REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

November 2, 1915 to February 10, 1916.

H. A. LIBBY
REPORTER

VOLUME 32

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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.
District No. Eight,
HON. K. E. LEIGHTON.
District No. Nine,
HON. A. G. BURR.
District No. Ten,
HON. W. C. CRAWFORD.
District No. Eleven,
HON. FRANK FISK.
District No. Twelve,
HON. 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.

CASES REPORTED IN THIS VOLUME.

TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

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TABLE OF SOUTH DAKOTA CASES CITED IN OPINIONS.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

IN THE MATTER OF CERTAIN PROCEEDINGS FOR THE DISBARMENT OF H. B. DOUGHTY.

(149 N. W. 721.)

Record examined, and charges made *held* not to be supported by the evidence.

Opinion filed December 12, 1914.

Original proceeding for disbarment.

Proceedings dismissed.

John A. Layne, A. M. Christianson, R. A. Nestos, with *John Carmody*, Assistant Attorney General, of counsel, for Disbarment Committee of State Bar Association.

H. B. Doughty, pro se.

BRUCE, J. This is a proceeding for disbarment. The complaint and petition charges the practical embezzlement of two items of $22.50 and $4.75 respectively, which are alleged to have been collected for clients and not turned over.

The defendant answers that one of these items was property kept in payment of legal services formerly rendered, and that the other was retained inadvertently, and was subsequently paid. The testimony of the defendant is quite strongly corroborated, while that of the complaining witness is but little supported. In addition to this the record shows that the defendant, though arrested more than a year ago for practically the same offense, was acquitted by a jury. Not only is there a reasonable doubt in our minds, but we are unable even to say that there is a preponderance of the evidence in support of the charges made. The record before us, in short, by no means satisfies us of the guilt of the defendant.

The proceedings will therefore be dismissed.

SPALDING, Ch. J. I concur on the ground that the guilt of the defendant is not so clearly established on the first charge as to justify his disbarment, and his failure to account for the second item promptly is reasonably explained.

JAMES ARTHUR v. HENRY B. SCHAFFNER.

(152 N. W. 123.)

Default judgment — entry of — notice of — application to reopen — judgment not void — relief — laches.

Defendant had actual knowledge in 1908 that judgment had been entered by default against him in 1907. After a futile attempt to reopen such judgment under § 7483, Comp. Laws 1913, he applied to trial court to have the judgment set aside for irregularities in its entry, such application being made in 1913. It is not claimed that the judgment is void. *Held*, that defendant's inexcusable laches justified the trial court in denying the relief.

Opinion filed March 16, 1915.

Appeal from the District Court of Morton County; *Nuchols, J.*
Affirmed.
F. E. McCurdy, for appellant.

A motion to vacate a judgment for irregularity does not come under § 6884 of the Codes 1905, and may be made at any time within the time fixed by the court. The statute does not limit the time in which such an application may be made. Martinson v. Marzolf, 14 N. D. 309, 103 N. W. 937; Naderhoff v. George Benz & Sons, 25 N. D. 165, 47 L.R.A.(N.S.) 853, 141 N. W. 501.

Oliver Leverson, J. W. McCormick, of counsel, for respondent.

The judgment of a court of general jurisdiction, and the record thereof, are presumed to be regular. That no proof was offered of the plaintiff's claim, at the time of the entry of judgment, is no sufficient reason for attacking a judgment regular in all respects so far as the record shows. Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937.

An erroneous judgment may be of full force and effect until reversed. Black, Judgm. §§ 170, 328.

Even if it does not affirmatively appear upon the judgment roll that the court had jurisdiction, yet such will be conclusively presumed. Freeman, Judgm. §§ 124, 132.

Where default has been entered, no rights of plaintiff are forfeited by delay in taking final judgment. Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218.

A person desiring to obtain relief from a default judgment, on any ground or for any reason, must take the necessary steps within a reasonable time; and his unexcused delay and laches will preclude him from obtaining any relief. Black, Judgm. § 313.

BURKE, J. In March, 1907, plaintiff sued the defendant for the sum of $195 and interest since 1905. Before the time to answer had expired, defendant and plaintiff reached some agreement between themselves regarding a settlement, and no answer was interposed. The attorney for the plaintiff, however, was not notified of the settlement, and entered judgment by default on the 24th of April, 1907. It was not until 1908 that defendant discovered that such judgment had been entered, when he made application under the statute to have the same opened upon the ground of inadvertence, surprise, and excusable neglect. This motion, however, was never brought on for hearing, and on the 2d of September, 1911, a new motion upon the same identical grounds was made and served, and duly denied by the district court.

No appeal was taken from such order. At that time, however, the judge of the district court ordered a new judgment to be entered *nunc pro tunc,* allowing the sum of $50, which had been paid by the defendant under the terms of the personal settlement already mentioned. Notwithstanding the premises, defendant in October, 1913, made a still further motion to vacate such judgment, upon the grounds that the same had been irregularly entered, and was voidable. He states expressly that this motion is not based on § 7483, Comp. Laws 1913, but upon the ground, as he states, that the court had the right to nullify the judgment as irregular, irrespective of the statute, and cites us to the case of Naderhoff v. George Benz & Sons, 25 N. D. 165, 47 L.R.A.(N.S.) 853, 141 N. W. 501, upon which mainly he relies. Such case does not, in our opinion, aid defendant. Conceding, as he must, that the judgment before us is not void, but at most voidable, to set it aside defendant must bring himself within all those equitable rules usually imposed upon those asking equitable relief. From 1908, when defendant discovered that a judgment had been entered against him, until 1913, five long years passed during which nothing was done towards opening the judgment, upon the ground of such irregularity. This delay justified the trial court in refusing the relief demanded. See Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937; Black, Judgm. §§ 170–326; Freeman, Judgm. §§ 124–132. Defendant was guilty of inexcusable laches, and the judgment of the trial court is in all things affirmed.

J. S. SMITH v. BARNES COUNTY, NORTH DAKOTA, a Municipal Corporation.

(152 N. W. 674.)

Money had and received — action to recover — against a county — misdemeanor — defendant — deposit of cash bail — will not lie without showing bail has been exonerated.

