Such a mortgage attaches to the excess, whether it be in area or in value. Scott v. Keeth, 152 Mich. 547, 116 N. W. 183; Tibbetts v. Terrill, 44 Colo. 94, 96 Pac. 978; Jones v. Losekamp, 19 Wyo. 83, 114 Pac. 673; 21 Cyc. 551; Wilson v. Wilson, 85 Neb. 167, 122 N. W. 856; Barrows v. Barrows, 138 Ill. 649, 28 N. E. 983; McClendon v. Equitable Mortg. Co. 122 Ala. 384, 25 So. 30; 15 Am. & Eng. Enc. Law, 677–684; Severtson v. Peoples, 28 N. D. 372, 148 N. W. 1054.

No homestead rights are involved in this action. There was a settlement and agreement of separation. White, Sr., relinquished all homestead right by their agreement of settlement and separation, and such agreement is still in force. Such agreements are valid in this state. Rev. Codes 1905, § 4081, Comp. Laws 1913, § 4413; Holcomb v. Holcomb, 18 N. D. 561, 120 N. W. 547, 21 Ann. Cas. 1145.

So far as property interests are concerned, such an agreement has the same effect as a divorce which is accompanied by a division of the property. Re Winslow, 121 Cal. 92, 53 Pac. 362; Re Davis, 106 Cal. 453, 39 Pac. 756; Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358; Re Yoell, 164 Cal. 540, 129 Pac. 1002; Jordon v. Clark, 86 Kan. 509, 121 Pac. 345.

The foreclosure of the mortgage by advertisement, when it matured by the lapse of time and the execution and delivery of sheriff's deed, cut off all claim of homestead, if such right ever before existed.

The sheriff's deed has the same force and effect as though issued in foreclosure by action. Rev. Codes 1905, § 7467, Comp. Laws 1913, § 8087; Grove v. Great Northern Loan Co. 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345; Rev. Codes 1899, § 5856; Bailey v. Hendrickson, 25 N. D. 500, 143 N. W. 134, Ann. Cas. 1915C, 739.

When a regular sale is made under a power of sale contained in the instrument, not only the mortgagor, but all persons claiming any interest in the equity of redemption by privity of estate with him, are considered as parties to the proceeding, and are precluded by it as fully as if they had been made parties defendant by regular subpœna in an ordinary foreclosure suit. Aiken v. Bridgeford, 84 Ala. 295, 4 So. 266.

Where such a sale is made as prescribed by statute, all questions which would have been determinable in an equitable action to foreclose a mortgage will be settled by such sale. 1 Wiltsie, Mortg. § 812, p. 912; Warner v. Blakeman, 36 Barb. 501; Foogman v. Patterson, 9 N. D. 254, 83 N. W. 15; Curtis v. D. M. Osborne & Co. 63 Neb. 837, 89 N. W. 420; Dodd v. Scott, 81 Iowa, 319, 10 L.R.A. 360, 25 Am. St. Rep. 492, 46 N. W. 1057; 21 Cyc. 619; Eversole v. First Nat. Bank, 136 Ky. 362, 124 S. W. 360; Blair v. Guaranty Sav. Loan & Invest. Co. 54 Tex. Civ. App. 443, 118 S. W. 608; Fruge v. Fulton, 120 La. 750, 45 So. 595; Brownell v. Stoddard, 42 Neb. 177, 60 N. W. 380; Miller v. Sherry, 2 Wall. 237, 17 L. ed. 827; Thompson, Homestead & Exemption, § 827.

Both under the statute and under the general equity doctrine of subrogation, plaintiff is entitled to have these prior claims reinstated and to be subrogated thereto. This is but just relief. The right of subrogation does not necessarily rest upon contract or privity, but upon principles of natural equity, and does not depend upon the act of the creditor, but may be independent of him and also of the debtor. Rev. Codes 1905, §§ 6126, 6142, Comp. Laws 1913, §§ 6702, 6718; Home Invest. Co. v. Clarson, 15 S. D. 513, 90 N. W. 153; Baker v. Baker, 2 S. D. 261, 49 N. W. 1064; Ebert v. Gerding, 116 Ill. 224, 5 N. E. 591; Pom. Eq. Jur. §§ 1211 et seq.; Elliott v. Tainter, 88 Minn. 377, 93 N. W. 124; 37 Cyc. 462; Emmert v. Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; London & N. W. A. Mortg. Co. v. Tracy, 58 Minn. 201, 59 N. W. 1001; Heisler v. C. Aultman & Co. 56 Minn. 454, 45 Am. St. Rep. 486, 57 N. W. 1053; Warne v. Morgan, 68 Kan. 450, 75 Pac. 480; Scriven v. Hursh, 68 Mich. 176, 36 N. W. 54; Gordon v. Stewart, 4 Neb. (Unof.) 852, 96 N. W. 624.

BURKE, J. Action to quiet title. Plaintiff had judgment. Defendant and respondent appeal, demanding a trial *de novo*. The facts leading up to this litigation, either undisputed or decided by us, are as follows: "The intervener, John F. White, and his wife, Lizzie N. White, the defendant, were the owners in 1907 of a hotel building in the city of Grand Forks, title standing in the name of both. Owing to some domestic trouble an agreement was entered into between the two

on April 15, 1907, whereby it was agreed that the parties separate as husband and wife, and live apart and separately from and after that date; that in consideration of the separation the husband should deed, by proper conveyances, all his right, title, and interest in and to any real estate which he held in his own name or in the joint name of the spouses. He also agreed to transfer and set over to his wife, all his right, title, and interest in any personal property located in said hotel. The wife, upon her part, agreed to maintain and support herself and the children, eight in number, the youngest being five months old; to pay all outstanding debts against said property, and to relieve the husband from any liability in connection with her support or the support of the children in the future. In pursuance of this agreement, the husband left Grand Forks and worked upon farms in Montana and near Argusville, North Dakota, and Dilworth, Minnesota. He testifies that he then returned to his home at Grand Forks, remaining about a year and a half and going in 1911 to Canada, where he worked as bridge carpenter for eight or ten months, returning to Grand Forks about a month before the trial. He testifies that since that time he has been living at home with his family. This testimony is corroborated by the wife. At the time of the separation agreement, and in compliance therewith, an attempt was made by the husband to transfer the property which stood in their joint names, to the wife, and upon the advice of an attorney both joined in a deed of the said property to the oldest son, John F. White, Jr., who lived in Pennsylvania, and a deed from the son was executed in favor of the mother. Such deeds were, however, not recorded until 1909, as will be hereinafter shown. At the time of the said transfer there were due and unpaid upon said premises mortgages and liens which in 1909 approximated $9,500. In 1909 the wife applied to the plaintiff Savings & Loan Company for a loan of $10,000, to take care of said encumbrances. This application was in writing, duly verified by her, and among other things stated that she was married; that her husband's name was John F. White; that the property belonged to her and that it was a homestead. Although there is some conflict in the testimony, it seems plain to us that this application was first signed only by the wife and submitted to the plaintiff. Being unable to obtain the signature of the husband as it seems to us, plaintiff's agent, O. M. Hatcher, conceived

the idea of filing for record the deed to the son; have the mortgage executed by the son, and then file the deed from the son to the mother. At all events, the son signed the application for loan below the mother's signature and executed the mortgage. Upon this state of the record the loan company, however, demanded that the mother sign the mortgage note and ratify in writing the son's acts. The proceeds of the loan to the amount of $9,500 were disbursed by plaintiff in paying the prior encumbrances upon the property; the balance, less expense, was paid to Mrs. White, she receiving a check for $469.70. The $10,000 mortgage given under those circumstances was later foreclosed by advertisement and went to sheriff's deed. The defendant, however, refused to vacate the premises, and this action to quiet title followed. The original complaint was in statutory form, alleging that plaintiff is the owner of the property and asking for possession and for the value of its use and occupation. This action was instituted against Mrs. White only, who answered alleging title in herself, claiming that the mortgage was void because the premises were their homestead. The father also intervened with a similar defense. Plaintiff replied to both by general denials. The case was tried in October, 1913, and taken under advisement. In December, two months later, plaintiff applied for leave to file an amended complaint, which was allowed, and there was thereupon filed a complaint in two parts,—the first being a repetition of the original complaint, and the second setting forth in detail all the facts in relation to the state of the title which we have already enumerated, and the prayer for judgment was in the alternative. First, that the plaintiff be decreed the owner of the property; second, that in the event the foreclosure be held invalid, that the mortgage be declared a valid lien; and third, in event the mortgage be also held invalid that the prior encumbrances and liens against the premises be reinstated and plaintiff subrogated to the rights of the original holders thereof. Defendant and intervener answered said amended complaint in substantially the same form as the original pleadings. The trial court made findings of fact and conclusions of law to the general effect that the $10,000 mortgage was void because the premises were a homestead and the husband had not joined in the mortgage; the prior liens and encumbrances, however, were reinstated, and plaintiff was

subrogated to the interest of the original holders; defendant and intervener filed one brief and state their contentions as follows:

"Appellants' contention is, first, that the court erred in allowing an amendment to the complaint after the case had been submitted; second, that the evidence is insufficient to support several findings of fact made by the lower court; third, that the conclusion that plaintiff should be subrogated to the several liens that had been canceled by payment is erroneous."

We will not consider the question of the validity of the $10,000 mortgage, because plaintiff has not appealed, but will devote ourselves to the question of the correctness of the trial court's judgment as entered. That the mortgage as originally given was void is not, however, conceded by the respondent, but there is material evidence to support the trial court's conclusion. The application originally taken from the wife and submitted to plaintiff contains a positive statement that the premises were hers; that she was a married woman residing thereon; and that the same was her homestead. Notwithstanding the agreement to separate, there is also ample evidence that the husband returned and resided upon the premises as the head of the family, and there is no dispute that the same have been used ever since by the wife and her children. There is also reason to believe the mortgage given by the son a subterfuge adopted by plaintiff's agent in an attempt to avoid the homestead feature after the father had refused to sign the papers. With this preliminary statement, we proceed to the questions which we believe are before us.

(1) Appellant insists that it was error to allow the filing of the amended complaint. This question has been fully discussed in the cases of Holler v. Amodt, ante, 11, 153 N. W. 465, and Sheimo v. Norqual, ante, 343, 153 N. W. 470, decided within a few days by this court. Also, Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855; Anderson v. First Nat. Bank, 5 N. D. 80, 64 N. W. 114; 6 N. D. 497, 72 N. W. 916; Martin v. Luger Furniture Co. 8 N. D. 220, 77 N. W. 1003, and other cases cited in Holler v. Amodt, supra. Section 7482, Comp. Laws 1913, reads: "The court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party; or by correcting a mistake in

the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." As stated in the prior decision of the court herein mentioned, an amendment should be allowed if in the interests of justice, and it does not change substantially the claim or defense. Applying the law to the facts before us, we note that this is an action to quiet title. That practically all that is necessary for the plaintiff's pleadings is to allege ownership, and demand that the defendants set forth their claim so that the title may be determined. The difference in the first and second complaint is, to our mind, largely one of detail. The original complaint demanded such other and further relief as to the court might seem just. Defendant and intervener were also offered all the additional time necessary to meet the issue after the filing of amended complaint. We do not believe there was any substantial difference in the pleadings, and there was, therefore, no error in allowing the amended complaint to be filed.

(2) Under this heading appellant attacks certain findings of fact, five in number, which he claims are not supported by the evidence.

The first three findings challenged relate to the so-called separation and abandonment of the homestead by the husband. The trial court held that the separation agreement had been duly entered into and executed, and that the husband had abandoned the homestead. There is evidence to support those findings, but whether they are correct or not is not material, in view of the conclusion of the trial court, which has been adopted by us, that the mortgage was void. We will not further discuss the proposition. The fourth and fifth findings challenged by appellant relate to fraudulent representations made by Mrs. White to the plaintiff loan company. Upon this point the evidence is conflicting, but we are satisfied that plaintiff's agent, Hatcher, knew all of the facts and circumstances surrounding the title to the property. We do not, however, believe the findings material. If plaintiff's right to be subrogated to the rights of the lienors and mortgagors whose claims it paid out of the proceeds of the loan, depended upon bad faith upon Mrs. White's part, there might be some grounds for complaint. However, a mutual mistake made by plaintiff and Mrs. White furnishes as much reason for subrogation as misrepresentations

by her. The matter of subrogation will be treated further in the next paragraph.

(3) The third and last attack upon the judgment challenges plaintiff's right to be subrogated to the canceled mortgages and liens. Plaintiff insists, first, that the payment by plaintiff of the prior encumbrance was purely voluntary; second, it is made by a party under no obligation at law to make the payment; third, that the debt being paid at debtor's request only is extinguished; fourth, that there was no agreement that the earlier debts be kept alive. All of those abstract propositions are supported by citations of authority, but we do not believe those principles apply to the case at bar. Subrogation is a branch of equity and is governed by the doctrines thereof. The facts in each case should be searched to determine the rights of the parties and to settle their disputes as fairly and justly as human reason can devise. In the case at bar we have property lawfully mortgaged and encumbered with liens upon which foreclosures are threatened. The husband had attempted to devest himself of title thereto, and for more than a year and a half had absented himself from home. The wife applies to plaintiff for a new lien to take up the outstanding indebtedness. Owing to the confusion in the title, it is deemed advisable to have the mortgage executed by the son. The money was actually disbursed and the property saved from its threatened danger in the utmost good faith upon the part of plaintiff. If we concede that the new mortgage was void because of the lack of the father's signature, yet good conscience requires that plaintiff be reimbursed for the money used by them in good faith to save the property. The intervener, Mr. White, should not be heard to question this simple act of justice. He executed a separation agreement with his wife, deeded the property to her, left her temporarily at least, and did nothing to prevent the loss of the property upon foreclosure. It is unthinkable that a court of equity should hear him complain, when plaintiff is to be reimbursed from the property which it has saved. Plaintiff was not an intermeddler, stranger, or volunteer in the transaction. Its conduct from beginning to end is above criticism. It was invited by defendant to save her property. At 37 Cyc. 363, it is said: "Subrogation is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised, succeeds to the right of the creditor in relation to the debt. The doctrine is one of equity and benevolence, and, like contribution and other similar

equitable rights, was adopted from the civil law, and its basis is the doing of complete, essential, and perfect justice between all the parties without regard to form, and its object is the prevention of injustice. The right does not necessarily rest on contract or privity, but upon principles of natural equity, and does not depend upon the act of the creditor, but may be independent of him and also of the debtor." And at page 462 of the same volume, it is said: "Where an invalid or defective mortgage is given to secure an advancement of money made for the express purpose of paying off a prior encumbrance, the mortgagee in the defective mortgage will be subrogated to the lien of the encumbrance so discharged in the absence of intervening encumbrances." See Elliott v. Tainter, 88 Minn. 377, 93 N. W. 124; Emmert v. Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; London & N. W. A. Mortg. Co. v. Tracy, 58 Minn. 201, 59 N. W. 1001; Warne v. Morgan, 68 Kan. 450, 75 Pac. 480; Scriven v. Hursh, 39 Mich. 98, 68 Mich. 176, 36 N. W. 54; Gordon v. Stewart, 4 Neb. (Unof.) 852, 96 N. W. 624; 3 Cook, Corp. 6th ed. § 850; Title Guarantee & T. Co. v. Haven, 196 N. Y. 487, 25 L.R.A.(N.S.) 1308, 89 N. E. 1082, 1085; 17 Ann. Cas. 1131.

See also the late case of Beyer v. Investors' Syndicate, ante, 247, 153 N. W. 476. We fully agree with the conclusions of the trial court that plaintiff should be subrogated to all those encumbrances which he has paid, and in addition should be allowed payments made for taxes and insurance upon the premises, and other expenses in connection with the $10,000 loan. To this end, the trial court should make an accounting and determine the amount due to plaintiff and allow further proceedings not inconsistent with this opinion. Respondent will recover his costs in this appeal. Judgment affirmed.

JULIUS BATZER v. J. A. HALLIDAY.

(153 N. W. 994.)

Justice's court judgment — suit in equity — to have declared void — jurisdiction — equity of judgment — day of trial — failure to enter.

1. Plaintiff and appellant, by this action in equity, seeks to have a justice's

judgment declared void for the alleged reason that the justice lost jurisdiction through a failure to enter such judgment on the day of the trial. On defendant's motion, judgment on the pleadings was entered dismissing the action. *Held*, proper, for reasons stated in the opinion.

Notice of motion — object of stated — on pleadings and all papers filed — dismissal of action — complaint — cause of action.

2. Defendant's notice of motion stated that he would move for a dismissal of the "complaint" and "that judgment of dismissal of the action be entered accordingly, with costs," etc. Such notice also contained a recital "that the said motion will be made on the pleadings and all papers and instruments filed in the above-entitled action."

Held, that such notice sufficiently apprised plaintiff of the fact that defendant would ask for a dismissal of the action upon the ground that the complaint did not state a cause of action.

Pleading — meritorious defense — proof of — void judgment.

3. Following Halverson v. Bennett, 22 N. D. 67, 132 N. W. 434, *held*, that equity will not grant the relief prayed for without an allegation in the complaint, supported by proof, of the existence of a meritorious defense to the action in which such alleged void judgment was entered, and no such defense is alleged.

Opinion filed July 2, 1915.

Appeal from District Court, Renville County; *Leighton*, J.

From a judgment in defendant's favor, plaintiff appeals.

Affirmed.

Grace & Bryans, for appellant.

The judgment entered by the justice is void, by reason of the failure of the justice to enter judgment at the close of the trial, and for the further reason that the justice, by adjourning, lost jurisdiction. Sluga v. Walker, 9 N. D. 108, 81 N. W. 283; Power v. Larabee, 2 N. D. 148, 49 N. W. 724; 24 Cyc. 598; 17 Cyc. 1570.

Action in equity is the proper remedy by which to obtain relief from a void judgment. Rev. Codes 1905, § 7114, Comp. Laws 1913, § 7728; Halverson v. Bennett, 22 N. D. 67, 132 N. W. 434.

The notice of motion must set forth the specific grounds upon which the motion will be made. 28 Cyc. 6, Under Statement 3.

Swenson & Rodsater, for respondent.

Grounds of motion for judgment on the pleadings are sufficiently stated when reference is made to the pleadings, papers, files, and records

of the action, and upon the ground that the answer on file constitutes no defense to the cause of action set out in the complaint. Hanna v. Curtis, 1 Barb. Ch. 263.

The rule requiring a notice of motion to specify the particular grounds or points upon which it is made does not apply in cases where the opposing party has no right to amend, or explain matters of which complaint is made, by affidavit, or otherwise. 31 Cyc. 608.

At the time of the commencement of this action in equity, plaintiff had a plain, speedy, and adequate remedy at law. 23 Cyc. 992.

It is well settled that equity will not interfere with a judgment where the party seeking relief had an adequate remedy at law, and lost the same through his own negligence and neglect. Agard v. Valencia, 39 Cal. 292; Richardson v. Eureka, 110 Cal. 441, 42 Pac. 965.

The plaintiff shows no meritorious defense against the action forming the basis of the judgment which he seeks to have set aside. Such a showing is necessary. Halverson v. Bennett, 22 N. D. 67, 132 N. W. 434.

There is no showing that the judgment of the justice was unjust, or that a like judgment would not follow in the same action; nor is there anything to show why a like judgment should not follow. Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888.

The judgment in the justice court action was not, and is not, void. Markley v. Rand, 12 Cal. 275; Sluga v. Walker, 9 N. D. 108, 81 N. W. 282; Ryals v. McArthur, 92 Ga. 378, 17 S. E. 350; 24 Cyc. 602.

While the jurisdiction of equity to grant relief against justice's judgments is fully recognized, it is strictly exercised, and the right to relief must be clearly shown. 24 Cyc. 600, 605, 608; 23 Cyc. 1005; State ex rel. Heffron v. Bleth, 21 N. D. 27, 127 N. W. 1043.

Fisk, Ch. J. This is an action in equity brought in the district court of Renville county to set aside and have adjudged to be null and void a certain justice court judgment in an action wherein the defendant was plaintiff and plaintiff's brother, Herman Batzer, was defendant, Fred Dietz and F. H. Stoltz were garnishees, and this plaintiff, intervener. Defendant moved for judgment on the pleadings, which motion was granted and judgment entered dismissing the action, and this appeal is from the judgment thus entered.

The complaint is as follows:

"I. That in an action heretofore tried in the justice court before W. D. Keenen, justice of the peace, on the 28th day of August, A. D. 1913, wherein J. A. Halliday was plaintiff, and Herman Batzer defendant, and Fred Dietz and F. H. Stoltz, garnishees, and this plaintiff intervener, a judgment was entered against the defendant, Herman Batzer, on the 29th day of August, A. D. 1913.

"II. That said action above referred to was tried on the 28th day of August, A. D. 1913, and judgment should have been entered on said day, but that the said justice of the peace did not enter judgment until the 29th day of August, A. D. 1913; that he had lost jurisdiction to enter judgment in said action by his failure to adjourn at the close of the trial to a definite time, or by his failure to make any adjournment.

"III. That on the 29th day of August, A. D. 1913, date of entering judgment against Herman Batzer, the defendant in the action heretofore mentioned, the said justice of the peace and the plaintiff, J. Halliday did not enter any judgment against this plaintiff as intervener in said action, or against F. H. Stoltz and Fred Dietz, the garnishees therein, but that thereafter on the 4th day of October, A. D. 1913, the said plaintiff or his attorneys caused or required said justice of the peace to enter judgment against the said garnishees, and against the defendant, Herman Batzer, and this intervener, which judgment should have been entered on the 28th day of August, A. D. 1913; that a copy of said judgment is hereto attached, and marked Exhibit "A" and made a part of this complaint.

"IV. That this plaintiff, being the intervener in said action tried in the justice court as mentioned in ¶ 1 of the complaint, had the right to appeal from said judgment entered by said justice of the peace wherein it was found against the defendant, Herman Batzer, and against this plaintiff as intervener, and would have appealed therefrom had the judgment been entered in said action against this plaintiff on the 28th day of August, A. D. 1913, but that the plaintiff lost his right of appeal by reason of the failure of the said plaintiff's attorneys and the justice of the peace to enter any judgment therein until the 4th day of October, A. D. 1913, more than thirty days having elapsed since the date of trial of said action and the date of which the judgment should have been entered, thereby barring the plaintiff's right of appeal; that the judg-

ment entered against the defendant, Herman Batzer, and against the garnishees therein, and this plaintiff, is wholly void and of no effect, said judgment not being in proper form, nor does it appear on the docket of the justice that any judgment was ever entered against the defendant in said action, Herman Batzer, and for a further reason that said judgments were entered more than thirty days after the trial of said action; that said justice of the peace thereby lost jurisdiction to enter any judgment therein, and entered the same without notice to this plaintiff, or to his attorneys, and at the request of the plaintiff, J. A. Halliday, judgment was entered on or about the 4th day of October, A. D. 1913.

"V. That thereafter and on the 22d day of September, A. D. 1913, an execution was issued upon the judgment which was entered against the defendant, Herman Batzer, and after the issuing of such execution, and on the 4th day of October, A. D. 1913, after the plaintiff's attorneys ascertained that said judgment was of no effect, they caused to be entered judgment, which is hereto attached, which judgment is wholly void and of no effect; that said execution was delivered to the sheriff of Renville county, and on the 7th day of October, A. D. 1913, he levied upon the property of this plaintiff under and by virtue of said execution; that the property so levied upon by the sheriff was the property of this plaintiff, and immediately after the same was levied upon this plaintiff filed with the sheriff, according to the statutes, a third-party claim setting forth his ownership to said property; that the sheriff did refuse to release or give said property to this plaintiff, and still holds the same under and by virtue of said levy made by him under and by virtue of said execution issued on the void judgment above mentioned and hereto attached.

"VI. That there is no other judgment against the defendant, Herman Batzer, or the garnishees, or this intervener, in said justice action, nor does any appear upon his docket than the judgment hereto attached.

"VII. That the money now in the hands of the sheriff is the property of this plaintiff, a third-party claim having been filed by him with the sheriff, claiming said property, which affidavit of third-party claim is hereby referred to and made a part of this complaint; that this plaintiff has no other adequate remedy at law, or otherwise to recover said property, or vacate said judgment, having lost his right of appeal by

the failure of the justice to enter a judgment in the action tried in the justice court, for more than thirty days after the trial thereof, and there being no remedy to vacate said justice court judgment by motion, or otherwise, more than thirty days having elapsed before entering said judgment, and that said judgment being dated back to make it appear that it had been entered on the 28th day of August, A. D. 1913.

"Wherefore, plaintiff prays judgment, and that it be decreed by the court that the judgment entered against the defendant, Herman Batzer, and against the garnishees, Fred Dietz and F. H. Stoltz, and against this plaintiff as intervener, in the action tried in the justice court, be declared to be null and void and of no effect, and that the levy made by the sheriff on the 7th day of October, A. D. 1913, under the execution issued under such judgment, be declared to be null and void and of no effect, and that such levy be released, and the property now in the hands of the sheriff belonging to this plaintiff be ordered by the court to be returned to him, and that he recover his costs and disbursements in this action."

Attached to and made a part of such complaint are exhibits "A" and "B," which are copies of the justice's judgments referred to in the complaint and are as follows:

Exhibit "A."

Be it remembered that the summons, affidavit for garnishment, and garnishment summons were served upon the defendants as appears from the return of service of Ole P. Handy as hereto attached; that the affidavit for garnishment and garnishee summons were duly served upon Fred Dietz, and affidavit for garnishment and garnishee summons were duly served upon F. H. Stoltz, through his agent, Tollef Syverson, as appears from the return of service of Ole P. Handy as heretofore attached; that said action came for trial, and after hearing and considering said case, judgment was entered for the plaintiff, and against the defendant for the sum of forty-seven and 83-100 ($47.83) dollars, and the garnishee, F. H. Stoltz, having disclosed indebtedness seventeen and 25-100 ($17.25) dollars to the defendant, and garnishee, Fred Dietz, having disclosed indebtedness of sixty ($60) dollars to the defendant.

Now, therefore, it is adjudged that the plaintiff have judgment against F. H. Stoltz for the sum of seventeen and 25-100 ($17.25)

dollars, and the plaintiff have judgment against Fred Dietz in the sum of forty-seven and 83-100 ($47.83) dollars.

Dated at Mohall, this 28th day of August, A. D. 1913.

W. D. Keenen,
Justice of the Peace.

Exhibit "B."

Julius Batzer having filed with the above-entitled action a complaint of intervention, and said complaint of Julius Batzer having upon hearing been dismissed,

Now, therefore, upon motion of George I. Rodsater, attorney for plaintiff,

It is ordered and adjudged that the plaintiff, J. A. Halliday, have judgment against the intervener, Julius Batzer, for the sum of five ($5) dollars.

Dated this 28th day of August, A. D. 1913.

W. D. Keenen,
Justice of the Peace.

The answer consists of a qualified general denial, and also specific denials putting in issue all of the allegations of the complaint, with the exception that it is therein admitted that the justice court action referred to in the complaint was tried on August 28, 1913, and that execution was issued on the judgment rendered therein on September 22, 1913; and it is affirmatively alleged that judgment was entered by such justice on August 28, 1913, against Herman Batzer, defendant, and Fred Dietz, garnishee, for the sum of $47.83, and against the garnishee Stoltz in the sum of $17.25, also against Julius Batzer, this plaintiff, as intervener, in the sum of $5. Such answer also alleges that the plaintiff is not a party in interest, and not the proper party to maintain this action.

We are agreed that the trial court was correct in granting the motion for judgment on the pleadings and in entering the judgment here complained of, and we will briefly set forth our reasons for such conclusion.

Appellant's contention that the motion, being for a dismissal of the plaintiff's complaint, instead of for a dismissal of the action or for judgment on the pleadings, is hypercritical and clearly without merit. It is apparent that by their motion defendant's counsel intended to and did

challenge the sufficiency of the complaint to state a cause of action, and is tantamount to a demurrer upon the ground that the complaint fails to state a cause of action. A motion to dismiss the complaint can be construed only as a motion to dismiss the action, and the notice of motion apprised the plaintiff that the defendant will, at the hearing of the motion, ask "that judgment of dismissal of the action be entered, with costs."

A motion "to dismiss the complaint," or, "to strike out the complaint," or, "for judgment on the pleadings," are terms of the same import and are used interchangeably. 31 Cyc. 608.

Appellant's contention that such notice of motion is insufficient because it fails to state the grounds of the motion is equally untenable. The notice of motion, as well as the motion, sufficiently apprised the plaintiff of the fact that the sufficiency of his complaint to state a cause of action was being challenged, and this was all that was required. The district court clearly had jurisdiction to entertain such motion.

This brings us to the merits.

A sufficient answer to appellant's contention on the merits is the fact that equity will not grant relief under the facts disclosed in the complaint for the reason that a meritorious defense against the judgment sought to be set aside is not shown. Such judgment is not void upon its face, and this being true, the rule announced by this court in Halverson v. Bennett, 22 N. D. 67, 132 N. W. 434, is controlling. The syllabus in that case correctly states the court's holding, and is as follows:

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

Appellant's contention that he alleges a meritorious defense by the allegation "that the money in the hands of the sheriff is his property" is without merit. This money was paid by the garnishees under their disclosures of indebtedness to the defendant, Herman Batzer. Such disclosures are binding and conclusive on such garnishees. If, as this appellant contends, these garnishees are indebted to him, his remedy is plain, but he cannot properly litigate the question of such alleged liability in this action, nor could he do so in the action before the justice.

In other words, plaintiff had no right to intervene in the justice court action. The complaint discloses that the two garnishees made disclosures admitting their liability in specific amounts to Herman Batzer, the defendant, and if, as this plaintiff contends, these garnishee defendants were indebted to him his remedy against them could be in no manner affected by the decision in that action. It is well settled that in order to authorize an intervention under our Code the person seeking to intervene must have such a direct and immediate interest in the matter in litigation that he will either gain or lose by the direct operation and legal effect of the judgment. See Dickson v. Dows, 11 N. D. 407, 92 N. W. 798, and authorities cited; also in Re McClellan, 27 S. D. 109, 129 N. W. 1037, Ann. Cas. 1913C, 1029. It is clear that this plaintiff does not come within the statute on intervention as construed in the above cases.

Judgment affirmed.

A. Y. MORE and J. L. More, a Copartnership Doing Business under the Firm Name and Style of More Brothers v. WESTERN GRAIN COMPANY, a Corporation.

(153 N. W. 976.)

Service of papers — setting time to running — personal service — service by mail — effect of each.

1. Where the service of a paper by one party has the effect of setting time to run against the opposite party, the time which thus begins to run is twice as long when the service is by mail (§ 7954, Compiled Laws), as when made personally.

Computation of time — rule of — as to service of papers — appeals.

2. This rule is applicable to appeals.

Conversion — complaint in — allegations of actual conversion — demand and refusal — not necessary.

3. Where a complaint in an action for conversion contains allegations of an actual conversion, an averment of demand and refusal is not required.

Interpleader — order of — when allowed.

4. Under the provisions of § 7414, Compiled Laws, an order of interpleader

may be allowed only (1) in an action upon contract; (2) in an action for specific real property; (3) in an action for specific personal property.

Conversion — action for damages for — interpleader — not allowable.

5. An order of interpleader should not be allowed under the provisions of § 7414, Compiled Laws, in an action for damages for conversion of personal property.

Opinion filed July 8, 1915.

From an order of the District Court, Hettinger County; *Crawford*, J., plaintiffs appeal.

Reversed.

J. K. Murray, for appellants.

To maintain interpleader it is necessary that the plaintiff make demand upon the defendant for the same debt or property as the person not a party to the action. Rev. Codes 1905, § 6826, Comp. Laws 1913, § 7414.

"Debt is a legal liability to pay a specific sum of money," a sum of money reduced to a certainty, and distinguished from a claim for uncertain damages.

The claim here is not for property. An action for damages for tort is not a claim for a debt. 13 Cyc. 398; Sonnesyn v. Akin, 12 N. D. 227, 97 N. W. 577.

A person not a party to an action in conversion cannot make claim for the same debt, because such action is not for debt. The claims of parties must be identical. Sonnesyn v. Akin, supra; Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 133; 38 Cyc. 428, 499; 1 Wait, Pr. p. 170, and cases cited thereunder; 23 Cyc. 8; 3 Kerr's Cyc. Code Civ. Proc. of Cal. pt. 1, § 386, note 67 p. 424, and cases cited; Pfister v. Wade, 56 Cal. 43; Hoyt v. Gouge, 125 Iowa, 603, 101 N. W. 464; 23 Cyc. 11, 36.

Interpleader cannot be maintained in a tort action, or in any action not within the permission of the statute. Rev. Codes 1905, § 6826, Comp. Laws 1913, § 7414; North Pacific Lumber Co. v. Lang, 28 Or. 246, 52 Am. St. Rep. 780, 42 Pac. 799; United States v. Vietor, 16 Abb. Pr. 153; American Teleg. & Cable Co. v. Day, 20 Jones & S. 128; 3 Kerr's Cyc. Code Civ. Proc. of Cal. pt. 1, §§ 386, note 39, p. 422, § 386, note 86, p. 424; 23 Cyc. 9.

The complaint controls as to the nature of the action. Rev. Codes 1905, § 6826, Comp. Laws 1913, § 7414; Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 133; 38 Cyc. 428–499; Cardill v. Minnesota Elevator Co. 89 Minn. 442, 95 N. W. 306.

Damages is properly pleaded by alleging the value of the property converted. Rev. Codes 1905, § 6586, Comp. Laws 1913, § 7169; 38 Cyc. 2071; 13 Cyc. 175.

An order of interpleader cannot be questioned on an appeal from the judgment. Attack must be made by appeal from the order. Bolton v. Donavan, 9 N. D. 575, 84 N. W. 357.

Interpleader must show that he has no remedy at law. 1 Wait, Pr. 169–179.

Plaintiff's claim must be admitted by applicant for interpleader. Orient Ins. Co. v. Reed, 81 Cal. 145, 22 Pac. 484; Pfister v. Wade, 56 Cal. 43.

F. C. Heffron and *Emil Scow,* for respondent.

The judgment of the trial court "dismisses the action;" such judgment is final, and no further action can be had by any person except to carry such judgment into effect, or to vacate it, or reverse it. Greeley v. Winsor, 3 S. D. 138, 52 N. W. 674; Todd v. Todd, 7 S. D. 174, 63 N. W. 777.

The district court had complete jurisdiction in this case, and therefore had power to dismiss same. German Bank v. American F. Ins Co. 83 Iowa, 491, 32 Am. St. Rep. 316, 50 N. W. 53; Comp. Laws 1913, §§ 7412, 7597, subdiv. 2, 8.

No proceeding can be taken to question the judgment entered, except by direct attack to vacate or reverse it. 23 Cyc. 1055–1057, and notes 8–31; Borden v. McNamara, 20 N. D. 225, 127 N. W. 104, Ann. Cas. 1912C, 841; Westbay v. Gray, 116 Cal. 660, 48 Pac. 800; Haug v. Great Northern R. Co. 42 C. C. A. 167, 102 Fed. 74; Greeley v. Winsor, 3 S. D. 138, 52 N. W. 674.

The appeal here is a collateral attack upon the judgment. Greeley v. Winsor, 3 S. D. 138, 52 N. W. 674; Todd v. Todd, 7 S. D. 174, 63 N. W. 777.

Had plaintiffs appealed from the judgment, the order could have been reviewed by such appeal. Shellenberg v. Fremont, E. & M. Valley R. Co. 45 Neb. 487, 50 Am. St. Rep. 561, 63 N. W. 859; Des Moines Sav.

Bank v. Morgan Jewelry Co. 123 Iowa, 432, 99 N. W. 121; Victor Sewing Mach. Co. v. Heller, 41 Wis. 657; State ex rel. Miller v. Albertson, 25 N. D. 206, 141 N. W. 478.

The Western Grain Company was not the real party defendant in interest. It had no interest in the grain or in the proceeds thereof. Probate Judge v. Sulloway, 68 N. H. 511, 49 L.R.A. 347, 73 Am. St. Rep. 619, 44 Atl. 720; Hambright v. Southern R. Co. 98 S. C. 219, 82 S. E. 416; Shaw v. Alexander, 32 Miss. 229.

Permission to sue a receiver must be granted by the court appointing such receiver, before suit can be maintained. Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Jones v. Moore, 106 Tenn. 188, 61 S. W. 81; Smith v. St. Louis & S. F. R. Co. 151 Mo. 391, 48 L.R.A. 368, 52 S. W. 378; Colburn v. Yantis, 176 Mo. 684, 75 S. W. 653; Schmidt v. Gayner, 59 Minn. 307, 61 N. W. 333, 62 N. W. 265; Naumburg v. Hyatt, 24 Fed. 898; 34 Cyc. 411, note 79; High, Receivers, § 254; 34 Cyc. 187, c. note 61.

Permission to sue a receiver is jurisdictional, and cannot be waived by him. Brown v. Rauch, 1 Wash. 500, 20 Pac. 785; Martin v. Atchison, 2 Idaho, 624, 33 Pac. 47.

Leave to sue a receiver must be alleged in the complaint. Reed v. Axtell, 84 Va. 231, 4 S. E. 587, 10 Am. Neg. Cas. 346; Day v. Postal Teleg. Co. 66 Md. 369, 7 Atl. 608; Baker v. Carraway, 133 Ala. 502, 31 So. 933.

Interpleader is an old and well-established rule of justice, and the Code provisions in regard thereto do not supplant or repeal the older methods of procedure, but are merely concurrent or declaratory. Cronin v. Cronin, 9 N. Y. Civ. Proc. Rep. 137; Chamberlain v. O'Connor, 1 E. D. Smith, 665; Beck v. Stephani, 9 How. Pr. 193; Comp. Laws 1913, § 7594; Patterson v. Perry, 14 How. Pr. 505; Board of Education v. Scoville, 13 Kan. 17; First Nat. Bank v. Beebe, 62 Ohio St. 41, 56 N. E. 485.

No appeal can be maintained by a plaintiff for any purpose, where the complaint does not state a cause of action. Comp. Laws 1913, § 7937, subdiv. 14; Pierson v. Minnehaha County, 28 S. D. 534, 38 L.R.A.(N.S.) 261, 134 N. W. 212; Sanford v. Duluth & D. Elevator Co. 2 N. D. 6, 48 N. W. 434; Towne v. St. Anthony & D. Elevator Co. 8 N. D. 200, 77 N. W. 608; First Nat. Bank v. Minneapolis & N.

Elevator Co. 11 N. D. 280, 91 N. W. 436; Kendall v. Duluth, 64 Minn. 295, 66 N. W. 1150.

CHRISTIANSON, J. This is an appeal from an order of interpleader. The facts necessary for a determination of the questions presented on this appeal are as follows:

This action was brought to recover damages for the alleged conversion of 1,331 bushels and 50 pounds of wheat and 366 bushels of barley upon which plaintiffs claim a lien by virtue of a chattel mortgage. The complaint is in the usual form, and alleges the execution and delivery to plaintiff by one Charles Procise, of three promissory notes, on the 19th day of August, 1912, aggregating in all $1,300, and the subsequent execution and delivery of a chattel mortgage to secure the payment of such notes, and the filing of such mortgage for record in the office of the register of deeds of Hettinger county on February 4, 1913. The complaint also alleges the stipulations and conditions of the mortgage, and that default was made in such conditions entitling the plaintiff to possession of the crops. The complaint further alleges, "That on or about the 14th day of October, 1913, the defendant converted all of the aforesaid grain to its own use, which grain was at all times herein mentioned of the value of $1,300; that plaintiffs claim the highest market price of said grain since the date of said conversion."

The summons and complaint in this action were served upon the defendant, Western Grain Company, on December 4, 1913. Thereafter on December 28, 1913, pursuant to notice, the defendant moved the court that one Albert L. Lane be substituted as defendant in the above-entitled action, and that the Western Grain Company be discharged from liability to any or either of the parties hereto. The motion was based upon an affidavit of the manager of the defendant, Western Grain Company, wherein it is admitted that the grain described in the complaint is deposited and stored in the warehouse of the defendant at Regent, North Dakota, but that the grain is, also, claimed by one Albert L. Lane, who on the 1st day of August, 1913, was appointed receiver of all the property of said Procise and that said Lane makes a demand upon the defendant for the grain or the proceeds thereof; that said defendant is unable to determine whether the plaintiff, or said Lane as receiver, is entitled to the grain or the proceeds thereof. In opposition

to the motion of interpleader the plaintiffs offered an affidavit of their attorney, J. K. Murray, to the effect that the plaintiffs did not seek to recover possession of the grain, but that the action was one in tort for damages caused to plaintiffs by reason of the conversion of the grain by the defendant; that possession of the grain had been demanded numerous times, but that defendant had refused to deliver possession; that when the grain was delivered to defendant by the mortgagor, Charles Procise, the defendant mixed such grain with other grain in its elevator, and that said defendant issued to said Lane storage tickets, and not special bin tickets, for such grain, and that the defendant had shipped the grain out of the state. The plaintiffs also offered a sheriff's return in an action in claim delivery, brought by the above-named plaintiffs against the Western Grain Company and said Albert L. Lane as defendants, wherein the sheriff certifies that he was unable to obtain possession of the grain by reason of the fact that the defendant, Western Grain Company, had mixed such grain with other grain in its elevator, and was therefore unable to sort the same from other grain in its elevator and deliver the same to the sheriff. The statements in the affidavit of Murray and in the sheriff's return were not denied. Upon these affidavits the court made an order directing that Albert Lane, as receiver of Charles Procise, be substituted as defendant in the action in place of the Western Grain Company, and that said Western Grain Company be dismissed and discharged as defendant in all particulars. This appeal is taken from the order so made.

At the threshold of this case we are confronted with a motion to dismiss the appeal on the ground that it was not taken within the time allowed by law. In this state an appeal may be taken from an appealable order "within sixty days after written notice of the same shall have been given to the party appealing." Section 7820, Compiled Laws 1913. The question presented by the motion is whether the appeal was taken within sixty days after written notice of the order was given to the plaintiffs. The affidavits submitted in support of the motion show that on the 3d day of January, 1914, F. C. Heffron, one of the attorneys for the defendant at Dickinson, North Dakota, mailed the original order and a copy thereof to J. K. Murray, the attorney for the plaintiffs, with a request that said Murray admit service on the original order. Thereafter on January 17, 1914, Murray admitted service thereof and

returned the same to Heffron. The reason for the delay in the admission of service is not altogether clear, and, as we view the matter, is immaterial. The attorneys for the defendant claim that service of notice of the order became complete on the 3d day of January, 1914, when the envelop containing the order was deposited in the postoffice at Dickinson, North Dakota, and that the appeal was not taken within sixty days after the order was served upon plaintiff's attorney. The appeal was taken and perfected on March 17, 1913. The original order contained in the judgment roll has indorsed thereon the written admission of plaintiff's attorney, Murray, showing that the order was served in January 17, 1913. This order, together with the admission of service, was filed in the office of the clerk of the district court and transmitted to this court pursuant to the appeal. Did defendant's attorney at the time of service and at the time he caused the order with proof of service thereof to be filed in the office of the clerk of the district court intend to rely on service by mailing? We think not. He filed no affidavit of mailing, but relied on the admission of service which he had requested and obtained. The claim of service by mailing is utterly inconsistent with the request for such admission of service, and the subsequent conduct of defendant's counsel, and at variance with the proof of service filed in the court below, and transmitted to this court on this appeal. But even if the order was served by mailing, and defendant's counsel in position to raise the question at this time, still we are satisfied that the appeal was taken in time. Section 7954 of the 1913 Compiled Laws reads as follows: "When the service is by mail it shall be double the time required in cases of personal service, except service of notice of trial which may be made sixteen days before the day of trial including the day of service."

This court in the case of Clyde v. Johnson, 4 N. D. 92, 58 N. W. 512, in construing this section, held that when a complaint is served by mail the time in which to answer or demur is twice as long as when served personally, and that the defendant had sixty days, instead of thirty days, in which to answer or demur to the complaint. The court said: "We are clear that the service of the demurrer was not too late. The service could be properly made by mail. Comp. Laws, § 5329. 'In case of service by mail the paper must be deposited in the postoffice, addressed to the person on whom it is to be served, at his place of resi-

dence, and the postage paid.' Id. § 5330. 'When the service is by mail it shall be double the time required in cases of personal service.' Id. § 5331. If the complaint had been personally served upon defendant's counsel, they would, under the statute, have been required to serve their answer thereto within thirty days from the date of such personal service. Id. § 4895. But the complaint was served by mail, and it follows, under § 5331, supra, that the defendant had double time in which to answer, *i. e.*, sixty days; and the demurrer was served within sixty days. But appellant's counsel contends that the facts above set forth show a personal service by delivery of a copy of the complaint under Id. §§ 4898, 4899; and that the return receipt, signed by the defendant's attorneys, at the date of receiving the registered letter, constitutes proof that the copy of the complaint was received by delivery on the day the registered letter was taken from the postoffice at Fargo by defendant's attorneys. The theory of counsel that service by mail is a personal service, because it is shown that the letter mailed was received on a date certain, is novel. No authority is cited in support of the contention, and we think none can be found. There is no written admission of service, signed by defendant's attorneys; nor does the record show that an affidavit or other proof was filed in the court below, showing that the copy of the complaint which was inclosed in a letter and mailed at Ashley, North Dakota, was ever received in fact by the defendant's counsel. Conceding that the returned receipt shows when the registered letter was taken from the postoffice, it yet fails to constitute proof that the copy of the complaint was personally served on defendant's counsel at that time. Nor do we think that service of a paper by mailing the same can be converted into personal service by showing the fact that the paper was received at the time it was taken from the postoffice by the attorney to whom it is addressed. The law permits the service of papers by mail in lieu of personal service under certain circumstances, but we think no authority can be shown for a mode of serving papers compounded of service by mail and personal service."

This section was also construed in New York long prior to its adoption in this state, in the case of Dorlon v. Lewis, 7 How. Pr. 132, wherein the court said: "But the 412th section of the Code declares that 'where service is by mail, it shall be double the time required in case of personal service.' The language of this provision, though substantially the same

as that of the 7th rule in force at the time the Code was adopted, is not, perhaps, the most happy that might have been selected to express what was intended. To say that 'service by mail' shall be 'double time' conveys of itself no distinct idea to the mind. It is, to say the least, an awkward expression. Lapse of time forms no essential ingredient in the act of serving a paper. And yet it is the law that when the act is performed in a particular way, it, that is, the service, shall be double the time required when the act of serving the paper is performed in another manner.

"But I believe this rule has always been construed to mean that where the service of a paper by one party, as, for example, a pleading, or a notice, has the effect of setting time to run against the opposite party, the time which thus begins to run shall be twice as long when the service is by mail as when it is personal. Thus, the 143d section declares that a demurrer or answer must be served within twenty days after the service of the copy of the complaint. The time begins to run from the service. If, instead of serving the complaint personally, the plaintiff elects to serve it by mail, the time which thus begins to run against the defendant is forty days, instead of the twenty days otherwise allowed. So, either party may give to the other a notice of trial. It must be ten days before the court. But if he will serve his notice by mail, the time is doubled, and the notice must be served twenty days before the court.

"The rule is applicable to appeals like that which is the subject of this motion. The right of appeal is limited to thirty days after 'written notice,' etc. The object of giving such notice is to terminate the right of appeal. The time for the adverse party to appeal begins to run from the time of the service of notice. If, therefore, the party giving the notice chooses to serve his notice by mail, as he may, he also gives the other party double the time he would have had if the service had been personal. The appeal in this case, therefore, was in time." See also Wait's Practice, vol. 4, p. 219. The motion to dismiss the appeal is denied.

This brings us to a consideration of the order upon its merits. Respondent first contends that the order must be affirmed for the reason that plaintiff's complaint fails to state a cause of action. This contention rests solely upon the ground that the complaint contains no allegation that prior to the commencement of the action a demand was made

upon the defendant for the property, and that defendant refused to deliver the same to plaintiffs. No attack was made upon the complaint in the court below, but the question is raised here for the first time. It is probably true that the defendant in this case would not be guilty of conversion, as against the plaintiffs claiming as mortgagees, until a demand was made upon it for a delivery of the grain. First Nat. Bank v. Minneapolis & N. Elevator Co. 11 N. D. 280, 287, 91 N. W. 436. But proof of such demand and refusal would merely constitute evidence of conversion. The complaint herein contained a positive allegation "that the defendant converted all of the aforesaid grain to its own use." This allegation was sufficient to entitle plaintiffs to introduce evidence to prove a conversion, including a demand upon, and refusal by, defendant to deliver the grain to the plaintiffs.

The Encyclopaedia of Pleading & Practice, vol. 21, p. 1083, states the rule thus: "Where actual conversion of the property is alleged in the declaration or complaint, it is wholly unnecessary to allege that before the institution of the action a demand was made upon the defendant for the property, and that he refused to deliver it to the plaintiff. This rule applies not only in cases in which the defendant's possession was wrongful in its inception, and in which it is unnecessary to prove a demand upon the defendant as a constituent part of the conversion, but also even in those cases in which it may be necessary to prove, in order to establish the fact of conversion, that there were a demand and a refusal."

And Cyc. vol. 38, p. 2071, "where an actual conversion is alleged, an averment of demand and refusal is not required."

In the case of Daggett v. Gray, 110 Cal. 169, 42 Pac. 568, the supreme court of California said: "If the relation of the defendant to the property is such that a previous demand is essential in order to establish conversion on his part, proof of such demand must be made at the trial, but the demand need not be alleged. The allegation that the defendants 'converted and disposed of the property to their own use' is the allegation of a fact sufficient, in the absence of a special demurrer, to sustain a judgment. Upon the trial of an issue on this averment, the plaintiff would be at liberty to introduce evidence of a demand and refusal, if such evidence were sufficient or necessary to establish the conversion; and he would also, under this averment, be authorized to offer

evidence that the defendants had sold or otherwise dealt with the property in repudiation of the claim of the plaintiff. 'Where conversion is alleged as a fact, in general terms, that is sufficient to admit of any evidence on the trial of issue joined that tends to establish such conversion, and the plaintiff is not bound to allege the particular act or acts which constitute conversion, in an action of this character. Averments which sufficiently point out the nature of the pleader's claim are sufficient, if under them, upon a trial of the issues, he would be entitled to give all the necessary evidence to establish the claim.' Berney v. Drexel, 33 Hun, 34. See also Johnson v. Ashland Lumber Co. 45 Wis. 119; Rochester R. Co. v. Robinson, 133 N. Y. 246, 30 N. E. 1008."

The remaining and more difficult question is whether the defendant was entitled to an order of interpleader in this action. The statutory provisions in this state relative to interpleader are as follows: "The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in." Comp. Laws, § 7412.

"A defendant against whom an action is pending upon a contract, or for specific, real or personal property, may, at any time before answer upon affidavit that a person not a party to the action and without collusion with him makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct, and the court may in its discretion make the order." Comp. Laws, § 7414.

Under the provisions of § 7412, Compiled Laws, the original parties would still remain parties to the litigation, but under the provisions of § 7414, Compiled Laws, the original defendant may be entirely eliminated from the litigation, and another defendant substituted. The defendant in this case made its application under the provisions of § 7414, Compiled Laws. This section permits an interpleader only in the following three classes of cases: (1) In an action upon a contract; (2) in an action for specific real property; (3) in an action for specific person-

al property. Does the present action come within any of these three classes of actions? The plaintiffs in this action ask for damages for a conversion by the defendant of the grain in which they had a special property by reason of the chattel mortgage lien thereon. Plaintiffs in their complaint have asked the highest market value of the property between the date of conversion and the verdict, under the provisions of subdivision 2 of § 7168, Comp. Laws.

It seems too clear for argument that an action for damages for conversion is not an action upon a contract. 38 Cyc. 2006; 21 Enc. Pl. & Pr. 1012; Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 133. It is true that the person damaged may waive the tort and sue in assumpsit, but that condition does not exist in this case. The present action is based upon tort, and not upon contract. Is this an action for personal property? We think not. An action to recover damages for conversion is entirely different from an action to recover possession of property. 38 Cyc. 2005; 21 Enc. Pl. & Pr. 1013; Maxwell v. Farnam, 7 How. Pr. 236. This distinction was recognized, under the common law, where different forms of action were required dependent upon which form of relief was desired,—trover being maintained where damages for conversion were sought, and replevin or detinue where recovery of the specific property was sought. And this distinction is also recognized in the Code of Civil Procedure of this state. See Comp. Laws, §§ 7168, 7516 and 7682.

The provision of the Code of Civil Procedure of this state relative to interpleader involved in this action is a substitute for the old equitable action of interpleader, and is governed by the same principles. Pustet v. Flannelly, 60 How. Pr. 67.

The equitable remedy of interpleader, independent of statutory regulations, according to Professor Pomeroy (Pom. Eq. Jur. 3d ed. vol. 5, § 43), "depends upon and requires the existence of the four following elements, which may be regarded as its essential conditions: (1) The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; (2) all their adverse titles or claims must be dependent, or be derived from a common source; (3) the person asking the relief—the plaintiff—must not have nor claim any interest in the subject-matter; (4) he must have incurred no inde-

pendent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position of a stakeholder."

The defendant in this case is charged with a conversion,—with having committed an actionable wrong against the plaintiffs. The claim of Lane is based upon contract,—the general storage tickets issued to him by the defendant. These tickets may be sold and assigned by Lane. It seems quite clear that the plaintiffs and Lane are not claiming the same property or the same debt. Any judgment which plaintiffs may obtain can be satisfied only by a payment of the amount thereof in money. It cannot be satisfied by a delivery of the grain. The claim of Lane or his assignee can be satisfied by delivering a like amount and quality of grain in accordance with the terms of the storage receipts. As to Lane the defendant is a bailee, but as to the plaintiffs (according to the claim in their complaint) it is a tort feasor. At the time the relation of bailor and bailee between the defendant and Lane originated, the plaintiffs were unknown and had no connection with it, and if plaintiff's claim is true, the defendant's possession of and dominion over the grain became tortious after demand and refusal.

The facts in this case would not entitle defendant to maintain the old equitable action of interpleader. First Nat. Bank v. Bininger, 26 N. J. Eq. 345; Bartlett v. The Sultan, 23 Fed. 257; Delaware, L. & W. R. Co. v. Corwith, 16 N. Y. Civ. Proc. Rep. 312, 5 N. Y. Supp. 792; Dodge v. Lawson, 22 N. Y. Civ. Proc. 112, 19 N. Y. Supp. 904; Shaw v. Coster, 35 Am. Dec. 690, and note on page 702 (8 Paige, 339); La Femina v. Arsene, 69 App. Div. 285, 74 N. Y. Supp. 749; Quinn v. Green, 36 N. C. (1 Ired. Eq.) 229, 36 Am. Dec. 46; Pfister v. Wade, 56 Cal. 43; Hoyt v. Gouge, 125 Iowa, 603, 101 N. W. 464; Ryan v. Lamson, 153 Ill. 520, 39 N. E. 979; United States v. Vietor, 16 Abb. Pr. 153; North Pacific Lumber Co. v. Lang, 28 Or. 246, 52 Am. St. Rep. 780, 42 Pac. 799; 5 Pom. Eq. Jur. 3d ed. §§ 52, 53; 40 Cyc. 445.

We realize that under the peculiar statutory provisions of some states the remedy of interpleader has been greatly enlarged so as to include a number of causes not included in the old equitable action. But the legislature in this state has wisely limited the classes of actions in which interpleader may be had to those involving a specific debt arising from contract or the recovery of specific real or personal prop-

erty. It would be a manifest injustice to permit an interpleader in an action for a tort. Worthless persons could be interpleaded, and in this manner the right of the plaintiff to recover damages be defeated. If an elevator company would be permitted to interplead as party defendant, the person from whom it received or purchased grain, it could never be held liable for conversion. An action in tort is founded upon some act of the tort feasor amounting to a breach of legal duty owing by the wrongdoer to the injured party. And the whole theory of the remedy of interpleader is contrary to its use in actions for damages for a tort. As was said by Lord Chancellor Eldon in Slingsby v. Boulton, 1 Ves. & B. 334: "A person cannot file a bill of interpleader who is obliged to put his case upon this, that as to one of the defendants he is a wrongdoer."

We are satisfied that the present action does not come within the provisions of § 7414, Compiled Laws. It is not an action for specific personal property; neither is it an action to recover a debt. "A debt is a sum of money due by contract, express or implied." And a legal liability for uncertain damage founded upon a tort is not a debt. 13 Cyc. 398; Sonnesyn v. Akin, 12 N. D. 227, 97 N. W. 557.

It follows from what has been said that the order appealed from must be reversed. It is so ordered.

GEORGE WONSER v. WALDEN FARMERS ELEVATOR COMPANY, a Corporation.

(153 N. W. 1012.)

Laborer's lien — default in payment — owner may take possession of property covered by.

1. The statutes of this state authorize the owner of a farm laborer's lien, upon default in payment of the debt secured thereby, to take possession of the property covered by the lien.

Right of possession — against one who has converted the property — action at law may be maintained.

2. Such right of possession may be enforced by an action at law for damages against one who has converted the property covered by such lien.

Lien — waiver — question of intent.

3. The question of waiver is generally a question of intent.

Property covered by lien — grain — lien not waived by party hauling to elevator.

4. A farm laborer does not waive his right to a farm laborer's lien, where, in performance of the work for which he was hired, he hauls and delivers at an elevator grain on which the lien is claimed.

Opinion filed July 10, 1915.

From a judgment of the District Court, Cass County; *Pollock*, J., defendant appeals.

Affirmed.

Pollock & Pollock, for appellant.

Plaintiff has wholly failed to comply with the statute. The lien here claimed is purely statutory. Substantial compliance with the statute is required of one claiming such a lien. Lavin v. Bradley, 1 N. D. 297, 47 N. W. 384; Moher v. Rasmusson, 12 N. D. 73, 95 N. W. 152.

To maintain an action in conversion plaintiff must have had possession of the property, or the immediate right of possession, at the time of conversion. Parker v. First Nat. Bank, 3 N. D. 87, 54 N. W. 313; Rev. Codes 1905, § 6280; Comp. Laws 1913, § 6860; Rev. Codes 1905, chap. 30, art. 5.

Such alleged lien gives no right to an action in conversion, without first having the lien itself established by suit in equity. Hahn v. Sleepy Eye Mill. Co. 21 S. D. 324, 112 N. W. 843; Evington v. Smith, 66 Ala. 398; Corbitt v. Reynolds, 68 Ala. 378; Street v. Nelson, 80 Ala. 230; Anderson v. Bowles, 44 Ark. 108; Frink v. Pratt, 26 Ill. App. 222, 130 Ill. 327, 22 N. W. 819.

The lien here claimed is insufficient, and does not conform to the statutes, in many essential requirements, and therefore gives to the claimant no right thereunder. Such a lien is not valid, unless there is strict compliance with the statute. Lavin v. Bradley, 1 N. D. 291, 47 N. W. 384; Moher v. Rasmusson, 12 N. D. 73, 95 N. W. 152.

The circumstances surrounding this case bring it within the rule of waiver, as the same is applied to chattel mortgages and other liens. The plaintiff hauled and delivered to the elevator the identical grain

upon which he claims his lien, knowing it was to be taken into the elevator and handled in the usual course of business, and without instruction to the elevator company to keep it separate from other grain, or to put it into a special bin. He knew that it was so delivered for general storage and sale. He waived his right to a lien. Richmire v. Andrews & G. Elevator Co. 11 N. D. 457, 92 N. W. 819; Best v. Muir, 8 N. D. 46, 73 Am. St. Rep. 742, 77 N. W. 95; Bidgood v. Monarch Elevator Co. 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561.

W. J. Courtney, for respondent.

A person who performs farm labor, as defined by our statute, is entitled to a lien upon all the grain which his labor helped to produce and secure. The plaintiff made substantial compliance with the requirements of the statutes. Rev. Codes 1905, §§ 6277, 6280, Comp. Laws 1913, §§ 6857, 6860; Hahn v. Sleepy Eye Mill. Co. 21 S. D. 324, 112 N. W. 843.

CHRISTIANSON, J. Plaintiff claims to have a farm laborer's lien upon certain flax described in the complaint, and has brought this action to recover damages for the alleged conversion thereof by the defendant. The only questions presented on this appeal go to the sufficiency of the complaint and whether the evidence offered by plaintiff entitled him to recover.

The complaint is in the usual form and alleges that the plaintiff was employed by one K. W. Rickel, as a farm laborer to work during the farming season of 1913, upon a farm occupied and operated by said Rickel in Cass county, North Dakota. That plaintiff was to receive for said services the sum of $2.75 per day, and that plaintiff worked upon section 29, township 142, range 55, in Cass county thirty-five days as a farm laborer, and that said services ended on November 11, 1913, and that $64 is due plaintiff by reason of said services. That said Rickel, who occupied and farmed said premises during the season of 1913, planted, harvested, and threshed a crop of flax thereon, and that plaintiff performed labor in the harvesting and threshing of said grain during said season, and that to secure the payment of his wages he caused a farm laborer's lien to be executed in the following form:

Farm Laborer's Lien.

State of North Dakota } ss.:
County of Cass }

George Wonser, being first duly sworn, deposes and says that between the 1st day of April, 1913, and the 1st day of December, 1913, he performed service in the capacity of a farm laborer for K. W. Rickel of the township of Lake, county of Cass, state of North Dakota, by virtue of a contract with the above named K. W. Rickel, by the terms of which this affiant was employed in the capacity of a farm laborer, and for his services was to receive two and 75/100s dollars per day, payable at once, and that said sum is the reasonable value of such services, and not in excess of the price usually charged for the same kind of work in said county of Cass. And that thereunder he performed services in the capacity aforesaid for the above named K. W. Rickel, which services commenced on the 21st day of September, 1913, and ended on the 27th day of October, 1913.

That the services so performed amounted in the aggregate to thirty-five (35) days, and that the reasonable value thereof is sixty-four (64) dollars, that the amount paid affiant therefor is none dollars, and that there yet remains unpaid thereon the sum of sixty-four (64) dollars.

That the above named K. W. Rickel has growing, harvested on the following described premises in the county of Cass in said state, to wit: All of section twenty-nine (29), township one hundred forty-two (142) range fifty-five (55) a crop of flax, on which affiant claims a lien for the sum of sixty-four (64) dollars.

Affiant further deposes and says that he did not without cause quit his employment before the expiration of the time for which he was employed, and that he was not discharged for cause.

(Signed) George Wonser.

Subscribed and sworn to before me this 11th day of November, A. D. 1913.

W. J. Courtney
Notarial Notary Public.
Seal. My commission expires Sep. 25, 1919.

That such lien was filed for record in the office of the register of

deeds of Cass county on November 12, 1913. That while said lien was in force and effect, and while plaintiff was entitled to immediate possession of the flax by virtue of said lien, and on or about November 15, 1913, the defendant converted said flax to its own use, and refused to deliver the same to plaintiff on demand. That defendant converted about 3,000 bushels of flax covered by said lien of the value of $2 per bushel, and that prior to the commencement of the action, plaintiff demanded immediate possession of the flax or a sufficient amount thereof to pay his claim, but that defendant refused to deliver the same or its proceeds, but unlawfully converted the same to its own use to the plaintiff's damage in the sum of $64. The answer is a general denial. At the commencement of the trial defendant's attorney objected to the introduction of any testimony, on the grounds that plaintiff could not maintain an action in conversion, but must first bring an equitable action to foreclose the lien; and that the farm laborer's lien does not conform to the provisions of the laws of this state with reference to farm laborer's liens. The latter objection is aimed particularly at the alleged discrepancy in the lien where it is stated that the plaintiff performed thirty-five days labor at $2.75 per day, no part of which has been paid, and that there remains unpaid on the lien the sum of $64. The objection was overruled.

The testimony shows that plaintiff commenced to work for Rickel about September 7, 1913. That prior to September 21st, he worked on other lands farmed by Rickel, but that between the 21st of September and up to and including the 27th of October, the plaintiff performed in all nineteen and three-fourths days of labor in harvesting and threshing crops upon the land described in the lien, and during the balance of that time performed labor on other lands farmed by Rickel. That Rickel agreed to pay plaintiff $2.75 per day (or $3.25 per day if plaintiff remained till the work was completed), for this work. That the reasonable value of such services and the usual wage paid other laborers in that vicinity at that time for similar services was $3 per day. That defendant received in all over 2,000 bushels of the flax in question, the market value of which ranged from $1.27 at its lowest to $1.38 at its highest. The testimony further shows that the plaintiff hauled a considerable portion of the flax at the time it was threshed, and delivered the same at the elevator of the defendant elevator company. As

already stated, the services of the plaintiff ended on October 27. Immediately after the lien had been executed and filed, demand was made upon the president and general manager of the defendant for a delivery of the flax or a sufficient portion thereof or its proceeds to pay plaintiff's claim. The demand was refused,—the president and general superintendent of the defendant corporation, in reply to the demand, stated as follows: "I will not give you any of this grain, as Mr. Sherman of Tower City has made a claim for it and is now ready to put up a bond to indemnify the company and you can't get it. You may bring your action in conversion, but we will not deliver a bushel of the grain."

At the close of the case defendant moved for a directed verdict on the grounds specified in the objection to the introduction of testimony, and the additional ground that plaintiff waived his right to a lien by hauling and delivering the flax to the defendant. This motion was denied. The defendant offered no evidence, and upon plaintiff's motion verdict was directed in favor of the plaintiff for $54.31, the same being for nineteen and three-fourths days' services at $2.75 per day. Judgment was entered pursuant to the verdict, and this appeal is from the judgment.

The principal errors assigned on the appeal attack the rulings of the court in overruling the objection to the introduction of evidence at the commencement of the trial, and in denying defendant's motion for a directed verdict. Defendant asserts that these rulings are erroneous for three reasons: (1) That the plaintiff cannot maintain an action in conversion without first establishing his lien by a suit of equity; (2) that the lien is invalid; (3) that plaintiff waived his right to a lien by hauling and delivering the flax to the defendant elevator company. We will consider these propositions in the order stated.

(1) The statutory provisions in this state relative to farm laborers' liens are as follows: "Any person who performs services for another in the capacity of farm labor between the 1st day of April and the 1st day of December in any year, shall have a lien on all crops of every kind grown, raised, or harvested by the person for whom the services were performed during said time, as security for the payment of any wages due or owing to such persons for services so performed, and said lien shall have priority over all other liens, chattel mortgages, or encumbrances, excepting, however, seed grain and threshers' liens; pro-

vided, that the wages for which a lien may be obtained must be reasonable and not in excess of that which is usually charged for the same kind of work in the locality where the labor is performed; provided, further, that in case any such person without cause quits his employment before the expiration of the time for which he is employed, or if he shall be discharged for cause, then he shall not be entitled to a lien as herein provided." Comp. Laws, § 6857.

"In order to acquire a lien as specified in the preceding section, the person performing such services shall, within thirty days after the services are fully performed, file in the office of the register of deeds of the county in which any of the real estate is situated on which any crop is grown, on which a lien is claimed, an affidavit and notice, setting forth the terms of the employment, the name of the employer, the time when the services were commenced and when ended, the wages agreed upon, if any, and if not agreed upon, then the reasonable value of the same, the terms of payment, if any, and a description of the real estate on which any crop is grown, or has been grown, or harvested, on which a lien is claimed, the amount paid him, if any, and the amount remaining unpaid, and that said laborer claims a lien for the same." Comp. Laws, § 6858.

"It shall be the duty of the register of deeds to file and enter said affidavit and notice in the manner required by law for filing and entering chattel mortgages, entering employers as mortgagors and laborers as mortgagees, and he shall be entitled to a fee of 10 cents for filing the same." Comp. Laws, § 6859.

"If the person for whom such services were performed fails to pay for the same when due, or if he shall sell, conceal, or dispose of the property covered by said lien or any part thereof, *then the owner of such lien shall have the right to take full and absolute possession of all the property covered by such lien, and sell the same in the same manner and upon the notice provided by law for the foreclosure of chattel mortgages* and the cost and fees for foreclosing shall be the same." Comp. Laws, § 6860.

Section 6878, Compiled Laws, reads: "Upon default being made in the payment of a debt secured by a lien upon personal property, such lien may be foreclosed upon the notice, and in the manner provided for the foreclosure of mortgages upon personal property, *and the holder of*

such lien shall be entitled to the possession of the property covered thereby for the purpose of foreclosing the same. The costs and fees for such foreclosure shall be the same as are provided in § 8132. A report of such foreclosure shall be made in the manner set forth in § 8128; Provided, that when the lien has not been filed in the office of any register of deeds, then a report of such sale shall be filed in the office of the register of deeds, of the county wherein the property is sold. Such liens may also be foreclosed by action as provided in chapter 29 of the Code of Civil Procedure."

It seems entirely clear that the statutes quoted entitles the owner of a farm laborer's lien to possession of the property, when default has been made in the payment of the debt secured by the lien. Hence, the decision of this court in Black v. Minneapolis & N. Elevator Co. 7 N. D. 129, 73 N. W. 90, and similar decisions of other courts, have no application. Actions for conversion of grain brought by the holders of statutory liens have been upheld in the following cases: Mitchell v. Monarch Elevator Co. 15 N. D. 495, 107 N. W. 1085, 11 Ann. Cas. 1001; Schlosser v. Moores, 16 N. D. 185, 112 N. W. 78; Hahn v. Sleepy Eye Mill. Co. 21 S. D. 324, 112 N. W. 843; Nash v. Brewster, 39 Minn. 530, 2 L.R.A. 409, 41 N. W. 105.

(2) Nor do we believe that there is any merit in the contention that the lien is invalid for failure to conform to the statutory provisions relative to such liens. It is true as asserted by appellant's counsel, the lien under consideration is wholly statutory, and hence can be acquired and enforced only when there has been a substantial compliance with the provisions of the statute by which the lien is created. An examination of the lien shows a substantial compliance with the provisions of the statute under which it was filed. The trial court construed the lien most strongly against the plaintiff in every instance, and permitted plaintiff to recover only for services rendered: (1) In caring for crops on the particular tract of land described in the lien; (2) between the two dates stated in the lien as the time of the commencement and termination of the term of employment; (3) for the minimum amount that could be computed as due plaintiff under the terms of employment set forth in the lien. The discrepancies in dates and amounts could not prejudice anyone except plaintiff himself, and did not invalidate the lien. Freeman v. Clark, 28 N. D. 578, 149 N. W. 565; Mitchell v.

Monarch Elevator Co. 15 N. D. 495, 107 N. W. 1085, 11 Ann. Cas. 1001; 2 Cyc. 62. Respondent contends that plaintiff was entitled to a lien on the flax in question, not only for the labor performed in caring for the crops on the lands described in the lien, but for all services he rendered on other lands as a farm laborer during the time set forth in the lien. This question is not before us, and we express no opinion thereon. See, however, Beckstead v. Griffith, 11 Idaho, 738, 83 Pac. 764.

(3) Appellant next contends that plaintiff, by hauling the grain and delivering same to the defendant's elevator, waived his right to a lien. In hauling this grain plaintiff merely performed the work for which he was hired. He could not file a lien under the statute until his services had been fully performed. The question of waiver is a question of intent. Joslyn v. Smith, 2 N. D. 53, 49 N. W. 382. Can it be said that plaintiff by performing the very labor he was hired to do manifested an indisputable intent to waive the lien which the statute gave him for whatever might be due him for such services, when they had been fully performed? The answer seems obvious. See Joslyn v. Smith, supra; Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118. There is no contention that defendant relied upon such alleged waiver by the plaintiff, or was in any manner misled or prejudiced thereby. On the contrary, the testimony shows that at the time the lien was filed, and when demand was made upon defendant thereunder, defendant was still in possession of the flax covered by the lien and had made no settlement with anyone therefor, although it had knowledge of the conflicting claims to the property. Hence, it is obvious that defendant was not induced to do anything to its prejudice by the acts of plaintiff alleged to constitute a waiver. And "it is an elementary proposition of law that to constitute a waiver the acts or omissions made the basis thereof must be relied upon and serve as an inducement to the doing of something which would otherwise not have been done." Hahn v. Sleepy Eye Mill. Co. 21 S. D. 329, 112 N. W. 843.

Appellant also contends that under the rule announced by this court in Richmire v. Andrews & G. Elevator Co. 11 N. D. 453, 92 N. W. 819, the lien never attached to the flax. Respondent, on the other hand, contends that the facts in this case distinguish it from those involved in the Richmire Case. Respondent's counsel further earnestly

contends that the rule announced in the Richmire Case is unsound, and that that decision should be overruled. The decision in the Richmire Case involved the construction of the statute relative to a farm laborer's lien, and held that the lien did not attach until it was filed. Respondent's counsel claims that this construction is contrary to the legislative intent, and productive of hardship and injustice. If this is correct, the legislature can readily provide adequate legislation to meet the conditions suggested by counsel. The proper remedy to obtain the relief counsel asks at the hands of this court is by legislative enactment, rather than by judicial construction.

We are satisfied, however, that the rule laid down in the Richmire Case does not preclude plaintiff's right to recover in the case at bar. This was the opinion of the learned trial judge, and we concur in the conclusion reached by him. In this connection it may be noted that the learned trial judge who presided in the case at bar also presided in the trial of the Richmire Case, and his judgment therein was affirmed by this court. In the Richmire Case the flax was sold and shipped out of the state before the lien was filed. In the case at bar the evidence shows that the defendant received the grain at its elevator, and merely issued slips showing the amount of flax in the different loads. The ships were produced and offered in evidence, and they are not storage receipts in any sense of the word; but as already stated are merely slips of paper showing the weights of the various loads delivered. The reply of the president and general manager of the defendant company at the time demand was made upon him, on or about November 15, 1913, shows clearly that at that time settlement had not been made with anyone for the flax delivered,—either by payment or otherwise. The delivery of the flax to the defendant's elevator must be deemed a bailment, and not a sale. Dammann v. Schibsby Implement Co. 30 N. D. 15, 151 N. W. 985; Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118.

The undisputed testimony in the case at bar shows that the defendant was possessed of the flax at the time the lien involved in this action was filed and at the time demand was made upon defendant for a delivery of a sufficient portion of the flax or the proceeds thereof to satisfy plaintiff's claim. The plaintiff's lien attached before defendant converted the property, and deprived plaintiff of his special property there-

in. The decision of the trial court upon the issues presented in this case meets with our entire approval.

Judgment affirmed.

ALBERT HEDDAN v. WALDEN FARMERS ELEVATOR COMPANY, a Corporation.

(153 N. W. 1015.)

Farm laborer — one employed by owner of crop — one who performs labor for such owner — connected with the securing of the crop — lien for wages.

A person who, while in the employment of the owner of a crop and under his direction, performs labor directly connected with the harvesting and threshing thereof, is a farm laborer within the meaning of § 6857, Compiled Laws 1913, giving a lien to a farm laborer for his wages.

Opinion filed July 10, 1915.

From a judgment of the District Court, Cass County, *Pollock*, J., defendant appeals.

Affirmed.

Pollock & Pollock for appellant.

W. J. Courtney for respondent.

CHRISTIANSON, J. This case was argued and submitted together with the case of Wonser v. Elevator Co. ante, 382, 153 N. W. 1012. This is an action for damages for conversion of the same flax involved in the other case. The plaintiff, Heddan, also claims under a farm laborer's lien. It was conceded on the argument that the evidence in the two cases is substantially the same, and that upon all the questions decided in the case of Wonser v. Elevator Co., a determination of one case would be decisive of the other. The pleadings are similar, and the record respecting the objection to the introduction of testimony and

Note.—For other cases as to who is a farm or agricultural laborer within statutes giving lien, see notes in 19 L.R.A.(N.S.) 1039, and 32 Am. Rep. 264.

the motion for a directed verdict is the same in both cases. The same argument is advanced, that plaintiff cannot maintain an action for damages for conversion, but must first maintain an action in equity to enforce the lien. Substantially the same reasons are assigned for alleged invalidity of the lien in this case as were assigned in the case of Wonser v. Elevator Co. Hence, upon these questions the decision in the case of Wonser v. Elevator Co. is controlling and decisive in this case. The question of waiver raised and decided in the Wonser Case does not exist in the case at bar, as it is not contended that the plaintiff, Heddan, hauled or delivered any of the flax to the elevator company. The lien in this case was filed, and demand made upon the defendant for the flax or its proceeds at the same time that demand was made in the Wonser Case. The testimony in this case shows that the plaintiff, Heddan, performed labor in harvesting and threshing the flax in question, and that he claimed a lien only for services performed in the harvesting and threshing of the very flax upon which the lien is claimed. Rickel, the employer, owned or operated a small threshing machine with which he threshed his own grain. And the plaintiff in this case during the threshing of the flax, in addition to pitching bundles and performing other labor of that character, also assisted to some extent in operating the threshing machine, which necessitated that he commence work earlier in the morning and continue at work later in the evening than some of the other laborers engaged in this work. For this extra work it was agreed that he was to be paid a small sum per day extra, or $3.50 per day in all for his services. The undisputed testimony showed this to be only a reasonable wage for the labor performed. Defendant asserts that this constituted the plaintiff an expert machinist, and that for this reason he was not a farm laborer within the meaning of the statutes relative thereto as construed by this court in Lowe v. Abrahamson, 18 N. D. 182, 19 L.R.A.(N.S.) 1039, 119 N. W. 241, 20 Ann. Cas. 355.

The undisputed testimony, as already stated, shows that all the work for which a lien is claimed was performed in harvesting and threshing the flax on which the lien is claimed. In performing this work the plaintiff did the work he was directed to do by his employer. While threshing, as already stated, in addition to pitching and doing work of that character, he also assisted in oiling the machinery, putting on

belts, and generally aided in the care and operation of the threshing machine. All the work performed by plaintiff, however, was directly connected with the harvesting and threshing of the flax. The flax could neither be harvested nor threshed except by the use of machinery, and certainly the mere fact that part of plaintiff's work consisted in aiding in the operation of machinery owned and operated by the employer did not deprive plaintiff of the character of a farm laborer. The flax indeed had little or no value until it was threshed. Plaintiff's services were directly connected with the final work in the production of the flax and its preparation for the market. The work plaintiff performed was directly in connection with the harvesting and threshing of the flax, and the legislative intent in the enactment of the statute creating farm laborers' liens was to secure to farm laborers who performed services directly in connection with the production of a crop a lien for their services on the crop produced by their labor. The lien was doubtless intended for the benefit of any person who as a farm laborer performed any work directly connected with the production of a crop in any of its stages,—such as the planting, cultivating, harvesting, or threshing thereof. Lowe v. Abrahamson, supra; Breault v. Archambault, 64 Minn. 420, 58 Am. St. Rep. 545, 67 N. W. 348; Saloy v. Dragon, 37 La. Ann. 71. And it seems quite clear to us that the labor performed by the plaintiff in this case was in every particular directly connected with the production of the crop in question, and that therefore plaintiff is entitled to claim a farm laborer's lien thereon for the amount due him for his labor.

The testimony offered amply sustains plaintiff's right to recover the amount for which judgment was ordered. The trial court's determination of the questions involved in this action was correct, and the judgment appealed from is affirmed.

JOHN A. HODSON v. WELLS & DICKEY COMPANY.

(154 N. W. 193.)

Agency — sales solicitor for lands — authority — representations as to land — contract of employment — provisions control.

Defendants appointed one Weese, a sales solicitor, to obtain purchaser for real estate in North Dakota under contract set forth in the opinion, and which contract contained the following clause: "No advertisement or other representations on your part that you are for any purposes an agent of said company will be permitted, the terms 'sales solicitor' being invariably used, and any violation of this provision shall of itself revoke this appointment and terminate your authority thereunder."

Plaintiff alleges that Weese induced him to purchase land by false representations as to its quality and value. *Held*, for reasons stated in the opinion, that the action will not lie, as it was not within the scope of the authority of Weese to make any representations as to the quality or value of the land.

Opinion filed July 2, 1915.

Appeal from the District Court, Stutsman County; *Coffey*, J.

Reversed.

Watson & Young and *E. T. Conmy*, for appellant.

In the sale of lands, mere "words of praise" or "dealers' talk," even though relied upon by the purchaser, do not furnish ground for action for damages for fraud and deceit. It is the duty of the purchaser to investigate for himself. Failing in this, he takes his own chances. Kerr, Fr. & Mistake, p. 84; Van Horn v. Keenan, 28 Ill. 448; Miller v. Craig, 36 Ill. 111; Noetling v. Wright, 72 Ill. 391.

"A person has the right to exalt the value of his own property to the highest point his antagonist's credulity may bear," such is not actionable misrepresentation. Miller v. Craig, 36 Ill. 111; Mayo v. Wahlgreen, 9 Colo. App. 506, 50 Pac. 43; Buxton v. Jones, 120 Mich. 522, 79 N. W. 980; Stevens v. Alabama State Land Co. 121 Ala. 450, 25 So. 995; Moore v. Turbeville, 2 Bibb, 602, 5 Am. Dec. 642; 20 Cyc. 51–54; Bossingham v. Syck, 118 Iowa, 192, 91 N. W. 1047; Else v. Freeman, 72 Kan. 666, 83 Pac. 409; Wightman v. Tucker, 50 Ill. App. 75.

False representations by the vendor of land as to profits he has

realized, quantity of timber on it, richness of the soil, value of the land, are mere matters of opinion, and are not actionable. Crown v. Carriger, 66 Ala. 590; 48 Century Dig. § 40; Ott v. Pace, 43 Mont. 82, 115 Pac. 37; Saunders v. Hatterman, 24 N. C. (2 Ired. L.) 32, 37 Am. Dec. 404; Brown v. Bledsoe, 1 Idaho, 746; Else v. Freeman, 72 Kan. 666, 83 Pac. 409; Tretheway v. Hulett, 52 Minn. 448, 54 N. W. 486; Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315; Davis v. Reynolds, 107 Me. 61, 77 Atl. 409; Armstrong v. White, — Ind. App. —, 34 N. E. 847; Lake v. Security Loan Asso. 72 Ala. 207; Williams v. McFadden, 23 Fla. 143, 11 Am. St. Rep. 345, 1 So. 618; Noetling v. Wright, 72 Ill. 390; Cagney v. Cuson, 77 Ind. 494; Hartman v. Flaherty, 80 Ind. 472; Shade v. Creviston, 93 Ind. 591; Picard v. McCormick, 11 Mich. 68; Doran v. Eaton, 40 Minn. 35, 41 N. W. 244; Union Nat. Bank v. Hunt, 76 Mo. 439.

No legal fraud can be predicted on "dealer's talk" or "words of praise." Heald v. Yumisko, 7 N. D. 428, 75 N. W. 806; Beare v. Wright, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057; Heyrock v. Surerus, 9 N. D. 28, 81 N. W. 36; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 905.

Where a vendee has opportunity to see and inspect a piece of land before buying, he cannot later on be heard to say that he has been deceived as to its character and value. Harvey v. Smith, 17 Ind. 272; 20 Cyc. 32; Moore v. Turbeville, 2 Bibb, 602, 5 Am. Dec. 642; Morrill v. Madden, 35 Minn. 493, 29 N. W. 193, 37 Minn. 282, 34 N. W. 25; Anderson v. McPike, 86 Mo. 293; Fisher v. Dillon, 62 Ill. 379; Buxton v. Jones, 120 Mich. 522, 79 N. W. 980; Realty Invest. Co. v. Shafer, 91 Neb. 798, 137 N. W. 873; Long v. Warren, 68 N. Y. 426; Brown v. Smith, 109 Fed. 26; Scott v. Walton, 32 Or. 460, 52 Pac. 180; Lee v. McClelland, 120 Cal. 147, 52 Pac. 300; Peak v. Gore, 94 Ky. 533, 23 S. W. 356; Woodson v. Winchester, 16 Cal. App. 472, 117 Pac. 565; McKibbin v. Day, 71 Neb. 280, 98 N. W. 845; Long v. Kendall, 17 Okla. 70, 87 Pac. 670; Francois v. Cady Land Co. 149 Wis. 115, 135 N. W. 484; Saunders v. Hatterman, 24 N. C. (2 Ired. L.) 32, 37 Am. Dec. 404.

Opportunity to inspect precludes relief from fraudulent representations. Shepard v. Goben, 142 Ind. 318, 39 N. E. 506; Long v. Warren, 68 N. Y. 426; Wren v. Moncure, 95 Va. 369, 28 S. E. 588.

The rule of *caveat emptor* applies to the sale of real property. Collier v. Harkness, 26 Ga. 362, 71 Am. Dec. 216; Tretheway v. Hulett, 52 Minn. 448, 54 N. W. 486; Walsh v. Schmidt, 206 Mass. 405, 34 L.R.A.(N.S.) 798, 92 N. E. 496, 1 N. C. C. A. 906; Armstrong v. White, — Ind. App. —, 34 N. E. 847.

One cannot, in any event, be heard to say that he relied on the false statements of his vendor, when he himself knew as much about the land as the vendor. 20 Cyc. 49, 50; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 905; Collins v. Jackson, 54 Mich. 186, 19 N. W. 947; Heyrock v. Surerus, 9 N. D. 28, 81 N. W. 36; McKibbin v. Day, 71 Neb. 280, 98 N. W. 845; Peak v. Gore, 94 Ky. 533, 23 S. W. 356; Long v. Kendall, 17 Okla. 70, 87 Pac. 670; Francois v. Cady Land Co. 149 Wis. 115, 135 N. W. 484; Saunders v. Hatterman, 24 N. C. (2 Ired. L.) 32, 37 Am. Dec. 404.