1. An action against a county to recover, as for money had and received, a

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Note.—On the general question of deposit of cash in lieu of bail in criminal cases, in absence of statutory authority, see note in 44 L.R.A.(N.S.) 1150.

cash deposit in lieu of bail made by a defendant charged with a misdemeanor, will not lie without a showing that such bail has been exonerated.

Defendant — criminal action — arraignment — appearance by counsel — does not operate to release bail — even though it is a cash deposit.

2. The appearance of a defendant by counsel upon arraignment, in a criminal action, although authorized in misdemeanors, does not operate as an exoneration of the bail, even though such bail is in the form of a cash deposit in lieu of the usual undertaking.

Unauthorized forfeiture — cash bail — payment to county treasurer — by erroneous order of court — action against county to recover back — will not lie — reinstatement of bail — motion for — remedy.

3. An unauthorized forfeiture of such cash bail, and the payment thereof to the county treasurer pursuant to an erroneous order of the district court, will not give rise to a cause of action against the county for the recovery thereof as for money had and received; the proper remedy being an application to set aside such unauthorized forfeiture and to have such bail reinstated and returned into the custody of the clerk of court.

Opinion filed April 26, 1915.

Appeal from District Court, Barnes County, *Coffey,* J.

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

Affirmed.

Lee Combs and *L. S. B. Ritchie,* for appellant.

Where a person or a corporation has accepted money which belongs to another, he or it is bound to pay it over to the other even though no privity of contract exists between the parties and even though there is no express promise to pay such money to the party to whom it belongs, because the law presumes such a promise to pay. Hyde v. Thompson, 19 N. D. 1, 120 N. W. 1095; Martin v. Royer, 19 N. D. 504, 125 N. W. 1027, and cases cited.

In such a case the plaintiff may introduce any evidence which tends to show that the defendant has possession of money belonging to him, which in good conscience he ought to pay over. Freehling v. Ketchum, 39 Mich. 299; Grannis v. Hooker, 29 Wis. 65; 29 Cyc. 880, ¶ 2; Whittle v. Whittle, 5 Cal. App. 696, 91 Pac. 170; Reilly v. Provost, 98

App. Div. 208, 90 N. Y. Supp. 591; Libman v. Cohen, 69 Misc. 312, 125 N. Y. Supp. 488.

An action may be maintained against a county for bail money belonging to plaintiff. Sutherland v. St. Lawrence County, 42 Misc. 38, 85 N. Y. Supp. 696.

In this case defendant had the right, through his counsel, to enter a plea of not guilty, or to go to trial without being present in court. Rev. Codes 1905, § 9872, Comp. Laws 1913, § 10709.

The court erred in refusing permission to plaintiff, through his counsel, to prove that when the criminal case against him was called, his counsel appeared, offered to plead, or go to trial, but this was denied and the cash bail forfeited. Such proof was material and proper. Bridges v. Sullivan County, 92 N. Y. 570; Strough v. Jefferson County, 119 N. Y. 212, 23 N. E. 552; Story v. Robertson, 5 Neb. (Unof.) 404, 98 N. W. 825.

A court cannot deny to a defendant charged with a misdemeanor the right to appear by counsel, offer to plead, and to go to trial in his absence, nor can the court, after denying these statutory rights, lawfully forfeit the defendant's bail money, under such circumstances. People v. Ebner, 23 Cal. 158; People v. Budd, 57 Cal. 349; Neaves v. State, 4 Tex. App. 1; People v. Miller, 63 App. Div. 11, 71 N. Y. Supp. 212; People v. Welch, 88 App. Div. 65, 84 N. Y. Supp. 703; State ex rel. Gleim v. Evans, 13 Mont. 239, 33 Pac. 1010.

M. J. Englert, State's Attorney, and *H. A. Olsberg,* Assistant State's Attorney, for respondent.

The terms and conditions of a cash bail deposited in lieu of surety are fixed by the statutes of this state. Rev. Codes 1905, §§ 10261, 10264, Comp. Laws 1913, §§ 11119, 11122; State v. Banks, 24 N. D. 21, 138 N. W. 973.

It is not necessary to enter a judgment on an order forfeiting a cash bail deposited in lieu of surety. Morrow v. State, 6 Kan. 222; Arnsparger v. Norman, 101 Ky. 208, 40 S. W. 574; State v. Brown, 149 Wis. 572, 136 N. W. 174, Ann. Cas. 1913D, 193.

The plaintiff's remedy was to apply to the district court for an order remitting to him his cash bail money, or for a remission of the forfeiture. Rev. Codes 1905, § 10267, Comp. Laws 1913, § 11125; United States v. Eldredge, 5 Utah, 161, 13 Pac. 673.

Plaintiff has not availed himself of the privileges offered by the statute. He has waived all the irregularities of which he could have taken advantage. 3 Enc. Pl. & Pr. 243; 5 Cyc. 132 (e), 136 (6).

He could have appealed from the order of forfeiture. Morrow v. State, 6 Kan. 222; People v. Miller, 63 App. Div. 11, 71 N. Y. Supp. 212; Dow v. Lillie, 26 N. D. 512, L.R.A.1915D, 754, 144 N. W. 1082.

In this state the court has power to require the presence in court of a defendant charged with a misdemeanor. Rev. Codes 1905, §§ 9353, 9934, Comp. Laws 1913, §§ 10092, 10771; Warren v. State, 19 Ark. 214, 68 Am. Dec. 214; State v. Johnson, 82 Kan. 450, 27 L.R.A.(N.S.) 943, 108 Pac. 793; Wells v. Terrell, 121 Ga. 368, 49 S. E. 319; State v. Minton, 19 S. C. 280; Walker v. Com. 79 Ky. 292; Bond v. Com. 7 Ky. L. Rep. 94; Com. v. M'Neill, 19 Pick. 127.

The plaintiff cannot recover back such bail money in an action for money had and received. Gile v. Interstate Motor Car Co. 27 N. D. 108, L.R.A.1915B, 109, 145 N. W. 732.

If the forfeiture proceedings are not involved in this action, then the money is, in law, still in the hands of the court. 5 Cyc. 136 (6).

The plaintiff's action must fall, because his evidence was directed to the forfeiture proceedings, and this amounts to a collateral attack, and is not permissible. Bulkley v. Stewart, 1 Day, 130, 2 Am. Dec. 57; Barrere v. Somps, 113 Cal. 97, 45 Pac. 177, 572; Young v. Appelgate, 9 Kan. App. 493, 58 Pac. 1000.