The statements relied upon here to show fraud were made without the scope of the agent's authority, and are not binding upon the defendant. One who purchases real estate from a nonresident owner, through a real estate broker, is bound to ascertain not only the terms of his authority, but also the correspondence by which such authority was obtained. Merritt v. Wassenich, 49 Fed. 785; Roberts v. Rumley, 58 Iowa, 301, 12 N. W. 323; Whart. Agency, § 163; Rice v. Peninsular Club, 52 Mich. 87, 17 N. W. 708; Chaffe v. Stubbs, 37 La. Ann. 656; Rust v. Eaton, 24 Fed. 830; Reitz v. Martin, 12 Ind. 306, 74 Am. Dec. 215; Hurley v. Watson, 68 Mich. 531, 36 N. W. 726; Snow v. Warner, 10 Met. 132, 43 Am. Dec. 417; Story, Agency, §§ 126, 133, and note; Dickinson County v. Mississippi Valley Ins. Co. 41 Iowa, 286; Beringer v. Meanor, 85 Pa. 223; Weise's Appeal, 72 Pa. 351; Dozier v. Freeman, 47 Miss. 647; Davidson v. Porter, 57 Ill. 300; Mechem, Agency, § 137; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Henry v. Lane, 62 C. C. A. 625, 128 Fed. 250; State, Decker, Prosecutor, v. Fredericks, 47 N. J. L. 469, 1 Atl. 470; Titus v. Cairo & F. R. Co. 46 N. J. L. 393; Dyer v. Duffy, 39 W. Va. 148, 24 L.R.A. 339, 19 S. E. 540; Advance Thresher Co. v. Roger, 123 La. 1067, 49 So. 709; Americus Oil Co. v. Gurr, 114 Ga. 624, 40 S. E. 780; Seibold v. Davis, 67 Iowa, 560, 25 N. W. 778; Monson v. Kill, 144 Ill. 248, 33 N. E. 43; Brown v. Grady, 16 Wyo. 151, 92 Pac. 622; Bowles v. Rice,

107 Va. 51, 57 S. E. 575; Batty v. Carswell, 2 Johns. 48; Schaeffer v. Mutual Ben. L. Ins. Co. 38 Mont. 459, 100 Pac. 225; Devinney v. Reynolds, 1 Watts & S. 328; National Union F. Ins. Co. v. John Spry Lumber Co. 235 Ill. 98, 85 N. E. 256; Williams v. Kerrick, 105 Minn. 254, 116 N. W. 1026; Tondro v. Cushman, 5 Wis. 279; Kelly v. Troy F. Ins. Co. 3 Wis. 254; Samson v. Beale, 27 Wash. 557, 68 Pac. 180; 31 Cyc. 1363, 1364; Mayo v. Wahlgreen, 9 Colo. App. 506, 50 Pac. 40; Kennedy v. McKay, 43 N. J. L. 288, 39 Am. Rep. 581; National Iron Armor Co. v. Bruner, 19 N. J. Eq. 335; Lansing v. Coleman, 58 Barb. 619; Daniels v. Bruce, — Ind. App. —, 93 N. E. 675; Cooley v. Perrine, 41 N. J. L. 322, 32 Am. Rep. 210; Dodd v. Farlow, 11 Allen, 426, 87 Am. Dec. 726.

"An authority to sell and convey real property includes the authority to give the usual covenants of warranty." These do not include the power to make representations as to the character or value or quality of the property. Rev. Codes 1905, §§ 5402, 5777, Comp. Laws 1913, §§ 5958, 6345.

A broker's authority is limited simply to the procuring of a purchaser for the land. Larson v. Newman, 19 N. D. 153, 23 L.R.A. (N.S.) 849, 121 N. W. 204; Ballou v. Bergvendsen, 9 N. D. 289, 83 N. W. 10; Brandrup v. Britten, 11 N. D. 376, 92 N. W. 453; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924.

The principal alone, if anybody, is liable for the acts and statements of a subagent. Kuhnert v. Angell, 10 N. D. 59, 88 Am. St. Rep. 675, 84 N. W. 579; Mechem, Agency, §§ 193, 197; 1 Am. & Eng. Enc. Law, 979, 981; Barnard v. Coffin, 141 Mass. 37, 55 Am. Rep. 443, 6 N. E. 364; Renwick v. Bancroft, 56 Iowa, 527, 9 N. W. 367; Nelson v. Title Trust Co. 52 Wash. 258, 100 Pac. 730; Eastland v. Maney, 36 Tex. Civ. App. 147, 81 S. W. 574; 1 Am. & Eng. Enc. Law, 2d ed. 985; Fritz v. Chicago Grain & Elevator Co. 136 Iowa, 699, 114 N. W. 193; Williams v. Moore, 24 Tex. Civ. App. 402, 58 S. W. 953; McKinnon v. Vollmar, 75 Wis. 82, 6 L.R.A. 121, 17 Am. St. Rep. 178, 43 N. W. 800; Clark & S. Agency, § 345, (d) p. 377; Bound v. Simkins, — Tex. Civ. App. —, 151 S. W. 573.

It is competent for an agent to sell lands, to employ a subagent to show the lands to prospective buyers. McKinnon v. Vollmar, 75 Wis. 82, 6 L.R.A. 121, 17 Am. St. Rep. 178, 43 N. W. 800; National Bank

v. Johnson, 6 N. D. 180, 69 N. W. 49; Davis v. King, 66 Conn. 465, 50 Am. St. Rep. 104, 34 Atl. 107; Schloss Bros. & Co. v. Gibson Dry Goods Co. 6 Ala. App. 155, 60 So. 436; Michael v. Crawford, — Tex. Civ. App. —, 150 S. W. 465; Tippecanoe Loan & T. Co. v. Jester, 180 Ind. 357, L.R.A. 1915E, 721, 101 N. E. 915; Wright v. Isaacks, 43 Tex. Civ. App. 223, 95 S. W. 55; Breck v. Meeker, 68 Neb. 99, 93 N. W. 993; 31 Cyc. 1427; Calhoon v. Buhre, 75 N. J. L. 439, 67 Atl. 1068; 31 Cyc. 1427; 1 Am. & Eng. Enc. Law, 981; Bank of California v. Western U. Teleg. Co. 52 Cal. 280; Gum v. Equitable Trust Co. 1 McCrary, 51, Fed. Cas. No. 5,867; Corcoran v. Hinkel, 4 Cal. Unrep. 360, 34 Pac. 1031; Davis v. King, 66 Conn. 465, 50 Am. St. Rep. 104, 34 Atl. 107; Fanset v. Garden City State Bank, 24 S. D. 248, 123 N. W. 688.

"Subagent lawfully appointed represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the subagents. Fairchild v. King, 102 Cal. 320, 36 Pac. 649; Bank of California v. Western U. Teleg. Co. 52 Cal. 280; Smith v. National Bank, 191 Fed. 226; Rev. Codes 1905, §§ 5794, 5796, Comp. Laws 1913, §§ 6362, 6364.

But there is nothing in the record to show that the statements made by the subagent were made with intent to deceive plaintiff. Rev. Codes 1905, § 5388, Comp. Laws 1913, § 5944; 9 Decen. Dig. "Fraud," § 58 (1); 20 Cyc. 24–27; Miller v. Howell, 2 Ill. 499, 32 Am. Dec. 37.

"Fraud is not established and relief will not in general be granted, without proof that the party who made the false representation knew at the time that it was false. The law raises no presumption of knowledge from the mere fact that the representation is false." Anderson v. McPike, 86 Mo. 294; Nelson v. Minneapolis Street R. Co. 61 Minn. 167, 63 N. W. 486; Stubbs v. Johnson, 127 Mass. 219; Kelly v. Pioneer Press Co. 94 Minn. 448, 103 N. W. 330; 9 Decen. Dig. "Fraud," § 13 (2); Brown v. Bledsoe, 1 Idaho, 746.

"Opinions of experts as to the value of property are incompetent, where the witnesses fail to first show a sufficient knowledge of the subject to form opinions." Haight v. Kimbark, 51 Iowa, 13, 50 N. W. 577; Lee v. Clute, 10 Nev. 149; Rich v. Jones, 9 Cush. 329; Half v. Curtis, 68 Tex. 640, 5 S. W. 451; Gates v. Chicago & A. R. Co. 44 Mo.

App. 488; Mendum v. Com. 6 Rand. (Va.) 704; Levee Comrs. v. Dillard, 76 Miss. 641, 25 So. 292; Tyler Southeastern R. Co. v. Hitchins, 26 Tex. Civ. App. 400, 63 S. W. 1069; Chicago, R. I. & T. R. Co. v. Douglass, 33 Tex. Civ. App. 262, 76 S. W. 449; Louisiana R. & Nav. Co. v. Sarpy, 117 La. 156, 41 So. 477; Flint v. Flint, 6 Allen, 34, 83 Am. Dec. 615; Cochrane v. Com. 175 Mass. 299, 78 Am. St. Rep. 491, 56 N. E. 610.

It is the duty of the trial court to instruct the jury upon all material matters of law raised by the evidence in the case, whether requested so to do or not. The charge should cover all such matters at least in a general way. Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1; Owen v. Owen, 22 Iowa, 270; Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224; Barton v. Gray, 57 Mich. 622, 24 N. W. 638; Putnam v. Prouty, 24 N. D. 531, 140 N. W. 93; Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1.

M. C. Freerks and *Buck & Jorgenson,* for respondent.

If representations were fraudulently made with the intent to induce plaintiff to rely upon them as facts, and to act and contract upon the belief thus induced, the wrongdoer succeeding in such purpose is not to be shielded from responsibility by the plea that the defrauded party would have discovered the fraud and falseness of the representations if he had followed up such means of information as were available to him. Fargo Gas & Coke Co. v. Fargo Gas & Electric Co. 4 N. D. 219, 37 L.R.A. 593, 59 N. W. 1066; Roberts v. Holliday, 10 S. D. 576, 74 N. W. 1034; Hunt v. Barker, 22 R. I. 18, 84 Am. St. Rep. 812, 46 Atl. 46; Tacoma v. Tacoma Light & Water Co. 17 Wash. 458, 50 Pac. 55; Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. 496; Sockman v. Keim, 19 N. D. 317, 124 N. W. 64; Luncheon v. Wocknitz, 21 S. D. 285, 111 N. W. 632; McCabe v. Desnoyers, 20 S. D. 581, 108 N. W. 341; Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032; Chilson v. Houston, 9 N. D. 503, 84 N. W. 354; Gustafson v. Rustemeyer, 70 Conn. 125, 39 L.R.A. 644, 66 Am. St. Rep. 92, 39 Atl. 104; Andrew D. Meloy & Co. v. Donnelly, 119 Fed. 458; Lovejoy v. Isbell, 73 Conn. 368, 47 Atl. 682.

A party cannot claim the benefits of a contract made in his behalf by one assuming to act as agent, by whom the contract was procured,

without assuming the burdens. Union Trust Co. v. Phillips, 7 S. D. 225, 63 N. W. 903.

If advantage is taken of any part of such a contract, the entire contract must be adopted. Wyckoff v. Johnson, 2 S. D. 91, 48 N. W. 837; Joslin v. Miller, 14 Neb. 91, 15 N. W. 214; Kickland v. Menasha Wooden Ware Co. 68 Wis. 34, 60 Am. Rep. 831, 31 N. W. 471; Elwell v. Chamberlain, 31 N. Y. 619.

"An agent for a particular act or transaction is called a special agent. All others are general." Comp. Laws 1913, § 5753.

The distinction between a general and a special agent is that one is created by the power given to do acts of a class and the other by power to do individual acts only. Butler v. Maples, 9 Wall. 766, 19 L. ed. 822; Rev. Codes 1905, § 577, Comp. Laws 1913, § 6340.

It is within the scope of the authority of a real estate agent to represent the acreage of a tract of land in his hands for sale, and the principal is liable for false and fraudulent representations made by the agent in such respect. Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558; People v. Terwilliger, 59 Misc. 617, 110 N. Y. Supp. 1034; Darks v. Scudder-Gale Grocer Co. 146 Mo. App. 246, 130 S. W. 430.

A principal is chargeable with the fraudulent acts and declarations of a special agent, done and made for the purpose of effecting a sale, though not commissioned to commit a fraud. Concord Bank v. Gregg, 14 N. H. 331; Clogston v. Martin, 182 Mass. 469, 65 N. E. 839; Reynolds v. Mayor, L. & Co. 39 App. Div. 218, 57 N. Y. Supp. 106; Green v. Des Garets, 210 N. Y. 79, 103 N. E. 964, 146 App. Div. 956, 131 N. Y. Supp. 1118; Dzuris v. Pierce, 216 Mass. 132, 103 N. E. 296; Foix v. Moeller, — Tex. Civ. App. —, 159 S. W. 1048; Sargent v. Barnes, — Tex. Civ. App. —, 159 S. W. 366; Kleine Bros. v. Giddcomb, — Tex. Civ. App. —, 152 S. W. 462; Haynor Mfg. Co. v. Davis, 147 N. C. 267, 17 L.R.A.(N.S.) 193, 61 S. E. 54.

Weese was a general agent, and the acts which he did and the statements he made in respect to the land come within the scope of his authority, and defendant not only accepted the benefits, but he did so with full knowledge of the fraud of his agent. Feil v. Northwest German Farmers' Mut. Ins. Co. 28 N. D. 355, 149 N. W. 358; Akin v. Johnson, 28 N. D. 205, 148 N. W. 536.

"An agent who contracts in his own name without disclosing the

principal may sue in his own name or be sued on such contract, and the third person, on discovery of the agency, may, at his election, proceed against either,—against the principal or the agent. 15 Current Law, 104; John Monroe & Co. v. Adams, 136 Ky. 252, 124 S. W. 296; Jewell v. Colonial Theatre Co. 12 Cal. App. 681, 108 Pac. 527; Leterman v. Charlottesville Lumber Co. 110 Va. 769, 67 S. E. 281; Bierce v. State Nat. Bank, 25 Okla. 44, 105 Pac. 195; Whitney v. Woodmansee, 15 Idaho, 735, 99 Pac. 968; Eddy v. American Amusement Co. 9 Cal. App. 624, 99 Pac. 1115; Fitzpatrick v. Manheimer, 157 Mich. 307, 122 N. W. 83; National German American Bank v. Lang, 2 N. D. 71, 49 N. W. 414.

False representations by seller, relied upon by buyer, are fraudulent and actionable, though seller believes them to be true. McCabe v. Desnoyers, 20 S. D. 581, 108 N. W. 341.

BURKE, J. Plaintiff is a resident of Indiana, fifty years of age, and a farmer by occupation. The defendant is a well-known real estate brokerage company with an office in Minneapolis, Jamestown, and other places. Mr. Weese was their agent under the terms of a written appointment, which will be hereinafter set forth. His duties were to bring prospective buyers to North Dakota, and plaintiff was one of his customers. When Weese and plaintiff arrived at Courtenay, they were joined by Mr. De Nault, manager of the Jamestown office of the defendant company, in an automobile, and plaintiff was shown several tracts of land. Among those tracts was one known as the Hamilton Farm and another known as section 35, 143–65. Plaintiff personally examined both of those tracts, especially the Hamilton Farm, upon which he made a thorough examination of the soil with a spade. There is some dispute as to the extent of his examination of section 35, which, however, we do not consider material to a determination of this appeal. Plaintiff returned to Indiana, and, after some negotiations, decided that he would purchase the Hamilton Farm at around $50 an acre. However, by the time he had decided to make the purchase, the Hamilton Farm had been disposed of to other parties, and Weese suggested that he take in place thereof section 35, which he had seen upon his visit to North Dakota, at a price of $32.50 per acre. This purchase was

accordingly made. Something over a year later, plaintiff brought this action alleging that he had been deceived by Weese as to the character of the soil and subsoil, and the value of section 35, alleging that if the land had been as represented to him it would have been worth $40 per acre, whereas in truth and fact it was not worth to exceed $20 per acre, wherefore he demands judgment for the difference, $12,800. Upon a trial to a jury, plaintiff recovered judgment for the sum of $4,800. Defendant appeals, assigning numerous errors, of which, however, we need mention but one group,—those relating to the scope of the authority of the agent, Weese.

(1) As already stated, defendants are real estate brokers with main offices in Minneapolis and a branch office at Jamestown, North Dakota. They employed Weese under a written appointment headed: "Authorization of Sales Solicitor," and reading in part as follows:

"During the year 1910, or until written notice given to you, you are hereby authorized to act as sales solicitor to solicit applications and secure buyers in the county of . . . for the purchase of lands in North Dakota, South Dakota, and Minnesota, which Wells & Dickey Company has for sale. For the services in obtaining the applications for the purchase of lands, the said Wells & Dickey Company agrees to pay you in the case where, as a direct result of your efforts, sales of such land are finally consummated, . . . the sum of $1 per acre. . . . It is hereby understood and agreed that sales are not fully closed, and under the commissions are not payable, until the entire cash payments have been made to this company at its office in Minneapolis, Minnesota, or Jamestown, North Dakota, accompanied by the execution and delivery to it of the required notes and contracts, or mortgages, and the acceptance on the part of the purchaser of the titles to be conveyed. It is understood and agreed that the foregoing commission will be paid only in case you bear all the traveling, entertainment, and general expenses incidental to bringing purchases to this company. . . . *No advertisement, or other representation on your part that you are for any purposes an agent of said company will be permitted. The term 'sales solicitor' being invariably used, and any violation of this pro-*

vision shall of itself revoke this appointment and terminate your authority thereunder.

"(Signed) Wells & Dickey Company.
"By ————————.

"I accept the foregoing appointment upon the terms above stated.

————————"

Appellant insists that the sale was made after a personal examination of the land, and that if any misrepresentations regarding the land were made, the same consisted of merely "trade talk," but more especially it insists that if any statements were made by Weese which could be construed to be fraudulent, the same were not within the scope of his authority, and not binding upon the defendant. In this we think appellant is correct. There is no claim that the defendant personally made any misrepresentations, nor that Mr. Weese's authority was anything excepting that shown by the written appointment, which we have quoted. It is well settled that a party dealing with the agent of a corporation must, at his peril, ascertain what authority the agent possesses, and is not at liberty to charge the principal by relying upon the agent's assumption of authority, which may prove to be entirely unfounded. Rice v. Peninsular Club, 52 Mich. 90, 17 N. W. 708; Mechem, Agency, § 137; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924.

An examination of the appointment of Mr. Weese shows that his authority was limited to the duties of a sales solicitor. In Samson v. Beale, 27 Wash. 557, 68 Pac. 184, it is said: "An agent with restricted power to sell a tract of land at a given price has no power to bind his principal by any representation as to the quantity or quality of the land." At 31 Cyc. 1363, 1364, it is said: "The authority to sell land must be strictly pursued, and acts outside of the authority will not bind the principal." In Mayo v. Wahlgreen, 9 Colo. App. 506, 50 Pac. 40, it is said: "Where a vendor's agent has misrepresented lands sold by him, and there is no attempt on the part of the purchaser to rescind, he may bring his action for deceit only against the agent, unless he can trace some connection between the principal and the agent and thereby charge the principal with responsibility for the agent's misrepresenta-

tions." In National Iron Armor Co. v. Bruner, 19 N. J. Eq. 335, it is said: "An agent with restricted power to sell a tract of land at a given price has no power to bind his principal by any representation as to the quantity or quality of the land." See also Lansing v. Coleman, 58 Barb. 619, a leading case wherein it is said: "To hold that a person not authorized to make a sale, but simply to advertise the property for sale and procure someone to negotiate with the owner, can make representations or warranties binding upon the owner, without his authority or knowledge, would be too dangerous. The well-known office of such an agent is merely to initiate a negotiation, not to complete one. The parties proposing in such a case to purchase are necessarily referred to the principal for the actual negotiations, and there is no hardship in requiring, but, on the contrary, common prudence and justice to the vendor would seem to demand that the purchaser should come to him for the facts which are to influence the purchase." See also Ballou v. Bergvendsen, 9 N. D. 285, 83 N. W. 10; Brandrup v. Britten, 11 N. D. 376, 92 N. W. 453; Larson v. Newman, 19 N. D. 153, 23 L.R.A.(N.S.) 849, 121 N. W. 204; Kuhnert v. Angell, 10 N. D. 59, 84 N. W. 579, 1 Am. & Eng. Enc. Law, 981; Fanset v. Garden City State Bank, 24 S. D. 248, 123 N. W. 688.

Without going further into the case, it is sufficient to say that plaintiff, under the proofs, cannot maintain this cause of action against the defendant, and a verdict should have been directed accordingly. Judgment of the trial court is reversed, and the proceedings ordered dismissed.

In the Matter of the APPLICATION OF W. J. SIDLE for a Writ of Habeas Corpus.

(154 N. W. 277.)

Habeas corpus — by natural parents for custody of infant — paternity and identity concealed — left with strangers for several years — best interests of child — main consideration — adoption without knowledge of natural parents.

1. Where habeas corpus is brought by the natural parents of an infant for

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Note.—That the welfare of the child is the controlling feature in suits for its custody is in accord with the well-established doctrine, see notes in 20 Am. Dec.

its custody and control, and it is shown that the child has for a period of almost eight years been left among strangers and its paternity and identity concealed, the pole star and main considerations of the court will be the best interests of such child, and where these interests point, as they are held to point in the case under consideration, to the continued custody of the adoptive parents, the court will not interfere with such control and possession, even though the adoption may have been made without the actual knowledge of the natural parents, and under the belief and on the grounds of their decease.

Right of custody and possession — as between natural and adoptive parents — means or wealth not alone controlling.

2. In determining the question of the right to the possession of an infant as between its natural and its adoptive parents and the real interests of the child in such a matter, the relative poverty of the former does not alone, save in extreme cases, furnish a sufficient reason for depriving them of their offspring.

Right of possession — determination — consideration for child — best interests — its right to the love, care, and guidance of a father and mother — lack of interest by natural parents — wishes of child, when of proper age and intelligence.

3. In determining the right to the possession of a child in habeas corpus and the best interests thereof as between the natural and the adoptive parents, the court will take into consideration the right of such child to the love, care, and guidance of a father as well as of a mother, and the heartlessness and lack of interest of the natural father. It will also take into consideration the wishes of the infant when the latter is old enough and of sufficient intelligence to reasonably understand the situation in which it is placed.

Right of possession — determination — the child is but the future citizen — interests of the state in its citizens are paramount.

4. In determining the right to the control and possession of an infant in habeas corpus, the court will take into consideration the fact that the child is but the future citizen, and that paramount to the interests of the claimants, and even of the natural parents, are the interests of the parent state.

Opinion filed October 4, 1915.

Habeas corpus for the possession of a minor child.
Writ quashed.

330, on the subject of the custody of legitimate child on habeas corpus. Also note in 41 L.R.A.(N.S.) 564, discussing the denial of custody of child to parent for its well-being, and note in 30 L.R.A.(N.S.) 146, on the validity of adoption of child without consent of natural parents.

Statement of facts by BRUCE, J.

This is a proceeding upon a writ of habeas corpus to determine the right to the custody of Herbert Clark, an infant, the controversy being between the natural parents and the parents by adoption of the child, who is now some eight years of age.

The testimony shows that W. J. Sidle and Elsie Edwards (Sidle) were married in the city of Maquoketa, Iowa, on the 28th day of February, 1907, and soon after their marriage removed to Mandan, North Dakota; that about six months after their marriage the child was born; that the father, W. J. Sidle, from false pride, and for fear of the anger of his parents, and on account of his lack of interest in the child and desire to get rid of it, persuaded his wife, who really appears, during all of the times in controversy, to have been persuaded against her will and against her real instincts, to go to St. Paul, Minnesota, that the child might be born there and its birth concealed both from his family and from any friends or acquaintances that they might have in Mandan or the city of Bismarck, where they seem to have been living at the time. Mr. Sidle did not accompany his wife to St. Paul, nor was he present in that city at the time of the birth. Mrs. Sidle was accompanied, however, by a nurse, a Miss Wendell, who seems throughout to have been actuated by a strange but undoubted loyalty to Mrs. Sidle, and later, by an unquestionable affection for the child itself, and so much so that it subjected her to the suspicion, which we find to be unfounded, that she herself was the mother of the infant. On arriving at St. Paul, Mrs. Sidle was taken to a private hospital belonging to a Mrs. White, where the child was born and where she remained for about two weeks. At the end that time the father, W. J. Sidle, came to the city and persuaded his wife to allow the nurse to take the child with her to Iowa so that its birth might be concealed, at any rate until after the period of nine months had elapsed from the time of the marriage. There can be no question that at this time the husband promised his wife that the child would be be returned to her the following spring. One of the arguments by which her consent was gained was that the family would remove to the coast and to entirely new surroundings, and that by these means the age of the child and the real date of its birth could be concealed. For the next two years the baby boy was cared for by the nurse, or, more strictly speaking, his

care was provided for. He was first taken to a hospital in Iowa City, Iowa, where he remained for about two weeks. He was then taken to another hospital at Maquoketa, Iowa, where he remained for eleven or twelve weeks. He was then taken to the house of the nurse, Miss Wendell, which at the time was rented by her to her sister, a Mrs. Reynolds, and the child seems to have been jointly cared for there by the nurse and this sister. Soon thereafter the sister seems to have become so attached to the infant that she contemplated its adoption, and the nurse, fearing complications, took him from her and back to his parents at Mandan, where he stayed for two or three weeks. After this time he was again given by his parents to the nurse and put by her into the custody of still another trained nurse, a Miss Waterbury. Soon thereafter, however, Miss Wendell was compelled to take her blind brother to London, England, to consult a specialist, and on Miss Waterbury declining to take the responsibility for the child in the interim, at the last moment and with the consent of the parents, took the child to London with her. After being absent for sime six weeks, the nurse and child returned to America and upon their return the former learned that her sister, Mrs. Reynolds, and her husband, immediately after the taking of the child from them, which had been done covertly, had procured articles for its adoption, it appearing that in their petition for the same they had alleged to the mayor of Maquoketa that the child was either an abandoned child or that its parents were dead, and it also appearing that these representations were justified by the statements of the nurse herself, who through all the years in controversy seems to have stated to all inquirers that the parents of the child were both dead. Miss Wendell then took the child to Kansas City, where it was cared for for a period of six or seven months in the home of a Mrs. Berry, and from which place he was taken to the home of two maiden ladies in Chicago, where he was left for some time and then taken to the home of two other young ladies, and left there for a period of several weeks. From there he was taken to a Mrs. Palmer at Cedar Rapids, Iowa, and there evidently lovingly cared for for eight months. From there and in 1911 he was again surreptitiously taken by the nurse to Massachusetts and given a home in the house of a Mrs. Roffer. The justification for this removal, as appears to have been the justification in some of the other instances,

being that Mrs. Palmer was becoming too attached to the boy and the boy too attached to her. Mrs. Roffer seems to have been one of those motherly women whom Providence has scattered all over the land, and seems to have taken every care of the child which she could under her limited circumstances. It remained with her nearly a year. From Mrs. Roffer's home the boy was again brought back to Chicago, at which place, though only five years of age, he was tagged and ticketed in care of the conductor and porter to Mrs. Palmer in Cedar Rapids. Iowa. The testimony shows that when he arrived it was at night and was met at the train by Mrs. Palmer, he tearfully insisted that no one should take him from her again. From this time on Mrs. Palmer seems to have lovingly cared for the boy, and to have insisted on knowing something of his antecedents, and to have urged his adoption by someone. Miss Wendell, however, insisted for a time at least that he could not be adopted, and gave Mrs. Palmer to infer that she herself could take care of him. It appears, also, that during the child's first visit to Mrs. Palmer's, he had been taken for a short visit to his parents, and on his return had been left with a Mrs. Stuhr for a short time because he remembered them and their names, and it was thought best not to return him to Mrs. Palmer until he had ceased talking about them. During all of these years, the nurse had furnished some money for the support of the child. Some of it, we have no doubt, was furnished by the parents. There is testimony that they paid in all about $2,500. The evidence, as a whole, hardly justifies this conclusion. We are satisfied that the parents paid some money. We are satisfied, however, that at times at least, the proper clothing, if not the care of the child, was dependent upon the kindness of those with whom he was left, and that even if Mrs. Palmer was, before the taking by the Clarks, which we will later refer to, paid anything for the custody of the child, she for a long time received nothing, and relied merely upon the promise that some money would be forthcoming if a nurses' association and possibly an uncle, whom it was contended, were interested in the child, could furnish the same. About the 12th of November, 1912, the respondent, Charles F. Clark, was told by Mrs. Palmer that she had a little child with her, and at about this time Mrs. Clark was asked by Mrs. Palmer to care for the child while she was away visiting her daughter who was about to be confined. Mrs. Clark con-

sented. Mrs. Palmer stayed about three weeks. When she returned she brought her daughter's infant child with her, and on account of the fact that the child, Herbert Clark, seems to have had or was threatened with the whooping cough and the unwillingness of Mrs. Palmer to subject her daughter's infant to the contagion, the child Herbert was left with the Clarks for an indefinite time. This arrangement was readily consented to by the Clarks, as they had no child of their own and "the little one filled their home." The child has remained with them ever since, and at no time has he ever slept under any other roof except with Mr. or Mrs. Clark, and at no time, either in the home of the Palmers or of the Clarks, has he ever referred to the Sidles nor mentioned their names. No payment was made to the Clarks, either by the nurse or by Mrs. Palmer or the Sidles, and, as we believe from the testimony, none was offered until after the formal adoption of the child by them, and then, if at all, not by the Sidles, but by the nurse.

About seven months after the boy came into his family, and on the 19th day of June, 1913, Mr. Clark had himself appointed its guardian. Later and in the early part of the year 1914 he prepared adoption papers, which were then signed by him and his wife, but were not acknowledged or consented to by the mayor as the statute required, until the 19th day of June, 1914.

After the signing of the adoption papers by the Clarks, but before their acknowledging and recording, but after the appointment of Mr. Clark as guardian, and on the 14th day of May, 1914, Miss Wendell attempted to gain possession of the child while he was at school, but was arrested in the attempt. After this event she visited the Clarks and seemingly acquiesced in their custody of the child and reiterated to them the story that parents were dead.

Later and on the 19th day of June, 1914, the Clarks formally acknowledged the adoption papers, the consent of the mayor was obtained, and the child was formally adopted. The statutes of Iowa provide that a child may be adopted if its parents are dead or where the child has been abandoned, and it was evidently upon the theory of the death of the parents that the papers were issued. On this point the Clarks testified: "Before we took out the adoption papers we inquired of Miss Wendell very carefully on that point. We got what information Mrs. Palmer had on that point. We got no other informa-

tion except the positive assurance that his parents were both dead. . . . She (Miss Wendell) told me positively at that time, and other times, giving us the names and the facts, that his father was John Wenzel and his mother Catherine Wenzel, and that his father had been killed about three months before the child's birth and that his mother died a few days after his birth. Mrs. Palmer told us that she (Miss Wendell) had told her two different stories that were not entirely harmonious but both gave the information that the child's parents were both dead." The telling of these stories is not denied by the petitioners. Miss Wendell, indeed, admits telling them and several others to the same effect. At this time also the prior adoption of the boy by Mr. and Mrs. Reynolds was unknown to the Clarks, but on the fact becoming known and on the 21st day of February, 1915, the former parties surrendered whatever rights they had and the boy was readopted by the latter. Even at this time the Clarks had no knowledge of the true parentage of the child, nor of the falsity of the stories which had been told by the nurse in relation thereto, and at no time whatever did the petitioners communicate in any way with them until the eve of the bringing of the present proceeding, that is to say, until May, 1915, nor until that time did they receive any intimation from anyone of the claims or relationship of the petitioners. During the eight years also which have intervened between the birth of the child and the bringing of the present proceeding the child has not been in the home of his natural parents for more than two months in all, and when away was visited by his mother but once, and by his father only twice, and then clandestinely and but for an hour or so on each occasion. There can be no doubt that the nurse was unwilling to lose the control of the child, and was very fond of him, and that much of her neglect was due to her profession and to the fact that she was not only called hither and thither by her general patients, but that she was called upon at numerous and critical times, in so far at least as the interests of the boy were concerned, to attend to numerous relatives during serious sicknesses. As far as the Sidles were concerned, however, there appears to us to have been a practical abandonment of the boy from the time of his birth to the time of the bringing of the present proceedings. The child, in fact and no matter by whose fault, was changed from place to place; at many times was without sufficient clothing; at many times was uncared for;

and at all times a ceaseless effort seems to have been made to deprive him of the love and affection of those who were drawn to him.

This brings us to the institution of the habeas corpus proceedings. Their story is as follows: Following the adoption of the child, the nurse seems to have tried to keep the fact concealed from its parents, though it is difficult for us to understand how, if they had cared for the boy at all, they could have been ignorant of it. They at any rate allowed months to intervene without taking any steps to assure themselves of the nature of its custody, and, even if we take their testimony at its face value, allowed themselves to be put off by the flimsiest of pretexts and by assurances which no really natural parent would ever listen to. It is a noticeable fact, indeed, that although the record in this case has been loaded with a large number of letters and other exhibits, many of which are utterly incompetent and irrelevant, there is in it not a single letter from either of the Sidles to the nurse, to Mrs. Palmer, to the Clarks, or to any of the various custodians of their homeless child. Be this as it may, however, in May, 1915, Miss Wendell visited the Sidles at Flasher in North Dakota. While she was on this visit the Clarks also by a fortuitous combination of circumstances also came into the state with their newly adopted son on a business and pleasure trip, and with the intention of calling upon the Sidles, whom, after the adoption of the child, they had learned had some knowledge of his parentage, though they had no knowledge or reason to believe even then that the Sidles were the parents themselves. It is in fact unbelievable that if the Clarks had known of such parentage they would have brought the child with them and run the risk of habeas corpus proceedings in a strange state and in a foreign jurisdiction. Mrs. Clark telephoned to know if Mrs. Sidle could see her, Miss Wendell recognized her voice, and, to use the language of Mrs. Sidle, "We got busy and sent for the lawyers."

The petitioner, W. J. Sidle, is a real estate agent in the employ of a land company and earns $1,500 a year. He owns a home in Flasher, North Dakota, which is worth about $2,000, but which is encumbered by mortgages to the amount of $1,100. He also has some interest in a subsidiary land company, which seems to have been formed by him and his fellow employees for the purpose of dealing in what he terms "real estate snaps." The extent, however, of that business or of that interest

is not shown. Flasher is a town of about four hundred inhabitants, with good schools and churches, as is the case with almost all Dakota towns, no matter how small. The Clarks are worth about $50,000 and have an annual income of from $6,000 to $8,000. They are conceded to be of high repute in their community, and are cultured and refined. They have no children of their own. Mr. Clark is a lawyer. The church and educational facilities of Cedar Rapids are excellent. Since taking the boy into their household, the couple have taken the best possible care of him, and have given him every possible advantage. His appearance and demeanor is that of one who has been well trained and well cared for. He appears and expresses himself as being perfectly happy and thoroughly contented with his present lot.

Some question has been raised as to the paternity of the child. We are satisfied, however, that the boy is the child of the petitioners, W. J. Sidle and Elsie E. Sidle, and of none others, and, though conceived out of wedlock, was legitimatized by the marriage of these parties some six months before its birth. It also appears that the child was first named Brice, but that a few years after his birth the name was changed by the parents and Miss Wendell to Herbert, so that his identity could be the better concealed.

H. R. Bitzing, Robert Nash, and *Charles W. Farr,* for petitioners.
Aubrey Lawrence, and *James H. Trewin,* and *Hyland & Madden,* for respondents.

BRUCE, J. (after stating the facts as above). Although the proceedings are, in their form, proceedings under the writ of habeas corpus, the personal liberty of the child is only technically involved, and the whole question in controversy is the right to his custody and possession. In such a case the court sits more as a court of equity than as a court of law. Its controlling consideration must be the interests of the child, and its paramount duty is to leave that child where those interests will be the best subserved. Knapp v. Tolan, 26 N. D. 23, 49 L.R.A.(N.S.) 83, 142 N. W. 915; Hochheimer, Custody of Infants, 96; People ex rel. Humex v. Phelps, 58 Misc. 625, 109 N. Y. Supp. 943; Kelsey v. Green, 69 Conn. 291, 38 L.R.A. 471, 37 Atl.

679; Sheers v. Stein, 5 L.R.A. 781, and note (75 Wis. 44, 43 N. W. 728), note in Ann. Cas. 1914A, 739.

It was given to the little wanderer to himself state the law of his case, and to furnish the irresistible argument to which no court ever has or ever should turn a deaf ear. Four or five months after he had first come to the home of the Clarks, and as he was sitting one Sunday morning between them on a davenport, he turned to his foster parents and said: "Papa, mamma, God gives every little folk a papa and a mamma and a home, and you are the papa and the mamma that God has given me, and this is my home, and I am going to stay here." After wandering about for six years, after being taken from place to place, and after being constantly and purposely removed from those who had begun to become attached to him as soon as that attachment became apparent; after being deprived of that which is dearer to every child, and in fact to every human being, than food or drink or raiment or wealth or power, and that is simple and genuine love,—the little wanderer had at last found a haven of rest. He had not merely found the physical comforts and opportunities which wealth furnishes, but he had found love. He had found not merely a mother, but a father. God does intend to give "to every little folk a papa and a mamma," and it is the dread of the lack of the former if the custody of the child is given to the petitioners, that largely controls our decision in this case. In arriving at our conclusions we do not consider the relative wealth of the respondents and of the petitioners and the material advantages which money can furnish. We agree thoroughly with counsel for the petitioners that this question of wealth should not be controlling.

We are fully aware of the dominating interests of natural parents. We realize that often the wealth of parents has been a stumbling block to the progress of their children, rather than an advantage. We agree with the supreme court of Georgia that poverty alone furnishes no reason to deprive a parent of his offspring, and that the greatest characters in history have been those who have been born in the manger and in the log cabin, rather than in the palace. See Cormack v. Marshall, 211 Ill. 519, 67 L.R.A. 787, 71 N. E. 1077, 1 Ann. Cas. 256; Re Carter, 77 Kan. 765, 93 Pac. 584; Sloan v. Jones, 130 Ga. 836, 62 S. E. 21; Monk v. McDaniel, 116 Ga. 108, 42 S. E. 360; Lamar v. Harris, 117

Ga. 993–997, 44 S. E. 866; Wohlford v. Burckhardt, 141 Ill. App. 324; Holmes v. Derrig, 127 Iowa, 625, 103 N. W. 973.

We believe, however, that a child is entitled to both a father and a mother, and that the love and guidance and support of the one is as necessary to him as is that of the other. We believe that Mrs. Sidle loves the child. We believe that although through the long years of separation that love was not strong enough to induce her to absolutely insist upon the presence of the boy, she nevertheless constantly yearned for him. We might be willing to pass over the failure of this insistence, and justify it on the ground that she was hoping against hope that sometime the boy might be brought to her without any disclosures as to his past. But we still have the man Sidle. Without his sincere affection and co-operation, and without his love, a change from the custody of the Clarks to that of the Sidles must be ruinous in its consequences. In a home of love and sympathy and interest, the boy might soon forget the advantages which the resources and affection of the Clarks have been able to afford him. He might, like many another child, grow into a finer and a stronger man were he deprived of these material advantages. But he must have love and guidance, and that ungrudgingly bestowed. At first he would be heartbroken at the change and dissatisfied with his new surroundings. He must have those who will bear with him, who will love him and who will guide him. We think that he might count upon the loyalty of his mother, but we dare not trust the father, and the wife during eight years has been dominated by that father. He tried to destroy the child before he was born. He sent him out a wanderer when only two weeks old, and kept him as such for nearly eight years. Through his agent, Miss Wendell, he purposely deprived him of the companionship even of strangers when those strangers began to show any signs of genuine affection for him. He has never really adequately provided for his wants, even those which were physical. Even now he gives no evidence of affection,—merely a willingness that his wife shall have the boy, and he only brought the present suit because she insisted upon it and because the time had arrived when silence was longer impossible. Can we send the child to such a home as this? We know that in the home of the respondents he will be properly trained and educated. We know that in that home he is radiantly happy. We know that for the first

time in his life he has really entered into a haven of rest. We do not know that such things would be true if he were given to the petitioners. No court should lightly set aside the claims of natural parents, but must a child who has been treated unnaturally for eight years, and who has at last come to his own, be again subjected to the risk of ill treatment merely because of the fact of relationship? The boy is now at an age where he needs the guidance of a father as well as of a mother; at an age where an unkind word coupled with the knowledge of the past might again send him a wanderer upon the face of the earth. We dare not run the risk of the change. We refuse to "treat the child as a shuttlecock, weaving affection here and there, with no permanency whatever." Gray v. Field, 10 Ohio Dec. Reprint, 170.

In refusing to interfere with the present custody of the infant, and in quashing the writ of habeas corpus, we are following not merely the dictates of our own consciences and of our own judgments, but the almost unanimous decisions of the courts of the country which have been rendered under similar circumstances. See Re Burdick, 91 Wis. 639, 40 L.R.A.(N.S.) 887, 136 N. W. 988; Armstrong v. Stone, 9 Gratt. 102; Church, Habeas Corpus, §§ 440–442; Green v. Campbell, 35 W. Va. 698, 29 Am. St. Rep. 843, 14 S. E. 212; Sheers v. Stein, 75 Wis. 44, 5 L.R.A. 781, 43 N. W. 728, 3 Mod. Am. Law, 346.

An examination of the child has been made, and his desire is certainly to stay with the Clarks, and in a case such as this the wishes of the child may well be considered. People ex rel. Humex v. Phelps, 58 Misc. 625, 109 N. Y. Supp. 943; Richards v. Collins, 45 N. J. Eq. 283, 14 Am. St. Rep. 726, 17 Atl. 831; People ex rel. Wehle v. Weissenbach, 60 N. Y. 385; Com. v. Hammond, 10 Pick. 274; Merritt v. Swimley, 82 Va. 433, 3 Am. St. Rep. 115; Re Gould, 174 Mich. 663, 140 N. W. 1013; Neville v. Reed, 134 Ala. 317, 92 Am. St. Rep. 35, 32 So. 659.

We must also remember that, after all, the child is but the future citizen, and that paramount to the interests of any of the parties to the litigation, and even of the parents themselves, are the interests of the parent state. McKercher v. Green, 13 Colo. App. 270, 58 Pac. 406.

The writ of habeas corpus will be quashed. Each party will pay his own costs.

STATE BANK OF MAXBASS, a Corporation, v. HONORA HILEMAN and Andrew G. C. Hileman and John D. Gruber Company, a Corporation.

(154 N. W. 532.)

Trial de novo — supreme court — appeal — statement — retrial must be demanded in — such demand in notice of appeal not sufficient.

1. On an appeal in cases triable *de novo* in the supreme court under § 7846 of the Compiled Laws of 1913, which requires that the appellant must specify in the statement of the case either that he desires a retrial of the entire case or of certain designated questions of fact, the statement in the notice of appeal that appellant "demands a trial *de novo* of the action in the supreme court" is not a sufficient compliance therewith.

Statement of case on appeal — proper specifications — failure to make — motion to strike — counter motion to remand for amendments — showing on — costs as terms.

2. Upon a motion by respondent to strike from the files the statement of the case, for failure to contain proper specifications, appellant made a counter motion for an order remanding the record to enable him to make application to have proper specifications supplied, *held*, under the showing, that such counter motion should be granted upon the payment of certain motion costs as terms.

Brief — failure to conform to rules — motion to strike — omissions result of inadvertence — new brief filed — on terms — prejudice.

3. Upon motion to strike appellant's brief for failure to conform to the rules of this court, appellant, upon payment of terms, is granted leave to file a new brief, it appearing that the omissions are the result of inadvertence and that respondent will not be prejudiced by the granting of such leave.

Opinion filed October 9, 1915.

Motion to strike appellant's statement of case and brief and for an affirmance of the judgment.

Motion denied conditionally.

Cowan & Adamson for the motion.

Albert Weber, contra.

FISK, Ch. J. Respondent moves this court for an order striking from the files the statement of the case and appellant's brief, and summarily affirming the judgment below.

The grounds for such motion are in substance: 1. That appellant has failed to specify in his statement of the case a demand either for a trial *de novo* or for the review of any questions of fact.

2. That the brief fails to comply in any respect with the rules of this court in such cases.

The first part of the motion is technically well taken, but appellant's counsel explains the omission as the result of inadvertence and excusable neglect, and asks that the record be remanded to the lower court that such omission may be supplied. Under the showing we think the interests of justice will be best subserved by granting such request. It does not appear that respondent will be in any way prejudiced by the delay thus occasioned, as the case will probably not be reached on the calendar of this court for several months.

While the statement fails to contain the specification required by statute, the notice of appeal does contain a demand for a trial *de novo* of the action in the supreme court. This, however, is manifestly not a compliance with the statute, which specifically requires that in actions triable *de novo* in this court the appellant shall specify therein the questions of fact that he desires the supreme court to review, and if he desires a review of the entire case he shall so specify. Comp. Laws 1913, § 7846; see also rule 31.

Appellant's counsel expressly concedes that the criticism of his brief is well taken, but he attempts to excuse the omissions as a mere oversight or inadvertence, and asks that he be granted leave to supply another brief. We find that the excuse offered for the omissions is sufficient to justify this court under the circumstances in granting the request aforesaid. However, we think terms should be imposed as a condition to the granting of these favors. It is accordingly ordered that upon payment to respondent's counsel of $25 motion costs, the record may be remanded for correction, and the appellant may also within thirty days file a supplemental brief as requested.

If appellant fails to pay such motion costs or fails to supply such deficiencies in his statement of case and brief within thirty days the respondent's motion will be granted.

CHRISTIANSON, J., disqualified, and did not participate.

OSCAR S. HILMEN v. TOBIAS NYGAARD and Mary Nygaard.

(154 N. W. 529.)

Appeal — dismissed — remittitur transmitted to and filed in lower court — appellate jurisdiction lost — mistake or fraud — recall for review.

1. Where an appeal has been dismissed, and the remittitur transmitted to and filed in the trial court, the appellate court has lost jurisdiction of the case, and cannot recall the remittitur, or review its decision unless the order was based on fraud or mistake of fact, or the remittitur was sent down through inadvertence or mistake.

Appeal — reinstatement of — motion for — grounds for — mistake — inadvertence — surprise — excusable neglect — merit in appeal.

2. Upon a motion to reinstate an appeal, on the ground that the order of dismissal was entered against the appellant through his mistake, inadvertence, surprise, or excusable neglect, appellant must show apparent merit in the appeal.

Opinion filed October 11, 1915.

Appeal from District Court of Pierce County. *Burr*, J. Motion to reinstate appeal.

Denied.

R. E. Wenzel for motion.

D. J. O'Connell, contra.

CHRISTIANSON, J. On February 27, 1915, an order was entered by this court, pursuant to notice and after hearing, upon respondent's motion for a dismissal of the appeal for want of prosecution, whereby it was "ordered that said motion to dismiss the appeal herein be and the same is hereby granted, unless counsel for the appellant shall cause the record on appeal to be filed in the office of the clerk of this court on or before April 15, 1915, and unless there shall be paid by the appellant herein to counsel for the respondent the sum of $10, as and for terms and costs incurred; failing to pay said terms and file the record on appeal within the time indicated above, an order will be entered dismissing the appeal." Subsequently, pursuant to stipulation between counsel for the respective parties, the time in which to

comply with this order was extended until July 1, 1915. The record not being filed, the final order of dismissal was entered on July 3, 1915, and the remittitur transmitted to and subsequently filed in the district court. About August 5, 1915, upon appellants' application, an order to show cause was issued requiring the respondent to show cause why the appeal should not be reinstated: Upon the hearing of such order the following facts are conceded: The appeal in this case was taken from a judgment in an action of foreclosure wherein all the issues were fully litigated and tried to the court. No statement of case has been proposed, served, or settled, nor has a transcript of the proceedings had in the court below been procured. Appellants' present counsel concedes that no error appears on the judgment roll, and that unless the statement of case discloses error, there will be no merit in the appeal. He also concedes that he does not know whether any error was committed in the trial of the cause in the court below. He states that it will be necessary for him to obtain a transcript of the proceedings and examine the same for the purpose of determining whether any error was committed.

This is not a case wherein the remittitur was issued and transmitted inadvertently or by mistake, but it was issued and transmitted in accordance with an order entered by this court pursuant to notice and after hearing. In such case a remittitur will not be recalled and the appeal reinstated. The Encyclopædia of Pleading & Practice, vol. 2, p. 359, states the law on this subject to be as follows: "Where an order of dismissal acts as a statutory judgment of affirmance, the appellate court loses jurisdiction to set it aside and reinstate the case after a remittitur has been regularly issued and filed, unless the order was based on fraud or mistake of fact, where it may be set aside at any time."

And speaking on the same subject, in State v. Sund, 25 N. D. 59, 62, 140 N. W. 716, this court said: "There must be an end to litigating a question, at some point of time; and if this court was at liberty to review and re-review and review again its decisions in the same cause in which they were made, our time could be fully occupied in the reconsideration of questions supposed to have been long since settled, without taking up new litigation. This question has been passed upon by other courts. We call attention to a few of the authorities. Leese v. Clark,

20 Cal. 387, in which, in an opinion written by Chief Justice Field, this question was discussed at length, and it was held that the court cannot recall a case and reverse its decision after the remittitur is issued; that it has determined the principles of law which shall govern, and having thus determined, its jurisdiction in that respect is gone. And the court said: 'The supreme court has no appellate jurisdiction over its own judgments; it cannot review or modify them after the case has once passed, by the issuance of the remittitur, from its control.' 'The court cannot recall the case and reverse its decision after the remittitur is issued.'

We are also satisfied that even though this court had jurisdiction to reinstate the appeal, the showing made by appellant is insufficient to justify us in so doing. In order to justify the reinstatement of an appeal on the ground that the order of dismissal was entered against appellant through his mistake, inadvertence, surprise, or excusable neglect, appellant must show apparent merit in his appeal. In this case no such showing is made. We quote with approval the following language used by the supreme court of Idaho, in disposing of a similar question in the case of Jacobs v. Shenon, 4 Idaho, 341, 39 Pac. 193: "There should also be an affidavit or some showing of merits in the appeal. In Hagar v. Mead, 25 Cal. 599, the court says that, on motion to reinstate cause once dismissed by reason of laches in filing of transcript under the rules, the affidavits should show that in the opinion of counsel, at least, there are substantial errors in the record, which ought to be corrected by this court. In the case at bar no effort is made to show that there is any apparent error in the trial or hearing of the cause in the court below. We think, in order to reinstate an appeal once dismissed, the appellant should show such a condition of the record as would indicate that there was apparent error in the proceedings of the lower court. No effort is made to do so." See also 3 Cyc. 203.

The motion to reinstate the appeal is denied.

THOMAS KENNEDY v. A. E. DENNSTADT.

(154 N. W. 271.)

Vendor — executory contract — abstract of title — agreement to furnish within specified time — condition precedent — performance by vendee.

1. An agreement by a vendor in an executory contract to furnish within a specified time an abstract showing a good and merchantable title to the property conveyed is a condition precedent, and the vendor must show a compliance therewith before he can require performance on the part of the vendee.

Good and merchantable title — meaning of — fee simple — free from litigation — palpable defects — doubts — enables purchaser to sell or mortgage.

2. A good and merchantable title means a title in fee simple, free from litigation, palpable defects, and grave doubts, which will enable the purchaser not only to hold the land in peace, but which will also enable him, whenever he may desire to so do, to sell or mortgage it to a person of reasonable prudence and caution.

Pleading — general denial — qualified — in issue — what is — what is not.

3. A qualified general denial which denies "each and every allegation, matter, and thing, and each and every part and portion thereof, in said plaintiff's complaint contained, except as hereinbefore admitted or explained," does not place in issue those allegations of the complaint which are admitted in other paragraphs of the answer.

Opinion filed September 14, 1915.

From an order of the District Court of Barnes County; *Coffey, J.*, plaintiff appeals.

Reversed.

A. W. Fowler, for appellant.

A "good and merchantable title" in respondent is not shown or satisfied by showing the legal title in someone, and an equitable estate in respondent. Such does not satisfy or fulfil his executory contract. It is an independent covenant on the part of respondent, and a condition precedent. Martin v. Roberts, 127 Iowa, 218, 102 N. W. 1126; Blied v. Barnard, 120 Minn. 399, 139 N. W. 714; Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 S. W. 739; Brown v. Widen, — Iowa, —, 103 N. W. 158; 39 Cyc. 1516, note 48.

The contract further required the respondent to furnish, within a fixed time, an abstract showing upon its face a good and merchantable title in himself, and, upon his default to do so, appellant was entitled to rescind the contract and recover back his purchase money. Buswell v. O. W. Kerr Co. 112 Minn. 388, 128 N. W. 459, 21 Ann. Cas. 837; Brown v. Widen, — Iowa, —, 103 N. W. 158; Grow v. Taylor, 23 N. D. 475, 137 N. W. 451.

These matters are material, and must disclose the condition of the title when the contract was made, and that such title then met the covenants of the contract. George v. Conhaim, 38 Minn. 338, 37 N. W. 791; Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504; Horn v. Butler, 39 Minn. 515, 40 N. W. 833; Smith v. Taylor, 82 Cal. 553, 23 Pac. 217; Howe v. Hutchison, 105 Ill. 501; Kane v. Rippey, 22 Or. 296, 23 Pac. 180; Lessenich v. Sellers, 119 Iowa, 314, 93 N. W. 348.

Where the contract requires an abstract of a stipulated character, until such is furnished the contract has not been performed. Boas v. Farrington, 85 Cal. 535, 24 Pac. 787; Martin v. Roberts, 127 Iowa, 218, 102 N. W. 1126; Spooner v. Cross, 127 Iowa, 259, 102 N. W. 1118; Noyes v. Johnson, 139 Mass. 436, 31 N. E. 767; Bruce v. Wolfe, 102 Mo. App. 384, 76 S. W. 723; Heller v. Cohen, 154 N. Y. 299, 48 N. E. 527; Williams v. Daly, 33 Ill. App. 454; Carrabine v. Cox, 136 Mo. App. 370, 117 S. W. 616.

The vendor must show a title good in himself—not in a third person. McVeety v. Marvey Mercantile Co. 24 N. D. 245, 139 N. W. 586, Ann. Cas. 1915B, 1028; McCulloch v. Bauer, 24 N. D. 109, 139 N. W. 318.

The abstract, to comply with such contract, must show "good and merchantable" title in the vendor at the time that he is the owner of both the legal and equitable title. Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724; Reynolds v. Borel, 86 Cal. 538, 25 Pac. 67; Ankeny v. Clark, 1 Wash. 549, 20 Pac. 583, 148 U. S. 345, 37 L. ed. 475, 13 Sup. Ct. Rep. 617; Maupin, Marketable Title to Real Estate, p. 731 and cases; Murray v. Ellis, 112 Pa. 485, 3 Atl. 845; Adams v. Reed, 11 Utah, 480, 40 Pac. 723; 39 Cyc. 1465, and cases cited.

Lee Combs and *L. S. B. Ritchie*, for respondent.

The abstract provision in the contract was not an independent cove-

nant; this provision and that as to the delivery of the deed are to be held as concurrent, and must be taken together. The furnishing of the abstract was not a condition precedent. Kessler v. Pruitt, 14 Idaho, 175, 93 Pac. 965; Plummer v. Kennington, 149 Iowa, 419, 128 N. W. 552.

"Where the covenants in a written contract for the sale of real estate are mutual and dependent, the vendor's obligation to convey being dependent upon a cash payment and the execution of notes and a mortgage by the vendee, the vendee can place the vendor in default only by tendering performance on his part; and, in the absence of such tender, he is not entitled to rescind the contract and recover back payments made when the contract was executed. Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037; Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623.

One who is required to furnish an abstract in connection with the sale of real estate, showing good title, sufficiently complies with such promise if he furnishes such abstract with other papers, showing his right and power to convey the land as promised and at the time stipulated in the contract. Such right and power need not be wholly disclosed by the abstract itself. Welch v. Dutton, 79 Ill. 465; Laub v. DeVault, 139 Ill. App. 398; Prichard v. Mulhall, 140 Iowa, 1, 118 N. W. 43.

The contract here provides for mutual acts of the parties. The delivery of the deed was the delivery of the abstract, and the delivery of possession was to follow the cash payment. They were dependent, one upon the other. Gail v. Gail, 127 App. Div. 892, 112 N. Y. Supp. 96; Clifton v. Charles, 53 Tex. Civ. App. 448, 116 S. W. 120.

If the agreement is made by the vendor in good faith, even though he be not the absolute owner of the land, but has at the time such an interest therein or is so situated that he can carry into effect the agreement on his part at the time when he has agreed to do so, it will be upheld. Chitty, Contr. 11th, Am. ed. 431; Dresel v. Jordan, 104 Mass. 407; Townshend v. Goodfellow, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056; Smith v. Gansler, 83 Ky. 371; Gaither v. O'Doherty, 11 Ky. L. Rep. 594, 12 S. W. 306; Tapp v. Nock, 89 Ky. 414, 12 S. W. 713; Tiernan v. Roland, 15 Pa. 429; Silfver v. Daenzer, 167 Mich. 362, 133 N. W. 16; Golden Valley Land & Cattle Co. v. Johnstone, 25 N. D. 148, 141 N. W. 76; Martinson v. Regan, 18 N. D. 467, 123 N. W. 285.

"Where an answer contains specific or general denials of the material allegations of the complaint, it is not subject to a general demurrer. This is true even though the answer contains other defenses which are demurrable. Redwater Land & Canal Co. v. Reed, 26 S. D. 466, 128 N. W. 702.

"Where the facts alleged in the complaint or answer entitle the party pleading to any relief whatever, although only nominal, a demurrer directed to the entire pleading, on the ground that it does not state a cause of action or defense, should be overruled. Acme Harvesting Mach. Co. v. Guy, 27 S. D. 441, 131 N. W. 508, and cases cited; Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023; Sweet v. Salt Lake City, 43 Utah, 306, 134 Pac. 1167, 8 N. C. C. A. 922; 31 Cyc. 329, and cases there cited; Stoddard v. Treadwell, 26 Cal. 294; McCann v. Pennie, 100 Cal. 547, 35 Pac. 158; Collier v. Ervin, 2 Mont. 335; Burgi v. Rudgers, 20 S. D. 646, 108 N. W. 253; Williams v. Black, 24 S. D. 501, 124 N. W. 728; Redwater Land & Canal Co. v. Reed, 26 S. D. 466, 128 N. W. 702; Van Tuyl v. Robin, 80 Misc. 360, 142 N. Y. Supp. 535; Bergstrom v. Commercial Advertiser Asso. 147 App. Div. 774, 131 N. Y. Supp. 1025.

CHRISTIANSON, J. Plaintiff brought this action to recover $1,000, the amount of the first payment made under a contract for the purchase of certain real estate. The contract is as follows:

This agreement made in duplicate this 8th day of October, A. D. 1912, between A. E. Dennstadt, party of the first part, and Thomas E. Kennedy, party of the second part:

Witnesseth, That in consideration of the stipulation herein contained and payments to be made as hereinafter specified, the first party hereby agrees to sell unto the second party the following described real estate, situate in the county of Barnes and state of North Dakota, to wit:

North half (N. ½) and the southwest quarter (S. W. ¼) of the northwest quarter (N. W. ¼) and the north half (N. ½) of the N. E. ¼, all in section 34, township 142, range 61, west of the 5th principal meridian and containing 200 acres, more or less, according to the government survey thereof for the sum of $11,400.

And the second party hereby agrees to purchase all right, title, and

interest in said described real estate, and pay the said amount, $11,400, to said party, his heirs, assigns, or representatives, as follows:

One thousand dollars upon execution of this instrument, and the balance of $10,400 in the following payments, to wit:

$3,000 payable on the 1st day of March, 1913.
$1,000 payable on the 1st day of March, 1914.
$1,000 payable on the 1st day of March, 1915.
$1,000 payable on the 1st day of March, 1916.
$1,000 payable on the 1st day of March, 1917.
$1,000 payable on the 1st day of March, 1918.
$1,000 payable on the 1st day of March, 1919.
$1,400 payable on the 1st day of March, 1920.

Party of the second part to assume a mortgage of $.....

Party of the second part to assume a mortgage of $.....

All deferred payments to bear interest at 6 per cent per annum from October 8, 1912.

Provided said first party furnishes said second party with an abstract of title to the above-described real estate, showing a good and merchantable title, within ninety days from the date hereof, and execute and deliver unto said second party a good and sufficient warranty deed to said land, with waiver and conveyance of homestead therein on or before the 1st day of March, 1915.

But in case said second party fails in his payments as above stipulated, then the first party shall have the right to declare this contract null and void, and title to said real estate shall revert to said first party, and second party shall forfeit all money paid on this contract.

Excepting default caused by remediless flaw to the title, first party agrees that, upon failure to furnish said warranty deed to said second party, as above stipulated, that he will pay unto said second party the sum of $100 as "liquidated damages," together with all money paid on this contract, with interest at 6 per cent on same from date hereof.

It is further agreed that possession to the above-cherished real estate shall be given to said second party on the first day of March, 1913, providing said payments are made as above stipulated.

Taxes for the year 1912 to be paid by the party of the first part.

Taxes for the year 1913 to be paid by the party of the second part.

In witness whereof said parties hereto set their hands the day and year first above written.

Witnesses:

C. C. Beers, A. E. Dennstedt, C. A. Dennstedt, Thos. E. Kennedy.

The complaint sets forth the contract, and alleges that, upon the execution of the contract, the plaintiff paid to the defendant the sum of $1,000 as part of the purchase price of said land, and also executed and delivered to the defendant promissory notes for the various deferred payments mentioned in the contract. That on or about February 13, 1913, the defendant transmitted an abstract of title to said real estate to the plaintiff, which abstract failed to show a good and merchantable title in the defendant to the land in question or any part of it; but did show that the defendant had no title thereto other than a contract for the purchase thereof from one Henry Etter, by the terms of which the defendant had agreed to pay to said Etter, instalments and payments at different times until the year 1937. That on or about February 27, 1913, plaintiff submitted said abstract to his attorneys for examination, and, upon being advised by them that the abstract showed that the defendant did not have a good and merchantable title, the said plaintiff's attorneys, at his direction, notified the defendant that the defendant had failed to furnish an abstract until long after the ninety days mentioned in the contract had expired; that the abstract furnished showed that the defendant had no title to the premises except a mere contract of purchase, under the terms of which he was required to make payments until the year 1937, with no provision whereby it might be sooner paid off; and that for these reasons the plaintiff would not take the land, and demanded a return of the money paid on the contract. That since February 27, 1913, the defendant has wholly failed and refused to perfect in himself a good and merchantable title to the premises, and has wholly failed and refused to furnish or exhibit to plaintiff any abstract of title whatever thereto except the abstract heretofore mentioned. That in the month of April or the first part of May, 1913, the defendant served and caused to be served upon the plaintiff a pretended notice of cancelation of the land contract, whereby such contract is declared to be canceled for default in the terms thereof on account of nonpayment of the sum of $3,000,

with interest, said payment being due under the terms of the contract on March 1, 1913; and the notice of cancelation further provides "that the said contract will be terminated and canceled and all rights thereunder forever foreclosed . . . in case redemption of said default shall not have been made . . . by payment of all past-due principal and interest, together with legal costs and expenses incurred" on or before 10 o'clock on March 1, 1913.

The answer admits the execution of the contract and the payment by plaintiff to defendant of $1,000 as part purchase price, and the execution and delivery by plaintiff of the notes as alleged in the complaint. The answer further admits the service of notice of cancelation of the contract. The answer further alleges that at the time defendant entered into said contract with the plaintiff, the defendant had an agreement with one Henry Etter, the owner of said real estate, for the purchase thereof; and that thereafter and on the 14th day of November, 1912, said Etter executed and delivered to defendant a written contract for deed, covering said tract of land, wherein said Etter agreed to transfer and sell said land to the defendant, or to anybody he might designate as grantee according to the terms of said contract, and that as a part of said contract the said Etter agreed that the defendant might pay as much of the principal as he might desire to pay in addition to the required payment stipulated in the contract, at any time, so that the defendant was in a position to transfer said real estate to the plaintiff at any time that plaintiff complied with the stipulations and covenants concerning the payment of the purchase price of said lands. That said contract for deed is the same contract which is referred to in plaintiff's complaint. And that said contract was recorded in the office of the register of deeds of Barnes county on February 8, 1913, and that citations of the book and page where the same was recorded were mentioned and set forth in said abstract, and that said contract was therefore open to the inspection of the plaintiff, or his attorney, from the date of the recording thereof. "That by the terms of said contract, the defendant did not covenant or agree to furnish an abstract showing merchantable title in himself, but only agreed to furnish an abstract showing that the land involved was held by a merchantable title." That at the time defendant received the letter from plaintiff's attorney set forth in the complaint regarding the failure to

furnish abstract, and demanding a return of the $1,000, the defendant wrote a letter to plaintiff's attorneys, advising them of the fact that defendant was ready, willing, and able to deed said premises according to the terms of his contract with plaintiff, by reason of the terms of the contract held by defendant for the purchase of said tract of land from Etter, and that receipt of such letter was acknowledged. That plaintiff failed to make any further payments on the contract. That plaintiff has been to considerable expense in and about the transaction involved in this action, and that if plaintiff is excused and released from fulfilling the contract, and awarded a return of the $1,000 set forth in the complaint, the defendant will suffer irreparable loss in the sum of $1,000. That defendant caused notice of cancelation of the contract referred to in plaintiff's complaint to be served for the purpose of protecting himself against loss or damage on account of plaintiff's failure to perform his contract for the purchase of said real estate, and for no other reason. The last paragraph in the answer is as follows: "Further answering, this defendant specifically and emphatically denies each and every allegation, matter, and thing, and each and every part and portion thereof in said plaintiff's complaint contained except as hereinbefore admitted or explained."

The plaintiff interposed a demurrer to the answer on the ground that it did not state facts sufficient to constitute a defense. The trial court entered an order overruling the demurrer, and this appeal is from such order.

The whole controversy in this case turns upon the construction and effect to be given to the clause in the contract providing that defendant shall furnish an abstract of title showing a good and merchantable title within ninety days from the date of the contract. Plaintiff claims that this clause obviously was intended for his benefit, and is an independent covenant on the part of the defendant and a condition precedent to his right to demand any further payments under the contract or retain the payment already made. The respondent, however, contends that this clause is not an independent covenant or a condition precedent, but that the same is mutual and concurrent with the other stipulations in the contract relative to the delivery of the deed, and the payment of $3,000 on the purchase price on March 1, 1913, and the delivery of possession of the premises upon such payment.

Respondent's next contention is that the clause in question did not require him to furnish an abstract showing a good and merchantable title in himself; but all that he was required to do was to furnish an abstract showing "that the land in question was held by a good and merchantable title." And that this stipulation was fully complied with when he furnished an abstract showing such title in Henry Etter, which abstract also contained notations showing the book and page where the contract for the purchase of said premises from Etter to defendant was recorded. Defendant also contends that the last paragraph in his answer constitutes a general denial of all the allegations of plaintiff's complaint, and that such general denial constitutes a good defense, and that, therefore, the demurrer was properly overruled even though the rest of the answer was insufficient to raise any issue.

Courts do not make contracts for the parties, but merely construe them. The rules applicable to the construction of contracts were fully discussed by this court in the case of Harney v. Wirtz, 30 N. D. 292, 152 N. W. 803. As stated in that case: "The first and main rule for the construction of contracts is that the intent of the parties as expressed in the words they have used must govern." And, "if the words clearly show the intention, there is no need for applying any technical rules of construction; for where there is no doubt there is no room for construction." This rule applies with equal force to contracts for the purchase and sale of land as to other contracts. 39 Cyc. 1306. And in determining whether covenants in such contracts are dependent or independent, and whether conditions therein are precedent or concurrent, the intention of the parties is the paramount and controlling consideration. 39 Cyc. 1306; 6 R. C. L. § 248.

Among the various rules of construction to be applied in arriving at the intent of the parties, the order of time in which it appears that the covenants are to be performed is an important consideration. Ibid.

"A condition precedent is one which is to be performed before some right dependent thereon accrues or some act dependent thereon is performed. Comp. Laws, § 5771.

"Conditions concurrent are those which are mutually dependent and are to be performed at the same time." Comp. Laws, § 5772.

One of the statutory rules for the construction of contracts in this state is that the whole of the contract must be taken together so as to

give effect to every part if reasonably practicable. Comp. Laws, § 5901. It is therefore essential that the entire contract be considered in order to ascertain the intent of the parties with reference to the clause in question.

Under the terms of the contract, the plaintiff was required to pay down $1,000 at its execution,—which it is conceded that he did. The next and largest payment stipulated for in the contract was the sum of $3,000, to be paid on March 1, 1913. The plaintiff was not entitled to demand a deed until March 1, 1915, and before this time he would be required to make payments aggregating in all $6,000 and interest. But the contract does provide that within ninety days from its date, or on or before January 6, 1913, the defendant was to furnish to the plaintiff an abstract of title showing a good and merchantable title to the premises. This abstract, it will be observed, was to be furnished almost two months before plaintiff was required to make the next payment on the contract. So far as the plaintiff was concerned, nothing further was required to be done by him until this abstract was furnished. It seems clear that this condition or stipulation in the contract is not in any sense dependent upon, or concurrent with, any other clause or stipulation, as the time within which the abstract was to be furnished is entirely different from that fixed for the performance of any other act under the contract. The respondent alone was required to act. The clause could not be intended for the benefit of the defendant; but obviously it must have been intended solely for the benefit of the plaintiff. Plaintiff had already paid $1,000, without any evidence of defendant's title to the premises; but before making the next payment (the largest provided for in the contract) he was to receive an abstract "showing good and merchantable title." Thereupon, on making the next payment, plaintiff was to receive possession. Such possession, of course, would have constituted notice to the world of plaintiff's interests and estates in the premises; and if defendant held the premises by a good and merchantable title, plaintiff in possession under his contract of purchase could have continued to make payments under the contract with a sense of security and safety.

Under the terms of the written contract it is provided "that in consideration of the stipulation herein contained and the payments to be made as hereinafter specified, the first party hereby agrees to sell unto

the second party the following described real estate. . . . And the second party thereby agrees to purchase all right, title, and interest in said described real estate, and pay the said amount, $$11,400, to said first party his heirs, assigns, or representatives as follows: $1,000 upon execution of this instrument . . . , $3,000 payable on the first day of March, 1913, . . . provided said first party furnishes said second party with an abstract of title to the above described real estate showing a good and merchantable title within ninety days from the date hereof."

It seems quite clear to us that the furnishing of the abstract was a condition precedent. It was not to be performed at the same time that any other act was to be performed. The defendant agreed to perform this within a stipulated time, which was so fixed as to give plaintiff adequate opportunity to examine and investigate the title before the next payment came due. Did this happen as a matter of chance, or did the parties have some purpose in view? This court cannot presume that parties enter into written contracts regarding a matter of this importance, and use language idly or without purpose. The clause providing for the delivery of an abstract is made co-ordinate with the clause providing for the delivery of a deed at a subsequent date. The defendant himself recognized the duty incumbent upon him to furnish an abstract complying with the terms of the contract. The parties by their own construction of the contract have recognized the clause relative to furnishing an abstract as being a condition precedent, rather than a condition concurrent and mutual with the payment of the $3,000 on March 1, 1913, and the delivery of possession following such payment.

"If the contract of sale is fairly susceptible of two or more different meanings, that meaning which has been put upon the contract by the practicable construction thereof by the parties in their conduct under such contract will be adopted by the court as the true meaning thereof." 39 Cyc. 1297.

We are satisfied that the stipulation relative to the furnishing of the abstract was a condition precedent, and that defendant must comply therewith before he can require plaintiff to perform any act under the contract. Comp. Laws, § 5774; Sunshine Cloak & Suit Co. v. Roquette Bros. 30 N. D. 143, L.R.A.—, —, 152 N. W. 359.

Respondent contends, however, that the abstract furnished complied

with the terms of the contract, and showed a good and merchantable title in Henry Etter. The respondent relies upon and seeks to invoke the rule announced by this court in Martinson v. Regan, 18 N. D. 467, 123 N. W. 285, and reiterated in Golden Valley Land & Cattle Co. v. Johnstone, 25 N. D. 148, 141 N. W. 76, wherein this court said: "That as a general rule when a contract is entered into in good faith, the vendor having an estate or interest in the lands [contracted to be conveyed in the future], it is not necessary that he be actually in a situation to perform at the time the contract is made; that the most that is required of him is that he be able to perform when the vendee has a right to call upon him for performance."

We have no desire to depart from the doctrine laid down in these cases, when applied to a proper state of facts. But we are fully in accord with the principles of law laid down in these cases. In the Johnstone Case this court said: "Courts do not make contracts for parties. Had defendants desired a perfect title before transferring their property or making payments, they should have contracted with reference to the title, at the date of contract, rather than for a conveyance to be based alone on the title of plaintiff at a future date."

In the case at bar, plaintiff agreed to purchase the land, and make certain stipulated payments upon certain conditions, one of which was that within ninety days from the date of the contract, defendant was to furnish an abstract showing a good, merchantable title. As stated in the Johnstone Case, the contract might have provided that plaintiff should be the holder of title on the date of the contract, or, if they desired, the parties might contract that he should be the holder of such title at some future date. In the case at bar, the contract in unmistakable terms provided that defendant must within ninety days from the date of the contract furnish to the plaintiff an abstract of title showing a good, merchantable title. The Johnstone Case recognized the rights of parties to make lawful contracts and the duty of the courts to construe and enforce such contracts in accordance with the manifest intent of the parties as expressed therein. The principle enunciated in the Johnstone Case is directly contrary to the rule contended for by respondent in this case.

Under the terms of the clause of the contract involved in this controversy, defendant was required to furnish plaintiff with an abstract

of title to the realty, showing a good and merchantable title, within ninety days from the date of the contract. Did the abstract furnished by defendant comply with the terms of this agreement? We think not. The only purpose of the abstract was to furnish to plaintiff evidence of defendant's title to the lands,—the title which defendant himself, under the specific terms of the contract, at a subsequent date was to convey to the plaintiff by warranty deed. Plaintiff was to receive his title from the defendant. His only interest was in defendant's title to the property. It seems quite clear to us that the intention of the parties as expressed in the words which they used was to the effect that plaintiff should be furnished with an abstract showing that his vendor, *i. e.*, the defendant, had a good and merchantable title to the property. Hence, it is not a question whether defendant actually had, or eventually would be able to procure and perfect in himself, a good and merchantable title, but whether the abstract furnished to the plaintiff showed such title. Grow v. Taylor, 23 N. D. 469, 475, 137 N. W. 451.

A good and merchantable title means a title in fee simple, free from litigation, palpable defects, and grave doubts; that is, a title which will enable the purchaser not only to hold the land in peace, but will enable him, whenever he may desire to do so, to sell or mortgage the land to a person of reasonable prudence and caution. Reynolds v. Borel, 86 Cal. 538, 25 Pac. 67, 69; Fagan v. Hook, 134 Iowa, 381, 105 N. W. 155, 157, 111 N. W. 981. See also 4 Words & Phrases (1st series); 2 Words & Phrases (2d series); Bouvier's Law Dict.; Eaton v. Blackburn, 49 Or. 22, 88 Pac. 303, 304; and Bruegger v. Cartier, 29 N. D. 575, 151 N. W. 34.

The abstract furnished by the plaintiff did not show a good and merchantable title in the defendant, and hence defendant failed to comply with the stipulation in the contract requiring him to furnish an abstract showing such title. Buswell v. O. W. Kerr Co. 112 Minn. 388, 128 N. W. 459, 21 Ann. Cas. 837; Boas v. Farrington, 85 Cal. 535, 24 Pac. 787; Drury v. Mickelberry, 144 Mo. App. 212, 129 S. W. 237; Brown v. Widen, — Iowa, —, 103 N. W. 158; Davis v. Fant, — Tex. Civ. App. —, 93 S. W. 193; Martin v. Roberts, 127 Iowa, 218, 102 N. W. 1126; Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739. Defendant made no attempt to furnish any additional abstract, but stood by the abstract furnished, and served notice of cancelation on

plaintiff's failure to make the second payment provided for in the contract. And in his answer, defendant asserts that the abstract which he furnished was sufficient in this, that it did show that the premises were held by a good and merchantable title by Etter. Both parties have elected to declare or treat the contract as abandoned or rescinded,—the defendant by formal written notice of cancelation, and the plaintiff by demanding a return of the purchase money paid, followed by this action for the recovery of such moneys.

Respondent contends, however, that the answer contains two distinct and separate defenses,—"one of which is a general denial of all allegations of plaintiff's complaint,"—and that therefore the demurrer was properly overruled. It is true, defendant had the right to set up all his defenses, even though they might be inconsistent. But the scope or effect of each defense must necessarily depend upon the language in which it is presented. The clause in defendant's answer relied on falls far short of being a general denial. It expressly denies only those allegations of the complaint which had not been "admitted or explained" in former paragraphs of the answer.

This allegation must be taken for what it says, and certainly cannot overcome the positive and unequivocal admissions contained in other paragraphs of the answer. To construe this paragraph as a general denial would be contrary to its express language. It seems too clear for argument that such denial must be construed so as to do what it purports to do, namely, place in issue those portions of the complaint, and those only, which are not admitted by the admissions or explanations contained in other portions of the answer. Myrick v. Bill, 3 Dak. 284, 17 N. W. 268; McLaughlin v. Alexander, 2 S. D. 226, 49 N. W. 99; Mattoon v. Fremont, E. & M. Valley R. Co. 6 S. D. 301, 60 N. W. 69; Coffin v. Smith, 26 S. D. 536, 128 N. W. 805.

The order appealed from must be reversed. It is so ordered.

WILLIAM C. MICHAELS, John Michaels, Herman F. H. Michaels, and Adolf F. Just v. GABRIEL BARRON.

(154 N. W. 254.)

Adverse claims to lands — action to determine — contract — cancelation of — purchase price — essence of contract — time is conditionally so — failure to strictly comply with terms.

1. In an action to determine adverse claim to lands which were purchased under a conditional contract of sale under which the sum of $2,000 was paid down, and it was agreed that the defendant, if dissatisfied with his purchase, could, after the expiration of a year, cancel his contract of purchase and recover back the purchase price paid, provided that by a certain date he did certain breaking, and in which said contract certain payments, in addition to the $2,000 originally paid, were to be made before the end of such year: *Held*, that time was not of the essence of the contract as to such payments, except in so far as defendant's right to a deed was concerned; that the delay in doing the breaking before the specified time had been sanctioned and permitted by the plaintiffs, and that the right of the defendant to cancel the contract and to recover back the purchase price was not terminated by such failure or omissions.

Opinion filed September 15, 1915.

Appeal from the District Court of Morton County; *Nuchols*, J.

Action to determine adverse claims to real estate. Answer setting up conditional contract of purchase, which provided for a cancelation of the contract at the option of the defendant or purchaser, and a claim of such cancelation, and the recovery of the amount paid, as a condition precedent to the quieting of the title.

Judgment for defendant. Plaintiff appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an action to determine adverse claims to 400 acres of land in Morton county, the complaint being in the statutory form. The answer admits that the plaintiffs are the owners of the premises, but alleges a conditional contract of purchase by the defendant, and the payment of the sum of $2,000 and interest, which the defendant claims

should be returned to him as a condition of quieting the title, it being his claim that according to the contract of purchase he had the option of canceling the contract and recovering back the money which he had paid. The findings of fact and conclusions of law of the trial judge were as follows:

Findings of fact: "1. That this is an action to quiet title to the premises described in the complaint, and to foreclose the defendant from any interest in said land, and to determine what rights or interest the defendant has in said tract, and to grant such general relief as may be just in the premises, and that by consent of counsel, the question of the right of the defendant to the return of the money claimed by him under his answer was tried and submitted to the court.

"2. That the title to the premises described in the complaint is in the plaintiffs, who are copartners; that the plaintiff Wm. C. Michaels is the spokesman and general manager of the plaintiffs; that in the year of 1910, the plaintiffs and defendant entered into a written contract by the terms of which the plaintiffs agreed to sell to the defendant the following described premises, to wit: The south half of section 15; and the north half of the northeast quarter and the north half of the northwest quarter of section 22, all in township 140, north of range 84, west of the 5th P. M., in Morton county, North Dakota, in consideration of the sum of $2,000 that was paid to the plaintiffs on August 27, 1910, and in consideration of the further payment of certain deferred payments mentioned in the contract; that said contract also provided that the plaintiffs herein agreed to cancel the said contract and return to the defendant the amount paid by him on the contract, at or after ten days after November 1, 1911, upon written notice from the defendant and upon the defendant's returning to the plaintiffs a wagon which was delivered to the defendant by the plaintiffs at the time the contract was executed, and also upon the delivery by the defendant to the plaintiffs of 200 bushels of No. 1 wheat, and upon the defendant's breaking 40 acres on said premises prior to July 1, 1911; that time was not made the essence of said contract as to the returning of the said wagon or wheat, or as to the breaking of the said 40 acres; that at the time the defendant entered into said contract, he expressed doubts as to his desire or ability to purchase said land, and that the clause in said contract allowing him to cancel said contract and to recover back his

money was put in the contract in order that the defendant might make a trial of said land for the term of a year, and at the end of that time be able to put himself back in his original position if dissatisfied.

"3. That the defendant went into the possession of the said land and commenced breaking thereon, and cultivated crops on that portion of the land that had been broken theretofore, and that in the spring of 1911, the defendant decided that he would be unable to keep the land, and notified the plaintiffs that he did not desire the property or to carry out the purchase of the land, and that he would want his money back and the contract canceled; that continuing from said spring of 1911, and during the summer and fall of said year, the defendant at many and divers occasions notified and told the plaintiffs of his desire to cancel the contract; that the defendant broke 40 acres on said lands; said breaking being finished in the month of October, 1911; that the plaintiffs, by their actions and words at the time the contract was entered into and during the following year, led the defendant to believe that he had until the end of the crop year within which to break said 40 acres, and that the defendant did so believe; that the plaintiffs by their actions and words waived the breaking of the said 40 acres prior to July 1, 1911; that the defendant returned to the plaintiffs the wagon mentioned in said complaint, and also surrendered up the possession of the premises in the fall of 1911, and on the 25th day of November, 1911, by written notice served upon each of the plaintiffs, tendered the return of the said wagon and 200 bushels of No. 1 wheat, to be returned at any place requested by the plaintiffs; also calling attention to the fact that the 40 acres were broken, and in said written notice demanded the return of the $2,000 which had been paid by the defendant upon the contract; that the plaintiffs failed to indicate any place where said wagon or wheat could be returned, and the defendant left 200 bushels of wheat in the house on the premises, locking said house and tendering the key of same to the plaintiffs; that thereafter the plaintiffs took 96 bushels and 25 pounds of said wheat into their possession; that the market value of No. 1 wheat at the premises mentioned in the complaint in the month of November, 1911, was 83 cents; that the defendant lawfully and in all things substantially complied with the terms of said contract between him and the plaintiffs; that the plaintiffs have not returned to the defendant the purchase price, to wit, the sum

of $2,000 paid by him, although repeated demands have been made on them to do so; that since the month of November, 1911, the plaintiffs have been in possession of the premises and are now holding and using the same. 4. That by the terms of said contract a deferred payment of $1,358.90 was to become due on the 27th day of August, 1911, from the defendant to the plaintiffs, and that the plaintiffs took no proceedings to cancel said contract because of the failure of the defendant to pay said deferred payment, until after the defendant had given notice to the plaintiffs of his intention to exercise the option in said contract of allowing him to cancel the same, and until after he had demanded the return of said portion of the purchase price that he had paid upon said contract, which written demand was served on the plaintiffs on November 25, 1911. 5. That other than herein found the allegations of plaintiffs' complaint are untrue. 6. That all the allegations of the defendant's answer are true, except as herein otherwise specifically found."

"Conclusions of law: 1. That the defendant is entitled to have and recover from the plaintiffs the sum of $1,889.20, being the sum of $2,000, less 200 bushels of wheat at 84 cents per bushel, and also less the sum of $23.80, interest at 7 per cent upon $1,358.90 to November 25, 1911, a deferred payment which became due by the terms of said contract from the defendant to the plaintiffs on the 27th day of August, 1911, to which should be added $81 for the wheat received by plaintiffs from defendant, leaving the sum of $1,889.20, which defendant is entitled to recover from plaintiffs, with interest thereon at 7 per cent per annum from November 25, 1911. 2. That the said defendant is further entitled to recover from the plaintiffs his costs and disbursements therein. 3. That the amount which the defendant is entitled to recover as hereinbefore found shall be a lien upon the premises in said complaint described. 4. That upon the payment to the defendant by the plaintiffs of the amount hereinbefore set out, the plaintiffs are entitled to the decree of this court quieting the title to the said premises in them as against the defendant."

W. H. Stutsman, for appellants.

Under a contract permitting purchaser to disaffirm if dissatisfied with his title, his good faith, and not the reasonableness of his dissatis-

faction, is the test of his right. Sanger v. Slayden, 7 Tex. App. 605, 26 S. W. 847.

A party may enforce his agreement as to time, because the parties are, as a rule, allowed to make such contracts as they please. Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207.

Where a contract provides that a certain act be done before action can be brought,—a condition precedent to the bringing of such action,—the condition must be strictly complied with. White v. Mitchell, 30 Ind. App. 342, 65 N. E. 1061.

A party to a contract has no right to rescind his agreement until he has, as a condition precedent, strictly performed his part. Griffin v. Griffin, 163 Ill. 216, 45 N. E. 241; Wallace v. McLaughlin, 57 Ill. 53; Hunt v. Smith, 139 Ill. 296, 28 N. E. 809; Rev. Codes 1905, § 5249, Comp. Laws 1913, § 5805.

Parol evidence of a prior or contemporaneous agreement is inadmissible to vary the terms of a written contract. Te Poel v. Shutt, 57 Neb. 592, 78 N. W. 288.

The right to annul a contract for nonperformance of its terms by the contractors is lost where the employers are in default by failure to estimate and pay for work done and materials furnished by the contractors. O'Connor v. Henderson Bridge Co. 95 Ky. 633, 27 S. W. 251, 983; Graf v. Self, 109 N. Y. 369, 16 N. E. 551; Mason v. Edward Thompson Co. 94 Minn. 472, 103 N. W. 507; Provident Loan Trust Co. v. McIntosh, 68 Kan. 452, 75 Pac. 498, 1 Ann. Cas. 906; Prothro v. Smith, 6 Rich. Eq. 324; Gale v. Dean, 20 Ill. 320; Hopkins v. Shull, 2 Ohio Dec. Reprint, 272; Aikman v. Sanborn, 5 Cal. Unrep. 961, 52 Pac. 729.

A party cannot strictly enforce a contract while he himself is in default. Blewett v. McRae, 88 Wis. 280, 60 N. W. 258; Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co. 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995; State v. Winona & St. P. R. Co. 21 Minn. 472.

Hanley & Sullivan, for respondent.

After one party has performed the contract in a substantial part, and the other party has accepted and had the benefit of such part performance, the latter is precluded from relying upon the performance of the residue as a condition precedent to his liability. 9 Cyc. 645, 689.

Upon the vendor's electing to return the thing sold within the time specified, the vendor was bound to refund, and this though the vendee had given his obligation for the purchase money. Giles v. Bradley, 2 Johns. Cas. 253.

The plaintiff waived the time of performance on defendant's part, as to the breaking. Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207.

There has been substantial performance. Columbian Lyceum Bureau v. Sherman, 19 N. D. 58, 121 N. W. 765.

A false impression may be produced by words, acts, concealment, or suppression. Whether the plaintiff and his agent intended to defraud the defendant makes no difference. The results to defendant are the same. Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032.

Courts of equity will carefully scrutinize contracts between persons occupying relations of trust and confidence, and if it appears that a contract was entered into through the exercise of undue influence by one upon the other, they will not hesitate to cancel such contract. Fjone v. Fjone, 16 N. D. 100, 112 N. W. 70; Bennett v. Glaspell, 15 N. D. 239, 107 N. W. 45; Sanger v. Slayden, 7 Tex. Civ. App. 605, 26 S. W. 847.

BRUCE, J. (after stating the facts as above). After thoroughly examining the record and briefs in this case we are quite satisfied of the correctness of the findings and conclusions of the learned trial judge. We are satisfied that it was the intention of the parties that the defendant should be permitted to rescind the contract and recover back the money which he had paid, if, after entering upon the land and giving the matter a trial, he was dissatisfied with his bargain. We are satisfied too, that, as far as the payments were concerned, time was only of the essence of the contract, provided that the defendant desired to retain the land and to obtain a deed from the plaintiff. We are not prepared to hold that in order to rescind the contract the defendant was compelled to pay the instalments on the purchase price, only to have them paid back again to him in the event of his rescission. We, too, are convinced that any delay that there was in the doing of the breaking was due to the dry season, and was fully sanctioned and approved by the plaintiff. It is true that the breaking was done in

separate tracts, but there was nothing in the contract which prevented this being done. It is quite apparent to us that the nature of the land was such that this was not an unreasonable procedure.

The judgment of the District Court is affirmed.

STATE OF NORTH DAKOTA v. H. E. KILMER.

(153 N. W. 1089.)

Criminal prosecution — costs of — failure to pay — imprisonment for — Constitution.

1. Section 10941, Compiled Laws of 1913, which authorizes imprisonment in case of the nonpayment of the costs of a criminal prosecution, does not violate either the Constitution of the state of North Dakota or that of the United States.

District court — terms of — grand jury — informations — state's attorney — preliminary examinations — during terms — defendants — time for preparation.

2. Section 10628, Compiled Laws of 1913, provides that during each term of the district court at which a grand jury has not been summoned, the state's attorney shall file informations against all persons accused of having committed a crime or public offense, and authorizes the filing of such an information and the trial of the defendant at such term, even though the preliminary examination was held during such term of the court, provided that a reasonable time and opportunity is afforded for the preparation of his defense.

Information — names of witnesses — indorsed on — criminal prosecutions — other witnesses may be called by state — circumstances giving such right.

3. A witness whose name is not indorsed on the information may be examined on behalf of the state in a criminal prosecution, where it is shown that the attorney for the defendant was given due notice of the state's intention to call such witness, and when prior to the filing of the information the prosecution, though it was aware that such witness had some knowledge of the occurrence, had no knowledge that his testimony would be in any way material to the issues.

Liquor nuisance — maintaining at certain place — government permit — issued to defendant — for town in which nuisance was kept — admissible.

4. Where one is accused of maintaining a liquor nuisance at a certain place,

proof of the issuance to such person of a government license for the sale of intoxicating liquors in the town and state where such nuisance is claimed to have been maintained is admissible even though the premises described in said license are different from those mentioned in the information, as such evidence tends to show that the defendant was in the business of selling intoxicating liquors.

Identity of names — identity of persons — presumption — preliminary proof unnecessary.

5. The presumption that identity of names indicates identity of persons will make admissible, in a trial for maintenance of a liquor nuisance, a government license for the sale of liquor issued to a person of the same name as the defendant, without preliminary proof of the identity of the person.

Internal revenue collector — records of office — certified copy — liquor license — evidence — proof of records — certificate.

6. A certified copy of the records in the office of the collector of internal revenue, relating to the issuance of a liquor license, is admissible in evidence in a prosecution for maintaining a liquor nuisance when properly proved, and such record is properly proved when there is attached thereto a certificate by the collector of internal revenue as to its correctness and authenticity.

Internal revenue collector — records of — certified copy — statements in — as to facts shown by record itself — evidence.

7. A statement in a certificate of the collector of internal revenue which is attached to a certified copy of the record of special taxpayers and registers of his district does not render the admission of such record reversible error because it states in substance that the record shows the issuance of United States special tax stamps to the defendant, when the record upon its face shows the same fact.

Opinion filed July 2, 1915. Rehearing denied September 15, 1915.

Appeal from the District Court of Burleigh County; *Nuessle,* J.

Prosecution for maintaining a liquor nuisance. Judgment for plaintiff. Defendant appeals.

Affirmed.

Mockler & Ullness, for appellant.

A witness whose name is not indorsed on the information cannot be called and allowed to testify for the state, against a defendant on trial for crime, and over his objection, where it clearly appears that the prosecuting attorney knew of such witness before filing the information, and where only one day's notice of intention to call such witness was

given. Comp. Laws 1913 § 10631; People v. Hall, 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665, 4 Am. Crim. Rep. 357; State v. Frazer, 23 S. D. 304, 121 N. W. 790; State v. Matejousky, 22 S. D. 30, 115 N. W. 96; State v. Albertson, 20 N. D. 512, 128 N. W. 1122; State v. Pierce, 22 N. D. 358, 133 N. W. 991; State v. King, 9 S. D. 628, 70 N. W. 1046.

Identity of names does not necessarily identify persons. Where a person is on trial for the crime of keeping and maintaining a liquor nuisance, the fact that a government license or permit was issued to a person of the same name as that of the defendant, and such permit is sought to be offered in evidence to prove its issue to defendant. is no proof that the defendant is the same person as the one named in the permit. The identity of the defendant, and his personal relation to the permit, must be established by competent proof. Wedgwood's Case, 8 Me. 75; Com. v. Briggs, 5 Pick. 429; Com. v. Norcross, 9 Mass. 492; Bogue v. Bigelow, 29 Vt. 179; Comp. Laws 1913, § 7920; Sykes v. Beck, 12 N. D. 242, 96 N. W. 844; McGuire v. Sayward, 22 Me. 230; Doe ex dem. Foute v. McDonald, 27 Miss. 610; Martin v. Anderson, 21 Ga. 301; Dillon v. Mattox, 21 Ga. 113; Jay v. East Livermore, 56 Me. 107.

A person may give away intoxicating liquor to another without being guilty of any crime. Comp. Laws 1913, § 10117; 23 Cyc. 181; State v. Hall, 28 N. D. 649, 149 N. W. 970.

The evidence as to times and places should, if anything, make two distinct offenses. The jury was permitted to find the defendant guilty of either of two crimes. Comp. Laws 1913, § 10117; 23 Cyc. 177; 12 Cyc. 631; State v. Kruse, 19 N. D. 203, 124 N. W. 385; State v. Dellaire, 4 N. D. 312, 60 N. W. 988; State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Thoemke, 11 N. D. 386, 92 N. W. 480; State v. Winbauer, 21 N. D. 161, 129 N. W. 97.

H. J. Linde, Attorney General, and *H. R. Berndt,* State's Attorney, for respondent.

A term of court, within the meaning of the law, is a term actually held, and not one that may be held. Rev. Codes 1905, § 9791, Comp. Laws 1913, § 10628; State v. Fleming, 20 N. D. 105, 126 N. W. 565.

A witness whose name is not indorsed on the information may be called by the state, and may testify, where it appears that even though

such witness was known by the state's attorney to possess some knowledge concerning the case, yet the materiality of the testimony of such witness was not known to such attorney; and especially where the defendant is given ample notice of the fact that such witness will be called. State v. Pierce, 22 N. D. 358, 133 N. W. 991; State v. Albertson, 20 N. D. 512, 128 N. W. 1122.

To show that one accused of violating the local option law had a revenue license covering certain dates and places, the only evidence admissible is either the collector's book or a certified copy thereof, duly authenticated by him or his deputy. True copies of books of record in the collector's office are admissible. Goble v. State, 42 Tex. Crim. Rep. 501, 60 S. W. 966; Thurman v. State, 45 Tex. Crim. Rep. 569, 78 S. W. 937; State v. Sannerud, 38 Minn. 229, 36 N. W. 447; State v. Peterson, 38 Minn. 143, 36 N. W. 443; McKnight v. United States, 54 C. C. A. 358, 115 Fed. 972, 61 C. C. A. 112, 122 Fed. 926; Dillon v. Mattox, 21 Ga. 113; Doe ex dem. Foute v. McDonald, 27 Miss. 610.

Official documents in the departments of the United States government may be proved by certificate of the legal custodian thereof. Comp. Laws 1913, § 7919.

There was no showing that defendant kept intoxicating liquors at his dwelling house for the use of himself, his family, domestic servants, or invited guests. The instructions of the court clearly announced the law of the case upon the question of who is a "keeper of a common nuisance." State ex rel. Kelly v. Nelson, 13 N. D. 122, 99 N. W. 1077; State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Ekanger, 8 N. D. 559, 80 N. W. 482; Webster's Int. Dict. 1484; Hogue v. State, 93 Ark. 316, 124 S. W. 783, 130 S. W. 167; White v. State, 153 Ind. 689, 54 N. E. 763; Western Exp. Co. v. United States, 72 C. C. A. 516, 141 Fed. 28; State v. Flagstad, 25 S. D. 337, 126 N. W. 585.

Proof of a single unlawful sale within the building is sufficient to make out a place kept for that purpose, and therefore a nuisance. State v. Russell, 95 Iowa, 406, 64 N. W. 281.

BRUCE, J. This is an action in which the defendant and appellant was convicted of maintaining a common nuisance in the form of a place in which intoxicating liquors were sold, bartered, or given away as a beverage, and in which place persons were permitted to resort

for the purpose of drinking intoxicating liquors as a beverage, and in which place intoxicating liquors were kept for sale, barter, exchange, and delivery as a beverage.

The first assignment of error raises the proposition that the court erred in sentencing the defendant to pay the costs of the action and in default of such payment to stand committed for a certain time. There is no citation of authority, however, in support of this proposition, and we believe that none can be found. Section 10941 of the Compiled Laws of 1913, which is construed in State v. Fleming, 20 N. D. 105, 126 N. W. 565, expressly authorizes imprisonment in the case of nonpayment of the costs of a criminal prosecution, and we know of no constitutional provision that it contravenes. The courts, indeed, have everywhere held that imprisonment as an alternative for the payment of a fine is not an imprisonment for debt, and the same principles apply in the case of costs which are imposed as a part of a fine, and as a penalty for the transgression. Dixon v. State, 2 Tex. 481, 482; Bailey v. State, 87 Ala. 44, 6 So. 398; Morgan v. State, 47 Ala. 34; Re Boyd, 34 Kan. 570, 9 Pac. 240.

The second assignment of error is that "the court erred in assuming the jurisdiction of the case, for the reason that no proper preliminary examination had been terminated prior to the commencement of the term of court at which this case was tried." It is claimed that the preliminary hearing was held subsequently to the convening of the term of court, and that the information was filed in the district court during the term, and that such procedure was in violation of law. We cannot, however, so hold. There is no pretense that the defendant was not given full time and opportunity to prepare his defense, and the procedure appears to have been in conformity with, rather than in violation of, the constitutional provision that provides that "in criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial." See § 13, Constitution of North Dakota. Section 10628 of the Compiled Laws of 1913 provides that "during each term of the district court held in and for any county or judicial subdivision in this state at which a grand jury has not been summoned and impaneled, the state's attorney of the county or judicial subdivision, or other person appointed by the court, as provided by law, to prosecute a criminal action, shall file an information or infor-

mations as the circumstances may require, respectively, against all persons accused of having committed a crime or public offense within such county or judicial subdivision or triable therein." This section certainly seems to contemplate that informations can be filed during, as well as at the beginning of, the term where no grand jury is in session nor called.

The third specification of error states that "the court erred in permitting S. M. Ferris, whose name was not indorsed on the information, to become a witness and give testimony in this case, for the reason that it was known to the state that he was a material witness prior to the filing of the information." There is, however, no merit in this assignment. The state's attorney positively testified that though he had known that the witness had been present at the defendant's place of business on the night of the raid, yet he had no knowledge that the witness had been at any time anywhere else than in the rear part of the premises, guarding the same on the outside, or that he had overheard the conversations which he was afterwards called upon to testify to, and that this information came to him later and immediately before the trial It is also shown that the attorney for the defendant was given due notice of the state's intention to call this witness.

Section 9794, Rev. Codes 1905, being § 10631, Compiled Laws of 1913, provides that "said state's attorney or person appointed to prosecute shall subscribe his name to said information and indorse or otherwise exhibit thereon the names of all witnesses for the prosecution known to him to be such at the time of the filing of the same, but other witnesses may testify, in behalf of the prosecution, on the trial of said action, the same as if their names had been indorsed upon the information." In the case of State v. Pierce, 22 N. D. 358, 133 N. W. 991, we held that "witnesses whose names are not indorsed on the information may be examined by the state on the trial of a criminal case, when the prosecution had no knowledge of the witnesses or of their knowledge of anything material to the issues prior to the filing of the information, and in the absence of a showing that the defendant was prejudiced thereby." See also State v. Albertson, 20 N. D. 512, 128 N. W. 1122. We can see no prejudice in the case at bar.

The fourth assignment of error takes exception to the introduction in evidence of the plaintiff's exhibit "M," which was a certified copy

of the record of special taxpayers and registers in the office of the collector of internal revenue for the states of North and South Dakota, which was certified to by James Coffey, collector for such district, and which record showed the payment by one H. E. Kilmer of 320 Fourth street, North, Bismarck, North Dakota, of a government tax as a retail malt-liquor dealer. The objection to this certificate was that it was incompetent, irrelevant, and immaterial, that it had not been properly identified; that it had not been properly authenticated as provided by law; that there was no law in the state to receive it in evidence, it not being a record of any office of the state of North Dakota, and that, if it were admitted to be the record which it purported to be, it was only a copy or memorandum not required by law to be kept, and that it did not refer to the premises of this defendant on which the state attempted to prove the maintenance of a common nuisance, the exhibit showing that the plaintiff's place therein described was 320 Fourth street North, which was not the property kept at the date alleged in the information; and, further, that there is nothing to show how long the license was in force, or that it was in force at the time of the commission of the alleged offense; also, that the introduction of such certificate would deprive the defendant of his constitutional right to meet the witnesses face to face, and that it was not a document or an authenticated copy of a document required by law to be kept, and was not properly identified.

There is no merit in the objection that the certified record does not describe the identical property nor for how long the license would continue. The evidence was certainly competent to show that the defendant was in the business of selling liquor in violation of the law in the state of North Dakota, and to that extent the evidenec was competent. Nor is there any merit in the contention that there was no proof that the H. E. Kilmer therein described was the H. E. Kilmer who was prosecuted. The presumption is that he was the same party. "It is an inference of fact that identity of name indicates an identity of person, and it has been held that the court itself will assume the inference to be correct, in the absence of evidence to the contrary." See 16 Cyc. 1055. People v. Rolfe, 61 Cal. 540; State v. Robinson, 39 Me. 150; State v. McGuire, 87 Mo. 642. And this presumption is augmented where both the surnames and the given names are identical,

where an appropriate initial is written out in full, or where there is other indentification. See 16 Cyc. 1055, note 41. It is true that this presumption may, according to some authorities, be overcome by a conflicting presumption of law, and that the presumption of innocence is one of these presumptions. The cases which are cited by counsel, however, do not appear to be in accord with the weight of authority nor with sound reason. See State v. McGuire, 87 Mo. 642; State v. Kelsoe, 76 Mo. 505; Gitt v. Watson, 18 Mo. 274; Flournoy v. Warden, 17 Mo. 435; Hendricks v. State, 26 Ind. 493; People v. Rolfe, 61 Cal. 540; Com. v. Norcross, 9 Mass. 492; Bogue v. Bigelow, 29 Vt. 179. There, too, are other statements in the record, such as residence, which tend to prove the identity.

The conclusion of the supreme court of Missouri, that where the names are identical it rests with the defendant to prove that they are not the same, certainly meets with our approval, and is in accordance with sound public policy. In addition to that, we have ¶ 25 of § 7936, Compiled Laws of 1913, which enumerates identity of person from identity of name among the denominational or disputable presumptions. This provision is found in the California Code, and is the basis of the decision in the case of People v. Rolfe, 61 Cal. 540, and distinguishes the law in this state from that which may prevail in some other jurisdictions.

Nor is there any merit in the contention that the certified record was not properly identified or authenticated. It was made by James Coffey, collector of internal revenue, district of North and South Dakota. It bore the seal of such collector. The trial court took judicial notice of the signature and seal of the collector of internal revenue, and was authorized to do so under subdivisions 20 and 73 of § 7938 of the Compiled Laws of 1913. Subdivision 8 of § 7919 of the Compiled Laws of 1913 provides that "documents in the departments of the United States government (may be proved) by certificate of the legal custodian thereof." Section 7918 provides that an entry made by an officer or board of directors, or under the direction or in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry. Section 7917 of the Compiled Laws of 1913 provides that entries in public or other official books or records made in the performance of his duty by a public officer of this state, or by an-

other person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein.

Nor is there any merit in the objection that the certified copy of the record was incompetent and irrelevant. Section 3238 of the United States Revised Statutes, Comp. Stat. 1913, § 5961, provides that "all special taxes imposed by law shall be paid by stamps denoting the tax." Section 3239 provides that "every person engaged in any business, avocation or employment who is thereby made liable to a special tax, except tobacco peddlers, shall place and keep conspicuously in his establishment or place of business all stamps denoting the payment of said special tax." Section 3240, United States Revised Statutes, provides that "each collector of internal revenue shall, under regulations of the Commissioner of Internal Revenue, place and keep conspicuously in his office for public inspection an alphabetical list of the names of all persons who shall have paid special taxes within his district and shall state thereon the time, place and business for which such special taxes have been paid." Section 10128, Compiled Laws of 1913, provides among other things that in actions or proceedings for the abatement of nuisances and "in all cases . . . the fact that any person engaged in any kind of business, has or keeps posted in or about his place of business a receipt or stamp showing payment of the special tax levied under the laws of the United States upon the business of selling distilled, malt or fermented liquors, or the *holding of a license* from the government of the United States in the name of any person, persons or corporation to sell intoxicating liquor shall be held and deemed prima facie evidence against such person, persons or corporation that he or they or it are keeping for sale and selling intoxicating liquors contrary to law."

There can be no doubt that the records of the collector of internal revenue are public records and are directed to be kept by the Federal Statutes. In the case of Miller v. Northern P. R. Co. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215, we held that a public record kept pursuant to the law of a sister state, when properly proved, is admissible in evidence in the courts of this state as prima facie proof of the facts therein recorded. If this is true of the records of a sister state it must be true of the records of the United States. It has been held in our sister state of South Dakota that the records of a postoffice are records kept

by a person in a public office, and this under the provisions of § 7917, Compiled Laws of 1913, which was enacted in territorial days and is common to both states, and provides that "entries in public or other official books or records make in the performance of his duty by a public officer of this state or by another person in the performance of a duty specially enjoined by law are prima facie evidence of the facts stated therein." It is quite clear from the statutes that the government receipt or license and the certified record are competent evidence. "Inasmuch," says the court in the case of McKnight v. United States, 61 C. C. A. 112, 122 Fed. 926, in referring to 54 C. C. A. 358, 115 Fed. 972, "as a defendant could not be compelled to produce any such criminating document, we held that neither notice nor demand to produce same was necessary, but that secondary evidence might be made in respect of any document which the evidence should show in the possession or under the control of the defendant." "It is said," says the supreme court of Michigan, in People v. Lalonde, 171 Mich. 286, 137 N. W. 74, "that this certificate was incompetent for the reason that there was no showing that the record itself could not have been produced; it being located in Detroit and within the jurisdiction of the court. The record which was certified by the internal revenue collector was one which he is required to keep by the laws of the United States. He is also required to furnish certified copies of the same to the prosecuting officers of any state, county, or municipality making application therefor. Section 3240, U. S. Rev. Stat., as amended by act of June 21, 1906, chap. 3509, 34 Stat. at L. 387, Comp. Stat. 1913, § 5963. The record itself would have been admissible on the question of the respondent's guilt (People v. Moore, 155 Mich. 107, 118 N. W. 742), and we can see no reason why a certified copy of the record should not be admissible when certified in accordance with our statute for the admission of public records, where the removal of them from their usual place of custody would work an inconvenience to the public service. Comp. Laws 1897, § 10169. We think the trial court was not in error in admitting the certificate." There can be no doubt, indeed, of the competency, relevancy, and materiality of the certified record. See also 23 Cyc. (c) 255 and notes 71 and 72; Daniel v. State, 11 Ga. App. 799, 76 S. E. 162; Hargrove v. State, 8 Okla. Crim. Rep. 487, 129 Pac. 74; Blunk v. State, 10 Okla. Crim. Rep.

203, 135 Pac. 946; State v. Shufeldt, 86 Kan. 975, 122 Pac. 895; Huckabee v. State, 7 Ga. App. 677, 67 S. E. 837; Anderson v. Com. 143 Ky. 87, 136 S. W. 134; State v. Donato, 127 La. 393, 53 So. 662; Strange v. State, 5 Ala. App. 164, 59 So. 691; Columbo v. State, 65 Tex. Crim. Rep. 608, 145 S. W. 910.

Nor is there any merit in the contention that the certified record does not state for how long the license was in force, or that it was in force at the time of the commission of the alleged offense. Section 3237 of the United States Revised Statutes, Comp. Stat. 1913, § 5960, provides that "all special taxes shall become due on the 1st day of July, 1891, and on the 1st day of July in each year thereafter or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year and in the latter case it shall be reckoned proportionally from the 1st day of the month in which the liability to a special tax commenced to the 1st day of July following." The courts of this state take judicial notice of the Federal Statutes. The information in the case at bar charged the defendant with maintaining a common nuisance "on the 11th day of April, 1914, and continuously from then to and including the 11th day of October, 1914." There is in the record positive testimony of the illegal sale of liquor by the defendant on the 4th day of June, 1914, and prior to the expiration of the year from the issuing of the license. No objection, therefore, can be taken to the certified record, on the ground that there is no showing that the same was in force at the time of the commission of the offense complained of.

Nor is there any merit in the objection to the certificate of the collector of internal revenues, James Coffey. The objection to the certificate is that it states that it shows "the issuance of United States special tax stamps, issued by this office during the year 1913 to the person foregoing named." This statement, it is claimed, amounts to nothing more nor less than testimony which is given by James Coffey, and which is not subject to cross-examination. The record, however, as we have before said, was admissible. It reads as follows:

"Record of Special Taxpayers and Registers, District of No. and So. Dakota. Name, Kilmer, H. E., Business, Retail Malt Liquor Dealer. Place, Bismarck, N. D. Street and number, 320–4th Street North. From what time, Oct. 1–1913. Amount of Tax, $15. Date of pay-

ment or Issue of Certificate, Oct. 27, 1913. Serial No. of Stamp, 9936. Filing No. Form 11, 1624."

—and has attached to it the following certificate:

"I the undersigned duly appointed and qualified collector of internal revenue for the states of North and South Dakota do hereby certify that the above and foregoing is a true and accurate exemplification and copy of the public record now on file and remaining on file in my office at Aberdeen, in the state of South Dakota, showing the issuance of United States special tax stamps issued by this office during the year 1913 to the person foregoing named; that I have compared the same with the original public record aforesaid, and find the same to be a literal copy thereof. In testimony whereof I hereby attach my hand and seal this 27—day of January, 1914, at my office at Aberdeen, state of South Dakota. James Coffey,

"Collector of Internal Revenue,

"District of North & South Dakota (Seal)."

It will be seen from the body of this record, independently of the certificate, that a tax of $15 was paid for the business of retail malt liquor dealer by one H. E. Kilmer. The words in the certificate which are objected to proved no more, and are merely surplusage.

We are not unaware of the decision of this court in the case of State v. Gottlieb, 21 N. D. 179, 129 N. W. 460, and which at first glance may appear to announce a doctrine contrary to that herein held. In that case, however, there was no attempt to introduce in evidence a certified copy of the records of the office of the collector of internal revenue. The exhibit which was excluded consisted merely of a certified list of special taxpayers in Wells county, which was furnished by the collector of internal revenue to the county auditor of such county and filed by him. The record so sought to be proved was not the record of the office of the collector of internal revenue, but was a record of the office of the county auditor. This court held that there was no law making such a list or record a record in the auditor's office, and that the list was therefore inadmissible. It also held that it could not be introduced as an official certificate of the collector, as it did not "purport to be a certified copy of any official record in his office, but merely a certificate by him of the existence of certain facts as shown by his records." These

considerations do not appear in the case at bar. Here the exhibit is a certified copy of the records in the office of the collector of internal revenue, and is certified by the collector of internal revenue to be such.

The judgment of the District Court is affirmed.

SECURITY STATE BANK, a Corporation v. STATE BANK OF BRANTFORD, NORTH DAKOTA.

(154 N. W. 282.)

Certified check — indorsement — bank — designation of — pleading — names of parties — demurrer.

1. Where a check is certified, "Good when properly indorsed," and is persented for payment by the Security State Bank of Brantford, North Dakota, but is indorsed "Security State Bank," and an action is brought on such certificate by "Security State Bank, a corporation," and the complaint alleges that the plaintiff is a duly organized and authorized banking corporation, an objection is not raised by general demurrer which is based upon the contention that there may have been other banks of the same name, and that the words, "of Brantford, North Dakota," should have been added to the indorsement and to the name of the plaintiff in the title to the action.

Complaint — objection to — demurrer — indorsement of certified check — name — drawee — use of rubber stamp — signature.

2. Where a check is certified, "Good when properly indorsed," and is presented for payment by the Security State Bank of Brantford, North Dakota, but is indorsed "Security State Bank," and an action is brought on such certificate by Security State Bank, a corporation, and the complaint alleges that the plaintiff is a duly organized and authorized banking corporation, an objection is not raised by a general demurrer that the indorsement was made by means of a rubber stamp, the complaint alleging that the check was properly indorsed by the plaintiff and presented to the defendant for payment, and also showing that the defendant was the drawee bank.

Certified check — drawee — suit against — bank — protest fees — domestic checks — bills of exchange — complaint — demurrer.

3. Where a suit is brought on a certified check against the drawee bank for an amount which covers protest fees as well as the amount of the check, the fact that protest fees are not authorized by statute on domestic checks and bills of exchange will not render the complaint vulnerable to a general demurrer.

Certified check — by drawee bank — makers — deposit by — sufficient to meet check — immaterial as to certifying bank.

4. Where a check is certified by the drawee bank it is immaterial whether the makers of the check had a deposit in the bank sufficient to meet the same or not in so far as the liability of the certifying bank is concerned.

Opinion filed September 16, 1915.

Appeal from the District Court of Eddy County; *Buttz,* J. Action to recover on certified check. Demurrer. Judgment for plaintiff overruling demurrer. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J.

The complaint in this case alleges that "the plaintiff now is, and during all the times hereinbefore mentioned has been, a corporation organized and existing under and by virtue of the laws of the state of North Dakota, and authorized to do business as a bank of discount and deposit at Brantford, North Dakota, that the defendant is also a bank of deposit; that at Brantford, North Dakota, between the 20th day of May, 1913, and the 17th day of June, 1913, the plaintiff bought and received in the due and regular course of business certain checks drawn upon defendant, and paid therefor the different sums specified on said checks, amounting in all to the sum of $300.60, of which checks the following are copies." Here follow copies of numerous checks drawn upon the defendant bank at Brantford, made payable to different parties and bearing various indorsements, and a number of which are indorsed by the last indorsee prior to the plaintiff bank in blank, one of which is indorsed by such last indorser, and one or two of which are indorsed payable to the order of any bank or banker. All of these checks are finally indorsed "Security State Bank," and below these indorsements appears the following: "6–10–13. 'Good,' when properly indorsed. P. A. Vanderkhoff, Asst. Cr." The complaint then alleges that "thereafter on the date stated in the indorsement on the said checks the defendant, by its duly authorized agent and assistant cashier, P. A. Vanderkhoff, in writing, accepted said checks to be good when properly indorsed; that said checks had been properly indorsed by the plaintiff and presented to said defendant for payment, and pay-

ment was refused; that the plaintiff is the owner and holder of said checks; that there is now due thereon the sum of $300.60, with interest thereon; that on the 18th day of June, 1913, the plaintiff caused said checks to be protested for nonpayment, and paid and expended for protest fees thereon the sum of $22.50, no part of which has been paid, wherefore the plaintiff demands judgment for the sum of $326.10," etc. To this a demurrer was interposed "on the grounds and for the reasons that upon the face of the complaint it affirmatively appears: (1) That the court has no jurisdiction of the subject-matter of the action; (2) that the complaint fails to state facts sufficient to constitute a cause of action."

This demurrer was overruled, and from the order overruling the demurrer this appeal is taken.

Maddux & Rinker, for appellant.

"Where the holder of an instrument payable to his order transfers it for value, without indorsing it, the transferee acquires the right to have the indorsement of the transferrer." Comp. Laws 1913, § 6351.

"A person not a party to an instrument who places his signature thereon before delivery is liable as an indorser." Comp. Laws 1913, § 6366.

"An indorser is liable to all subsequent parties." Comp. Laws 1913, § 6366, subdiv. 1.

When the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder. Comp. Laws 1913, § 6386; National Bank v. Millard, 10 Wall. 152, 19 L. ed. 897; 5 Am. & Eng. Enc. Law, note p. 1062; Marine Bank v. Fulton County Bank, 2 Wall. 252, 17 L. ed. 785; Thompson v. Riggs, 5 Wall. 663, 18 L. ed. 704.

There is no foundation for an action on the part of the holder against the bank, unless there is a privity of contract between him and the bank. The bank owes no duty and is under no obligation to the holder. The holder takes the check on the credit of the drawer in the belief that he has funds in the bank to meet it. The bank did not contract with the holder of the check to pay it, at the time it was given, and owes him no duty until the check is accepted. Atty. Gen. v. Continental L. Ins. Co. 71 N. Y. 325, 27 Am. Rep. 55; Dickinson v. Coates, 79 Mo. 251, 49 Am. Rep. 228; Hopkinson v. Forster, L. R. 19 Eq. 74, 23 Week.

Rep. 301, 3 Eng. Rul. Cas. 755; Rosenthal v. Mastin Bank, 17 Blatchf. 322, Fed. Cas. No. 12,063; 2 Dan. Neg. Inst. 4th ed. ¶ 1639.

A qualified acceptance in express terms varies the effect of the bill or check. Comp. Laws 1913, § 6441.

In this case the certificate of the drawee bank, "good when properly indorsed," is but a qualified acceptance. A cashier by virtue of his office is authorized to collect checks in accordance with usage and custom. Rev. Codes 1905, §§ 6444, 6451, 6452, 6453, 6513, Comp. Laws 1913, §§ 7027, 7033a, 7034, 7035, 7095; 1 Michie, Banks & Bkg. p. 719, 720.

The indorsement must be in the full, complete name of the corporation, and no part of the corporate name can be omitted. It is of great moment that indorsements be so made. The checks might be forged and the bank of deposit pay them. In such case the bank of deposit can recover against the indorsers. First Nat. Bank v. Bank of Wyndmere, 15 N. D. 299, 10 L.R.A.(N.S.) 49, 125 Am. St. Rep. 588, 108 N. W. 546; Canadian Bank v. Bingham, 46 Wash. 657, 91 Pac. 185; National Bank v. National Mechanics' Bkg. Asso. 55 N. Y. 211, 14 Am. Rep. 232; Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564, 63 L.R.A. 245, 96 Am. St. Rep. 169, 73 Pac. 456.

A corporation can only sue in the name and style given to it by law. Porter v. Nekervis, 4 Rand. (Va.) 359; 3 Thomp. Corp. 2d ed. p. 3181; Rev. Codes 1905, §§ 4637, 4639, subdiv. 1, 4, Comp. Laws 1913, §§ 5148, 5150.

James A. Manley, for respondent.

The acceptance of the checks by defendant, "good when properly indorsed," binds defendant to honor and pay them when so presented, and such is true in the case at bar.

Plaintiff's real and complete name is "Security State Bank," and its location or place of business is Brantford, North Dakota, and indorsement consists of the "signature of the indorser without additional words." Anderson's Law Dict. p. 681; Rev. Codes 1905, §§ 6333, 6493, Comp. Laws 1913, §§ 6916, 7075.

The acceptor of the checks engages that he will pay them according to the tenor of his acceptance, and admits the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw them, and the existence of the payee, and his then capacity to

indorse. Rev. Codes 1905, § 6364, Comp. Laws 1913, § 6947; 5 Am. & Eng. Enc. Law, 2d ed. 1053; Robson v. Bennett, 2 Taunt. 389, 11 Revised Rep. 614; First Nat. Bank v. Currie, 147 Mich. 72, 9 L.R.A. (N.S.) 701, 118 Am. St. Rep. 537, 110 N. W. 499, 11 Ann. Cas. 241; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008.

BRUCE, J. (after stating the facts as above). The first ground which is urged for a reversal by defendant and appellant is that the indorsement by the plaintiff bank was merely "Security State Bank," when the indorsement should have been "Security State Bank of Brantford, North Dakota." There is evidently no merit in this objection, at least on demurrer. The action is brought in the name of the Security State Bank; the complaint alleges that the plaintiff is a duly organized and authorized banking corporation, and, if it has any other name, such does not appear upon the face of the complaint, and the point could certainly not be raised by general demurrer.

The next objection is that the indorsement of the "Security State Bank was made by means of a rubber stamp." Whether this is true or not does not appear on the face of the complaint or in the record which is before us, and the sufficiency of the rubber stamp is therefore not presented to us. In addition to this fact is the fact that the complaint states that the checks were properly indorsed by the plaintiff and presented to the said defendant for payment, and the complaint also shows that the defendant was the drawee bank. "A 'proper indorsement' as used with reference to an indorsement on a negotiable instrument means such indorsement as the law merchant requires in order to authorize payment to the holder. If presented by the original payee no indorsement would be proper, or at least necessary. If presented by another, a proper indorsement to show such other's title would be requisite. Kirkwood v. First Nat. Bank, 40 Neb. 484, 24 L.R.A. 444, 42 Am. St. Rep. 683, 58 N. W. 1016, 1018." 6 Words & Phrases, 5691. There is no claim that the indorsements prior to that of the Security State Bank were in any way irregular, and the indorsement of such Security State Bank, under the circumstances of the case, was not necessary to show the title of the plaintiff or to the payment. The complaint shows an indorsement, "Security State Bank." The de-

murrer does not show or specify any defect in this indorsement. It is quite common for officers of corporations to affix their names to the signature of such corporations, and it would have been perfectly proper for the plaintiff to have indorsed the check, "Security State Bank, by ———— President or Cashier," etc., as the case might be. We know of no statute or common-law holding, however, which makes the name of an officer of such corporation necessary to the signature or indorsement of the corporation. As far as we can read the certificate of the defendant bank, it was that the check was good when properly indorsed. In other words, that it was accepted as regards the plaintiff and all subsequent transferees who should hold it by proper indorsement. There is nothing which would in any manner seem to question the regularity of the indorsements appearing thereon at the time of its presentment for certification. The defendant says in his brief that "the indorsements were made with a rubber stamp. The cashier of the State Bank refused to accept or pay the checks unless the Security State Bank would properly indorse them, which request was refused. The State Bank, drawee, then caused each check to be indorsed in these words, "good when properly indorsed." Whether this is true, or not, however, we do not know. We presume that a bank is not required to certify or to honor a check, and cannot be held liable by the payee or indorsees of such check for such refusal. National Bank v. Millard, 10 Wall. 152, 19 L. ed. 897; 5 Am. & Eng. Enc. Law, 1062. Not being compelled to certify a check, the defendant may certify them on any condition that it pleases, and no doubt in the case at bar could have refused to certify or pay the checks unless the indorsement of the Security State Bank was in writing, or at any rate accompanied by the signature of one of the officers thereof. This defense, however, is not raised by the demurrer. There is, as we said before, nothing in the demurrer about a rubber stamp, or concerning any refusal of the defendant to accept or pay the check unless some other indorsement was made.

We realize that the North Dakota statute provides that "the name assumed by such (banking) association shall not be the name of any other bank in the state." See subdivision 1, § 4637, Rev. Codes 1905, being subdivision 1 of § 5148 of the Compiled Laws of 1913. Even, however, if there were other banks in the state of the same name,

this fact would not protect the plaintiff bank from its liability on its indorsement, nor have we anything before us to show which of the numerous banks, if numerous banks there are of the same name, was first incorporated.

A claim is also made that protest fees are not authorized by statute on domestic checks or bills of exchange. This fact, however, if fact it be, does not render the complaint vulnerable on a general demurrer, but would only cut down the amount of the judgment. Defendant also contends that the complaint does not allege that the drawers of the various checks had sufficient credit in the defendant bank to cover the same. This allegation we believe to be unnecessary. The suit is brought upon the defendant bank's contract of acceptance, and if the acceptance was once made and regular, in other words, if the checks were properly certified, it is immaterial whether the drawers thereof had deposits or not. First Nat. Bank v. Currie, 147 Mich. 72, 9 L.R.A.(N.S.) 701, 118 Am. St. Rep. 537, 110 N. W. 499, 11 Ann. Cas. 241.

The judgment of the District Court is affirmed.

SECURITY STATE BANK v. FIRST STATE BANK OF BRANTFORD.

(154 N. W. 284.)

Opinion filed September 16, 1915.

Appeal from the District Court of Eddy County; *Buttz*, J. Action to recover on a certified check. Demurrer.

Judgment for plaintiff overruling demurrer. Defendant appeals. Affirmed.

Maddux & Rinker for appellant.

James A. Manley for respondent.

PER CURIAM: This case is controlled by the decision in the case of Security State Bank v. State Bank, ante, 454, 154 N. W. 282.

The judgment of the District Court is affirmed.

J. E. GRAY, as Trustee of James P. Johnson, Bankrupt, v. E. G. ARNOT, as Sheriff of Walsh County, North Dakota.

(154 N. W. 268.)

Bankruptcy — judgments — attachments — levies — legal proceedings — within four months of filing petition — adjudged bankrupt — void — contractual liens — in good faith — unaffected.

1. The language of § 67 of the bankruptcy act of 1898, which provides that "levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt,"—relates merely to levies, judgments, attachments, and liens which are acquired through legal proceedings, and does not affect contractual or quasi contractual liens. A scrupulous care, indeed, is evidenced throughout the act to save all such rights and liens which are obtained in good faith from the bankrupt.

Sale of goods — action for purchase price — attachment — bankruptcy —petition filed in — attachment — proceedings nullified.

2. Where within four months of the filing of a petition in bankruptcy an action is brought by the vendor of goods to recover the purchase price of the same, and as subsidiary to such action an attachment is issued and levied against such goods, under the provisions of § 6938, Rev. Codes 1905, being § 7537 of the Compiled Laws of 1913, the lien of such attachment and of the judgment rendered in such attachment proceedings is nullified by the petition.

Good sold — vendor — lien of — attachment.

3. A vendor in North Dakota has, after a delivery to the vendee, no lien upon the goods sold, for the purchase price, except by virtue of the levy of an attachment under the provisions of § 6938, Rev. Codes 1905, being § 7537, Comp. Laws 1913.

Vendor of goods — action for purchase price — attachment — bankruptcy — trustee in — cannot intervene — recovery of goods — right of title —trial of.

4. Where an action is brought by the vendor of goods to recover the purchase price thereof, and an attachment is issued and levied on such goods in said proceeding, and within four months of the bringing of such action a petition in bankruptcy has been filed, the trustee in bankruptcy has no right or power to intervene in the action in order to gain the possession of the

goods. The action being for money merely, and the lien of the attachment having been nullified by the filing of the petition in bankruptcy, such trustee cannot, by filing a petition in intervention, transform the action into one for the recovery of goods or for the trial of the right of title thereto.

Bankruptcy — trustee in — possession of property — action for — state courts.

5. The trustee of a bankrupt estate may bring an action in the state courts in order to gain possession of property which belongs to the estate.

Goods sold — action for price — attachment — goods sold under — recovery of — by trustee.

6. Where an attachment proceeding and the lien thereof have been nullified by the filing of a petition in bankruptcy, the trustee will not be precluded from recovering the possession of the property by the mere fact that after the filing of such petition the goods have been sold under such attachment proceedings.

Lien of attachment — nullified — goods — custodia legis — sheriff — involuntary bailee — for trustee in bankruptcy.

7. After the lien of an attachment has been nullified by the filing of a petition in bankruptcy, the goods can no longer be said to be *in custodia legis*, so that an action against the sheriff for the possession thereof cannot be maintained. After the nullification of such lien of attachment, the sheriff holds merely as an involuntary bailee for the benefit of him who is entitled to the possession of the goods, and who in such case is the trustee in bankruptcy.

Opinion filed September 16, 1915.

Appeal from the District Court of Walsh County, *Kneeshaw*, J.

Action in claim and delivery to obtain the possession of personal property. Judgment for plaintiff. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an action in claim and delivery, which is brought by the trustee in bankruptcy of an insolvent debtor for the possession of certain personal property which he claims belongs to the estate.

On the 14th day of February, 1911, Bristol & Sweet Company, a corporation, brought an action in the district court of Cass county against the defendant James P. Johnson, of Grafton, North Dakota, to recover the purchase price of certain merchandise theretofore sold to the said Johnson. The complaint describes the property, and alleges that the defendant "had the same on hand." Accompanying this complaint, and on the same day, there was filed in the district court an

affidavit and undertaking in attachment, and afterwards and on the same day a warrant of attachment was issued. The affidavit for attachment, among the other statutory grounds, stated that the action was brought to recover the purchase money of the goods described, and the same statement was made in the complaint. The warrant of attachment was levied on the 16th day of February, 1911, and the goods taken into the sheriff's hands, the goods at the time of the levy being in the possession of the defendant Johnson. On the 18th day of March, 1911, a demurrer was interposed by the defendant Johnson, and later a motion for a change of venue was made, which motion was denied, and which demurrer was overruled, and the defendant was declared in default, and judgment rendered against him for the amount prayed for in the complaint, and so much of the property as was necessary was ordered to be sold to satisfy the judgment. There is no record of any motion having been made for leave to answer before the judgment was rendered. On the 4th day of April, 1911, this judgment was docketed, and the sheriff continued to hold possession of the property until the fall of 1911, when the said sheriff sold the property for considerably less than plaintiff's claim. Meanwhile, and on the 17th day of February, 1911, that is to say, some three days after the bringing of the action by Bristol & Sweet Company, and two days after the warrant of attachment came into the hands of the sheriff, and one day after he had made his levy thereunder, and a month or so before the docketing of the judgment in the action, the defendant in the action, James P. Johnson, filed a petition in bankruptcy in the district court of the United States for the northern district of North Dakota, and in which said petition the said Johnson listed all of his property, including the property attached, claiming that the same did not exceed in value $1,000, and alleged, among other things, that he was a married man and the head of a family, and that said property was exempt. On the 11th day of March, one J. E. Gray was elected trustee in bankruptcy, and duly qualified on the 18th day of March, 1912, and thereupon caused a notice to be given to the defendant E. G. Arnot, the sheriff of Walsh county, and made a demand for the property heretofore described, which demand the sheriff ignored; and on the 17th day of April, 1912, the said trustee, the present plaintiff, brought this action in justice court for the possession of the

same. Judgment was rendered in his favor, and the defendant appealed to the district court. Judgment again being had for the plaintiff, this appeal has been taken. There is evidence that none of the property described in the complaint was set apart to the said Johnson as exempt, and that the same is in no way exempt to him under the laws of the state of North Dakota. There is also evidence that, prior to the levy by the sheriff and the filing of the petition in bankruptcy, that is to say, on the 14th or 15th day of February, 1911, the said sheriff consulted the trustee as a lawyer as to whether the warrant of attachment was all right and regular; that the said Gray told him if he had the papers to go along and serve them.

A. C. Lacy, for appellant.

Where property is attached, and within four months thereafter the debtor is declared a bankrupt, and his trustee asserts no right to the property in said attachment proceeding, it is immaterial, as between the attaching creditor and the bankrupt, whether the trustee in bankruptcy has or had a valid title to the property, as the debtor has no other right or title to the property than he had when he filed his petition in bankruptcy, at which time it was subject to attachment. Rochester Lumber Co. v. Locke, 72 N. H. 22, 54 Atl. 705; in Re Durham, 104 Fed. 231.

The trustee in bankruptcy is a purchaser of the property of the bankrupt, and he acquires only the title of the bankrupt, and can sell only such title as the bankrupt had. F. A. Ames Co. v. Slocomb Mercantile Co. 166 Ala. 99, 51 So. 994; Re Peacock, 178 Fed. 851.

The assignee of a bankrupt takes the property subject to all liens to which it was subject while in the hands of the bankrupt. Clason v. Morris, 10 Johns. 524; Phillips v. Helmbold, 26 N. J. Eq. 202; Blank v. Blank, 124 La. 832, 50 So. 745; Union Brewing Co. v. Inter-State Bank & Trust Co. 240 Ill. 454, 88 N. E. 997; Under bankruptcy act 1898, 30 Stat. at L. 566, chap. 541, § 70b; Bennett v. Ætna Ins. Co. 201 Mass. 554, 131 Am. St. Rep. 414, 88 N. E. 335; Walter A. Wood Co. v. Eubanks, 95 C. C. A. 273, 169 Fed. 929.

The trustee is invested with no better title than the bankrupt had. Loveland, Bankr. 3d ed. § 175; Norcross v. Nathan, 99 Fed. 414; Rev. Codes 1905, § 6938; subd. 8, Comp. Laws, 1913, § 7537.

The Federal courts will neither interfere with property in the lawful possession of state courts, nor tolerate interference by the state courts with property in their custody. Rock Island Plow Co. v. Western Implement Co. 21 N. D. 608, 132 N. W. 351; Re Russell, 41 C. C. A. 323, 101 Fed. 248.

A state court is not devested of jurisdiction of an action to enforce a specific lien on property of a debtor, by the debtor's being adjudged a bankrupt pending the action, or by failure of the trustee in bankruptcy to intervene. Vance v. Lane, 26 Ky. L. Rep. 618, 82 S. W. 297; Black, Bankr. 66; Loveland, Bankr. 278; Brandenburg, Bankr. 183; Metcalf Bros. v. Barker, 187 U. S. 165, 173, 47 L. ed. 122, 126, 23 Sup. Ct. Rep. 67; Frazier v. Southern Loan & T. Co. 40 C. C. A. 76, 99 Fed. 707; Pickens v. Dent, 45 C. C. A. 522, 106 Fed. 653; Rock Island Plow Co. v. Western Implement Co. 21 N. D. 608, 132 N. W. 351.

The bankrupt law does not devest state courts of jurisdiction. There is nothing in the act which sanctions anything to the contrary. Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; Burbank v. Bigelow, 92 U. S. 179, 183, 23 L. ed. 542, 543.

The filing of a petition in bankruptcy is not a caveat, injunction, or attachment against holders of prior liens or titles. Rathman v. Booth, 106 C. C. A. 253, 183 Fed. 914; Mueller v. Nugent, 184 U. S. 1, 14, 46 L. ed. 405, 411, 22 Sup. Ct. Rep. 269, 275; Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; Jerome v. McCarter, 94 U. S. 734, 740, 24 L. ed. 136, 139; Reynolds v. Pennsylvania Oil Co. 150 Cal. 629, 89 Pac. 610.

A trustee failing to intervene in an action pending against a bankrupt is bound by the judgment in such action. Va. 1911, Under bankruptcy act, July 1, 1898, 30 Stat. at L. 544, chap. 541; Heckscher v. Blanton, 111 Va. 648, 37 L.R.A(N.S.) 923, 69 S. E. 1045; Brown v. Wygant, 163 U. S. 618, 623, 41 L. ed. 284, 286, 16 Sup. Ct. Rep. 1159; Kessler v. Herklotz, 132 App. Div. 278, 117 N. Y. Supp. 45; Remington, Bankr. §§ 1640–1644; Griffin v. Mutual L. Ins. Co. 119 Ga. 664, 46 S. E. 870; Herring v. Downing, 146 Mass. 10, 15 N. E. 116; Thatcher v. Rockwell, 105 U. S. 469, 26 L. ed. 949; Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417; Vance v. Lane, 26 Ky. L. Rep. 619, 82 S. W. 297; Black, Bankr. 66; Loveland, Bankr. 278; Brandenburg,

Bankr. 183; Collier, Bankr. 7th ed. 222; Hubbard v. Gould, 74 N. H. 25, 64 Atl. 668; Hahlo v. Cole, 112 App. Div. 636, 98 N. Y. Supp. 1049; Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; Norton v. Switzer, 93 U. S. 355, 23 L. ed. 903; Jerome v. McCarter, 94 U. S. 734, 737, 24 L. ed. 137, 138; Frazier v. Southern Loan & T. Co. 40 C. C. A. 76, 99 Fed. 707; Burbank v. Bigelow, 92 U. S. 179, 183, 23 L. ed. 542, 543; Re Klein, 97 Fed. 31; Weaver Mercantile Co. v. Thurmond, 68 W. Va. 530, 33 L.R.A.(N.S.) 1061, 70 S. E. 126, 3 N. C. C. A. 1.

Where a court has jurisdiction, it has the right to decide every question which arises in the cause; and whether its decision be correct or not, its judgment, until reversed, is binding in every other court. Metcalf Bros. v. Barker, 187 U. S. 165, 174–176, 47 L. ed. 122, 126–128, 23 Sup. Ct. Rep. 67; Frazier v. Southern Loan & T. Co. 40 C. C. A. 76, 99 Fed. 707.

Gray & Myers, for respondent.

A lien for the purchase price of personal property sold and delivered does not exist in this state, merely by force of the exemption statutes, or by reason of any other law. It is the levy upon the property, either under attachment or execution, and while such property is still in the hands of and owned by the original vendee, that gives the lien. Northern Shoe Co. v. Cecka, 22 N. D. 635, 135 N. W. 177.

Where property has been levied upon under attachment within four months prior to the debtor's adjudication in bankruptcy, the attachment is annulled by the filing of petition in bankruptcy by the debtor and his adjudication as a bankrupt; and any lien brought into existence by the attachment is dissolved, and the title to the property vests at once in his trustee in bankruptcy. Bankruptcy act 1898, § 67f; Clarke v. Larremore, 188 U. S. 486, 47 L. ed. 555, 23 Sup. Ct. Rep. 363; First Nat. Bank v. Staake, 202 U. S. 141, 50 L. ed. 967, 26 Sup. Ct. Rep. 582; Re Wilkes, 112 Fed. 975; Staunton v. Wooden, 102 C. C. A. 355, 179 Fed. 61; Goodnough Mercantile Co. v. Galloway, 48 Or. 239, 84 Pac. 1049; Watschke v. Thompson, 85 Minn. 105, 88 N. W. 263; Hall v. Chicago, B. & Q. R. Co. 88 Neb. 20, 128 N. W. 645; Cavanaugh v. Fenley, 94 Minn. 505, 110 Am. St. Rep. 382, 103 N. W. 711; Alexander v. Wilson, 144 Cal. 5, 77 Pac. 706; Dittemore v. Cable Mill. Co. 16 Idaho, 298, 133 Am. St. Rep. 98, 101 Pac. 593;

Bank of Garrison v. Malley, 103 Tex. 562, 131 S. W. 1064; D. C. Wise Coal Co. v. Columbia Lead & Zinc Co. 123 Mo. App. 249, 100 S. W. 680; Wallace v. Camp, 200 Pa. 220, 49 Atl. 942; Wood v. Carr, 115 Ky. 303, 73 S. W. 762; Armour Packing Co. v. Wynn, 119 Ga. 683, 46 S. E. 865.

The provision of our bankruptcy law is similar in effect to general insolvency laws, and operates *ipso facto* to dissolve the attachment. Baum v. Rapheal, 57 Cal. 361; Cerf v. Oaks, 59 Cal. 132; Lynch v. Roberts, 57 Md. 150; O'Neil v. Harrington, 129 Mass. 591; Lincoln v. Leshure, 132 Mass. 40; Nelson v. Winchester, 133 Mass. 435; Gay v. Raymond, 140 Mass. 69, 2 N. E. 782; Wright v. Dawson, 147 Mass. 384, 9 Am. St. Rep. 724, 18 N. E. 1; Wright v. Morley, 150 Mass. 515, 23 N. E. 232; North Star Boot & Shoe Co. v. Lovejoy, 33 Minn. 229, 22 N. W. 388; Wheelock's Petition, 18 R. I. 463, 28 Atl. 966; Bank of American Loan & T. Co. v. Burdick, 18 R. I. 481, 28 Atl. 967; Baldwin v. Buswell, 52 Vt. 57; Palmer v. Woodward, 28 Conn. 248; Johnson v. Bray, 35 Minn. 248, 28 N. W. 504; Owen v. Roberts, 81 Me. 439, 4 L.R.A. 229, 17 Atl. 403.

Such was the holding of the courts under the bankruptcy act of 1867. Duffield v. Horton, 73 N. Y. 219; Miller v. Bowles, 58 N. Y. 253.

Under such statutory provisions, the attachment becomes dissolved without the assistance or necessity of any order of the court out of which it issued. King v. Loudon, 53 Ga. 64; Duffield v. Horton, supra; Tichenor v. Coggins, 8 Or. 270; Sullivan v. Rabb, 86 Ala. 433, 5 So. 746; Conner v. Long, 104 U. S. 228, 26 L. ed. 723; Chapman v. Brewer, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799; International Bank v. Sherman, 101 U. S. 403, 25 L. ed. 866; Bracken v. Johnston, 4 Dill. 518, Fed. Cas. No. 1,761; Hill v. Harding, 93 Ill. 77; Barker v. McLeod, 14 Nev. 148; Johnson v. Bray, 35 Minn. 248, 28 N. W. 504; Weisenfeld & Co. v. Mispelhorn, 5 W. Va. 46.

The dissolution of the attachment lien operates to render the sheriff an involuntary bailee of the property for the owner; that is, his continued possession of the property would be the possession of the owner. 4 Cyc. 808 and 809; Rev. Codes 1905, § 6963, Comp. Laws 1913, § 7562.

As against the bankrupt's trustee, the holding of the property by the sheriff, under such circumstances, would not be an adverse holding. Re Francis-Valentine Co. 36 C. C. A. 499, 94 Fed. 793.

The mere refusal of the sheriff to surrender the attached property does not render him an adverse claimant. Staunton v. Wooden, 102 C. C. A. 355, 179 Fed. 61.

The question of the right of title to property is not here involved. The property in question belonged to the bankrupt; upon his adjudication as a bankrupt, the title thereto at once vested in his trustee, who was then entitled to the physical possession of the same; and the form of this action represents the proper remedy. The moment the attachment was annulled and dissolved, that moment the property ceased to be in the custody of the law; and upon the sheriff's failure to surrender the same, replevin would lie. Ranft v. Young, 21 Nev. 401, 32 Pac. 490; Anderson v. Nunan, 5 Wash. 493, 34 Am. St. Rep. 875, 32 Pac. 107; Re Walsh Bros. 159 Fed. 560.

That portion of the judgment in the attachment suit, ordering the property in question to be sold by the sheriff to satisfy the money judgment rendered therein, was and is wholly void. The court had no jurisdiction, and such judgment, to that extent, is open to collateral attack. King v. Louden, 53 Ga. 64; D. C. Wise Coal Co. v. Columbia Lead & Zinc Co. 123 Mo. App. 249, 100 S. W. 680; Re Beals, 116 Fed. 530; Re Goldberg, 121 Fed. 581; Lehman S. & Co. v. E. Martin & Co. 132 La. 231, 61 So. 212.

The complaint in the action in which the attachment was issued contains no allegation as to the purchase price of the goods sold, nor is any issue as to that fact tendered by such pleading; nor is a judgment in such form demanded. The judgment is simply for money on a debt, and was entered by default. The plaintiff there was only entitled to such relief as he had demanded in his complaint. Sobolisk v. Jacobson, 6 N. D. 175, 69 N. W. 46; Jewett Bros. v. Huffman, 14 N. D. 110, 103 N. W. 408; Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49; Rev. Codes 1905, § 7680, Comp. Laws 1913, § 8315; Sache v. Wallace (Sache v. Gillette) 101 Minn. 169, 11 L.R.A.(N.S.) 803, 118 Am. St. Rep. 612, 112 N. W. 386, 11 Ann. Cas. 348.

BRUCE, J. (after stating the facts as above). There can be no ques-

tion that the defendant in this action can place no reliance on the lien of the attachment nor upon the judgment which was rendered in the action in which the attachment was issued. The language of § 67 of the bankruptcy act of 1898 is too clear to admit of any dispute. It expressly provides that "levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt," etc. [30 Stat. at L. 565, chap. 541]. There is no dispute that the levy and judgment were made and rendered within the time mentioned in the statute, and that said James P. Johnson was in fact a bankrupt.

The statute mentioned, however, relates merely to levies, judgments, attachments, and liens which are acquired through *legal proceedings*. It certainly does not by its terms, and in all logic and justice cannot be held, to affect contractual liens or quasi contractual liens or rights, except perhaps as to matters of procedure. "A most scrupulous care is in fact evinced throughout § 67 of the bankruptcy act of 1898 to save all rights and liens obtained in good faith from the bankrupt." See 3 R. C. L. 298.

But had the Bristol & Sweet Company, and has the sheriff now, any such lien? We think not. Plaintiff had no lien except by virtue of the levy of attachment. The Code nowhere gives a special lien to a vendor of chattels, after a delivery to his vendee, except as he may acquire such lien by the levy of an attachment or execution in an action to recover the purchase price, and that attachment being rendered null and void by the Federal statute, no such lien can be deemed to exist, or in fact to ever have existed. Northern Shoe Co. v. Cecka, 22 N. D. 631, 635, 135 N. W. 177.

Nor was the plaintiff precluded from bringing the present action by reason of the fact that he had not intervened in the action of Bristol & Sweet Company v. Johnson. That action could not, in any view of the case, be deemed to have been an action for the possession of the property, nor to try the title thereto. Not only was it fundamentally an action for

the recovery of money, and not only was the attachment merely subsidiary thereto, but the lien of the writ or warrant of attachment having been nullified by the filing of the petition in bankruptcy, nothing thereafter remained in the action and for adjudication but the money claim, and this, even if we concede that there was a personal service or appearance in the case. The plaintiff therefore could not have intervened even if he had desired. He could not turn an action for money only into an action for the recovery of personal property or to try the title thereto. Jewett Bros. v. Huffman, 14 N. D. 110, 103 N. W. 408.

Nor was the trustee precluded from bringing the present action in the state court. It may be possible that an application to the bankruptcy court for a summary order to the sheriff to turn over the property might have been a proper remedy, but we find no statute or rule of law which in terms prescribes such a procedure, or in any way makes it exclusive.

Nor is there any merit in the contention that the sheriff held the property under the judgment of the district court and its order to sell. It is sufficient to say that it was not sold, and that the rights of no innocent third party were involved until after the lien of the attachment and the judgment had been nullified by the filing of the petition in bankruptcy. King v. Loudon, 53 Ga. 64; D. C. Wise Coal Co. v. Columbia Lead & Zinc Co. 123 Mo. App. 249, 100 S. W. 680; Re Beals, 116 Fed. 530; Re Goldberg, 121 Fed. 581; Lehman, S. & Co. v. E. Martin & Co. 132 La. 231, 61 So. 212.

Nor is there any merit in the contention that the property was still *in custodia legis,* and that therefore the present action of claim and delivery could not be maintained. "It goes without saying, that the attachment sued out by the plaintiff [Bristol & Sweet Company] was stricken with the nullity denounced by the Federal statute, and the property affected by the attachment was discharged and released from the same. Under . . . [§ 67 of the United States bankruptcy act (Act of July 1, 1898, chap. 541, 30 Stat. at L. 565)] which is the supreme law of the land. After an adjudication in bankruptcy, a state court has no jurisdiction to hold property under an attachment for any purpose." Lehman, S. & Co. v. E. Martin & Co. 132 La. 231, 61 So. 212. The defendant therefore held the property not as an officer of the law, but as an involuntary bailee or trustee,—at the will of and for the

benefit of him who was entitled to the possession thereof, and who in the case at bar was the trustee in bankruptcy.

The judgment of the District Court is affirmed.

McGREGOR v. GREAT NORTHERN RAILWAY COMPANY.

(154 N. W. 261.)

Contributory negligence — evidence of — subject to different conclusions — as to facts — or conclusions drawn from the facts — one of fact for jury.

1. When the evidence in regard to contributory negligence is such that different minds may reasonably draw different conclusions, either as to the facts or the conclusions to be drawn from the facts, then the question of contributory negligence is one of fact to be determined by the jury.

Shipment of horses — care taker — riding in stock car instead of caboose — accident — contributory negligence — matter of law.

2. It is *held* that, under the terms of the contract and the circumstances of the case, a care taker of a shipment of horses, who at the time of the accident was riding in the stock car instead of in the caboose, was not guilty of contributory negligence as a matter of law.

Shipment of live stock — person in charge — riding under shipping contract — passenger for hire.

3. A person in charge of live stock, riding under a contract which evidences his right of transportation on the train transporting the stock shipment, and contemplates his carriage to care for the stock, is a passenger for hire.

Stock shipment under contract — care taker riding in stock car — mode of transportation — risks reasonably incident thereto — assumption of — occurrences — unnecessary — unusual — train — handling of — risks and dangers — not assumed.

4. A person so traveling will be deemed to have assumed all risks reasonably incident to the mode of transportation utilized, but not those risks and dangers produced by unnecessary and unusual occurrences not incident to the proper handling of a train of that kind.

Railway company — must exercise care — safety of such a passenger — obligation — not relieved from.

5. A railway company is not relieved from its obligation to exercise great care for the safety of such passenger.

Proximate cause — use of term by court — further definition — not necessary — unless requested — not error.

6. It was not reversible error for the court to use the term "proximate cause" without otherwise defining it, in absence of a request for an appropriate instruction.

Instructions to jury — considered as a whole.

7. The court's instructions to the jury should be considered and construed as a whole.

Instructions — correct as far as given — if further are desired — should be requested.

8. Where an instruction is correct as far as it goes, a party to the action who deems the same not sufficiently explicit should present requests for more specific and comprehensive instructions.

New trial — motion for — affidavit — diligence — acts performed — must be specific — must be shown — province and duty of court — general assertions of diligence — insufficient — opinions — conclusions.

9. An affidavit, presented to show diligence, in support of a motion for new trial on the ground of newly discovered evidence, should specifically state the acts performed in order that the court may determine what diligence was used, and mere general assertions of diligence are insufficient, as they constitute only the opinions or conclusions of the affiant.

New trial — motion for — newly discovered evidence — court — sound judicial discretion — addressed to — appellate court — will not interfere — unless abuse is shown.

10. A motion for new trial on the ground of newly discovered evidence is addressed largely to the sound, judicial discretion of the trial court, and the appellate court will not interfere unless a manifest abuse of such discretion is shown.

Opinion filed September 16, 1915.

Appeal from a judgment and an order denying a new trial of the District Court of Ward County; *Leighton,* J. Defendant appeals.

Affirmed.

Dudley L. Nash and *Murphy & Toner,* for appellant.

The evidence shows that plaintiff was guilty of contributory negligence, and the court erred in not granting defendant's motion for a directed verdict. The plaintiff voluntarily, and without cause or provocation, placed himself in an unusual and dangerous place. He knew this. It was obvious. He had ample opportunity to go into the caboose

after the first smash-up claimed by him, and ride therein in the usual manner, and as the men did. He elected to remain in the stock car and take his chances. 2 White, Personal Injuries, § 796; Ashbrook v. Frederick Ave. R. Co. 18 Mo. App. 290; Carroll v. Inter-State Rapid Transit Co. 107 Mo. 653, 17 S. W. 889, 4 Am. Neg. Cas. 686; Norfolk & W. R. Co. v. Ferguson, 79 Va. 241; Little Rock & Ft. S. R. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10; Files v. Boston & A. R. Co. 149 Mass. 204, 14 Am. St. Rep. 411, 21 N. E. 311, 3 Am. Neg. Cas. 856; Jackson v. Crilly, 16 Colo. 103, 26 Pac. 331; Higgins v. Cherokee R. Co. 73 Ga. 149; Foley v. Boston & M. R. Co. 193 Mass. 332, 7 L.R.A. (N.S.) 1076, 79 N. E. 765; Cottrell v. Pawtucket Street R. Co. 27 R. I. 565, 65 Atl. 269; Tuley v. Chicago, B. & Q. R. Co. 41 Mo. App. 432; Rucker v. Texas & P. R. Co. 61 Tex. 499; Brown v. Scarboro, 97 Ala. 316, 12 So. 289; International & G. N. R. Co. v. Copeland, 60 Tex. 325, 8 Am. Neg. Cas. 504; Wait v. Omaha, K. C. & E. R. Co. 165 Mo. 612, 65 S. W. 1028; Hedrick v. Missouri P. R. Co. 195 Mo. 104, 93 S. W. 268, 6 Ann. Cas. 793; Pennsylvania R. Co. v. Langdon, 92 Pa. 21, 37 Am. Rep. 651, 10 Am. Neg. Cas. 215; Houston & T. C. R. Co. v. Clemmons, 55 Tex. 88, 40 Am. Rep. 799; Peoria & R. I. R. Co. v. Lane, 83 Ill. 448, 9 Am. Neg. Cas. 222; Florida Southern R. Co. v. Hirst, 30 Fla. 1, 16 L.R.A. 631, 32 Am. St. Rep. 17, 11 So. 506; Bromley v. New York, N. H. & H. R. Co. 193 Mass. 453, 79 N. E. 775.

The general rule as to diligence seems to be that the application of a party for a new trial, on the ground of newly discovered evidence, must show what diligence he exercised in preparing for the first trial, how the new evidence was discovered, and why it was not discovered before the first trial, and such facts as to make it clear that the failure to produce the new evidence was not the fault or want of diligence on the part of the applicant. 1 Spelling, New Trials, p. 363, § 218.

The defendant's affidavits used upon the motion do not contain mere conclusions, but are statements of ultimate facts, upon the subject of diligence. This is all the rule requires. Boggess v. Read, 83 Iowa, 548, 50 N. W. 43.

Upon the question of newly discovered evidence, the rule seems to be that if the proposed newly discovered evidence brings to light some new fact bearing upon the main question, and that it would be likely to

change the result, a new trial should be granted. 1 Spelling, New Trials, p. 367, and cases cited; Beery v. Chicago & N. W. R. Co. 73 Wis. 197, 40 N. W. 687.

Or, if such evidence be material on that issue alone on which the verdict is based, it is sufficiently material to justify the granting of a new trial. 1 Spelling, New Trials, p. 367, and cases cited; McMullen v. Winfield Bldg. & L. Asso. 4 Kan. App. 459, 46 Pac. 410.

And to deny a new trial under such conditions, the court must be of the opinion that the admission of the new evidence would not cause a different result. 1 Spelling, New Trials, p. 371.

"In order to warrant a new trial for material newly discovered evidence, it is not necessary that it bear exclusively upon the question of the plaintiff's right to a judgment for some amount. It will be sufficient if it affect the amount of recovery. 1 Spelling, New Trial, § 223; Jensen v. Hamburg American Packet Co. 23 App. Div. 163, 48 N. Y. Supp. 630.

Courts cannot refuse a new trial on the ground merely that the proposed new evidence is cumulative, or impeaching, or both, in character. All relevant, competent, and material new discovered evidence must of necessity be more or less cumulative or impeaching; but if it be of sufficient probative force and materiality to probably change the result upon retrial, it is sufficient, or at least a new trial should not be denied because of the fact that it seems to be cumulative or impeaching. 1 Spelling, New Trials, § 225, and cases cited; Wilson v. Seaman, 15 S. D. 103, 87 N. W. 577; Oberlander v. Fixen, 129 Cal. 690, 62 Pac. 254.

Where evidence of such a nature appears of such strength and probative force and value as to be decisive of the result, the motion should be granted. Pengilly v. J. I. Case Threshing Mach. Co. 11 N. D. 249, 91 N. W. 63, 12 Am. Neg. Rep. 619; Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; 1 Spelling, New Trials, § 227, and cases cited; Sulman v. Dolan, 24 S. D. 32, 123 N. W. 72; State v. Laper, 26 S. D. 151, 128 N. W. 476.

The newly discovered evidence here offered by the defendant is material, and is of such probative force and value that the court must say, with reason, that in all probability it would change the result upon a further trial. Delmas v. Martin, 39 Cal. 555; Croner v. Farmers'

F. Ins. Co. 18 App. Div. 263, 46 N. Y. Supp. 108; Louisville & N. R. Co. v. Bickel, 97 Ky. 222, 30 S. W. 600; Texas & P. R. Co. v. Barron, 78 Tex. 421, 14 S. W. 698; Van Wagenen v. Carpenter, 27 Colo. 444, 61 Pac. 698.

It was the duty of the trial court to explain the meaning and application of the technical term "proximate cause" to the jury, and its failure to do so was prejudicial error. 2 Thomp. Trials, § 2327; Chappell v. Allen, 38 Mo. 213; Clarke v. Kitchen, 52 Mo. 316.

E. R. Sinkler, for respondent.

The affidavits produced on defendant's motion for a new trial are purely impeaching, and the rule is that such evidence does not furnish good ground for a new trial. Libby v. Barry, 15 N. D. 286, 107 N. W. 972; Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Stoakes v. Monroe, 36 Cal. 388, 2 Mor. Min. Rep. 246; 14 Enc. Pl. & Pr. p. 791; Tuberville v. State, — Miss. —, 38 So. 333; State v. McKenzie, 177 Mo. 699, 76 S. W. 1015; People v. Sullivan, 40 Misc. 308, 81 N. Y. Supp. 989.

"Where defendant claimed an alibi, and introduced several witnesses who testified to having seen him at a certain place, newly discovered evidence that defendant was seen at such place talking to a witness who had denied seeing him there is not ground for new trial." Whitfield v. State, 40 Tex. Crim. Rep. 14, 48 S. W. 173.

A motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its decision is conclusive upon the question unless it clearly appears that the discretion vested in the trial court has been abused. Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Barrett v. Third Ave. R. Co. 45 N. Y. 628; Hayne, New Tr. & App. 87.

Application for new trial upon such ground is always looked upon with distrust and disfavor. Braithwaite v. Aiken, 2 N. D. 62, 49 N. W. 419; Nelson v. Carlson, 54 Minn. 90, 55 N. W. 821; Chalmers v. Sheehy, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 710.

Where newly discovered evidence is merely impeaching and cumulative in its character, it is not ground for a new trial. Reid v. State, 103 Ga. 572, 30 S. E. 248; Whitehead v. Breckenridge, 5 Ind. Terr. 133, 82 S. W. 698; Corley v. New York & H. R. Co. 12 App. Div. 409, 42 N. Y. Supp. 941; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92,

62 Pac. 948, 20 Mor. Min. Rep. 591; Knuffke v. Knuffke, 8 Kan. App. 857, 56 Pac. 326; Baxter v. Hamilton, 20 Mont. 327, 51 Pac. 265; Libby v. Barry, 15 N. D. 286, 107 N. W. 972; Huster v. Winn, 8 Okla. 569, 58 Pac. 736; Curran v. A. H. Strange Co. 98 Wis. 598, 74 N. W. 377; Harvey v. Ivory, 35 Wash. 397, 77 Pac. 725; 14 Enc. Pl. & Pr. 791.

A new trial will not be granted for newly discovered evidence which is merely cumulative. Wood v. Moulton, 146 Cal. 317, 80 Pac. 92; Patterson v. San Francisco & S. M. Electric R. Co. 147 Cal. 178, 81 Pac. 531; Halstead v. Horton, 38 W. Va. 727, 18 S. E. 953.

And especially where such evidence, by the exercise of reasonable diligence, could have been produced at the trial. Knollin v. Jones, 7 Idaho, 466, 63 Pac. 638; Guerold v. Holtz, 103 Mich. 118, 61 N. W. 278; Ernster v. Christianson, 24 S. D. 103, 123 N. W. 711; Hahn v. Dickinson, 19 S. D. 373, 103 N. W. 642; State v. Reilly, 25 N. D. 339, 141 N. W. 720.

Affidavits upon such a motion must contain a statement of the facts showing the diligence used. A mere general statement that the party used due diligence to find and ascertain the facts before the trial is the statement of an opinion or conclusion. The facts themselves should be brought before the court by the affidavits, and then it is for the court to conclude as to their nature, force, and value, upon the question of diligence. St. Louis Southwestern R. Co. v. Stanfield, 63 Ark. 643, 37 L.R.A. 659, 40 S. W. 126, 2 Am. Neg. Rep. 298; B. S. Flersheim Mercantile Co. v. Gillespie, 14 Okla. 143, 77 Pac. 183; Bradley v. Norris, 67 Minn. 48, 69 N. W. 624; Goracke v. Hintz, 13 Neb. 390, 14 N. W. 379; Heady v. Fishburn, 3 Neb. 263.

It is not sufficient to allege in affidavit to support a motion for new trial upon this ground, that the party could not with reasonable diligence procure such testimony before the trial. The affidavit must state and specify what particular efforts the party made before the trial, to produce the testimony. Tomer v. Densmore, 8 Neb. 384, 1 N. W. 315; Graham v. Payne, 122 Ind. 403, 24 N. E. 216; Keisling v. Readle, 1 Ind. App. 240, 27 N. E. 583; Hamm v. Romine, 98 Ind. 77.

The burden of proof was upon defendant to show contributory negligence on the part of plaintiff, by a fair preponderance of all of the evidence—not by or from the evidence of the defendant, but from all of

the evidence. The court so very properly instructed the jury in this case. 11 Enc. Pl. & Pr. p. 217; Louisville & N. R. Co. v. Smith, 129 Ala. 553, 30 So. 571; Mobile, J. & K. C. R. Co. v. Bromberg, 141 Ala. 258, 37 So. 395; Missouri, K. & T. R. Co. v. Millam, 20 Tex. Civ. App. 688, 50 S. W. 417.

The failure of the court to define to the jury in its instruction, the technical meaning of the term "proximate cause," was not error. It amounted to a nondirection of the jury, and is very dissimilar to a misdirection.

It is a general rule in all cases, subject to few exceptions, that mere nondirection, in the absence of request, does not constitute error. 11 Enc. Pl. & Pr. 217.

CHRISTIANSON, J. The plaintiff, R. R. McGregor, brought this action to recover damages for personal injuries alleged to have been sustained by him through the negligence of the defendant railway company, while he was traveling in charge of stock upon one of its freight trains. The plaintiff claims that on March 11, 1913, while rightfully upon said train of the defendant and in charge of a carload of horses, then being shipped from St. Cloud, Minnesota to Glasgow Montana, and while riding on such train engaged in the discharge of his duties as care taker accompanying such stock shipment in accordance with the shipping contract, the defendant negligently managed the train by stopping the same almost instantly while the train was running at a speed of about 40 miles per hour, with the result that the horses in the charge of the plaintiff were thrown to the floor of the car, thereby breaking the partitions and mangers in said car. That thereupon the plaintiff, with the assistance of the employees of the defendant in charge of said train, went to the car for the purpose of taking care of said horses and getting them on their feet, and that while so engaged and before the plaintiff had an opportunity to get out of the car and into the caboose attached to the train, the defendant's employees started the train and caused the same to proceed at a great rate of speed, and that while so proceeding the defendant's employees again grossly, negligently, and carelessly brought the said train to an almost instant stop with the result that one of the horses in the car was thrown upon the plaintiff, thereby pinioning him to the floor of the car resulting in

severely and permanently injuring the plaintiff. The defendant denied negligence and further charged that plaintiff's injuries, if any, were caused through plaintiff's own carelessness in placing himself in a dangerous and unsafe position while riding upon the train, in this, that the plaintiff without any cause or justification whatever, went into the car where certain horses and stock were being transported, and while there, and on account of the ordinary and usual handling and movement of said car and train, plaintiff was brought in contact with the horses, and suffered the injuries complained of. At the close of all the testimony, the defendant moved for a directed verdict based principally on the ground that plaintiff was guilty of contributory negligence. The motion was denied, and the cause submitted to the jury, which returned a verdict in favor of the plaintiff, in the sum of $1,548.20. The defendant made an alternative motion for judgment notwithstanding the verdict or a new trial, which was denied, and this appeal is taken from the judgment and from the order denying defendant's motion for judgment notwithstanding the verdict or a new trial.

The evidence shows that on March 8, 1913, the plaintiff entered into a contract with the defendant railway company, for the shipment of ten head of horses from St. Cloud, Minnesota, to Glasgow, Montana. Under the terms of this contract, it was agreed that "the shipper will . . . feed, water, and *attend same* at his own expense and risk while in the stock yards of the carrier waiting shipment or *while in the cars*. . . ." The contract also provided for a limitation of the value of the horses carried, and further provided that the contract does not entitle "the holder or the parties named therein to ride in the cars of any train except the train in which the stock referred to is drawn or taken." The contract, however, contains no provision requiring the shipper to ride in the caboose attached to the train. On March 11, 1913, the plaintiff was riding in the caboose of the freight train in question, between Devils Lake and Minot, in this state. The train had two engines. About 2 miles west of Churches Ferry, the train came to a sudden stop by reason of the engines pulling apart. The plaintiff testifies that the shock was so violent that while he was sitting in the caboose he fell on the floor. According to the plaintiff's testimony, the train at this time was running from 35 to 40 miles an hour, while the defendant's witnesses place the speed at from 20 to 25 miles an hour. When the train

stopped, the plaintiff went back to his car, which was the second car from the caboose, to see about his stock, and found that the horses had been knocked down and that one of them was still down and apparently unable to get up, and that thereupon the plaintiff, and a brakeman named Scheideeger, went into the car and finally succeeded in getting the horse up. The brakeman, Scheideeger, testified: "I was asked by the conductor to help this man (referring to plaintiff) get up the horses." The partitions had been broken down, and plaintiff started to nail the planks up again. Before this work was finished, and while he was so engaged, the train started. The brakeman still remained in the car. No request was made of the plaintiff to cease his labors, or to leave the car, and apparently no opportunity given him or the brakeman to get out of the car. After the train had proceeded for some distance, and while plaintiff was standing in an upright position at the side of the car, near the door, engaged in nailing the planks at the side of the car, the train again came to a sudden or violent stop for the same cause which occasioned the first stop; *viz.,* the two engines pulled apart. At the time of the second stop, the train according to plaintiff's testimony was running at a speed of from 20 to 30 miles per hour, and according to the testimony of members of the train crew at a considerable less speed. Plaintiff testifies that at the second stop, one of the horses fell upon him and pinioned him to the floor of the car, and that his brother, who was in the car at the time, and an emigrant traveling on the same train, assisted in getting the horses up after the second stop. Plaintiff claims that his back and thigh were bruised, his toes trampled, and a lump made upon his back; which he claims still was there at the time of the trial; that he feels weak and has pain, does not sleep well at night, and cannot do hard work. The brakeman, Scheideeger, testifies that he was standing in the door of the car at the time of the second stop, and that the plaintiff was standing against the south wall of the car. He says that he could not see plaintiff at the time of the stop, but could see him in a few minutes afterwards, and that when he saw him, plaintiff was still standing against the wall; that he could see some of the horses and that none of them were knocked down. The brakeman, Scheideeger, further testified: "Q. Was there much of a jar when it stopped the second time? A. Quite severe, yes." The engineer testified that both stops were caused by the head engine breaking off from the rear engine,

occasioning what he called an "emergency stop." That he examined the couplings to see if he could find why they would not stay coupled; that the coupling was not more than ordinarily worn, and was the standard coupling used by railways. On cross-examination he testified that it was a usual or customary thing to couple engines together, but not a usual or customary thing to have them break apart. That he did not know what caused the breaking apart of the engines; that there must have been something the matter to cause them to separate, but he did not know what it was. He further testified that the front engine, after the second stop, was not attached again but went ahead of the train to Leeds. That the reason for this was that they knew something was wrong, and thus were afraid the front engine would break loose again.

The conductor, in answer to questions as to the reason for the engines breaking apart, testified: "As near as I can get to it, it is the difference in the size of the wheel of the engines,—the driving wheels of the engines. The bigger engine ahead and the smaller wheels behind it, and that makes the coupling more or less higher. The wheels were not the same size. That is the only way I can figure it out. There was one large and one small engine."

While numerous errors are assigned, only four are discussed in the brief, and hence these alone will be considered, as this court has repeatedly held that errors assigned, but not discussed in the brief, will be deemed abandoned. Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531; Foster County Implement Co. v. Smith, 17 N. D. 178, 115 N. W. 663.

Appellant asserts that plaintiff was guilty of contributory negligence as a matter of law, and that defendant was entitled to a directed verdict. Appellant's counsel say: "It appears from the evidence of the plaintiff that prior to the first stop he was riding in the caboose. It is common knowledge that a caboose is furnished with all stock trains, for the purpose of accommodating the passengers whether riding on stock contracts or otherwise. That a person riding in or on top of a box car is not where he belongs." Appellant's counsel assert that plaintiff rode in a place where he had no right to ride; a place not intended for passengers, which was more dangerous than the caboose, and that therefore plaintiff is chargeable with contributory negligence as a matter of law, and cannot recover for injuries resulting to him by reason of his assuming such

extra hazard. Numerous authorities are cited in support of this argument, but a careful examination of all the authorities cited show that none of them are in point. The authorities cited were cases wherein passengers voluntarily, unnecessarily, and intentionally rode in places not intended for passengers, such as baggage cars, on top of a caboose or box car, or on an engine. In no case cited by appellant's counsel (with one exception) did the person injured ride on a drover's pass, or stock shipment contract. In the cases cited the persons injured, without any necessity or duty, and without any authority on the part of the railroad company to so do, voluntarily and unnecessarily exposed themselves to extra hazards by riding in places where passengers were not intended, or expressly forbidden, to ride; and the courts held that by so doing they assumed the extra hazard, and hence could not hold the railroad company liable for the effect of their own wrongful or careless conduct, nor recover for injuries sustained while so riding, unless it was also shown that they would have been injured if they had been riding in their proper places. The principle involved in the authorities cited by appellant can have no application here. In this case the plaintiff was riding on the train under the terms of a stock contract which contained no provision requiring him to ride in the caboose, nor any prohibition against his riding in the stock car. Under the terms of the contract it was the duty of the plaintiff to "feed, water, and attend the (horses) at his own expense and risk . . . while on board cars. . . ." Under the terms of the contract, therefore, it was clearly contemplated, and the intention of the parties, that the plaintiff should do whatever was reasonably necessary to attend his horses while on board cars. The duty to "feed, water, and attend" the horses was by the express terms of the contract placed upon him. This necessarily implied that he was to be given a reasonable opportunity to discharge this duty. And "it follows that if it was necessary, or if reasonable prudence required, that . . . [plaintiff go into and] remain in the car . . . [to] take care of . . . [his horses] as claimed by him, then he was rightfully there at the time of the accident." Kloppenburg v. Minneapolis, St. P. & S. Ste. M. R. Co. 123 Minn. 173, 143 N. W. 322. The question is, whether the plaintiff in going into, and remaining in, the stock car, and being there in the place and posi-

tion he was at the time of the accident, exercised the ordinary care and prudence natural to a prudent man, under all of the circumstances.

Unless the court could say from the conceded facts or undisputed evidence that ordinarily intelligent, reasonable, and fair-minded men would not and ought not to believe that plaintiff was acting as an ordinarily prudent person would have acted under the circumstances, then it was the duty of the court to submit this question to the jury. "The law can only define the duty of individuals under given circumstances. The existence of the circumstances is a question of fact for the jury." Dufour v. Central P. R. Co. 67 Cal. 319, 7 Pac. 769. "Where the circumstances are such that men of ordinary prudence and discretion might differ as to the character of the act under the circumstances of the case, the question is one of fact, and an appellate court should not be called upon to review the finding of a jury." Thurber v. Harlem Bridge, M. & F. R. Co. 60 N. Y. 331; Hays v. Miller, 70 N. Y. 112, 117.

The question of contributory negligence should always be submitted to the jury unless no recovery could be had upon any view that could properly be taken of the facts which the evidence tends to establish. "Where the evidence is such that different minds may reasonably draw different conclusions as to contributory negligence, the question is for the jury." 29 Cyc. 631. "If the facts are such that but one conclusion can reasonably be drawn from them, it is the province of the court to determine that conclusion. But if different minds may reasonably reach different conclusions from them, the parties are entitled to have the question determined by the jury." Whitsett v. Chicago, R. I. & P. R. Co. 67 Iowa, 150, 25 N. W. 104. When the evidence in regard to the contributory negligence is conflicting, or so uncertain that different minds might reasonably draw different conclusions, either as to the facts or the deductions to be drawn from the facts, then such question is properly submitted to the jury. See 29 Cyc. 631; Thomp. Neg. §§ 425, 427; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972; Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367, 121 N. W. 830; Jackson v. Grand Forks, 24 N. D. 601, 45 L.R.A.(N.S.) 75, 140 N. W. 718; Rober v. Northern P. R. Co. 25 N. D. 394, 142 N. W. 22; Farmers' Mercantile Co. v. Northern P. R. Co. 27 N. D. 302, 146 N. W. 550. What is ordinary care and prudence

must necessarily depend upon all the circumstances of the transaction under consideration.

"In the ordinary transactions of life all men are required at times to assume some risks, and to confront dangers that are incident to their several vocations. What an active and experienced man may sometimes have occasion to do, and may do without being guilty of culpable negligence, another decrepit or inexperienced person might not do without being guilty of gross carelessness. The quality of every act should be judged by its environment. The fact that a man assumes a dangerous position, or incurs a risk, is not always conclusive evidence of negligence. Circumstances may have justified the assumption of the particular risk. A man is guilty of culpable negligence when he does or omits to do an act that an ordinarily prudent person in the same situation, and with equal experience, would not have done or omitted to do; or when he voluntarily exposes himself to a danger, which there was no occasion to incur in the proper discharge of his duties." Chicago, M. & St. P. R. Co. v. Carpenter, 5 C. C. A. 551, 554, 12 U. S. App. 392, 56 Fed. 451, 7 Am. Neg. Cas. 486. "In concluding by their general verdict that the appellee was not guilty of negligence contributing to his injury in riding in the stock car, instead of the caboose, the jury had the right to take into consideration, with the other facts and circumstances surrounding him at the time, the location of the car in the train, its distance from the caboose, and the duties required of the shipper by the shipping contract with reference to caring for the stock. He was not knowingly violating any rule of the carrier by riding in the stock car, and, taking the conduct of the employees in charge of the train in permitting him to ride there, together with the responsibility placed upon him by the contract itself as the shipper of the stock, and the particulars in which the carrier, by the contract, had released itself from liability, it cannot be said that appellee had no right to act upon the belief that he was riding in a proper place on the train while in the car with the stock." Lake Shore & M. S. R. Co. v. Teeters, — Ind. App. —, 74 N. E. 1014, 1021. See also 29 Cyc. 641; Hill v. Union Electric Light & P. Co. 260 Mo. 43, 169 S. W. 345, 356.