A complaint must allege all the facts necessary to enable the plaintiff to recover upon the cause of action set out. Barrere v. Somps, 113 Cal. 97, 45 Pac. 177, 572; Soden v. Murphy, 42 Colo. 352, 94 Pac. 353.

Fisk, Ch. J. Appellant, by this action, seeks to recover from the respondent, Barnes county, the sum of $500 and interest as for money had and received for the use and benefit of appellant's assignor, one A. R. Smith, who deposited such sum with the clerk of the district court of said county in November, 1911, as cash bail for his appearance in the district court to answer to the charge of selling intoxicating liquors contrary to law. In February, 1913, A. R. Smith assigned to

appellant any claim which he possessed against defendant county for the recovery of such money.

The defense, briefly stated, was and is that the conditions upon which such bail money was deposited were never complied with in that A. R. Smith absconded and never appeared in the district court to answer to the charge aforesaid, and that such bail was duly adjudged to be forfeited for such nonappearance, and was ordered to be paid over to the treasurer of defendant county, which order was later complied with.

At the trial in the district court appellant's counsel sought to show that the order declaring a forfeiture of such bail was a nullity for the alleged reason that the said A. R. Smith, as was his alleged right, appeared through counsel to answer to the charge aforesaid, such charge being merely a misdemeanor. In support of such contention counsel rely upon § 9872, Rev. Codes 1905, § 10709, Comp. Laws 1913, which in effect provides that if the information or indictment is for a misdemeanor a defendant may appear upon arraignment by counsel, and his personal appearance is unnecessary. Such offer of proof was rejected apparently upon the ground that the complaint was not broad enough to permit such proof, or, in other words, that the validity of such order forfeiting the bail could not be questioned collaterally in this manner.

At the conclusion of the trial the court directed a verdict in defendant's favor. Thereafter judgment was entered pursuant thereto, and this appeal is both from such judgment and from an order denying plaintiff's motion for a new trial. As stated by appellant's counsel, the specifications of error all relate to the rulings of the lower court in excluding evidence offered by plaintiff in support of his alleged cause of action, and they may therefore be considered together and in a general manner.

Conceding all that appellant claims with reference to the alleged errors of the trial court in excluding the testimony offered by him, still, unless such rulings were prejudicial, he cannot complain. We fail to see how they were prejudicial. The whole basis upon which appellant's cause of action is predicated appears to us to be without foundation. He assumes that in equity and good conscience he is entitled to recover such bail money because, forsooth, the trial court in the

criminal action in which such bail was furnished exceeded its jurisdiction in assuming to declare such bail forfeited, for the reason that, the charge being merely a misdemeanor, the defendant therein had the statutory right to and did appear through his attorney. Granting all this to be true, does it follow that in equity and good conscience plaintiff's assignor was entitled to a return of such bail money? Clearly not. Had no such forfeiture been adjudged by the trial court such bail money would rightfully and legally have remained in the custody of the clerk until the conditions of the bail were complied with. The evident fallacy in appellant's contention consists in the unwarranted assumption that the conditions of the cash bail were satisfied merely by defendant's appearance through his counsel for arraignment; but such is not the law as we view it. On the contrary, § 10264, Rev. Codes 1905, § 11122, Comp. Laws 1913, prescribes the terms of an undertaking of bail, and among other conditions are the following: ". . . that the above named . . . (naming the defendant) . . . will at all times hold (or surrender) himself amenable to the orders and process of the court, and, if convicted, will appear for judgment, and render himself in execution thereof." Where a cash deposit for bail is made the like conditions obtain. See § 10261, Rev. Rodes 1905, § 11119, Comp. Laws 1913, which prescribes that "a deposit of the sum of money mentioned in the order admitting to bail is equivalent to bail," etc. If an undertaking of bail had been given instead of a cash deposit in lieu thereof, no one would contend that such bail was exonerated by defendant's appearance upon arraignment, either personally or through counsel.

This is a complete answer to appellant's contention that he is entitled to recover the amount of such deposit as for money had and received. If, therefore, such bail was improperly forfeited, as appears to be the holdings under statutes like ours (People v. Ebner, 23 Cal. 158; People v. Budd, 57 Cal. 349; Neaves v. State, 4 Tex. App. 1; People v. Miller, 63 App. Div. 11, 71 N. Y. Supp. 212; People v. Welch, 88 App. Div. 65, 84 N. Y. Supp. 703; State ex rel. Gleim v. Evans, 13 Mont. 239, 33 Pac. 1010), still this fact would not authorize a suit to recover the deposit as for money had and received without a showing that the conditions of such bail had been complied with. No such showing was

attempted to be made. The only remedy in such a case would be an application to reinstate such bail.

Upon the question generally as to exoneration of bail by an appearance through counsel where the defendant is charged with a misdemeanor, see Warren v. State, 19 Ark. 214, 68 Am. Dec. 214; State v. Johnson, 27 L.R.A.(N.S.) 943, and note (82 Kan. 450, 108 Pac. 793); 3 R. C. L. p. 45.

Judgment affirmed.

BOVEY-SHUTE LUMBER COMPANY, a Corporation, v. OLE IVERSON, Gunhild Salveson, and Imperial Elevator Company, a Corporation.

(Two cases.)

(155 N. W. 32.)

Action to foreclose mechanic's lien. Trial *de novo*. Plaintiff alleges that it sold certain lumber to the defendant in 1907, and that it perfected a lien in 1911. Evidence examined and, *held*,—

Mechanic's lien — action to foreclose — complaint — allegations — proof — failure of — contract — between parties — absence of.

That there is a total failure of proof of the allegations of the complaint, the proof showing a sale to defendant's father. Being no contract, there can be no lien, and the action must fail.

Opinion filed November 2, 1915.

APPEAL from the District Court of Pierce County, *Burr*, J.

Affirmed.

Flynn & Traynor, for appellants.