The plaintiff in the case at bar went into the car containing the horses, concededly for the purpose of doing that which it was his duty to do. The necessity of going into the car in the first instance is not in dispute.

The brakeman, one of the employees of the defendant in charge of the train, at the request of the conductor, accompanied the plaintiff into the car for the purpose of assisting in raising the horses. The conductor in charge of the train therefore had actual knowledge of the fact that plaintiff was in the car in question, and at the time the train started and at the time of the happening of the accident neither the plaintiff nor the brakeman had left the car. The evidence shows without dispute that when the train started the plaintiff had not had sufficient time to do what was necessary to do in order to properly attend his horses, and it was while in the discharge of that duty that he was injured by the sudden stopping of the train. The undisputed testimony shows that at the time of the accident he was standing in an upright position by the side of the car, near the door, while the brakeman was standing in the other door holding on to the door jamb. The brakeman saw and knew what plaintiff was doing. The conductor knew that he went into the car. The accident in question was, according to the undisputed testimony of all the witnesses, occasioned by the sudden stopping of the train owing to the breaking apart of the engines. Two such stops occurred, both due to the same cause. The second violent stop took place shortly after a similar occurrence. The accident was occasioned by the second stop. Both the engineer and conductor state that there was something the matter with the coupling, and the conductor gives, as his opinion for the breaking apart of the engines, the difference in the size of the drive wheels of the two engines. We are satisfied that, under the evidence in this case, it cannot be held as a matter of law that plaintiff was guilty of contributory negligence, but that this was a question of fact, and properly submitted to the jury. Kloppenburg v. Minneapolis, St. P. & S. Ste. M. R. Co. 123 Minn. 173, 143 N. W. 322; St. Louis & S. F. R. Co. v. Kerns, 41 Okla. 167, 136 Pac. 169; Evansville & T. H. R. Co. v. Mills, 37 Ind. App. 598, 77 N. E. 608; Lake Shore & M. S. R. Co. v. Teeters, — Ind. App. —, 74 N. E. 1014, 166 Ind. 335, 5 L.R.A.(N.S.) 425, 77 N. E. 599, 20 Am. Neg. Rep. 309; Pittsburgh, C. C. & St. L. R. Co. v. Brown, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625; Southern R. Co. v. Roach, 38 Ind. App. 211, 78 N. E. 201; Missouri, K. & T. R. Co. v. Avis, 41 Tex. Civ. App. 72, 91 S. W. 877; Texas & P. R. Co. v. Adams, 32 Tex. Civ. App. 112, 72 S. W. 81; Pennsylvania R. Co. v. McCloskey, 23 Pa. 526, 12 Am. Neg. Cas. 548;

Lawson v. Chicago, St. P. M. & O. R. Co. 64 Wis. 447, 54 Am. Rep. 634, 24 N. W. 618; Florida, R. & Nav. Co. v. Webster, 25 Fla. 394, 5 So. 714; Illinois C. R. Co. v. Beebe, 174 Ill. 13, 43 L.R.A. 210, 66 Am. St. Rep. 253, 50 N. E. 1019; Harvey v. Deep River Logging Co. 49 Or. 583, 12 L.R.A.(N.S.) 131, 90 Pac. 501; Lake Shore & M. S. R. Co. v. Brown, 123 Ill. 162, 5 Am. St. Rep. 510, 14 N. E. 197; Chicago, M. & St. P. R. Co. v. Carpenter, 5 C. C. A. 551, 12 U. S. App. 392, 56 Fed. 451, 7 Am. Neg. Cas. 456; Chicago, R. I. & P. R. Co. v. Lee, 34 C. C. A. 365, 92 Fed. 318; Feldschneider v. Chicago, M. & St. P. R. Co. 122 Wis. 423, 99 N. W. 1034, 16 Am. Neg. Rep. 630.

The plaintiff was rightfully upon the train under a personal contract with the defendant. He was not a trespasser, a mere licensee, or a free passenger; but a passenger for hire, and entitled to protection as such. 6 Cyc. 545; Lake Shore & M. S. R. Co. v. Teeters, — Ind. App. —, 74 N. E. 1014, 1018; Kloppenburg v. Minneapolis, St. P. & S. Ste. M. R. Co. 123 Minn. 173, 143 N. W. 322; Evansville & T. H. R. Co. v. Mills, 37 Ind. App. 598, 77 N. E. 608. And while it is true that plaintiff, by traveling on a freight train will be deemed to have assumed the inconvenience and discomfort, as well as all risks reasonably incident to the operation of that kind of a train, still he was and continued to be a passenger, and the obligation on the part of the railway company to exercise great care for his safety remained in full effect. The plaintiff assumed those risks, and those risks only, reasonably incident to the mode of transportation utilized, but not those risks and dangers produced by unnecessary and unusual occurrences not incident to the proper handling of a freight train. In Chicago, R. I. & P. R. Co. v. Lee, 34 C. C. A. 365, 368, 92 Fed. 318, the court said: "The agreement of carriage is nothing, after all, but a contract, and a railroad company may lawfully stipulate to carry a passenger in a baggage car, in an express car, a stock car, or on a freight train generally. If it makes such a contract, it is required to exercise ordinary care in the performance of it." Cyc. states the law on this subject as follows: "In the operation of freight trains, however, somewhat greater peril is involved to passengers riding thereon than is involved in the operation of passenger trains. Nevertheless, the rule of liability, that is, the requirement as to the exercise of a high degree of care and foresight, is the same. The passenger by assuming to ride by this means of conveyance does not relieve the

carrier from the obligation to exercise great care for his safety. And a passenger properly allowed to ride in a place of danger is entitled to that degree of care which corresponds to the danger to which he is exposed." 6 Cyc. 594. And the supreme court of Minnesota in the case of Kloppenburg v. Minneapolis, St. P. & S. Ste. M. R. Co. 123 Minn. 173, 143 N. W. 322, said: "While in the car he must be deemed to have assumed all risks reasonably incident to such carriage, but not those resulting from unnecessary and extraordinary occurrences involving dangers not incident to the proper handling of that kind of train."

It is next asserted that the court committed two errors in its instructions to the jury: (1) By failing to define "proximate cause;" (2) by instructing the jury as follows: "But the burden of proof is upon the defendant to prove by a fair preponderance of all the evidence that the plaintiff was guilty of contributory negligence." The remainder of the instructions are not challenged.

The court's instructions to the jury were in writing. Defendant made no request for an additional instruction defining the term "proximate cause." The court in its instructions outlined the issues of facts to be determined by the jury, and concededly gave correct definitions of "negligence" and "contributory negligence," and clearly informed the jury what it must find in order to entitle plaintiff to a recovery, as well as what constituted such contributory negligence as would bar his right of recovery. The court's instructions upon these features of the case are not questioned, but are conceded to be correct. There was no dispute or conflict in the evidence as to the cause of the accident. The testimony all showed that it was caused by the sudden or violent stopping of the train; and that this in turn was occasioned by the breaking apart of the engines. Did this occur through the negligence of the defendant? Was plaintiff guilty of contributory negligence? Did plaintiff suffer any injury? If so, were the injuries caused by the negligence of defendant? And, if plaintiff is free from contributory negligence, what amount of money will compensate plaintiff for the injuries he received, if any? These questions were fully submitted to the jury under appropriate instructions. It is difficult to see how, under the evidence in this case, any prejudice could result from the omission to define "proximate cause" in the charge to the jury. No error was committed by such omission, in

absence of a request for such instruction. Miller v. Boone County, 95 Iowa, 5, 63 N. W. 352; Burk v. Creamery Package Mfg. Co. 126 Iowa, 730, 106 Am. St. Rep. 377, 102 N. W. 793, 18 Am. Neg. Rep. 62; Louisville v. Hart, 143 Ky. 171, 35 L.R.A.(N.S.) 207, 136 S. W. 212; See also 11 Enc. Pl. & Pr. 217; Thomp. Trials, 2d ed. § 2341; 29 Cyc. 651.

Nor do we find any merit in the second objection to the instructions. Appellant's objection to this instruction is stated in its brief as follows: "The instruction standing alone without explanation is not good law. No explanation of the limitation or application of the rule was attempted. Hence the jury must have understood that, before the defendant could recover, the defendant must prove by a fair preponderance of the evidence that the plaintiff was guilty of contributory negligence, no matter whether or not plaintiff had established that the defendant was guilty of any specific act of negligence proximately causing plaintiff's alleged injuries, and without reference to whether or not the testimony of the plaintiff disclosed contributory negligence." No authority is cited, and no further argument presented in support of this assignment of error. The instrument complained of is not even a complete paragraph of the charge. The entire paragraph reads as follows: "The burden of proof is upon the plaintiff to prove by a fair preponderance of all the evidence, the allegations of his complaint, that is, by the greater weight of all the evidence in the case; but the burden of proof is upon the defendant to prove by a fair preponderance *of all the evidence* that the plaintiff was guilty of contributory negligence." Immediately following the foregoing, the court further instructed the jury: "The plaintiff claims that his injuries were sustained by reason of the negligence of the defendant. It is for the jury to decide from all the evidence in the case whether the defendant was negligent at the time of the injury, and whether the negligence of the defendant was the proximate cause of the injury." The court thereupon defined the term "negligence," and after defining such term instructed the jury as follows: "The defendant in this case claims that the plaintiff at the time of the injury was guilty of contributory negligence, and that such contributory negligence was the proximate cause of his injury. Should the jury find that he was guilty of contributory negligence, then you should find for the defendant for a dismissal of this action." The

court then carefully defined "contributory negligence," and prescribed the rules to be applied by the jury in determining whether the plaintiff in this case was guilty of contributory negligence; and then further instructed the jury as follows: "And if plaintiff's act at the time of the injury was contributory negligence when measured by these rules, then you should find for the defendant."

No rule is better settled than that the court's instructions must be considered as a whole. "The charge is entitled to a *reasonable interpretation.* It is *construed as a whole,* in the same connected way in which it was given, upon the presumption that the jury did not overlook any portion, but gave due weight to it as a whole; and this is so, although it consists of clauses originating with different counsel and applicable to different phases of the evidence. If, when so construed, it presents the law fairly and correctly to the jury, in a manner not calculated to mislead them, it will afford no ground for reversing the judgment, although some of its expressions, if standing alone, might be regarded as erroneous; or because there may be an apparent conflict between isolated sentences; or because its parts may be in some respects slightly repugnant to each other, or because some one of them taken abstractly, may have been erroneous." Thomp. Trials, § 2407. See also 38 Cyc. 1778; Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841; Wyldes v. Patterson, ante, —, 153 N. W. 630.

The charge, construed as a whole, seems to fairly submit the issues in the case to the jury. The objection urged that the instruction complained of in effect made it incumbent upon the plaintiff to disprove plaintiff's case, and eliminated plaintiff's testimony from the jury's consideration in determination of the question of contributory negligence, is wholly without merit. The court expressly stated that the defendant was required to prove contributory negligence only "by a fair preponderance *of all the evidence.*" Can it be said that this limited the jury to a consideration of defendant's evidence only? This contention is untenable. The jury's attention was directed to all the evidence. In the case of Evansville & T. H. R. Co. v. Mills, 37 Ind. App. 598, 77 N. E. 608, 612, where an instruction relative to the same matter was under consideration, and where the court failed to instruct the jury in so many words that "*all* the evidence" must be considered, the court in disposing of the same contention which is made by appellant in this case, said: "It

would be imputing dense ignorance to the jurors to say that they must have understood that by the expressions, 'from a preponderance of the evidence,' and 'from the evidence in the case,' the court meant less than all the evidence upon the subject of contributory negligence, regardless of its source." See also Missouri K. & T. R. Co. v. Milam, 20 Tex. Civ. App. 688, 50 S. W. 417; and Mobile, J. & K. C. R. Co. v. Bromberg, 141 Ala. 258, 37 So. 396, 402.

Even though the instruction complained of was not entirely perfect, this would not necessarily constitute reversible error, unless it further appears that the jury were misled thereby. For "courts of error do not sit to decide moot questions, but to redress real grievances. It is therefore a rule of nearly all the courts, that no judgment will be reversed on account of the giving of erroneous instructions, unless it appear probable that the jury were misled by them." Thomp. Trials, § 2401. The defendant made no request for any further or additional instruction, and it is difficult to see how at this time it can be heard to say that the court should have further explained or qualified the instruction in question. Where an instruction is correct as far as it goes, error cannot be assigned on the ground that it was not sufficiently full or explicit, unless request is made for more specific and comprehensive instruction. 11 Enc. Pl. & Pr. 217; Thomp. Trials, 2d ed. §§ 2341, 2396; 38 Cyc. 1693; Nokken v. Avery Mfg. Co. 11 N. D. 399, 92 N. W. 487; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972; Landis v. Fyles, 18 N. D. 590, 120 N. W. 566; State ex rel. Pepple v. Banik, 21 N. D. 417, 131 N. W. 262; Zilke v. Johnson, 22 N. D. 75, 132 N. W. 640, Ann. Cas. 1913E, 1005.

Defendant also insists that a new trial should have been granted on the ground of newly discovered evidence. Upon the trial a brother of the defendant testified that he was present and saw the accident and assisted in raising the horse which fell on plaintiff. The presence of this brother upon this train was denied by the conductor and brakeman, who testified for the defendant. The testimony of both the brakeman and the plaintiff showed that an emigrant was present at the time of the accident, and assisted in raising the horses which had fallen down in plaintiff's car at the first stop. The proposed new testimony is that of the various conductors who handled the train on which plaintiff was riding between St. Cloud, Minnesota, and Minot, North Dakota, their

proposed testimony being to the effect that each conductor was required to make a report of all persons riding on their train, and, that, with the exception of a short distance between Minnesota transfer and Barnesville, Minnesota, no person rode upon such train except persons holding stock contracts.

The proposed testimony of Ole Anderson, in certain particulars, contradicts the testimony of the plaintiff, but in other particulars it also squarely contradicts the testimony of the brakeman. Anderson's proposed testimony is further to the effect that he does not remember seeing any other person in the car at the time of the accident except the plaintiff and the brakeman; and "that his best recollection is that only the plaintiff, the brakeman, and he [Anderson] were the only persons who assisted in raising the horses. It will be observed that the purpose of the proposed newly discovered evidence is largely to impeach the testimony of D. F. McGregor by showing that he was not on the train at the time of the accident. The witness McGregor, however, did not testify that he rode in the caboose, but on the contrary his testimony was rather to the effect that he rode in the car in which the horses were contained. And the brakeman testified that there was ample hiding room in which a man could have been concealed in the car.

Under the laws of this state a new trial may be granted for "newly discovered evidence material to the party making the application, which he could not with reasonable diligence have discovered and produced at the trial." Compiled Laws, §§ 7660, 1913. The exercise of reasonable diligence, therefore, is an express requirement of the statute.

The only showing of diligence is the affidavit of one of the attorneys for the defendant, to the effect that he has been such attorney ever since the commencement of the action. "That the claim department of the defendant under the direction of this affiant made a thorough investigation of the facts and circumstances surrounding the alleged injury of plaintiff at the time, place, and manner set out in the complaint, and made a report in writing to this affiant, and took statements in writing from all persons that could be found at the time of such investigation, who knew anything about the facts or circumstances relating to the alleged injury of the plaintiff, and such written statements were delivered to affiant before the trial of the above-entitled action. . . . That said report and none of said written statements so taken in the investigation

of said case disclosed the name of the person present (being an emigrant) with the plaintiff in the car at the time of the alleged injury nor his whereabouts, although said report did disclose that such a person was present, and that under affiant's direction said claim department of the defendant made diligent efforts to ascertain the name and whereabouts of said emigrant so present at the time of said accident, and made inquiries of various parties likely to know, but up to the time of trial was wholly unable to ascertain the name of said emigrant or his whereabouts. That the defendant, for the first time upon the trial of his action, learned, through the testimony of the plaintiff herein, that the name of said emigrant, so present as aforesaid, was Ole Anderson, and subsequent to the trial herein located him in the state of North Dakota." The affidavit further states that the report and written statements did not disclose that D. McGregor was present at the accident or upon the train. The affidavit of Ole Anderson tendered in support of the motion for new trial shows that he is a resident of Mayville, North Dakota, having lived there for twenty-eight years, and is engaged in the business of buying, selling and shipping horses, and has been so engaged for a number of years. That he shipped a carload of horses from Mayville to Williston, North Dakota, and was in charge of such shipment at the time of the accident. The testimony of the conductor in charge of the train at the time of the accident shows that there were only five or six persons riding on the train at the time of the accident. The affidavits of the conductor and the auditor tendered in support of the motion for new trial show that all such persons were riding on stock contracts. The stock contract of the defendant in evidence in this case shows that such agreement contains the name of the shipper, a description of the shipment, station where shipped, and the place of destination, and is signed by the shipper. This action was commenced June 2, 1913, and was not tried until December 3, 1913. Hence, the defendant had a period of six months in which to obtain the necessary witnesses, and during all of this time it must have had in its possession the stock contract containing the name and address and signature of Ole Anderson, the witness in question.

What person made the thorough investigation for the claim department? What did he do in making his investigation? Why did he fail to locate Ole Anderson? These questions are not answered or explained.

The mere assertion of diligence contained in the affidavit of defendant's attorney is at the best a mere conclusion. It is not contended that the attorney had any personal knowledge of what was done.

"The affidavit presented to show the requisite diligence where a new trial is sought on the ground of newly discovered evidence must possess a greater degree of certainty than a pleading. It should negative every circumstance from which negligence can be inferred. *General assertions of diligence are viewed as mere opinions or conclusions of law.*

"The acts which were performed and which are supposed to constitute the diligence required by law should be specifically stated in order that the court may determine what diligence was used." Spelling, New Tr. & App. Pr. § 218.

The trial court filed a memorandum opinion with the order denying a new trial, wherein he says: "I am satisfied that the showing herein made is insufficient to warrant the granting of a new trial: 1st. For the reason that the evidence which defendant claims is newly discovered evidence would only be cumulative so far as Anderson is concerned, and the evidence as shown by the other affidavits would only be in the nature of impeaching testimony; 2d. There does not seem to me to be any probability of a different result in the event a new trial was granted than has already been reached in the former trial. There does not seem either to have been any very diligent search made for the witness Anderson, and there is a serious question whether or not sufficient diligence has been used or shown."

It is elementary that a motion for a new trial on the ground of newly discovered evidence is addressed largely to the sound judicial discretion of the trial court, and that the appellate court will not interfere unless it is shown that such discretion has been abused. The law applicable to motions for a new trial on discretionary grounds, both in the trial and appellate courts, was fully discussed by this court in two recent divisions. See Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419; State v. Cray, ante, 67, 153 N. W. 425.

"The determination of this [diligence], as well as every other question relative to this ground for new trial, is addressed to the discretion of the trial court, whose duty it is to take into consideration the particular circumstances of each case, with all its distinct and varying phases and bearings, for the purpose of ascertaining what is and

what is not diligence within the contemplation of the statute; and its conclusion upon the point is so peculiarly and exclusively an exercise of discretion, that the appellate court will never be justified in interfering therewith unless the record discloses a clear abuse of discretion." 1 Hayne, New Tr. & App. § 92, p. 433.

"It is to be remembered that a wide discretion is vested in the trial court in determining the weight to be given to the statements contained in affidavits upon motion for new trial. This discretion is to be exercised in determining the diligence shown, the truth of the matters stated, and the materiality and probability of the effect of them, if believed to be true." People v. Weber, 149 Cal. 325, 86 Pac. 671; Scanlon v. San Francisco & St. J. R. Co. 128 Cal. 586, 61 Pac. 271, and Hayne, New Tr. & App. §§ 87, 89.

"Not only must the newly discovered evidence be of such a character, and so presented, as to render it probable that a different result will or ought to follow a retrial, but the question itself as to whether the evidence is of such a character, and whether a different result is probable or ought to follow, is one addressed to the discretion of the trial court, and the exercise of that discretion will not be disturbed except in case of a manifest abuse." 1 Hayne, New Tr. & App. § 91, p. 431.

In State v. Cray, supra, this court said: "The question of whether or not a new trial ought to be granted was primarily a question for the trial court. The function of this court on this appeal is merely to review the ruling of the trial court on this motion, and this review is limited to a determination of the question of whether, in denying a new trial, the trial court abused its discretion, and thereby effected an injustice. The discretion vested in the trial court should always be exercised in the interest of justice. The presumption is that it was properly exercised. Even if all the newly discovered evidence had been offered and received at the trial, there would still be ample evidence to sustain the verdict. The trial court, after considering the newly discovered evidence, and weighing the same with the evidence adduced upon the trial, was still of the opinion that substantial justice had been accomplished at the former trial. There is nothing to justify this court in saying that the trial court erred in its conclusion, or abused its discretion in so holding."

This language is equally applicable to the case at bar. The judgment and order appealed from must be affirmed. It is so ordered.

JOHN SWORDS v. BENJ. McDONELL.

(154 N. W. 258.)

Personal injuries — accident in gravel pit — damages for verdict — contributory negligence — assumption of risk.

1. Plaintiff sustained personal injuries in a gravel pit while in defendant's employ for which he recovered a verdict and judgment for $3,000. On appeal defendant urges that plaintiff was guilty, as a matter of law, of contributory negligence, and that he should be held to have assumed the risk; also that the evidence is insufficient to show negligence on defendant's part. *Held*, for reasons stated in the opinion, that each of such contentions is without merit. Umsted v. Colgate Elevator Co. 18 N. D. 316, and Webb v. Dinnie Bros. 22 N. D. 377, are cited and followed as controlling.

Instructions — more specific — request for.

2. Following the well-settled rule it is held that, in the absence of a request for more specific instructions, error cannot be predicated upon the giving of instructions which state the law correctly as far as they go, but which are not as full and specific as they should have been.

Instructions — issues — incorrect statement of law — fatal to recovery — prejudicial — law applicable to issues — must be charged.

3. An instruction which mistakes the law as applied to the issues and the proof is fatal to a recovery unless it affirmatively appears that it was non-prejudicial.

Special damages — neither alleged nor proved — instructions upon — prejudicial error.

4. Applying the last stated rule it is held prejudicial error, where special damages are neither alleged nor proved, to instruct the jury that "damages for a personal injury consist of three principal items: First, the expense which the injured person is subjected to by reason of the injury complained of." In the light of the record, the giving of this instruction was very prejudicial.

Opinion filed September 17, 1915.

Appeal from the District Court of Ward County; LEIGHTON, J.

Action by John Swords against Benjamin McDonell. Plaintiff had judgment. Defendant appeals.

Reversed.

Greenleaf, Bradford, & Nash, for appellant.

It is the duty of the master to furnish a reasonably safe place for his servant to work. He is not required to provide a place that is absolutely safe. Frequently the work which the servant is employed to do is dangerous in itself, and of course the servant assumes the ordinary risk in performing that work. Ross-Paris Co. v. Brown, 121 Ky. 821, 90 S. W. 568; Wilson v. Chess & W. Co. 117 Ky. 567, 78 S. W. 453; Wood, Mast. & S. § 325.

A preson who acts with full knowledge of all the attendant perils must be held to have assumed the risk. Mellott v. Louisville & N. R. Co. 101 Ky. 212, 40 S. W. 696; Chicago G. W. R. Co. v. Crotty, 4 L.R.A.(N.S.) 832, 73 C. C. A. 147, 141 Fed. 913; Gorman v. Des Moines Brick Mfg. Co. 99 Iowa, 257, 68 N. W. 674; Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277, 11 Am. St. Rep. 492, 33 N. W. 305; Toomey v. Eureka Iron & Steel Works, 89 Mich. 249, 50 N. W. 850; Showalter v. Fairbanks, M. & Co. 88 Wis. 376, 60 N. W. 257; Writt v. Girard Lumber Co. 91 Wis. 496, 65 N. W. 173; Bradshaw v. Louisville & N. R. Co. 14 Ky. L. Rep. 688, 21 S. W. 346; Linch v. Sagamore Mfg. Co. 143 Mass. 246, 9 N. E. 728; Wescott v. New York & N. E. R. Co. 153 Mass. 460, 27 N. E. 10; Reed v. Stockmeyer, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186; Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 24 L. ed. 506, 7 Am. Neg. Cas. 340.

The fact that he was ordered by a superior to do the act, while he knows and appreciates the dangers attendant, and where the act is one of those assumed, is wholly immaterial. The master incurs no special liability or responsibility by ordering the servant to perform one of his ordinary duties in the regular course of his work. Davis v. Detroit & M. R. Co. 20 Mich. 105, 4 Am. Rep. 364; Ruchinsky v. French, 168 Mass. 68, 46 N. E. 417, 1 Am. Neg. Rep. 620; Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277, 11 Am. St. Rep. 492, 33 N. W. 395; Paule v. Florence Min. Co. 80 Wis. 350, 50 N. W. 189; Welch v. Brainard, 108 Mich. 38, 65 N. W. 667; Linch v. Sagamore Mfg. Co. 143 Mass. 200, 9 N. E. 728; Hoth v. Peters, 55

Wis. 405, 13 N. W. 219; Beittenmiller v. Bergner & E. Brewing Co. 22 W. N. C. 33, 12 Atl. 599; Showalter v. Fairbanks, M. & Co. 88 Wis. 376, 60 N. W. 257; Burlington & C. R. Co. v. Liehe, 17 Colo. 280, 29 Pac. 175; Stuart v. New Albany Mfg. Co. 15 Ind. App. 184, 43 N. E. 961; Burke v. Davis, 191 Mass. 20, 4 L.R.A.(N.S.) 791, 114 Am. St. Rep. 591, 76 N. E. 1039; Frangiose v. Horton, 26 R. I. 291, 58 Atl. 944, 17 Am. Neg. Rep. 371; Toomey v. Eureka Iron & Steel Works, 89 Mich. 249, 50 N. W. 850; Welch v. Carlucci Stone Co. 7 Ann. Cas. 301, note.

The test of the servant's conduct as to negligence, where he is acting in obedience to orders given, and with a knowledge and appreciation of the attendant circumstances, is the same as in other cases; that is, was his conduct that of a reasonably prudent man under like circumstances. Hubler v. Johnson-McLean Co. 74 Neb. 840, 105 N. W. 247, 19 Am. Neg. Rep. 362; Chicago G. W. R. Co. v. Crotty, 4 L.R.A.(N.S.) 832, 73 C. C. A. 147, 141 Fed. 913; Stephens v. Southern R. Co. 82 S. C. 542, 64 S. E. 601; Joswoyak v. Lake Shore & N. S. R. Co. 4 Ohio Dec. Reprint, 317; Greeley v. Foster, 32 Colo. 292, 75 Pac. 351; McArthur Bros. Co. v. Nordstrom, 87 Ill. App. 554; Chicago, I. & L. R. Co. v. Sanders, 42 Ind. 585, 86 N. E. 430; McArthur Bros. Co. v. Troutt, 88 Ill. App. 638; Attleton v. Bibb Mfg. Co. 5 Ga. App. 777, 63 S. E. 918; Paterson v. Erie R. Co. 78 N. J. L. 592, 30 L.R.A.(N.S.) 209, 75 Atl. 922.

Where there is no allegation of special damages in the complaint, and where there is no proper proof of same, it was highly prejudicial for the court to instruct upon such subject, for same was in no wise an issue in the case. Such instruction and especially when the court expressly called the jury's attention to the matter of expenses, as one of the elements of damages, was prejudicial error. Barron v. Northern P. R. Co. 16 N. D. 277, 113 N. W. 102.

"When actual pecuniary damages are sought, some evidence must be given showing their existence and extent. If this is not done, the jury cannot indulge in an arbitrary estimate of their own." Sedgw. Damages, §§ 180, 483; Smith v. Evans, 13 Neb. 314, 14 N. W. 406; Taulbee v. Moore, 106 Ky. 749, 51 S. W. 564; Galveston, H. & S. A. R. Co. v. Thornsberry, — Tex. —, 17 S. W. 521, 6 Am. Neg. Cas. 610; 5 Am. & Eng. Enc. Law, 718; Reed v. Chicago, R. I. & P. R. Co. 57

Iowa, 23, 10 N. W. 286; Brown v. White, 202 Pa. 297, 58 L.R.A. 321, 51 Atl. 962.

A verdict should be supported by legal evidence; otherwise it is the whim, caprice, or guess of the jury. Cousins v. Lake Shore & M. S. R. Co. 96 Mich. 386, 56 N. W. 14, 4 Am. Neg. Cas. 152; Stafford v. Oskaloosa, 57 Iowa, 748, 11 N. W. 668; Eckerd v. Chicago & N. W. R. Co. 70 Iowa, 353, 30 N. W. 615, 3 Am. Neg. Cas. 373; Olson v. Erickson, 53 Wash. 458, 102 Pac. 400.

E. R. Sinkler, for respondent.

"The law would seem plain where the menace or danger is so uncertain as to cause discussion between the employees and the employer, with the result that the employer dissuades the employee of his apprehension that the doctrine of assumption of risks cannot be invoked."

The mere fact that the servant can do the act or work directed to be done by him, by the use of extraordinary care, caution, and skill, does not render him guilty of concurrent negligence. Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 316, 122 N. W. 390; Webb v. Dinnie Bros. 22 N. D. 377, 134 N. W. 41; Haas v. Balch, 6 C. C. A. 201, 12 U. S. App. 534, 56 Fed. 984; Brown v. Lennane, 155 Mich. 686, 30 L.R.A.(N.S.) 453, 118 N. W. 581; Nelson-Bethel Clothing Co. v. Pitts, 131 Ky. 65, 23 L.R.A.(N.S.) 1014, 114 S. W. 331; McKee v. Tourtelotte, 167 Mass. 69, 48 L.R.A. 542, 44 N. E. 1071; Dallemand v. Saalfeldt, 48 L.R.A. 753, and note, 175 Ill. 310, 67 Am. St. Rep. 214, 51 N. E. 645, 5 Am. Neg. Rep. 9; McBrayer v. Virginia-Carolina Chemical Co. 89 S. C. 387, 71 S. E. 980; Chicago Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572; Norfolk & W. R. Co. v. Ward, 90 Va. 687, 24 L.R.A. 717, 44 Am. St. Rep. 945, 19 S. E. 849; 4 Labatt, Mast. & S. pp. 3936, 3938, 3960, 3965, and 3967; Faulkner v. Mammoth Min. Co. 23 Utah, 437, 66 Pac. 801; Miller v. Bullion-Beck & C. Min. Co. 18 Utah, 358, 55 Pac. 59; Anderson v. Pitt Iron Min. Co. 103 Minn. 252, 114 N. W. 954; Choctaw, O. & G. R. Co. v. Jones, 7 Ann. Cas. 435, and note, 77 Ark. 367, 4 L.R.A. (N.S.) 837, 92 S. W. 244; Bennett v. Gulf, C. & S. F. R. Co. — Tex. Civ. App. —, 159 S. W. 132, 5 N. C. C. A. 572.

A servant cannot assume a risk which he does not believe to exist. "There is much reason in the rule that allows a favorable construction to be placed on the act of the servant, done in obedience to the order of

his superior, though involving danger. Obedience to orders given by the master becomes a habit with the servant. It is expected that he will obey. Whilst the law will not excuse the servant where the thing ordered is plainly and manifestly perilous, it will do so where a man of ordinary prudence and care would under the circumstances have obeyed the order, although involving danger." Van Duzen Gas & Gasoline Engine Co. v. Schelies, 61 Ohio St. 298, 55 N. E. 998; Cook v. St. Paul, M. & M. R. Co. 34 Minn. 45, 24 N. W. 311, 16 Am. Neg. Cas. 247; Choctaw, O. & G. R. Co. v. Jones, 7 Ann. Cas. 442, note; 4 Labatt, Mast. & S. pp. 3960–3974; Graham v. Newburg Orrel Coal & Coke Co. 38 W. Va. 273, 18 S. E. 584; Harder & H. Coal Min. Co. v. Schmidt, 43 C. C. A. 532, 104 Fed. 282, 9 Am. Neg. Rep. 227; Bradbury v. Goodwin, 108 Ind. 286, 9 N. E. 302; Lake Superior Iron Co. v. Erickson, 39 Mich. 492, 33 Am. Rep. 423, 10 Mor. Min. Rep. 39; Daley v. Schaaf, 28 Hun, 314; Stomne v. Hanford Produce Co. 108 Iowa, 137, 78 N. W. 841; Gundlach v. Schott, 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 322; Shadford v. Ann Arbor Street R. Co. 121 Mich. 224, 80 N. W. 30, 6 Am. Neg. Rep. 579; Purcell Mill & Elevator Co. v. Kirkland, 2 Ind. Terr. 169, 47 S. W. 311; Anderson v. Steinreich, 32 Misc. 680, 66 N. Y. Supp. 498; Warner v. Chicago, R. I. & P. R. Co. 62 Mo. App. 192; Fried & R. Packing Co. v. Hugel, 105 C. C. A. 402, 183 Fed. 110.

It is the master's duty to furnish the servant with a safe place in which to work. If the place is not safe, and the master knows it is not safe, it is then his absolute duty to warn the servant of the danger. Webb v. Dinnie Bros. 22 N. D. 377, 134 N. W. 41; Haas v. Balch, 6 C. C. A. 201, 211, 12 U. S. App. 534, 56 Fed. 984; O'Brien v. Nute-Hallett Co. 177 Mass. 422, 59 N. E. 65; Cases cited under Assumption of Risk, supra.

Where a party to an action deems the charge of the court not sufficiently explicit, he should present written requests for instructions. State ex rel. Pepple v. Banik, 21 N. D. 417, 131 N. W. 262; State v. Haynes, 7 N. D. 352, 75 N. W. 267; State v. Rosencrans, 9 N. D. 163, 82 N. W. 422; Landis v. Fyles, 18 N. D. 590, 120 N. W. 566; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 227, 112 N. W. 972; Zilke v. Johnson, 22 N. D. 83, 132 N. W. 640, Ann. Cas. 1913E, 1005; Rev. Codes 1905, § 7021, Comp. Laws 1913, § 7620.

That nominal damages can be recovered when no appreciable injury has been shown is well settled. Seitz v. Dry Dock, E. B. & B. R. Co. 16 Daly, 264, 10 N. Y. Supp. 1, 6 Am. Neg. Cas. 42; Western R. Co. v. Stone, 145 Ala. 663, 39 So. 723; Swift v. Broyles, 115 Ga. 885, 58 L.R.A. 390, 42 S. E. 277; Lance v. Apgar, 60 N. J. L. 447, 38 Atl. 695; Comp. Laws 1913, § 7184; Ashby v. White, 2 Ld. Raym. 955, 3 Ld. Raym. 320, 1 Smith Lead. Cas. 231, 14 How. St. Tr. 695, 1 Eng. Rul. Cas. 521; Whittemore v. Cutter, Gall. 429; Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; Fullam v. Stearns, 30 Vt. 455.

Where the charge of the trial court, taken as a whole, states the law correctly, error cannot be predicated on an isolated portion which, taken alone, is erroneous. Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841.

Fisk, Ch. J. While in defendant's employ as a common laborer, and engaged in shoveling gravel into a wagon out of a gravel pit in Minot, plaintiff was severely injured by the falling of a ledge or overhanging embankment, and he sues to recover damages for such injuries. The trial in the court below resulted in a verdict in his favor for the sum of $3,000. The appeal is from the judgment entered pursuant to the verdict, no motion for a new trial having been made.

The testimony relating to the important issues is in dispute; but the jury having resolved these issues in plaintiff's favor, and their findings having substantial support, this court is bound by plaintiff's version. The following statement of facts in respondent's brief is, we think, substantially correct.

"On the 13th day of January, 1913, the plaintiff was in the employ of the defendant as a common laborer, and his duties were the shoveling into wagons and hauling gravel from a certain gravel pit one side of which was about 15 feet high. The plaintiff had been in defendant's employ for about two days, and on the days prior to the day on which the injury occurred he had been working in another part of the gravel pit. Plaintiff had nothing to do with taking down the embankment, but this work was performed by the defendant in person. At the point where plaintiff was hurt he had loaded three wagons of gravel only. Just before plaintiff was injured he told the defendant that it did not look safe for him to work where he was working. And the defendant

said: 'I was on top there and drove wedges in there, and I examined it. You could put a team of horses on top it would not come down. You shovel this in. Go ahead, I was just up there and looked at it, I will stand the responsibility; fill it in before it freezes again.' Plaintiff then commenced to shovel the gravel which the defendant had picked out, and when he had shoveled three or four shovels full after defendant had assured plaintiff of the soundness and safety of the embankment, it fell upon the plaintiff and injured him. On the day of the injury no part of the embankment was knocked down. Nor had any part of the embankment been knocked down by anyone while the plaintiff worked there. The plaintiff testified that he knew that there was danger if the embankment fell, but that he did not know there was any danger, because he was assured by the defendant that the embankment was safe and would not fall. The defendant had gone upon the embankment for the purpose of examining it to ascertain its safety, and, after he had made an examination of it, which it was his duty to do, he assured the plaintiff that the place was safe and that the embankment would not fall, and ordered him to hurry up and shovel in the gravel before it froze. While the plaintiff may have had apprehensions from the appearance of the embankment, his apprehensions were put at rest by the assurances of the master. He believed that the place was safe after he was told that it was safe. The plaintiff made no examination of the embankment, and it was not his duty so to do, but the examination was made by the master who had that duty to perform, and after a full examination of the embankment by the master, the master told the plaintiff the results of his investigation and examination, and that he found the embankment safe and that it could not come down. Only a few seconds elapsed between the time the defendant assured plaintiff of the safety of the place and the time of the injury.

"The plaintiff sustained severe injuries. One of his legs was broken. He remained in the hospital for about three weeks at Minot and then was taken home for two months and a half, and then was taken to Rochester, and at the time he was taken to Rochester his legs was still broken. He had an operation performed on his leg at Rochester. At the time of the trial his left leg was still injured. A piece of the bottom of the knee cap was cracked, and he could not use his leg without the use of crutches. This condition existed ten months after the in-

jury. The plaintiff at the time of trial was suffering from pains in his leg and back. At the time of trial he could not bear any weight on his leg. At the time of trial ten months after the injury there was still a running sore on his leg as a result of the injury. Plaintiff since his injury has not been able to work. On the day of the trial the physician examined the leg and found 'considerable deformity of the leg.' There was considerable deformity of the tibia. It was out of its natural line. One leg was slightly shorter than the other. The leg will never be as efficient a leg as before, and that injury was a permanent one. The doctor testified that his injury to his leg would always affect him. At the time the doctor made the examination of the broken right leg, plaintiff complained of the pain in the knee cap of the left leg. The evidence does does show that the plaintiff is permanently crippled. Before the injury the plaintiff was a strong, able-bodied man forty-nine years old, and, on account of the injury, he has suffered in his general health."

The acts of negligence pleaded are: (1) Negligence in commanding plaintiff to work in a dangerous place; (2) negligence in failing to warn plaintiff of the dangers; (3) negligence in failing to prevent a cave-in of the embankment. The answer admits that the plaintiff sustained injuries, but denies any negligence on defendant's part, and defendant affirmatively alleges contributory negligence and assumption of the risk by plaintiff. No special damages are pleaded.

The specifications of error presented for our consideration are the questions of assumption of risk, contributory negligence, insufficiency of the evidence to show negligence of the defendant, the correctness of the instructions to the jury, as well as certain errors in ruling out testimony and in limiting the cross-examination of the plaintiff. Excessive damages are also alleged.

In the light of the facts as testified to by the plaintiff, and which we must accept as true, we are firmly of the view that there is no merit in appellant's specifications relative to assumption of risk, contributory negligence, or alleged insufficiency of the evidence to show negligence of defendant as alleged. Under the evidence each of these questions was properly for the jury, and it would have been error for the court to have decided them as a matter of law. The rules of law applicable to the evidence as before stated are too well settled to re-

quire extended discussion. We merely cite the following cases as controlling in the case at bar: Umsted v. Colgate Farmer's Elevator Co. 18 N. D. 316, 122 N. W. 390; Webb v. Dinnie Bros. 22 N. D. 377, 134 N. W. 41. See also the following authorities based on quite similar facts: Haas v. Balch, 6 C. C. A. 201, 12 U. S. App. 534, 56 Fed. 984 (8th C.); Brown v. Lennane, 155 Mich. 686, 30 L.R.A.(N.S.) 453, 118 N. W. 581; Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876; McBrayer v. Virginia-Carolina Chemical Co. 89 S. C. 387, 71 S. E. 980. Also the numerous authorities cited in note in 7 Ann. Cas. 436–442; Labatt, Mast. & S. 3960–3974.

What we have said with reference to the question of assumption of risk is equally applicable to the question of contributory negligence. It is in very rare cases that the court can say as a matter of law that plaintiff was guilty of contributory negligence. The case at bar is not one of such cases. Umsted v. Colgate Farmer's Elevator Co. and Webb v. Dinnie Bros. supra, are controlling on this point in respondent's favor. The issues as to plaintiff's contributory negligence were clearly for the jury.

Appellant urges that the evidence is insufficient as a matter of law to establish negligence of the defendant as alleged. We have read the record carefully, and are unable to concur in this view. Defendant was personally in charge of the work, and expressly admitted knowledge of the dangerous character of the work that plaintiff was engaged in doing, and that he thought it was unsafe. He commanded the plaintiff to work at the place of the injury. This was culpable negligence. See the foregoing authorities and especially Webb v. Dinnie Bros. and Haas v. Blach, supra.

This brings us to a consideration of the court's instructions to the jury. We have examined the instructions complained of, and, with but one exception, which we will presently notice, we deem them free from prejudicial error. Some of them are perhaps not as clear and complete as they should have been, but no requests were made by defendant for further and more specific instructions, and it is well settled that in the absence of such request appellant will not be heard to complain where the instructions cover the subject correctly but only in a general way. State ex rel. Pepple v. Banik, 21 N. D. 419, 131 N. W. 262; Zilke v. Johnson, 22 N. D. 85, 132 N. W. 640, Ann. Cas. 1913E,

1005; Landis v. Fyles, 18 N. D. 590, 120 N. W. 566; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 227, 112 N. W. 972; State v. Rosencrans, 9 N. D. 163, 82 N. W. 422, and State v. Haynes, 7 N. D. 352, 75 N. W. 267. The above rule has no application, however, to an instruction which misstates the law. Such an instruction is fatal to a recovery unless it appears that its giving was nonprejudicial.

This brings us to the instruction upon the question of damages the giving of which, for reasons hereinafter stated, we deem very prejudicial. In the first place, it should be borne in mind that there is no allegation in the complaint covering special damages, there being no reference whatever to expenses incurred by plaintiff in medical aid or hospital bills, nor is there any proof in the record touching the amount of any such expenses. Notwithstanding this, the court evidently through inadvertence charged the jury as follows: "Damages for a personal injury consist of *three principal items; First, the expense which the injured person is subjected to by reason of the injury complained of;* second, the inconvenience and suffering resulting from it; and, third, the loss of earning power, if any, and whether temporary or permanent, consequent upon the character of the injury." This instruction was correct in the abstract, but as applied to the pleadings and proof in this case the portion italicized was, we think, clearly erroneous and exceedingly prejudicial. Respondent's counsel evidently appreciates the erroneous character of such instruction standing alone, but he strenuously contends that the instructions taken as a whole are correct, or at least render the instruction complained of nonprejudicial. Notwithstanding the contention of respondent's counsel to the contrary, we deem the decision in Barron v. Northern P. R. Co. 16 N. D. 277, 113 N. W. 102, not only in point, but it is controlling in appellant's favor. See also Reed v. Chicago, R. I. & P. R. Co. 57 Iowa, 23, 10 N. W. 286; Brown v. White, 202 Pa. 297, 58 L.R.A. 321, 51 Atl. 962; Olson v. Erickson, 53 Wash. 458, 102 Pac. 400. Respondent's counsel misconstrues the instructions when he says the jury was told "that one of the elements of damages in personal injury cases were expenses, *if any.*" The last two words as employed in the instructions merely qualify the third item of damages stated, *viz.,* "the loss of earning power." It is clear, we think, that the jury was told in express and unqualified language that they might, in assessing damages, take into

consideration the expenses to which the plaintiff had been subjected to by reason of the injuries complained of. The testimony incidently discloses that plaintiff had two doctors at Minot, and was confined in the hospital at that place for three weeks; that he was removed to Rochester, Minnesota, where an operation was performed on his leg, and where he was confined in a hospital for six weeks. It is quite natural and probable, therefore, that the jury in fixing the damages considered these matters. At least we cannot, in the light of the instruction aforesaid, presume that they did not do so, nor have we any right to assume that they allowed for such expenses merely nominal damages. As very correctly argued by appellant's counsel: "The jury is told that damages for personal injury consist of three *principal* items, and that the first principal item is the expense to which the injured person is subjected by reason of the injury. The question of the expense to which the plaintiff would be put by reason of injury is made of primary importance. This form of instruction would allow the jury to consider loss of time, medicine, nursing, cost of mechanical therapeutic devices, railroad fare to Rochester, Minnesota, surgical dressings from time to time, and the cost of a surgical operation performed on plaintiff's leg at one of the great surgical institutions in the world, the Mayo Hospital at Rochester."

For the error in giving such instruction, the judgment must be reversed and the cause remanded for a new trial. It is so ordered.

ERIK R. RAMSTAD, James Johnson, and Elinora Roach, Administratrix of the Estate of Joseph Roach, Deceased, v. A. CARR, Alex Scarlett, R. H. Bosard, John Ehr, and F. B. Lambert, as Park Commissioners of the Park District of the City of Minot.

(L.R.A. —, —, 54 N. W. 195.)

Owner of land — dedication — intent.

1. There can be no dedication, in the absence of an intent on the part of the owner to dedicate.

Dedication — intent — determined from acts of owner — not from some hidden purpose.

2. Such intent, however, is to be ascertained from the acts of the owner, and not from the purpose hidden in his mind.

Owner of lands — plats and sells property with reference to plat — dedication of public places shown — streets — intention.

3. When the owner plats his property, and sells lots with reference to the plat, he thereby manifests an indisputable intention to dedicate the public places shown on such plat.

Park — designated on plat — dedication — intention.

4. The word "park" written upon a lot of land designated upon such plat is as significant of a dedication and of the use to which the land is dedicated, as is the word "street" written thereon.

Park — meaning of — public place — setting apart for use.

5. The ordinary American meaning of a park is a piece of ground set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as opportunity for open-air recreation, and the term is not applicable to private inclosures enjoyed by the few to the exclusion of the public.

Numbering of lots on plat — public use — dedication — intention.

6. The designation of a lot by a number upon a plat, laid out under the statute which requires persons making the plat to describe all lots intended for sale by progressive numbers, is not incompatible with a purpose on the part of the owner to dedicate the lot to public uses.

Statutory dedication — grant.

7. A statutory dedication is in the nature of a grant.

Dedication — municipality — acceptance by.

8. And such dedication does not become effective or binding upon the municipality, or render it subject to the duties or liabilities of ownership until the dedication has been accepted.

Acceptance — beneficial — presumed.

9. But acceptance of a dedication may be presumed when it is beneficial to the donee.

Formal acceptance not necessary — acts — conduct — municipal officers — dominion over — assumption.

10. Formal acceptance of a dedication is not required, but such acceptance may be manifested by any act or conduct on the part of the proper municipal officers, which clearly indicates an assumption of dominion over the property dedicated.

Statutory dedication — filing plat — selling property — withdrawn only by vacation — statute.

11. A statutory dedication by the filing of a plat, and the sale of lots by the owner with reference thereto, can be withdrawn only by a vacation of the plat under the statute.

Dedication — effective — withdrawn — rejected.

12. Such dedication continues effective until withdrawn by the donor, or rejected by the donee.

Dedication — formal rejection — implied rejection — acts and conduct — intention.

13. A dedication may be rejected formally; or rejection may be implied from acts on the part of the municipality clearly indicating an intention to reject.

Taxing officers — assessment of dedicated property — effect of.

14. Officers for assessing taxes do not represent the public for the acceptance of dedications, and the fact that the land dedicated is assessed and taxes collected thereon by the municipality does not of itself negative an acceptance of the same for public purposes.

Opinion filed June 29, 1915.

From a judgment of the District Court of Ward County, *Leighton,* J. Defendants appeal.

Reversed and remanded.

George A. McGee for appellants, *F. B. Lambert,* of counsel.

Where the owner plats land into lots, blocks, streets, and alleys, and the plat thereof is duly executed, filed, and recorded, and all done as by the laws of this state provided, and where a portion of such land is marked and designated on the plat as a park; and where such owner in thereafter selling the lots used such plat, made reference to the said park and to its location, and issued his deeds describing the lots sold as "according to the plat," and where the proper public officials have assumed dominion over such park,—the whole amounts to a conveyance, dedication, or grant to the public. Comp. Laws 1913, § 3946; Cole v. Minnesota Loan & T. Co. 17 N. D. 409, 117 N. W. 354, 17 Ann. Cas. 304; Elliott, Roads & Streets, p. 92; Pittsburgh, C. C. & St. L. R. Co. v. Crown Point, 150 Ind. 536, 50 N. E. 745.

In such a case the grantor is estopped, as well in reference to the public as to his grantees, to deny the existence of the park and the easement in the public. 12 Cyc. 454, note 75; Elliott, Roads & Street,

2d ed. § 118, and cases cited; Russell v. Lincoln, 200 Ill. 511, 65 N. E. 1088, and authorities therein cited; Clark v. Elizabeth, 40 N. J. L. 172.

This rule of dedication by estoppel applies equally to public squares and parks, as to streets, alleys, and to individual grantees by purchase. Poudler v. Minneapolis, 103 Minn. 479, 115 N. W. 274; Watertown v. Cowen, 4 Paige, 510, 27 Am. Dec. 80; Fessler v. Union, 67 N. J. Eq. 14, 56 Atl. 272; Atty. Gen. v. Abbott, 154 Mass. 323, 13 L.R.A. 251, 28 N. E. 346; Sanborn v. Amarillo, 42 Tex. Civ. App. 115, 93 S. W. 473; Archer v. Salinas City, 93 Cal. 43, 16 L.R.A. 145, 28 Pac. 839; Florida East Coast R. Co. v. Worley, 49 Fla. 297, 38 So. 618; Carter v. Portland, 4 Or. 340; Pella v. Scholte, 24 Iowa, 283, 95 Am. Dec. 729; Russell v. Lincoln, 200 Ill. 511, 65 N. E. 1088; Abbott v. Cottage City, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325, and cases cited; Cole v. Minnesota Loan & T. Co. 17 N. D. 409, 117 N. W. 354, 17 Ann. Cas. 304; Lamoure v. Lasell, 26 N. D. 638, 145 N. W. 577; Atlas Lumber Co. v. Quirk, 28 S. D. 643, 135 N. W. 172.

The fact of dedication of a park, or public square, may be established in the same manner as in the case of highways and streets, and the statutory form of dedication has the same effect as a deed. 3 Dill. Mun. Corp. 5th ed. §§ 1071, 1095, (644), pp. 1096, 1747, note 1; Bayonne v. Ford, 43 N. J. L. 292; Fisk v. Ley, 76 Conn. 295, 56 Atl. 559.

The word "park" written upon a block on a map of city property indicates a public use; and conveyances made by the owner of the platted land, by use of and reference to such map, operate conclusively as a dedication of the block. Price v. Plainfield, 40 N. J. L. 608; Maywood Co. v. Maywood, 118 Ill. 61, 6 N. E. 866; Ehmen v. Gothenburg, 50 Neb. 715, 70 N. W. 237; 3 Dill. Mun. Corp. 5th ed. p. 1748, note 1; San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405; Poudler v. Minneapolis, 103 Minn. 479, 115 N. W. 274; Evans v. Blankenship, 4 Ariz. 307, 39 Pac. 812.

The same doctrine applies to "a spring of water" set apart for "public use." M'Connell v. Lexington, 12 Wheat. 582, 6 L. ed. 735; Cincinnati v. White, 6 Pet. 431, 8 L. ed. 452; Bingham v. Walla Walla, 3 Wash. Terr. 68, 13 Pac. 408.

The term "park" as it is used in this country means a tract of land

within a town or city devoted to public purposes of amusement, pleasure, exercise, and recreation, and generally means a place open to the public for such uses and purposes. Ehmen v. Gothenburg, 50 Neb. 715, 70 N. W. 237; Ruch v. Rock Island, 5 Biss. 95, Fed. Cas. No. 12,105; Avondale Land Co. v. Avondale, 111 Ala. 523, 21 So. 318; Roberts v. Mathews, 137 Ala. 523, 97 Am. St. Rep. 56, 34 So. 624; East Birmingham Realty Co. v. Birmingham Mach. & Foundry Co. 160 Ala. 461, 49 So. 448; Evans v. Blankenship, 4 Ariz. 307, 39 Pac. 812; Frauenthal v. Slaten, 91 Ark. 350, 121 S. W. 395; San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405; Archer v. Salinas City, 93 Cal. 43, 16 L.R.A. 145, 28 Pac. 839; Pierce v. Roberts, 57 Conn. 31, 17 Atl. 275; Florida East Coast R. Co. v. Worley, 49 Fla. 297, 38 So. 618; Smith v. Heath, 102 Ill. 130; Maywood Co. v. Maywood, 118 Ill. 61, 6 N. E. 866; Riverside v. MacLain, 210 Ill. 308, 66 L.R.A. 288, 102 Am. St. Rep. 164, 71 N. E. 408; Logansport v. Dunn, 8 Ind. 378; Rhodes v. Brightwood, 145 Ind. 21, 43 N. E. 942; Bennett v. Seibert, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071; Fisher v. Beard, 40 Iowa, 625; Warren v. Lyon City, 22 Iowa, 351; Pella v. Scholte, 24 Iowa, 283, 95 Am. Dec. 729; Daughters v. Riley County, 81 Kan. 548, 27 L.R.A. (N.S.) 938, 106 Pac. 297; Rowan v. Portland, 8 B. Mon. 232; Elliott v. Louisville, 123 Ky. 278, 90 S. W. 990; Northport Wesleyan Grove Campmeeting Asso. v. Andrews, 104 Me. 342, 20 L.R.A.(N.S.) 976, 71 Atl. 1027; Abbott v. Cottage City, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325; Atty. Gen. v. Abbott, 154 Mass. 323, 13 L.R.A. 251, 28 N. E. 346; Sinclair v. Comstock, Harr. ch. (Mich.) 404; Conkling v. Mackinaw City, 120 Mich. 67, 79 N. W. 6; Banker v. Johnston, 21 Mich. 319; Poudler v. Minneapolis, 103 Minn. 479, 115 N. W. 274; Rutherford v. Taylor, 38 Mo. 315; Price v. Thompson, 48 Mo. 363; Baker v. Vanderburg, 99 Mo. 378, 12 S. W. 462; Cummings v. St. Louis, 90 Mo. 259, 2 S. W. 130; Methodist Episcopal Church v. Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; Price v. Plainfield, 40 N. J. L. 608; Bayonne v. Ford, 43 N. J. L. 292; Watertown v. Cowen, 4 Paige, 510, 27 Am. Dec. 80; De Witt v. Ithaca, 15 Hun, 568; Buffalo v. Delaware, L. & W. R. Co. 178 N. Y. 561, 70 N. E. 1097; Perrin v. New York C. R. Co. 36 N. Y. 120; Conrad v. West End Hotel & Land Co. 126 N. C. 776, 36 S. E. 282; Milliken v. Denny, 141 N. C. 224, 53 S. E. 867; Huber v. Gazley, 18 Ohio, 18; Carter v. Portland, 4 Or. 340; Church v. Portland, 18 Or. 73, 6 L.R.A. 259, 22 Pac. 528;

Morrow v. Highland Grove Traction Co. 219 Pa. 619, 123 Am. St. Rep. 577, 69 Atl. 41; Gillean v. Frost, 25 Tex. Civ. App. 371, 61 S. W. 345; Abbott v. Mills, 3 Vt. 521, 23 Am. Dec. 222; Leuders v. Tenino, 49 Wash. 521, 95 Pac. 1089; Shertzer v. Hillman Invest. Co. 52 Wash. 492, 100 Pac. 982.

Where lands are so platted for town or city purposes, and the plats so marked and lots are sold with reference to such plats, public policy requires that the legal consequences of sales made under such conditions shall be neither uncertain nor obscure, and such beneficial results can be secured only by maintaining the rule that such acts and conduct amount to a dedication of such parts of said lands as are marked for park or public square use, and such rule is not to be frittered away by frivolous circumstances, or other vague indications of an intention inconsistent with the presumption that follows from such specified acts of a dedicatory design. Bayonne v. Ford, 43 N. J. L. 292; Price v. Plainfield, 40 N. J. L. 608; Archer v. Salinas City, 93 Cal. 43, 16 L.R.A. 145, 28 Pac. 839; Abbott v. Mills, 3 Vt. 521, 23 Am. Dec. 222.

Such rule is illustrated and followed in many cases. Pierce v. Roberts, 57 Conn. 31, 17 Atl. 275; Rhodes v. Brightwood, 145 Ind. 21, 43 N. E. 942; Morrow v. Highland Grove Traction Co. 219 Pa. 619, 123 Am. St. Rep. 677, 69 Atl. 41.

Estoppel by abandonment cannot arise against a city or municipality, except by long-continued nonuse and by acts clearly indicating abandonment by the public, and by long adverse use of such property, with the apparent will and consent of the public. Davies v. Huebner, 45 Iowa, 574; Biglow v. Ritter, 131 Iowa, 213, 108 N. W. 218; Oliver v. Synhorst, 48 Or. 292, 7 L.R.A.(N.S.) 243, 86 Pac. 376; Bangor Twp. v. Bay City Traction & Electric Co. 147 Mich. 165, 7 L.R.A.(N.S.) 1187, 118 Am. St. Rep. 546, 110 N. W. 490, 11 Ann. Cas. 293; Poudler v. Minneapolis, 103 Minn. 479, 115 N. W. 274; Grogan v. Haywood, 6 Sawy. 498, 4 Fed. 161.

The city is not precluded from obtaining the land dedicated to the public for park purposes by the fact that, after dedication, it assessed the land for municipal taxes. Evans v. Blankenship, 4 Ariz. 307, 39 Pac. 812; San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405; Ashland v. Chicago & N. W. R. Co. 105 Wis. 398, 80 N. W. 1101; Reuter v. Lawe, 94 Wis. 300, 34 L.R.A. 733, 59 Am. St. Rep. 891, 68 N. W. 955.

James Johnson and *Palda, Aaker, & Greene,* for respondents.

There is no stronger proof of a person's claim to real property than his voluntary payment of taxes imposed upon it. If plaintiffs had ever intended that this tract of land should be devoted solely to public uses, they would never have voluntarily paid taxes thereon. Case v. Favier, 12 Minn. 89, Gil. 48; Trerice v. Barteau, 54 Wis. 99, 11 N. W. 244; Canton Co. v. Baltimore, 106 Md. 69, 11 L.R.A.(N.S.) 133, 66 Atl. 679, 67 Atl. 274.

There has never been any common-law dedication of the land in question. Cole v. Minnesota Loan & T. Co. 17 N. D. 409, 117 N. W. 354, 17 Ann. Cas. 304.

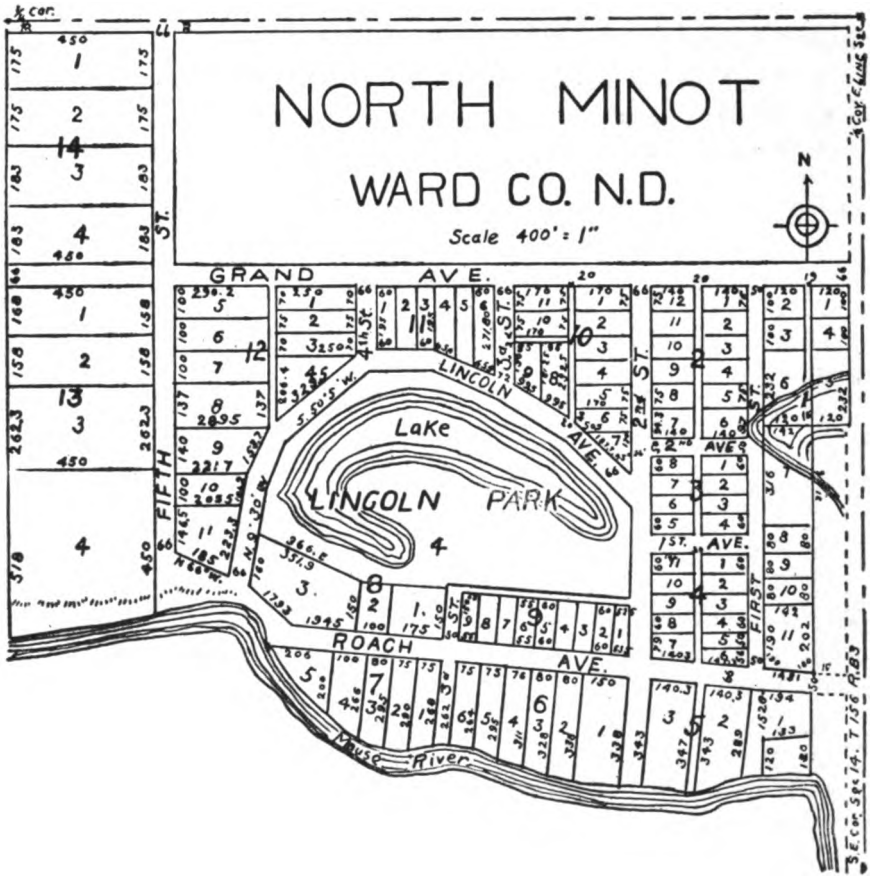
Acceptance by the public is necessary to dedication, either statutory or at common law. Donovan v. Allert, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441; Northern P. R. Co. v. Lake, 10 N. D. 541, 88 N. W. 461; Rev. Codes 1905, § 2422, Comp. Laws 1913, § 3297; Wayne County v. Miller, 31 Mich. 447; Field v. Manchester, 32 Mich. 279; Canton Co. v. Baltimore, 106 Md. 69, 11 L.R.A.(N.S.) 129, 66 Atl. 679, 67 Atl. 274; Hamilton v. Chicago, B. & Q. R. Co. 124 Ill. 235, 15 N. E. 854; Jordan v. Chenoa, 166 Ill. 530, 47 N. E. 191.

CHRISTIANSON, J. The question presented for our determination on this appeal is whether a certain tract of land situate within the corporate limits of the city of Minot is a public park, dedicated by the owners to the use of the public, and as such subject to, and under the control of, the board of park commissioners of that city; or the private property of the plaintiffs. The plaintiffs prevailed in the courts below, and defendants have appealed, and demanded a trial *de novo* in this court.

The land in question is a portion of a larger tract which the plaintiffs purchased in January, 1905, from one Sevald H. Johnson. The property was purchased and owned jointly by Erick R. Ramstad, James Johnson, and Joseph Roach, but the legal title was taken only in the name of the plaintiff Erick R. Ramstad, and he appeared as the sole record owner. The warranty deed from Sevald H. Johnson to Erick R. Ramstad was recorded in the office of the register of deeds of Ward county on January 12, 1905. Thereafter Ramstad as owner of the property caused the same to be surveyed and platted as an addition to the city of Minot under the name of "North Minot." The

plat shows that there are in all 106 lots in the addition. Near the center of the tract, covered by the plat, was a lake (at least it is so designated on the plat, while the evidence shows that it was rather a low, swampy tract on which there was standing water at all times). The tract involved in this litigation is that part of the tract which is designated as "Lincoln park." It is also designated as lot 4 of block 8 of this addition. The map or plat of such survey was duly executed and acknowledged by the plaintiff Ramstad as proprietor, and certified by the surveyor on May 12, 1905, and was thereafter on May 13, 1905, duly recorded in the office of the register of deeds of Ward county, North Dakota.

The following is an exact reproduction of the plat:—



Indorsed upon the plat as recorded is the following statement signed and acknowledged by Ramstad:

"General Description. Know all men by these presents that Erick R. Ramstad, the owner and proprietor of the following described land— . . . has caused the same to be surveyed and platted, and hereby donates and dedicates to the public use all the streets and alleys thereon shown."

It is conceded that the plaintiff Ramstad remained the ostensible owner of the premises, and had exclusive control and management of the platting of the addition, and of the sale of lots therein.

The plaintiff Johnson testified:

Q. Did you sell any lots in this addition, Mr. Johnson?

A. I did not sell any.

Q. You did not have anything to do with the selling of the lots?

A. I did not sell any lots.

Q. Are you positive of that?

A. I am sure about it, there was only one man that sold the lots.

The plaintiff Ramstad testified in part as follows:

Q. Mr. Ramstad, the tracts of land designated on the plat "Lincoln park" is surrounded by lots, is it not, platted lots?

A. Platted around them.

Q. The lots adjacent to the property called Lincoln park have been sold?

A. Yes.

Q. In the sale of the lots, did you use a plat or map similar to this?

A. Similar to this, a little bigger.

Q. And the property was sold or designated on that plat?

A. Yes, the same as this.

Q. That is, you used that plat, and the property around there was sold with reference to that plat?

A. You mean the lots?

Q. Yes?

A. Yes.

Q. The plat from which you sold was the same as this, except larger?

A. I got it in my pocket here, if you want to see it.

Q. And the plat that you used had lot 4 designated as Lincoln park on it?

A. Yes.

Q. The lots were platted around Lincoln park the same as exhibit 1?

A. Yes.

Q. Let us see the plat.

A. This is the same thing, only the bottom is torn off. I had a larger one, but this is the plat I used all the time.

Q. The plat you used selling lots adjacent to Lincoln park is exhibit A, is it not?

A. Yes, that is the plat I used.

Q. The various lots were pointed out on that plat?

A. Yes.

Q. That plat is in the same condition as it was at the time you made the various sales?

A. Yes.

Q. With the exception of some tears across the bottom?

A. Yes. The same thing.

Q. Do I understand you to testify that all the lots adjoining the park designated as Lincoln park have been sold?

A. All the lots.

Q. They are sold for resident purposes?

A. Yes.

Q. And there are and have been quite a number of houses constructed there?

A. Quite a number of houses. . . .

Q. When did you sell the last lot which faces Lincoln park or is around Lincoln park as near as you can state?

A. I cannot remember.

Q. As near as you can state, Mr. Ramstad, would it be a year ago?

A. It would be more than that.

Q. Have you any lots left in that addition at the present time?

A. No more lots.

Q. How long since you sold the last lot in that addition?

A. Three or four years ago, I think, is the last one.

Q. Surrounding the park, about how many lots have buildings been

constructed on, about how many buildings have been constructed around the park?

A. You mean facing the park?

Q. No, not facing it, how many around here have buildings been constructed, would there be half of them vacant now?

A. The lots?

Q. The lots immediately adjoining the park?

A. Oh, yes.

Q. More than half of them?

A. I would not say more than there is quite a number of them here.

Q. But they have been sold?

A. They have been sold. . . .

Q. Mr. Greene asked you if at the time you had some sales you took the prospective purchaser to the land itself, you also thought you did in those cases, you also had a map, did you not or had exhibit A in most cases?

A. Yes.

Q. And the majority of the lots and practically all of the lots in that addition were sold from exhibit A?

A. Yes, most of them.

Q. Did you ever make any statement to Mr. Lee that you intended to plat this lot 4, subdivide it into lots?

A. I never done such a thing.

Q. Did you have any intention of doing such a thing?

A. No.

Q. Did you during 1906, or at any time after the plat of this addition was filed, do any work in the way of beautifying this spot or improving it as a park?

A. Done some breaking and planted some trees along the north side along the avenue.

Q. What did you do in the way of improving the street and avenue fronting on the park?

A. Planted trees there.

Q. I mean as to the grading?

A. Yes, grading up and fixing up the street.

Q. What did you do in that regard or have you done, did you have anybody?

A. Yes, I did.

Q. Tell what it was.

A. I graded the street and planted the trees.

Q. When was that?

A. I graded the street in 1906.

Q. When did you plant any trees?

A. In 1906 and 1907.

Q. Did you or anybody, any other plaintiff to your knowledge, ever make any application to the city of Harrison township or the county officers or the boards to strike this particular tract off the tax list?

A. No.

Cross-examination.

Q. You made some improvements there, that is, when you were selling the lots?

A. I graded the streets all through there in 1906.

Q. You mean you graded the streets through the entire addition don't you?

A. All over the addition.

Q. When you blocked it off in lots you graded off the various streets?

A. Yes.

Q. Throughout the entire addition?

A. Yes.

The testimony on the part of the plaintiffs further shows that at the time the tract was platted, the greater portion of "Lincoln park" was low, wet ground; that a considerable portion thereof was under water; that a number of the houses on the lots around the park do not face the park; but that in blocks 3, 4, 8, 10, and 12 there are a number of houses facing on Lincoln park. Also, that portions of Lincoln park were cultivated for a couple years, and that plaintiffs permitted various parties to utilize portions thereof for gardening purposes.

Among the witnesses called for the defendants were Mrs. Sibbald and Mrs. Fedje, and the following synopsis of their testimony is taken from plaintiff's brief:

Mrs. Sibbald: I have lived in Minot about ten years. I owned some property in North Minot, at one time. I suppose I bought it from Mr. Ramstad, though I never saw him. Mr. Johnson negotiated and made out the deed for me. At the time the deed was made out I

was shown a plat; I suppose it was just like exhibit A. It was similar to that. I was shown there a territory marked as Lincoln park. I bought the property from the plat. I got the impression from the plat that it was to remain a public park. I don't know as the presence of the park would enhance the value of the property, but its presence was my reason for choosing those particular lots. It was the thing that induced me to buy. It would make the property more desirable for me.

(Cross-examination): I think I bought lots 8 and 9 in block 10. Mr. J. G. Moore showed me the lots. I don't know that he had a contract for the purchase, or that the contract was assigned to me. I never saw Mr. Ramstad, that I know of. I would not know him if I saw him. I don't know of any representations made by Mr. Johnson as to the park, except what I saw on the plat. The lots were not built on. They remained vacant until I sold them. All the information I had as to this park was from the mere fact that I saw it marked on the plat and from what Mr. Moore told me at the time I went over and saw the lots. I don't remember any representations by Mr. Johnson or Mr. Ramstad.

(Redirect examination): The papers were made out in Mr. Johnson's office. Mr. Moore told me of the addition over there, and these lots were across the street from the park, and he took me over and showed them to me. I wanted lots overlooking the park, and I believed that it was a park at the time I signed the contract and paid my money. I think the transaction was in 1906 or 1907.

Mrs. Fedje: I live in Minot, on the north side, and in the vicinity of Lincoln park. I own two lots, numbers 6 and 7 in block 10 of North Minot. I bought them from Erik Ramstad. He showed me a plat similar to exhibit A.

Q. Did he have any plat there that showed Lincoln park, if you remember?

A. I don't remember that. Mr. Ramstad said it was to be a park. Pointed to it and said: This is to be a park. That was at the time I bought the lots.

Q. Did the fact that Mr. Ramstad represented that it was to be a park enter into your buying the lots near the park?

A. Oh, partly. I wanted to buy lots near the park. Mr. Ramstad

did not say how large a space the park would be, nor whether there would be a body of water in it. It was pointed out as south of me. The conversation between us took place partly at his home. When I purchased the lots I believed there would be a park there.

(Cross-examination).

Q. Did Mr. Ramstad tell you that the park was given to the public to be a public park?

A. No, sir, he did not say anything to me about intending to fix it up himself for a park some time. He did not say whose it was, nor whether it was a public or private affair. I built a house on the lots and I live there.

(Redirect examination): Did you or did you not believe that it would be a park for the public for the public people of the city?

A. Yes, naturally I took it that way. I believe that when I bought the lots.

(Recross-examination): I paid $350 for the two lots. I didn't pay any more because of its being fronted on this park.

(Redirect examination): If the park which Mr. Ramstad pointed out was to be a park it would make my property more desirable.

At the time of the filing of this plat and for a period of four years thereafter, this platted tract was outside of the corporate limits of the city of Minot and was a part of Harrison township, but thereafter during the month of May, 1909, by proceedings duly had under the laws of this state, this platted district was annexed to and became a part of the city of Minot. The annexation proceedings were confirmed by this court in May, 1911, in the case of State ex rel. Johnson v. Clark, 21 N. D. 517, 131 N. W. 715.

In the fall of 1911, the city of Minot was duly organized as a park district, under the provisions of the laws of this state relating thereto, and the defendants in this action were chosen as, and still constitute, the board of park commissioners of such park district.

It is conceded that this tract was assessed for taxation in the township of Harrison and thereafter in the city of Minot in the name of the plaintiff Ramstad, for and during all the years from 1905 up to and including 1912, and that such taxes were paid by him. It is also conceded that there was no acceptance by the municipality, or any attempt

to exercise any dominion or control over the premises involved herein by any of its officers, until in May, 1913, at which time the board of park commissioners regularly adopted a resolution setting forth the election and organization of such board, and the duty of the board to supervise, maintain, and beautify the various parks of the city. The resolution further described with particularity six different parcels of land in said city as constituting the parks of the city,—one of which was the tract involved in this action. The resolution further stated that such parcels of real estate, constituting parks, still remained on the tax lists, but that the park board had taken control of these parks, and also taken steps to improve and beautify the same, and that therefore the park board requested the board of city commissioners of the city of Minot to strike the various tracts of real estate constituting such parks from the tax list for the year 1913, and thereafter. The board of city commissioners of the city of Minot, on May 19, 1913, complied with the request of such resolution and struck all of said properties, including the tract of land involved in this action, from the assessment roll, and said property has not since that time been assessed for taxation. Thereafter, about June, 1913, the defendants as such park commissioners entered upon the premises involved herein, and caused certain improvements to be made, including the planting of a number of trees. Plaintiffs thereupon demanded that defendants discontinue such improvements. Defendants refused to comply with this demand, and plaintiffs brought this action to enforce their rights as alleged owners of the premises.

Defendants contend that the plaintiffs by filing the plat, and selling lots with reference thereto, dedicated the tract designated thereon as Lincoln park to the public; and that under the provisions of § 3946, Comp. Laws, the filing of the plat constituted a conveyance thereof; that no acceptance was necessary; but that if acceptance was necessary that then the acts of the municipal officers in striking same from the tax list, and assuming control thereof, and planting trees thereon, constituted a sufficient acceptance.

Plaintiffs, however, contend that there was neither a statutory nor a common-law dedication; that the fact that the tract called "Lincoln park" was also designated on the map at lot 4 of block 8 was inconsistent with an intent to dedicate the same as a park, and that the numerical

designation will control; that, in any event, acceptance by the public within a reasonable time was necessary, and that the levy of taxes upon the premises, and the payments thereof by plaintiffs, was inconsistent with, and negatives, any intention on the part of the plaintiffs to dedicate, and on the part of the municipality to accept; that the acts of the defendant were insufficient to constitute acceptance, but if sufficient, came too late.

The statutory provisions of this state relating to the survey and platting of towns and additions; the preparation and filing of plats or maps of such surveys, and the dedication thereby of lands intended to be used for public purposes, so far as they are material to a consideration of the question involved in this case are as follows: "When any person wishes to lay out a town in this state or an addition or subdivision of out-lots, such person shall cause the same to be surveyed and a plat thereof made which shall particularly describe and set forth all the streets, alleys, commons or public grounds and all in and out-lots or fractional lots within or adjoining said town, giving the names, width, courses, boundaries and extent of all such streets and alleys." Comp. Laws, § 3942. "All the in-lots intended for sale shall be numbered in progressive numbers or by squares in which they are situated and their precise length and width shall be stated on said map or plat; and out-lots shall in like manner be surveyed and numbered and their precise length and width stated on the plat or map, together with any streets, alleys, or roads which shall divide or border the same." Comp. Laws, § 3943.

"The plat or map after having been completed shall be certified by the surveyer and the officers, and every person whose duty it shall be to comply with the foregoing requirements shall at or before the time of offering said plat or map for record acknowledge the same before some person authorized to take acknowledgments. A certificate of such acknowledgment shall by the officer taking the same be indorsed on the plat or map, which certificate of the survey and acknowledgment shall also be recorded and form a part of the record." Comp. Laws, § 3945.

"When the plat or map shall have been made out and certified, acknowledged and recorded as required by this chapter every donation or grant to the public, or to any individual, religious society or corporation, marked or noted as such on said plat or map, shall be deemed a sufficient conveyance to vest the fee simple of such parcel or parcels

of land as are therein expressed, and shall be considered to all intents and purposes a general warranty against such donors, their heirs or representatives, to said donees or grantees, for their use for the uses and purposes therein named, expressed and intended, and no other use and purpose whatever; and the land intended to be used for the streets, alleys, ways, commons or other public uses in any town, city or addition thereto shall be held in the corporate name thereof in trust to and for the use and purposes set forth and expressed or intended." Comp. Laws, § 3946.

(1–2) It is true, as plaintiff's counsel contends, that an intent on the part of the owner to dedicate is essential. But the intention recognized by the court is to be ascertained from the acts of the owner, and not from the purpose hidden in his mind. "It is the intention which finds expression in conduct, and not that which is secreted in the heart of the owner, that the law regards." Dill. Mun. Corp. 5th ed. § 1079; McQuillin, Mun. Corp. § 1562.

(3) There is no question but that the plaintiffs herein not only caused the premises to be platted, and the plat recorded, but also sold lots with reference thereto. And that on such plat the premises involved herein were designated as "Lincoln park." It is generally held that such facts manifest an indisputable intention on the part of the plaintiffs to dedicate the public places designated on the map to public use.

"Dedications have been established in every conceivable way by which the intention of the party can be manifested. Where a plat is made and recorded, and lots are sold with reference thereto, the requisite intention is generally indisputable." Dillon, Mun. Corp. 5th ed. § 1079, p. 1706.

"If the owner plats his property and then sells lots pursuant to the plat, his intent to dedicate public places on such plat is shown, and he is estopped to deny a dedication as against such purchasers, and it seems his only way to retain the property so dedicated is to vacate the plat if he can obtain the consent of the purchasers, and the statute authorizes a vacation in such a case or does not forbid it. So, where the proprietor of land sells and conveys lots in conformity and with reference to a city map, on which his land is laid off into lots with streets, etc., such sales are a recognition and adoption of the map, and

amounts to a dedication of designated streets and public places to public use." McQuillin, Mun. Corp. § 1562, p. 3247.

"It is well settled and beyond dispute, that if the owner of land sells a lot or lots with reference to a plat or map made by him or by others, which shows on its face certain parts thereof marked as streets, alleys, parks, or other public places, the owner is estopped, as against the grantee or grantees, to assert title to such public places, and that the grantee or grantees have a right to require the grantor to keep such public places open for the use designated." McQuillin, Mun. Corp. § 1577, p. 3269.

"Where the owner of real property lays out a town upon it, and divides the land into lots and blocks, intersected by streets and alleys, and sells any of the lots with reference to such plan, or where he sells with reference to the map of a town or city in which his land is so laid off, he thereby dedicates the streets and alleys to the use of the public, unless it appears, either by express statement in the conveyance or otherwise, that the mention of the street was solely for purposes of description, and not as a dedication thereof. On the same principle the owner will be held to have dedicated to the public use such pieces of land as are marked on the plat or map as squares, courts, or parks. The reason is that the grantor by making such a conveyance is estopped, as well in reference to the public as to his grantees, from denying the existence of the easement." 13 Cyc. 455. See also Cole v. Minnesota Loan & T. Co. 17 N. D. 409, 427, 117 N. W. 354, 17 Ann. Cas. 304.

Plaintiff's counsel, however, contend that there was no representation on the part of the owners that the premises in question were to be used for a public park, and that plaintiffs manifested no such intention. It is not seriously denied that the premises were to be used for a park when the proper time arrived; but it is most earnestly contended that it was to be, not a public, but a private, park, with title and control vested in the plaintiffs.

It is alleged in the complaint: "That at the times of the making and recording of said plat and at all times since, it was the purpose and designs of these plaintiffs as owners of said property to hold and preserve said lot four (4) as and for a private park, to be at their pleasure equipped and devoted to such purposes as they might see fit to devote the same; that no words of dedication of said lot four (4) for

public purposes are used in the certifying of said plat, and that said plaintiffs have never since the platting of said premises, by deed of conveyance or by any act or conduct on their part, donated or dedicated said premises to the public use."

(4–5) It will be observed that there is nothing on the map to indicate that Lincoln park is reserved by the owners. The very term "Lincoln park" indicates a dedication to public, rather than a reservation for private, use.

In municipal affairs, a park is a piece of ground set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as opportunity for open-air recreation. (Com. v. Hazen, 207 Pa. 52, 57, 56 Atl. 263.)

"If the words 'public park' had been upon it, no question would have arisen. But a park in a city means to the sense of every person a place open to everyone. It carries no idea of restriction to any part of the public or to any specific number of persons. Restrictions as to time of entrance or behavior of those entering are conceivable, but the idea that any class of the community is to be excluded would not be entertained primarily by any person in connection with the idea of a park within the limits of a city. That it was to be a place of public resort would be the impression which any person would receive, by looking at the map in this case, delineating a tract of 60 acres, with streets, and a square or block, upon which is marked 'park.' The grantee in a deed made by reference to it has a right to so understand it. Neither the grantors nor any person claiming under them can come in, and against any such grantee, or against the public, set up an intent differing from that which the word adopted naturally imports. There is no such uncertainty of meaning as will let in parol testimony to vary or modify it. If the grantors had a different intention, that should have appeared from the papers themselves. The popular and natural meaning should have been so modified in accordance with such intention." Price v. Plainfield, 40 N. J. L. 608, 613.

In the case of Archer v. Salinas City, 93 Cal. 43, 49, 16 L.R.A. 145, 28 Pac. 839, the court said: "The word 'park,' written upon a block of land designated upon a map, is as significant of a dedication, and of the use to which the land is dedicated, as is the word 'street,' written upon such map. The word carries with itself the idea of an

open or inclosed tract of land for the comfort and enjoyment of the inhabitants of the city or town in which it is located, and is so defined by lexicographers. In England the word when applied to an inclosed tract of land in the country has a different signification, and signifies that the lands inclosed are the private grounds of the proprietor. In this country, too, a man may inclose his own land and style it a park, or give that name to his place, without giving to the public any right to its use, for in such a case there would be no semblance of dedication; but the meaning of a word is to be determined by the circumstances connected with its use. In London, as well as in any city in this country, the term 'park' signifies an open space intended for the recreation and enjoyment of the public, and this signification is the same whether the word be used alone or with some qualifying term, as Hyde park, or Regent's park, or, as in the present case, 'Central park.' Upon this point the authorities are uniform." See also Dill. Mun. Corp. 5th ed. § 1096.

The supreme court of Pennsylvania, in the case of Com. v. Hazen, 207 Pa. 52, 56 Atl. 263, held that the term "park" was not applicable to a private inclosure. The court said: "It may be conceded that the word 'park' has been used in other ages and in other countries, occasionally, to mean a tract of land inclosed and stocked with beasts of chase, such as that described by Xenophon as belonging to Cyrus, King of Persia, filled with wild beasts which he hunted on horseback; but we doubt whether the ordinary citizen of Pike county got his notion of a park from Xenophon. . . . But the American meaning of 'park' is . . . 'a piece of ground set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as opportunity for open-air recreation.'" This definition gives the common understanding of the term. It fits Fairmount park, Philadelphia; Central park, New York; Highland park, Pittsburg, and probably every public park in the country. It is not applicable to private inclosures enjoyed by the few to the exclusion of the public; it is not applicable to a game and fish preserve, which the subject of this act clearly is, as understood both in this country and in England. By this title the resident of Pike county, even if he knew the park was to be located in his county, would assume it would be an open place for his and his family's recreation along with others of the public. He would

not dream that it was for the exclusive enjoyment of the few; that he would be haled before a magistrate by a deputy sheriff, fined and possibly imprisoned, if he set foot upon it."

In the case of Ehmen v. Gothenburg, 50 Neb. 715, 70 N. W. 237, it was held that the mere fact that the park was designated by the proprietor's name did not imply private ownership. And it seems obvious that a designation of the park under the name of "Lincoln park" is far more indicative of a dedication to public use than if the park had been designated "Ramstad's park." See also authorities cited in 6 Words & Phrases, 1st series; 3 Words & Phrases, 2d series; see also Bouvier's Law Dict.; Black's Law Dict.

Plaintiff's counsel also contend that the plat negatives any intent on the part of the proprietor to dedicate the tract involved herein to public use, for two reasons: (1) That the tract, in addition to being designated as Lincoln park, is also designated as lot 4 of block 8; and that, therefore, under the provisions of § 3943, Comp. Laws, the latter designation indicates that said lot was intended for sale the same as other lots in the addition. (2) That the proprietor's certificate attached to the plat makes no reference to a park, while it specifically mentions streets and alleys. We are unable to agree with plaintiff's counsel in either proposition.

(6) The plaintiff Ramstad in his testimony denies any intention of subdividing and offering Lincoln park for sale; and the complaint in this action expressly alleges that this tract was to be a park. Hence, it is apparent that the plaintiffs themselves disclaim that the numerical designation was placed thereon for the purpose of manifesting an intention on the part of the owners that the lot was for sale. It is also conceded that the tract involved herein contains in all between 15 and 20 acres of land, and is too large to be sold as a lot without further subdivision. A significant fact to be considered in this connection is that all the other lots in the addition had been sold long prior to the commencement of this action,—the tract involved herein being the only one out of all the 106 lots remaining unsold.

The supreme court of Michigan in the case of Baker v. Johnston, 21 Mich. 320, passed on the same proposition, under a statute apparently identical with our own. That court said: "It is claimed, however, that, as this square, although marked 'public square,' is also marked as

'block No. 6,' the latter designation is inconsistent with any public designation, because the statute requires the person making the plat to describe 'all the lots intended for sale by progressive numbers.' We do not think that this provision would invalidate the designation of a block by its number for any lawful public purpose. It was merely designed to produce some degree of harmony in the numbering, and to facilitate the location and description of lots. And in case a block offered to the public should be refused, it is evident that its being numbered with the rest in regular course would then tend to prevent any break in the continuity of the numbering, and lead to harmony instead of confusion. We think there is no force in this objection."

Nor do we believe that the proprietor's certificate indicates an intention to reserve the premises as the private property of the owners, sufficient to overcome the intent to dedicate manifested by the owner's designation of the premises as Lincoln park on the recorded plat, and sale of lots with reference thereto. It may be observed that the laws of this state make no provision for the form of a proprietor's certificate attached to the map; but such laws do provide that dedication is effected by marking or noting on the map every donation or grant to the public. Comp. Laws, § 3946.

In the case of Bayonne v. Ford, 43 N. J. L. 292, it was claimed that the form of designation of the park on the map indicated a reservation of private ownership, and negatived any intention to dedicate to public use. In discussing the question the court said: "As the practice of selling city lots by reference and in conformity to maps of this description is very prevalent in this state, public policy seems to require that the legal consequences of sales under such conditions should be neither uncertain nor obscure; and such beneficial result can be secured by maintaining that the rule established by the case just cited is not to be frittered away by frivolous circumstances, or other vague indications of an intention inconsistent with the presumption from the specified acts, of a dedicatory design. The reasonable inference from the existence on a map of this description of a tract marked off as a park or other public improvement is that such easement is intended to give value to the adjacent lots, and after such inference has been drawn and sales effected on that footing, the burthen should be thrown on the vendor to show, by the clearest proofs, that the inference thus made was unwar-

ranted. In the case at hand, it seems to me that the proof designed for that end is of the slenderest and most inconclusive character. On the map in question the section of land set off as a park has this description; *viz.*, 'Annette park, now belonging to R. Graves;' and the contention is that this phrase, expressive of ownership, distinguishes this case from that of Price v. Plainfield. But the terms relied on do not sufficiently express the idea sought to be attributed to them. The assertion of ownership comprised in these words does not reach to the point of inquiry, which is as to the use which the owner intends to make of the land admittedly owned by him. The phrase denotes a claim of ownership when the proof was made, but it denotes nothing with respect to the purpose to which the premises are to be applied in the future, whether they are to be retained or sold, as dedicated." See also Ehmen v. Gothenburg, 50 Neb. 715, 70 N. W. 237.

The contentions of plaintiffs' counsel as to both propositions are also refuted by the testimony of the surveyor, who prepared the original plat.

He was called as a witness for the plaintiffs, and testified as follows:

"My name is M. E. Severance. I was a qualified surveyor in May, 1905."

Q. I show you exhibit, which is marked exhibit 1, and ask you if you are the surveyor who prepared the original plat of which that is a copy?

A. I did.

Q. Who employed you to do that work?

A. Mr. Ramstad.

Q. The plat was prepared by yourself as surveyor?

A. Yes, sir.

Q. Was any statement made to you by Mr. Ramstad at the time of the preparation of that plat as to the character of the lot 4, block 8 which is marked as Lincoln park, whether it was to be a private or public park?

A. There was not anything more than is stated on the plat, it was a park, Lincoln park.

It should be remembered that this testimony was offered by the plain-

tiffs. Hence, it is unnecessary for us to consider whether it was admissible, and we express no opinion upon that question.

Plaintiff's counsel next contend that the dedication did not become effective or vest any rights in the municipality until it was accepted in some manner by the public, or by the municipal officers.

(7) In this state a statutory dedication is in the nature of a grant. Comp. Laws, § 3946; Cole v. Minnesota Loan & T. Co. 17 N. D. 409, 419, 117 N. W. 354, 17 Ann. Cas. 304. It is almost elementary that a grant does not become effective until accepted by the grantee. 13 Cyc. 570, 571; 13 Ballard, Real Prop. § 146. It is true, however, that acceptance of a grant need not be by formal or express words to that effect, but may be by acts, conduct, or words of the parties showing an intention to accept. It is also true, as a general rule, that delivery of a grant implies its acceptance by the grantee, in the absence of fraud, artifice, or imposition. 13 Cyc. 571. And acceptance of a grant beneficial to the grantee may be presumed. This is especially true where it conveys valuable property, and creates no obligation or burden to be assumed by the grantee. 13 Ballard, Real Prop. § 146; 13 Cyc. 570. While it is true that the owner by platting land, and the sale and conveyance of lots, with reference to the plat, as a general rule, is estopped to deny the dedication of the parts of the tract, marked on the plat as streets, alleys, parks, or other public places, as against his grantees; or may even be estopped to revoke or deny such dedication as against the public,—still it does not necessarily follow that the grant thereby becomes vested in, or the dedication accepted by, the municipality. Ownership and control by the municipality may, and in a number of cases would, entail burdens and expense. And it seems obvious that a municipality cannot have undesirable properties thrust upon it, and be burdened with the various duties, expenses, and liabilities incident to ownership, without some action, direct or implied on its part showing acceptance, any more than a private individual can have such burdens thrust upon him without acceptance on his part.

(8–9) While there is a great deal of conflict in the authorities upon the question of whether an acceptance is necessary in the case of a statutory dedication, still we believe that the better and more prevalent rule is that an acceptance is necessary. The rule seems sound and logical, and has the support of excellent authority.

The supreme court of Michigan, in the case of Wayne County v. Miller, 31 Mich. 447, in an opinion by Judge Cooley, said: "It concerns the parties in this case, however, to know when it is that the peculiar fee the statute contemplates actually vests in the county. The plaintiff assumes that this takes place immediately a plat duly executed is properly recorded. As the execution and recording of the plat is wholly a private matter, subject to no public supervision whatever, this view would enable proprietors of lands to lay out so many streets and avenues as they might see fit, and wherever their private interests should determine; and whether the streets were desired by the public or not, the private ownership would be displaced. Either one of two consequences must then follow,—the public must be under some obligations to treat the land as constituting a street, and be subject to such liabilities as that fact would impose, or the land must remain waste property, in the hands of an owner who cannot use it for the purposes of profit, and who at the same time refuses to put it to the purposes contemplated in making the plat. . . .

"But if the plat is regarded as a grant, it is equally necessary that there should be acceptance. No one can thrust a grant upon another without his assent. Thompson v. Leach, 2 Vent. 198; Jackson ex dem. Smith v. Goodell, 20 Johns. 188; Hurst v. McNeil, 1 Wash. C. C. 70, Fed. Cas. No. 6,936. It is true, acceptance of a grant may be presumed when it is beneficial (Tompkins v. Wheeler, 16 Pet. 118, 10 L. ed. 908; Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146; Church v. Gilman, 15 Wend. 661, 663, 30 Am. Dec. 82; Peavey v. Tilton, 18 N. H. 151, 45 Am. Dec. 365; Townson v. Tickell, 3 Barn. & Ald. 36, 22 Revised Rep. 291); but there can be no conclusive presumption that a grant of land for a public way is so. We may almost take judicial notice that an offer of land for such a purpose is often—and very properly—declined, for the reason that no such way as the one proposed is needed, and by the acceptance the public would be burdened with obligations without corresponding benefits."

McQuillin (McQuillin Mun. Corp. §§ 1576–1578) says: "The rule supported by the better reason, however, would seem to be that, even in the case of a statutory dedication, an acceptance should be necessary in order to make the municipality liable to maintain the streets or alleys and for injuries resulting from defects therein." § 1576.

"The general rule, however, seems to be that the platting of land and the sale of lots pursuant thereto constitute a dedication, if it may be so called, of the public places delineated upon the plat only as between the grantor and purchaser, and that, so far as the municipality is concerned, such acts amount to a mere offer of dedication, and there is no complete dedication without an acceptance of some kind by the municipality. In still other jurisdictions, it seems to be held that no acceptance is necessary, so far as the right of the municipality in and to the public places is concerned. . . .

"On a review of the authorities, the more prevalent and better rule would seem to be that there must be an acceptance, either express or implied, on the part of the municipality, in order to render it liable for repairs or for injuries resulting from a defect in the street or other public place; that the right to accept exists at least for a reasonable time unless the plat is legally vacated before acceptance, or the municipality is estopped from interfering because of acquiescence in the possession of the public places as private property, by the grantor or his grantees or third persons; that until acceptance the municipality should have no right to enforce the dedication by an action to enjoin the obstruction of the public place or the like, unless such an action of itself be considered an acceptance.

"The reason in support of requiring an acceptance is that the place offered to be dedicated may be one, because of its location or for other reasons, which would be a burden rather than a benefit to the municipality, or else the benefits would be slight in comparison to the burden, and in such a case the imposition of liability on the municipality without its consent is apparently unjust. On the other hand, it would seem that the municipality, where it does not accept the offer to dedicate, should not be entitled to the benefit of the dedication unless it is also burdened with the liabilities connected therewith." § 1577.

"A further exception is apparently declared by some authorities by holding that where the dedication confers a benefit on the public without imposing any burden, as when land is donated for a public park or square or school site, an acceptance will be presumed and the dedication becomes complete, as soon as the owner had manifested his intent by appropriate acts or declarations." § 1578.

(10) It is next contended that there never has been an acceptance

by the municipality, and that therefore the defendants have no right to exercise dominion over the property. That the acts of the municipal authorities in striking the property from the tax list, and subsequently improving the same, are not sufficient to constitute acceptance. It is contended that a formal acceptance by ordinance is necessary. This contention is not well founded. The question whether there has been an acceptance depends primarily upon whether there has been an intent to accept the offer to dedicate. McQuillin, Mun. Corp. § 1589, p. 3304.

"The methods in which the municipality may accept lands dedicated to public use, and become liable for the maintenance of streets, ways, and other public places, are of great variety, and may be said to include every act done by the municipality through its proper officers in the exercise of its jurisdiction and control of public streets and highways. When property is dedicated to public use for a street, way, or other purpose, the acceptance by the municipality need not be expressed and appear of record, but may be implied from any acts showing the recognition by the municipality of its existence as a public street or highway and the assumption of control over the same, as by repairs and improvements knowingly made and ordered, or knowingly paid for by the local authorities which has the legal power to adopt the street or highway." Dill. Mun. Corp. 5th ed. § 1087.

"Unless otherwise provided by statute or charter, there is no necessity for any formal acceptance of the dedication.

"Acceptance may be shown in a great many ways, by any act with respect to the property claimed to be dedicated that clearly indicates an assumption of jurisdiction and dominion over it. There need be but little affirmative action to indicate an intention to accept a dedication. So, there need not be any affirmative action on the part of the municipal authorities. To constitute an acceptance, the property dedicated need not be in the actual use or occupation of the public." McQuillin, Mun. Corp. § 1579.

"The acceptance of a dedication may be evidenced by acts of municipal officers, such as exercising authority over the property dedicated, to improve or regulate. . . . So, an acceptance may be shown by ordinances or resolutions adopting, or referring to and recognizing as corporate property, lands designated in a plat as public places or otherwise offered to be dedicated for public use; or by making a survey in

which the strip dedicated appears as a street, and the adoption of such survey as the official survey for the municipality. . . . The act of the municipal authorities in taking possession is an acceptance, as is, it seems, the inclusion of a street within the beat of a police officer." McQuillin, Mun. Corp. § 1580.

We are satisfied that the acts of the municipal authorities constituted a sufficient acceptance. The very fact that plaintiffs have found it necessary to bring this action, and that the municipal officers are here on appeal asserting their rights in the property, is of itself rather persuasive evidence of an acceptance.

It is next contended that if such acts constituted a sufficient acceptance, that such acceptance was not within a reasonable time, and that therefore the offer to dedicate must be deemed withdrawn.

(11–12) The recording of the plat, and sale of lots by the owner with reference thereto, was a grant by the owner to the public of the public places marked on the plat. This grant, it is true, was not binding upon, or effective against, the municipality until accepted by it, but the tender of conveyance on the part of the owner continued until withdrawn by the owner or until it was rejected by the municipality. The statutes of this state fix not only the method in which a dedication may be effected by the filing of a plat; but they also prescribe the manner in, and conditions under, which the plat may be vacated and the dedication revoked. Comp. Laws, §§ 3959–3966. See also Lamoure v. Lasell, 26 N. D. 638, 145 N. W. 577.

As the dedication was made by the statutory method of filing a plat, and the sale of lots by the owner with reference thereto, it could be withdrawn only by a vacation of the plat under the statute. Kimball v. Chicago, 253 Ill. 105, 97 N. E. 257, 259. See also McQuillin, Mun. Corp. §§ 1562, 1592; and Burroughs v. Cherokee, 134 Iowa, 429, 109 N. W. 876. In the case at bar the owners had made no attempt to withdraw the dedication by vacating the plat,—or in any other manner. The offer to dedicate remained in full force at the time of acceptance thereof by the municipal officers.

(13) As an acceptance may be accomplished either by a formal acceptance, or may be implied from any acts on the part of the municipality with respect to the property dedicated that clearly indicate an assumption of jurisdiction and dominion over it; so a rejection of the

dedication may be manifested either by a formal rejection on the part of the municipality, or may be implied from acts on the part of the municipality which clearly indicate an intention to reject the property dedicated. That is, the conduct of the municipality may be such that a change of its position would cause such injustice to private persons who had relied upon such conduct as to warrant the courts in applying the doctrine of equitable estoppel *in pais* against the municipality and the public, to prevent manifest injustice and wrong to those who relied upon and were misled by the conduct of the municipality and the public; but to create such estoppel something more must be shown than a mere failure on the part of the municipality to formally accept and use the property for its intended purpose, before the growth or expansion of the municipality has made it necessary or desirable to apply the property to the purpose for which it was dedicated. Dillon (Dill. Mun. Corp. 5th ed. § 1089) says: "It may be years before the convenience of the public or those who live upon adjacent lots requires that they should formally be taken in charge by the municipal authorities, and in the absence of acts showing a positive intention to revoke on the part of the owner, the right to accept the dedication will usually continue until the wants and conveniences of the public require the use of the dedicated streets."

While the authorities generally merely lay down the rule that acceptance must be within a reasonable time, still it seems obvious this is merely another way of saying that failure to accept for an unreasonable length of time is evidence of an intent to reject the dedication. In any event the municipality must be allowed a reasonable time in which to accept. And in order to be evidence of a rejection of the dedication, the delay of acceptance must be for such length of time and under such circumstances as to clearly indicate an intention to reject the dedication; or, as it has been said, "the delay of acceptance must be for such length of time and under such circumstances as to clearly indicate an abandonment of any intention to accept the offer of dedication." What is a reasonable or unreasonable time will necessarily depend on the condition and situation of the parties and the property, and generally on the circumstances of each particular case. Dill. Mun. Corp. 5th ed. § 1089; Burroughs v. Cherokee, 134 Iowa, 429, 109 N. W. 876.

"What is a reasonable time is a question of fact for the jury, who may

take into consideration not only the time that has elapsed, but also all the other facts and circumstances in the case.

"In determining whether the lapse of time precludes a municipality from accepting an offer to dedicate made by a plat, statutory or otherwise, something more than a mere lapse of time should be taken into consideration, in some cases. For instance, if the proprietor occupies the public places designated in the plat, and expends considerable sums in erecting buildings thereon with the acquiescence of the municipality, it would seem that the municipality would be equitably estopped to open the public place, after many years, notwithstanding the lapse of time might not be so great as to otherwise preclude an acceptance of the dedication.

"The lapse of thirty-four years, and of twenty years, has been held to preclude an acceptance, while, on the other hand, the lapse of such periods in particular places as fifty years, thirty years, twenty-seven years, twenty-five years, twenty-three years, and ten years, has been held not to preclude an acceptance thereafter." McQuillin, Mun. Corp. § 1587. See also Dill. Mun. Corp. 5th ed. § 1086.

A proprietor in preparing and recording a plat, and selling lots with reference thereto, proposes to the public that the tracts dedicated by such plat for public uses shall be used for the specified purposes at such times as the growth and expansion of the municipality makes it desirable or necessary for public convenience that they be so used. The dedication is to the public, and the municipality merely holds the title in trust for the public for the intended use. Comp. Laws, § 3946; see also Gordon County v. Calhoun, 128 Ga. 781, 58 S. E. 360. The municipal officers necessarily must have some discretion in determining when the public interests require an improvement of the property and the application thereof to the purpose for which it was dedicated.

Most plats in this state were laid out, and streets, alleys, and other public places marked thereon, dedicated with no intention on the part of the proprietor that the property so dedicated should be immediately improved and utilized for the public purposes for which they were dedicated. It is seldom, indeed, that all the property dedicated, such as streets, alleys, and parks, are needed, or put into immediate use. It might be many years before public convenience required that the property dedicated be improved and utilized by the public for the purpose

to which it was dedicated. In this case for instance,—at the time the property was platted it was outside of the corporate limits of the city; four years afterwards it was annexed. The city of Minot did not organize as a park district until in the fall of 1911; and the first official act on the part of the board of park commissioners (so far as the record in this case shows), to assume active control over, and make proper improvements in, any of the park properties of the city, was in the spring of 1913. No tax levy could have been made by the board of park commissioners until in 1912, and the moneys received from such taxes could hardly have been available for making improvements in park properties until the spring of 1913. The donor will be presumed by law to have contemplated this state of things, and imposed no condition upon the public to use the property dedicated until the public wants required its improvement and use for the purpose intended. Shea v. Ottumwa, 67 Iowa, 39, 24 N. W. 582. And the fact that during the time when public convenience does not require such use, the property is permitted to lie vacant, or is used by the donor or other private persons for purposes not inconsistent with the improvement and use thereof by the public when the time arrives when public convenience requires that the property be used for the purpose for which it was dedicated, will not work an estoppel against the municipality or the public. McClenehan v. Jesup, 144 Iowa, 352, 120 N. W. 74. Under the facts in this case, it seems quite clear that the municipal authorities assumed jurisdiction over, and sought to improve and utilize, the tract involved herein for park purposes, just as soon as public interests made this necessary. And the alleged use of portions of the property during a couple of summers for gardening purposes by the people living in that vicinity was not in any manner inconsistent with an intent to accept the dedication, and improve and use the premises for park purposes when the wants or convenience of the public so required. There is no contention that public interests required that the property involved in this action be improved or used for park purposes prior to the spring of 1913. The plaintiffs themselves, while alleging in their complaint that the property was intended for a private park, had failed to take any steps to improve or utilize it for that purpose. No authority has been called to our attention, and a diligent search has failed to discover any, supporting plaintiffs' contention that, under the facts and

circumstances in this case, the acceptance on the part of the municipality came too late.

(14) It is next vigorously asserted that the assessment and collection of taxes is not only inconsistent with an intent on the part of the owners to dedicate, but is virtually tantamount to a rejection on the part of the municipality. It frequently happens—as in this case—that land is platted where no incorporation exists. The dedicator, however, is to the public at large, and it is not absolutely necessary that there should be some donee or grantee or some organized body politic for whose benefit the dedication is made. "Hence, the fact that there is no municipal corporation in existence which is authorized to take advantage of the dedication at the time when the dedication evidences his intention to make it will not defeat the dedication; upon such a corporation coming into existence, whether by incorporation or by extension of the corporate limits to include the locus, the right to take advantage of the dedication on behalf of the public will vest therein if the dedication has not been previously revoked or recalled." Dill. Mun. Cor. § 1086.

While there are authorities holding that evidence of assessment or nonassessment, taxation or failure to tax, is admissible on the question of acceptance, still such evidence, although admissible, is by no means conclusive, and the fact that land is taxed by the municipality does not of itself negative an acceptance of an offer to dedicate the same for public purposes.

The supreme court of Michigan in the case of Baker v. Johnston, 21 Mich. 320, 350, in considering this proposition, said: "The assessment or nonassessment of the premises we do not regard as material, as the assessing officers do not represent the public for the acceptance of dedications." And the supreme court of California, in San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405, 408, said: "It is further insisted that because after 1871 the town and county assessors included this square in their assessment lists, and it was included in the general tax levy, and the defendant's intestate paid the taxes, and, in obedience to the municipal ordinances, improved the streets bordering on the square, the plaintiff is now estopped from claiming it as against the defendants. The answer is, that when the block was dedicated to the use of the public as a public square it became a part of the public grounds of the town, and could not be legally assessed or taxed for state,

county, or municipal purposes; and the erroneous action of officials in the respects named could not impair the rights of the public, or confer rights upon the defendants."

The principles announced by the supreme court of California and Michigan in the two cases from which we have quoted is supported by the great weight of authority. Ellsworth v. Grand Rapids, 27 Mich. 256; Rhodes v. Brightwood, 145 Ind. 21, 43 N. E. 942; Boise City v. Hon, 14 Idaho, 272, 94 Pac. 167; Ashland v. Chicago & N. W. R. Co. 105 Wis. 398, 405, 80 N. W. 1101; Hangar v. Des Moines, 109 Iowa, 480, 80 N. W. 549; Sanborn v. Amarillo, 42 Tex. Civ. App. 115, 93 S. W. 473; Arnold v. Orange, 73 N. J. Eq. 280, 66 Atl. 1052. In practically all the decisions wherein the payment of taxes has been considered as evidence tending to show a rejection of the offer to dedicate, there has generally, in addition thereto, been found to exist, not only a mere nonuser by the public or actual user by the donor; but also that private rights had grown up so as to be in equity paramount to the public right, and that an upholding of the public rights in the property would result in gross injustice to the holders of the private rights. No such conditions exist in the case at bar.

Upon the trial of this action the defendants offered to pay back to the plaintiffs all taxes paid by plaintiffs on the premises involved, subsequent to the filing of the plat. This offer still continues. Hence, no injury will result to the plaintiffs by reason of the assessment of the premises and the payment of taxes thereon by plaintiffs. If the taxes are repaid to the plaintiffs, with interest, they are in no worse position than if the grant had been accepted by formal ordinance of acceptance by the municipal authorities of the city of Minot immediately after the property came within the corporate limits of the city.

We reach the conclusion that the tract involved in this action constitutes a public park within the park district of the city of Minot, and subject to, and under the jurisdiction of, the defendants as the board of park commissioners of that city. The judgment of the District Court is reversed, and the cause remanded with directions to enter judgment in conformity with this decision.

Goss, J., did not participate, Hon. C. W. Buttz, Judge of the Second Judicial District, sitting in his stead.

STATE OF NORTH DAKOTA v. H. A. GILBERT.

(153 N. W. 1009.)

Criminal action — extortion — conviction — appeal — evidence — verdict — sustained.

From a conviction of the crime of extortion, defendant appeals. It is *held* that the evidence is sufficient to sustain the verdict.

Opinion filed July 8, 1915.

From the District Court of Bowman County *Nuessle,* Special Judge. Affirmed.

Newton, Dullam, & Young and *H. W. Olson,* for appellant.

The verdict is not sustained because it clearly appears that the defendant entered into negotiations with the complaining witness for the purpose of inducing him to pay a just debt to defendant, and because there is no evidence of any threat to accuse or prosecute the complaining witness.

Extortion is the obtaining of property from another with his consent, induced by a wrongful use of force or fear, or under color of official right. Comp. Laws 1913, § 9943; State v. Fordham, 13 N. D. 500, 101 N. W. 888; State v. Rechnitz, 20 Mont. 488, 52 Pac. 264; People v. Williams, 127 Cal. 212, 59 Pac. 581; Mann v. State, 47 Ohio St. 556, 11 L.R.A. 656, 26 N. E. 226; State v. Hammond, 80 Ind. 80, 41 Am. Rep. 791; People v. Griffin, 2 Barb. 427; State v. Bruce, 24 Me. 71; Com. v. Jones, 121 Mass. 57, 23 Am. Rep. 257; People v. Wightman, 104 N. Y. 598, 11 N. E. 135, 7 Am. Crim. Rep. 101; Reg. v. Richards, 11 Cox, C. C. 43; Reg. v. Coghlan, 4 Fost. & F. 316.

Mere false pretense is not enough. There must be a felonious intent. State v. Hollyway, 41 Iowa, 200, 20 Am. Rep. 586; Rex v. Hall, 3 Car. & P. 409; Hawk. P. C. chap. 34, § 14; 2 Archbold, Crim. Pl. Ev. & Pr. 366; Roscoe, Crim. Ev. 7th Am. ed. 910, and cases cited in notes; Rex v. Donnally, 1 Leach, C. C. 196, 2 East, B. C. 713, 783; 2 Am. Crim. Law, § 1697, and cases cited; 1 Russell, Crimes, 872; 2 Bishop, Crim. Law, 422, and cases cited; People v. Hall, 6 Park.

Crim. Rep. 642; State v. Bond, 8 Iowa, 540; Reg. v. Hemmings, 4 Fost. & F. 50; Crawford v. State, 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628, 9 Am. Crim. Rep. 587; State v. Brown, 104 Mo. 365, 16 S. W. 406; Gant v. State, 115 Ga. 205, 41 S. E. 698; Driscoll v. People, 47 Mich. 413, 11 N. W. 221.

If there was a threat in this case, there is no evidence that it was such as would overcome a person of ordinary intelligence and prudence. Rex v. Southerton, 6 East, 140, 2 Smith, 305, 8 Revised Rep. 428; State v. Evans, Houst. Crim. Cas. (Del.) 97; 38 Cyc. 292.

Our statutes do not contain any such words or conditions in defining the crime. Comp. Laws 1913, § 9943.

A threat is any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free, voluntary action which alone constitutes consent.

Henry J. Linde, Attorney General, *Francis J. Murphy,* and *H. R. Bitzing,* Assistant Attorneys General, for respondent.

The offense of extorting money from a person by means of threats was not known to the common law, and as it is known to-day, is of statutory origin. State v. Coleman, 116 Am. St. Rep. 457, note.

Under the statutes of the states of Ohio and Indiana, from which states defendant's counsel have cited authorities, the rule of construction is not the same as must obtain here. There the words "with intent to extort or gain" are used; or that "pecuniary advantage" must be sought. Our statutes do not contain any such words or conditions in defining the crime. Comp. Law 1913, § 9943; Re Sherin, 27 S. D. 232, 40 L.R.A.(N.S.) 810, 130 N. W. 761, Ann. Cas. 1913D, 446.

"A threat is any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free, voluntary action which alone constitutes consent." 38 Cyc. 290; State v. Coleman, 99 Minn. 487, 116 Am. St. Rep. 460, 110 N. W. 5.

Goss, J. Defendant was convicted of extortion arising from his procuring one Andrew Byer to execute to him two promissory notes of $500 each, secured by chattel mortgage. The prosecution is based upon only one of said notes.

All testimony was received without objection, and no exceptions to instructions have been filed. From the denial of a motion for new trial defendant appeals. The only error assigned is alleged insufficiency of the evidence to sustain the verdict. Such insufficiency is specified as follows: (1) "There is no evidence that the defendant made any threats whatever against the complainant. (2) The evidence clearly shows that whatever was said by defendant to the complainant was said for the purpose of inducing the payment of a just debt and obtaining that to which he was entitled in justice and equity. (3) The evidence clearly shows that the complaining witness was guilty of the offense with which defendant charged him. (4) The evidence discloses no intent or purpose on the part of the defendant to extort property from the complaining witness without his consent, induced by wrongful use of force or fear, and that the wrongful use of force or fear was not the controlling cause of the delivery of property to defendant by the complaining witness. (5) The evidence clearly shows that the complaining witness was not a person of normal mind, and that such threats as were used by defendant did not constitute the wrongful use of force or fear. (6) The evidence clearly shows that the mind of the state's principal witness was so beclouded that he could not recall the things that had happened. That his testimony was in part suggested to him, and that is so vague, confused, and uncertain that a conviction based thereon cannot be sustained."

Appellant's counsel have discussed these questions together under the general proposition that "the verdict is not sustained because it clearly appears that the defendant entered into negotiations with complaining witness for the purpose of inducing him to pay a just debt to the defendant, and because there is no evidence of any threat to accuse or prosecute the complaining witness." Appellant contends it is established by the proof that "defendant had personal property, including certain shawls, in his building on his land. These were taken by the complaining witness. After it was discovered that the shawls had been stolen by complaining witness, defendant took up with him the matter of settlement. As a result of their negotiation the notes were executed. The shawls were not returned until after the execution of the notes. In the course of negotiations defendant told the complaining witness he would be 'as welcome to the notes as the

flowers in May, if the shawls were returned.' There is nowhere a scintilla of evidence which indicates that the defendant had any other purpose than to secure recompense for the valuable shawls. His language is not threatening in its character. He told Byer, according to the latter's testimony, that he had better 'fix the things up a little bit so there won't be any trouble about it. You don't want to be locked up. You are too old a man to be locked up.' Byer himself said that Gilbert never threatened him, that he acted of his own free will and accord; that he thought signing the notes was the best thing he could do." These excerpts from his brief illustrate the substance of the claim of the appellant that the testimony is insufficient to support the conviction. Counsel has briefed quite elaborately upon the disputed question of whether good faith or a lack of a corrupt intent in the making of threats and obtaining money thereby is a good defense to a charge of extortion. But it will not be necessary to pass upon that question, as the record does not necessarily present it. The jury could have found that the defendant was not in good faith in his claim that the notes were obtained in settlement of a valid property claim of defendant. It is unnecessary, therefore, to pass upon whether a person can be convicted of extortion on a settlement of a valid or good-faith claim where the settlement is obtained under threats of a criminal prosecution. The authorities on the question are in irreconcilable conflict. Some hold that the employment of unlawful means, that is, threats to prosecute, are alone sufficient to constitute the crime, notwithstanding the intent with which the acts were done was but to procure one's own property or a settlement for it. On the other hand, equally reputable authorities claim that the ends obtained, as well as the means employed, must both be considered; and accordingly that it is not extortion to obtain one's own property or settlement of a bona fide claim of indebtedness by means of threats to prosecute for crime committed. Cases will be found cited on both sides of this proposition in note in 40 L.R.A.(N.S.) 801.

The testimony will now be briefly analyzed with reference to its sufficiency to sustain the verdict and on the bona fides of defendant's purported settlement of a debt by procuring the notes. The prosecuting witness Andrew Byer was sixty years of age. He had been injured some years before and was partially paralyzed. His memory is

shown to be at times faulty and unreliable. His condition is such that the jury might well find that he was an easy subject to influence. That he was what might be termed a "mark," overcredulous and easy to deceive. The setting of the case, the surroundings, the parties and the occurrences in evidence bearing on and leading up to the execution of these notes, are enough to at least excite the suspicion that the sequence of events did not occur accidently, but instead were brought about by someone, and that defendant could be that person, inasmuch as he was on hand at the finish to receive these notes as a result of what smacks as a conspiracy between him and some other parties to procure them in the exact way in which they were obtained. Byer was a bachelor and dwelt alone. One Clayton came to his house, spent two or three days with him, and finally induced him to go with him to an unoccupied dwelling house of defendant's 3 miles away and to remove some property therefrom. Clayton and defendant are shown to have been well acquainted. Defendant had been in the neighborhood three days before and left a horse with one Holbrook, living a quarter of a mile from defendant's dwelling house, and whom the evidence attempts to establish to have been left in charge of it, and defendant's property therein as well as that of defendant's wife also left in this vacant house through the winter. This property of the wife's was in an unlocked trunk in which she left shawls which she claims were of a value of $1,500, and the loss of which is made the basis of a claim as the consideration for the notes given by Byer to her husband, the defendant. Clayton and Byer, after loading the goods taken from this house into their sleigh, drive away from it some distance when they are overtaken by defendant. Clayton unhitched one of the horses and rode away on it, leaving Byer behind. Byer was kept in tow for some days, when he was taken to a bank and his notes were secured. At the time they were obtained the defendant asked the banker if they were buying notes and was informed they were not. Before they went to the bank, Byer testifies that Gilbert had told him that, "we better fix this thing up a little and I will hitch up the team." "You better fix this thing up so there won't be any trouble about it." "He thought it was the best thing we could do was to fix it up." "He said it would be the best thing to straighten it up. Nobody would know anything about it. If I did not fix it up I might get into trouble." "He says: 'You

don't want to be locked up. You are too old a man to be locked up.'" "And that I was too old a man to get into any racket." That he "was apt to go to jail from five to ten years" if he didn't sign the notes, and that he "was too old a man to get into trouble, or to get into jail." Byer states that as he did not want to get into any trouble he thought it would be the best thing he could do was to sign the notes, but that he was scared by what was said to him; and again he says that he was not scared, but signed them of his own accord. "Before we went to the bank, while in the hotel, Gilbert told me about certain valuable articles, something that was worth a whole lot of money, that had been stolen." "He told me that when they were returned this note he was going to sign would be given back, and that 'I would be as welcome to it as the flowers in May,' but I never saw them. That was what he said before we went to the bank. That was in the hotel. I didn't like to go to the bank to sign these notes, but I thought it was better to do that than to get into trouble. I had to take my medicine, that's all." They then went to the bank. Gilbert got some blank notes and a chattel mortgage blank, and filed the amount in the bank, had Byer sign them by mark, he being unable to read, and the banker and parties present witnessed them. One Edward Byer, a nephew of Andrew Byer, a witness for the state, testified in substance that when he heard the trouble his uncle was in he came up from Ellendale to see him; that his uncle told him "that Gilbert would know about this trouble, and to see him," which he did. "I first asked Gilbert what kind of trouble my uncle was in, and he told me 'they wanted to keep it a secret; that Andy didn't want it to get out.' I told him I was Andy's nephew, and I came here to settle this thing up, if there was any way to do so. He said he would have to see Andy first before he would tell me what was the matter, because, he said, 'Andy didn't want anybody to know of this.' Then he asked me if we had any mortgages on Andy's property, and I told him my uncle had a mortgage on his property. And then we went to the hotel and Gilbert took Andy up to his room and had some little conversation there with him. I should judge they were there ten minutes, and after being up there awhile, Gilbert called me up there and told me how the deal was. Andy was there in the room. I asked Gilbert what the trouble was first and what papers were that Andy had signed, and he told me there were two $500 notes se-

cured by a chattel mortgage for the purpose of the two robes worth $600, and which they settled for $500 each, and then he told me how it was that these robes were stolen. He told me there was a man by the name of Clayton had got Andy to steal some stuff out of a certain house down in South Dakota. Then I asked him where the robes was, and he said they were in the house, and it seems as though there was nobody living there he said; and then I asked him how they got away with the robes; he said he didn't see anybody get them away, about the only way they could have been taken was that Clayton had on a big sheepskin overcoat and Andy wouldn't have seen them, and he thought that was the reason he rode off, wouldn't want to get caught. He told me these robes belonged to a woman up to New England. He wouldn't say who the woman was. At Scranton I asked him who this woman was, and he said it was a friend of his. He claimed that Andy didn't get these robes, but that Andy would be responsible as well as Clayton, for he was along with Clayton. He claimed that the robes had been stolen. One reason that he gave why Andrew Byer should settle this matter by giving these notes was because he was along and helped steal this stuff. He gave a further reason. He said this woman might prosecute him on two charges. I remember one was grand larceny and the other I couldn't say. He said Andy wouldn't have no witnesses on his side to help him out, and he would be pretty apt to serve his term in the penitentiary for five or ten years or such a matter. He asked me to release the mortgage that we had on Andy's property so that the woman would take a settlement without any further work. He wouldn't say who this woman was." They then went to Ludlow. At which place Gilbert said that the woman told him "that she didn't think the security was good enough unless we released the mortgage we had on Andy's stock." "The woman at that time was in the hotel; I had found out by that time who this woman was. They called her Mrs. Gilbert in the hotel, and that afternoon when Gilbert told me that this woman wouldn't want to accept this settlement unless we released this mortgage, I asked him if this was not his wife, and he said it was his wife. And Gilbert and I went into a room and by ourselves and talked the matter over, and I told him that if they wouldn't give us the team to give us the neighbor's horse anyway, as he needed the horse, and that the neighbor would like to have his horse. 'Well,' he says, 'I'll tell you

what I will do with you,' he says to me, 'If you put up $100 to show that you are in good faith I will let you have the horse.' I says, 'I haven't got $100, and I don't think I would have to put up $100 anyway because I think that Obert can come and get his horse anyway.' 'Well,' he says, 'if you put up 100 I will let you indorse it on the note yourself,' and then he pulled out these two $500 notes and showed them to me, secured by chattel mortgage. The note described in the information is one of these notes." "Gilbert told me that the woman owned these notes. When I seen that the note was made out to H. A. Gilbert, and the chattel mortgage was the same, I asked him how it came that they were made out in his name, and he says 'it was easier to do it that way at the time,' and he says 'he would indorse the notes because it wouldn't make so much trouble.' He offered to sell the notes to me after I asked these questions. After we got to talking about that, I told him he was in the automobile business in Ellendale and sold automobiles, and he asked me what kind of a deal I would give him on these notes; that he would trade these notes for an automobile; and then I asked him if these notes wasn't his; and he told me they wasn't his, but he said he could buy these notes, get them at reduced rates and give me a good deal on them. At the time I saw these notes and mortgage I noticed that there was a horse on the chattel mortgage, a stallion that didn't belong to Andrew Byer. I knew it wasn't Andy's. I made a remark about that to Gilbert at that time. He told me the stallion belonged to him, to Gilbert. He said: 'It would make the mortgage look better' and 'she would be more apt to accept it.' That was after he told me this woman was his wife." As the defendant did not testify, none of these statements are denied. Mrs. Gilbert, however, testified for the defense, and the "robes," under her testimony, turned out to be shawls of great value. One was an India shawl of a value of $1,000 and the other a camel's hair shawl worth $600, both belonging to her. That during or just before the trial, the shawls had been returned to them. Holbrook testified to a mysterious return, and that he then placed them in the top of the unlocked trunk belonging to Mrs. Gilbert, in the house from which it was alleged to have been stolen. And that either during or shortly before the trial, Mrs. Gilbert testified to telling Andy Byer, "You know, Mr. Byer, the shawls have been returned and you are welcome to your notes at any time." "I didn't want his

money at all." "He was welcome to it at that time." That he said "he would just like to let the case drop, and I was perfectly willing." "He called me girlie." "That was kind of an affectionate way of addressing me." That she owned the notes, but had left them in the possession of Gilbert's bondmen. "I never tried to assign them to anyboby." Van Bergan, whose name had been scratched out and the name of Peters inserted as an indorsement on the notes, "is a friend of mine." "He is in Minneapolis. I thought of sending them to Van Bergan, but I never did. I thought I would, because he was a friend. I thought possibly I would, but I changed my mind." Holbrook's testimony is conflicting and worthy of little credence. Although he testified that he "knew within ten minutes after the theft (of goods out of the dwelling house) had been committed that these goods had been stolen," yet it was not until the second day after he attempted to find out where they went, although he was employed to guard them and knew defendant was in the neighborhood.

The conclusions to be drawn from the whole record are that these "robes" or "shawls" may never have been taken, or really may never have existed. They served at most as a mere pretense for the purpose of imposing upon the credulity of the simple-minded Andrew, whom the evidence shows was two weeks later placed under guardianship. That in all probability there was a conspiracy to do just what was done, namely, place Byer in the apparent position of having stolen something from the defendant to furnish a claim upon which, under a semblance of right, the property of Byer's could be filched from him. Threats were made by the defendant that Byer would be prosecuted. This is shown also by the testimony of the nephew, and the fact that defendant attempted to conceal from him the facts of the situation and represented that a woman at New England (his wife) would prosecute if the settlement did not stand and if a prior mortgage upon Andrew's property was not discharged. The testimony, in connection with this, including the fact that the notes and mortgage ran to the defendant instead of to his wife; that the defendant falsified the security and mortgage, placing therein some of his own property, under a pretense that it would better satisfy his wife and thus get her to approve of the situation; and his endeavor to sell the notes as well as to get the nephew to pay $100 to be indorsed on them,—all taken together are sufficient to make it highly

improbable, to say the least, but what the transaction was fraudulent in its inception; and that threats as testified to were likewise used upon the complaining witness as the means inducing his execution and delivery of the notes. The claim of good faith on the part of the defendant is highly improbable. It is in the case only by bare inference, and the jury would be warranted in finding he acted with criminal motive. On the whole, the evidence is sufficient to justify, as well as to sustain, the verdict, and the judgment is affirmed.

HODGINS TRANSFER COMPANY v. JOHN A. CARLSON.

(154 N. W. 254.)

Reversed and remanded by consent of parties.

Opinion filed October 6, 1915.

Appeal from District Court of Ward County; *Leighton*, J. Defendant appeals.

Reversed and remanded by consent of parties.

W. F. Doherty, for defendant and appellant.

Coyle & Herigstad, for plaintiff and respondent.

PER CURIAM: Error is assigned upon the granting of plaintiff's motion to strike out portions of defendant's answer and counterclaim. The respondent appeared in this court and confessed error, and consented that the cause be reversed and remanded. This being so, and, as a reversal will merely give the parties and the trial court further opportunity to consider the matters involved, a reversal will be ordered and the cause remanded, without a consideration of the merits of the appeal. See 3 Cyc. 404.

Reversed and remanded.

STATE OF NORTH DAKOTA v. J. R. McKONE.

(154 N. W. 256.)

Intoxicating liquors — importing — for sale as a beverage — evidence — bills of lading — receipts — consignments — rulings of trial court.

1. Appellant was convicted of the crime of importing intoxicating liquors for sale as a beverage, and he has appealed, assigning a large number of specifications of error relating to rulings in the admission of testimony. In the main, the testimony was of a documentary character, consisting of bills of lading and receipts showing, without dispute and beyond all doubt, numerous large consignments of liquors to appellant from points in Minnesota. It was also shown that appellant held both a retail and wholesale liquor dealers' license from the Federal government. Appellant's guilt was established beyond all question. In the light of the record it is held, for reasons stated in the opinion, that none of the rulings complained of, even if erroneous, were of a prejudicial character.

Evidence — frequent large importations of liquors — criminal purpose.

2. Evidence of frequent large importations of liquors by appellant on dates immediately prior to the date charged in the information was admissible as tending to show a criminal purpose as charged in importing the liquors on such date.

Criminal cases — appeals in statutory rule — technical errors — substantial rights.

3. The statutory rule that on appeals in criminal cases this court shall give judgment without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties is applied and enforced, it clearly appearing that none of the rulings complained of could have prejudicially affected the substantial rights of appellant.

Evidence — railway company agent — bills of lading — figures and abbreviations — made in regular business — explaining meaning.

4. The court did not err in permitting the witness McDonald, agent of the Northern Pacific Railway Company at Bismarck, to explain the meaning of certain figures, designations, abbreviations, and letters appearing on the bills of lading, and receipts for consignments to appellant aforesaid, it appearing that such notations were made in the regular course of business of such common carrier and unfamiliar to persons outside of the railway service.

Evidence — certified copy of records — revenue collector.

5. Following the rule announced in the recent case of State v. Kilmer, decided by this court, it is held that exhibit "A," consisting of a certified copy of the

records of the collector of internal revenue for the district of North and South Dakota, was competent evidence.

Instructions — persons — receiving goods — paying freight — jury may infer that defendant imported goods.

6. Among other things the jury was instructed in effect that a person to whom the goods were consigned and who pays the freight and receives the same may be deemed to have imported the same within the meaning of the statute against importations of liquors. Such instruction merely advised the jury that they *may* infer from such acts that the defendant imported the liquors and the same was clearly proper.

Instructions — errors — specifications.

7. The instructions when considered as a whole were substantially correct, and the specifications relating thereto are without merit.

Opinion filed September 17, 1915.

Appeal from the District Court of Burleigh County; *Nuessle,* J.

From a judgment convicting defendant of the crime of unlawfully importing intoxicating liquors for sale as a beverage, he appeals.

Affirmed.

Hyland & Madden, for appellant.

The general rule in respect to the proof of private documents and writings is that before they are admissible in evidence their execution must be proved. 2 Jones, Ev. ¶ 538; Linn v. Ross, 16 N. J. L. 55; Francis v. Hazlerig, 1 A. K. Marsh. 93; Dunlap v. Glidden, 31 Me. 510; Williams v. Keyser, 11 Fla. 234, 89 Am. Dec. 243; Stamper v. Griffin, 20 Ga. 312, 65 Am. Dec. 628; Equitable Endowment Asso. v. Fisher, 71 Md. 430, 18 Atl. 808; Baker v. Massengale, 83 Ga. 137, 10 S. E. 347; Robertson v. Du Bose, 76 Tex. 1, 13 S. W. 300.

Proof of some collateral offense is generally no proof of the offense charged. State v. Fallon, 2 N. D. 510, 52 N. W. 318.

An official can only certify as to the instrument being a correct copy of the original. The certificate in this case fails to so show. Sykes v. Beck, 12 N. D. 242, 96 N. W. 844.

An officer is not clothed with authority to determine that to which the record or document relates or pertains, or to pass judgment upon it, as to any matter. McQuire v. Sayward, 22 Me. 230.

Such officer cannot make his own statement of what he pleases to say appears by the record. What appears by the record and the record

itself must be made known to the court by a duly authenticated copy. English v. Sprague, 33 Me. 440; Jay v. East Livermore, 56 Me. 107; Greeno v. Durfee, 6 Cush. 363; Oakes v. Hill, 14 Pick. 448.

There is no law in this state permitting proof of foreign records, by certified copy. Our statutes relate only to domestic records. Miller v. Northern P. R. Co. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215.

Defendant is charged with having imported liquors into the city of B., for illegal sale or gift, and not with having caused the same to be done. Maples v. State, 130 Ala. 121, 30 So. 428; Campbell v. State, 79 Ala. 271; Morgan v. State, 81 Ala. 72, 1 So. 472; Dale v. State, 90 Ark. 579, 120 S. W. 389; Jones v. State, 100 Ga. 579, 28 S. E. 396; Reese v. Newnan, 120 Ga. 198, 47 S. E. 560; Johnson v. State, 63 Miss. 228; Rector v. State, — Tex. Crim. Rep. —, 90 S. W. 41; Crawford v. State, — Tex. Crim. Rep. —, 58 S. W. 1006; Anderson v. State, 32 Fla. 242, 13 So. 435; Chinn v. Com. 17 Ky. L. Rep. 1205, 33 S. W. 1117; State v. Johnson, 139 N. C. 640, 52 S. E. 273; State v. Mosier, 25 Conn. 40.

In cases where the keeping and maintaining of a common nuisance is involved, no one except the owner or keeper of such a place can be adjudged guilty of such offense. State v. Dahms, 29 N. D. 51, 149 N. W. 965; State v. Hall, 28 N. D. 649, 149 N. W. 970.

"In charging the jury the court shall only instruct as to the law of the case." The jury are the exclusive judges of the facts. Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003; State v. Barry, 11 N. D. 428, 92 N. W. 809; State v. Peltier, 21 N. D. 188, 129 N. W. 451.

The possession of a government permit to sell liquors is competent and sufficient to justify a verdict only if the jury are satisfied of defendant's guilt beyond a reasonable doubt. State v. Momberg, 14 N. D. 291, 103 N. W. 566; State v. Kelly, 22 N. D. 5, 132 N. W. 223, Ann. Cas.1913E, 974; State ex rel. Kelly v. Nelson, 13 N. D. 122, 99 N. W. 1077.

The finding of liquors on the premises by any person, other than an officer empowered to make investigation under search warrant, is no evidence of guilt. State ex rel. McClory v. McGruer, 9 N. D. 572, 84 N. W. 363.

The presumption of innocence, in matters of crime, is one of the

strongest presumptions known to the law, and the jury should have been so instructed in this case, because the evidence of guilt of defendant was almost wholly of the presumptive kind. Holtan v. Beck, 20 N. D. 5, 125 N. W 1048; Kadlec v. Pavik, 9 N. D. 278, 83 N. W. 5.

H. J. Linde, Attorney General, and *H. R. Berndt,* State's Attorney, for respondent.

The term "import" as used in our prohibition law means to bring in not only from a foreign state or country, but into the county, town, or city from outside their boundaries. Arkansas v. Kansas & T. Coal Co. 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; 21 Cyc. 1740.

A bill of lading is both a receipt and a contract of carriage, and as such is open to explanation. It is prima facie evidence of ownership of the property mentioned, in the consignee. Cunard S. S. Co. v. Kelley, 53 C. C. A. 310, 115 Fed. 678; Delta Bag Co. v. Kearns, 112 Ill. App. 269; Harrison v. Hixson, 4 Blackf. 226.

The instruction that the consignee so importing, receiving, and receipting for goods, may be deemed to have imported them, was entirely proper. White v. State, 153 Ind. 689, 54 N. E. 763; State v. Dahlquist, 17 N. D. 40, 115 N. W. 81; Com. v. Hildreth, 11 Gray, 327; 12 Cyc. 420; 6 Am. & Eng. Enc. Law, 570; Cliquot's Champagne, 3 Wall. 114, 18 L. ed. 116.

The word "tending," in its primary sense, means direction of course towards any object, effect, or result. White v. State, 153 Ind. 689, 54 N. E. 763; Webster's Int. Dict. 1484; 38 Cyc. 125, note 25; Hogue v. State, 93 Ark. 316, 124 S. W. 783, 130 S. W. 167.

In this case the state has never intended or undertaken to prove the commission of other like offenses by defendant. The other incidents, of the existence of which proof was offered, were only for the purpose of identifying or connecting up the defendant with the crime charged, and to show intent. State v. Sweizewski, 73 Kan. 733, 85 Pac. 800; Goode v. State, 50 Fla. 45, 39 So. 461; Ingram v. State, 84 Am. Dec. 782, and note, 39 Ala. 247; Com. v. Campbell, 7 Allen, 541, 83 Am. Dec. 705; State v. Dalquist, 17 N. D. 40, 115 N. W. 81; State v. Miller, 20 N. D. 509, 128 N. W. 1034.

In the trial of a person charged with maintaining and keeping a common nuisance, copies of the records of the office of the internal revenue collector for the proper district, even though taken by a person

other than the custodian of such records, are admissible as tending to show that the defendant is engaged in the business of retail liquor dealer. State v. Nippert, 74 Kan. 371, 86 Pac. 478; Com. v. Best, 180 Mass. 492, 62 N. E. 748; 6 Decen. Dig. 400 (3) u. 486, 489.

FISK, C. J. The appellant was convicted in the district court of Burleigh county of the crime of importing intoxicating liquors for sale as a beverage contrary to the provisions of § 9763 of the Revised Codes of 1905, Comp. Laws 1913, § 10600. From a judgment of conviction he has appealed, urging fifty-five specifications of error upon which he relies for a reversal.

Most of these specifications relate to rulings on defendant's objections to the admission of testimony and the refusals of the court to strike out answers to questions asked by the prosecution. A few relate to rulings admitting documentary evidence, and the remainder to the giving of certain instructions and the refusal to instruct as requested. The testimony in the main consists of documentary evidence in the form of bills of lading and receipts for payments of freight purporting to cover various shipments of liquors from points outside of this state to defendant at Bismarck. In addition thereto, the state introduced over defendant's objection exhibit "A," being a purported certified copy of the records of the collector of internal revenue at Aberdeen, South Dakota, showing the issuance to appellant of two receipts for special taxes for the business of wholesale and retail liquor dealer, the dates of payment being stated as June 14, 1913, and July 17, 1913, both taking effect from July 1, 1913.

The prosecution of necessity relied largely upon the receipts and bills of lading aforesaid and the inferences to be drawn therefrom. It therefore follows that the question as to the correctness of the court's rulings with reference to such exhibits is of vital importance and consequently deserving of serious consideration. With these observations we proceed to the consideration of such of the specifications of error as we deem worthy of notice.

Appellant's first specification is not argued, and is therefore deemed abandoned. The second specification challenges the correctness of the court's rulings on the following question asked the witness McDonald, agent of the Northern Pacific Railway Company at Bismarck, with

reference to exhibit 1: Q. "It shows the orginal signature of the party to whom the freight was delivered?" This exhibit purports on its face to be a receipt for freight consisting of twenty boxes of bottled liquor delivered November 17, 1913, by the Northern Pacific Railway Company to J. R. McKone as consignee. Standing alone such ruling might have constituted prejudicial error upon some of the grounds urged in the objection thereto, but such errors, if any, are clearly cured in the subsequent testimony of the witness McGattigan, who was assistant cashier of the Northern Pacific Railway Company at its freight house in Bismarck on the date of the transaction, and who positively identified defendant's signature thereon as genuine.

Appellant has grouped defendant's specifications, Nos. 1 to 22, both inclusive and Nos. 33 to 40, both inclusive, and argued them together. They relate in the main to the rulings of the court denying the objections of the defendant to the admission of testimony. We have carefully considered these specifications of error, but find them without substantial merit. They are too numerous to mention in detail. Some of them are not wholly without merit when considered without reference to other portions of the record; but in the light of the entire record we have no hesitancy in adjudging, as we do, that the defendant's rights were amply protected at all stages of the trial, and that he has no just cause for complaint. In fact, the learned trial court is to be commended for its eminently fair and impartial rulings throughout the trial. We feel safe in saying that any errors which may have been committed against the defendant were of a nonprejudicial nature. Our basis for this assertion may be summed up by stating that the undisputed evidence in the form of documentary proof consisting of bills of lading and receipts conclusively establishes defendant's guilt beyond all doubt. In the light of such evidence the jury could not do otherwise than find the defendant guilty as charged, for such evidence disclosed, without dispute, that on the date charged and for a considerable time prior thereto defendant received from points in the state of Minnesota, at very frequent periods, large consignments of beer and other intoxicating liquors, for which he receipted and paid the freight either personally or through his agents. These facts are established beyond cavil by witnesses and documentary proof of the most conclusive character. In view of the frequency of such shipments and the size of them, it would

be a mockery of justice to say either that defendant was not instrumental in directly causing such importations to be made, or that they were made for legitimate purposes, for the record discloses that on November 17, 1913, he received and receipted for 20 boxes of bottled liquor; 1 barrel of bottled liquor consisting of 200 pints, 5 casks of beer from the Minneapolis Brewing Company, and 5 casks of large bottled beer from Jacob Schmidt Brewing Company, and four days prior thereto he received and receipted for 5 casks of beer from the latter company. In the month of October preceding, there was shipped to him at Bismarck and receipted for, 9 barrels of bulk whisky, 1 barrel of bottled liquor, 1 barrel of brandy, and 40 casks of beer. The foregoing does not embrace all the shipments disclosed by the proof, but they are sufficient to show the magnitude of the illegitimate traffic in intoxicating liquors conducted by the defendant. Further comment is uncalled for.

But appellant's counsel contends that proof of shipments received at times other than November 17th, the date charged in the information, was improperly received. We cannot sustain such contention, as such shipments were clearly admissible as throwing light on the vital issue, the proof of which rested on inference alone, as to defendant's purpose in importing the liquors on the 17th. But conceding for the sake of the argument that such testimony was inadmissible, its introduction was nonprejudicial, as without it the verdict must have been the same. This is, we think, a proper case for the application of the statutory rule which requires this court on appeals in criminal cases to give judgment without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties. See § 11013, Comp. Laws 1913, also State v. Tolley, 23 N. D. 284, 136 N. W. 784. It is impossible for anyone to entertain a doubt regarding defendant's illegal intent in importing the large quantities of liquor on the date charged.

Nor do we think there is any merit in appellant's specifications challenging the rulings which permitted the witness McDonald to explain the meaning of certain figures, designations, abbreviations, or letters appearing on the exhibits aforesaid. These were notations made in the regular course of business of the common carrier, and not familiar to persons outside of the railway service, and it is elementary that they were subject to explanation by those possessing expert knowledge thereof.

Error is sought to be predicated on the ruling permitting the intro-

duction of exhibit "A," a certified copy of the record of the collector of internal revenue for the district of North and South Dakota. All that need be said in answer thereto is that all the grounds here urged against such ruling were fully considered and disposed of contrary to appellant's contention in the case of State v. Kilmer, ante, 442, 153 N. W. 1089, just decided by this court. We may further add, however, that the only purpose of such testimony was to show defendant's intent in importing the liquors, and even if, for any reason, such ruling was error, it could not have been prejudicial, for without such testimony the verdict must have been the same.

Appellant complains of that portion of the instructions to the jury reading as follows: "And if the goods were shipped into the state of North Dakota, consigned to any person, who pays the freight thereon, and receives the same, he may be deemed to have imported the same within the meaning of that term." We see no error in such instruction. It, in effect, merely tells the jury that they may infer from such acts that defendant imported the liquors. They were not told that they *should* draw such inference. The instruction was clearly proper. White v. State, 153 Ind. 689, 54 N. E. 763. Moreover, the state of the proof was such that no other inference or conclusion was possible. It would be ridiculous as well as contrary to all human experience to say that all these large and numerous shipments of liquor could have been made to defendant without his knowledge and procurement.

We have considered all the specifications of error relating to the instructions, as well as all others, and we find no substantial merit therein. We are entirely convinced from the record that defendant was accorded a fair trial, free from errors of a substantial and prejudicial nature, and that the verdict was not only just and proper, but was the only verdict that the jury could have properly rendered. Entertaining these views, it is, under the statute above cited, our plain duty to affirm the judgment, and we accordingly do so.

GREAT NORTHERN RAILWAY COMPANY v. EDWARD G. LENTON and Mary Lenton, his Wife, and State of North Dakota.

(154 N. W. 275.)

Action to condemn additional right of way. *Held:*

Jury — verdict of — evidence.

1. Jury's verdict has basis in evidence.

Verdict — direction — motion for.

2. No error in overruling motions to direct verdict.

Chance verdict — damages — individual estimates — sum of — divided by number of jurors — quotient — knowingly agreed upon as verdict.

3. Not a chance verdict merely because, in arriving at the amount, the jury took each juror's estimate of what should be assessed as the damages, and divided the total by the number of jurors, and afterward knowingly and understandingly agreed that such quotient should be the amount of the verdict.

Opinion filed September 21, 1915.

From a judgment of the District Court of Ward County; *Leighton,* J. Plaintiff appeals.

Affirmed.

Dudley L. Nash and *Murphy & Toner,* for appellant.

If the two strips of land had been condemned all the way through defendant's land, then all damage of which legal complaint might be made would be removed. Therefore, the measure of damages is the value of the entire two strips all the way across the land. 10 Am. & Eng. Enc. Law, 1173; White v. Chicago, St. L. & P. R. Co. 122 Ind. 317, 7 L.R.A. 257, 23 N. E. 782; Kimball v. White Water Valley Canal Co. 1 Ind. 285; Gordon v. Tucker, 6 Me. 247; Fowle v. New Haven & N. R. Co. 112 Mass. 334, 17 Am. Rep. 106; McCormick v. Kansas City, St. J. & C. B. R. Co. 57 Mo. 433; Trenton Water Power Co. v. Chambers, 13 N. J. Eq. 199; Denver City Irrig. & Water Co. v. Middaugh, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 555; Churchill v. Beethe, 48 Neb. 87, 35 L.R.A. 442, 66 N. W. 992; Van Schoick v. Delaware & R. Canal Co. 20 N. J. L. 249.

Where it is necessary in constructing the road, originally, to dig ditches for the purpose of making a fill, and these are dug partially

outside of the original right of way, and defendant knowingly consented thereto, such matters cannot be considered as forming any basis of damages. Even if defendant did not so consent, the action of the company would constitute trespass—a recovery for which cannot be had in condemnation proceedings or suit. In such case defendant has his remedy at law. Bethlehem South Gas & Water Co. v. Yoder, 112 Pa. 136, 4 Atl. 42; Leber v. Minneapolis & N. W. R. Co. 29 Minn. 256, 13 N. W. 31; Lafayette, M. & B. R. Co. v. Murdock, 68 Ind. 137; Missouri, K. & T. R. Co. v. Ward, 10 Kan. 352; Proetz v. St. Paul Water Co. 17 Minn. 163, Gil. 136; Callanan v. Port Huron & N. W. R. Co. 61 Mich. 15, 27 N. W. 718; Dourd v. Mason City & Ft. D. R. Co. 76 Iowa, 438, 41 N. W. 65; Leavenworth, N. & S. R. Co. v. Usher, 42 Kan. 637, 22 Pac. 734; Leavenworth, N. & S. R. Co. v. Herley, 45 Kan. 535, 26 Pac. 23; Bridgers v. Dill, 97 N. C. 222, 1 S. E. 767.

Damages anticipated because of the possibility of teams becoming frightened and running away are too remote and speculative to be considered. The ditches of which complaint is now made existed before this suit was commenced, and are not an issue in this condemnation suit by the company. Southwestern Mineral R. Co. v. Harvey, 8 Kan. App. 489, 54 Pac. 806; St. Louis, K. & S. W. R. Co. v. Hammers, 51 Kan. 127, 32 Pac. 922; Otoe County v. Heye, 19 Neb. 289, 27 N. W. 145; Nashville & D. R. Co. v. Comans, 45 Ala. 437; Re New York, L. & W. R. Co. 27 Hun, 151; Alabama & W. R. Co. v. Burkett, 46 Ala. 569; Chicago, P. & St. L. R. Co. v. Eaton, 136 Ill. 9, 26 N. E. 575; Atchison & D. R. Co. v. Lyon, 24 Kan. 745; Presbrey v. Old Colony & N. R. Co. 103 Mass. 1.

The possible increase in the growth and accumulation of weeds is not an element in this case, and proof touching such subject was not proper. 2 Lewis, Em. Dom. § 438; Montana R. Co. v. Warren, 137 U. S. 348, 34 L. ed. 681, 11 Sup. Ct. Rep. 96; Doyle v. Manhattan R. Co. 128 N. Y. 488, 28 N. E. 495.

In this class of cases the proper query is the difference in the market value of the land before and after taking. Damages upon any other basis are improper. San Diego Land & Town Co. v. Neale, 88 Cal. 50, 11 L.R.A. 604, 25 Pac. 977; Springer v. Chicago, 135 Ill. 552, 12 L.R.A. 609, 26 N. E. 514; 2 Lewis, Em. Dom. p. 947; Young v. Harrison, 21 Ga. 584; St. Louis, K. & N. W. R. Co. v. St. Louis Union

Stock Yards Co. 120 Mo. 541, 25 S. W. 399; 10 Am. & Eng. Enc. Law, 1158, 1174, subdiv. 5 and cases cited; Blair v. Charleston, 43 W. Va. 62, 35 L.R.A. 852, 64 Am. St. Rep. 837, 26 S. E. 341.

The jury arrived at its verdict by making individual estimates of damages, adding these together, and then dividing the sum so reached by the number of jurors, and then voting quotient so obtained as their verdict. This was a chance verdict and should be set aside. Burke v. Magee, 27 Neb. 156, 42 N. W. 890; Barton v. Holmes, 16 Iowa, 252; Guard v. Risk, 11 Ind. 156; Gallaway v. Massee, 133 Wis. 638, 113 N. W. 1098; Fuller v. Chicago & N. W. R. Co. 31 Iowa, 211; 24 Am. & Eng. Enc. Law, 1006–1008, and cases cited; Johnson v. Husband, 22 Kan. 277.

Where the result of their mathematical calculations is afterwards fully discussed by the jury, and they have fairly deliberated upon and considered same, and then by ballot adopt such result as their verdict, it is doubtless good. But in this case there was no deliberation and no consideration by the jury. 24 Am. & Eng. Enc. Law, 1008; Johnson v. Husband, supra.

F. B. Lambert, for respondent.

The issue of compensation in eminent domain proceedings must be left to a jury. Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570.

The legislature may expand the rights fixed by the Constitution, but it cannot curtail them. Martin v. Taylor, 4 N. D. 278, 25 L.R.A. 838, 60 N. W. 392.

The jury must render its verdict upon the evidence; so long as the verdict is less than the amounts fixed as damages by the witnesses, and so long as the railroad company furnished the jury with no other evidence, method, or way of arriving at their verdict, the verdict cannot be said to be excessive or improper. Chicago, M. & St. P. R. Co. v. Brink, 16 S. D. 644, 94 N. W. 422; Tri-State Teleph. & Teleg. Co. v. Cosgriff, 19 N. D. 771, 26 L.R.A.(N.S.) 1171, 124 N. W. 78; Donovan v. Allert, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441; Cosgriff v. Tri-State Teleph. & Teleg. Co. 15 N. D. 210, 5 L.R.A. (N.S.) 1142, 107 N. W. 525; Searle v. Lead, 10 S. D. 405, 73 N. W. 913.

"When land is taken for a right of way the owner can recover compensation for the land taken, and for the injury to or depreciation in

value of his adjoining land. Reisner v. Atchison Union Depot & R. Co. 27 Kan. 382; 18 Century Dig. under "Eminent Domain," § 365, cols. 1277–1279.

The chance of water being backed up on the land by reason of the embankments, the danger from the accumulation of weeds and dry grass, and all such matters, are proper for the jury to consider in determining the damages to the adjoining land. Ft. Worth & G. R. Co. v. Dial, 38 Tex. Civ. App. 260, 85 S. W. 22; Kansas City, Ft. S. & G. R. Co. v. Owen, 25 Kan. 419; St. Joseph & D. C. R. Co. v. Chase, 11 Kan. 47; Missouri P. R. Co. v. Kincaid, 29 Kan. 654; Comp. Laws 1913, §§ 2807, 4646–4648; Centralia & C. R. Co. v. Drake, 125 Ill. 393, 17 N. E. 820; Chicago & M. Electric R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758.

The additional cost of fencing made necessary to protect stock from damages or dangers upon the railroad tracks is a proper element of damages to be considered by the jury. White Water Valley R. Co. v. McClure, 29 Ind. 536; Grand Rapids & I. R. Co. v. Horn, 41 Ind. 479; Baltimore, P. & C. R. Co. v. Lansing, 52 Ind. 229; Shirley v. Southern R. Co. 121 Ky. 187, 89 S. W. 124; Pittsburgh, B. & B. R. Co. v. McCloskey, 110 Pa. 436, 1 Atl. 555.

Cuts and fills necessary in the construction of a railroad should be considered as enhancing the damages. Little Rock, M. R. & T. R. Co. v. Allen, 41 Ark. 431; Ellsworth v. Chicago & N. W. R. Co. 91 Iowa, 386, 59 N. W. 78; Cummins v. Des Moines & St. L. R. Co. 63 Iowa, 397, 19 N. W. 268; Kansas City, C. & S. R. Co. v. Story, 96 Mo. 611, 10 S. W. 203.

Or the erection of a coal house or hoisting apparatus. Chicago, B. & Q. R. Co. v. O'Connor, 42 Neb. 90, 60 N. W. 326.

The value of property is fixed by what it would bring at a fair public sale when the owner wanted to sell and others wanted to buy. Value is not limited to the price which the property might bring at forced sale. Market value means fair value. Chase v. Portland, 86 Me. 367, 29 Atl. 1107; Lawrence v. Boston, 119 Mass. 126; Edmands v. Boston, 108 Mass. 535; 3 Sutherland, Damages, 462; Cooley, Const. Lim. 6th ed. 697; 5 Words & Phrases, 4387.

Value, and market value, are synonymous terms, in practical life. They are interchangeable terms. Jones v. Noel, 98 Tenn. 440, 36

L.R.A. 862, 39 S. W. 725; 5 Words & Phrases, 4387; Black's Law Dict. p. 761.

One is entitled to the value of the improvements which are destroyed or injured by the appropriation of his land on which they are situated. 15 Cyc. 759.

It is not only permissible, but commendable, on the part of the jury, where they are widely apart on the question of the amount of damages, to ascertain what is the general average of their sentiment on the subject, and, in so doing, they have the right to express by ballot their individual estimate of damages, add these sums together, and divide the amount by the number of jurors, and then knowingly adopt the result or quotient as their verdict. Such a verdict is not a chance verdict. Burke v. McGee, 27 Neb. 156, 42 N. W. 890; Gallaway v. Massee, 133 Wis. 638, 113 N. W. 1098; 24 Am. & Eng. Enc. Law, 1006–1008, and cases cited; 12 Am. & Eng. Enc. Law, 378; 38 Cyc. 1843 note; Heath v. Conway, 1 Bibb, 399; Murphy v. Murphy, 1 S. D. 316, 9 L.R.A. 820, 47 N. W. 142; Johnson v. Seel, 26 N. D. 299, 144 N. W. 237; Hunt v. Elliott, 77 Cal. 588, 20 Pac. 132; McDonnell v. Pescadero & S. M. Stage Co. 120 Cal. 476, 52 Pac. 725; Turner v. Tuolumne County Water Co. 25 Cal. 402, 1 Mor. Min. Rep. 107; Boyce v. California Stage Co. 25 Cal. 460, 9 Am. Neg. Cas. 66; 1 Kerr's Cyc. Cal. Code, p. 1077, art. 32.

But it is questionable if a verdict can be impeached by the affidavits of the jurors who rendered it.

This should be done by the officer in charge or by outside witnesses. "Misconduct of the jurors, unless it is in open court, cannot be proved by their affidavits." 12 Am. & Eng. Enc. Law, 378; 37 Century Dig. cols. 941, 1306; Pleasants v. Heard, 15 Ark. 403; Croasdale v. Tantum, 6 Houst. (Del.) 218; St. Martin v. Desnoyer, 1 Minn. 156, 61 Am. Dec. 494, Gil. 131; St. Clair v. Missouri P. R. Co. 29 Mo. App. 76; Clark v. Manchester, 64 N. H. 471, 13 Atl. 867; Moses v. Central Park & E. R. Co. 3 Misc. 322, 23 N. Y. Supp. 23; International & G. N. R. Co. v. Gordon, 72 Tex. 44, 11 S. W. 1033; Chesapeake & O. R. Co. v. Patton, 9 W. Va. 648; Turner v. Tuolumne County Water Co. 25 Cal. 397, 1 Mor. Min. Rep. 107; Boyce v. California Stage Co. 25 Cal. 460, 9 Am. Neg. Cas. 66; Ulrick v. Dakota Loan & T. Co. 2 S. D. 285, 49 N. W. 1054; Long v. Collins, 12 S. D. 621, 82 N. W. 95; 29 Cyc. 812, notes

90 and 91 and cases cited; 2 Thomp. Tr. p. 1882, § 2602, and cases cited in note 3, p. 1883; Ponca v. Crawford, 23 Neb. 662, 8 Am. St. Rep. 144, 37 N. W. 609; Parshall v. Minneapolis & St. L. R. Co. 35 Fed. 650.

Goss, J. This action is to condemn two 50-foot strips 600 feet long alongside of the right of way of the plaintiff. The verdict for $410 included the value of the land taken and damages from the severance. Plaintiff contends the verdict should not exceed $207, and that the evidence is insufficient to justify a verdict for the greater amount. Appellant has briefed upon the basis of the record presenting the question whether damages from severance can exceed the value of the land that would have been taken had the 50-foot strip sought to be condemned extended entirely across the half section, instead of being but a portion thereof 600 feet in length. Its reasoning is that all damages arising from the severance of the 600-foot tract had accrued and were paid for by the original taking and severance; that is, by the settlement for the damages occasioned by the earlier taking of the original right of way; that, therefore, none of the first and the usual elements of damage from severance remain unpaid for. This reasoning leaves but the value of the land taken, together with such damage occasioned by its severance as peculiarly result therefrom. Plaintiff contends such damage by severance cannot amount to more than the actual value of the land that would have been taken had the area sought to be condemned reached entirely across the land in question instead of taking but a portion thereof. Hence, plaintiff would measure its damages by the market value of the land embraced within the 50-foot strips extended entirely across the land of plaintiff, and in his brief has offered to pay therefor, at $40 per acre, the stipulated value of the land actually taken. And plaintiff's brief resolves to an argument upon the insufficiency of the evidence to sustain the verdict in excess of $207 but based upon the foregoing hypothesis.

Plaintiff's contention might be worthy of extended consideration if it was within the issues presented to the trial court. However, the record may be searched in vain for any indication that this theory was in the mind of plaintiff's counsel at the time of the trial. This issue was never presented below and will not be passed upon here.

Plaintiff made its case by showing the amount of land taken and its value to be $40 an acre. This by Lenton under cross-examination. In defense, proof was offered that the difference in values of the tracts remaining before and after the taking for railroad purposes was from six to eight hundred dollars. Under examination as to the basis for such claimed damage, several witnesses testified that the additional corners at the end of the strips taken and next to the original right of way rendered farming inconvenient, and caused an added element of damage from severance, beyond any occasioned by the taking of the original right of way. Appellant concedes in its brief that such an added element of damage exists by its offer to not only pay for the corners themselves, but for the value of the land within the extensions of the strips continued entirely across the land of the defendants. At the close of the defense the plaintiff asked for a directed verdict for only the value of the $1^{38}/_{100}$ acres actually taken at $40 an acre, or $55.20, contending that "it is shown by the evidence that the damages for the severance of the right of way has been paid for once, and that damages for severance alone cannot accrue more than once." And, "that there is no competent testimony whatever except that which is based upon mere speculation to show the amount of alleged damages by reason of severance to the balance of the land." The position taken on this motion is inconsistent with its position on appeal, and ignores actual and existing elements of damage arising to defendants from reasons above stated. The motion was properly denied.

In rebuttal the plaintiff offered proof that the value of the land taken, together with the damage to the portion of the tract remaining, would in the aggregate be the equivalent of a total damage of $150 per acre for the land taken. Or, in other words, disregarding the stipulated value of the land as $40 per acre for the tract actually taken, the actual damage arising from both the taking and the injury to the balance could be equitably estimated on a basis of $150 per acre for the land taken, or a total of $207 as the aggregate damage. Upon this theory at the close of the case plaintiff moved "that the court direct a verdict in favor of the defendant and against the plaintiff, assessing the damages at the sum of $207, being the value of the land at $150 an acre as shown by the testimony of the last two witnesses (plaintiff's witnesses), there being no other competent testimony in the case as to the value of the land or

damages." The court properly denied this motion, as the value of the land taken had been stipulated at $40 per acre, or $52.80, the value to which the owners had testified, and the proof disclosed that the severance had occasioned actual damage; and that the value of the remainder after the taking was reduced from $600 to $800. There was sufficient basis in the proof from which the jury could determine the amount of damages resulting from the severance. The theory upon which the motion was made was based upon an assumed and improper measure of damages and to have granted the motion would have been prejudicial error.

But upon this appeal, as above stated, defendant urges an entirely different contention from that specified in said motion, and one having no basis in the record. To quote from his brief, "The plaintiff specifies wherein the evidence is insufficient to support or justify the verdict as follows: That there is no competent and relevant testimony in the record whatever, that the combined value of the land and the damage to the balance exceeds $207. That the only item of damage to the balance of the land assigned by the witnesses, or which could have been considered, was the inconvenience caused by leaving jogs in the land at the ends of the strip taken. Hence, if the jogs are eliminated, there is no damage, and the cost of removing the jogs would be the value of the two strips of land clear through at $40 per acre, which would not amount to more than half the amount of the present verdict." There is no proof of the area of such a strip. If it be taken as respondent figures it at 7.71 acres even at $40 per acre, it would amount to much more than what plaintiff contends the verdict should be, $207. But if figured at $150 per acre, according to plaintiff's rebuttal testimony, it would amount to double the verdict rendered. As above indicated this course of reasoning is a departure from the theory of trial, and invokes a measure for assessment of damages never presented to the trial court. In fact it is contrary to the basis for computation of $150 per acre adopted by plaintiff on trial and upon which he moved for a directed verdict. The contention "that the measure of damages is the value of the two strips all the way across this land," to support which authority is cited, is wholly foreign to the review on this appeal. Neither of the motions for directed verdict could have been granted, and as the principal question briefed cannot be raised for the first time on appeal the only one remaining for consideration is as to whether this is a chance

verdict. Under motion for judgment notwithstanding the verdict or for new trial, a juror's affidavit was presented. It recited that "said verdict was arrived at as follows: We took a ballot to ascertain whether or not we would give the plaintiff anything. We next balloted on the question of amount, and we were so far apart that we then decided to ballot a third time, each juror giving the amount he thought was right. We then took these amounts, added them together, and took the average. Then knowing what the amount was, we took a ballot on the general average to see if we all agreed to that amount, and in that manner found the amount we were willing to give." This affidavit discloses that the amount of the verdict was knowingly determined and agreed to as the verdict, although it was based upon merely the general average of the amount each individual juror thought should be allowed. No agreement is shown to have been made in advance of the fixing of the amounts by each individual juror that the general average of such amounts should constitute the verdict. It is therefore not a quotient verdict, nor can it be held to be a verdict determined by chance under the second subdivision of § 7660, Comp. Laws 1913, 29 Cyc. 812; 29 Am. & Eng. Enc. Law, 1007, and note 3; Long v. Collins, 12 S. D. 621, 82 N. W. 95. Authorities cited by appellant are contrary to his contention. While such a method is not to be encouraged, yet, to permit the verdict to be overturned on this showing alone would establish a dangerous precedent and be without support in precedent. A verdict so found might be just and equitable in amount even though the result of such a compromise.

The judgment is affirmed.

STATE OF NORTH DAKOTA EX REL. FRANK E. PACKARD, as a Member of the State Tax Commission v. CARL O. JORGENSON, as State Auditor.

(154 N. W. 525.)

Original writ of mandamus to compel the state auditor to issue salary warrants to the members of the state Tax Commission.

Mandamus — original writ — state auditor — state Tax Commission — laws — repeal of — salaries — appropriation for.

Held, that chapter 43, Sess. Laws 1915, does not directly or indirectly repeal § 5, chapter 303, Sess. Laws 1911, which, under the holding in State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, appropriates money for the salaries of such tax commissioners.

Opinion filed October 7, 1915.

Writ issued.

George E. Wallace and *H. H. Steele,* for petitioner.

The supreme court has original jurisdiction to issue writs of mandamus or other writs, especially where the prerogatives, rights and franchises of state government are involved. Const. §§ 86, 87; Rev. Codes 1905, §§ 6751, 7822, Comp. Laws 1913, §§ 6727, 8457; State ex rel. Goodwin v. Nelson County, 1 N. D. 101, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33; State ex rel. Moore v. Archibald, 5 N. D. 359, 66 N. W. 234; State ex rel. Wineman v. Dahl, 6 N. D. 81, 34 L.R.A. 97, 68 N. W. 418; State ex rel. Plain v. Falley, 8 N. D. 90, 76 N. W. 996; State ex rel. Wolfe v. Falley, 9 N. D. 450, 83 N. W. 860; State ex rel. Fosser v. Lavik, 9 N. D. 461, 83 N. W. 914; Anderson v. Gordon, 9 N. D. 480, 52 L.R.A. 134, 83 N. W. 993; State ex rel. Granvold v. Porter, 11 N. D. 309, 91 N. W. 944; State ex rel. Buttz v. Liudahl, 11 N. D. 320, 91 N. W. 950; State ex rel. Byrne v. Wilcox, 11 N. D. 329, 91 N. W. 955; State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 388; Duluth Elevator Co. v. White, 11 N. D. 534, 90 N. W. 14; State ex rel. Mitchell v. Larson, 13 N. D. 420, 101 N. W. 315; State ex rel. Frich v. Stark County, 14 N. D. 368, 103 N. W. 913; State ex rel. Madderson v. Nohle, 16 N. D. 168, 125 Am. St. Rep. 628, 112 N. W. 141; State ex rel. Erickson v. Burr, 16 N. D. 581, 113 N. W. 705; State ex rel. Steel v. Fabrick, 17 N. D. 532, 117 N. W. 860; State ex rel. Cooper v. Blaisdell, 17 N. D. 575, 118 N. W. 225; State ex rel. McCue v. Blaisdell, 18 N. D. 55, 24 L.R.A.(N.S.) 465, 138 Am. St. Rep. 741, 118 N. W. 141, 18 N. D. 31, 118 N. W. 360; State ex rel. Miller v. Norton, 20 N. D. 180, 127 N. W. 717; State ex rel. Williams v. Meyer, 20 N. D. 628, 127 N. W. 834; State ex rel. Miller v. Miller, 21 N. D. 324, 131 N. W. 282; State ex rel. Watkins v. Norton, 21 N. D. 473, 131 N. W. 257; State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, 49 L.R.A.(N.S.) 67, 142 N. W. 450.

"A majority of said Tax Commission shall constitute a quorum for the transaction of business and the performance of the duties of the commission." Comp. Laws 1913, § 2085.

"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." Hoyne v. Danisch, 264 Ill. 467, 106 N. E. 341.

"It is sufficient if the intention to make the appropriation is clearly evidenced by the language employed in the statute upon the subject, or if it is evident that no effect can possibly be given to a statute unless it be construed as making the necessary appropriation." Carr v. State, 127 Ind. 204, 11 L.R.A. 370, 22 Am. St. Rep. 624, 26 N. E. 778; Power v. Hamilton, 22 N. D. 177, 132 N. W. 664; Vermont Loan & T. Co. v. Whithed, 2 N. D. 82, 49 N. W. 318; State ex rel. Flaherty v. Hanson, 16 N. D. 347, 113 N. W. 371; Whitney v. Whitney, 14 Mass. 92; Ryegate v. Wardsboro, 30 Vt. 746; People ex rel. Atty. Gen. v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 243; Durousseau v. United States, 6 Cranch, 307, 3 L. ed. 232; Brewer v. Blougher, 14 Pet. 178, 10 L. ed. 408; Reiche v. Smythe, 13 Wall. 162, 20 L. ed. 566; Atkins v. Fibre Disintegrating Co. 18 Wall. 302, 21 L. ed. 841; 36 Cyc. 1109, and cases cited; Howlett v. Cheetham, 17 Wash. 626, 50 Pac. 523.

"Repeals by implication are not favored, and will not be indulged in unless it is manifest that the legislature so intended." Reeves & Co. v. Bruening, 16 N. D. 402, 114 N. W. 313; 26 Am. & Eng. Enc. Law, 721, and cases cited; 2 Current Law, 1734–1736 and recent authorities cited; 36 Cyc. 1087; 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. 194, 94 N. E. 899; Lewis's Sutherland Stat. Constr. 2d ed. § 247, and note, § 267, and cases cited; State v. Young, 17 Kan. 414; Minot v. Amundson, 22 N. D. 239, 133 N. W. 551; Hoyne v. Danisch, 264 Ill. 483, 106 N. E. 341; People ex rel. Hinch v. Harrison, 185 Ill. 307, 56 N. E. 1120; People ex rel. Kelly v. Raymond, 186 Ill. 407, 57 N. E. 1066; Galpin v. Chicago, 249 Ill. 554, 94 N. E. 961; Cruse v. Aden, 127 Ill. 231, 3 L.R.A. 327, 20 N. E. 73; People ex rel. Akin v. Kipley, 171 Ill. 44, 41 L.R.A. 775, 49 N. E. 229; Hogan v. Akin, 181 Ill.

448, 55 N. E. 137; Krome v. Halbert, 263 Ill. 172, 104 N. E. 1066; People ex rel. Redman v. Wren, 5 Ill. 269; Bryan v. Buckmaster, Breese (Ill.) 408; People ex rel. Krouse v. Harrison, 191 Ill. 257, 61 N. E. 99; Cleveland, C. C. & St. L. R. Co. v. Blind, — Ind. —, 105 N. E. 483; 9 Ind. Dig. Stat. V. b; Carver v. Smith, 90 Ind. 222, 46 Am. Rep. 210; Jeffersonville, M. & I. R. Co. v. Dunlap, 112 Ind. 93, 13 N. E. 403.

There must be an irreconcilable conflict before it can be said that one law passed by the same legislature repeals another upon the same subject, and there is no such conflict unless, after the application of every recognized rule of construction, substantial harmony is found impossible. Hay v. Baraboo, 127 Wis. 1, 3 L.R.A.(N.S.) 84, 115 Am. St. Rep. 977, 105 N. W. 654; Black, Interpretation of Laws, pp. 117, 118; Sedgw. Stat. Constr. 98; Lewis's Sutherland, Stat. Constr. § 275; Dwarris, Stat. 765; Deneen v. Unverzagt, 225 Ill. 378, 80 N. E. 321, 8 Ann. Cas. 396, and cases cited; Jersey City v. Hall, 79 N. J. L. 559, 76 Atl. 1058, Ann. Cas. 1912A, 696; 36 Cyc. 1088, and authorities; Lewis v. Cook County, 72 Ill. App. 151; State ex rel. St. Paul Gaslight Co. v. McCardy, 62 Minn. 509, 64 N. W. 1133; Crane v. Reeder, 22 Mich. 322; Woodworth v. Kalamazoo, 135 Mich. 233, 97 N. W. 714; Nelden v. Clark, 20 Utah, 382, 77 Am. St. Rep. 917, 59 Pac. 524; Fargo v. Ross, 11 N. D. 369, 92 N. W. 449; Schafer v. Schafer, 71 Neb. 708, 99 N. W. 482; Augusta Nat. Bank v. Beard, 100 Va. 687, 42 S. E. 694; State ex rel. Henderson v. Burdick, 4 Wyo. 272, 24 L.R.A. 266, 33 Pac. 125.

The repeal clause to an act adds no strength to the act itself. The fact of repeal must clearly appear from the subject-matter and from the language used. Hoyne v. Danisch, 264 Ill. 483, 106 N. E. 341.

A general appropriation bill merely suspends a continuing appropriation in case of conflict. Reed v. Houston, 12 Iowa, 35; Jeffreys v. Huston, 23 Idaho, 372, 129 Pac. 1065; United States v. Langston, 118 U. S. 389, 30 L. ed. 164, 6 Sup. Ct. Rep. 1185; Mernaugh v. Orlando, 41 Fla. 433, 27 So. 34; Brown v. Barry, 3 Dall. 365, 1 L. ed. 638; 36 Cyc. 1101.

Henry J. Linde, Attorney General, *Francis J. Murphy,* and *H. R. Bitzing,* Assistant Attorneys General for defendant.

Assuming that chapter 303 of the Session Laws of 1911, being the

law creating a nonpartisan tax commission, contains in itself a sufficient appropriation, the contention of the defendant is that any appropriation which might be so contained has been suspended by the general appropriation bill or the so-called budget bill of the 1915 general legislative assembly. Jeffreys v. Huston, 23 Idaho, 379, 129 Pac. 1065; State ex rel. Holcombe v. Burdick, 4 Wyo. 290, 33 Pac. 131; United States v. Fisher, 109 U. S. 146, 27 L. ed. 887, 3 Sup. Ct. Rep. 154; United States v. Mitchell, 149 U. S. 146, 27 L. ed. 887, 1 Sup. Ct. Rep. 157; Falk v. Huston, 25 Idaho, 26, 135 Pac. 746; United States v. Langston, 118 U. S. 389, 30 L. ed. 164, 6 Sup. Ct. Rep. 1185; Dunwoody v. United States, 143 U. S. 578, 36 L. ed. 269, 12 Sup. Ct. Rep. 465; Belknap v. United States, 150 U. S. 588, 37 L. ed. 1191, 14 Sup. Ct. Rep. 183.

The intention of the legislature as indicated and expressed by the budget bill of 1915 was to reduce the salaries of the tax commissioners. It is not to be presumed that the legislature only intended to appropriate part of that which they knew had been already appropriated. Mansfield v. Chambers, 26 Cal. App. 499, 147 Pac. 595; Belknap v. United States, 150 U. S. 588, 37 L. ed. 1191, 14 Sup. Ct. Rep. 183; Owen v. Beale, 145 Ala. 108, 39 So. 907; State ex rel. Jones v. Clausen, 78 Wash. 103, 138 Pac. 653.