The materials having been purchased and delivered under the law in force in 1907, such law only is applicable, and controls in this case, and fixes the right of plaintiff to its lien. Comp. Laws 1913, § 6237; Session Laws, 1909, chap. 158; Session Laws, 1911, chap. 187; Mahon v. Surerus, 9 N. D. 57, 81 N. W. 64; Craig v. Herzman, 9 N. D. 140,

81 N. W. 288; Salzer Lumber Co. v. Claflin, 16 N. D. 602, 113 N. W. 1036; Bardwell v. Mann, 46 Minn. 285, 48 N. W. 1120; Nystrom v. London & N. W. American Mortg. Co. 47 Minn. 31, 49 N. W. 394; Nelson v. Sykes, 44 Minn. 68, 46 N. W. 207; Garneau v. Port Blakely Mill Co. 8 Wash. 467, 36 Pac. 463; Weaver v. Sells, 10 Kan. 609; Weber v. Bushnell, 171 Ill. 587, 49 N. E. 728; Walker v. Whitehead, 16 Wall. 314, 317, 21 L. ed. 357, 358.

The consent of the owner may be implied from his failure to make objection. Boisot, Mechanics Liens, §§ 19, 20, pp. 23–25; Rev. Codes 1905, § 6237, Comp. Laws 1913, § 6814; Congdon v. Cook, 55 Minn. 1, 56 N. W. 253; Wheaton v. Berg, 59 Minn. 525, 52 N. W. 926; Heath v. Solles, 73 Wis. 217, 40 N. W. 804; Scroggin v. National Lumber Co. 41 Neb. 195, 59 N. W. 548; Evans v. Judson, 120 Cal. 282, 52 Pac. 585; Rev. Codes 1905, § 6243, Comp. Laws 1913, § 6823.

Where it is the intent of the leasehold agreement that the lessee shall improve the property, which will benefit the lessor, and the lessor consents to the making of the improvements, his fee is subject to the lien. Kremer v. Walton, 16 Wash. 139, 47 Pac. 238; Evans v. Judson, 120 Cal. 282, 52 Pac. 585; Dougherty-Moss Lumber Co. v. Churchill, 114 Mo. App. 578, 90 S. W. 405; Otis v. Dodd, 90 N. Y. 336; Mosher v. Lewis, 10 Misc. 373, 31 N. Y. Supp. 435.

Before the penalties of the statute will be visited upon the party failing to furnish a bill of particulars, he must first have been ordered by the court to furnish it, and have failed to do so. Hanson v. Lindstrom, 15 N. D. 584, 108 N. W. 798.

L. R. Nostdal, for respondents.

The written demand for verified statement of account, made by defendants, was ignored by plaintiff. Plaintiff was therefore not entitled to offer proof in support of its complaint. Rev. Codes 1905, § 6868, Comp. Laws 1913, § 7457.

Conversations had with a person, since deceased, cannot be shown in evidence. Rev. Codes 1905, § 7253, Comp. Laws 1913, § 7871; Session Laws, 1907, 1909.

Plaintiff neglected to file its claim against the estate of Iverson within the law limit, and it is therefore barred. Rev. Codes 1905, §§ 8097,

8099, 8100, 8103, 8105, Comp. Laws 1913, §§ 8734, 8736, 8737, 8740, 8742.

BURKE, J. Action to foreclose mechanic's lien; trial *de novo*. Plaintiff for its cause of action alleges, in addition to the formal matters, that "on or about the 8th day of July, 1907, it made a contract with Ole Iverson, through his agent, Eric Iverson, and Mrs. Eric Iverson, wherein and whereby the above-named plaintiff agreed to furnish to the said Ole Iverson certain material for the erection, alteration, and repair of a certain dwelling house, etc." He further alleges that on the 11th of September, 1911, a mechanic's lien was perfected against the premises upon which said building was erected. This action seeks to foreclose said lien, Ole Iverson being the principal defendant, two other creditors being made defendants to determine their adverse liens.

Upon the trial one Christianson was called as a witness for the plaintiff, and testified that he was the yard agent through whom the sale was made. Further he testified:

Q. Did you sell this lumber to Ole Iverson?

A. No, sir.

Q. At the time you sold it to Eric Iverson and at the time of its delivery, was Ole Iverson present?

A. Why, he hauled the lumber for his father.

Q. And you delivered it to him to haul for his father, did you?

A. Yes, sir.

. . . . . .

Q. On or about 1907 did you make a sale of some lumber to Eric Iverson?

A. Yes, sir.

Q. And do you know for what that lumber was purchased,—what was stated to you at that time?

A. It was for an addition to the Ole Iverson house.

Q. Who hauled the lumber?

A. Ole Iverson hauled the most of it.

It further developed upon the trial that in July, 1907, Ole Iverson was the owner of a quarter section of land, upon which he resided with

his family. His father, Eric, and mother, Barbara Iverson, desiring to erect a building thereon and live near their son, it was agreed among themselves that the father pay for the lumber, and build what was practically an addition to the son's house. Pursuant to this understanding the father, Eric, bought of the Bovey-Shute Lumber Company $323.50 worth of lumber, paying thereon the sum of $229.15. The son had nothing to do with the transaction excepting to haul home the lumber. December 17, 1907, the father died, intestate; an administrator was appointed, notice given to creditors, and finally the property of deceased, including this addition to the dwelling house, was distributed according to law and the administrator discharged in 1909. The lumber company did not file any claim against the estate, and the same is therefore barred by the statute of nonclaim. In the distribution of the estate the dwelling house was treated as personal property, and title thereto transferred to the mother, Barbara Iverson, who was not made a party to the present action. Upon September 11, 1911, the lumber company filed a mechanics' lien against the son, Ole, which lien is the basis of the present action. The lower court rendered judgment for the defendant, and this appeal follows. Appellant devotes most of his brief to a discussion of the statute under which the lien was filed. The view which we have taken of the case, however, renders it unnecessary to enter into a discussion of these phases.

(1) It is plain to us that there has been a total failure of proof of the allegations of plaintiff's complaint. It is alleged a contract was made with the son, Ole, and the proof shows a sale to the father, Eric. The son certainly cannot be held, upon this showing, for the price of the lumber. Being no contract, there can be no lien, and the action must fail. Whether this situation arose through the failure of plaintiff to file a claim against the estate of Eric Iverson we need not discuss. It is also patent that no lien can be allowed against the building. It now belongs to the mother, and she was not made a party to this action. Judgment of the trial court is affirmed.

G. SOMERS & COMPANY, a Corporation, v. GEORGE W. WILSON.

(155 N. W. 30.)

County court — order of — appeal from — default judgment — diligence — defense — inadvertence — motion for — relief from — discretion — abuse of.

Upon an appeal from an order of the county court refusing to relieve defendant from a default judgment, the facts disclose that defendant acted with the utmost diligence in arranging, through his attorney, to have a concededly meritorious defense interposed. Such attorney also acted with unusual promptitude in preparing the answer and other papers connected with the defense, but, through inadvertence, he was one day late in serving the answer on plaintiff's attorneys, who resided at Fargo, several hundred miles away.

Held, under the particular facts stated in the opinion, that it was a manifest abuse of discretion on the part of the trial court to deny this motion for relief from such default.

Opinion filed November 2, 1915.

Appeal from the County Court of Cass County, *A. G. Hanson*, J.

From an order refusing to relieve defendant from a default judgment, he appeals.

Reversed.

Ray O. Miller and *Henry J. Linde*, for appellant.

The rule adopted by our supreme court requires a very liberal construction of our statute relating to relief from default judgments. Rev. Codes 1905, § 6884, Comp. Laws 1913, § 7483; Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102; Barrie v. Northern Assur. Co. 99 Minn. 272, 109 N. W. 248.

Such statutes are remedial in their character and application, and are intended to furnish a simple, speedy, and efficient means of relief in a most worthy class of cases. The discretion of the trial court is not merely a mental one, but a sound legal, judicial discretion, giving effect to the will of the law. Freeman, Judgm. 4th ed. § 106; Tripp v. Cook, 26 Wend. 143; Citizens' Nat. Bank v. Branden, 19 N. D. 493, 27

L.R.A.(N.S.) 858, 126 N. W. 102; Barto v. Sioux City Electric Co. 119 Iowa, 179, 93 N. W. 268; Grady v. Donahoo, 108 Cal. 211, 41 Pac. 41; Watson v. San Francisco & H. B. R. Co. 41 Cal. 17; Dodge v. Ridenour, 62 Cal. 263.

Pfeffer & Pfeffer, for respondent.

"Discretion" means a judicial discretion, to be exercised under the exigencies of each case as it arises. The mere fact that the appellate court does not fully agree with the trial court does not suffice to show abuse of discretion. Fargo v. Keeney, 11 N. D. 484, 92 N. W. 386; Cline v. Duffy, 20 N. D. 525, 129 N. W. 75; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228.

A motion to vacate a judgment is not based upon a strict legal right, but is addressed to the favor of the court; and its finding will not be disturbed except for clear abuse. Cline v. Duffy, 20 N. D. 525, 129 N. W. 75; Bagby v. Chandler, 8 Ala. 230; Merchants' Ad-Sign Co. v. Los Angeles Bill Posting Co. 128 Cal. 619, 61 Pac. 277; Clarke v. Witram, 99 Cal. 50, 33 Pac. 798; Williamson v. Cummings Rock Drill Co. 95 Cal. 652, 30 Pac. 762; Poirier v. Gravel, 88 Cal. 79, 25 Pac. 962; Garner v. Erlanger, 86 Cal. 60, 24 Pac. 805; Dougherty v. Nevada Bank, 68 Cal. 275, 9 Pac. 112; Fargo v. Keeney, 11 N. D. 484, 92 N. W. 836; 23 Cyc. 895, and cases cited; 3 Cyc. 341, and cases cited; 3 Century Dig. title "Appeal and Error," § 3823.

The neglect of counsel employed and having charge of the case is the neglect of the client, and must be so treated. Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102; 23 Cyc. 939, and cases cited; Wilson v. Smith, 17 Tex. Civ. App. 188, 43 S. W. 1086; Thomas v. Duncan, 7 Ky. L. Rep. 371; Savage v. Dinkler, 12 Okla. 463, 72 Pac. 366.

One making affidavit in support of a motion to vacate a judgment must have original knowledge of the alleged facts stated, and it must so clearly appear; otherwise such affidavit is hearsay. Getchell v. Great Northern R. Co. 24 N. D. 487, 140 N. W. 109.

An applicant, to be relieved from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, must show a good excuse for failing to defend at the proper time; he must give a sufficient, substantial reason. Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; Sargent v. Kindred, 5 N. D. 8, 63 N. W.

151; Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 252; Gauthier v. Rusicka, 3 N. D. 1, 53 N. W. 80; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228; Getchell v. Great Northern R. Co. 24 N. D. 487, 140 N. W. 109; Reilly v. Ruddock, 41 Cal. 312; People v. O'Connell, 23 Cal. 281; Harlan v. Smith, 6 Cal. 173; Utley v. Cameron, 87 Ill. App. 71; Bass v. Smith, 60 Ind. 40; Walker v. Clark, 8 Iowa, 474; Moran v. Mackey, 32 Minn. 266, 20 N. W. 159; 23 Cyc. 930, and cases cited.

Such an affidavit will be construed most strongly against him who makes it. Johannes v. Coghlan, 23 N. D. 588, 137 N. W. 822; Jenkins v. Gamewell Fire Alarm Teleg. Co. 3 Cal. Unrep. 655, 31 Pac. 570; Bailey v. Taaffe, 29 Cal. 422; Hazelrigg v. Wainwright, 17 Ind. 215; Frost v. Dodge, 15 Ind. 139; Brown v. Warren, 17 Nev. 417, 30 Pac. 1078; Woods v. Lang, — Tex. —, 11 S. W. 917; 23 Cyc. 954, and cases cited; 30 Century Dig. title "Judgment," § 312.

It should state facts, not conclusions. Marin v. Potter, 15 N. D. 284, 107 N. W. 970; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228; Edwards v. McKay, 73 Ill. 570.

"Accident or oversight" on the part of the attorney is not sufficient. Martin v. Reese, 105 Iowa, 694, 75 N. W. 496; Rosenthal v. Payne, 2 N. Y. Supp. 717; Johannes v. Coghlan, 23 N. D. 588, 137 N. W. 822.

That either the party or attorney, or both, were engaged upon other work, and forgot, is not a valid or sufficient excuse. It is the duty of a party to an action to give it due attention. Bazal v. St. Stanislaus Church, 21 N. D. 602, 132 N. W. 212; Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102.