BURKE, J. Petitioner asks mandamus to compel the state auditor to issue salary warrants to the members of the state Tax Commission. The facts leading up to the controversy, briefly stated, are as follows: Chapter 303, Sess. Laws 1911, creates a permanent nonpartisan Tax Commission, defines its powers, and appropriates money for the maintenance thereof. Section 2 of said chapter provides for the appointment by the governor, with the advice and consent of the senate, of three persons, the term of one of whom should expire on the first Monday in May, 1915; another whose term should expire May, 1917, and one whose term should expire May, 1919, and upon the expiration of the term of each of said persons a successor be named for a period of six years. Section 5 provides that each of said commissioners shall receive an annual salary of $3,000 payable in the same manner as the salaries of other state officers are paid. By chapter 318, Sess. Laws 1913, amendments were made to §§ 6, 7, and 8 of said chapter 303, Sess. Laws

1911, the object of the amendment being to specifically appropriate money for the payment of salaries and other expenses of said Tax Commission. The 1913 law, however, was vetoed. See State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, 49 L.R.A.(N.S.) 67, 142 N. W. 450.

With the legislation and litigation in this condition, the legislature of 1915 met. February 8, 1915, senate bill No. 261 was introduced under a title stating that its object was to amend and re-enact chapter 303, Sess. Laws 1911. The principal changes proposed were that a tax commissioner should be appointed by the governor by and with the advice and consent of the senate for a term of two years to begin on the 1st day of March in each odd-numbered year. This bill was finally passed in the senate, February 23, and was sent to the house, where it came to a vote and was finally defeated March 4, 1915, the last day but one of the session. In the meantime, there had been introduced the budget house bill No. 488 (now chapter 43, Sess. Laws 1915) entitled: "An Act to Appropriate Money for the Expenses of the Executive, Legislative, and Judicial departments of the state government, and for public schools, specifying the amount and time for which such appropriations shall be available, and repealing §§ 141, 155, 652, and 654, subdivision 9 of §§ 5146 and 5146a of the Compiled Laws of 1913, and all other acts and parts of acts in so far as the same relate to appropriations conflicting herewith, or to appropriations for the same matters or purposes provided for herein." This passed the House, February 24, 1915; was amended and passed in the senate, March 4, 1915, went to a conference committee and was finally passed by both the House and senate, March 5, the last day of the session. Subdivision 18 of said chapter 43, Sess. Laws 1915, reads:

"Tax Commission.

Salary, Tax Commissioner, . . . $3,000 per annum. . . . $6,000."

The state auditor, believing that no appropriation had been made for the salaries of two of the tax commissioners, refused to issue warrants therefor, but offers to issue salary warrant to one commissioner if said Commission designate which member shall receive the same.

(1) There is not much controversy between the parties, and their contention may be briefly stated as follows: Respondent concedes that under State ex rel. Birdzell v. Jorgenson, supra, an appropriation for

the salaries of the three commissioners was provided by chapter 303, Sess. Laws 1911, and that unless the section relating to the salaries has been repealed by the budget bill, chapter 43, Sess. Laws 1915, relators are entitled to the relief demanded. He insists that it was the legislative intent that the salary of two of the commissioners be repealed, and that one be paid, and that by implication, if not directly, all portions of chapter 303, Sess. Laws 1911, relating to salary were repealed. He relies particularly upon the language found at the beginning of said budget bill, wherein it says: "All other acts and parts of acts in so far as the same relate to appropriations conflicting herewith, or to appropriations for the same matters or purposes provided for herein," are hereby repealed.

We have reached a conclusion favorable to the relator, and we base our conclusion upon the following:

First, it is unreasonable to believe the legislature intended two of the commissioners to perform the duties of their office, enjoined upon them by law, without compensation, while the third, doing exactly the same work, should be paid.

Second, the budget bill nowhere specifically mentions the repeal of the salary of the tax commissioners.

Third, the budget bill does not mention the subject in its title, and it will be presumed that the legislature intended to enact only constitutional measures.

Fourth, at about the time of the introduction of the budget bill, senate bill No. 261 was introduced, affording the legislature ample opportunity to open and directly repeal the salary clauses which are now claimed to have been repealed indirectly.

Fifth, it is apparent that the defeat of senate bill No. 261 was followed so closely by the passage of the budget bill that no time was given for consideration of this item, and that it was voted for and passed by inadvertence.

Sixth, the budget bill does not purport to carry appropriations for all purposes, and an examination of the Session Laws of 1915 shows that from chapter 5 to chapter 50 something like forty other bills were enacted carrying appropriations: For instance, chapter 9, approved March 3, 1915, provides money for a field officer for the penitentiary, —salary $2,400. Chapter 21 appropriates salary for the state examiner,

approved March 3, 1915; chapter 27, approved March 2, appropriates money for the fish commissioner's salary,—$1,500; chapter 38 appropriates money for the public accountant; chapter 42, approved March 11, 1915, appropriates money for a high school inspector. If respondent's contention is correct, the budget bill, which was not approved until March 13th, would have repealed all those prior appropriations enacted but a few days earlier by the same legislature.

It is our conclusion that chapter 303, Sess. Laws 1911, is still in full force and effect, except as amended in 1913, as held in State ex rel. Birdzell v. Jorgenson. Section 5 of said chapter provides that "each of said commissioners shall receive an annual salary of $3,000, payable in the same manner as the salaries of other state officers are paid;" that the legislature of 1915 neither directly nor indirectly effected a repeal of this subdivision, and it is as much the law now as the provisions of the budget bill. That the subdivision of the budget bill relied upon by respondent, appropriating money for one tax commissioner, was enacted through an inadvertence and is a nullity.

It follows that it is the duty of the respondent to issue the warrants for the salaries aforesaid. It is so ordered.

BRUCE, J., being disqualified, did not participate, HONORABLE W. L. NUESSLE, Judge of Sixth Judicial District, sitting in his stead.

STATE OF NORTH DAKOTA EX REL. ISAAC P. BAKER v. L. B. HANNA, as Governor of the State of North Dakota, R. F. Flint, as Commissioner of Agriculture and Labor, Thomas Hall, as Secretary of State, Henry J. Linde, as Attorney General, and W. H. Stutsman, as President of the Railroad Commission.

(154 N. W. 704.)

Application for original writ of mandamus against the individual members of the state board of immigration to compel organization of said board and performance by it of its duties under chap. 234, Sess. Laws 1915, creating said board and defining its duties.

The respondents by answer state their willingness to organize and act as a board, provided § 7 of chap. 234, Sess. Laws 1915, is in force. But respondents recite the finding in the office of secretary of state of certain petitions, one set for a referendum of the entire act, and one for referendum of § 7 thereof, the appropriation part of said statute; and that while neither petition taken alone has enough signatures thereon to authorize a referendum vote, yet if both sets should be considered as but one petition and as sufficient to referend § 7, the appropriation part of said act, then § 7, the appropriation, would be suspended, pending a vote thereon at the next general election; and meanwhile the board, being entirely without funds, it would be useless to organize as well as powerless to act. *Held:*—

Original writ of mandamus — application for — State Board of Immigration — organization — appropriations — referendum — hearing on — double petitions — must relate to same subject-matter.

1. To authorize the two petitions to be treated as one, both must deal with the same subject-matter and seek the same object.

Act — petition to referend — effect of — revocation of — old statute — reinstatement of — two petitions — dissimilar in their objects.

2. An affirmative vote on the petition to referend the entire act would revoke the repealing section of chap. 234, Sess. Laws 1915, expressly repealing earlier statutes, and thereby reinstate the old statutes making a standing biennial appropriation of $10,000 for immigration purposes and a different board of immigration; while an affirmative vote upon reference of § 7 only of chap. 234 would leave the present board intact but with no appropriation or funds for its use. Hence, the two petitions are entirely dissimilar in objects sought as they are in subject-matter. They are separate petitions, and cannot be treated as one only for the referending of § 7 alone.

Act — referending — reasons for — two petitions — must seek same result.

3. That the petitioners to referend the entire act have assigned in their petition as a reason for its reference that it entails "a needless waste of public money" and "is a needless burden of taxation with no benefit to the people of the state" does not authorize it to be treated as a petition for reference of § 7, the appropriation only, as petitioners for reference of the entire act must be held to have understood the law, and that in effect they petitioned for a reinstatement of the old biennial appropriation for $10,000, while those petitioning for only reference of the appropriation, § 7, desire no appropriation whatever. Under no reasoning can the two classes of petitioners be said to either desire or seek the same result. The two petitions must be held to be conflicting and incompatible, and cannot be consolidated as one petition.

Petitions — desire of petitioners as expressed — cannot be ignored.

4. Petitions cannot be combined when to do so will override or ignore the desires of one set of petitioners as expressed in their petition.

Referendum — effect of — will of people — sets aside — petition strictly construed — court fiat — cannot amend Constitution.

5. As a referendum sets aside or suspends the will of the people as expressed by legislative act, petitions for a referendum should be required to comply strictly with the mandatory constitutional provisions under which a referendum is authorized. To require less is the equivalent of amending said constitutional provisions by court fiat, as well as to be derelict in enforcing the Constitution itself.

Referendums — failure of.

6. Chapter 234 is in full force and effect, and no part thereof has been referred. The referendums attempted of the act and § 7 thereof have both failed.

Writ issued — costs — public officials — acts justified — judicial determination — public funds — disbursement of.

7. Writ ordered issued, but no costs will be taxed as the public officials concerned were justified in obtaining a judicial determination of the questions involved before disbursing public funds with any doubt of their right to do so.

Opinion filed October 8, 1915.

Benton Baker, for petitioner.

There are two petitions in this matter, calling for referendums of the act in question, and also of a part of such act. They are of the same kind, signed by different electors, and a single petition for certain objects was clearly intended by the signers, and the whole really constitutes but one petition or instrument. Hammett v. Hodges, 104 Ark. 510, 149 S. W. 667; Williamson v. Russey, 73 Ark. 270, 84 S. W. 229; Butler v. Mills, 61 Ark. 477, 33 S. W. 632; McKinney v. Bradford County, 26 Fla. 267, 4 So. 855; Douglass v. Baker County, 23 Fla. 419, 2 So. 776; State ex rel. Stringfellow v. Chouteau County, 42 Mont. 62, 111 Pac. 144; State ex rel. McNary v. Olcott, 62 Or. 277, 125 Pac. 303; Graves v. Rudd, 26 Tex. Civ. App. 554, 65 S. W. 63; Chambers v. Cline, 60 W. Va. 588, 55 S. E. 99.

A single comprehensive organization should be necessary. State ex rel. Halliburton v. Roach, 230 Mo. 408, 139 Am. St. Rep. 639, 130 S. W. 689.

Disregarding whatever ulterior purpose an effectual referendum of the appropriating section might have accomplished, in legal effect the remainder of the act would be valid and of force, though dormant,

perhaps, for lack of funds to put into effect its purpose. State ex rel. Donahey v. Roose, 90 Ohio St. 345, 107 N. E. 760.

The actions and duties of the secretary of state in reference to referendum petitions are purely ministerial. He has no authority to pass upon the validity of such instruments. State ex rel. Cooper v. Blaisdell, 17 N. D. 575, 118 N. W. 225; Throop, Pub. Off. 537; Wyman, Administrative Law, § 39, p. 153; People ex rel. Chatterton v. Secretary of State, 58 Ill. 90; State ex rel. Speer v. Barker, 4 Kan. 379, 96 Am. Dec. 175; State ex rel. Bienvenu v. Wrotnowski, 17 La. Ann. 156; State ex rel. Register of Lands v. Secretary of State, 33 Mo. 293; State ex rel. McNary v. Olcott, 62 Or. 277, 125 Pac. 303; State ex rel. Kemper v. Carter, 257 Mo. 52, 165 S. W. 773; State ex rel. Halliburton v. Roach, 230 Mo. 408, 139 Am. St. Rep. 639, 130 S. W. 689; People ex rel. Rozenkranz v. Carr, 86 N. Y. 512; State ex rel. Drake v. Doyle, 40 Wis. 188, 22 Am. Rep. 692.

He is not a judicial officer. State ex rel. Standard Oil Co. v. Blaisdell, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089.

Wm. Lemke and *Frank O. Hellstrom,* appeared as attorneys for Thomas Hall, Secretary of State, and *Henry J. Linde,* Attorney General, appeared as attorney for himself and members of the board, other than the Secretary of State.

Goss, J. Based upon affidavits of petitioner as a taxpayer, an alternative original writ of mandamus was issued by this court directed to the governor, commissioner of agriculture and labor, secretary of state, attorney general, and president of the State Railroad Commission, to individually and collectively and as the state board of immigration, show cause why they should not meet and organize as said state board of immigration, and why said board should not proceed to perform its duties pursuant to chapter 234 of the Session Laws of 1915. To this writ two separate returns have been filed. To both petitioner demurred.

Respondents by return allege that by the filing of petitions for referendum in the office of the secretary of state, the appropriations made in § 7, of chapter 234 of the Session Laws of 1915, have been suspended and referred to a vote of the people at the next general election as provided by § 25 of article 2 of our state Constitution as amended, and that organization of the board is a useless formality

where the appropriation part of the bill is thus suspended. The board is without funds even to pay expenses of organization if § 7 has been referred. Respondents are willing to act if it has not. All facts are stipulated. Only three questions are raised: (1st) Is the return of the secretary of state, that § 7 of the act has been referred, conclusive upon the court in this proceeding? (2d) Is the action of the secretary of state in filing and canvassing the various referendum petitions discretionary, and if so is the discretion of that official controllable by a mandamus? And, (3d) Do the two kinds of referendum petitions filed authorize a referendum of the appropriation contained in § 7 of the act?

The first two questions may be considered together. It is urged that his return as secretary of state, that this portion of the act has been referred, is as conclusive upon the courts as would be the regular return of a canvassing board upon the results of an election. The fallacy of this argument consists in the erroneous assumption that the secretary of state is required by law to make or file a return or certificate analogous thereto, passing upon the number and sufficiency of the petitioners and whether the petitions work a referendum. No certificate or return whatsoever, is either called for or provided. His duties with reference to this matter are fixed by the Constitution as amended, and amount to no more than determining as a ministerial act the facts of record in his office as sufficient or insufficient upon which to authorize a referendum.

The legislature has not provided for any official canvass by any board of canvassers or any person or official of the petitioners upon petitions for referendum that may be filed with the secretary of state. As none is provided none is contemplated. The petitions speak for themselves. That official must cause the question to be submitted to ballot if the referendum petitions are sufficient under the law. Under constitutional provisions he must ascertain whether the petitions are sufficient in form, and if so whether they are signed by a sufficient percentage of the total electorate of the state to constitute a basis for a referendum vote. The mere counting of the petitioners is not analogous to a canvass of the vote of an election. It is difficult to see wherein any discretion whatsoever is vested in said official. The law declares what the petitions must contain to be valid. Like any other official acting

under the law, he simply obeys the law. That a question of law may arise, as here, upon the sufficiency of the petition, vests no discretion in said official in acting under it. He obeys the law, or he does not, according to whether his construction of the law be right or wrong. But no discretion is involved. State ex rel. McNary v. Olcott, 62 Or. 277, 125 Pac. 303; State ex rel. Halliburton v. Roach, 230 Mo. 408, 139 Am. St. Rep. 639, 130 S. W. 689,—both on the same question arising on referendum petitions. Where no return is to be made and no discretion vested, there can be no defense on these grounds.

The issuance of the writ then turns upon the sufficiency of the petitions for referendum to operate a reference of § 7, sufficiency of which may be inquired into by mandamus. To constitute a petition with enough signers thereto concededly two entirely different petitions must be treated as but a petition for referendum of § 7. The signers of variant petitions must be counted in order to have the constitutional percentage of electors petitioning for the reference of § 7. One set of petitions reads: "We, the undersigned electors of the state of North Dakota, do respectfully petition you that at the next general election there be referred to the people of the state, for approval or rejection by means of a vote taken at the polls, an act of the legislative assembly of the state of North Dakota approved March 9, 1915, being an act entitled, 'An Act Creating a State Board of Immigration, Prescribing Its Powers and Duties, Making an Appropriation therefor and Repealing, §§ 573, 577 and 578 of the Compiled Laws of the State of North Dakota for the Year 1913.'"

"We object to this act, as it means a needless waste of public money amounting to $60,000, and a needless burden of taxation, with no benefit to the people of the state." To this petition to refer the entire act was 3,533 purported signatures.

The other petition reads: "We, the undersigned legal voters of the state of North Dakota, respectfully order that that portion of senate bill No. 194, entitled, 'An Act Creating a State Board of Immigration Prescribing Its Powers and Duties, Making an Appropriation therefor, and Repealing §§ 573–578 of the Compiled Laws of North Dakota for the Year 1913,' contained in § 7, and which reads as follows: 'Section 7. There is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, or as much thereof as may be

necessary to carry out the purpose of this act, the sum of $25,000 for the year 1915, and the sum of $35,000 for the year 1916'; passed by the fourteenth legislative assembly of the state of North Dakota, shall be referred to the people of this state for their approval or rejection at the next regular election."

To this petition to refer only § 7 of the act, there were attached 4,722 purported signatures. It is stipulated that at the regular state-wide election in the year 1914 there were cast 82,280 votes, and that 10 per cent thereof, or 8,228 petitioners, must have petitioned for referendum before an act can be said to be referred. Neither petition alone has sufficient signers. The total to the two petitions is 8,255. Can these two petitions for referendum, one of the entire act, and the other of but the appropriation part of it, be consolidated and considered as one petition for a referendum of the appropriation? To be so treated, both must deal with the same subject-matter and seek the same object. State ex rel. Halliburton v. Roach, 230 Mo. 408, 139 Am. St. Rep. 639, 130 S. W. 689; Hammett v. Hodges, 104 Ark. 510, 149 S. W. 667. In the Arkansas case it is said that it is necessary that the several petitions to constitute one petition must "contain the same subject-matter, because in no other way could it be positively determined that the number necessary to propose a measure under the initiative had all petitioned for the same measure." Logically, the next inquiry then is whether these two forms of petitions cover identical subject-matter. Manifestly they do not. One is for a referendum of the entire act; the other, for only one of several provisions of it. The former would suspend and possibly repeal the act, abolish the law creating the state board of immigration, as well as to revoke § 7 thereof, the appropriation. Nor is that all by any means that the petitioners for referendum of the act have petitioned for and would accomplish. Annulling the act would abrogate § 8 thereof, the portion wherein other statutes are expressly repealed. That would operate to reinstate those repealed statutes, §§ 573–578, inclusive, Comp. Laws 1913. Thereby would be reinstated a board of immigration of entirely different official personnel and membership. Nor is that all. Abrogation of the repealing clause would revive the former annual continuing appropriation for immigration purposes of $5,000, provided by § 577, Comp. Laws 1913, expressly repealed by the act sought to be referred. Hence, the petitioners for

the repeal of the entire act have, among other things, so expressed themselves as desiring a biennial appropriation of $10,000 for immigration purposes. And this, too, notwithstanding their objection to the biennial appropriation of $60,000, provided in § 7 of the act, and which appropriation they term "a needless burden of taxation with no benefit to the people of the state." These petitioners must be taken as desiring the abolition of the board of immigration provided for by the later law, also a reinstatement of the old law, and with it the old board of immigration, together with an appropriation of $10,000 for this biennial period for the use of said old board. In legal effect, such is what they have petitioned for, and that will be the result of an affirmative vote upon the referendum they seek by their petition. But the petitioners for a referendum of § 7, the appropriation part only, of the statute in question, seek nothing of the kind. An affirmative vote upon their petition would bear entirely different results as its fruit. Instead, the present board instead of the old board of immigration would exist, or rather the law would exist for its formation, but with no appropriation whatever for its use. It would exist as a board, but be entirely without funds, leaving the sinews of war for succeeding legislatures to provide, subject to possible future referendum upon any appropriation so provided. One set of petitioners, then, would have a biennial appropriation of $10,000 available, the other would have no appropriation; the first set would have an immigration board made up of the governor, secretary of state, state auditor, state treasurer, and attorney general, with the commissioner of agriculture and labor as the general executive agent of said board. The other petitioners would have a board composed of the governor, secretary of state, attorney general, commissioner of agriculture and labor, and president of the State Railroad Commission. One set of petitioners would have the old board and with funds to act; the other the new and different board, but without funds and powerless to act because thereof. To each petitioner knowledge of the law must be presumed. It must be assumed that every petitioner understood fully that for which he petitioned, and contemplated the result that might be brought about by it. Indeed the results achievable must be taken as the object sought by each respective petitioner. Analysis of results proves conclusively that these two classes of petitioners have not in any respect the same purposes in view, nor

have they petitioned for the same thing, but instead have petitioned concerning wholly different subject-matter.

Respondent's contention is urged upon the theory that the greater includes the less, and that because a referendum of the entire act will necessarily refer the included part, the appropriation, the petition therefor must be held as equivalent to one for the repeal of the appropriation. But respondent's reasoning is faulty. Petitioners for reference of the entire act desire more than do those for but the appropriation part of it. Respondent's theory would ignore the result as well as the real intent of the petitioners to refer the act. Every petitioner to referend the appropriation might in reason have refused to sign the petition to refer the act, preferring the present board, but without funds, to the old board with funds. And the same is true of those seeking a reference of the act itself. As reasonable men, each petitioner might have refused to join in a petition to refer the appropriation, desiring either the old board with funds or the present board with the larger appropriation. To hold that these two petitions, widely divergent in subject-matter and object sought, can be consolidated as a petition for and work a referendum of § 7, would be to violate the expressed intent of all those petitioning for a referendum of the entire act, inasmuch as it would be holding them petitioners for something not only not asked for or sought, but plainly contrary to their desires.

Mention should be made, also, that constitutional provisions are being dealt with. These are plainly expressed in the fundamental law. It is so plain that he who runs may read. Those who would seek to set aside a legislative act, the work of a co-ordinate branch of government, and in whom is reposed and to whom is delegated the exercise of law making as both the arm and the voice of the sovereign state, should be required to come within the plain, as well as mandatory, constitutional provisions. They should be held to petition to suspend only what they have plainly sought to refer. There can be no enlargement of these written petitions by strained construction or mere inference or consolidation of it with others different in subject-matter, scope, and effect. This is but to enforce the basic law, the Constitution itself. To require less is to amend it by implication or be derelict in enforcing its provisions.

Respondents have shown no valid reason why the writ should not

issue directing them to meet as a board of immigration, as provided by chapter 234 of the Session Laws of 1915, and organize as such board, and thereafter proceed to perform the duties therein declared. Neither the act, nor § 7 thereof, has been referred, and chapter 234 aforesaid is in all its parts in full force and effect, including an appropriation of $25,000 for the year 1915 and one of $35,000 for the year 1916 as provided by § 7 thereof.

This is a test case and costs will not be allowed. As the matters herein passed upon were necessary of determination that the existence of the board and its power to act be first determined, none of the respondents have acted capriciously or without cause, but, on the contrary, were fully justified in refusing to expend the state's funds until a final decision should be obtained upon these questions.

Let judgment be entered accordingly.

KEIDO MASSETT v. H. B. SCHAFFNER.

(154 N. W. 653.)

Law case — rulings of lower court — appellant must challenge — specifications — assignments of error.

1. Where appellant in a law case fails to challenge the correctness of the lower court's ruling by any specification or assignment of error, his appeal presents nothing to the supreme court for consideration.

District court — appeals to — justice court — return of justice — certificate — impeachment of — by later certificate of justice — leave of court.

2. A return made pursuant to statute by a justice of the peace on an appeal to the district court cannot be later impeached by a certificate of the justice thereafter made and filed without leave of court.

Appeal — statutory return of justice — certificate — impeachment — judgment — regular upon its face.

3. Even if such statutory return were thus subject to impeachment, it is held that such certificate wholly fails to impeach the same, and that the judgment of the justice was in all respects regular upon its face.

Verdict of jury — judgment on — entered same day — compliance with statute.

4. The record discloses that the judgment was entered by the justice on the

same day upon which the verdict was returned, and—following Peterson v. Hansen, 15 N. D. 198,—it is held that this was a compliance with the statute.

Opinion filed October 9, 1915.

Appeal from the District Court of Dunn County; *Crawford, J.*

From a judgment in plaintiff's favor, defendant appeals.

Affirmed.

F. E. McCurdy, for appellant.

A justice of the peace has no jurisdiction to enter judgment upon the verdict of a jury rendered after the cause has been adjourned to an indefinite time, and in the absence of the parties against whom the verdict is rendered, and his counsel. Rev. Codes 1905, § 8426, Comp. Laws 1913, § 9089.

It is immaterial whether the justice enters the judgment the same day the verdict is returned, or thereafter. He had adjourned the cause to an indefinite time, and he had lost jurisdiction to farther act, especially in the absence of the losing party and his counsel. Re Evingson, 2 N. D. 184, 33 Am. St. Rep. 768, 49 N. W. 733; Sluga v. Walker, 9 N. D. 108, 81 N. W. 282; Peterson v. Hansen, 15 N. D. 198, 107 N. W. 528.

T. F. Murtha and *George H. Purchase,* for respondents.

The return or transcript of the justice, that is, the certified copy of his docket, shows a legal judgment in favor of plaintiff. The justice had no right, by further certificate or otherwise, to attempt to modify such return. A justice of the peace has a reasonable time after receiving verdict in which to enter judgment. Rev. Codes 1905, § 8507, Comp. Laws 1913, § 9170; Peterson v. Hansen, 15 N. D. 198, 107 N. W. 528; Sluga v. Walker, 9 N. D. 108, 81 N. W. 282.

A justice of the peace cannot amend a judgment entered by him, even to correct a mistake. McCormick Harvesting Mach. Co. v. Halvorson, 11 S. D. 427, 74 Am. St. Rep. 820, 78 N. W. 1000.

Fisk, Ch. J. This litigation arose in a justice court where plaintiff recovered a judgment pursuant to a verdict rendered by a jury in the sum of $25 damages and costs taxed at $135.90. Such judgment is

regular upon its face. Thereafter defendant appealed to the district court upon questions of law alone, where the judgment was affirmed with costs taxed at $140.80, making a total judgment of $165.80. From the latter judgment this appeal is prosecuted.

We cannot refrain from expressing our regret that this class of litigation should find its way to the court of last resort. For it is apparent that however the decision goes, both parties must ultimately be losers as a result of their efforts to obtain justice, and thereby the administration of justice is brought into disrepute without any fault of the judiciary. In controversies involving such trivial sums, we believe that appeals to this court should not be authorized, or in any event that there should be some protection afforded the parties against the taxation of such large bills of costs. By this we do not mean to criticize the attorneys for either party. They, no doubt, merely complied with the instructions of their clients. We refer to the matter in the hope that the legislature may, in its wisdom, see fit to provide a less expensive remedy in cases involving such trivial sums.

For the following very obvious reasons we can do naught but affirm the judgment of the district court. In the first place not a single specification or assignment of error appears in the record, and consequently we have nothing before us for review. That appellant must in some manner challenge the ruling below in order to enable this court to review the same, is well settled.

But we shall not rest our decision of this appeal upon technical grounds, for it is very clear that appellant is here without any substantial merit to his appeal. He attempts to argue that the judgment pronounced by the justice is a nullity because, as he asserts, the same was not entered at once upon the return of the verdict. This assumption of fact is not warranted by the record which, as before stated, is regular upon its face. The record discloses that some time after the justice made his return on the appeal to the district court, as the statute provides, and which return shows a judgment in all respects regular, a purported certificate by such justice was filed, wherein he certifies as follows: "That on the 15th day of August, 1913, the above-entitled action was tried to a jury in this court, and that the jury returned a verdict in favor of the plaintiff and against the defendant for the sum of $25 damages; that the verdict was returned at noon

on the 15th day of August, and that thereafter another action was tried between the same parties, and that I computed the costs in this action and entered up the judgment on the 15th day of August, 1913, 9:30 P. M., and that on the 19th day of August, 1913, I notified F. E. McCurdy, attorney for the defendant, of the amount of the costs, and sent him a transcript of the judgment, as I did not enter up a judgment nor compute the costs at the time, nor until after court had adjourned and the parties had left for their homes."

It is perfectly obvious that such certificate has no proper place in the record, and it cannot be considered for the purpose of impeaching or adding to the statutory return aforesaid. Moreover, it is equally obvious that even if it could rightfully be considered, it discloses no legal reason for holding the judgment to be irregular and void. The case of Peterson v. Hansen, 15 N. D. 198, 107 N. W. 528, cited by appellant, is a direct authority against his contention that the justice lost jurisdiction to enter such judgment by the few hours' delay in entering the same after the return of the verdict. The appeal is, therefore, wholly devoid of merit, and the judgment is accordingly affirmed.

NORTHERN SAVINGS BANK, a Corporation, v. JOS. M. KELLY and the Courier-Forum Publishing Company Jos. M. Kelly.

(154 N. W. 650.)

Suit upon promissory note. Defense, failure of consideration, wrongful transfer of said note, and entire lack of consideration. Certain rulings of the trial court assigned as error.

Promissory note — indorsement — by president of company — suit on — proof of indorsement — ownership — possession — pleadings.

1. The proof of indorsement made by the president of the defunct Courier-Forum Publishing Company together with the admissions of the answer and the possession of the note by plaintiff, made a prima facie showing of indorsement and ownership.

Agreement — between defendant and payee — note not to be considered valid — except upon contingency — wrongful transfer of note — consideration for note — failure of — rulings of court — error — defense to note — purchaser in due course.

2. It was error in the trial court to reject the offer of the defendant to show an agreement with the Courier-Forum Publishing Company to the effect that said note would not be valid unless a consolidation of the Courier-News and Forum was effected. This evidence was competent to show a defense in the hands of the original holder of the note sufficient to put the plaintiff on proof as an innocent purchaser in due course.

President of company — cross-examination — books — custody of — stock of corporation — subscriptions to — failure to secure — consideration for note.

3. It was error in the trial court to restrict the cross-examination of the president of the defunct Courier-Forum Publishing Company when called by the defendant under the statute. Such testimony was competent to show custody of the books of said defunct corporation and for the purpose of showing any knowledge that the witness may have had of the subscriptions to the stock of said corporation. Defendant was given a certain written instrument wherein it was agreed that the note should be invalid unless certain Democrats were to subscribe $15,000 to such corporate stock, or the defendant's note should be invalid. Defendant should have been allowed to prove the failure to secure those subscriptions.

Plaintiff corporation — president of — cross-examination — defense to note — knowledge of president — purchaser.

4. It was also error in the trial court to exclude questions asked of the president of the plaintiff tending to show that at the time of the purchase of the note he knew of the defense outlined in the answer.

Opinion filed October 13, 1915.

Appeal from the District Court of Cass County; *Pollock*, J.

Reversed.

Flynn & Traynor, for appellant.

There was no proof of the indorsement of the note involved in this case. The mere making of the indorsement by the so-called president of the payee is no proof at all. There was no proof that he was president, or that he had authority to make the indorsement, by which, coupled with a so-called delivery, the said note was transferred. There are no presumptions in favor of either of these acts. 3 Enc. Ev. 625.

If Hatcher were president, there is no presumption that he had authority to indorse and transfer the note. 1 Dan. Neg. Inst. §§ 388, 394; Bank of United States v. Dandridge, 12 Wheat. 70, 6 L. ed. 555; Stoddard v. Lyon, 18 S. D. 207, 99 N. W. 1116.

The mere possession of a promissory note, transferred by indorsement, does not avoid the necessity of proving the indorsement. Rev. Codes 1905, §§ 6361, 6493, Comp. Laws 1913, §§ 6944, 7075; Smith v. Courant Co. 23 N. D. 297, 137 N. W. 781; Vickery v. Burton, 6 N. D. 245, 69 N. W. 193; Massachusetts Loan & T. Co. v. Twichell, 7 N. D. 440, 75 N. W. 786; Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614.

If a negotiable instrument is transferred without indorsement, the transferee takes it subject to all the defenses that might be urged against it in the hands of the payee. Rev. Codes 1905, § 6351, Comp. Laws 1913, § 6934; Vickery v. Burton, 6 N. D. 245, 69 N. W. 193; Massachusetts Loan & T. Co. v. Twichell, 7 N. D. 440, 75 N. W. 786.

In construing a pleading to determine its effect, its allegations shall be liberally construed with a view of substantial justice between the parties. Rev. Codes 1905, §§ 6357, 6869, Comp. Laws 1913, §§ 6940, 7458; Walters v. Rock, 18 N. D. 45, 115 N. W. 511; Waldner v. Bowden State Bank, 13 N. D. 604, 102 N. W. 169, 3 Ann. Cas. 847.

The defendant had the right to show all the facts, conditions, and circumstances under which the note was signed and delivered, as well as those pertaining to its negotiation and transfer, so as to show fraud in both instances. This being accomplished, the burden of proof then shifted to plaintiff, to show that it purchased the note in good faith, in due course, and without notice of defects. Vickery v. Burton, 6 N. D. 245, 69 N. W. 193; First Nat. Bank v. Flath, 10 N. D. 281, 86 N. W. 867; Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614; Walters v. Rock, 18 N. D. 52, 115 N. W. 511; American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99; Citizens' State Bank v. Garceau, 22 N. D. 576, 134 N. W. 882; Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550; Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081.

This is not a case of varying a writing, but of vitiating it. Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; Rev. Codes 1905, §§ 5351, 5352, Comp. Laws 1913, §§ 5907, 5908.

Parol proof of the conditions, agreements, and circumstances surrounding the making and delivery of a note is competent. Burke v. Dulaney, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816; Rev. Codes 1905, § 5346, Comp. Laws 1913, § 5902; First Nat. Bank v. Flath, 10 N. D. 281, 86 N. W. 867; Citizens' State Bank v. Garceau, 22 N. D. 576, 134 N. W. 882; 6 Enc. Ev. 16; Mendenhall v. Ulrich, 94 Minn. 100, 101 N. W. 1057; 20 Cyc. 112; Rochford v. Barrett, 22 S. D. 83, 115 N. W. 522; Kirby v. Berguin, 15 S. D. 444, 90 N. W. 857; Red River Valley Nat. Bank v. Barnes, 8 N. D. 432, 79 N. W. 880; Prairie School Twp. v. Haseleu, 3 N. D. 340, 55 N. W. 938; Juilliard v. Chaffee, 92 N. Y. 535; Skaaraas v. Finnegan, 31 Minn. 48, 16 N. W. 457; Grand Forks Lumber & Coal Co. v. Tourtelot, 7 N. D. 587, 75 N. W. 901.

A director of a corporation, and the one in whose sole charge all of the files and records had been for a long time, is competent to testify as to who were subscribers to the stock of the corporation, and especially whether or not certain subscriptions to stock had been made. 3 Enc. Ev. 617; Jones, Ev. § 212.

Arthur W. Fowler, for respondent.

Evidence of the president of a corporation that he made the indorsement of the note in suit in the name of the corporation is sufficient proof of an indorsement. But, in this case, the answer admits the indorsement. Coffin v. Smith, 26 S. D. 536, 128 N. W. 805; Farmers' Bank v. Riedlinger, 27 N. D. 318, 146 N. W. 556.

Defendant is estopped to deny that Hatcher was president, or to deny his authority to indorse. Rev. Codes 1905, §§ 6324, 6362, Comp. Laws 1913, §§ 6907, 6945; Grover v. Muralt, 23 N. D. 576, 137 N. W. 830; Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. ed. 552; National Folding Box & Paper Co. v. American Paper Pail & Box Co. 55 Fed. 488.

Persons acting publicly as officers of a corporation will be presumed rightfully in office, so far as regards other persons. Hall v. Carey, 5 Ga. 239; Selma & T. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; Narragansett Bank v. Atlantic Silk Co. 3 Met. 282; Hilliard v. Goold, 34 N. H. 230, 66 Am. Dec. 765; Rev. Codes 1905, §§ 6336, 6347, 6361, Comp. Laws 1913, §§ 6919, 7030, 7043; Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614; Farmers' Bank v. Riedlinger, 27

N. D. 318, 146 N. W. 556; Shepard v. Hanson, 9 N. D. 251, 83 N. W. 20; Dan. Neg. Inst. § 812; Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724.

Prima facie every holder of a negotiable instrument is deemed a holder in due course, both under the law merchant and the statutes of this state. Rev. Codes 1899, § 59, chap. 100, Civ. Code; 2 Randolph, Com. Paper, § 730; Million v. Ohnsorg, 10 Mo. App. 432; 8 Cyc. 227, 233; Rev. Codes 1905, § 6336, Comp. Laws 1913, § 6919; Grover v. Muralt, 23 N. D. 576, 137 N. W. 830; Ravicz v. Nichells, 9 N. D. 536, 84 N. W. 353.

The mere allegation of fraud in the exception of the note throws no burden upon the plaintiff. Vickery v. Burton, 6 N. D. 245, 69 N. W. 193, and cases cited; State ex rel. Dorgan v. Fisk, 15 N. D. 224, 107 N. W. 191; Palmer v. Smedley, 18 How. Pr. 321; Sayer v. Harker, 113 Iowa, 584, 85 N. W. 786; Smith v. Parker, 148 Ind. 127, 45 N. E. 770; Cerney v. Paxton & G. Co. 78 Neb. 134, 10 L.R.A.(N.S.) 640, 110 N. W. 882; Maclaren v. Kramar, 26 N. D. 244, 50 L.R.A.(N.S.) 714, 144 N. W. 90.

Parol evidence is not admissible to show that the subscription was made upon a condition not expressed in the instrument. 10 Cyc. 391, and cases; 3 Enc. Ev. 622, and cases; Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; Johnson v. Kindred State Bank, 12 N. D. 336, 96 N. W. 588; American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99; Aden v. Daub, 146 N. C. 10, 59 S. E. 162; Crilly v. Gallice, 78 C. C. A. 525, 148 Fed. 835.

Counsel, after the rulings of the court to the effect that he was not using the best evidence, made no offer of proof to lay any foundation for secondary evidence, or to show that the witness was or could be testifying from his own knowledge. Madson v. Rutten, 16 N. D. 281, 13 L.R.A.(N.S.) 554, 113 N. W. 872; Bristol & S. Co. v. Skapple, 17 N. D. 272, 115 N. W. 841.

A party to an action who is in default cannot be called for cross-examination under the statute. There must have been issue joined. Suter v. Page, 64 Minn. 444, 67 N. W. 67.

BURKE, J. This litigation arises over a certain promissory note given by the defendant under the following circumstances: In the

spring of 1912 two daily papers were published at Fargo,—the Forum and the Courier-News. From the correspondence we infer that the Forum was Republican and that the Courier-News almost, if not quite, Democratic. From the same sources we infer that the parties to this action are of the Democratic faith. About the 8th of March, 1912, one O. M. Hatcher approached the defendant for a subscription to a new company to be known as the Courier-Forum Publishing Company which was to buy both of the aforesaid newspapers. Upon that date, Mr. Kelly subscribed for ten shares par value, $100 each, giving therefor his note in words and figures, as follows:

Fargo, North Dakota, March 8, 1912.

On December 1, 1912, for value received, I promise to pay to the order of the Courier-Forum Publishing Company one thousand and no /100 dollars ($1,000), with interest from date until paid at the rate of 7 per cent annum, payable annually. Principal and interest payable at payee's office at Fargo, North Dakota.

(Signed) Joseph M. Kelly,
Devils Lake, North Dakota.
Postoffice.

At the time of the signing of the note, O. M. Hatcher gave to Mr. Kelly a writing in the following language:

March 8, 1912.

It is agreed that this subscription is conditional upon the securing of subscriptions from J. P. Lamb, John Bruegger, W. E. Purcell, S. J. Doyle, John Fried, George Duis, M. F. Murphy, John Cashal, F. A. Wilson, Frank Lish, or other prominent Democrats to the extent of not less than $15,000 to the preferred stock of the Courier-Forum Publishing Company of Fargo.

(Signed) O. M. Hatcher
for Courier-Forum Publishing Company.

March 20, 1912, George Hollister wrote a letter upon the stationery of the Northern Trust Company to the following effect:

Fargo, North Dakota, Mar. 20, 1912.

Joseph M. Kelly, Esq.,
Devils Lake, N. D.

Dear Sir:—

We have to-day bought your note of $1,000, given to the Courier-Forum Publishing Company. We would prefer to have this note upon one of our blanks for reasons that I will explain to you the next time I see you. I inclose you such blank and ask that you sign the same and return to us, on receipt of which the note given the newspaper will be canceled and mailed to you.

I have just returned from a six weeks' vacation—got home in time to vote yesterday—but I solemnly swear that I did not vote for La Follette.

Yours truly,
(Signed) George Hollister
President.

Under date of March 21, 1912, Mr. Kelly replied as follows:

Mr. G. H. Hollister, President,
Northern Trust Company,
Fargo, North Dakota.

Dear Sir:—

Your letter of March 20th advising of the purchase of my note, received. When I gave the note to Hatcher, it was with the express and written conditions that he had to sell to fifteen other fellows mentioned an equal amount of the stock, or it would not be payable. So, until that is complied with, I do not think the note is much good to you or Hatcher except to show to the others in order to induce them to subscribe.

I am always willing to subscribe my share to support the cause and am doing so here to support our own paper, and I told Hatcher that I would not put in a cent unless the Democrats outside of Fargo, who have a local interest, would come through, and he assured me he could get them if I would sign the note, so I did so, taking from him an agreement to that effect.

From the way our Democrats voted for La Follette it looked as though they were all tending towards socialism.

Yours truly,
(Signed) Joseph M. Kelly.

At the trial below, plaintiff called M. N. Hatcher and asked the following question:

Q. Witness show plaintiff's exhibit B. I call your attention to the indorsement on the back of this paper: "The Courier-Forum Publishing Company, by M. N. Hatcher, President," and ask you if you know who made that indorsement.

A. I did, sir.

The note was then offered in evidence, and plaintiff rested. Defendant thereupon moved for judgment for dismissal of the action, which was denied. The complaint, besides the ordinary allegations, reads: "Before the maturity of said note, the said Courier-Forum Publishing Company for good and valuable consideration by its indorsement in writing upon the back of said note, duly indorse, transfer, and deliver said note to this plaintiff. . . ."

The answer, in addition to the general denial and a denial of the corporate existence of the Courier-Forum Publishing Company, contains the following allegations:

"4. Admits that on or about the 8th day of March, 1912, the defendant, Joseph M. Kelly, executed the promissory note mentioned in plaintiff's complaint, but alleges that there was absolutely no consideration for the giving of said note, and that the same was obtained by one Hatcher on conditions hereinafter stated, of which the plaintiff had full knowledge at the time of the alleged transfer of said note to plaintiff."

Then follow allegations of the false representations already mentioned. The answer contains the following:

"7. Specifically denied that the said note was ever, for good and valuable consideration or for any consideration at all, duly indorsed, transferred, and delivered by the said Courier-Forum Publishing Company to the plaintiff herein, and alleges that the said note was delivered to the Northern Trust Company of Fargo by the said Hatcher,

and by the said Northern Trust Company delivered to this plaintiff. 8. That at all times before the delivery of said note to the Northern Trust Company and to the plaintiff, the said Northern Trust Company and the said plaintiff had sufficient knowledge of the facts hereinbefore set forth to put them on inquiry, and they were, in fact, informed before delivery to the plaintiff of the facts with reference to the giving of said note, and took the same with full knowledge of the facts."

It appears that Mr. Hollister was also the president of the Northern Savings Bank, this plaintiff, at the time of the purchase of the note.

1. The first controversy arises over defendant's contention that the indorsement has not been proved. As stated above, M. N. Hatcher, president of the defunct corporation, was called as a witness and made the plain statement that he had written the indorsement (waiving demand and notice protest—Courier-Forum Publishing Company, by M. N. Hatcher, President) on the back of said note. At the trial below defendant's attorney said:

"The point is, if your Honor please, that there is no proof of any authority to indorse here. All proof, so far, is just simply that Mr. Hatcher wrote that on the back of it."

Appellant insists that there is no proof of indorsement by the Courier-Forum Publishing Company. We do not think the point well taken. Section 6919, Comp. Laws 1913, provides: ". . . . An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery." Section 6930 reads: "Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected, before the instrument was overdue." Section 6944, Comp. Laws 1913, provides: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some other person under whom he claims acquired the title as a holder in due course. . . ." See: Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614; Farmers' Bank v. Riedlinger, 27 N. D. 318, 146 N. W. 556.

Taken in connection with the defendant's answer, we think the presumptions quite sufficient to make a prima facie case for the plain-

tiff, carrying him to the point where defendant is able to show a defense to the note itself. Of course, when such a stage was reached, and defendant had shown that in the hands of the original payee, said note was unenforceable, the burden would shift, and plaintiff must then show himself a good-faith purchaser without notice, etc.

2. This brings us logically to the efforts made by the defendant to show fraud in the taking and transfer of the note. The defendant Kelly, upon his own behalf, testified that in addition to the written agreement given to him by Hatcher, there was an oral agreement that said note should not be used or negotiated for any purpose unless the consolidation of the Courier-News and the Fargo Forum was effected, and, before the said note should be negotiated or used for any purpose, that sufficient subscriptions should be obtained to effect said consolidation, to wit the sum of $50,000, and that the defendant would be consulted about the consolidation so that he could be assured that everything was all right. That no notification was ever given him to go to Fargo to pass upon such consolidation. This offer of proof was rejected by the trial court upon the theory apparently that it was not consistent with the allegation of defendant's answer. Respondent adds further grounds for its rejection, that the proof, if admitted, would show no fraud in the inception of the note, but merely in its wrongful delivery. We believe that the evidence was admissible. The answer is broad enough to admit the proof offered, and we think the evidence tended, in some measure at least, to show fraud in the inception of the note. It must be borne in mind that at this stage of the trial, defendant was merely showing a defense against the original payee of the note, and it could not seriously be contended that this defense would be shut out in an action between the original parties. As there must be a new trial, we express this opinion, although we consider the matter less prejudicial than those treated in the next paragraph.

3. The next controversy arises over the effort of the defendant to show that the Democrats named, or others, had not subscribed $15,000 worth of the stock. M. N. Hatcher, the man who had made the indorsement upon the back of the note, as president of the Courier-Forum Publishing Company, was called for cross-examination, and over the plaintiff's objection was allowed to testify. As plaintiff has not ap-

pealed, we will not consider its contention that this testimony was improperly admitted. Mr. Hatcher was one of the organizers of the Courier-Forum Publishing Company, its president, had signed the articles of incorporation, was one of the directors, had never resigned from such position, and was such director at the time of the trial. He was asked whether or not the Democrats named—Lamb and others —had subscribed to the Courier-Forum Publishing Company to the amount of $15,000, and to aid his recollection there were placed in his hands the books of the company. He was not allowed to answer upon the grounds that the books themselves were the best evidence. He was then specifically asked:

Q. Well, you know as a matter of fact, do you not, that there never was any subscription obtained from J. P. Lamb?

(Objected to for the same reasons. No foundations for this proof, secretary of this company is not here.)

The Court: Objection sustained.

Q. . . . You, as well as your brother, was the man engaged in the endeavor to consolidate the Courier-News and the Fargo Forum?

(Objected to for the same reason and for the futher reason concerning the offer of parol proof under this contract.) Sustained.

Q. Well, is the list of subscribers whose names are mentioned in the stubs of this certificate book that is handed you, is that a complete list of the subscribers to the stock?"

(Objected to as calling for a conclusion, and not the best evidence.) Sustained.

And again:

Q. Have you in your possession all of the subscription slips such as the one they claim that Mr. Kelly signed; that is, exhibit C? You have in your possession, have you not, all of such subscriptions as were ever filed with the Courier-Forum Publishing Company?

(Objected to for the reason that this is not the officer that would know whether they were filed or not. It is not the best evidence because the files were the best evidence.)

Sustained.

Again he was asked:

Q. Well, as a matter of fact, this is the stock certificate book, in which is contained all the records with reference to the issuance of stock certificates of the Courier-Forum Publishing Company?

(Same objection.)

Objection sustained.

Q. Well, you know, do you not, that this is the only certificate book that you have in your possession?

A. It is all I have; yes, sir.

Q. You never heard or saw any other subscription book for the Courier-Forum Publishing Company?

A. No, sir.

Q. You never saw or heard of any certificate of stock above number forty-seven in that corporation?

A. No, sir.

Q. Now, as a matter of fact, Mr. Hatcher, you know, don't you, that there are no other stock certificates issued than those that are shown by this record to have been issued?

A. I don't know; no, sir.

And again:

Q. You don't know when these certificates of stock were issued?"

(Objected to as immaterial.)

Sustained.

And again:

Q. How long is it since he (O. M. Hatcher) was in the state?

A. He was in the state about the 1st of November, 1912.

Q. Now since that time you have had charge and are the only one who has had charge of the business of the Courier-Forum Publishing Company?

A. Well, I don't know that there has been any one particularly in charge.

Q. Well, so far as there has been anyone you have been that one?

A. I have consulted with Mr. Holt at his request, two or three times.

. . .

Q. Well, any mail that has come to the Courier-Forum Publishing Company since your brother left the state has been handled by you?

A. I have never got any mail.

Again:

Q. You are the man who wrote the indorsement on the back of the note in this case?

A. Yes, sir.

Again:

Q. I show you exhibit 3, and ask you if that is a list of the stock subscriptions as given by you to Mr. Holt?

A. I don't know. I can hardly answer that "Yes" or "No" because I did not give him any list.

Q. Well, what did you give him?

A. He had all of these down to here as I recollect, and I told him that the stock record book would show these files. . . . I told him that was the list as far as I knew.

Q. And that list contains the names of all that appear, from the records of the Courier-Forum Publishing Company, to have been subscribers to the stock?

(Objected to as not the best evidence.)

Sustained.

. . . . . .

Q. Well, you know, as a matter of fact that More Brothers, of Fargo, are already subscribers of the stock of the Courier-Forum Publishing Company?

(Objected to as immaterial and not the best evidence.)

Sustained.

Q. Well, do you know anything about it, Mr. Hatcher?

(Same objection.)

Sustained.

Defendant's attorney then stated to the court: "The question of fact is, who were subscribers,—he may know that. If he knows that of his own knowledge, he may testify to that. We are not attempting to show the conditions of the subscriptions. We are attempting to show merely who are subscribers.

"By the Court. If I understand this situation you are not entitled to this answer and I shall have to so rule.

And again:

Q. Mr. Hatcher, you have charge of all of the records of the Courier-Forum Publishing Company, since O. M. Hatcher left the state?

A. No, sir. I have not. I had charge of them since about—

Q. Well, you may say.

A. Since he left the state I have had charge. It was in August, 1912. I got what had not been taken. We moved from the office over there and took to my office. . . .

Q. Well, those parts of the Courier-Forum Publishing Company's records you know to have been missing, were minutes of meetings?

A. Yes, we have minutes of our meetings, but some are still missing.

Q. But that is all you know of those records of the Courier-Forum Publishing Company that are missing?

A. I don't know of any others.

Q. And when you went there you found stock subscriptions?

A. I found a file; yes, sir.

Q. You found a file which contained stock subscriptions?

A. Contained some; yes, sir.

Q. Well, now just get your thinking cap on and see if you can recollect just what shape you found these stock subscriptions in. Whether you found them all together in one file.

(Objected to as immaterial. No foundation laid for this inquiry.)

Sustained.

Q. This stock subscription book, exhibit 2, is the only subscription book that was in file on record at that time?

(Objected to as immaterial.)

Sustained.

The stock certificate book, exhibit 2, offered in evidence. (Objected to as immaterial. For the further reason that there was no foundation laid or proof of the breach of the written contract offered in this case and that it is incompetent. Proves nothing.)

Sustained.

There is much more of the rulings of the court of a similar nature which are challenged by defendant. We are forced to the conclu-

sion that the restriction placed upon the cross-examination of this witness by the court constituted prejudicial error. The defendant had a right to find out, if he could, from this witness, whether or not the prominent Democrats named, or others, had subscribed $15,000 towards the formation of the corporation. If the witness knew that those subscriptions had not been obtained, his testimony was competent and should have been received. Defendant, however, was not allowed to ascertain whether or not he had this knowledge, and the questions seeking to elicit this information from him, or at least to discover whether he had the knowledge, were improperly rejected. Furthermore, if this witness, as the testimony tends to show, was in charge of all of the books of the company, he could testify to their identity and allow the same to be offered in evidence. From the questions already given it will be seen that defendant was prevented from showing that the witness had the books in his custody, and was also prevented from introducing the books in evidence. It is difficult to see how the defendant, under the various rulings enumerated, could have proved the fact which was in his mind, to wit, that the leading Democrats of the state had not subscribed $15,000. For the errors enumerated a new trial must be ordered.

4. It follows that it was error to exclude questions like the following:

"Q. You told Mr. Hollister at the time that you turned over the note to him that it was taken for a subscription to the stock of the Courier-Forum Publishing Company, and that it was not to be used unless the Courier-Forum Publishing Company were formed—the consolidation took place of the two institutions?"

(Objected to.)

Sustained.

And it was also error to sustain objection to the following question asked of Mr. Hollister:

"Q. At the time you took this note, Mr. Hollister, you knew that it was given for a subscription to the stock of the Courier-Forum Publishing Company, did you not?"

(Objected to. No foundation laid. No breach of the written contract so far shown.)

Also the following question asked of the witness:

"Q. And at the time you took the note you knew that there had been a conditional agreement between Mr. Hatcher and Mr. Kelly?"

This, and other enumerated errors, however, are not likely to be repeated in another trial. The case is remanded for further proceedings in accordance with the views expressed herein.

MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY Company, a Corporation, v. W. H. STUTSMAN, O. P. N. Anderson, and W. H. Mann, the Board of Railroad Commissioners of the State of North Dakota, and W. F. Cushing, Secretary of said Board.

(154 N. W. 654.)

District court — judgment — railway company — crossing — near village — commissioners of railroads — state board — authority — jurisdiction — order of — appeal from — subject-matter — jurisdiction conferred.

1. From a judgment of the district court that said railway company construct a crossing over their tracks near the village of Fingal, in Barnes county, the company appeals: *Held:*—

Under the record there is no question open on this appeal concerning the jurisdiction or authority of the State Board of Commissioners of Railroads to order in the crossing at the place in question. Thereafter, on the railway's appeal from said order the case was tried upon the merits anew on testimony taken in district court. Nowhere in the record, prior to appeal, was jurisdiction of the district court challenged. The parties could confer jurisdiction of the subject-matter upon that court, and have done so, without objection. And no question of jurisdiction arises upon the record, the parties being held to the theory of trial as had below.

Facts — merits — judgment — justified.

2. On the merits involving the facts, the judgment was justified.

Opinion filed October 13, 1915.

Appeal from the District Court of Barnes County: *Coffey,* J.

Affirmed.

Lee Combs, and *L. S. B. Ritchie* (*John L. Erdall* of counsel), for appellant.

The commissioners had no jurisdiction to hear and determine the matter involved. The doctrine of implied authority cannot be relied upon by the commissioners in this case, since our statutes give them but a supervisory control of the railroads in the state, and gives them no authority or power to regulate the building and maintenance of highway crossings over the track and right of way of railroads. Rev. Codes 1905, § 369, Comp. Laws 1913, § 589.

The railroad commissioners are statutory officers, and have only such powers as are conferred upon them, express or implied, by the statutes of the state, and they cannot act outside of such authority. State ex rel. Ellis v. Atlantic Coast Line R. Co. 51 Fla. 578, 4 So. 875.

Such jurisdiction as to highways is not given them by implication. Railroad Comrs. v. Oregon R. & Nav. Co. 17 Or. 65, 2 L.R.A. 195, 19 Pac. 702.

"Authority of the railroad commissioners to do or compel any particular act on the part of the railway must be an express one embodied in the statute creating or defining the duties of such boards." Elliott, Railroads, §§ 682–684; Cambridge v. Boston & A. R. Comrs. 153 Mass. 161, 26 N. E. 241; Re Railroad Comrs. 83 Me. 273, 22 Atl. 168; Rev. Codes 1905, §§ 4306, 4320, 4322, 4325–4397, Comp. Laws 1913, §§ 4657, 4687, 4688, 4709–4783.

W. H. Stutsman and *Henry J. Linde,* Attorney General, and *Francis J. Murphy* and *H. R. Bitzing,* Assistant Attorneys General, for respondents.

The general powers under which the Board of Railroad Commissioners acts are found in chapter 116 of the Laws of 1897. This law appears to have been taken from Nebraska, and has been construed by the supreme court there. State ex rel. Bd. of Transportation v. Fremont, E. & M. Valley R. Co. 22 Neb. 313, 35 N. W. 119.

South Dakota, also, has a statute like ours upon the subject, and it has been also construed by the supreme court there, against the appellant's contention. State ex rel. Tomkins v. Chicago, St. P. M. & O. R. Co. 12 S. D. 305, 47 L.R.A. 569, 81 N. W. 503.

In Oregon, from which state counsel for appellant cite authority, the law does not give the Board of Railroad Commissioners any remedial or supervisory powers whatever, and does not authorize it to make

any order, but merely to investigate and recommend and to advise the railroad companies of their neglect of duty. Such law is not applicable in this state. Railroad Comrs. v. Oregon R. & Nav. Co. 17 Or. 65, 2 L.R.A. 195, 19 Pac. 702.

Goss, J. Upon complaint to the State Board of Commissioners of Railroads by the chairman of the township board of Binghampton township, in Barnes county, the Board made an investigation resulting in its issuance to appellant railroad company of an order that it construct a certain crossing over their tracks near the village of Fingal. The company appealed. In its notice of appeal it is recited that the appeal is "from said order and the whole thereof, and it demands a review in said district court of the proceedings had in said matter." A purported transcript of the proceedings before the Commission was filed in district court, and thereupon trial in court was had anew on the merits on testimony taken but without the filing of pleadings further formulating issues. From the entire record before the district court it appears that no question of jurisdiction of that court of either subject-matter or parties was ever raised, either by demurrer, motion, or otherwise. Nor was the question of proper parties plaintiffs ever there invoked for decision. Instead 140 typewritten pages of testimony were taken at the trial had on the merits. The decision upon the merits was adverse to defendant. Findings and conclusions were made and filed, and judgment was entered ordering in the crossing. From that district court judgment the defendant appeals to this court. For the first time it now attempts, both by specifications served and assignments of error, to question the jurisdiction of the commissioners and afterward that of the district court "to hear and determine the controversy," quoting from its brief. Also, that there is no provision of law giving the commissioners authority to order the establishment of a highway crossing over railroad tracks at a point where there is no public highway in existence, or lawfully laid out, "nor at any point in the state." In its brief the appellant thus attacks the jurisdiction of the commissioner and of the district court on appeal, and the authority of the district court to enter the judgment appealed from.

There is no question of jurisdiction of the commissioner before this court. This proceeding stands exactly as though these parties had

formulated their issue for decision and thereupon submitted the same to the district court for trial and decision upon the merits, and with that court having jurisdiction at law of the subject-matter so submitted for arbitrament. Upon proper proceedings, unquestionably that court would have had jurisdiction to determine and adjudge that this railway company should build this crossing over its tracks at the place in question. That being so, as a matter of law, we are not concerned in the steps leading up to the submission of that question to that court on the merits, further than to know that the same was done and without any objection thereto, or any question made as to the jurisdiction of that court over the subject-matter. With that ascertained, jurisdiction is beyond challenge for the first time on appeal in this court. The record discloses no demurrer, motion, or objection going to jurisdiction passed upon below. In fact, trial on appeal is now attempted upon issues of law never presented below, and this is so notwithstanding the needless conclusion of law found "that the Board of Railroad Commissioners acted within the scope of its authority in ordering the crossing located as in its order described, and at the time of making said order exercised a valid judgment and discretion." The real issue presented below was whether the facts in the case justified the establishment of the new highway; and, if it did, whether the company should be obliged to build the crossing, when it maintained two other crossings some blocks distant in said village, which it claimed was fully adequate to the needs of the community. A hundred pages of testimony are devoted to this issue and the incidental questions as to whether the new crossing, if constructed, would be dangerous and an unreasonable and unnecessary interference with railroading under all the facts and circumstances. On this appeal, appellant also assigns error and argues at length upon the latter questions, the real merits of the case as tried below. It is elementary that a change of theory of trial will not be permitted in this court from that adopted in the court below. It is true that jurisdiction of subject-matter may always be raised. But for reasons heretofore given, the lower court had jurisdiction of the subject-matter and parties. There is, therefore, no question properly raised of the authority of the Commission.

Next in order is the specifications challenging the sufficiency of the evidence to justify the judgment for the establishment of the crossing.

Concerning this the facts are that one of the reasons why the township board, on behalf of the community, desire this crossing, is to afford another road to said village. It appears that at certain seasons snow drifts prevent travel on the old road at a point 1,500 feet north of the company's right of way. This new road and crossing desired would relieve from necessity of traveling on the old road at such time. Evidently the township board deems it advisable to give a choice of routes, by establishing this second one into the town. It is not a question of the adequacy of the crossings already established to accommodate the public, as appellant argues should be the test. Adequacy of said crossings is but one element in the general convenience of the community. Without approaches or roads leading to them traversible generally and at all periods of the year, the public interested is not at all times provided with suitable roads to and from the market place. The evidence justifies the finding that at certain times another road than the old one is necessary.

But the appellant argues that as the necessity for another road arises from obstructions by snow occasioned by a grove 1,500 feet from its right of way, that the cause of obstructions should be removed or another road around the obstruction be established, instead of forcing it to construct and maintain another crossing. The feasibility of that matter rested with the township board. It has seen fit to cure the trouble by procuring another highway for the public, and not to remove the grove or take enough of the grove owner's land to build another road upon. This may be because conditions would not permit it, or because to do so would be unduly lengthening an established route of travel. Perhaps other sufficient reasons actuated the township board. In any event, no sufficient reason appears why there should not be another route affording a choice of highways. That the crossings and highways already established are adequate, when traversible, is no reason why another should not be established, if necessary. And the proof affirmatively discloses that such necessity exists at certain seasons. A railroad company is to be treated no differently in such respects than any other landowner, and must, like others, submit to necessities arising from public convenience. Circumstances may be shown, as for instance, that the crossing would be unusually dangerous or an un-

necessary interference with traffic, and which might excuse a railroad from installing a crossing. But such is not this case under the proof.

The objection made that there is no showing that the road is laid out as a highway is without merit. The proof is that $149 was paid by the township for the site of the proposed road. That the same has been graded by the township and is ready for travel as soon as the crossing is completed, the grading being done by the township on both sides of the railroad track and upon the company's right of way to the track. With the crossing in and the roadway thus completed, it could scarcely be said it did not amount to a highway dedicated to public travel.

The judgment appealed from, however, should be modified to describe more accurately the location of the proposed crossing, and to adjudge that the same be built and maintained by said railway company, and this as a judgment independent of the order made by the Board of Railway Commissioners and without any reference thereto, and as a matter solely within the jurisdiction of the district court, the judgment of which should be so complete as to constitute the only record and judgment necessary in the matter. As so modified, the judgment is affirmed, with respondent's taxable costs on this appeal to be added.

WINNIFRED C. BLOOD v. EDA HOWARD and Ovas H. Kinnear.

(154 N. W. 524.)

Statement of case — settled by supreme court — upon refusal of trial court — facts — trial court — counsel — disagreement between.

Section 7657, Comp. Laws 1913, authorizes the supreme court to settle a statement of case only in cases wherein the trial judge refuses to settle it in accordance with the facts. This section applies in cases where there is a disagreement between the trial court and counsel as to the facts concerning the trial, and may be invoked when the trial court refuses to allow a truthful statement of what occurred at the trial; but it has no application to a case wherein the trial court refuses to settle a statement because it was not presented for settlement within the time prescribed by law, and no good cause was shown for the delay.

Opinion filed October 14, 1915.

Application to settle statement of case.

Denied.

H. S. Blood, Devils Lake, North Dakota, for plaintiff and petitioner.

Weeks & Moum, Bottineau, North Dakota, for defendants and respondents.

CHRISTIANSON, J. The plaintiff has made an application to this court to settle the statement of case. The following undisputed facts appear from the record presented on such application: The case was tried January 8, 1915, before a referee, who transcribed the testimony and submitted the same to Judge Cooley, the presiding judge, about February 6, 1915. The transcript consisted of only 35 pages of typewritten matter. On April 13, 1915, Judge Cooley made findings in favor of defendant, and judgment was entered upon such findings, on April 15, 1915, and notice of entry of judgment served on plaintiff's attorney on that same day. The plaintiff first advised her attorney that she did not wish to take an appeal, but subsequently, about June 10, 1915, changed her mind, and decided to appeal, and so advised her attorney, who thereupon ordered a transcript of the testimony. On July 27, 1915, plaintiff's attorney applied to Judge Cooley for, and obtained, an *ex parte* order extending the time in which to settle the statement of case until September 15, 1915. The order of extension was not served upon the defendant's attorneys, and they had no knowledge of such extension until about August 18, 1915, when they received a copy of the transcript. The proposed statement of case was presented to Judge Cooley for settlement pursuant to notice on September 10, 1915. At the same time and place defendants had noticed a motion to vacate and set aside the order of extension on the ground that no good cause for the extension had been shown. The motions came on for hearing at the same time and place, and were submitted together. Both sides submitted affidavits, and, after full hearing and consideration, the trial court entered an order vacating the *ex parte* order dated July 27, 1915, and denied plaintiff's application for a settlement of the statement of case, on the ground that plaintiff had failed to show good cause for an extension of time. Respondent's counsel contends that plaintiff has mistaken her remedy, and that this court has no authority to settle the statement of case under the facts in this case.

The application is made under the provisions of § 7657, Comp. Laws, 1913, which provides that "if the judge in any case refuses to allow an exception in accordance with the facts, the party desiring the statement settled may apply by petition to the supreme court to prove the same. . . ." This section applies only to cases wherein the trial judge refuses to allow a truthful statement of what occurred at the trial. In order to obtain a review of the rulings of the trial court, appellant must present to the appellate court a record showing the facts constituting such error. Appellant therefore is entitled to have a statement settled showing what took place in the trial court. This is essential to his right of appeal. If a trial court could be permitted to settle inaccurate records on appeal, it could prevent a review of its rulings, and in effect destroy the right of appeal. Hence, the legislature provided that this court may settle a statement in cases wherein the trial court has refused to settle the statement in accordance with the facts. This section was intended to give this court the right to exercise supervision over trial courts in cases wherein disputes might arise between counsel and the trial court in regard to what occurred at the trial. In this case there is no dispute between the trial judge and counsel regarding the facts, but the trial judge refused to settle the statement because it was not presented for settlement within the time provided by law, and no good cause was shown for the delay. Section 7657, supra, has no application to the facts in this case, and does not authorize this court to settle the statement of case. Tuttle v. Pollock, 19 N. D. 308, 312, 123 N. W. 339; Minard v. Gardner, 24 S. D. 404, 123 N. W. 855; Taylor v. Miller, 10 N. D. 361, 87 N. W. 597.

While the correctness of Judge Cooley's ruling is not before us, still the showing made before him by both parties has been presented to us upon this application, and in order that no erroneous impression may be created by this decision, we deem it proper to say that a majority of this court seriously question that there was any abuse of discretion on part of the trial judge in refusing to settle the statement of case.

It follows from what has been said that plaintiff's application must be denied. It is so ordered.

SCOFIELD IMPLEMENT COMPANY v. MINOT FARMERS GRAIN ASSOCIATION.

(154 N. W. 527.)

Future advances — mortgage to secure same — good faith — valid — lien created — extent of.

1. A mortgage which is given in good faith in whole or in part to secure future advances whether the object is expressed in the mortgage or not is valid to the extent of the lien therein expressly created.

Mortgage — delivery of — no particular form necessary — by words — acts — new agreement — for future advances — redelivery unnecessary.

2. No particular form or ceremony is necessary to constitute a sufficient delivery of a mortgage. It may be by words without acts, or by acts without words, or by both combined. Manual transfer of the document from the hands of the mortgagor to the hands of the mortgagee is not essential. It is only required that there shall be manifested a clear intention of the parties that the instrument shall become operative as a mortgage. Where, therefore, the consideration of a mortgage and note has failed by reason of the cancelation of the agreement under which it is delivered, the mortgage may be, by a parol agreement, retained as security for future advances which are to made under a new agreement, and no new physical delivery or execution is necessary.

Appeal from the District Court of Ward County; *Leighton,* J.

Action of conversion for the conversion of certain grain claimed to be subject to the lien of a mortgage. Judgment for plaintiff.

Defendant appeals.

Reversed.

Bosard & Twiford, for appellant.

A mortgage to secure future advances is good in law, and it is permissible to show by parol the agreement to advance the money thereunder, and holdings of the trial court to the contrary constitute prejudicial error, for which a new trial must be granted. Union Nat. Bank v. Moline, M. & S. Co. 7 N. D. 201, 73 N. W. 527; Merchants' State Bank v. Tufts, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760; 1 Jones, Mortg. 6th ed. pp. 300–320; Tapia v. Demartini, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641; Robinson v. Williams, 22 N. Y. 380; McDaniels v. Colvin, 16 Vt. 300, 42 Am. Dec. 512; Nelson v. Boyce, 7 J. J. Marsh, 401, 23 Am. Dec. 411.

Francis J. Murphy, for respondent.

The lien of a chattel mortgage in this state is special, and the same can only be enforced for the performance of a particular act or obligation. Comp. Laws 1913, §§ 6702, 6703.

A lien cannot be extended so as to cover or secure the performance of any obligation other than the one originally secured thereby. Comp. Laws 1913, § 6720.

A mortgage cannot be extended by parol to cover anything other than the debt secured, so as to bind junior encumbrancers in this state. Comp. Laws 1913, §§ 5831, 5938, 6187, 6758; 6 Cyc. 1020, 1021.

BRUCE, J. This is an action of conversion brought against the defendant Grain Association by the Scofield Implement Company on account of the alleged wrongful sale of grain alleged to be covered by a chattel mortgage. The main, if not the sole, defense of the defendant Grain Association is that paramount to the lien of the plaintiff was the lien of a chattel mortgage on crops which was given as part security for the purchase price of the land, but which afterwards, and before the execution of the chattel mortgage to the plaintiff, was by a verbal agreement released as security for the purchase price of the land, but by an oral agreement retained as security for advances which were thereafter to be and were thereafter made to the said mortgagor for the purpose of operating and developing the land under a lease thereof.

We are of the opinion that these facts could be proved under the pleadings, and that even if the error of the court in refusing to allow the defendant to prove them was afterwards cured by the admission of testimony which covered substantially the same proposition, he erred in directing a verdict for the plaintiff which could only have been on the ground that such evidence was inadmissible. The answer alleges,—"that: on the 6th day of April, 1909, Phillip Kershtien made, executed, and delivered to Jourgen Olson, promissory notes aggregating $5,680, $5,200 of said amount bearing interest at the rate of 5 per cent per annum, and the sum of $480 thereof bearing interest at the rate of 12 per cent per annum, said notes maturing November 1, 1909; that at the same time and place, and as a part of the same transaction, and for the purpose of securing the payment of said indebtedness, the said Phillip Kershtien made, executed, and delivered to Jourgen Olson, a

chattel mortgage wherein and whereby the said Phillip Kershtien mortgaged to the said Jourgen Olson all crops of every kind, nature and description, raised, sown, and grown on the lands described in plaintiff's complaint; . . . that under and pursuant to the power of sale contained in said mortgage, and agreeably to the statute pertaining thereto, and for the purpose of realizing on said security, Jourgen Olson took possession of the said grain at the time the same was threshed, and a portion of said grain was sold to the defendant, and the defendant then and there, with the consent and permission of the said Phillip Kershtien, paid the purchase price of said grain to Jourgen Olson as first mortgagee of said grain, or the portion thereof sold at defendant's elevator." It is true that the proof shows that this mortgage was first given to secure the purchase price of the land, and that the agreement that it should stand for security for future advances under the lease was made afterwards. The answer, however, nowhere states what consideration for the said notes and mortgage was paid or furnished to the said Phillip Kershtien, and since a mortgage can be given to secure future advances it was really immaterial whether the mortgage notes were given for the purchase price of the land or merely given to secure those future advances. The fact still remains that a note for $5,680 had been given, was extant, and was unsatisfied, and if not given in the first place on account of the future advances, was by the substituted arrangements existing as security therefor.

Even if given for future advances in the first instance it would have been unnecessary to have stated that fact in the mortgage or in the note. Union Nat. Bank v. Moline, M. & S. Co. 7 N. D. 201, 73 N. W. 527. It would also have been unnecessary to have stated that fact in the pleadings, a general allegation to the effect that such note had been given and such mortgage had been executed as security therefor and that such note was unpaid being sufficient.

It seems, too, to be quite generally held that a mortgage to secure future advances is valid, and that such a mortgage need not express its object upon its face, although it is better that it should. The true principle seems to be "that a mortgage knowingly and intentionally given and taken for a larger amount than is due, and not as security for future advances, is fraudulent as against the other creditors of the mortgagor, but that a mortgage given in good faith, in whole or in part,

to secure future advances, whether the object be expressed in the mortgage or not, is valid to the extent of the lien therein expressly created. It must show upon its face the utmost amount intended to be secured, but it need not show whether that amount represents an existing debt or future advances. A mortgage which misrepresents the transaction between the mortgagor and mortgagee is liable to suspicion, and ought to be critically examined; but if upon investigation the real transaction turns out to be fair and to have been had in good faith, it would be unjust to deprive the person claiming under it of his equitable rights. It is always better, however, for obvious reasons, that the mortgage should be drawn so as to show the true object . . . of the transaction, for suspicion is engendered by misrepresentation, but disarmed by a statement of the truth." See opinion in Tully v. Harloe, 35 Cal. 302–309, 95 Am. Dec. 102. See also Minor v. Sheehan, 30 Minn. 419, 15 N. W. 687.

We, in short, have held in the case of Union Nat. Bank v. Moline, M. & S. Co. 7 N. D. 201, 73 N. W. 527, that "a mortgage to secure future advances is valid as to the mortgagor, and also as to third persons. . . . If such mortgage states on its face that it is given as security for future advances, or if it appears to be a mortgage for a specified sum, and the total amount claimed to be due under it does not exceed such sum, the holder of a second lien on the same property, who has notice, either actual or constructive, of such mortgage, takes subject thereto, not only as to all advances which had been made when his lien attached, but also as to all future advances made by the holder of such mortgage before notice that another lien has attached to the property. . . . The recording of the second lien does not give the holder of the prior mortgage constructive notice of such second lien, and therefore advances thereafter made are protected the same as advances made before such second lien is recorded, provided the holder of the first lien has no other notice of the existence of such subsequent lien." See also Tully v. Harloe, 35 Cal. 302, 309, 95 Am. Dec. 102; Minor v. Sheehan, supra; Barnard v. Moore, 8 Allen, 273; Anderson v. Liston, 69 Minn. 82, 72 N. W. 52; Sayre v. Hughes, 32 N. J. Eq. 652.

It is undoubtedly "generally held that a mortgage on land cannot, by any mere parol agreement of the parties, be made to cover any other debt, or any fresh advances, or any larger amount than that expressed

in the mortgage itself,—certainly not to the prejudice of third persons acquiring rights in the property or liens upon it." 27 Cyc. 1075. We find nothing in the rule, however, which would seem to preclude a redelivery of a note and mortgage which is given to secure a definite amount, but the consideration of which has failed by the cancelation of the sale for which the debt was incurred, so that the new note and mortgage would secure a new debt. Such a procedure would merely save the necessity of formally re-executing the instruments; and as long as the date and lien of the mortgage and the making of the new agreement were prior to the execution of plaintiff's note, we cannot see that any rights would be violated. It is true that in the case at bar there is no proof of any new physical delivery.

We, too, are not unmindful that § 6712 of the Compiled Laws of 1913 provides that "the existence of a lien upon property does not of itself entitle the person in whose favor it exists to a lien upon the same property, for the performance of any other obligation than that which the lien originally secured." It is to be noticed, however, that the statute expressly uses the words, "does not of itself," and here we have proof of the oral agreement, or rather of the redelivery of the note and mortgage for the new consideration. The transaction, indeed, to our minds in effect amounted to a new delivery. "No particular form or ceremony is necessary to constitute a sufficient delivery of a mortgage. It may be by words without acts, or by acts without words, or by both combined. Manual transfer of the document from the hands of the mortgagor to those of the mortgagee is not essential. It is only required that there should be manifested a clear intention of the parties that the instrument shall become operative as a mortgage, and that the mortgagor shall lose and the mortgagee acquire the absolute control over it." 27 Cyc. 1114. Here the proof which was allowed to be introduced tended to show this new delivery, or at any rate the plaintiff should have been permitted to have shown it. So, too, we are not unmindful of § 5938 of the Compiled Laws of 1913, which provides that "a contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise." We have before us, however, not an attempt to alter a contract in writing, but a case where the consideration of a mortgage and mortgage note has failed by reason of the cancelation of the original agreement under which it was delivered

and the redelivery of it for another consideration which was sufficiently expressed in the note and mortgage, so that the redelivery of the same was not necessary.

For the reasons stated above we are satisfied that the learned trial judge erred in excluding evidence of the lease, and the contract for advances and the nature and extent thereof, and in directing a verdict for the plaintiff, and for those reasons the judgment is reversed and a new trial is ordered.

W. J. WOODS, Petitioner, below, against Maggie Woods, Sidney Woods, Wesley Woods, Ruth Woods, Ruby Woods, and Archibald Woods, Respondents below, v. H. H. TEESON, S. T. Sowka, Carpenter & Lizakowski and Ben A. Sell, Exceptants.

(154 N. W. 797.)

Surviving husband or wife — children of deceased — exemptions — additional exemption — heads of families — absolute exemptions — repeal of laws — Probate Code.

1. The surviving husband or wife of a deceased person, or in case of his or her death the minor children of a deceased person, are entitled under the provisions of § 8725 of the Compiled Laws of 1913 to "all the personal property of the testator or intestate which would be exempt from execution, if he were living, including all property absolutely exempt and other property selected by the person or persons entitled thereto to the amount in value of $1,500," and this additional exemption of $1,500 can be claimed in addition to the property absolutely exempt, and the amount thereof has not been reduced or affected by § 7731 of the Compiled Laws of 1913, which allows to the heads of families the sum merely of $500 in addition to such absolute exemptions.

Heads of families — exemptions — Civil Code.

2. Section 7731 of the Compiled Laws of 1913 is applicable merely to the heads of families, and is a part of the Civil Code, and does not relate to the survivors of a deceased person or to probate proceedings.

Opinion filed October 18, 1915.

Appeal from the District Court of Walsh County, *Kneeshaw*, J.

Exception by creditors to the administrator's final account, and demurrer thereto sustained.

Affirmed.

Gray & Myers, for appellants.

Section 5128 of the Compiled Laws of 1887, created "a general present exemption" which the debtor by his selection converts into a specific exemption. Fore v. Fore, 2 N. D. 260, 50 N. W. 712.

"There shall be set apart absolutely to the surviving husband, wife, or minor children all the *personal property of the testator or intestate which would be exempt from execution if he were living.*" Comp. Laws 1913, § 8725.

H. C. De Puy, for respondents.

It was the exemptions to heads of families alone, that the 1901 and 1911 legislatures deemed excessive, and such exemptions only that they intended to cut down. Laws 1907, chaps. 76 and 77; Laws 1911, chap. 132; Comp. Laws 1913, § 8725.

BRUCE, J. The proceedings which constituted the basis of this appeal were instituted in the county court of Walsh county. From the action of the county judge sustaining a demurrer to exceptions filed by certain creditors to the administrator's final account and allowing said account over said exceptions, an appeal was taken to the district court upon questions of law alone. From the order of the district court sustaining the order of the county court, this appeal is taken.

The sole question presented for determination by us is whether the county court erred in setting apart as exempt property of the value of more than $500 but less than $1,500, or whether such court should have limited the exemptions to not more than $500 and this in a probate proceeding where the claim for the exemptions was made by the widow and minor children of the deceased.

More specifically the question is: Does chapter 132 of the Session Laws of 1911, being § 7731 of the Compiled Laws of 1913, and which act is entitled: "Additional Exemptions Allowed *Heads* of *Families*," and which only allows to such the sum of $500, apply in probate proceedings and to the widow and minor heirs of a deceased person? In other words, does it modify or amend § 6391 of the Revised Codes of 1895, being § 8725 of the Compiled Laws of 1913, which provides that

"there shall also be set apart absolutely to the surviving wife or husband or minor children all the personal property of the testator or intestate which would be exempt from execution, if he were living, including all property absolutely exempt and other property selected by the person or persons entitled thereto to the amount in value of $1,500 according to the appraisement, and such property shall not be liable for any prior debt of the decedent except the necessary charges of his last sickness and funeral and expenses of the administration when there are no other assets available for the payment of such charges." We think it does not, and that the learned trial judge was therefore justified in sustaining the demurrer. We think, in short, that it was the intention of the legislature to allow to the surviving wife and minor children of a deceased person the sum of $1,500 as an exemption, as opposed to the $500 exemption which is allowed to one who is merely the head of a family.

Section 8725 of the Compiled Laws of 1913, which gives to the surviving husband or wife or minor children the $1,500 exemption, first appeared as § 6391 of the Revised Codes of 1895. The history of this provision and of § 7731 of the Compiled Laws of 1913, which gives to the *head of a family* an additional exemption of $500, and which, it is claimed, modifies § 8725 of the Compiled Laws of 1913, is as follows: Sections 5778 and 5779 of the Compiled Laws of 1887, being §§ 128 and 129 of chapter 5 of the Probate Code of 1877, provided that upon the death of either the husband or wife the survivor might possess, and, upon the death of both the husband and wife, the children might possess, the homestead and in addition thereto certain specified personal property such as books, wearing apparel, clothing, provisions, and furniture, to the value of the amount specified (Comp. Laws 1887, § 5779), "and in addition to the property mentioned in the preceding section there shall also be allowed and set apart to the surviving husband or wife or minor child or children of a decedent all such personal property or money as is exempt by law from levy and sale on execution or other final process from any court to be with the homestead possessed and used by them." Section 135 of the Probate Code, which is contained in the Revised Codes of 1877, had also provided that "if upon the return of the inventory of the personal estate of an intestate it appears that the value of the whole personal

estate does not exceed the sum of $1,500, the probate court by a decree for that purpose must assign for the use and support of the widow and minor child or children, if there be a widow or minor child and if no widow then for the children if there be any, the whole of the estate for the payment of the funeral expenses," etc., and this provision appears as § 5785 of the Compiled Laws of 1887. At the same time and prior to the passage of § 8725 of the Compiled Laws of 1913, and which first appeared as § 6391 of the Revised Codes of 1895 and as a part of the Probate Code, we find as a part of the Civil Code § 5127 of the Compiled Laws of 1887, which relates to debtors generally, and exempts from general execution all of the personal property mentioned in § 5778 of the Compiled Laws of 1887, except household and kitchen furniture. We also find § 5128, which reads as follows: "In addition to the property mentioned in the preceding section a debtor may by himself or his agent select from all other of his personal property not absolutely exempt, books, chattels, merchandise, money, or other personal property, not to exceed in the aggregate $1,500 in value which is also exempt and must be chosen and appraised as hereinafter provided." In 1891 and in the case of Fore v. Fore, 2 N. D. 260, 50 N. W. 712, this court held that under the statutes as then existing a widow was entitled to the absolute exemptions specified in § 5778 of the Compiled Laws of 1887, and in addition thereto to the additional exemptions to the amount of $1,500 which were allowed by § 5128 to the head of a family. In 1895 the codifiers eliminated both §§ 5778 and 5779 of the Compiled Laws of 1887, and enacted in their place and as a part of the Probate Code § 6391 of the Revised Codes of 1895, which is now contained in § 8725 of the Compiled Laws of 1913, and is as follows: "There shall also be set apart absolutely to the surviving wife or husband or minor children all the personal property of the testator or intestate which would be exempt from execution, if he were living, including all property absolutely exempt and other property selected by the person or persons entitled thereto to the amount in value of $1,500 according to the appraisement," etc. We thus find a plain intention that the provisions of the Probate Code which related to the exemptions of widows and minor children should, as far as possible, be comprehensive within themselves, and though the amount of additional exemptions was placed at $1,500 and at the same amount

as was allowed to debtors generally, the ascertainment of such amount was not made dependent upon a reference to the general exemption laws, reference to the general exemption laws only being necessary to determine what property was primarily and absolutely exempt. Following this and in 1897, the legislature by § 25 of chapter 111 of the Laws of 1897, and in an act which was entitled "An Act to Amend the Probate Code of the State of North Dakota," amended the provisions relating to the homestead of the surviving spouse by limiting it to the surviving husband or wife as long as he or she did not marry, and also by omitting the last clause of § 6389 of the Revised Codes of 1895, relating to the debts the homestead should be liable to. Thus the law remained from 1895 to 1901, and since this time no change has been made in the provisions of the Probate Code which relate to the exemptions of the surviving husband or wife or minor children of a deceased person. In 1901, however, the legislature as a part of the general *Civil* Code and by an act entitled "An Act to Amend §§ 324, 328, and 333 of the Code of Civil Procedure of the State of North Dakota, being §§ 5518, 5522, and 5528 of the Revised Codes of 1895 of the State of North Dakota, Relating to Exemptions," reduced the additional exemptions to *heads of families* to $1,000. See chapter 76 of the Laws of 1901. By chapter 132 of the Laws of 1911, being § 7731 of the Compiled Laws of 1913, the amount was again reduced to $500. The title to the act of 1911 was as follows: "Additional Exemptions allowed *Head of Family.* An Act to Amend § 7117 of the Revised Codes of North Dakota 1905, Relating to Additional Exemptions Allowed the Head of a Family Residing in North Dakota." It is to be noted that in neither the bodies of the preceding acts nor in the titles thereto was anything said concerning exemptions to husbands, widows, or minor children of deceased persons, and that the sections of the statutes specifically amended were those contained in the Civil Code and in the Civil Code alone.

It seems indeed quite clear to us that if the legislature had intended that the reduction of the exemptions in case of the head of the family from $1,500 to $1,000 and then from $1,000 to $500 should apply to the surviving husband or wife or minor children of a deceased person, that it would have said so, and would have amended the Probate Code provision as well as that of the Code of Civil Procedure. The

fact, indeed, that in the title to the act of 1901, reference was made merely to the Code of Civil Procedure and in the act of 1911, it was specifically stated that the act was in relation to additional exemptions allowed *heads of families* and was "An Act to Amend § 7117 of the Revised Codes of 1905, Relating to Additional Exemptions Allowed the Head of a Family," is full of significance. It would have been an easy matter to have amended the Probate Code provision as well as those contained in the Civil Code. From all of this we are convinced that it was the intention of the legislature to make a larger provision for windows and orphans than for the heads of families merely, thinking, no doubt, that the head of the family, being usually a man, could better take care of himself and of the family than could the widow or minor children if the father had died.

Nor do we see any merit in the contention of appellant that "unless we construe the language of the statute upon the theory that through the word 'including' the prior language of the statute is made to operate as a limitation upon all that which comes after, we have a very peculiar result. All that personal property that would have been exempt to the deceased if he were living must be set aside to the surviving husband, wife, or minor children, and *other property selected,* etc., must also be set apart. So construed, there is no limitation upon the character of the property which may be selected, and the person entitled thereto may make the selection out of either real or personal property." The answer to this contention is to be found in the general rule that general words which follow a specific enumeration must be construed to apply to things or facts or acts of the general class and nature of the things enumerated. So construed, the words, "other property," would refer to personal and not to real estate.

Nor is there any merit in the contention that if we construe the act as making $1,500 the limit of the additional exemptions of other property, the husband or wife, or surviving minor children, are deprived of the specific alternative exemptions provided for by subdivision 3 § 5129, of the Compiled Laws of 1887. Whether this was the intention of the legislature or not, we are not called upon to decide. All we have to say is that we think it is clear that, in addition to the absolute exemptions, the surviving husband, wife, or minor children were clearly given $1,500 additional exemptions by the statute, and even if this

privilege might bring with it a possible disadvantage in a few cases the intention of the legislature is none the less apparent.

If, too, we were to place the construction on the section which is contended for by counsel for appellants, it would lead to the most absurd results when we come to consider § 8725 in connection with § 8729 of the Compiled Laws of 1913, which we have before quoted. According to it, if one man dies with an estate consisting of a bank account of $1,501, his widow may claim but $500 as exempt, while the court is bound to give the whole $1,500 to the widow of another man who dies with a $1,500 bank account. The widow of the deceased with the lesser estate would receive $1,000 more than the widow of the deceased with the larger estate.

So, too, since the acts of 1901 and 1911 are by their titles, and by the wording of the sections themselves, made to apply merely to the *heads of families,* we have a situation where, if the contention of the appellants is correct, there is no provision made for orphans who are not the heads of families. This can hardly have been the intention of the legislature.

The order of the District Court is affirmed.

LAKE GROCERY COMPANY, a Corporation, v. LORETTA CHIOSTRI.

(154 N. W. 533.)

Order of district court — notice of — appeal from — within sixty days after — filing order with clerk — appeal.

An appeal to the supreme court, from an order of the district court, under § 7820, Comp. Laws 1913, must be taken within sixty days after notice thereof, and can be taken before such order is filed with the clerk of the district court.

Opinion filed October 19, 1915.

Middaugh & Hunt, of Devils Lake, North Dakota, for plaintiff and appellant.

Cowan & Adamson, of Devils Lake, North Dakota, for defendant and respondent.

BURKE, J. On July 9, 1915, an order was signed by the district court denying plaintiff's motion for judgment notwithstanding the verdict. This order was in the hands of defendant's attorneys sixty days later when they served the same upon appellant's attorneys. The same was, however, evidently withheld from record until the 14th of September, 1915, after the expiration of sixty days from its service.

On the 20th of July, 1915, an appeal from said order was perfected and the record transmitted to this court.

Respondent now moves this court to dismiss said appeal upon the grounds, first, "that said order of the district court bears date the 9th day of July, 1915, and appellant's attorneys admitted service thereof on July 15, 1915; second, that said order was not filed with, or entered by, the clerk of the district court of Ramsey county, North Dakota, until September 14, 1915, and appellant's attempted appeal from said order is dated July 15, 1915, and notice of appeal and undertaking was served on respondent's attorneys on July 15, 1915." The question is, therefore, whether the appeal was void because premature. Section 7820, Comp. Laws, 1913, reads: "An appeal from a judgment may be taken within six months after the entry thereof by default, or after written notice of the entry thereof, in case the party against whom it is entered has appealed in the action; and from an order *within sixty days after written notice of the same shall have been given to the party appealing;* provided, however, that upon a showing of reasonable diligence by the appellant, the district, or in case of its refusal so to do, the supreme court may order that the record shall remain in the district court for such time as shall be necessary to enable the appellant to properly prepare and have the same certified." It will be noted that an appeal from the judgment must be taken within six months after the *entry* thereof. That an appeal from an order may be taken within sixty days *after written notice* of the same shall have been given to the party appealing. In Heald v. Strong, 24 N. D. 120, 138 N. W. 1114, it was held that said statute limits the time for taking an appeal from an order to sixty days from the time written notice of such order shall have been given to the party appealing. If respondent's contention is correct,—by simply serving and withholding from record the original order, the sixty days' time for filing could be set in motion and yet no appeal could be taken,—appellant's

only remedy would be to resort to legal proceedings to compel the filing of the original. We do not believe this was the legislative intent.

In the case of judgments, not only is the time for appeal much longer, thus allowing appellant time to force respondents to file the order for judgment, but the time for appeal does not begin to run until the same has been entered. If, therefore, an order for judgment is withheld, the time for appeal is automatically extended. If, however, an order denying a motion for judgment notwithstanding the verdict is withheld from record but served upon opposing attorneys, the time within which an appeal may be taken starts to run from the date of service. The distinction is obvious. The motion to dismiss is denied.

Appellant makes as a countermotion that the record be remanded to the district court for the addition of this belated order and the judge's memorandum decision. This motion will be allowed. Neither side will recover costs.

OSCAR F. GRAY v. MARIE H. GRAY.

(154 N. W. 530.)

Divorce — suit for — defendant by cross-complaint alleges cause for divorce — trial on merits — action — dismissed — as to both parties — appeal — trial de novo — attorney's fees — allowance of.

Plaintiff brings suit for divorce. Defendant, by cross complaint, alleges cause for divorce. After trial on the merits a divorce is denied both parties and the complaint and cross complaint dismissed. Defendant appeals for trial *de novo*. Affirmed, but with an allowance to defendant of $150 attorney fee in this court, and costs.

Opinion filed September 27, 1915. Rehearing denied October 19, 1915.

From a judgment of the District Court of Cass County, *Pollock*, J., defendant appeals.

Modified.

M. A. Hildreth, for appellant.

Section 211 of the Federal Laws of the United States provides that it is a crime to cause to be sent through the mail any letter, writing,

or to take from the mail any drug, medicine, etc., to be used or applied for preventing conception. This includes the procuring of medicines with the intent and purpose of preventing conception. Burton v. United States, 73 C. C. A. 243, 142 Fed. 57.

"Grievous mental suffering is sufficient ground for divorce as extreme cruelty, although it does not impair the health." This rule finds much support. Construing Rev. Codes 1905, § 4051, Comp. Laws 1913, § 4382; Mahnken v. Mahnken, 9 N. D. 189, 82 N. W. 870; Barnes v. Barnes, 95 Cal. 171, 16 L.R.A. 660, 30 Pac. 298; Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 566; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Carpenter v. Carpenter, 30 Kan. 744, 46 Am. Rep. 108, 2 Pac. 122; Mosher v. Mosher, 16 N. D. 269, 12 L.R.A.(N.S.) 820, 125 Am. St. Rep. 654, 113 N. W. 99; Gibbs v. Gibbs, 18 Kan. 419; Bennett v. Bennett, 24 Mich. 482; Kline v. Kline, 49 Mich. 419, 13 N. W. 800; Caruthers v. Caruthers, 13 Iowa, 266; Wheeler v. Wheeler, 53 Iowa, 511, 36 Am. Rep. 240, 5 N. W. 689; Smith v. Smith, 8 Or. 100; Kennedy v. Kennedy, 73 N. Y. 369; Beyer v. Beyer, 50 Wis. 254, 36 Am. Rep. 848, 6 N. W. 807; Beebe v. Beebe, 10 Iowa, 133.

Indignities are a species of cruelty. 1 Bishop, Marr. & Div. 1828; Stewart, Marr. & Div. §§ 182, 282; Coble v. Coble, 55 N. C. (2 Jones, Eq.) 395.

Excessive use of drugs or opiates by either party is held to be such. Bishop, Marr. & Div. § 1282; Dawson v. Dawson, 23 Mo. App. 169.

Divorce is not a punishment of the offender, but rather a relief to the sufferer. The law on this subject "ill or cruel treatment" was designed for the benefit of the sensitive, even the abnormally sensitive, and not for the insensible and apathetic whom nothing but blows can affect. Doolittle v. Doolittle, 78 Iowa, 691, 6 L.R.A. 189, 43 N. W. 616; Robinson v. Robinson, 66 N. H. 600, 15 L.R.A. 121, 49 Am. St. Rep. 632, 23 Atl. 362.

Whether in any given case there has been inflicted this "grievous mental suffering" is a question of fact to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, refinement, delicacy of sentiment of the complaining party, and no arbitrary rule of law as to what particular probative facts shall exist in order to justify a finding of the ultimate facts of its

existence can be given. Barnes v. Barnes, 95 Cal. 171, 16 L.R.A. 662, 30 Pac. 298; Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 566; Mahnken v. Mahnken, 9 N. D. 191, 82 N. W. 870; 1 Bishop, Marr. & Div. 1574.

A long-continued course of ill treatment, even without physical violence, and where a continuance of cohabitation under the circumstances would be likely to impair health and imperil the life of the wife, she is entitled to a divorce. Hullinger v. Hullinger, 133 Iowa, 269, 110 N. W. 470; Shook v. Shook, 114 Iowa, 592, 87 N. W. 680; Berry v. Berry, 115 Iowa, 543, 88 N. W. 1075; Pfannebecker v. Pfannebecker, 133 Iowa, 425, 119 Am. St. Rep. 608, 110 N. W. 622.

Mental anguish and wounded feelings, constantly aggravated by repeated insults and neglect, are as bad as actual bruises to the person, and that which produces the one is not more cruel than the other. Glass v. Wynn, 76 Ga. 319; Kelly v. Kelly, 18 Nev. 49, 51 Am. Rep. 732, 1 Pac. 194; Gholston v. Gholston, 31 Ga. 625; Kempf v. Kempf, 34 Mo. 211; Small v. Small, 57 Ind. 568.

In its effect upon the marriage relation, cruel conduct, which has effectually destroyed it, cannot be regarded other than extreme. Briggs v. Briggs, 20 Mich. 42; 2 Bishop, Marr. & Div. §§ 1430, 1437; Mosher v. Mosher, 16 N. D. 269, 12 L.R.A.(N.S.) 820, 125 Am. St. Rep. 654, 113 N. W. 99; Skinner v. Skinner, 5 Wis. 451; Freeman v. Freeman, 31 Wis. 235.

It is settled law in this jurisdiction that slight corroboration is all that is necessary to comply with the provisions of our statute. Clopton v. Clopton, 11 N. D. 212, 91 N. W. 46; Tuttle v. Tuttle, 21 N. D. 508, 131 N. W. 460, Ann. Cas. 1913B, 1.

On the question of alimony, it is the husband's duty to maintain his wife. This does not depend alone upon his visible property. His ability is the measure of his duty, so that if he exerts himself his actual earnings become faculties for alimony; or, if he will not exert himself, his capacity for earning must be estimated. 2 Bishop, Marr. & Div. §§ 892, 1007, 1008, 1035, note 1; Pauly v. Pauly, 69 Wis. 419, 34 N. W. 512; Re Spencer, 82 Cal. 110, 23 Pac. 37.

Every injury is entitled, in law, to its pecuniary compensation, so that, in addition to her maintenance, the wife should have something for her mental suffering, and the loss of her husband's society. 2

Bishop, Marr. & Div. §§ 1008, 1009, 1033, 1129; Burr v. Burr, 7 Hill, 207; Turrel v. Turrel, 2 Johns. Ch. 391; Mussing v. Mussing, 104 Ill. 126; Pauly v. Pauly, 69 Wis. 419, 34 N. W. 512; Jackson v. Jackson, 91 U. S. 122, 23 L. ed. 258; Rev. Codes 1905, § 4073, Comp. Laws 1913, § 4405; Rev. Codes 1899, § 2761; Robinson v. Robinson, 79 Cal. 511, 21 Pac. 1095; DeRoche v. DeRoche, 12 N. D. 25, 94 N. W. 767, 1 Ann. Cas. 221.

"As between parents adversely claiming the custody or guardianship of the children, neither party is entitled to it as a right, for, other things being equal, if the child is of tender years, it should be given to its mother." Rev. Codes 1905, § 4129, subdiv. 2, Comp. Laws 1913, § 4461; 2 Bishop, Marr. & Div. §§ 1196, 1215.

Especial expenditures may be required for the children in ill health, and for many other causes. 2 Bishop, Marr. & Div. § 1216; Plaster v. Plaster, 67 Ill. 93.

J. F. Callahan, for respondent.

If the appeal of this appellant is dismissed, the respondent should not be required to pay any counsel fees or other costs. An attorney who advises a client to appeal in a case of this kind should be willing to hazard his fee on the correctness of his judgment. Jordan v. Westerman, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826; Barngrover v. Pettigrew, 128 Iowa, 533, 2 L.R.A.(N.S.) 260, 111 Am. St. Rep. 206, 104 N. W. 904.

The questions of "mental anguish" and "sufficiency of the evidence" in this class of cases have been passed upon and settled by this court. Clopton v. Clopton, 10 N. D. 569, 88 Am. St. Rep. 749, 88 N. W. 562; Mahnken v. Mahnken, 9 N. D. 188, 82 N. W. 870; Gardner v. Gardner, 9 N. D. 192, 82 N. W. 872; Mosher v. Mosher, 16 N. D. 269, 12 L.R.A.(N.S.) 820, 125 Am. St. Rep. 654, 113 N. W. 99; Rindlaub v. Rindlaub, 19 N. D. 352, 125 N. W. 479.

False charges of adultery made by either husband or wife, maliciously and without probable cause, constitute legal cruelty. Palmer v. Palmer, 45 Mich. 150, 40 Am. St. Rep. 461, 7 N. W. 760; Reinhard v. Reinhard, 65 Am. St. Rep. 80, note; 14 Cyc. 606.

The district court undoubtedly denied relief to either party on the theory that neither was blameless, and that neither had sufficiently corroborated the claims made. Tuttle v. Tuttle, Ann. Cas. 1913B, 1,

note; note to MacDonald v. MacDonald, 25 L.R.A.(N.S.) 45; Weiss v. Weiss, 174 Mich. 431, 140 N. W. 587.

Goss, J. Plaintiff brought this suit for divorce in July, 1913. The defendant answers and by cross complaint asks that she be granted a decree of divorce with alimony and suit money. In May, 1914, after trial, judgment was entered on the merits, dismissing both the plaintiff's complaint and defendant's cross bill, and assessing no costs.

Briefly the facts are that after some six months of courtship the parties were married January 3, 1912. Trouble began in April following, resulting in separation in June. In August, 1912, plaintiff began a first action for divorce. Before trial a reconciliation was effected and on December 24, 1912, the parties resumed married relations. Harmony prevailed for a couple of months before domestic difficulty then began. About the last of May, 1913, they finally separated. This action followed two months later. A boy, Oscar Gray, Jr., was born of the marriage, January 30, 1914. Plaintiff was fifty-six and defendant twenty-eight years of age at marriage. Plaintiff had never been married. Defendant married at twenty but had obtained a divorce from her first husband in November preceding her marriage to plaintiff in January, 1913. Her daughter, Frances Comfort, six years of age at the time of defendant's marriage to plaintiff, lived with plaintiff and defendant. Plaintiff's aged parents and his unmarried sister lived near the residence of the parties in Casselton. Defendant's mother and family resided a short distance in the country during the times in controversy.

It is unnecessary to recite much evidence. Defendant claims cruel and inhuman treatment, and alleges that plaintiff required her to use drugs to prevent pregnancy; that this caused her great and grievous mental suffering, distress and pain of mind, and constituted in fact and in law sufficient grounds for divorce. It is admitted that suppositories to prevent conception to the number of four or six dozen, according to the claim of the contending parties, were used while they were living together,—a period of a year. Each accuses the other of being the procuring cause in obtaining them. Both admit their use. Expert testimony offered by defendant as to whether injuries would result from their use to the degree claimed is conflicting. One physician

leaves the matter problematical or very doubtful as to whether injuries could have resulted to defendant from the amount used. Defendant's other expert witness is certain that any use of them whatever must have resulted in her physical injury to some extent. Aside from this there is no proof worth consideration of injurious results. The complaint does not allege as a ground for divorce that physical injury resulted from such cause, or at all, but bases cruelty solely upon distress of mind inflicted. It is apparent that the use of drugs was casual, and not habitual, nor to the extent claimed by defendant. It was without result in any event as the birth of the child two years after the marriage established.

The questions in issue are of fact in the first instance with credibility the determining factor. Flat contradictions of the principal witnesses are many. Corroborating circumstances seem to be with plaintiff rather than with defendant's version of the domestic difficulties, but reading between the lines neither is without fault, and it is difficult to say that one was more to blame than the other. Near relatives intermeddled with the probabilities being that the husband's mother and sister aided materially making the wife's position more or less uncomfortable from the start. Her testimony descriptive of her early treatment by them seems to bear all the earmarks of truth. As to the mother of defendant, she seems to have been a peace-maker rather than a disturbing element. From the printed record the reader would conclude that left by themselves the parties would live together with a reasonable degree of domestic tranquility. Probably the plaintiff failed to make allowance for his wife's peculiarities, petulancy, and comparative youth, when his age is considered. Defendant, perhaps, could not be expected to at all times be wholly responsible for her conduct, nor to be as reasonable, agreeable, and pleasant as her husband would desire. Plaintiff was somewhat austere and cold with her. Disparity of age entered in, and with it differences of habit, temperament, and tendencies. The use of the drugs above referred to, it would seem, was by mutual consent, and the husband cannot be held guilty of abuse of the wife solely upon that score. As to their acts, many in number and concerning which there is much testimony, there was but little that was much more than trivial; nothing but what could and should have been overlooked in the other. Her serious offense consisted in

speaking as she did to some of the witnesses who have testified concerning it of her husband and his sister. Her statements and her explanation as to what she said are at variance with what the fact would be found to be if that were more important. Doubtless, however, she was actually looked upon as an interloper instead of as a member of the family from the viewpoint of the husband's immediate relatives. Such may afford some excuse, although it does not justify her statements. But had her husband dealt more open-handed with her in matters of finance it would have been better. Frugality may be so extreme as to be unwise when practised by the husband toward his wife. Everything considered, it cannot be said that the learned trial court, who saw the witnesses face to face and heard them testify, was in error. He was in a position to determine the amount of credence to which each witness was entitled on the many disputed questions of fact. This court is not. It is impossible to pass as accurate judgment on such matters from the cold record as was afforded the trial judge. His conclusions are adopted on the facts. Nor can it be said as a matter of law that either of the parties is entitled to a divorce.

However, without setting a precedent in such cases, defendant's costs on appeal, if any remain unpaid, will be paid by plaintiff. And for preparing defendant's brief and arguing her cause in this court and as a balance in full of attorneys' fees to her attorney of record, a further allowance of $150 over any unpaid costs will be made. In case of default for thirty days after filing of remittitur herein in the payment of such fees and costs allowed, defendant or her attorney may procure a judgment to be entered in the lower court on remittitur herefrom, and have execution therefor. To this extent the judgment entered is modified.

It is so ordered.

On Rehearing. (Filed Oct. 19, 1915.)

Goss, J. Appellant seeks a rehearing. Counsel's carefully prepared petition evidences such a desire to render but a dispassionate discussion of the case that it calls for an answer. A strong appeal is made that a divorce be granted because of this being the second

suit for divorce brought by plaintiff without foundation, as determined by the judgment entered. It is also asserted that it will be impossible for the parties to ever live together in happiness; that neither can have the confidence in or affection for the other necessary for domestic tranquillity; that the husband is shown to possess no love for his wife; that his conduct has been such as to destroy all her regard for him, and that in the future his demeanor will be such as to be intolerable to her. That under these circumstances she should not be required to remain his wife, but be granted a divorce.

Appellant's reasoning and conclusions as well seem to assume, without his realizing their full import, that domestic trouble, loss of respect, esteem or affection of one spouse toward the other, creates a condition which necessarily should be ended by divorcement. It is not altogether the best interests of the parties that control. The state is vitally interested, and it has a duty in the matter. Divorce is not based upon any theory of mutual discord alone. Else every family could produce the discord and dissolve at pleasure. There is nothing of which this husband is guilty that amounts to a cause for divorce accruing to the wife. The same is true of the wife's conduct toward him. Whether they resume marital relations depends upon themselves. That they may remain separate is their own affair and the result of their own wilfulness or past folly.

Counsel's petition also assumes that plaintiff is absolved from supporting his wife and his son. Such is neither the express holding, nor the legal effect of this judgment. The husband remains under full obligation to support his family. No assumption that he will not do so properly and to her entire satisfaction will be indulged. Should he fail in his duties toward her in this respect, an action will lie for maintenance. This is mentioned to dispel any doubts as to the future rights and liabilities of the parties.

The petition for rehearing is denied.

THE STATE OF NORTH DAKOTA v. ED. RAMSEY.

(154 N. W. 731.)

Warrant of arrest — motion to quash — county court — criminal complaint — verification — by complainant — no personal knowledge of the facts — properly denied.

1. A motion to quash a warrant of arrest is properly denied where such warrant was issued out of a county court based upon a criminal complaint in all respects regular, and which is verified by the oath of the complaining witness, although it is made to appear that such witness had no personal knowledge of the facts at the time of making such complaint.

Criminal complaint — form of, must be positive — personal knowledge of complainant of facts not required.

2. Section 18 of the Constitution of North Dakota, which provides that ". . . no warrant shall issue but upon probable cause, supported by oath or affirmation . . ," construed and held not to require actual, personal knowledge of the person taking such oath or affirmation, but merely that the complaint shall be positive in form, instead of upon information and belief, and shall be verified as aforesaid.

County courts — increased jurisdiction — criminal complaints in — information — preliminary hearings — committing magistrate.

3. Criminal prosecutions may be instituted in the county courts having increased jurisdiction by the filing of a complaint as distinguished from an information. The filing of an information is contemplated only in cases where a preliminary examination is had before a committing magistrate and the accused bound over to the county court.

Veterinary dentistry — license — practising without — services — fees for — evidence of.

4. In a prosecution for wilfully and unlawfully practising veterinary dentistry without a license, evidence is admissible showing that the accused charged and collected a fee for his services, although the collection of a fee is not made an essential element of the offense.

Veterinary dentistry — practising without license — board of veterinarians — secretary of — records — identification — license not issued.

5. In a prosecution for practising veterinary dentistry without a license, it was competent to show by the secretary of the state board of veterinarians and by his records, properly identified, that no license had been issued to the accused.

Veterinarian — license fee — for right to practise — secretary of board — evidence.

6. In a prosecution for practising veterinary dentistry without a license, it was competent for the secretary of the state board of veterinarians to testify to the nonpayment by defendant of the statutory fee for a license.

Instructions — jury — correctness.

7. Certain instructions to the jury complained of are examined and held correct.

Instructions — requests for — charge of court — refusal of court.

8. Certain requests for instructions examined and held properly refused. Where requests for instructions are either substantially covered in the charge as given, or mistake the law, or, for any reason, their refusal is nonprejudicial, error cannot be successfully assigned thereon.

Opinion filed October 20, 1915.

Appeal from the County Court of Cass County, *A. G. Hanson,* J.

From a judgment of conviction for the crime of practising veterinary dentistry without a license, defendant appeals.

Affirmed.

Taylor Crum, for appellant.

An affidavit upon information and belief is insufficient upon which to base constructive criminal contempt proceedings, and gives no jurisdiction. State ex rel. Harvey v. Newton, 16 N. D. 154, 112 N. W. 52, 14 Ann. Cas. 1035.

So, also, an affidavit for a search warrant must be made by one with knowledge of the facts, and should be positive in form. State ex rel. Register v. McGahey, 12 N. D. 545, 97 N. W. 865, 1 Ann. Cas. 650, 14 Am. Crim. Rep. 283; State v. Gottlieb, 21 N. D. 183, 129 N. W. 460; State v. Cropper, 4 Kan. App. 245, 45 Pac. 131; State v. Blackman, 32 Kan. 615, 5 Pac. 173.

The motion to set aside the warrant in this case should have been granted. State v. Gleason, 32 Kan. 245, 4 Pac. 363, 5 Am. Crim. Rep. 172.

A charge verified upon information and belief is good for all purposes except for the issuance of a warrant to bring the defendant into court. State v. Moseli, 49 Kan. 142, 30 Pac. 189.

"The complaint must set up the facts constituting the offense on the *knowledge* of the person who makes it, and, if he does not know them,

other witnesses must be examined who do know them, and no person can be arrested on the mere belief of the person making the complaint. The liberty of the citizen is not held upon so slender a tenure as that." People v. Heffron, 53 Mich. 527, 19 N. W. 171; Ex parte Dimmig, 74 Cal. 164, 15 Pac. 619; Swart v. Kimball, 43 Mich. 443, 5 N. W. 635.

There is a distinct statutory difference between a complaint and an information. This is apparent from the statutory provisions. Comp. Laws 1913, §§ 10525–10527, and 10684.

A warrant may be issued by the county court *only,* for a person against whom an information has been filed. Comp. Laws 1913, § 8962.

The term "complaint" is a technical one, descriptive of proceedings before magistrates. 12 Cyc. 290.

A prosecution by information implies and means one by the public prosecuting officer, and from a presentment or indictment which is the method of accusation by the grand jury. 12 Cyc. 290, 291, note 28.

Our law has no provision concerning "charging and receiving pay" by one who does work along the line of veterinary dentistry. Comp. Laws 1913, § 2716; Sackett, Instruction to Juries, § 4810, note 16.

"The performance of dental work, and the charging and recovering therefor, is practising dentistry" (Texas Statutory Rules)—but there is no such showing in this case. Aldenhoven v. State, 42 Tex. Crim. Rep. 6, 56 S. W. 914.

To "practise" is to exercise a calling, trade, or profession. People Use of State Bd. of Health v. Blue Mountain Joe, 129 Ill. 370, 21 N. E. 925; French v. Parker, 16 R. I. 219, 27 Am. St. Rep. 733, 14 Atl. 872; Rawlinson v. Clarke, 14 Mees. & W. 187, 14 L. J. Exch. N. S. 364.

To make a single sale of land, under brokerage laws, does not make one a broker. Jackson v. Hough, 38 W. Va. 236, 18 S. E. 576; Hart v. Folsom, 70 N. H. 213, 47 Atl. 603.

The practice of medicine is defined by our Code, and the fee element is included. Comp. Laws 1913, § 463.

Dentistry as applied to human beings is also defined, and we there find the fee element. Comp. Laws 1913, § 509.

Arthur W. Fowler, State's Attorney, and *Wm. C. Green,* Assistant State's Attorney, for respondent.

It is clear that a complaint must, in order to show probable cause, be a statement of facts, supported by oath or affirmation. Such was the condition in this case when application for a warrant of arrest was made. State v. McKnight, 7 N. D. 444, 75 N. W. 790; State v. Longstreth, 19 N. D. 268, 121 N. W. 1114, Ann. Cas. 1913D, 1317.

Cases where complaints alleged facts merely on information and belief, and were so verified, are *not in point.* State v. Collins, 8 Kan. App. 398, 57 Pac. 38; Alderman v. State, 24 Neb. 97, 38 N. W. 36; State v. Stoffel, 48 Kan. 364, 29 Pac. 685; People v. Staples, 91 Cal. 23, 27 Pac. 523; Com. v. Mallini, 214 Pa. 50, 63 Atl. 414; State v. Etzel, 2 Kan. App. 673, 43 Pac. 798; State v. Crombie, 107 Minn. 171, 119 N. W. 660; Potter v. Barry, 156 Mich. 183, 120 N. W. 586.

The true meaning of the word "practise" as used in the law under consideration is "to perform any act or acts of the art or science defined." Our law does not require one act, or two acts, or frequent acts. State v. Blumenthal, 141 Mo. App. 502, 125 S. W. 1188; State v. Crombie, 107 Minn. 166, 119 N. W. 658.

FISK, Ch. J. Appellant was convicted in the county court of Cass county of the crime of wilfully and unlawfully practising veterinary dentistry without first procuring a permit or certificate authorizing him so to do, and he has appealed to this court from the judgment of conviction, alleging numerous assignments of error, which will be considered in the order presented.

The first assignment challenges the correctness of the ruling denying appellant's preliminary motion to quash the warrant of arrest. This motion was predicated upon the fact, which was developed through an examination of the complaining witness, that such witness at the time of making his complaint, which is sworn to positively, had no personal knowledge of the facts. It is argued that § 18 of our state Constitution was thus violated. This section reads: ". . . No warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." We are so clear that appellant is in error in urging the above contention that we deem an extended discussion of the point unnecessary. We deem the cases of State v. McKnight, 7 N. D. 444, 75 N. W. 790; and State v. Longstreth, 19 N. D. 268, 121 N. W. 1114, Ann.

Cas. 1913D, 1317, in point and controlling, and we adopt and reaffirm the reasoning and conclusions in those cases. See also Potter v. Barry, 156 Mich. 183, 120 N. W. 586. If appellant's contention were sound, many criminals would be immune from arrest and prosecution merely because of the fact that there are no persons having *personal or positive knowledge* connecting the accused with the commission of the crime, although there might be many persons possessing information of a nature sufficient to satisfy their minds to a moral certainty of the guilt of the accused. It is clear that the framers of the Constitution in adopting § 18 never intended that the "oath or affirmation" therein mentioned should in all cases be based upon nothing but actual personal knowledge of the person making the same. To impute to them such an intent is, we believe, wholly unwarranted.

Appellant's next contention is that no information was filed as the basis for the issuing of the warrant of arrest, the particular point being that under § 8962, Comp. Laws of 1913, prosecutions in the county court can be instituted only by the filing of an "information," and that the word "information" as there used must receive the meaning given it in §§ 10525–10527, inclusive, and § 10684, Comp. Laws of 1913, which sections define a complaint, indictment, and information, respectively. We are convinced that such contention is without merit. We think this very clearly appears from a consideration generally of the statutes governing the practice in county courts of increased jurisdiction. The language employed in § 8962 should be construed with reference to the preceding section, which prescribes that in criminal actions triable in the county court the justice of the peace or other committing magistrate before whom the accused person is brought must "admit to bail, bind over or commit for trial, the accused to the county court of such county, and the information shall be filed in such county court." It was the evident purpose of this section to relieve the district courts of certain criminal actions by compelling them to be tried in the county courts having increased jurisdiction, and the language in § 8962, with reference to authorizing the county court or the county judge to issue warrants of arrest for persons against whom an "information" has been filed, was evidently intended to apply merely to cases wherein the accused had been bound over to the county court by a committing magistrate, in which cases the practice in the district court was intended to

be made applicable to such county courts, so far as practicable. While § 8964 prescribes that "no preliminary examination shall be necessary before trial in criminal actions in the county court," yet § 8961, aforesaid, clearly contemplates that such preliminary examinations may be held. That criminal actions which are instituted directly in the county court, and not before committing magistrates, must, as a basis for the issuance of a warrant of arrest, be instituted through a complaint verified upon oath or affirmation, is entirely clear. In fact, this is imperative under the provisions of § 18 of our state Constitution. See §§ 10389, 10529, 10531, and 10535, Comp. Laws of 1913. See also State v. Gottlieb, 21 N. D. 179, 129 N. W. 460.

Appellant's third assignment calls in question the rulings permitting the state, over defendant's objection, to prove that Peterson, the owner of the horses treated by defendant, paid for such treatment. There is no merit to this assignment; even though such payment is not made an essential element of the crime, it was clearly competent to show that defendant exacted and received compensation for his professional services, and tends to refute the claim that he was not, in treating such live stock, engaged in practising veterinary dentistry within the inhibition of the statute as contradistinguished from gratuitous and friendly assistance shown by one neighbor toward another. Such testimony was also competent for another reason. It tended to corroborate the recollection of the witness as to the transaction.

Assignments number four, five, and six all relate to rulings permitting the state to show by the witness Babcock, who was secretary of the state board of veterinarians, that the records of his office do not show the issuance of any license to the defendant. We think a sufficient foundation was laid for the introduction of the record book, exhibit "B," in evidence and that such book was clearly competent. We also fail to discover any prejudicial error in any of the rulings challenged by these assignments. The statute, § 2713, Comp. Laws of 1913, provides that the board shall issue a certificate to all applicants passing the required examination, and to all applicants who are eligible to registration under § 2711, which certificates shall be signed by the president and secretary of the board. Said statute also makes such certificate conclusive evidence of the holder's right to practise veterinary medicine, surgery, or dentistry in this state. It also requires the board to keep

a record of all its proceedings and the name of each applicant for license, and provides that "said books and records shall be prima facie evidence of all the matter therein recorded." In the light of these statutory provisions, we entertain no doubt of the competency of the testimony objected to. See State v. Littooy, 52 Wash. 87, 100 Pac. 170, 17 Ann. Cas. 292.

Appellant's 7th assignment challenges the ruling of the court in denying defendant's motion made at the close of the state's case to dismiss the prosecution. The ground of the motion was that the testimony failed to disclose that defendant practised veterinary dentistry without a license, or that he has not a license to practise such veterinary dentistry. This assignment is not argued in appellant's brief, it being merely stated that "no competent, relevant, or material testimony had been introduced by the state which was sufficient to sustain a verdict of guilty." Such a general statement, without any attempt to set out reasons as a basis therefor, deserves the same brief treatment at the hands of this court. A consideration of the point serves to convince us that it is without merit. Furthermore, the contention here made is sufficiently answered elsewhere in this opinion.

The 8th assignment is likewise without substantial merit. It challenges the ruling permitting the witness Babcock to testify to the fact that under the rulings and regulations of the board of veterinarians an annual license fee of $3 is required, and that defendant had not paid such fee. The requirement as to the payment of such annual fee is statutory (Comp. Laws 1913, § 2715), and, hence, such testimony, even if incompetent, was nonprejudicial. It was entirely proper for such witness to testify to the nonpayment of such fee. In fact, the state had the burden of proving that defendant was not at the date of the transaction the holder of a license to practise such profession, and such testimony had a direct tendency to prove this fact.

The 9th assignment challenges the correctness of the following portion of the court's instructions to the jury: "I charge you, gentlemen of the jury, as a matter of law that if you believe from the evidence beyond a reasonable doubt that the defendant on or about July 12, 1913, in Cass county, North Dakota, filed or cut off teeth of horses belonging to the witness Lewis Peterson, and that the defendant received and accepted pay therefor, and that the defendant did not have a permit to

practise veterinary dentistry within the state of North Dakota, then you should find the defendant guilty." We fail to perceive any error in the giving of such instruction; nor does appellant's brief contain any argument on authority in support of his contention.

Among other things the court charged the jury as follows: "To the jury exclusively belongs the duty of weighing the evidence and determining the credibility of the witnesses. With that the court has absolutely nothing to do. The degree of credit due to a witness, whether for the state or the defendant, should, among other things, be determined by his character and conduct, by his manner upon the stand, his relations to the controversy and to the parties, his hopes and fears, his bias or impartiality, the reasonableness or otherwise of the statements he makes, the strength or weakness of his recollections viewed in the light of all other testimony, facts, and circumstances in the case. If any of the witnesses are shown knowingly to have testified falsely on this trial touching any material matters here involved, the jury are at liberty to reject the whole of their testimony unless the same is corroborated by other credible evidence in the case."

By his 9th assignment, appellant predicates error upon the giving of the above instruction. His counsel concede, however, that this is the stereotype form of such an instruction, and would not be objectionable if there was no issue or contradictions in the testimony; but he argues that in view of the fact that no testimony was offered by defendant such instruction had a tendency to mislead and prejudice the jury against him by creating in the minds of the jury an impression that if the testimony introduced was true, they should convict. We fail to discover any merit in this contention. Of course, such instruction would be erroneous if, as appellant's counsel contends, the fact that defendant operated on the teeth of Peterson's horses and charged and collected a fee therefor did not amount to practising dentistry within the meaning of § 2716, Comp. Laws 1913. If counsel's contention be correct as to the meaning of the word "practices" as used in such law, then obviously the state wholly failed in its proof, and the conviction cannot stand. Counsel argues that there must be a continuity of facts; that defendant, in order to come within the statute, must have practised dentistry habitually or frequently. In this we think counsel is in error. The correct rule is announced in State v. Reed, 68 Ark. 331, 58 S. W. 40. The statute

there reads: "Section 4973. It shall be unlawful for any person to practise or attempt to practise dentistry or dental surgery in the state of Arkansas without first having received a certificate from the board of dental examiners; provided, this shall not be construed as preventing any regular licensed physician from extracting teeth, nor to prevent any other person from extracting teeth, when no charge is made therefor by such persons." Defendant was indicted for practising dentistry without obtaining a certificate from the board of dental examiners. The evidence showed that he was at the time of the commission of the alleged offense a student under one Dr. Milan. The evidence also showed two instances in which defendant while so engaged performed dental work under the advice of such doctor, defendant performing the mechanical work,—one in extracting teeth and the other in filing teeth,—and that for the first work nothing was charged or received by him, and that for the latter work he charged and received a fee of $10. The court said: "From the language of the act under which this indictment was found, it is impossible to escape the conclusion that the performance of dental work and charging and receiving pay therefor is practising dentistry."

The remaining assignments relate to the refusal of the trial court to give certain requested instructions. It is contended that these stated the law correctly, and that they were not covered in the charge as given. These requests are as follows: (1) "I charge you that any person who either practises veterinary medicine, surgery, or dentistry in this state, without having had issued to him a permit to so practise by the state board of veterinary medical examiners, is guilty of a misdemeanor. In this connection you will first determine whether it appears that no such permit has been issued by said board to this defendant. And it is the duty of the state to satisfy your minds beyond a reasonable doubt that no such permit has been issued to this defendant by said board. He is not required to prove that he has such a permit. The state charges that the defendant has no such permit, and the state must prove such charge so that you are convinced beyond any reasonable doubt that he has no such permit, before you can find the defendant guilty. If the testimony introduced by the state has not so convinced you, beyond any reasonable doubt, that no such permit has been issued to defendant, your verdict must be 'not guilty.'" (2) "The defendant is not charged with practising veterinary medicine or surgery; but is only charged with prac-

tising veterinary dentistry without having a permit so to do. And I charge you that to 'practise veterinary dentistry' is to do or perform the same habitually or frequently, to make a practice of; to carry on habitually; to exercise it as a profession or an art; and that the performance of one or more isolated or occasional acts of dentistry on teeth of animals does not constitute the practice of veterinary dentistry within the meaning of the law. And proof that on one occasion the defendant filed some sharp corners from the teeth of some horses would not constitute the practice of veterinary dentistry. To practise a thing is to carry it on habitually. This is the ordinary and usual meaning of the word 'practise' as found in the dictionaries." (3) "And I charge you that 'dentistry' is the art, science, or profession of a dentist. And that a dentist is one whose profession or business it is to extract and repair teeth when diseased, or replace them with artificial ones when necessary."

We see no error in the refusal to give such instructions. The first was sufficiently covered in the court's charge as follows:

"I charge you, Gentlemen of the jury, as a matter of law, that if you believe from the evidence beyond a reasonable doubt that the defendant, on or about July 12, 1913, in Cass county, North Dakota, filed and cut off teeth of horses belonging to the witness, Lewis Peterson, and that the defendant received and accepted pay therefor, and that the defendant did not at that time have a permit or certificate to practise veterinary dentistry within the state of North Dakota, then when you should find the defendant guilty. . . . In this case it is incumbent upon the state to establish all of the material allegations of the complaint in this case to your satisfaction beyond a reasonable doubt. Before you are authorized to find the defendant guilty of the offense charged in the complaint, you must be satisfied of his guilt beyond a reasonable doubt. If you entertain a reasonable doubt as to the guilt of the defendant, it is your duty to find him not guilty."

The second request does not contain a correct statement of the law, and the third was, in view of the explicit instructions as to what facts the state was bound to prove to warrant a conviction, wholly superfluous, and in any event its refusal was nonprejudicial.

It is, of course, elementary that error cannot be predicated upon a refusal to give requested instructions, where they are substantially cov-

ered in the charge as given, or do not correctly state the law, or where it can properly be said that their refusal is, for any reason, nonprejudicial.

This disposes of all the assignments adversely to appellant, and necessitates an affirmance of the judgment. It is accordingly affirmed.

E. H. FARIN and Andrew Ritchie, Copartners as Farin & Ritchie, v. N. B. NELSON.

(155 N. W. 35.)

Action upon implied contract for rental of pasture land. Both parties concede law, as given in instructions, correct.

Rental of pasture land — implied contract — action on — evidence — finding of jury.

1. Evidence examined and found to be sufficient to support finding of jury that plaintiff had usurped said land to the exclusion of others.

Pasturage land — value of use of — owner of land — may testify as to value — circumstances.

2. The owner of the land had been in the vicinity during season and knew the grass conditions, but had not been actually upon the land itself. *Held*, that he was qualified to testify to the value of the use of said tract for pasturage.

Offer of proof — defendant — live stock — distrained by plaintiff — trespassing — remedies — election of.

3. Defendant offered to prove that prior to the institution of the present action plaintiff had distrained some live stock, owned by the defendant, as trespassers. The offer was properly rejected because it did not show an election of remedies.

Grazing — other stock — knowledge of defendant.

4. Evidence that other cattle grazed upon the land is immaterial unless shown that defendant was cognizant of their presence thereon.

Rental value of land — immaterial.

5. The rental value of the tract for fifty-three days is immaterial.

Opinion filed October 21, 1915.

Appeal from the District Court of Stark County; *Crawford*, J.

Affirmed.

T. F. Murtha and *H. E. Haney*, for appellant.

There being no evidence of damage or rental value of the land in

question, defendant's motion to dismiss, made at the close of plaintiff's case should have been granted. Cole v. Thompson, 134 Iowa, 685, 112 N. W. 178; Harrison v. Adamson, 76 Iowa, 337, 41 N. W. 34, 86 Iowa, 693, 53 N. W. 334; Foster v. Bussey, 132 Iowa, 640, 109 N. W. 1105.

Plaintiff distrained defendant's stock, prior to bringing this action, and held the same for acts complained of in this action. Evidence of this condition was offered by defendant but refused by the court.

The plaintiff's action thus taken was an election of remedies and a bar to this action, and further this action was not begun till more than sixty days after the trespass. Comp. Laws 1913, §§ 8500 and 8508.

Defendant should have been allowed to prove such election of remedies. 39 Cyc. 259.

An action for use and occupation arises upon contract, express or implied. 38 Cyc. 850; 31 Cyc. 851, 852.

The relation of landlord and tenant must exist to sustain an action for use and occupation. 39 Cyc. 853; Pacific States Corp. v. Arnold, 23 Cal. App. 672, 139 Pac. 239; Hurley v. Lamoreaux, 29 Minn. 138, 12 N. W. 447; De Pere Co. v. Reynen, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155; Janouch v. Pence, 3 Neb. (Unof.) 867, 93 N. W. 217.

Such action will not lie against a trespasser. 39 Cyc. 860 (c).

To be a competent witness as to value, one must have knowledge of the thing upon which he places a value. The mere fact, in an action of this kind, that he owns the land, does not qualify him to testify as to value.

The measure of damages was the value of the grass destroyed by *his stock,* and not such as was destroyed by other stock trespassing upon the same land. Cole v. Thompson, 134 Iowa, 685, 112 N. W. 178.

A tenancy cannot be implied where possession is not exclusive. 24 Cyc. 282 (2).

Or, under a claim of lease from a third person. Janouch v. Pence, 3 Neb. (Unof.) 867, 93 N. W. 217; 6 Words and Phrases, 4904, 5464; 39 Cyc. 860 (c).

There is no evidence that the land belonged to plaintiffs. The action must be by the real party in interest. Comp. Laws 1913, § 7395.

Thomas H. Pugh, for respondents.

A party who brings from a witness answers as to collateral matters will not be allowed to contradict testimony thus elicited. Becker v. Cain, 8 N. D. 615, 80 N. W. 805.

Defendant's claim that plaintiffs had attempted to treat the occupancy as a trespass is not well founded. It is not alleged that an action was commenced and pursued. Such a remedy as claimed was not open to plaintiffs, no allegation showing it. 15 Cyc. 252, 257.

The doctrine of election applies only where a party who actually has at hand two inconsistent remedies actually proceeds to enforce one of them. Turner v. Grimes, 75 Neb. 412, 106 N. W. 465; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773.

The right of action for use and occupation of real estate has long existed. Its principal or essential features are found in our Code. Comp. Laws 1913, § 7166; Furlong v. Cooney, 72 Cal. 322, 14 Pac. 12; Eva v. McMahon, 77 Cal. 467, 19 Pac. 872; Parkinson v. Shaw, 12 S. D. 171, 80 N. W. 189; Baldwin v. Bohl, 23 S. D. 395, 122 N. W. 247; 18 Am. & Eng. Enc. Law, 2d ed. 265.

The owner of land is prima facie entitled to recover in assumpsit for use and occupation by defendant. 18 Am. & Eng. Enc. Law, 2d ed. 266; Heddleston v. Stoner, 128 Iowa, 525, 105 N. W. 56; Butler v. Bertrand, 97 Mich. 59, 56 N. W. 342; Rodman v. Davis, 53 N. C. (8 Jones, L.) 134; Earl v. Tyler, 36 Okla. 179, 128 Pac. 269; Bilby v. Gilliland, 41 Okla. 150, 137 Pac. 690; Story v. McCormick, 70 Kan. 323, 78 Pac. 819; Lazarus v. Phelps, 152 U. S. 81, 38 L. ed. 363, 14 Sup. Ct. Rep. 477; De La Guerra v. Newhall, 55 Cal. 21; Simmonds v. Richards, 74 Kan. 311, 86 Pac. 452; Gillespie v. Hendren, 98 Mo. App. 622, 73 S. W. 361; Note to Monroe v. Cannon, 81 Am. St. Rep. 439; Colonial & U. S. Mortg. Co. v. Lea, 95 Ark. 253, 129 S. W. 84; Kipp v. Davis-Daly Copper Co. 41 Mont. 509, 36 L.R.A. (N.S.) 666, 110 Pac. 240, 21 Ann. Cas. 1372.

BURKE, J. Plaintiff was the owner of an uncultivated, unfenced section of land in Billings county. Defendant had a quarter section adjoining, and was the owner of over 100 head of cattle and horses. Plaintiff brings this action upon an implied lease of said section of land by the defendant, asking for the value of the use and occupation and rental of the same. It is not contended that any express contract

exists. Defendant in his answer admits that his live stock trespassed over the premises described during the year 1911, but denies that he occupied said premises under a lease, either express or implied. He maintains that at all times mentioned there was a law in the county of Billings preventing live stock to run at large. He further alleges that the sixty-days statute of limitations has run against any damages for which he may be liable in trespass. Trial was first had in justice court, where plaintiff recovered $22 and costs. Appeal was taken to the district court, where the case was tried twice, the first jury disagreeing, the second finding for the plaintiff again in the sum of $22. Defendant has now appealed to this court, assigning one error for each dollar of the verdict. These assignments are grouped in appellant's brief under seven headings, and could have been still further reduced. The trial court in its charge to the jury gave the following instruction to which no exception is taken by either party, and, under well-established rules, is binding so far as this litigation is concerned: "The court instructs you, as a matter of law, that cattle in the county of Billings during the year 1911 had a right to run at large during all seasons of the year, and if you believe from the evidence that they were merely turned out and trespassed upon said land then the plaintiff will not be entitled to recover; but it will be necessary for the plaintiff to establish that the defendant used and occupied these premises to the exclusion of other persons. In other words, if you believe from the evidence that this defendant went into possession and used this land to the exclusion of other persons, then the plaintiff is entitled to recover for the use and occupation of the premises. This you will have to determine by the facts in this case as to whether or not the cattle were turned out and permitted to run at large on the range, which the defendant had a right to permit them to do, or whether he close-herded the cattle upon this section, and went into the use and occupation of it to the exclusion of other persons, and did use it for his own personal use. If you believe from the evidence, and by a fair preponderance of the evidence, that he did go into the use and occupation of the premises to the exclusion of other persons, then it will be necessary for you to determine the reasonable value of said use and occupation by the evidence in this case."

For the purposes of this opinion this law will be presumed to be

correct. The first question arising, then, is whether or not there is any evidence in the case tending to show that the defendant went into possession of the said premises to the exclusion of others and close-herded his cattle thereon; and, second, whether the trial court erred in the reception or the rejection of evidence.

(1) Appellant maintains that there is no evidence whatever supporting the verdict as rendered under the instruction set forth above. The testimony of the witness Senkbeil is particularly relied upon by the plaintiff. He said:

Q. What instructions, if any, or what did Mr. Nelson say to you, if anything, in regard to where you should herd these cattle?

A. Before I go out there, he took us out in an automobile and showed us the section and his cattle, and showed us the place where we should herd the cattle. After that we make a bargain to pay us $25 a month to watch the cattle, riding that section, and he tell us he has rented it, and say we herd the cattle. I herd the cattle there about fifty-three days altogether.

And again:

Q. Was there no hay cut on that section that year?

A. Yes, sir.

Q. Who cut that hay?

A. Jahnke.

Q. Where was it hauled to?

A. It was hauled to Nelson's barn.

Jahnke testifies to the same effect. The witness, Obregebritch also testifies that Nelson told him that he had the land rented. The latter witness had cattle of his own, and testified that he kept his cattle off of the land excepting when they got upon it by mistake, through someone's leaving the bars open. While there is much testimony offered by the defendant to the general effect that he did not attempt to drive other persons' cattle off from the land, and that, as a matter of fact, other cattle did range thereon, yet we believe that the testimony of the three witnesses above mentioned is sufficient to carry the case to the jury, and to sustain a finding that the defendant had usurped the land to the exclusion of others. Telling neighbors that he had the same leased might be as effectual in preserving the land for his own use as

fencing the same. The question whether the defendant had, in fact, usurped the land, was a disputed question of fact for the jury, and its decision is controlling.

(2) The next question arises on the admission of testimony. Farin, one of the plaintiffs, was allowed to testify that he and Ritchie owned the land, and that the value of the use of that land for pasturage during the year 1911 was from $15 to $25 a quarter. This testimony was challenged upon the ground that ownership could not be proved in this manner, and that witness had not examined the land during that year, and therefore could have no knowledge as to the value of the hay grown thereon. Under the pleadings in this case, the testimony of the witness that the partnership owned the land was sufficient. An examination of the evidence discloses that the witness was in the vicinity of the land during the year 1911, although not actually upon this tract. While owners cannot testify indiscriminately as to the value of property owned by them, yet in this case the witness was qualified. He had observed the general grass condition in that neighborhood, and it will be presumed that he had sufficient knowledge of his own land to base an opinion as to the value of the rental. There is no merit in the contention that the evidence shows that the land was only used fifty-three days. One of the witnesses testified that he herded the cattle there that long and quit herding them. An examination of the record, however, discloses that he ceased to work for defendant at that time. There is other evidence upon which the jury might find that the land was used during the entire grazing season. Moreover, we can easily imagine a bunch of cattle eating all of the grass off a tract of land in fifty-three days so as to destroy the pasturage for that season.

(3) The defendant offered to prove that, prior to the institution of the present action, plaintiffs had distrained some of the live stock of defendant as trespassers. It is their contention that such action constituted an election of remedies. There are several reasons why this does not apply. In the first place, the offer of proof is indefinite as to time and place. One question asked is: "Before this action was started, did Farin & Ritchie take up any of your stock and claim damages against them for trespass?" Upon objection being sustained to this form of the question, it was repeated as follows: "Did Farin & Ritchie, or did they not, take up some of your stock and notify you

that they were holding the same for trespass in 1911?" This question did not refer to the land in controversy at all, does not show that plaintiffs knew about the trespass before the sixty days' statute of limitations had run against the claim, nor that plaintiffs had taken any legal action. The offer of the defendant to show that "prior to the institution of this case plaintiffs distrained the live stock of the defendant for the same acts complained of in the complaint, and notified defendant that they were holding same for damages on account of the acts complained of in the complaint," was subject to the objection that it was improper cross-examination; it did not show any legal action upon the part of the plaintiffs, and failed to show knowledge upon the part of plaintiff before the expiration of the sixty days' period of limitation. To constitute an election of remedies the party must have had in hand two inconsistent remedies, and actually proceeded to enforce one of them. 15 Cyc. 257; Turner v. Grimes, 75 Neb. 412, 106 N. W. 465; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773. Defendant does not claim that they were forced by these distraints to pay out any money, the evidence being offered merely upon the question of election of remedies. There was, therefore, no error in refusing the evidence offered.

(4) Error is next assigned upon the rejection of certain evidence to the effect that other cattle pastured upon this land during the season of 1911. This evidence is immaterial excepting as bearing upon the question of defendant's attempting to monopolize the land. If it were offered for this purpose it should be coupled with knowledge upon the part of the defendant showing that he was aware of their presence and made no effort to exclude them from the pasture. In the absence of this element the testimony was properly rejected.

(5) The 5th assignment of error relates to the exclusion of the question asked of one of defendant's witnesses as to the rental value of the section for fifty-three days. As already pointed out, the evidence does not disclose a fifty-three days' use of the land. One of plaintiff's witnesses merely quit after he had herded cattle fifty-three days. The other errors assigned either did not raise any substantial question, or are answered by the foregoing. The judgment of the trial court is affirmed.

BRUCE, J. (Specially concurring): I concur in the result of the above opinion, but not in all of its reasoning. The action in my mind is not an action on an implied lease, but an action for the value of the use of real estate which has been wrongfully occupied.

As far as the election of remedies is concerned, and the alleged errors in regard to the introduction of evidence in relation thereto, I concur in the opinion merely on the ground that there is no proof or offer of proof that any legal proceedings were actually had, and that "although acts prior to the actual commencement of legal proceedings indicate an intention to rely upon one remedial right, yet they do not constitute an election which will preclude the subsequent prosecution of an action or suit based upon an inconsistent remedial right, unless the acts contain the elements of an estoppel *in pais.*" 15 Cyc. 260.

DENNIE MANSON v. GREAT NORTHERN RAILWAY COMPANY.

(155 N. W. 32.)

Interstate commerce — section boss — hand car — riding on — railroad company — Federal employer's liability act — negligence.

Plaintiff was a section boss engaged in interstate commerce. Upon the day of his injury he took a hand car with thirteen men, besides himself, and worked upon an adjoining section. While returning in the evening it began to rain, and one of the men under him let go of the handle bars to put on his coat. In so doing he lost his balance, and plaintiff, in order to hold the man upon the hand car, himself released his hold, fell from the car, and was injured. There is no evidence that plaintiff had requested more hand cars or complained of the crowded condition. Evidence examined and *held:*

That the railroad company is guilty of no negligence for which it is liable under the Federal employers' liability act.

Opinion filed October 26, 1915.

Appeal from the District Court of Ward County; *Leighton,* J.

Reversed.

Dudley L. Nash and *Murphy & Toner,* for appellant.

There was no negligence shown on the part of defendant. The in-

jury was the result of an accident, or was due to the careless exercise of functions of control by the plaintiff. Hunter v. Kansas City & M. R. & Bridge Co. 29 C. C. A. 206, 54 U. S. App. 653, 85 Fed. 379; Hamilton v. Chicago, R. I. & P. R. Co. 93 Iowa, 46, 61 N. W. 415; Cameron v. Great Northern R. Co. 8 N. D. 618, 80 N. W. 885, 7 Am. Neg. Rep. 146; Dewey v. Chicago & N. W. R. Co. 31 Iowa, 373; Kenney v. Central R. Co. 61 Ga. 590; Illinois C. R. Co. v. Modglin, 85 Ill. 481; St. Louis, A. & T. R. Co. v. Denny, 5 Tex. Civ. App. 359, 24 S. W. 317; Brunswick & W. R. Co. v. Smith, 97 Ga. 777, 25 S. E. 759; Birmingham Furnace & Mfg. Co. v. Gross, 97 Ala. 220, 12 So. 36; Taylor v. Baldwin, 78 Cal. 517, 21 Pac. 124; McDermott v. Atchison, T. & S. F. R. Co. 56 Kan. 319, 43 Pac. 248; Hudson v. Charleston, C. & C. R. Co. 55 Fed. 248; Berlick v. Ashland Sulphite & Fiber Co. 93 Wis. 437, 67 N. W. 712; Gorham v. Kansas City & S. R. Co. 113 Mo. 408, 20 S. W. 1060; Lane v. Central Iowa R. Co. 69 Iowa, 443, 29 N. W. 419; Chicago & N. W. R. Co. v. Snyder, 117 Ill. 376, 7 N. E. 604; Gulf, C. & S. F. R. Co. v. Silliphant, 70 Tex. 623, 8 S. W. 673; Gulf, C. & S. F. R. Co. v. Hubert, — Tex. Civ. App. —, 54 S. W. 1074.

The plaintiff must be held, conclusively and as a matter of law, to have assumed any risk incident to so carrying his men on the hand car. Kelly v. Chicago, M. & St. P. R. Co. 53 Wis. 74, 9 N. W. 816; Bradshaw v. Louisville & N. R. Co. 14 Ky. L. Rep. 688, 21 S. W. 346; Carr v. North River Constr. Co. 48 Hun, 266; Kennedy v. Pennsylvania R. Co. 1 Monaghan (Pa.) 271, 17 Atl. 7; Lake Shore & M. S. R. Co. v. Knittal, 33 Ohio St. 468; Bengston v. Chicago, St. P. M. & O. R. Co. 47 Minn. 486, 50 N. W. 531; Weed v. Chicago, St. P. M. & O. R. Co. 5 Neb. (Unof.) 623, 99 N. W. 827; Southern P. Co. v. Ryan, — Tex. Civ. App. —, 29 S. W. 527; Norton v. Louisville & N. R. Co. 16 Ky. L. Rep. 846, 30 S. W. 599; Sliney v. Duluth & W. R. Co. 46 Minn. 384, 49 N. W. 187; Berlick v. Ashland Sulphite & Fiber Co. 93 Wis. 437, 67 N. W. 712; Beckman v. Consolidated Coal Co. 90 Iowa, 252, 57 N. W. 889.

Plaintiff would not have been disobeying the order of his master had he made several trips in conveying his men, were there not room for them all on the car. He did not request more cars. In any event, the order of the master is wholly immaterial on the question of the assumption of the risk. Bradshaw v. Louisville & N. R. Co. 14 Ky.

L. Rep. 688, 21 S. W. 346; Labatt, Mast. & S. § 438; Ferren v. Old Colony R. Co. 143 Mass. 197, 9 N. E. 608, 15 Am. Neg. Cas. 481; Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277, 11 Am. St. Rep. 492, 33 N. W. 395; Hoth v. Peters, 55 Wis. 405, 13 N. W. 219; Linch v. Sagamore Mfg. Co. 143 Mass. 206, 9 N. E. 728; Showalter v. Fairbanks, M. & Co. 88 Wis. 376, 60 N. W. 257; Burlington & C. R. Co. v. Liehe, 17 Colo. 290, 29 Pac. 175.

Plaintiff was guilty of contributory negligence in that he was not in his proper place on the car, but, under the rules and custom, he was in a place where he had no right to be at the time of the accident. Southern P. Co. v. Ryan, — Tex. Civ. App. —, 29 S. W. 527.

If the car was in fact insufficient, the plaintiff knew it, and he also knew the danger, and, having elected to ride and to operate the car, he assumed the risk of injury. The Federal employers' liability act does not change the rule. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

Francis J. Murphy, for respondent.

This case is within the Federal employers' liability act. State courts of general jurisdiction not only may but must enforce a right arising under such act. Act of April 22, 1908, 35 Stat. at L. 65, chap. 149; Act of April 5, 1910, 36 Stat. at L. 291, chap. 143; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Supp. Ct. Rep. 169, 1 N. C. C. A. 875; Oliver v. Northern P. R. Co. 196 Fed. 432; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; Pederson v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Southern R. Co. v. Howerton, — Ind. App. —, 101 N. E. 121; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893; Horton v. Oregon-Washington R. & Nav. Co. 72 Wash. 503, 47 L.R.A.(N.S.) 8, 130 Pac. 897.

Defendant's negligence in not furnishing plaintiff with a sufficient number of cars with which to do the work assigned was the proximate cause of the injury. Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. ed. 256, 259; Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369.

The defense of contributory negligence set up by defendant in its answer is abolished by the Federal employers' liability act, and is held to be solely a question for the jury. Fogarty v. Northern P. R. Co. 74 Wash. 397, L.R.A.—, —, 133 Pac. 609; McDonald v. Railway Transfer Co. 121 Minn. 273, 141 N. W. 177; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172; Grand Trunk Western R. Co. v. Lindsay, 120 C. C. A. 166, 201 Fed. 836.

The doctrine of the assumption of the risk is also abolished by the act. Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123, L.R.A.1915C, 39; Wright v. Yazoo & M. Valley R. Co. 197 Fed. 94; Southern R. Co. v. Howerton, — Ind. App. —, 101 N. E. 121; Sandidge v. Atchison, T. & S. F. R. Co. 113 C. C. A. 653, 193 Fed. 867; Malloy v. Northern P. R. Co. 151 Fed. 1019.

The question whether continued working in circumstances of danger with knowledge thereof amounts to an assumption of risk is a question of fact, that must not be withdrawn from the jury. Beven, Neg. 1908, 3d ed. p. 620; New York, N. H. & H. R. Co. v. Vizvari, L.R.A.1915C, 14, 126 C. C. A. 632, 210 Fed. 118; Labatt, Mast. & S. 2586.

BURKE, J. In June, 1911, plaintiff was section boss for defendant, stationed at Cedar, Minnesota. He had had about four years' experience, and had under him at the time thirteen men, having had them for about ten or twelve days. He had one hand car. He testifies that he received a letter from his road boss directing him to take out these men and meet the adjoining section crew upon the following day. In the morning he loaded his crew upon the hand car and went to the place designated. What happened upon the return trip in the evening is related by himself: "We were going home on the way at 5:30, and we were packed close together, and one of my men, as he was very close to me, started to go to put on his coat on account of rain, so he lost his balance, and he started to fall, and I caught him from falling, and I was close to the pump, as it was pumping too hard and the pump threw me in the middle of the track. The best I could do, I shoved myself to one side a ways, and just as I got my body out of the track the wheel caught my foot and ran over my foot."

He further testifies:

Q. Now this order you got from your road master,—did he say anything to you with reference to the number of men you were to take?

A. Yes, sir.

Q. How many men did he tell you to take?

A. All my men.

. . . . . .

Q. You were not running any faster than you ordinarily ran?

A. I don't remember.

. . . . . .

Q. How large a hand car was it?

A. I don't know.

Q. Haven't any idea?

A. Just a small car.

Q. What is the number of it?

A. I don't remember.

Q. Isn't it a fact, that that car is about 4 feet, 8 inches wide, and 6 feet long, is that about the size of it?

A. I don't know, I cannot tell.

. . . . . .

Q. Which hand did you use to grab this other man with?

A. With left hand.

Q. Where did you grab him?

A. I grabbed him from his body.

Q. Where?

A. From his neck somewhere I grabbed him.

Q. Caught him in front?

A. Yes, sir.

Q. By the throat?

A. I grabbed him somewhere, I don't remember where. I grabbed him to protect him from falling.

. . . . . .

Q. How did you come to fall?

A. As I grabbed for the man to protect the man from falling, the pumping which was close to me—I could not stand myself in the same way, and I grabbed him and I went pretty close to the handle, and the

pump handle as it was running struck me over here and threw me in the middle of the track.

Q. If you had not attempted to grab the other fellow you would not have fallen off, would you?

A. No, sir.

Q. If you had not let go of the handle bar you would not have fallen off, is that right?

A. No, sir.

Q. You mean to say that you would have fallen off whether you hung on to the handle bar or not, is that what you mean to say?

A. If I would not grab him I would not fall off.

There is no evidence that plaintiff complained to the railroad company about the lack of hand cars. Plaintiff in his brief states his position as follows: "This action was brought under the statute (Federal employers' liability act, 35 Stat. at L. 65, 66, chap. 149, Comp. Stat. 1913, §§ 8657–8665), upon the theory that the hand car furnished to the plaintiff and his coemployees by the defendant railroad company was wholly insufficient and inadequate to carry the number of men required by the defendant company to ride upon the same, the gravamen of this action being negligence in furnishing an insufficient number or inadequate kind of instrumentality, not that the instrumentality furnished was in defective condition. The facts disclosed by the record in this case bring the action clearly within the terms of § 1 of the act." Section 1 of said act, to which reference is had above, reads as follows: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent

upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Plaintiff had judgment, defendant appeals, urging two propositions: First, that no negligence has been shown against the defendant; and, second, that plaintiff knew, appreciated, and assumed the risk of the injury.

Since its first passage in 1908, the Federal employers' liability act has been constantly before the courts. Comprehensive notes covering those decisions will be found in 47 L.R.A.(N.S.) page 38, and L.R.A. 1915C, at page 47. The constructions given by the various courts have settled many questions which otherwise might have arisen in this case. It is conceded that in the case at bar the state laws are superseded by said Federal legislation. See Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

The principal changes made by the Federal statutes from the state laws are the abrogation of the fellow-servant doctrine and that one guilty of contributory negligence is entirely precluded from recovery. Seaboard Air Line R. Co. v. Horton, supra, by which it has been established that the common-law defense of assumption of risk is open to the defendant except in cases of the violation of the statute passed for the protection of an employee.

(1) We now approach the first disputed question. Has any negligence been proven against the defendant company?

Negligence is the basis of all liability under the act, and there can be no recovery under the act in the absence of negligence on the part of the railroad company or some of its employees. Hardwick v. Wabash R. Co. 181 Mo. App. 156, 168 S. W. 328; Southern R. Co. v. Howerton, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369; Cincinnati, N. O. & T. P. R. Co. v. Goldston, 156 Ky. 410, 161 S. W. 246; Chesapeake & O. R. Co. v. Walker, 159 Ky. 237, 167 S. W. 128; Helm v. Cincinnati, N. O. & T. P. R. Co. 156 Ky. 240, 160 S. W. 945; Cincinnati, N. O. & T. P. R. Co. v. Swann, 160 Ky. 458, L.R.A.1915C, 27, 169 S. W. 886; Cincinnati, N. O. & T. P. R. Co. v. Hill, 161 Ky. 237, 170

S. W. 599; Collins v. Pennsylvania R. Co. 163 App. Div. 452, 148 N. Y. Supp. 777; Gee v. Lehigh Valley R. Co. 163 App. Div. 274, 148 N. Y. Supp. 882; Hobbs v. Great Northern R. Co. 80 Wash. 678, L.R.A.1915B, 503, 142 Pac. 20.

In the case at bar plaintiff, to sustain this verdict, must point out from the evidence some act of the railroad company or its employees that can be said to constitute negligence. He answers that it was a failure to furnish him with sufficient hand cars; that if the hand car had not been crowded the accident would not have occurred. The authorities already cited abundantly show that the negligence of the railway company or its employees must have been the proximate cause of the injury, and that the burden of proving such rests upon the plaintiff. Charleston & W. C. R. Co. v. Brown, 13 Ga. App. 744, 79 S. E. 932; Fish v. Chicago, R. I. & P. R. Co. 263 Mo. 106, 172 S. W. 340, 8 N. C. C. A. 538.

Whether or not the failure of the railway company to furnish sufficient hand cars constitutes negligence depends on a great many things: First, we find nothing in the record to indicate that plaintiff complained of the overcrowding or had ever demanded of any of his superior officers another hand car. Again, we have his testimony to the effect that if he had not attempted to save another man from falling from the car, he would not have been injured. Plaintiff was the section boss, and could have taken two trips to bring home this crew upon the company's time, if he had so desired. There was no rule or regulation or order from any source requiring him to take this load at one time. There is no evidence that any person in authority knew of the overcrowding of the hand car. In what way, then, was the railway company at fault? If this accident had happened to one of the section men working under plaintiff, and he had positive orders from plaintiff to make the trip, a different situation would exist, and we are unable to see wherein the company is liable for not furnishing extra hand cars which were never demanded of them. Respondent cites us to several cases which he claims sustained his theory. Knapp v. Great Northern R. Co. — Minn. —, 153 N. W. 849, is one of those decided in July of this year. An examination of the facts in that case shows that an employee of the railway company, a station agent, had the additional duty of running a pumping station operated by a gas-

olene engine. Upon the shafting of the pump were two dangerous set screws. Plaintiff slipped upon the floor and fell against the machinery, was pulled into the machinery by the protruding set screws, and was injured. The supreme court of Minnesota says: "It is also said plaintiff's negligence was the sole cause of the injury; that had he not slipped, or got so near that his clothing were caught, the accident would not have happened. We think it more reasonable to say that his stumbling would have been of no serious consequence had there been no negligence in leaving a dangerous place exposed upon the machinery." We fully agree with the doctrine of the Minnesota court, but do not think it is authority in the case at bar. We are also cited to Kreigh v. Westinghouse, C. K. & Co. 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619, but we find in that case the following language: "But there was testimony in the case tending to establish the unsafe character of the derrick when operated in the manner it was intended to be operated." In the case before us, it is conceded that the hand car was not defective. Plaintiff had control of the car, and could regulate the size of the crew and the speed of the car. He could have stopped the car while the crew put on rain coats. While there may have been some overcrowding, it certainly was not the proximate cause of the injury. On the other hand, it is plain that the direct cause of the injury was plaintiff's action in saving his friend from falling. This was a pure accident for which the railway company is not liable.

The consideration of the second phase of this question will be unnecessary. The judgment of the trial court is reversed and the action ordered dismissed.

S. M. THORNLEY v. O. G. LAWBAUGH.

(47 L.R.A.(N.S.) 1127, 143 N. W. 348.)

Action — attachment — special appearance — jurisdiction — discharge of attachment — motion.

In an action to recover damages, plaintiff caused an attachment to issue, and a levy was made upon land in McLean county as belonging to defendant, a nonresident, who under special appearance subsequently moved to discharge

the attachment and dismiss the action for want of jurisdiction in the court of person or property of the defendant. Substituted service of the summons and complaint had been made upon defendant without the state. *Held:* That defendant cannot be heard to deny his ownership of the property attached to defeat the limited jurisdiction of the court proceeding quasi *in rem* against the attached property. He cannot set up title in a stranger to defeat the attachment levy as upon his property.

Opinion filed September 22, 1913.

Appeal by plaintiff from an order of the district court of McLean county, *Winchester,* J., quashing an attachment and dismissing the action.

Reversed and remanded.

Hyland & Nuessle, for appellant.

The alleged trust, as between the defendant and the grantors in the deed conveying the property in question to him, is void. Rev. Codes 1905, §§ 4821, 4835, Comp. Laws 1913, §§ 5364, 5378; Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390.

Such alleged trust was a secret one, and did not appear in the instrument of conveyance, nor in any other manner of record. Rev. Codes 1905, § 5038, Comp. Laws 1913, § 5594; Enderlin Invest. Co. v. Nordhagen, supra.

The plaintiff had no knowledge of the execution and delivery of the instruments in question.

Where the grounds of attachment, or any of them, are the same as those in the main action, they cannot be adjudicated upon a mere motion to discharge the attachment. Newell v. Whitwell, 16 Mont. 243, 40 Pac. 866; Kuehn v. Paroni, 20 Nev. 203, 19 Pac. 273; Olmstead v. Rivers, 9 Neb. 234, 2 N. W. 366; Drake, Attachm. 418.

On defendant's motion to dissolve an atttachment, the court cannot pass upon the material issues set forth in the complaint. Those contained in the affidavit, if not the same, may be traversed. Newell v. Whitwell, 16 Mont. 243, 40 Pac. 866; Kuehn v. Paroni, 20 Nev. 203, 19 Pac. 273; Olmstead v. Rivers, 9 Neb. 234, 2 N. W. 366; Kneeland v. Weigley, 76 Neb. 276, 107 N. W. 574; Drake, Attachm. 418.

Conceding the trust, the defendant still had full legal title to the land. 27 Cyc. 1329, 1331, 1332, and cases cited.

If the property is not the defendant's, he suffers no injury thereby. Rev. Codes, 1905, § 6951; Comp. Laws 1913, § 7550; 4 Cyc. 775, and cases cited at note 22; 5 Century Dig. 800; Kneeland v. Weigley, 76 Neb. 276, 107 N. W. 574; Vogelman v. Lewit, 48 Misc. 625, 96 N. Y. Supp. 207; Wise v. Ferguson, — Tex. Civ. App. —, 138 S. W. 816; Drake, Attachm. 418.

Newton, Dullam & Young, and *Shelby L. Large,* for respondent.

It is a general proposition of law that although real property is transferred by a conveyance absolute in form, the transfer may be held to have been made in trust. 39 Cyc. 60, and cases cited. Ellison v. Ganiard, 167 Ind. 471, 79 N. E. 450.

The trust agreement between grantors and respondent, being in writing, was sufficient to satisfy the law. Rev. Codes 1905, § 4821, Comp. Laws 1913, § 5364; Wiggs v. Winn, 127 Ala. 621, 29 So. 96; Whetsler v. Sprague, 224 Ill. 461, 79 N. E. 667; Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565; Nolan v. Garrison, 151 Mich. 138, 115 N. W. 58.

The grantee of a prior unrecorded deed is entitled to priority over attaching creditors, where they had secured no judgment lien upon the property. See Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308; Bateman v. Backus, 4 Dak. 433, 34 N. W. 66; Murphy v. Plankinton Bank, 13 S. D. 501, 83 N. W. 575; Kohn v. Lapham, 13 S. D. 78, 82 N. W. 408; see collection of cases, 4 Cyc. 639; Lamont v. Cheshire, 65 N. Y. 30; 25 Cyc. 1480, notes and cases cited; West Missabe Land Co. v. Berg, 92 Minn. 2, 99 N. W. 209; Norton v. Williams, 9 Iowa, 528; Plant v. Smythe, 45 Cal. 161; Drake, Attachm. 6th ed. 223.

Where the only ground of attachment is the nonresidence of the defendant, it becomes important for the defendant to set up a lack of interest in the property, to show an improper issuance of the attachment for want of jurisdiction. See collection of cases, 4 Cyc. 775; Schlater v. Broaddus, 3 Mart. N. S. 321; Harris v. Taylor, 3 Sneed, 536, 67 Am. Dec. 576; Greenwood Grocery Co. v. Canadian County Mill & Elevator Co. 72 S. C. 450, 2 L.R.A.(N.S.) 79, 110 Am. St. Rep. 627, 52 S. E. 191, 5 Ann. Cas. 261; see 27 Cyc. 1330-C, cases cited; Bateman v. Backus, 4 Dak. 433, 34 N. W. 66; see 4 Cyc. 806, and cases cited; Lawrence v. Steadman, 49 Ill. 270.

Statutes providing for the extraordinary remedy of attachment are

construed strictly. William Deering & Co. v. Warren, 1 S. D. 35, 44 N. W. 1068.

Goss, J. This is an action for damages for the recovery of $1,071, alleged to have been sustained because of alleged fraud and deceit of defendant in procuring, for the sum of $1,925, the discharge of a real estate mortgage of the face value of $2,996 upon a half section of land in McLean county. The discharge is pleaded to have been obtained through the alleged misrepresentation of defendant, and through the error, mistake, and ignorance of the plaintiff, known to the defendant to be such. The propriety of the attachment in the particular action is not challenged, and we do not pass thereon. The only questions before us arise upon a motion to dissolve the attachment, made by the defendant under special appearance for the purpose of motion only. Upon the purported cause of action, upon an affidavit for attachment in regular form, reciting the nonresidence of defendant and usual bond, a warrant of attachment was issued and a levy made upon the land. After the filing of an affidavit for publication of summons, reciting defendant's ownership of property in this state, personal service of the summons, complaint, affidavit, undertaking, warrant and notice of attachment, was had upon the defendant at Rockford, Illinois, at which place defendant has at all times resided. The defendant then moved "for an order setting aside and dismissing the attachment proceedings, and that the action be dismissed on the ground that the court has not acquired jurisdiction of the person of the defendant, and has not acquired jurisdiction over any of the property of this defendant." This motion was based upon six affidavits and upon "the summons, complaint, attachment proceedings, and all the files herein," and was made under a notice "that the undersigned appears specially in this action for the defendant above named, for the purposes of this motion only, and for no other purpose." The affidavits are uncontroverted, and, together with the correspondence and documents exhibited therewith, prima facie establish that the real estate attached and upon which the discharge of the mortgage was procured by the defendant, though standing in his name upon the records of McLean county at the time of the attachment, was in fact the property of a brother and sister-in-law of the defendant, and had been by them transferred to

defendant that he might, for convenience and the accommodation of the owners, reconvey title or mortgage, and thereby secure means to meet a past-due mortgage upon said land held by a third party; and that the defendant did, without notice of the attachment, but subsequent thereto, so convey title, in fact as a mortgage, to another party, thereby procuring the money necessary to pay such past-due mortgage, and satisfied the same. That the party holding the title thus conveyed from the defendant in fact holds the same as security only, and as a mortgage for the amount advanced and in trust for the real owners, the brother and sister-in-law, resident in Salem, Oregon, and that this defendant, at the time of the attachment, was likewise a trustee of said real owners, having himself no beneficial interest in the property, and possessing the bare legal title only in trust for the real and equitable owners. The good faith of the defendant in thus acting for his brother and the brother's wife appears prima facie established, and the facts so recited by affidavits are not controverted. Upon the hearing the motion was granted, the attachment vacated, and the action dismissed "for the reason that the court has not acquired jurisdiction over the person of the defendant, or over any property of the defendant," to which order an exception was granted, supersedeas was allowed, and this appeal was taken, and a reversal of the order is asked.

Section 6850, Rev. Codes 1905, § 7438, Comp. Laws 1913, provides that "from the time of this service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction and to have control of all the subsequent proceedings." As the affidavit for and proceedings to obtain the attachment were regular, and on their face sufficient and a compliance with law governing the issuance of the warrant of attachment, upon its issuance the court was clothed with jurisdiction under § 6850, Rev. Codes 1905, § 7438, Comp. Laws 1913, over any property of the defendant subsequently attached, and was authorized, by virtue of the attachment, to proceed *in rem* against such property; and as a step in such proceedings *in rem,* substituted service, the equivalent of service by publication (Rhode Island Hospital Trust Co. v. Keeney, 1 N. D. 411, 48 N. W. 341), was made by the personal service of the summons and complaint without the state after the filing of the affidavit for publication. After this was done the court had, as against the property attached, and

so far as any rights of the defendant were concerned, the jurisdiction conferred by statute to proceed *in rem* against such property levied upon and held as the property of the defendant. With such power in the court, and at such stage of the proceedings, the defendant, under a special appearance, by a motion to discharge the attachment upon the ground of his nonownership of the property attached, invokes the power of the court to try such fact of ownership of the property attached, and to annul the proceedings *in rem* against the property. Whether this can be done is the question involved. We have nothing to do with the vacation of an attachment because of defects or falsity in the affidavit or proceedings upon which the attachment is based. Under § 6938, Rev. Codes, 1905, § 7537, Comp. Laws 1913, it is not required that the affidavit for attachment upon which the warrant issues shall contain as an essential any statement that the defendant has property, real or personal, within the state subject to levy. Defendant is seeking to litigate by his motion, not one of the matters recited in the affidavit for attachment, and which may be controverted under § 6962, Rev. Codes 1905, § 7561, Comp. Laws 1913, but is endeavoring to controvert an alleged fact brought into the case, not by the issuance of the attachment alone, but by the levy. He is not, then, moving to discharge the attachment proper because of falsity or defect in the attachment proceedings prior to levy, but, instead, is litigating the legality of the levy. Jurisdiction depends upon a levy upon defendant's property, and in a sense the motion thus goes to jurisdiction of subject-matter.

Research discloses a division of the authorities upon this particular question. The general rule is thus stated in 4 Cyc. 775: "As seizure of property which he does not own can do an attachment defendant no possible injury, it naturally follows that courts have refused to allow defendant to move to quash on the ground that he has no interest in the attached property; but although the reason applies with equal force to foreign attachments, a nonresident defendant has been allowed to show lack of interest in the attached property, to oust the court of jurisdiction." Citing Schlater v. Broaddus, 3 Mart. N. S. 321; Harris v. Taylor, 3 Sneed, 536, 67 Am. Dec. 576. And this statement in the text has been taken as the author's opinion in the more recent case of Greenwood Grocery Co. v. Canadian County Mill & Elevator Co. 72

S. C. 450, 2 L.R.A.(N.S.) 79, 110 Am. St. Rep. 627, 52 S. E. 191, 5 Ann. Cas. 261, vacating an attachment on the ground here urged. We do not, however, understand the author as announcing such a rule. One of the best considered cases on the subject is that of Exchange Nat. Bank v. Clement, 109 Ala. 270, 19 So. 814, on all fours in facts and procedure with ours, denying a defendant such relief. See also the recent case of Kneeland v. Weigley, 76 Neb. 276, 107 N. W. 574, following the earlier cases of Darnell v. Mack, 46 Neb. 740, 65 N. W. 805, and modifying Welch v. Ayres, 43 Neb. 326, 61 N. W. 635; also citing McCord v. Bowen, 51 Neb. 247, 70 N. W. 950; Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931; and Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. See Kelly v. Baker, 26 App. Div. 217, 49 N. Y. Supp. 973; Vogelman v. Lewit, 48 Misc. 625, 96 N. Y. Supp. 207; Mitchell v. Skinner, 17 Kan. 563; Langdon v. Conklin, 10 Ohio St. 439; Drake, Attachm. § 418; Century Dig. title "Attachment," § 800; and Decen. Dig., under "Attachment," § 235. As is said in Wise v. Ferguson, — Tex. Civ. App. —, 138 S. W. 816–819: "It will be time enough to determine their (third parties') rights, if any, when the power of the court to do so is properly invoked." In short, if defendant is not the owner, and has no interest in this property attached, the jurisdiction of the court being limited to declaring a lien thereon, and the disposal of such property thereunder, it being without power to render a personal judgment against a nonresident not personally served, and not voluntarily appearing, he can remain without the jurisdiction of the court, uninjured in property, as no property of his is taken, and as no valid personal judgment can be rendered against him. It is not for him to attempt to so protect the property of others not being proceeded against, and who will not be bound by the judgment *in rem* entered upon the basis of the defendant's ownership thereof. Besides, it is unsatisfactory and uncertain at best to attempt to try title to real property upon affidavits; and, were it permissible, sufficient doubt as to ownership exists on the record made to warrant that question being determined upon a fuller hearing than is possible upon a hearing upon *ex parte* affidavits. Western Grocery Co. v. Alleman, 81 Kan. 543, 27 L.R.A.(N.S.) 620, 135 Am. St. Rep. 398, 106 Pac. 460. And such is held in a similar case in Rhine v. Logwood, 10 La. Ann. 585, a jurisdiction where want of ownership is ground for vaca-

tion of the attachment and dismissal of suit where jurisdiction depends thereon.

The motion should have been denied. It is therefore ordered that the district court of McLean county vacate its order dismissing the attachment and the action, and that plaintiff recover judgment against defendant for the costs and disbursements on this appeal. Case remanded for further proceedings.

BRUCE, J. (specially concurring). I concur in the result of the above opinion, but do not wish to express an opinion on all of the questions involved and discussed. I have no doubt that as a general proposition "a defendant in an attachment case cannot set up title in a stranger to defeat the attachment levy as on his property." I am in doubt, however, whether such a rule applies where the defendant holds such property, or claims to hold such property, as a trustee for another. The reason I concur in the opinion is that the question of the ownership is one of the main issues presented by the complaint, and I do not believe that such issue should be allowed to be tried on affidavits and on a motion to quash the attachment.

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ACCEPTANCE.
Of dedication, see Dedication, 7, 9, 10; Evidence, 3.
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Secondary evidence as to contents of books of account, see Evidence, 7–9.

ACTION.
By trustee in bankruptcy, see Bankruptcy, 4, 5.
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As to parties, see Parties.

1. Following Randall v. Johnstone, 25 N. D. 284, it is *held* that where three separate deeds for three different tracts constituting parts of a certain larger tract are executed to different grantees while the grantor is out of possession, and the three grantees bring separate actions in the name of the grantor as nominal plaintiff for their separate uses, such use plaintiffs are the real parties in interest; and such actions are separate and distinct, and between different parties, and the decision of one suit is not a bar to the bringing of the other. Schmidt v. Johnstone, 53.

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ANTICIPATORY BREACH.
Of executory contract of purchase and sale, see Sale, 2.

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TIME FOR APPEAL.

1. Where the service of a paper by one party has the effect of setting time to run against the opposite party, the time which thus begins to run is twice as long when the service is by mail (§ 7954, Compiled Laws), as when made personally. More v. Western Grain Co. 369.
2. This rule is applicable to appeals. More v. Western Grain Co. 369.
3. An appeal to the supreme court, from an order of the district court, under § 7820, Comp. Laws 1913, must be taken within sixty days after notice thereof, and can be taken before such order is filed with the clerk of the district court. Lake Grocery Co. v. Chiostri, 616.
4. A second order denying a new trial made after expiration of the statutory period allowed for appeal from an order denying a new trial cannot extend or revive the lapsed period for appeal that had fully run against the original order denying a new trial, and when that order had become final and conclusive. Miller v. Thompson, 147.

RECORD ON APPEAL.

5. From a judgment of the district court that said railway company construct a crossing over their tracks near the village of Fingal, in Barnes county, the company appeals: *Held*:—
Under the record there is no question open on this appeal concerning the jurisdiction or authority of the State Board of Commissioners of Railroads to order in the crossing at the place in question. Thereafter, on the railway's appeal from said order the case was tried upon the merits anew on testimony taken in district court. Nowhere in the record, prior to appeal, was jurisdiction of the district court challenged. The parties could confer jurisdiction of the subject-matter upon that court, and have done so, without objection. And no question of jurisdiction arises upon the record, the parties being held to the theory of trial as had below. Minneapolis, St. P. & S. Ste. M. R. Co. v. Stutsman, 597.
6. Section 7657, Comp. Laws, 1913, authorizes the supreme court to settle a statement of case only in cases wherein the trial judge refuses to settle it in accordance with the facts. This section applies in cases where there

APPEAL AND ERROR—continued.

is a disagreement between the trial court and counsel as to the facts concerning the trial, and may be invoked when the trial court refuses to allow a truthful statement of what occurred at the trial; but it has no application to a case wherein the trial court refuses to settle a statement because it was not presented for settlement within the time prescribed by law, and no good cause was shown for the delay. Blood v. Howard, 602.