Fisk, Ch. J. Plaintiff had judgment by default in the county court of Cass county; and from an order refusing to relieve defendant from such default and to permit him to defend upon the merits, he appeals.

The facts disclosed at the hearing of such motion in the court below, and which are shown by the record before us on this appeal, are not seriously in dispute, and, briefly stated, are as follows:

The summons and complaint were served upon defendant in Mountrail county, the place of his residence, on February 28, 1914, and on that date he retained his attorney, Roy O. Miller, to whom he made a full and complete statement of all the facts of his case, and was advised

by his said attorney that he had a valid and meritorious defense to plaintiff's cause of action. Whereupon he instructed such attorney to interpose a verified answer, and serve and file an affidavit and demand for a change of venue from Cass to Mountrail county, which his said attorney promised to do. Such attorney thereafter and on March 3, 1914, duly prepared, and had signed and sworn to, an affidavit as a basis for a demand for such change of venue, also a formal demand for such change, which he signed on that date. He also prepared an answer, which concededly states a good and meritorious defense to the plaintiff's complaint, and duly verified the same on March 9th. For some reason not entirely clear from the record, none of these papers were forwarded to plaintiff's attorney until March 11th, which was the date such default judgment was entered. It is true, it is stated in the affidavit of defendant's attorney that he forwarded all these papers to plaintiff's attorneys at Fargo on March 10th, for their admission of service, inclosing also a stipulation for them to sign, consenting to such change of venue, but plaintiff's attorneys produced at the hearing of the motion, and as a part of their showing in opposition thereto, an envelop postdated March 11th, and which they identified as the envelop received by them on the latter date, containing such papers; and defendant's attorney in his affidavit seems to concede that he was one day late in effecting service on plaintiff's attorneys of such papers. At that time the statutory period allowed for appearance after service of the summons in county court was ten days. Hence there was a default after March 10th, provided such papers were not deposited in the mail on that date. In view of the position of defendant's attorney in conceding or assuming in his affidavit that he was one day late, we shall, for the purposes of this appeal, hold that there was a default of one day, and that such default judgment was properly entered.

This being true, the burden is on the defendant to excuse such default, and to succeed on this appeal he must show that the trial court, in denying his motion, clearly abused the discretion vested in it. The rule applicable to such motions and to appeals therefrom is too well settled in this state to require reiteration here. We merely cite a few recent cases in this court, wherein the earlier holdings are referred to. They are: Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A. (N.S.) 858, 126 N. W. 102; Cline v. Duffy, 20 N. D. 525, 129 N. W.

75; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228. Applying the settled rules heretofore announced by this court to the facts before us, can it be properly said that the lower court clearly abused its discretion in making the order complained of? While we naturally have some hesitancy in so holding, we feel that under the particular facts of this case such question should be answered in the affirmative. We are prompted to this holding because of the manifest injustice which would result to defendant by a contrary decision. He is in no way to blame for the default, but, on the contrary, acted with the utmost despatch in attempting to interpose his concededly meritorious defense, and also in taking steps to be relieved from the default. The same may be said of his attorney, with the single exception of the very slight delay in procuring service of the answer and other papers. Owing to his exceptional promptitude in all other ways, we are convinced that such slight delay resulted through mere inadvertence and was excusable, especially in view of all the circumstances. Both defendant and his attorney resided several hundred miles from the place where the action was pending, and in a county not having increased jurisdiction in its county court, and the statutory time then given for appearance and answer was but ten days from the date of service of the summons,—a period too short, and since recognized to be so by our legislature. See Chapter 102, Laws 1915, extending the period to twenty days. While it is no doubt true that defendant and his attorney were bound to know the law, and consequently were bound to know that but ten days were allowed in which to answer, it is easy to see how a day's delay might happen to the most careful practitioner. To deny relief under all the circumstances is shocking to our sense of justice. We believe the case at bar clearly falls within the class of cases which the legislature had in mind in enacting § 7483, Compiled Laws of 1913, providing: "The court may . . . in its discretion, . . . at any time within one year after notice thereof, relieve, a party from a judgment . . . taken against him through his mistake, inadvertence, surprise, or excusable neglect," etc.

It should be stated that no question is raised as to the legal sufficiency, in point of practice, of defendant's showing on the motion, the sole contention being that the showing made was insufficient, under the settled rule, to excuse the neglect or default of his attorney. The order is

reversed to the extent of permitting defendant to answer and to go to trial upon the merits, but not for the purpose of permitting an application to be made for a change of venue of the action. Appellant will recover his costs on the appeal.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corporation, v. OLIVER G. NORDMARKEN.

(155 N. W. 669.)

Indemnity bond — action on — to recover money — employer — manager — salesman — larceny — embezzlement — findings of court.

1. In an action brought to recover money paid to the defendant's employer upon a bond by which the plaintiff obligated itself to indemnify the employer against such loss as it might sustain by reason of the larceny or embezzlement of the employer's property by the defendant as its manager or salesman, in the sale of machinery,—*held*, that the evidence justified the trial court in finding that there was no larceny or embezzlement for which the plaintiff was liable to the employer on the bond.

Stipulation — guaranty insurance company — employee — voucher — conclusive evidence — liability — void — public policy.

2. *Held*, further, that a stipulation between a "guaranty insurance company" and the guaranteed employee, that a voucher or other evidence of payment by the company to the employer shall be conclusive evidence against the employee as to the fact and extent of his liability to the company, is void as being against public policy in so far as it makes such voucher conclusive evidence.

Voucher — liability — prima facie evidence of the fact — other evidence — effect of.

3. *Held*, further, that assuming that such voucher establishes a prima facie liability of the defendant, that the other testimony introduced by the plaintiff as to the facts of the alleged default of the defendant rebuts the prima facie showing.

Opinion filed November 6, 1915.

Appeal from the District Court, McHenry County, *A. G. Burr*, J.

Action by the Fidelity & Deposit Company of Maryland against

Oliver G. Nordmarken. Directed verdict for the defendant, and from an order refusing a new trial, plaintiff appeals.

Affirmed.

Goss and Christianson, JJ., disqualified, did not sit, Hanley, District Judge, sitting by request.

Cowan & Adamson and *H. S. Blood,* for appellant.