7. On an appeal in cases triable *de novo* in the supreme court under § 7846 of the Compiled Laws of 1913, which requires that the appellant must specify in the statement of the case either that he desires a retrial of the entire case or of certain designated questions of fact, the statement in the notice of appeal that appellant "demands a trial *de novo* of the action in the supreme court" is not a sufficient compliance therewith. State Bank v. Hileman, 417.

8. Upon a motion by respondent to strike from the files the statement of the case, for failure to contain proper specifications, appellant made a counter motion for an order remanding the record to enable him to make application to have proper specifications supplied, *held*, under the showing, that such counter motion should be granted upon the payment of certain motion costs as terms. State Bank v. Hileman, 417.

9. Upon motion to strike appellant's brief for failure to conform to the rules of this court, appellant, upon payment of terms, is granted leave to file a new brief, it appearing that the omissions are the result of inadvertence and that respondent will not be prejudiced by the granting of such leave. State Bank v. Hileman, 417.

DISMISSAL OF APPEAL; REINSTATEMENT.

10. An appeal from a second order denying a motion for new trial, made after expiration of the statutory period allowed for appeal from an order denying a new trial, is not taken from an appealable order, and is on motion dismissed; but without prejudice to an earlier appeal from the judgment. Miller v. Thompson, 147.

11. Where an appeal has been dismissed, and the remittitur transmitted to and filed in the trial court, the appellate court has lost jurisdiction of the case, and cannot recall the remittitur, or review its decision unless the order was based on fraud or mistake of fact, or the remittitur was sent down through inadvertence or mistake. Hilmen v. Nygaard, 419.

12. Upon a motion to reinstate an appeal, on the ground that the order of dismissal was entered against the appellant through his mistake, inadvertence, surprise, or excusable neglect, appellant must show apparent merit in the appeal. Hilmen v. Nygaard, 419.

APPEAL AND ERROR—continued.

Trial de Novo on Appeal.

See also supra, 7; infra, 37; Escrow, 9; Judgment, 1; Pleading, 4; Taxation, 4, 6; Trusts, 1.

13. Findings of the trial court that the mortgage in question was fraudulently issued and *ultra vires*, and that this fact was known to the Investors' Syndicate before its execution have ample support in the evidence, and are adopted upon trial *de novo* by this court. Investors' Syndicate v. North American Coal & Min. Co. 259.

Objections and Exceptions; Raising Questions in Lower Court.

See also supra, 5.

14. Where the defendant does not ask the court to eliminate questions which are raised in the pleadings from the jury's consideration, he cannot complain that an issue raised by such pleadings is improperly submitted to the jury. Wyldes v. Patterson, 282.
15. Where appellant in a law case fails to challenge the correctness of the lower court's ruling by any specification or assignment of error, his appeal presents nothing to the supreme court for consideration. Massett v. Schaffner, 579.
16. Following the well-settled rule it is held that, in the absence of a request for more specific instructions, error cannot be predicated upon the giving of instructions which state the law correctly as far as they go, but which are not as full and specific as they should have been. Swords v. McDonell, 494.

Abuse of Discretion.

17. A motion for new trial on the ground of newly discovered evidence is addressed largely to the sound, judicial discretion of the trial court, and the appellate court will not interfere unless a manifest abuse of such discretion is shown. McGregor v. Great Northern R. Co. 471.
18. A motion for a new trial on the ground of misconduct of a juror is addressed largely to the sound judicial discretion of the trial court, and the appellate court will not interfere unless it is shown that such discretion has been abused. State v. Cary, 67.

APPEAL AND ERROR—continued.

19. This rule also applies to a motion for a new trial on the ground of newly discovered evidence. State v. Cary, 67.

20. In the instant case it is *held* that this court cannot say that the court abused its discretion in denying a new trial. It is also *held* that the evidence is sufficient to sustain the verdict. State v. Cary, 67.

21. The admission or rejection of photographs is largely within the discretion of the trial court; and whether they are sufficiently verified or whether they may be useful to the jury are preliminary matters, which are addressed to him. Wyldes v. Patterson, 282.

ERRORS WAIVED OR CURED BELOW.

22. Plaintiff sued upon a $110 note. Defendant answered, alleging usury. Plaintiff thereupon served amended complaint, alleging that said note should be for $100, but through mutual mistake was made to read $110. Defendant filed amended answer to said amended complaint, generally denying the allegations thereof. No objection was made to the condition of the pleadings at the time of the trial, and during the course thereof the trial court informed the attorney for plaintiff that defendant could rely upon both of the answers filed. At the close of all the testimony, plaintiff moved for a directed verdict, for the reason that the defense of usury was not properly pleaded. Trial court stated that he was not prepared to rule at that time. Before the ruling, application was made by defendant to file an amended answer, incorporating the plea of usury, if the same were not already contained in his pleadings. This motion was allowed, and the plaintiff was offered all the additional time he needed to prepare for trial upon the new answer, which was refused by him, and a demurrer to the amended complaint interposed. This was overruled, and the jury found for the defendant. The court erred in holding that the original pleadings were in effect at the trial, but the same is cured. Sheimo v. Norqual, 343.

REVIEW OF FACTS.

23. The finding of jury on a disputed question of fact is binding upon the appellate court, if there is any substantial competent evidence to sustain such finding. State v. Cary, 67.

24. From a conviction of the crime of extortion, defendant appeals. It is *held* that the evidence is sufficient to sustain the verdict. State v. Gilbert, 537.

WHAT ERRORS WARRANT REVERSAL.

25. The statutory rule that on appeals in criminal cases this court shall give

APPEAL AND ERROR—continued.

judgment without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties is applied and enforced, it clearly appearing that none of the rulings complained of could have prejudicially affected the substantial rights of appellant. State v. McKone, 547.

26. Appellants attack five findings of fact, but, as stated in the opinion, the same are immaterial to a decision, and therefore not reviewed. Northwestern Mut. Sav. & L. Asso. v. White, 348.

27. Appellant was convicted of the crime of importing intoxicating liquors for sale as a beverage, and he has appealed, assigning a large number of specifications of error relating to rulings in the admission of testimony. In the main, the testimony was of a documentary character, consisting of bills of lading and receipts showing, without dispute and beyond all doubt, numerous large consignments of liquors to appellant from points in Minnesota. It was also shown that appellant held both a retail and wholesale liquor dealers' license from the Federal government. Appellant's guilt was established beyond all question. In the light of the record it is held, for reasons stated in the opinion, that none of the rulings complained of, even if erroneous, were of a prejudicial character. State v. McKone, 547.

28. A statement in a certificate of the collector of internal revenue which is attached to a certified copy of the record of special taxpayers and registers of his district does not render the admission of such record reversible error because it states in substance that the record shows the issuance of United States special tax stamps to the defendant, when the record upon its face shows the same fact. State v. Kilmer, 442.

29. It was error in the trial court to reject the offer of the defendant to show an agreement with the Courier-Forum Publishing Company to the effect that said note would not be valid unless a consolidation of the Courier-News and Forum was effected. This evidence was competent to show a defense in the hands of the original holder of the note sufficient to put the plaintiff on proof as an innocent purchaser in due course. Northern Sav. Bank v. Kelly, 582.

30. It was error in the trial court to restrict the cross-examination of the president of the defunct Courier-Forum Publishing Company when called by the defendant under the statute. Such testimony was competent to show custody of the books of said defunct corporation and for the purpose of showing any knowledge that the witness may have had of the subscriptions to the stock of said corporation. Defendant was given a certain written instrument wherein it was agreed that the note should be invalid unless certain Democrats were to subscribe $15,000 to such corporate stock, or the defendant's note should be invalid. Defendant should have been al-

APPEAL AND ERROR—continued.

lowed to prove the failure to secure those subscriptions. Northern Sav. Bank v. Kelly, 582.

31. It was also error in the trial court to exclude questions asked of the president of the plaintiff tending to show that at the time of the purchase of the note he knew of the defense outlined in the answer. Northern Sav. Bank v. Kelly, 582.

32. An instruction which mistakes the law as applied to the issues and the proof is fatal to a recovery unless it affirmatively appears that it was non-prejudicial. Swords v. McDonell, 494.

33. Applying the last stated rule it is held prejudicial error, where special damages are neither alleged nor proved, to instruct the jury that "damages for a personal injury consist of three principal items: First, the expense which the injured person is subjected to by reason of the injury complained of." In the light of the record, the giving of this instruction was very prejudicial. Swords v. McDonell, 494.

34. It was not reversible error for the court to use the term "proximate cause" without otherwise defining it, in absence of a request for an appropriate instruction. McGregor v. Great Northern R. Co. 471.

35. Where an instruction is correct as far as it goes, a party to the action who deems the same not sufficiently explicit should present requests for more specific and comprehensive instructions. McGregor v. Great Northern R. Co. 471.

36. The charge of a court to a jury is entitled to a reasonable interpretation. It is to be construed as a whole, in the same connected way in which it is given, and upon the presumption that the jury did not overlook any portion that gave due weight to it as a whole. If, when so construed, it presents the law fairly and correctly, and in a manner not calculated to mislead the jury, it will afford no ground for reversing the judgment, although some of its expressions if standing alone might be regarded as erroneous, because there may be an apparent conflict between isolated sentences, or because some one of them, taken abstractly, may have been erroneous. Wyldes v. Patterson, 282.

JUDGMENT.

37. Plaintiff brings suit for divorce. Defendant, by cross complaint, alleges cause for divorce. After trial on the merits a divorce is denied both parties and the complaint and cross complaint dismissed. Defendant appeals for trial *de novo*. Affirmed, but with an allowance to defendant of $250 attorney fee in this court, and costs. Gray v. Gray, 618.

APPEAL AND ERROR—continued.

38. Reversed and remanded by consent of parties. Hodgins Transfer Co. v. Carlson, 546.

ARREST.

1. A motion to quash a warrant of arrest is properly denied where such warrant was issued out of a county court based upon a criminal complaint in all respects regular, and which is verified by the oath of the complaining witness, although it is made to appear that such witness had no personal knowledge of the facts at the time of making such complaint. State v. Ramsey, 626.

2. Section 18 of the Constitution of North Dakota, which provides that ". . . no warrant shall issue but upon probable cause, supported by oath or affirmation . . . ," construed and held not to require actual, personal knowledge of the person taking such oath or affirmation, but merely that the complaint shall be positive in form, instead of upon information and belief, and shall be verified as aforesaid. State v. Ramsey, 626.

ASSUMPSIT.

Recovery back of taxes paid, see Taxation, 8, 9.

ASSUMPTION OF RISK.

By care taker of stock during transportation, see Carriers, 3.

Burden of proof as to, see Evidence, 6.

By servant, see Master and Servant, 3–5.

ATTACHMENT.

Validity of attachment levied within four months of bankruptcy, see Bankruptcy, 1–3.

1. In an action to recover damages, plaintiff caused an attachment to issue, and a levy was made upon land in McLean county as belonging to defendant, a nonresident, who under special appearance subsequently moved to discharge the attachment and dismiss the action for want of jurisdiction in the court of person or property of the defendant. Sustituted service of the summons and complaint had been made upon defendant without the state. *Held*,—that defendant cannot be heard to deny his ownership of the property attached, to defeat the limited jurisdiction of the court proceeding quasi *in rem* against the attached property. He cannot set up title in a stranger to defeat the attachment levy as upon his property. Thornley v. Lawbaugh, 651.

BANKRUPTCY.

1. The language of § 67 of the bankruptcy act of 1898, which provides that "levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt,"—relates merely to levies, judgments, attachments, and liens which are acquired through legal proceedings, and does not affect contractual or quasi contractual liens. A scrupulous care, indeed, is evidenced throughout the act to save all such rights and liens which are obtained in good faith from the bankrupt. Gray v. Arnot, 461.
2. Where within four months of the filing of a petition in bankruptcy an action is brought by the vendor of goods to recover the purchase price of the same, and as subsidiary to such action an attachment is issued and levied against such goods, under the provisions of § 6938, Rev. Codes 1905, being § 7537 of the Compiled Laws of 1913, the lien of such attachment and of the judgment rendered in such attachment proceedings is nullified by the petition. Gray v. Arnot, 461.
3. Where an action is brought by the vendor of goods to recover the purchase price thereof, and an attachment is issued and levied on such goods in said proceeding, and within four months of the bringing of such action a petition in bankruptcy has been filed, the trustee in bankruptcy has no right or power to intervene in the action in order to gain the possession of the goods. The action being for money merely, and the lien of the attachment having been nullified by the filing of the petition in bankruptcy, such trustee cannot, by filing a petition in intervention, transform the action into one for the recovery of goods or for the trial of the right of title thereto. Gray v. Arnot, 461.
4. The trustee of a bankrupt estate may bring an action in the state courts in order to gain possession of property which belongs to the estate. Gray v. Arnot, 461.
5. Where an attachment proceedings and the lien thereof have been nullified by the filing of a petition in bankruptcy, the trustee will not be precluded from recovering the possession of the property by the mere fact that after the filing of such petition the goods have been sold under such attachment proceedings. Gray v. Arnot, 461.
6. After the lien of an attachment has been nullified by the filing of a petition in bankruptcy, the goods can no longer be said to be *in custodia legis*, so that an action against the sheriff for the possession thereof cannot be maintained. After the nullification of such lien of attachment, the sheriff holds merely as an involuntary bailee for the benefit of him who is entitled to

BANKRUPTCY—continued.
the possession of the goods, and who in such case is the trustee in bankruptcy. Gray v. Arnot, 461.

BANKS.
Certification of check by, see Checks.
Taxation of, see Taxation.

BEST AND SECONDARY EVIDENCE. See Evidence, 7–9.

BILLS AND NOTES.
1. Suit upon promissory note. Defense, failure of consideration, wrongful transfer of said note, and entire lack of consideration. Certain rulings of the trial court assigned as error. The proof of indorsement made by the president of the defunct Courier-Forum Publishing Company together with the admissions of the answer and the possession of the note by plaintiff, made a prima facie showing of indorsement and ownership. Northern Sav. Bank v. Kelly, 582.

BOOKS OF ACCOUNT.
Secondary evidence as to contents of, see Evidence, 7–9.

BRIEFS.
On appeal, see Appeal and Error, 9.

BROKERS.
1. Where a written contract of employment of a selling and soliciting agent provides that such agent shall receive a 10 per cent commission on the sales made and accepted under his contract, and further expressly provides that "no commission shall be allowed for sales made where other goods or property is taken in part payment," proof that such agent introduced to his employer a customer who, before such introduction, had told the agent that he would purchase a threshing machine from such employer if it was satisfactory to him, and later went with such agent to the office of the employer, and there said that he would purchase such machine if satisfactory to his son, but would make no definite contract at the time, a conversation also being held at such time in the presence of the employer and of the agent in relation to the taking of a secondhand machine in trade, and the would-be purchaser and the agent returned without making a definite contract, and later the purchaser returned to the office of the principal with

BROKERS—continued.

his son and approved of the machine, and made a contract with the employer for its purchase on condition that he could turn in a secondhand machine in part payment, which agreement was consummated,—such agent is not entitled to a recovery, upon the written contract, of the 10 per cent commission provided for in said agreement. Case Threshing Mach. Co. v. Loomis, 27.

2. Defendants appointed one Weese, a sales solicitor, to obtain purchaser for real estate in North Dakota under contract set forth in the opinion, and which contract contained the following clause: "No advertisement or other representations on your part that you are for any purposes an agent of said company will be permitted, the terms 'sales solicitor' being invariably used, and any violation of this provision shall of itself revoke this appointment and terminate your authority thereunder." Plaintiff alleges that Weese induced him to purchase land by false representations as to its quality and value. *Held*, for reasons stated in the opinion, that the action will not lie, as it was not within the scope of the authority of Weese to make any representations as to the quality or value of the land. Hodson v. Wells & D. Co. 395.

BURDEN OF PROOF.

In general, see Evidence, 2–6.

CANCELATION.

Of order for goods, see Sale, 2–10.

Of land contract, see Vendor and Purchaser, 3.

CAPITAL STOCK.

Taxation of, see Taxation.

CARETAKER.

Injury to caretaker of stock during transportation, see Carriers.

CARRIERS.

1. It is *held* that, under the terms of the contract and the circumstances of the case, a caretaker of a shipment of horses, who at the time of the accident was riding in the stock car instead of in the caboose, was not guilty of contributory negligence as a matter of law. McGregor v. Great Northern R. Co. 471.

2. A person in charge of live stock, riding under a contract which evidences his

CARRIERS—continued.

right of transportation on the train transporting the stock shipment, and contemplates his carriage to care for the stock, is a passenger for hire. McGregor v. Great Northern R. Co. 471.

3. A person so traveling will be deemed to have assumed all risks reasonably incident to the mode of transportation utilized, but not those risks and dangers produced by unnecessary and unusual occurrences not incident to the proper handling of a train of that kind. McGregor v. Great Northern R. Co. 471.

4. A railway company is not relieved from its obligation to exercise great care for the safety of such passenger. McGregor v. Great Northern R. Co. 471.

CERTIFICATION.

Of check, see Checks.

CHECKS.

Acceptance by depositary in escrow of check in lieu of cash payment, see Escrow, 1, 2, 5, 6.

Pleading in action on certification of check, see Pleading, 7–9.

1. Where a check is certified by the drawee bank it is immaterial whether the makers of the check had a deposit in the bank sufficient to meet the same or not in so far as the liability of the certifying bank is concerned. Security State Bank v. State Bank, 454.

CHILDREN. See Infants.

CIRCUMSTANTIAL EVIDENCE.

Admissibility of, see Evidence, 10.

CLOUD ON TITLE.

Right to jury to assess damages, see Jury.

Pleading in action to quiet title, see Pleading, 4.

Validity of tax deed constituting cloud on title, see Taxation, 4, 6.

1. An action to cancel a contract and remove a cloud upon the title of plaintiff's land, caused by the recording of such contract, in the office of the register of deeds, is essentially an equitiable action. Schmidt v. Johnstone, 53.

COMMISSIONS.

Of real estate agent, see Brokers, 1.

COMMON CARRIERS. See Carriers.

COMPENSATION.
Of real estate agent, see Brokers, 1.

COMPLAINT.
Of plaintiff, see Pleading.

CONDITIONS.
Of delivery in escrow, see Escrow.

CONSIDERATION.
For note, see Bills and Notes.
For contract, generally, see Contracts, 1, 4.

CONSTITUTIONAL LAW.
As to imprisonment for debt, see Imprisonment for Debt.
Right to trial by jury, see Jury.

CONTEST.
Of primary elections, see Elections.

CONTRACTS.
Action to cancel, as a cloud on title, see Cloud on Title.
Oral evidence as to written contract, see Evidence, 19.

1. A threat to cause a contract to be broken which another has made is not a valid consideration for a new contract between the person who makes the threat and the one who is threatened. Case Threshing Mach. Co. v. Loomis, 27.
2. A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise. Comp. Laws 1913, § 5938. Case Threshing Mach. Co. v. Loomis, 27.
3. In an action to recover a balance due as rent under a written lease, the sole defense interposed is that such contract, shortly after it was made, was modified and superseded by an oral agreement between the parties. *Held*, that there is no competent testimony in the record in support of this defense, and the trial court properly directed a verdict in plaintiff's favor. Wynn v. Coonen, 160.

CONTRACTS—continued.

4. Such alleged oral agreement was without consideration, and, furthermore, a written contract, in so far as it is executory, cannot be modified or superseded by an unexecuted parol agreement. Wynn v. Coonen, 160.

CONTRIBUTORY NEGLIGENCE.

Burden of proof as to, see Evidence, 6.
Of servant, see Master and Servant, 5.
As question for jury, see Trial, 5.

COPIES.

Admissibility in evidence, see Evidence, 12, 13.

CORPORATIONS.

Intervention by stockholder, see Parties.
Taxation of, see Taxation.

1. The policy of the incorporation laws of the state of North Dakota is that the capital stock of a corporation shall be fully subscribed as soon as possible, and when such capital stock is sold at par, a stockholder has no ground for complaint, even though the additional money may not be absolutely necessary to the existence of the corporation. Cross v. Farmers Elevator Co. 116.
2. The subscribers to the stock of a corporation may enter into an agreement under the terms of which neither themselves nor subsequent subscribers to the stock will be entitled to and receive more than the stipulated number of shares, and this agreement will be binding on the parties to it though not on the corporation. Cross v. Farmers Elevator Co. 116.

COSTS.

Imprisonment for nonpayment of, see Imprisonment for Debt.

CRIMINAL LAW.

Appeal in criminal case, see Appeal and Error.
As to arrest, see Arrest.
As to evidence in criminal case, see Evidence.
As to extortion, see Extortion.
Imprisonment for nonpayment of costs in criminal prosecution, see Imprisonment for Debt.

CRIMINAL LAW—continued.
As to sufficiency of indictment or information, see Indictment and Information.
Unlawful sale of liquors, see Intoxicating Liquors.
As to rape, see Rape.
Instructions in criminal cases, see Trial.
Witnesses in prosecution, see Witnesses.

1. Section 10628, Compiled Laws of 1913, provides that during each term of the district court at which a grand jury has not been summoned, the state's attorney shall file informations against all persons accused of having committed a crime or public offense, and authorizes the filing of such an information and the trial of the defendant at such term, even though the preliminary examination was held during such term of the court, provided that a reasonable time and opportunity is afforded for the preparation of his defense. State v. Kilmer, 442.
2. Criminal prosecutions may be instituted in the county courts having increased jurisdiction by the filing of a complaint as distinguished from an information. The filing of an information is contemplated only in cases where a preliminary examination is had before a committing magistrate and the accused bound over to the county court. State v. Ramsey, 626.

CUSTODY.
Of children, see Infants.

DAMAGES.
Error in instructions as to, see Appeal and Error, 33.
Right to jury to determine amount of, see Jury.
For breach of contract of sale by purchaser, see Sale, 3–10.

DEBT.
Imprisonment for, see Imprisonment for Debt.

DEBTOR AND CREDITOR.
Insolvency of debtor, see Bankruptcy.
Lien of creditor, see Liens.

DECLARATIONS.
Evidence of, see Evidence, 21, 22.
In pleading, see Pleading.

DEDICATION.

Presumption of acceptance of, see Evidence, 3.

1. A statutory dedication is in the nature of a grant. Ramstad v. Carr, 504.
2. There can be no dedication, in the absence of an intent on the part of the owner to dedicate. Ramstad v. Carr, 504.
3. Such intent, however, is to be ascertained from the acts of the owner, and not from the purpose hidden in his mind. Ramstad v. Carr, 504.
4. When the owner plats his property, and sells lots with reference to the plat, he thereby manifests an indisputable intention to dedicate the public places shown on such plat. Ramstad v. Carr, 504.
5. The word "park" written upon a lot of land designated upon such plat is as significant of a dedication and of the use to which the land is dedicated, as is the word "street" written thereon. Ramstad v. Carr, 504.
6. The designation of a lot by a number upon a plat, laid out under the statute which requires persons making the plat to describe all lots intended for sale by progressive numbers, is not incompatible with a purpose on the part of the owner to dedicate the lot to public uses. Ramstad v. Carr, 504.
7. And such dedication does not become effective or binding upon the municipality, or render it subject to the duties or liabilities of ownership until the dedication has been accepted. Ramstad v. Carr, 504.
8. A dedication may be rejected formally; or rejection may be implied from acts on the part of the municipality clearly indicating an intention to reject. Ramstad v. Carr, 504.
9. Officers for assessing taxes do not represent the public for the acceptance of dedications, and the fact that the land dedicated is assessed and taxes collected thereon by the municipality does not of itself negative an acceptance of the same for public purposes. Ramstad v. Carr, 504.
10. Formal acceptance of a dedication is not required, but such acceptance may be manifested by any act or conduct on the part of the proper municipal officers, which clearly indicates an assumption of dominion over the property dedicated. Ramstad v. Carr, 504.
11. A statutory dedication by the filing of a plat, and the sale of lots by the owner with reference thereto, can be withdrawn only by a vacation of the plat under the statute. Ramstad v. Carr, 504.
12. Such dedication continues effective until withdrawn by the donor or rejected by the donee. Ramstad v. Carr, 504.

DEEDS.

In escrow, see Escrow.

Tax deeds, see Taxation, 4–6.

DEFENSE.
In attachment proceeding, see Attachment.

DEFINITION.
Parks, see Parks.

DELIVERY.
In escrow, see Escrow.
Of mortgage, see Mortgage.

DEMONSTRATIVE EVIDENCE. See Evidence, 15–18.

DEMURRER. See Pleading, 7–9.

DENIAL.
In pleading, see Pleading, 5.

DE NOVO.
Trial *de novo,* see Appeal and Error, 7, 13, 37; Escrow, 9; Judgment, 1; Pleading, 4; Taxation, 4, 6; Trusts, 1.

DILIGENCE.
In moving for new trial, see New Trial, 4.

DIRECTION OF VERDICT. See Trial, 6, 7.

DISCRETION.
Review of, on appeal, see Appeal and Error, 17–21.

DISMISSAL.
Of appeal, see Appeal and Error, 10–12.

1. Plaintiff and appellant, by this action in equity, seeks to have a justice's judgment declared void for the alleged reason that the justice lost jurisdiction through a failure to enter such judgment on the day of the trial. On defendant's motion, judgment on the pleadings was entered dismissing the action. *Held,* proper, for reasons stated in the opinion. Batzer v. Halliday, 361.

DISMISSAL—continued.

2. Defendant's notice of motion stated that he would move for a dismissal of the "complaint" and "that judgment of dismissal of the action be entered accordingly, with costs," etc. Such notice also contained a recital "that the said motion will be made on the pleadings and all papers and instruments filed in the above-entitled action." *Held*, that such notice sufficiently apprised plaintiff of the fact that defendant would ask for a dismissal of the action upon the ground that the complaint did not state a cause of action. Batzer v. Halliday, 361.
3. *Held*, that the trial court, for reasons stated in the opinion, properly refused to strike case from the calendar. Schmidt v. Johnstone, 53.

DIVORCE.

Judgment on appeal in divorce suit, see Appeal and Error, 37.

DOCUMENTARY EVIDENCE. See Evidence, 11–14.

ELECTION OF REMEDIES.

1. Defendant offered to prove that prior to the institution of the present action plaintiff had distrained some live stock, owned by the defendant, as trespassers. The offer was properly rejected because it did not show an election of remedies. Farin v. Nelson, 636.

ELECTIONS.

1. The provisions of chapter 109, Laws 1907, known as the primary election law, and especially § 31 thereof, construed and *held*, to authorize a contest in the district court between aspirants for nomination as candidate for the office of member of the legislative assembly. It is accordingly *held*, that the district court had jurisdiction to hear such statutory contest, and it was error for it to refuse so to do. Leu v. Montgomery, 1.
2. Section 47 of the state Constitution, which vests in each house of the legislative assembly the power to judge of the election and qualifications of its own members, does not prevent the legislature from vesting jurisdiction in the courts to hear and decide contests involving nominations of candidates for such office, at a primary election. A primary for the purpose merely of making nominations is not an election, within the meaning of such constitutional provision. Leu v. Montgomery, 1.
3. The provisions of chapter 109, Laws 1907, construed and *held*, to furnish ample rules of procedure to govern the commencement, prosecution, and trial of such contests. Leu v. Montgomery, 1.

EMPLOYERS AND EMPLOYEES. See Master and Servant.

EQUITY.

Relief in, from judgment, see Judgment, 2.
Limitation of actions in equity, see Limitation of Actions, 1.
Subrogation in, see Subrogation.
See also, Cloud on Title; Injunction.

1. A court of equity, having once obtained jurisdiction of a controversy, will retain it for the purpose of administering complete relief and doing entire justice between the parties with respect to the subject-matter. Schmidt v. Johnstone, 53.
2. He who comes into a court of equity must come with clean hands, and a promoter of a corporation who has prepared and caused to be circulated a stock subscription form or contract by which some, at least, of the subscribers to the capital stock of a corporation, are made to agree not to purchase more than ten shares of such stock, and who in violation of such form or agreement has himself, before the capital stock of said corporation has been subscribed in full, obtained control of said corporation by obtaining an issue of stock to "dummies," and which stock he has afterwards had assigned to him, cannot come into a court of equity and complain because the directors of such corporation have taken such control from him by the sale of the balance of the capital stock of said corporation, even though such sale was for the principal purpose of depriving him of such control. Cross v. Farmers' Elevator Co. 116.
3. Under the circumstances of this case, equity will not allow the Whites to receive the property clear of all encumbrances. Conceding the invalidity of the $10,000 mortgage, the prior encumbrances must be restored and plaintiff subrogated to the same, and will recover the interest, taxes, insurance, and other expenses incurred by reason of taking the defective mortgage. Northwestern Mut. Sav. & L. Asso. v. White, 348.

ERROR. See Appeal and Error.

ESCROW.

1. One Havlicheck and wife entered into a written contract of sale of 400 acres of land, near Minot, to plaintiffs. Eighty acres of Illinois land was to be accepted in part payment. The contract provided for inspection of the Illinois land. It was reported to be satisfactory. H. and wife then executed to Thornhill their warranty deed to the 400 acres and a bill of sale of the personal property thereon, pursuant to the contract. Plaintiffs executed

ESCROW—continued.

their deed to the Illinois land. All deeds, bill of sale, and the preliminary contract of sale, accompanied by a written escrow agreement, were deposited in the Second National Bank of Minot. This bank received as depositary in escrow all of the deeds to be delivered according to the conditions of the written escrow agreement, which provided that the deeds were "to be delivered to the parties who are entitled to same upon performance of the agreements set forth" in the preliminary agreement of purchase and sale of the land. The original sale agreement stipulated for an initial payment of $1, made and received; that certain mortgages should be assumed by the purchaser; and the further payment of $3,000 in cash should be made by Thornhill to H., but with no definite time fixed for payment. Abstracts of title to all lands here and in Illinois were also to be furnished. No stipulation was made for inspection of them. These papers were so deposited in escrow on April 15, 1912. Four days later H. and wife executed and delivered their warranty deeds, immediately placed of record, to the 400 acres to defendant, Olson, as grantee, who, under the findings of the jury, it must be assumed, bought with notice of the escrow arrangement and the previous deposit of the papers thereunder with the bank. On April 23d plaintiffs procured title to the Illinois tract, which before that time they did not own, although they had attempted to deed same by the invalid deed in which the wife of one of said grantors had not joined, and which deed had been one of the instruments deposited in escrow. May 11th a second and valid deed to the Illinois tract was deposited with the bank to replace the invalid one, or to cure any defect of title thereunder, and on that day plaintiff served notice on H. and wife to appear at the bank at a certain hour that day to close up the escrow matter. They did not appear. On April 19th Thornhill served Olson with a written notice of the escrow arrangement, stating that "all interest, right, or title you acquire in said premises you take subject to the equities of the undersigned under and by virtue of said contract for deed." On May 11th plaintiffs, acting by their agent, the Brush-McWilliams Company, deposited with said bank a check drawn by plaintiffs on an Illinois bank and indorsed by the Brush-McWilliams Company, which check was payable to said bank, as payee, for the sum of $3,000. The bank thereupon treated the check as cash, but retained it, and it never has been cashed. On deposit with it of said check, the bank delivered, on May 11th, the deed of H. and wife, held by it in escrow, to plaintiffs. Neither H. and wife nor Olson has ever participated in the escrow proceedings after April 15th, nor done any act to recognize the same, or toward performance of the original contract of sale, after the deposit in escrow made April 15th; but on the contrary have disregarded the same. Olson having claimed at all times to have been a good faith purchaser without notice of the escrow proceedings. He has paid H. and wife, part

ESCROW—continued.

if not all, of the consideration for his deed. The action, though in equity to quiet title, is based upon title arising under a valid delivery by the bank to plaintiffs of the deed in escrow. It was tried as a law action to a jury, which found for plaintiffs for possession and $750 damages for detention thereof. Findings and conclusions were also made in accordance with and supplemental to the verdict. Defendant appeals as in an action at law on specifications of error, and not as on a trial *de novo*, and the case is submitted on appeal as a law case on an appeal from both an order denying a new trial and from the judgment. *Held:*

That the delivery of the deed by the bank to plaintiffs was unauthorized, and was in disregard of the escrow agreement in that it was delivered without a cash payment made by plaintiffs of $3,000 to said depositary, as was stipulated for by the escrow agreement before a valid second delivery of the deed could be made. Thornhill v. Olson, 81.

2. Under the escrow agreement said depositary was without authority to accept a check as and in lieu of a cash payment, and that the doctrine of substantial performance does not apply to a second delivery of deeds under a written escrow agreement. Thornhill v. Olson, 81.

3. The conditions stipulated for in an escrow agreement in writing, upon which the second delivery of the deed shall be made, are conditions precedent to its valid second delivery, and the consent of the grantor to its second delivery is deemed to be withheld until full compliance has been had with the escrow agreement. As a deed delivered without consent of the grantor passes no title, consent being essential to its validity, a deed delivered by the depositary in violation of the escrow agreement is no delivery, and passes no title. Thornhill v. Olson, 81.

4. The depositary is the agent of both parties, but neither for one more than the other, and is empowered to aid neither; and is merely a conduit used in passing title for convenience and safety. A delivery by the depositary in excess of its powers is a nullity. Thornhill v. Olson, 81.

5. The reception by the bank of the check in lieu of money did not amount to a loan of money by the bank to the plaintiffs, and will not be treated as such. Thornhill v. Olson, 81.

6. The act of the depositary in accepting the check as cash was not the act of the grantors, but was void as in excess of authority conferred by them upon the bank. Thornhill v. Olson, 81.

7. The question involved is one of performance of the escrow agreement,—not of the ability of the plaintiffs to perform that agreement,—as such ability, without full performance, cannot amount to compliance. Thornhill v. Olson, 81.

8. It is assumed, without deciding, that the deposit of papers with the bank amounted to a deposit in escrow. Plaintiffs can have no standing on their

ESCROW—continued.

claim of title, unless the same constituted an agreement in escrow. Thornhill v. Olson, 81.

9. The case is treated on this appeal as it was tried below, and treated by the parties on the appeal, *viz.*, a review of errors at law in a law action, and not a trial *de novo*. Thornhill v. Olson, 81.

10. It appears from the theory had of the case on trial and on appeal, that no title can ever be shown to have been in plaintiffs, and that they can never recover on the basis of title having passed to them, and are therefore without possibility of relief in this action; and the same is accordingly ordered dismissed. Thornhill v. Olson, 81.

EVIDENCE.

Review of discretionary ruling, see Appeal and Error, 21.
Prejudicial error as to, see Appeal and Error, 27–31.
Sufficiency of, to go to jury, see Trial, 1–3.

JUDICIAL NOTICE.

1. The distance back upon the roof of a building where a man standing on such roof comes within the range of vision of a person standing in the street can be mathematically demonstrated to a certainty; and the court may take judicial notice of what the results of the mathematical computation necessary to establish the fact would be. Wyldes v. Patterson, 282.

PRESUMPTIONS AND BURDEN OF PROOF.

See also infra, 14.

2. The mere withholding or failure to produce evidence, which under the circumstances would be expected to be produced, and which is available, gives rise to a presumption against the party withholding it. The courts recognize and act upon the natural inference that the evidence is held back under such circumstances because it would be unfavorable. Wyldes v. Patterson, 282.

3. Acceptance of a dedication may be presumed when it is beneficial to the donee. Ramstad v. Carr, 504.

4. The burden of proof is upon the plaintiff in an action for the value of goods alleged to have been sold, to establish the sale and delivery by it of the goods for which recovery was sought, and, also, the value thereof. Dr. R. D. Eaton Chemical Co. v. Doherty, 175.

5. The doctrine of *res ipsa loquitur* will apply, where the accident occurs through

EVIDENCE—continued.

the breaking of a steel cable 300 feet in length, and where such cable is not produced upon the trial by the defendant, nor is any proof introduced of its condition or inspection prior to the accident, and the action was begun within three months of the time when such accident occurred, and the only excuse for its nonproduction is that counsel does not know where it is. Wyldes v. Patterson, 282.

6. The burden of establishing the defenses of contributory negligence and the assumption of the risk is upon the defendant. Wyldes v. Patterson, 282.

BEST AND SECONDARY EVIDENCE.

See also infra, 12, 13.

7. Plaintiff sought to recover from the defendants for the value of certain merchandise, which plaintiff claimed to have sold and delivered to the defendant, Doherty, under a written contract, the performance of which was guaranteed by the defendants, Evoy and Coliton. One Collins, an officer of the plaintiff corporation, was permitted to testify, over objection, to his conclusions as to the value and delivery of such goods, based upon alleged entries made against Doherty in plaintiff's books of account. The books were not produced or offered in evidence, although they concededly were in the possession of the plaintiff. It is *held:*

That the testimony of Collins as to the contents of such book entries was incompetent, and should have been excluded. Dr. R. D. Eaton Chemical Co. v. Doherty, 175.

8. That, for the reasons stated in the opinion, such testimony was not admissible on the theory that such books constituted memoranda used by Collins to refresh his recollection. Dr. R. D. Eaton Chemical Co. v. Doherty, 175.

9. That the books of account were the best evidence of the contents of the entries made therein. Dr. R. D. Eaton Chemical Co. v. Doherty, 175.

COMPETENCY GENERALLY.

10. Circumstantial evidence is equally competent in civil and criminal cases. State Bank v. Bismarck Elevator & Invest. Co. 102.

DOCUMENTARY EVIDENCE.

11. In an action on a life insurance policy there was no error in rejection of a letter written by the defendant to its local secretary, which letter plaintiff denied having ever seen. Messersmith v. Knights of Pythias, 163.

EVIDENCE—continued.

12. A certified copy of the records in the office of the collector of internal revenue, relating to the issuance of a liquor license, is admissible in evidence in a prosecution for maintaining a liquor nuisance when properly proved, and such record is properly proved when there is attached thereto a certificate by the collector of internal revenue as to its correctness and authenticity. State v. Kilmer, 442.
13. Following the rule announced in the recent case of State v. Kilmer, decided by this court, it is held that exhibit "A," consisting of a certified copy of the records of the collector of internal revenue for the district of North and South Dakota, was competent evidence. State v. McKone, 547.
14. The presumption that identity of names indicates identity of persons will make admissible, in a trial for maintenance of a liquor nuisance, a government license for the sale of liquor issued to a person of the same name as the defendant, without preliminary proof of the identity of the person. State v. Kilmer, 442.

PHOTOGRAPHS.

15. Where a fact may be positively and accurately proved by a simple mathematical demonstration and computation, it is not error to exclude photographs, and other testimony which seeks to controvert the established laws of mathematics. Wyldes v. Patterson, 282.
16. It is not error to refuse to allow photographs to be introduced in evidence, where the premises involved are within three blocks of the courthouse, and an inspection is both practicable and possible. Wyldes v. Patterson, 282.
17. Photographs are received, as merely an aid to the jury in applying the evidence, and if they tend to confuse rather than aid the jury, they should be excluded. Wyldes v. Patterson, 282.
18. To be admissible in evidence, photographs should simply show conditions existing at the time in question; and photographs which show more than this, and with men in various assumed situations, in order to illustrate the claims and contentions of the parties, should not be admitted. Wyldes v. Patterson, 282.

PAROL EVIDENCE.

19. The court did not err in permitting the witness McDonald, agent of the Northern Pacific Railway Company at Bismarck, to explain the meaning of certain figures, designations, abbreviations, and letters appearing on the bills of lading, and receipts for consignments to appellant aforesaid, it appearing that such notations were made in the regular course of business

EVIDENCE—continued.

of such common carrier and unfamiliar to persons outside of the railway service. State v. McKone, 547.

OPINIONS AND CONCLUSIONS.

20. The owner of the land had been in the vicinity during season and knew the grass conditions, but had not been actually upon the land itself. *Held*, that he was qualified to testify to the value of the use of said tract for pasturage. Farin v. Nelson, 636.

DECLARATIONS; HEARSAY; RES GESTÆ.

21. Statements made by insured immediately before he left his family, and almost immediately before his death, are admissible as part of the *res gestæ*. Messersmith v. Knights of Pythias, 163.

22. Defendant appeals from conviction for statutory rape. Fifty-seven assignments of error appear, but only enough thereof are discussed to entirely destroy plaintiff's case. The testimony of prosecutrix's teacher, the principal of the school, and a lady member of the school board, as to statements made to them by prosecutrix during a private investigation, was improperly admitted upon the trial. Such statements were not voluntary, and, not being under oath, were hearsay. State v. Mackey, 200.

RELEVANCY AND MATERIALITY.

23. Action upon life insurance policy. The existence of the policy and death of insured admitted. Defendant offered no evidence excepting the proofs of death, which are alleged to contain admission of suicide. The issue for the jury was whether or not the insured had in fact suicided. The proofs of death were admitted merely as evidence upon that point. Certain evidence, tending to show the spirits, health, and domestic relations of the insured just prior to his death, was properly admitted. Messersmith v. Knights of Pythias, 163.

24. Evidence that the insured was the father of his first child, two months of age, was properly admitted. There was no error in the statement of plaintiff's attorney to the court, in answer to an objection to said evidence, as follows: "I have a right to show that his domestic life was happy; that he was a young married man; that he was in superb health." Messersmith v. Knights of Pythias, 163.

25. There was no error in admitting evidence that insured was successful in business, and was a man of scholarly attainments. Messersmith v. Knights of Pythias, 163.

EVIDENCE—continued.

26. Evidence of the rental value of the tract for fifty-three days is immaterial. Farin v. Nelson, 636.
27. Evidence that other cattle grazed upon the land is immaterial unless shown that defendant was cognizant of their presence thereon. Farin v. Nelson, 636.
28. In a prosecution for wilfully and unlawfully practising veterinary dentistry without a license, evidence is admissible showing that the accused charged and collected a fee for his services, although the collection of a fee is not made an essential element of the offense. State v. Ramsey, 626.
29. In a prosecution for practising veterinary dentistry without a license, it was competent to show by the secretary of the state board of veterinarians and by his records, properly identified, that no license had been issued to the accused. State v. Ramsey, 626.
30. In a prosecution for practising veterinary dentistry without a license, it was competent for the secretary of the state board of veterinarians to testify to the nonpayment by defendant of the statutory fee for a license. State v. Ramsey, 626.
31. Evidence of frequent large importations of liquors by appellant on dates immediately prior to the date charged in the information was admissible as tending to show a criminal purpose as charged in importing the liquors on such date. State v. McKone, 547.
32. Where one is accused of maintaining a liquor nuisance at a certain place, proof of the issuance to such person of a government license for the sale of intoxicating liquors in the town and state where such nuisance is claimed to have been maintained is admissible even though the premises described in said license are different from those mentioned in the information, as such evidence tends to show that the defendant was in the business of selling intoxicating liquors. State v. Kilmer, 442.

SUFFICIENCY.

33. Action to condemn additional right of way *held:* Jury's verdict has basis in evidence. Great Northern R. Co. v. Lenton, 555.
34. Action upon implied contract for rental of pasture land. Both parties concede law, as given in instructions, correct. Evidence examined and found to be sufficient to support finding of jury that plaintiff had usurped said land to the exclusion of others. Farin v. Nelson, 636.
35. The proof of payment of the taxes by production or the official receipt, signed by the treasurer, is sufficient to meet the burden of proof imposed upon plaintiff in this action. Beyer v. Investors' Syndicate, 247.
36. It being conceded that the evidence necessary to set aside a real estate mortgage must be clear, satisfactory, and convincing, the evidence in this case

EVIDENCE—continued.
is examined, and found not to be of that nature. Security State Bank v. Rettinger, 240.
37. The only testimony properly admitted in a prosecution for statutory rape was given by the prosecutrix. She was so weak-minded that she had no memory of dates nor conception of time. Her testimony in many material particulars is contradicted by the state's own witnesses, and is so unreasonable that it cannot support a conviction. State v. Mackey, 200.
38. Evidence examined, and held sufficient to support the verdict, and errors assigned on admission of evidence, and instructions held not well taken. Rittle v. Woodward, 113.

EXCEPTIONS. See Appeal and Error, 14–16.

EXECUTION.
Exemption from, see Exemption.

EXEMPTIONS.
1. The surviving husband or wife of a deceased person, or in case of his or her death the minor children of a deceased person, are entitled under the provisions of § 8725 of the Compiled Laws of 1913 to "all the personal property of the testator or intestate which would be exempt from execution, if he were living, including all property absolutely exempt and other property selected by the person or persons entitled thereto to the amount in value of $1,500," and this additional exemption of $1,500, can be claimed in addition to the property absolutely exempt, and the amount thereof has not been reduced or affected by § 7731 of the Compiled Laws of 1913, which allows to the heads of families the sum merely of $500 in addition to such absolute exemptions. Woods v. Teeson, 610.
2. Section 7731 of the Compiled Laws of 1913 is applicable merely to the heads of families, and is a part of the Civil Code, and does not relate to the survivors of a deceased person or to probate proceedings. Woods v. Teeson, 610.

EXTORTION.
Appeal from conviction of, see Appeal and Error, 24.

FACTS.
Review of, on appeal, see Appeal and Error, 23, 24.

FARM LABORER'S LIEN. See Liens.

FEDERAL EMPLOYERS' LIABILITY ACT. See Master and Servant, 1.

HABEAS CORPUS.
To secure custody of child, see Infants.

HARMLESS ERROR. See Appeal and Error, 25–36.

HEARSAY. See Evidence, 21, 22.

HIGHWAYS.
Grant of right of way for, over public lands, see Public Lands.
Requiring railroad to construct crossing over tracks, see Railroads.

HUSBAND AND WIFE.
Trust in property given to wife, see Trusts, 2.

IMPRISONMENT FOR DEBT.
1. Section 10941, Compiled Laws of 1913, which authorizes imprisonment in case of the nonpayment of the costs of a criminal prosecution, does not violate either the Constitution of the state of North Dakota or that of the United States. State v. Kilmer, 442.

INDICTMENT AND INFORMATION.
Time for filing of information, see Criminal Law, 1.
Commencing prosecution by filing complaint instead of information, see Criminal Law, 2.
1. The information included a greater period of time than was charged in the complaint in justice court as the time during which a common nuisance was maintained. A preliminary examination was waived. Defendant moved to quash the information upon the ground specified, that he had not had or waived a preliminary examination for the offense charged in the information, but without pointing out or stating as grounds for the motion that the information included additional time to that stated in the criminal complaint. The record does not affirmatively disclose that, in denying said motion, such variance in time was known to the court, or was presented as

INDICTMENT AND INFORMATION—continued.

the grounds for the motion made. *Held*, that under § 10729, Comp. Laws, 1913, requiring that a motion "to set aside the information must specify clearly the grounds of objection to the information," or the objection be waived, that the objection based upon such variance in time was not raised and was waived, and this court will not pass upon an issue not presented below. State v. Taylor, 236.

INFANTS.

1. Where habeas corpus is brought by the natural parents of an infant for its custody and control, and it is shown that the child has for a period of almost eight years been left among strangers and its paternity and identity concealed, the pole star and main considerations of the court will be the best interests of such child, and where these interests point, as they are held to point in the case under consideration, to the continued custody of the adoptive parents, the court will not interfere with such control and possession, even though the adoption may have been made without the actual knowledge of the natural parents, and under the belief and on the grounds of their decease. Re Sidle, 405.
2. In determining the question of the right to the possession of an infant as between its natural and its adoptive parents and the real interests of the child in such a matter, the relative poverty of the former does not alone, save in extreme cases, furnish a sufficient reason for depriving them of their offspring. Re Sidle, 405.
3. In determining the right to the possession of a child in habeas corpus and the best interests thereof as between the natural and the adoptive parents, the court will take into consideration the right of such a child to the love, care, and guidance of a father as well as of a mother, and the heartlessness and lack of interest of the natural father. It will also take into consideration the wishes of the infant when the latter is old enough and of sufficient intelligence to reasonably understand the situation in which it is placed. Re Sidle, 405.
4. In determining the right to the control and possession of an infant in habeas corpus, the court will take into consideration the fact that the child is but the future citizen, and that paramount to the interests of the claimants, and even of the natural parents, are the interests of the parent state. Re Sidle, 405.

INITIATIVE, REFERENDUM, AND RECALL.

1. Application for original writ of mandamus against the individual members of the state board of immigration to compel organization of said board and performance by it of its duties under chap. 234, Sess. Laws 1915, creat-

INITIATIVE, REFERENDUM, AND RECALL—continued.

ing said board and defining its duties. The respondents by answer state their willingness to organize and act as a board, provided § 7 of chap. 234, Sess. Laws 1915, is in force. But respondents recite the finding in the office of secretary of state of certain petitions, one set for a referendum of the entire act, and one for referendum of § 7 thereof, the appropriation part of said statute; and that while neither petition taken alone has enough signatures thereon to authorize a referendum vote, yet if both sets should be considered as but one petition and as sufficient to referend § 7, the appropriation part of said act, then § 7, the appropriation, would be suspended, pending a vote thereon at the next general election; and meanwhile the board, being entirely without funds, it would be useless to organize as well as powerless to act. *Held:*—To authorize the two petitions to be treated as one, both must deal with the same subject-matter and seek the same object. State ex rel. Baker v. Hanna, 570.

2. An affirmative vote on the petition to referend the entire act would revoke the repealing section of chap. 234, Sess. Laws 1915, expressly repealing earlier statutes, and thereby reinstate the old statutes, making a standing biennial appropriation of $10,000 for immigration purposes and a different board of immigration; while an affirmative vote upon reference of § 7 only of chap. 234 would leave the present board intact but with no appropriation or funds for its use. Hence, the two petitions are entirely dissimilar in objects sought as they are in subject-matter. They are separate petitions, and cannot be treated as one only for the referending of § 7 alone. State ex rel. Baker v. Hanna, 570.

3. That the petitioners to referend the entire act have assigned in their petition as a reason for its reference that it entails "a needless waste of public money" and "is a needless burden of taxation with no benefit to the people of the state" does not authorize it to be treated as a petition for reference of § 7, the appropriation only, as petitioners for reference of the entire act must be held to have understood the law, and that in effect they petitioned for a reinstatement of the old biennial appropriation for $10,000, while those petitioning for only reference of the appropriation, § 7, desire no appropriation whatever. Under no reasoning can the two classes of petitioners be said to either desire or seek the same result. The two petitions must be held to be conflicting and incompatible, and cannot be consolidated as one petition. State ex rel. Baker v. Hanna, 570.

4. Petitions cannot be combined when to do so will override or ignore the desires of one set of petitioners as expressed in their petition. State ex rel. Baker v. Hanna, 570.

5. As a referendum sets aside or suspends the will of the people as expressed by legislative act, petitions for a referendum should be required to comply strictly with the mandatory constitutional provisions under which a refer-

INITIATIVE, REFERENDUM, AND RECALL—continued.
endum is authorized. To require less is the equivalent of amending said constitutional provisions by court flat, as well as to be derelict in enforcing the Constitution itself. State ex rel. Baker v. Hanna, 570.
6. Chapter 234 is in full force and effect, and no part thereof has been referred. The referendums attempted of the act and § 7 thereof have both failed. State ex rel. Baker v. Hanna, 570.

INJUNCTION.
1. A void tax cannot be canceled and its collection enjoined by a suit in equity, unless there also exists some generally recognized head of equitable jurisdiction entitling the court to administer equitable relief. Merchants' State Bank v. McHenry, 108.
2. No irreparable injury can result to plaintiffs from enforced collection of this void tax, as it may sue to recover it back, and therefore has an adequate relief at law. Merchants' State Bank v. McHenry, 108.
3. As no action at law will lie against the bank by its shareholders upon its being compelled to pay the void tax, no multiplicity of suits can arise to confer equitable jurisdiction. Equitable relief is denied and this action ordered dismissed. Merchants' State Bank v. McHenry, 108.

INSOLVENCY.
As to bankruptcy, see Bankruptcy.

INSTRUCTIONS.
For instructions generally, and cross-references to same, see Trial, 8–12.

INSURANCE.
Reimbursement for insurance paid as basis of relief in equity, see Equity, 3.
Evidence in action on life policy, see Evidence, 11, 21, 23.

INTEREST.
Reimbursement for interest paid as basis of relief in equity, see Equity, 3.

INTERPLEADER.
1. Under the provisions of § 7414, Compiled Laws, an order of interpleader may be allowed only (1) in an action upon contract; (2) in an action for

INTERPLEADER—continued.

specific real property; (3) in an action for specific personal property. More v. Western Grain Co. 369.

2. An order of interpleader should not be allowed under the provisions of § 7414, Compiled Laws, in an action for damages for conversion of personal property. More v. Western Grain Co. 369.

INTERVENTION. See Parties.

INTOXICATING LIQUORS.

Appeal from conviction of violation of liquor laws, see Appeal and Error, 27.

Evidence in prosecution for violation of liquor laws, see Evidence, 14, 31, 32.

Instructions in prosecution for offense against liquor laws, see Trial, 9, 10.

JUDGMENT.

On appeal, see Appeal and Error, 37, 38.

Of dismissal, see Dismissal.

Dismissal of action asking relief from judgment, see Dismissal, 1.

1. This litigation is also the continuance of Investors' Syndicate v. Letts, 22 N. D. 452, and Investors' Syndicate v. North American Coal & Min. Co. ante, 259. Action to establish a lien for taxes, mortgages, and other expenditures by plaintiff upon the land which constitutes the assets of the coal company. Trial *de novo*. Plaintiff cannot assert title to the premises in himself, the same issues having been determined against this contention in an action in the United States district court in the year 1909. Beyer v. Investors' Syndicate, 247.

2. Following Halverson v. Bennett, 22 N. D. 67, 132 N. W. 434, *held*, that equity will not grant a prayer to have a justice's judgment declared void for the alleged reason that the justice lost jurisdiction through a failure to enter the judgment on the day of trial without an allegation in the complaint, supported by proof, of the existence of a meritorious defense to the action in which such alleged void judgment was entered, and no such defense is alleged. Batzer v. Halliday, 361.

JUDICIAL NOTICE. See Evidence, 1.

JURISDICTION.
In attachment, see Attachment.
In equity, see Equity.

JURY.
Question for, see Trial, 1–5.
1. In an action to cancel a contract and remove a cloud on title, damages for the value of the use and occupation of the land are dependant upon a determination of the equitable issues; and a demand for judgment for such use and occupation does not necessarily transform it into an action at law, or entitle defendant to a jury trial. Schmidt v. Johnstone, 53.

JUSTICE OF THE PEACE.
1. A return made pursuant to statute by a justice of the peace on an appeal to the district court cannot be later impeached by a certificate of the justice thereafter made and filed without leave of court. Massett v. Schaffner, 579.
2. Even if such statutory return were thus subject to impeachment, it is held that such certificate wholly fails to impeach the same, and that the judgment of the justice was in all respects regular upon its face. Massett v. Schaffner, 579.
3. The record discloses that the judgment was entered by the justice on the same day upon which the verdict was returned, and—following Peterson v. Hansen, 15 N. D. 198,—it is held that this was a compliance with the statute. Massett v. Schaffner, 579.

LACHES. See Limitation of Actions, 1.

LAND CONTRACT. See Vendor and Purchaser.

LANDLORD AND TENANT.
Oral modification of written lease, see Contracts, 3, 4.

LEASE.
Oral modification of written lease, see Contracts, 3, 4.

LETTERS.
Admissibility in evidence, see Evidence, 11.

LEVY AND SEIZURE.
As to exemptions, see Exemptions.

LICENSE.
Practice of veterinary dentistry without license, see Evidence, 28–30.

LIENS.
Validity of lien acquired within four months of bankruptcy, see Bankruptcy, 1–3.
For purchase price of goods sold, see Sale, 11.
Subrogation to, see Subrogation.

1. The statutes of this state authorize the owner of a farm laborer's lien, upon default in payment of the debt secured thereby, to take possession of the property covered by the lien. Wonser v. Walden Farmers' Elevator Co. 382.
2. Such right of possession may be enforced by an action at law for damages against one who has converted the property covered by such lien. Wonser v. Walden Farmers' Elevator Co. 382.
3. A person who, while in the employment of the owner of a crop and under his direction, performs labor directly connected with the harvesting and threshing thereof, is a farm laborer within the meaning of § 6857, Compiled Laws 1913, giving a lien to a farm laborer for his wages. Heddan v. Walden Farmers' Elevator Co. 392.
4. A farm laborer does not waive his right to a farm laborer's lien, where, in performance of the work for which he was hired, he hauls and delivers at an elevator grain on which the lien is claimed. Wonser v. Walden Farmers' Elevator Co. 382.

LIMITATION OF ACTIONS.
1. Intervener is not guilty of laches in the premises. Investors' Syndicate v. North American Coal & Min. Co. 259.
2. Intervener's claim is not barred by the statute of limitations. Investors' Syndicate v. North American Coal & Min. Co. 259.

LIVE STOCK.
Injury to caretaker of stock during transportation, see Carriers.

MAGISTRATE. See Justices of the Peace.

MANDAMUS.

To compel organization of state board of immigration, see Initiative, Referendum and Recall, 1.

To compel issue of salary warrants, see Statutes.

1. Writ ordered issued, but no costs will be taxed as the public officials concerned were justified in obtaining a judicial determination of the questions involved before disbursing public funds with any doubt of their right to do so. State ex rel. Baker v. Hanna, 570.

MAP.

Dedication by, see Dedication, 4–7.

MARKETABLE TITLE. See Vendor and Purchaser, 1, 2.

MASTER AND SERVANT.

Application of res ipsa loquitur in case of injury to servant, see Evidence, 5.

1. Plaintiff was a section boss engaged in interstate commerce. Upon the day of his injury he took a hand car with thirteen men, besides himself, and worked upon an adjoining section. While returning in the evening it began to rain, and one of the men under him let go of the handle bars to put on his coat. In so doing he lost his balance, and plaintiff, in order to hold the man upon the hand car, himself released his hold, fell from the car, and was injured. There is no evidence that plaintiff had requested more hand cars or complained of the crowded conditions. Evidence examined and *held:* That the railroad company is guilty of no negligence for which it is liable under the Federal employers' liability act. Manson v. Great Northern R. Co. 643.
2. If the negligence of the master, or of one for whose conduct the master is answerable, mingles with that of one who stands in the relation of a fellow servant to the servant receiving the injury, or if the negligence of the master or his representative is the proximate or efficient cause of the injury, the master will be liable, and will not be allowed to escape liability on the ground that the injury also proceeded from the negligence of one for whose conduct he was not answerable. Wyldes v. Patterson, 282.

ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE.

Burden of proof as to contributory negligence and assumption of risk, see Evidence, 6.

MASTER AND SERVANT—continued.

3. The doctrine of the assumption of the risk applies only to risks which the plaintiff knows and appreciates, or which in the exercise of due care he should have known and appreciated. Wyldes v. Patterson, 282.
4. Where an accident occurs through the premature lowering of an elevator, upon which the plaintiff is placing a wheelbarrow, and the evidence shows that the engineer who operated the engine which raised and lowered the elevator relied upon a system of signals, which the foreman in control of the plaintiff had, a short time prior to the accident, ordered discontinued, and the plaintiff himself was led to believe that such system was not in operation, and that the engineer would not rely thereon, but would use every precaution to give him ample time to draw back from said elevator, it cannot be said, as a matter of law, that such employee assumed the risk of the confusion of methods of operation which arose from the failure of the master to arrange for a common system, and to make it known to all of the parties concerned. Wyldes v. Patterson, 282.
5. Plaintiff sustained personal injuries in a gravel pit while in defendant's employ for which he recovered a verdict and judgment for $3,000. On appeal defendant urges that plaintiff was guilty, as a matter of law, of contributory negligence, and that he should be held to have assumed the risk, also that the evidence is insufficient to show negligence on defendant's part. *Held*, for reasons stated in the opinion, that each of such contentions is without merit. Umsted v. Colgate Elevator Co. 18 N. D. 316, and Webb v. Dinnie Bros. 22 N. D. 377, are cited and followed as controlling. Swords v. McDonell, 494.

MAXIMS.

As to equity principles, generally, see Equity, 2, 3.

MINORS. See Infants.

MODIFICATION.

Of contract, see Contracts, 2–4.

MORTGAGES.

1. A mortgage which is given in good faith in whole or in part to secure future advances whether the object is expressed in the mortgage or not is valid to the extent of the lien therein expressly created. Scofield Implement Co. v. Minot Farmers' Grain Asso. 605.
2. No particular form or ceremony is necessary to constitute a sufficient delivery of a mortgage. It may be by words without acts, or by acts with-

MORTGAGES—continued.

out words, or by both combined. Manual transfer of the document from the hands of the mortgagor to the hands of the mortgagee is not essential. It is only required that there shall be manifested a clear intention of the parties that the instrument shall become operative as a mortgage. Where, therefore, the consideration of a mortgage and note has failed by reason of the cancelation of the agreement under which it is delivered, the mortgage may be, by a parol agreement, retained as security for future advances which are to be made under a new agreement, and no new physical delivery or execution is necessary. Scofield Implement Co. v. Minot Farmers' Grain Asso. 605.

MOTIONS AND ORDERS.

Order of interpleader, see Injunction.

MUNICIPAL CORPORATIONS.

Acceptance by, of dedication, see Dedication, 7–10.

NEGLIGENCE.

Of carrier, see Carriers.

Of master or servant, see Master and Servant.

Presumption of, see Evidence, 5.

As question for jury, see Trial, 5.

NEGOTIABLE INSTRUMENTS. See Bills and Notes; Checks.

NEWLY DISCOVERED EVIDENCE.

New trial for, see New Trial, 4.

NEW TRIAL.

Review of discretion as to, on appeal, see Appeal and Error, 17–20.

1. A trial court has no jurisdiction after expiration of the statutory period allowed for an appeal from an order denying a new trial, to make a second order denying a new trial. Miller v. Thompson, 147.

2 The trial court granted a new trial upon motion which was served more than a year after the notice of the entry of the judgment had been served upon defendant.

Held, that the case was no longer pending, but had merged into a judg-

NEW TRIAL—continued.
ment, and the trial court therefore was without jurisdiction to entertain or allow a motion for the new trial. Grove v. Morris, 8.
3. Section 4, chapter 131, Laws 1913, requiring a statement of errors of law complained of, etc., to be served with the notice of motion for new trial, and with the notice of appeal, was not intended to apply in cases where the alleged error appears upon the face of the judgment roll proper, but only to cases where a statement of case is required in order to bring the rulings complained of upon the record. Leu v. Montgomery, 1.
4. An affidavit, presented to show diligence, in support of a motion for new trial on the ground of newly discovered evidence, should specifically state the acts performed in order that the court may determine what diligence was used, and mere general assertions of diligence are insufficient, as they constitute only the opinions or conclusions of the affiant. McGregor v. Great Northern R. Co. 471.

NONRESIDENTS.
Attachment against, see Attachment.

NOTES. See Bills and Notes.

OBJECTIONS.
To raise question on appeal, see Appeal and Error, 14–16.

OFFICERS.
Justices of the peace, see Justices of the Peace.

OPINION.
As evidence, see Evidence, 20.

ORAL EVIDENCE. See Evidence, 19.

PARENT AND CHILD.
Right to custody of children, see Infants.
Trust for benefit of children, see Trusts, 2.

PARKS.
Dedication of property for, see Dedication, 5.
1. The ordinary American meaning of a park is a piece of ground set apart and

PARKS—continued.
maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as opportunity for open-air recreation, and the term is not applicable to private inclosures enjoyed by the few to the exclusion of the public. Ramstad v. Carr, 504.

PAROL EVIDENCE. See Evidence, 19.

PARTIES.
Bar of intervener's claim by lapse of time, see Limitation of Actions.
1. This suit is a continuation of the litigation mentioned in Investors' Syndicate v. Letts, 22 N. D. 452, where a statement of the facts may be found. Intervener has the right, under the facts of this case, to answer upon behalf of the coal company, having shown that the officers thereof had refused to defend. Investors' Syndicate v. North American Coal & Min. Co. 259.

PAYMENT.
Subrogation for, see Subrogation.

PERSONAL PROPERTY.
Sale of, see Sale.

PETITION.
Of plaintiff, see Pleading.
Referendum petition, see Initiative, Referendum and Recall.

PHOTOGRAPH.
Admissibility in evidence, see Appeal and Error, 21; Evidence, 15–18.

PLAT.
Dedication by, see Dedication, 4–7.

PLEADING.
Curing of error in rulings as to, see Appeal and Error, 22.
Judgment on the pleadings, see Pleading, 1.

PLEADING—continued.

1. Where a complaint in an action for conversion contains allegations of an actual conversion, an averment of demand and refusal is not required More v. Western Grain Co. 369.

AMENDMENTS.

2. At the close of the evidence, plaintiff moved to amend her complaint by striking out all reference to the bill of sale and deed. This was denied by the trial court, and, for reasons stated in the opinion, such denial was error. However, this court in trial anew will consider the complaint properly amended. Holler v. Amodt, 11.
3. It was not error to allow the amendment to the answer to be filed under the circumstances of this case, as plaintiff was allowed sufficient time within which to meet the issues, if any change were made therein, and the plaintiff was, therefore, in no manner prejudiced. Sheimo v. Norqual, 343.
4. The Whites, husband and wife, signed an agreement to separate, and in accordance with this agreement the husband tried to convey to the wife property standing in their joint names. This was attempted by both joining in a deed to a son, who in turn executed a deed to the mother. Neither of these deeds was recorded until two years later. In the meantime the wife applied to plaintiff for a loan upon said property in the sum of $10,000 to take care of prior encumbrances to said amount. In her written application she stated that the premises were her homestead, and that she was a married woman. Being unable to obtain the signature of her husband, plaintiff's agent conceived the plan of having the deed to the son recorded and taking the mortgage from him. This was done, but plaintiff demanded that the mother join in the note and ratify the acts of the son as to the mortgage. Plaintiff applied the full amount of the proceeds in liquidating the prior encumbrances (excepting $469.70 paid the wife). The $10,000 mortgage was foreclosed, and plaintiff obtained a sheriff's deed. This action is to quiet title. Defendant and her husband plead the homestead character of the premises, and attempt to set aside the $10,000 mortgage because the husband did not join in its execution. Trial *de novo* in this court. The complaint was in statutory form, alleging ownership, and demanding that defendant set forth her claims of title so that an adjudication might be had. After the trial, at the suggestion of the trial court, an amended complaint was filed setting forth the details above enumerated and asking for an alternative judgment in the case mortgage was declared void, that the prior encumbrances be reinstated, and that plaintiff be subrogated to the interests of the holders thereof. There was no error in allowing this amendment, though it was unnecessary. Northwestern Mut. Sav. & L. Asso. v. White, 348.

PLEADING—continued.

Pleas and Answers.

Amendment of answer, see supra, 3.

5. A qualified general denial which denies "each and every allegation, matter, and thing, and each and every part and portion thereof, in said plaintiff's complaint contained, except as hereinbefore admitted or explained," does not place in issue those allegations of the complaint which are admitted in other paragraphs of the answer. Kennedy v. Dennstadt, 422.
6. A waiver of a material clause of a contract must, in order to be relied upon, be specially pleaded. Case Threshing Mach. Co. v. Loomis, 27.

Demurrer.

7. Where a check is certified, "Good when properly indorsed," and is presented for payment by the Security State Bank of Brantford, North Dakota, but is indorsed "Security State Bank," and an action is brought on such certificate by "Security State Bank, a corporation," and the complaint alleges that the plaintiff is a duly organized and authorized banking corporation, an objection is not raised by general demurrer which is based upon the contention that there may have been other banks of the same name, and that the words, "of Brantford, North Dakota," should have been added to the indorsement and to the name of the plaintiff in the title to the action. Security State Bank v. State Bank, 454.
8. Where a check is certified, "Good when properly indorsed," and is presented for payment by the Security State Bank of Brantford, North Dakota, but is indorsed "Security State Bank," and an action is brought on such certificate by Security State Bank, a corporation, and the complaint alleges that the plaintiff is a duly organized and authorized banking corporation, an objection is not raised by a general demurrer that the indorsement was made by means of a rubber stamp, the complaint alleging that the check was properly indorsed by the plaintiff and presented to the defendant for payment, and also showing that the defendant was the drawee bank. Security State Bank v. State Bank, 454.
9. Where a suit is brought on a certified check against the drawee bank for an amount which covers protest fees as well as the amount of the check, the fact that protest fees are not authorized by statute on domestic checks and bills of exchange will not render the complaint vulnerable to a general demurrer. Security State Bank v. State Bank, 454.

POLICE.
Arrest by, see Arrest.

PREFERENCES.
By bankrupt, see Bankruptcy, 1–3.

PREJUDICIAL ERROR. See Appeal and Error, 25–36.

PRESUMPTIONS.
In general, see Evidence, 2–6.

PRIMARY ELECTIONS. See Elections.

PRINCIPAL AND AGENT.
As to brokers, see Brokers.
Depositary in escrow as agent of both parties, see Escrow, 4.

PROMISSORY NOTES. See Bills and Notes.

PUBLIC LANDS.
1. The act of Congress approved July 26, 1866, granting a right of way for the construction of highways over public lands not reserved for public use, attached to and created a superior title therein to the grant of such lands to the Northern Pacific Railroad Company, under act of Congress approved July 2, 1864, because the certified plat of definite location of said road, containing the tract afterwards deeded to plaintiff, was not filed with the commissioner of the general land office until May 26, 1873, and did not apply to any interest in said lands previously granted to the public by the United States government. Wenberg v. Gibbs Twp. 46.

QUESTION FOR JURY. See Trial.

QUIETING TITLE. See Cloud on Title.

RAILROADS.
Appeal from judgment ordering construction of crossing over tracks, see Appeal and Error, 5.
Injury to employee, see Master and Servant.

RAILROADS—continued.
Grant of public lands to, see Public Lands.
1. On the merits involving the facts, the judgment that the railway company construct a crossing over its tracks was justified. Minneapolis, St. P. & S. Ste. M. R. Co. 597.

RAPE.
Evidence in prosecution for, see Evidence, 22, 37.

REAL ESTATE AGENT. See Brokers.

REAL PROPERTY.
Dedication of, see Dedication.
Deeds of, see Deeds.
As to public lands, see Public Lands.
Mortgage on, see Mortgage.
Sale of, see Vendor and Purchaser.

RECORDS.
On appeal, see Appeal and Error, 5–9.
Admissibility in evidence, see Evidence, 12, 13.

REDEMPTION.
From tax sale, see Taxation, 7.

REFERENDUM. See Initiative, Referendum and Recall.

REINSTATEMENT.
Of appeal, see Appeal and Error, 11, 12.

REMEDIES.
Election of, see Election of Remedies.

REPEAL.
Of statute, see Statutes.

RESCISSION.
Of land contract, see Vendor and Purchaser, 3.

RES GESTÆ. See Evidence, 22.

RES IPSA LOQUITUR. See Evidence, 5.

RES JUDICATA. See Judgment, 1.

RETAINING JURISDICTION.
By court of equity, see Equity, 1.

REVERSIBLE ERROR. See Appeal and Error, 25–36.

REVIEW.
Of justices' judgment, see Justices of the Peace.

SALES.
Burden of proof to establish sale and delivery, see Evidence, 4.
For taxes, see Taxation, 4–7.

1. The word "sell" is not synonymous with the terms "barter" and "dispose of." It involves a money transaction. Case Threshing Mach. Co. v. Loomis, 27.

CANCELATION OF ORDER; REFUSAL TO ACCEPT.

2. Before time fixed for delivery defendant gave notice of cancelation of his written and accepted order of plaintiff for a traction engine. Plaintiff refused to permit cancelation, insisting upon performance, with defendant repudiating the contract and declaring that he would not accept or pay for the machine. Plaintiff thereafter tendered it, and upon defendant's refusal to accept it, left the engine at defendant's farm against his protests and without his consent. Plaintiff claims title passed as on a delivery, and sues for the purchase price, $2,400, and freight $104 additional. *Held:* The doctrine that there can be no anticipatory breach of an executory contract of purchase and sale, adopted in Stanford v. McGill, 6 N. D. 536, is overruled, and the overwhelming weight of authority, both English and American, followed. Hart-Parr Co. v. Finley, 130.
3. The unconditional notice of cancelation, though not acquiesced in by plain-

SALES—continued.

tiff, operated to relieve defendant from damages resulting from the acts done by plaintiff in performance of the contract subsequent to notice of cancelation, and relieved defendant from freight charges incurred by plaintiff after such notice of cancelation. Hart-Parr Co. v. Finley, 130.

4. Though plaintiff could keep the contract alive and insist upon its performance up to the time for delivery, and could incur freight expense in so doing after notice of cancelation, its right to recover for it depends upon defendant's subsequent withdrawal of his repudiation and subsequent performance. Hart-Parr Co. v. Finley, 130.
5. The incurring of the freight charge after notice of cancelation received is an enhancement by plaintiff of its own damages, and not recoverable, unless suit can be maintained for the purchase price. Hart-Parr Co. v. Finley, 130.
6. Unless the contract stipulates the contrary, delivery and acceptance of property and vesting of title thereunder and payment of the purchase price therefor are concurrent acts, and until delivery and acceptance title does not vest, and the purchase price payable only on the vesting of title is not recoverable in a suit for the purchase price. Hart-Parr Co. v. Finley, 130.
7. To constitute a valid delivery on sale of personal property, there must be an acceptance of it by the purchaser or his agent. Constructive delivery may be an exception. Hart-Parr Co. v. Finley, 130.
8. In the face of a refusal to receive delivery of the property in performance of a contract of purchase and sale, the purchaser standing on a repudiation of it declared while the contract was wholly executory, with repudiation not subsequently waived or withdrawn, title cannot be cast upon the purchaser by operation of law. Hart-Parr Co. v. Finley, 130.
9. The attempted delivery did not vest title, and suit for the purchase price cannot be maintained, nor can the freight charges incurred after notice of cancelation be recovered. Hart-Parr Company v. Finley, 130.
10. The contract cannot be construed as authorizing a recovery independent of delivery of property or vesting of title in defendant, but instead is a contract of purchase and sale with payment conditioned upon the passing of title. Hart-Parr Co. v. Finley, 130.

Lien for Purchase Price.

Lien for purchase price acquired within four months of bankruptcy, see Bankruptcy, 1–3.

11. A vendor in North Dakota has, after a delivery to the vendee, no lien upon the goods sold, for the purchase price, except by virtue of the levy of an attachment under the provisions of § 6938, Rev. Codes 1905, being § 7537, Comp. Laws 1913. Gray v. Arnot, 461.

SECONDARY EVIDENCE. See Evidence, 7–9.

SERVANTS. See Master and Servant.

SPLITTING.
Of causes of action, see Action.

STATEMENT OF THE CASE.
On appeal, see Appeal and Error, 6–8.

STATUTES.
1. Original writ of mandamus to compel the state auditor to issue salary warrants to the members of the state Tax Commission. *Held*, that chapter 43, Sess. Laws 1915, does not directly or indirectly repeal § 5, chapter 303, Sess. Laws 1911, which, under the holding in State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, appropriates money for the salaries of such tax commissioners. State ex rel. Packard v. Jorgenson, 563.

STOCKHOLDERS. See Corporations.

SUBROGATION.
Of one who has paid off invalid mortgage, see Equity, 3.

To Tax Lien.

To tax lien, see also Judgment.

1. Under the circumstances of this case, plaintiff will be subrogated to the interests of the county in the taxes which he paid to protect the assets of the coal company. Beyer v. Investors' Syndicate, 247.
2. Bringing an action to rescind his original purchase of stock in the coal company is not evidence of plaintiff's bad faith in the present action, wherein he seeks subrogation to a tax lien because of payments of taxes alleged to have been made by him in good faith, to preserve the assets of the company, nor of an attempt upon his part to wrongfully absorb the assets of the corporation. Beyer v. Investors' Syndicate, 247.
3. The particular taxes for which plaintiff is entitled to a lien upon the premises are enumerated in the opinion. Beyer v. Investors' Syndicate, 247.

SUCCESSIVE SUITS. See Action.

SUICIDE.
Evidence on question of, see Evidence, 23–25.

TAXATION.
Reimbursement for taxes paid as basis of relief in equity, see Equity, 3.
Injunction against collection of, see Injunction.
Subrogation to tax lien, see Subrogation.

1. Action to enjoin collection of a tax levied against a state bank upon its shares of capital stock. *Held:* The capital stock, surplus, reserve funds, undivided profits, loans and discounts, banking furniture and fixtures not real estate, and all strictly banking utilities, are not taxable to the bank, nor at all, as items of personalty, but of and to the shareholders, apportioned on a per share valuation. Merchants' State Bank v. McHenry, 108.
2. A bank is not subject to taxation for the value of its shares of capital stock. Instead, assessment and levy should be made upon the value of the shares determined under § 2115, Comp. Laws 1913, and in the name of and against its respective shareholders. Merchants' State Bank v. McHenry, 108.
3. The purported assessment and tax levied thereon against the bank for the aggregate value of its bank shares is void. Merchants' State Bank v. McHenry, 108.

Sale; Deed; Redemption.

4. Action to quiet title to land. Trial *de novo*. Plaintiffs, heirs at law of deceased fee title holder, bring action against the holder of five tax deeds, whose grantee is in possession of the land. Evidence examined, and, *held*, that the tax deed issued for the 1894 taxes is valid, for reasons stated in the opinion. It is urged against the validity of said tax deed, that the notice of the expiration of time of redemption incorrectly stated the amount necessary, and time allowed for such redemption. *Held*, that such defects do not go to the extent of entirely vitiating the notice. Munroe v. Donovan, 228.
5. The fact that no record of an itemized statement of the estimated expenditures for said year exists is a minor defect, not jurisdictional, and is cured by § 72, chapter 132, Sess. Laws 1890, the law in effect at the time of such sale. Munroe v. Donovan, 228.
6. Action to quiet title to land. Trial *de novo*. Plaintiffs, heirs at law of deceased fee title holder, and the grantee of a sheriff's deed on mortgage foreclosure, bring action for the use and benefit of their grantee against

TAXATION—continued.

the holder of certain tax deeds who has been for many years in possession of the land. Following Munroe v. Donovan, ante, 228, just decided by this court, it is held that the tax deed issued upon tax sale for the year 1894 is valid and title is quieted in the defendants. McDowall v. Herbert, 217.

7. The notice of expiration of the time of redemption was served upon the person in whose name the land was assessed, and not upon the fee owner of the land. *Held*, that this is in compliance with § 103, chapter 132, Sess. Laws 1890, the law under which such service was made. Munroe v. Donovan, 228.

RECOVERY BACK OF TAXES PAID.

8. The payment of taxes to avoid a penalty, a portion of which taxes are illegal, but the legal portion of which taxes cannot be paid, or at any rate will not be received without the payment of the illegal part, and which penalty will be incurred upon the nonpayment of the taxes, is a payment under compulsion. Chicago, M. & P. S. R. Co. v. Bowman County, 150.

9. Where the statute, as does that of North Dakota (§ 2166, Compiled Laws of 1913), requires the county treasurer to deliver a list of the delinquent taxes to the sheriff, and upon such delivery requires the sheriff to immediately proceed to collect the same, and to distrain and sell the property upon which the taxes are delinquent, and where neither the treasurer nor the sheriff has the authority to cancel or rebate the illegal taxes, a property owner may assume that the officers of the law will obey the statute, and can pay such taxes under protest, and need not wait until the seizure is actually made or threatened in order that his payment may be involuntary; and if such taxes are illegal may afterwards bring suit for the recovery of the amount so paid. Chicago, M. & P. S. R. Co. v. Bowman County, 150.

TIME.

For appeal, see Appeal and Error, 1–4.

To move for new trial, see New Trial, 2, 4.

As essence of contract, see Vendor and Purchaser, 3.

TITLE.

Denial of, to defeat attachment, see Attachment.

Defects in, see Vendor and Purchaser, 1, 2.

TRIAL.

New trial, see New Trial.

As to witnesses on, see Witnesses.

SUFFICIENCY OF EVIDENCE TO GO TO JURY.

1. Evidence examined, and found sufficient to justify its submission to the jury; and supports the verdict. Messersmith v. Knights of Pythias, 163.
2. If there is such evidence as would cause reasonable men to draw different conclusions, the case should be submitted to the jury. State Bank v. Bismarck Elevator & Invest. Co. 102.
3. But a mere surmise or suspicion will not require a submission to a jury, or sustain the refusal on the part of the trial court to grant a nonsuit, and take the case from the jury. State Bank v. Bismarck Elevator & Invest. Co. 102.

QUESTIONS FOR COURT OR JURY.

4. Whether there is any legal evidence in the record, upon which a verdict for the party holding the burden of proof can be based, is a question of law to be determined by the court. State Bank v. Bismarck Elevator & Invest. Co. 102.
5. When the evidence in regard to contributory negligence is such that different minds may reasonably draw different conclusions, either as to the facts or the conclusions to be drawn from the facts, then the question of contributory negligence is one of fact to be determined by the jury. McGregor v. Great Northern R. Co. 471.

DIRECTION OF VERDICT.

6. For the reasons stated in the opinion, it is *held*, that facts necessary to recovery were not proven by any competent evidence, and that the trial court erred in directing verdict in plaintiff's favor. Dr. R. D. Eaton Chemical Co. v. Doherty, 175.
7. No error in overruling motions to direct verdict. Great Northern R. Co. v. Lenton, 555.

INSTRUCTIONS TO JURY.

Effect of failure to object to instructions, see Appeal and Error, 16.

Prejudicial error as to instructions, see Appeal and Error, 32–36.

TRIAL—continued.

8. The court's instructions to the jury should be considered and construed as a whole. McGregor v. Great Northern R. Co. 471.
9. Among other things the jury was instructed in effect that a person to whom the goods were consigned and who pays the freight and receives the same may be deemed to have imported the same within the meaning of the statute against importations of liquors. Such instruction merely advised the jury that they *may* infer from such acts that the defendant imported the liquors and the same was clearly proper. State v. McKone, 547.
10. The instructions when considered as a whole were substantially correct, and the specifications relating thereto are without merit. State v. McKone, 547.
11. Certain instructions to the jury complained of are examined and held correct. State v. Ramsey, 626.
12. Certain requests for instruction examined and held properly refused. Where requests for instructions are either substantially covered in the charge as given, or mistake the law, or, for any reason, their refusal is nonprejudicial, error cannot be successfully assigned thereon. State v. Ramsey, 626.

VERDICT.

Direction of, see supra, 6, 7.

Review of findings of verdict on appeal, see Appeal and Error, 23, 24.

13. Not a chance verdict merely because, in arriving at the amount, the jury took each juror's estimate of what should be assessed as the damages, and divided the total by the number of jurors, and afterward knowingly and understandingly agreed that such quotient should be the amount of the verdict. Great Northern R. Co. v. Lenton, 555.

TRIAL DE NOVO.

On appeal, see Appeal and Error, 7, 13, 37; Escrow, 9; Judgment, 1; Pleading, 4; Taxation, 4, 6; Trusts, 1.

TRUSTS.

Trustees in bankruptcy, see Bankruptcy, 4–6.

1. Action to quiet title to real property, and to partition same among certain heirs at law of one S., deceased. Appellant, who is one of such heirs, asserts exclusive ownership in one of the quarters involved, and the sole controversy relates to the title to such quarter. Upon a trial *de novo* in the supreme court, it is *held*, in accordance with the findings and conclusions of the trial court, that such land belongs to the heirs, and that any title ac-

TRUSTS—continued.

quired by appellant thereto is held by him in trust for such heirs. Sanford v. Sanford, 190.

2. Contemplating death, one A. executed a bill of sale of his personal property and a warranty deed of his real estate, in favor of his wife. A few days later he executed a will, leaving all of the property, both real and personal, to said wife. After his death, one of the children brings this suit against the mother, alleging that said property had been willed to the mother in trust, and praying that distribution be ordered. Evidence examined and *held* not of that clear and convincing character necessary to establish the trust alleged, but does show a gift of the property, by will, to the mother, without any restrictions whatever, and with the express desire upon the part of the father that his estate be kept together for the benefit of the family and the payment of the debts. That the father trusted the mother to sometime make a distribution of the property in no manner changes the absolute character of the gift. Holler v. Amodt, 11.

UNITED STATES.

Public lands of, see Public Lands.

VACATION.

Of judgment, see Judgment, 2.

VALUE.

Opinion evidence as to, see Evidence, 20.

VENDOR AND PURCHASER.

1. An agreement by a vendor in an executory contract to furnish within a specified time an abstract showing a good and merchantable title to the property conveyed is a condition precedent, and the vendor must show a compliance therewith before he can require performance on the part of the vendee. Kennedy v. Dennstadt, 422.
2. A good and merchantable title means a title in fee simple, free from litigation, palpable defects, and grave doubts, which will enable the purchaser not only to hold the land in peace, but which will also enable him, whenever he may desire to so do, to sell or mortgage it to a person of reasonable prudence and caution. Kennedy v. Dennstadt, 422.
3. In an action to determine adverse claim to lands which were purchased under a conditional contract of sale under which the sum of $2,000 was paid down, and it was agreed that the defendant, if dissatisfied with his purchase, could, after the expiration of a year, cancel his contract of purchase

VENDOR AND PURCHASER—continued.

and recover back the purchase price paid, provided that by a certain date he did certain breaking, and in which said contract certain payments, in addition to the $2,000 originally paid, were to be made before the end of such year: *Held*, that time was not of the essence of the contract as to such payments, except in so far as defendant's right to a deed was concerned; that the delay in doing the breaking before the specified time had been sanctioned and permitted by the plaintiffs, and that the right of the defendant to cancel the contract and to recover back the purchase price was not terminated by such failure or omissions. Michaels v. Barron, 436.

VERDICT.

Review of, on appeal, see Appeal and Error, 23, 24.

In general, see Trial, 13.

VETERINARY.

Prosecution for unlawfully practicing veterinary surgery, see Veterinaries.

VOTERS AND ELECTIONS.

See Elections.

WAIVER.

Necessity of pleading, see Pleading, 6.

1. The question of waiver is generally a question of intent. Wonser v. Walden Farmers' Elevator Co. 382.

WARRANT.

For arrest, see Arrest.

WILLS.

Creation of trusts by, see Trusts.

WITNESSES.

Prejudicial error as to examination of, see Appeal and Error, 30, 31.

1. A witness whose name is not indorsed on the information may be examined

WITNESSES—continued.

on behalf of the state in a criminal prosecution, where it is shown that the attorney for the defendant was given due notice of the state's intention to call such witness, and when prior to the filing of the information the prosecution, though it was aware that such witness had some knowledge of the occurrence, had no knowledge that his testimony would be in any way material to the issues. State v. Kilmer, 442.

WORK AND LABOR.

Lien for farm labor, see Liens.