A clause in an indemnity insurance policy, to the effect that the voucher received on payment of money by such company in settlement of loss sustained by the employer through the acts of the employee shall be conclusive evidence as to the amount and liability, is not void as being against public policy. London Guaranty & Acci. Co. v. Geddes, 22 Fed. 639.

C. W. Hookway, for respondent.

A party cannot agree to be bound conclusively by a contract which provides that the voucher taken in settlement of an indemnity loss shall be conclusive evidence of the liability incurred. Such a contract is against public policy. Fidelity & C. Co. v. Eickhoff, 63 Minn. 170, 30 L.R.A. 586, 56 Am. St. Rep. 464, 65 N. W. 351.

HANLEY, Special Judge. The plaintiff is what is termed a "guaranty insurance company," engaged in the business of guarantying employers against the fraud and dishonesty of their employees; and this action was brought by the plaintiff company to recover money paid by the plaintiff to the trustees in bankruptcy of the Western Implement Company, in settlement and compromise of an action brought by the trustees against the plaintiff corporation upon a bond by which the plaintiff obligated itself to make good to the Implement Company, defendant's employer, such loss as it might sustain by reason of the larceny or embezzlement of the defendant as the employee of said Implement Company.

The bond was issued in the year of 1905, upon the solicitation of the implement company, and upon the written application of the defendant, which application, among other things, provided that the defendant agreed "to reimburse the said Fidelity Company for all loss, costs, damages, and expenses, whatever, resulting from any act, default, or neglect of defendant, that said Fidelity company might sustain by reason of executing the bond or renewal thereof;" and defendant also

agreed in said application that the vouchers or other evidence of payment of such loss paid by the said company to the employer under such obligation, together with vouchers or other evidence of the payment of all costs and expenses incurred by the Fidelity Company in adjusting said loss, shall be taken as conclusive evidence, against the defendant, of the fact and extent of defendant's liability under his obligation to the Fidelity Company.

The bond issued by the plaintiff corporation pursuant to the application provided, as far as the terms thereof are material to a decision in this case, that the Fidelity Company agreed to reimburse the employer, Implement Company, for "such pecuniary loss as may be sustained by the employer, of money, securities, or other personal property belonging to the employer, as the employer shall have sustained by any act of larceny or embezzlement committed by the employee."

The answer of the defendant was a general denial, and a denial that the compromise and settlement of the Fidelity Company with the trustees was in good faith, and an allegation that the compromise was fraudulent and collusive, and without the sanction of the defendant.

Upon the trial the evidence offered by the plaintiff consisted of the application and bond, and proof of the execution thereof, and of proof by the testimony of defendant, on cross-examination as an adverse party, of the facts under which the alleged loss occurred. At the close of the plaintiff's case the trial court, on motion of the defendant, dismissed the case.

From an order denying a motion for a new trial, the plaintiff appeals to this court, assigning as error the directing of a verdict of dismissal and refusing a new trial, specifying in its brief and argument two questions: First, that the court erred in ruling that the hereinbefore mentioned provision in the application, making the vouchers conclusive evidence of the fact and extent of the defendant's liability, was void as against public policy, and argue that the said provision at least made the defendant prima facie liable. Second, that the court erred in ruling that the testimony did not affirmatively show a default in the condition of the bond.

We are satisfied that the learned trial court was right in holding that the clause in the application is void as against public policy. As is well said in Fidelity & C. Co. v. Eickhoff, 63 Minn. 170, 30 L.R.A.

586, 56 Am. St. Rep. 464, 65 N. W. 351, a case involving an exactly similar provision in a policy, in which case such provision was held void as against public policy,—"The right of a party to waive the protection of the law is subject to the control of public policy, which cannot be set aside or contravened by any arrangement or agreement of the parties, however expressed. Thus, an agreement to waive the defense of usury is void. So also, according to the weight of authority, is an agreement, made at the time of contracting a debt, to waive the prospective right of exemption." And, as stated in the Eickhoff Case, with such provisions a plaintiff "may, by his own *ex parte* acts, conclusively establish and determine the existence of his own cause of action. In short, he is made the supreme judge of his own case."

Counsel argues that the language used by the Minnesota court is *dicta,* and was only used as guidance to the lower court in the new trial granted. This is probably correct. However, in the same court, in Fidelity & C. Co. v. Crays, 76 Minn. 450, 79 N. W. 531, a case on a bond containing a similar clause, the court held the clause void as against public policy, and adhered to the language in the Eickhoff Case.

Both the Eickhoff and Crays Cases well illustrate the vice of what might happen under such provisions, these cases arising out of a shortage in weight between the grain purchased by a local elevator agent, and the grain shipped out by the agent. The shortage might well have been due to inaccuracy in the scales, or other innocent causes, and yet the agent would be liable merely by a showing that the insurance company paid for the shortage under the terms of the policy, and produced vouchers for such payment and settlement, if such provisions were held valid.

Nor does the counsel cite us any authority holding clauses like this valid. In London Guaranty & Acci. Co. v. Geddes, 22 Fed. 639, the sole case cited by counsel on this point, the objectionable clause was not passed upon by the court. That case arose on a motion to quash the capias and discharge in common bail, and the proceeding turned on the question as to whether the affidavit showed such a case of fraud as justified the issuance of the capias. The affidavit upon which the proceeding was based referred to conditions in the bond similar to the provision in the case at bar, and also charged embezzlement by the prisoner under the terms of the bond. The court did not pass upon the validity of the

"conclusive" provision. And in that case the court uses this language: "It is very clear there would be no liability for the amount claimed . . . but for the embezzlement of the defendant as charged," which is in fact the position of respondent in the case at bar; in other words, that the plaintiff cannot recover unless embezzlement is shown.

In an investigation of this subject, however, we find that Guarantee Co. of N. A. v. Pitts, 78 Miss. 837, 30 So. 758, holds as valid a "conclusive provision" in an application for insurance sued upon in that case. The provision passed upon in the Pitts Case is different from the one involved herein, in that the operation of the provision is limited by its express terms to settlements made in good faith. The distinction between that case and the case at bar is readily seen.

But the appellant contends that even if the "conclusive" provision is void, the introduction of the vouchers in evidence was prima facie evidence of the fact and extent of the defendant's liability to the plaintiff. Even if this is assumed, still the plaintiff went further in the trial of the action, and brought out facts explaining the employee's alleged default, which facts, as hereinafter explained, justified the trial court in concluding that on the whole of plaintiff's case a prima facie cause of action was not established. Fidelity & C. Co. v. Crays, supra.

This brings us to a consideration of the second point raised and argued by appellant, to wit, that the court erred in ruling that the testimony did not affirmatively show a default in the condition of the bond.

A proper consideration of this point necessitates a statement of the facts established concerning the alleged default, which facts, viewed in the light most favorable to the appellant, are substantially as follows: At the time the defendant made application to the plaintiff company for the bond in question, he was an employee of the insured Implement Company, and he was so employed as local manager, with the right and authority to sell machinery for the company for cash or credit. That sometime in 1906 he sold to his brother, a farmer, $1,900 worth of farm machinery on account, taking, either as collateral security or in payment thereof, stock in the Implement Company of the value of $2,000, which stock the brother owned. That the defendant had prior thereto advised the brother to invest in the stock, and that the brother was dissatisfied, and wanted to get out of the deal. That immediately

after making such sale, the defendant notified and informed the Implement Company of the transaction, and turned the stock over to the company. That the company kept the stock and did not repudiate the sale, but did notify the defendant not to make another such deal. That after the expiration of some months an action was brought by the Implement Company against the brother, in which payment for the property was sought, as conceded in the appellant's brief, and that sometime after the commencement of the action against the brother the Implement Company went into bankruptcy and trustees were appointed, and then an action was brought by the trustees against the plaintiff on the bond hereinbefore mentioned, on the ground that the sale was in fact embezzlement, and a default in the conditions of the bond.

Do these facts show embezzlement? We think not. In fact, under the facts developed by the plaintiff's case, we are of the opinion that it shows it was not embezzlement. The appellant bases his contention on § 9931 of the Compiled Laws of 1913, which reads as follows: "If any person being an officer, . . . servant, or agent of any . . . corporation, public or private, fraudulently appropriates to any use or purpose not in the due and lawful execution of its trust, any property which he has in his possession or under its control in virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement." And in this connection it might be well to again note that the provisions in the bond provided for the reimbursement of the insured only for loss sustained by "any act of larceny or embezzlement committed by the employee."

It is therefore clear that there was no default in the condition of the bond, unless the employee's acts amounted to either larceny or embezzlement. It is, of course, admitted that the complained-of acts do not amount to larceny; and we are equally clear that the acts do not constitute embezzlement. It is clear that the defendant as manager of the Implement Company had the right and authority to sell the merchandise of the company, either for credit or cash; and a sale of such merchandise for either credit or cash would be in the due and lawful execution of his trust; nor did the defendant secrete the property or the transaction, but made full disclosure thereof immediately to his principals, and turned over to the corporation the proceeds of the sale, to wit, the account against the brother and the stock delivered by him,

retaining for his own use nothing of the proceeds of the sale, and the Implement Company retain such proceeds, and did not repudiate the transaction.

All these facts and the facts hereinbefore stated show that there was no embezzlement, and that the transaction was ratified.

We are not unmindful of the fact that the appellant contends that there was no ratification pleaded, and that such defense is not available. However, to plead ratification it would have been necessary for the defendant to admit the embezzlement, which he has always denied, and certainly in determining whether or not the transaction was in the due and lawful execution of the defendant's trust the action of his principal in ratifying the transaction and accepting the proceeds thereof is material in determining the nature of the transaction.

Finding no error in the order denying the motion for a new trial, the same is affirmed.

A. C. HARRIS v. ED. HESSIN.

(155 N. W. 41.)

Default judgment — vacating — trial court — refusing to vacate — discretion — abuse of.

The refusal of the trial court to vacate a default and permit a trial on the merits, under the facts stated in the opinion, was an abuse of discretion.

Opinion filed November 6, 1915.

An appeal from the County Court of Increased Jurisdiction of Ward County, *Wm. Murray,* J.

Reversed.

Paul Campbell and *H. S. Kline,* for appellant.

The trial court has the power to relieve a person against whom a default judgment has been taken, from such judgment, or from an order or other proceedings taken against him, within one year, upon proper application; and when such party shows reasonable excuse, mistake, or that the judgment or other proceeding was taken improvidently, it is an

abuse of discretion for the court to deny relief. Comp. Laws 1913, § 6884; 32 Cyc. 406; Cline v. Duffy, 20 N. D. 525, 129 N. W. 75; Bismarck Grocery Co. v. Yeager, 21 N. D. 547, 131 N. W. 517.

Palda, Aaker, & Greene, and *I. M. Oseth,* for respondent.

It is only for abuse of discretion by the trial court that an order refusing to vacate a judgment, or other proceeding, can be reviewed by the appellate court. Cline v. Duffy, 20 N. D. 525, 129 N. W. 75.

Goss, J. Appellant sought relief in the lower court from a judgment taken against him by default. The record on this appeal presents a review of the decision of the lower court upon this issue. The matter has been here before. An opinion upon practice questions was written in Harris v. Hassin, found in 30 N. D. 33, 151 N. W. 4. Therein a remand was ordered, and the case is now here upon the former record, supplemented by the depositions of the county judge and clerk of the county court, since taken, and certain affidavits. All questions of law involved have been heretofore settled in this jurisdiction.

It can be assumed, for the purpose of this decision, that the particular continuance in question had was taken to May 5th, 1914, instead of May 8th, as contended by appellant. Briefly recited, the facts are that the case was at issue on the pleadings, and had been set on peremptory call for trial for March 12th, 1914, upon which date a continuance was granted to April 8th to enable the deposition of the defendant to be taken and be presented. On April 8th a postponement was asked by the plaintiff and concurred in by the defendant, who requested and secured a further continuance to April 22d, because the defendant's deposition had not arrived. This deposition arrived before April 22d. Plaintiff filed written objections thereto on said date, and which objections were well taken, and necessitated defendant either going to trial without the deposition and his defense on the merits, or his obtaining a further continuance to enable the retaking of said deposition in proper form. Defendant thereupon applied for a third continuance, and was granted it upon his payment of $25 terms, which was paid in open court, and the case was orally declared to be continued. The date to which this continuance was granted, or understood to have been granted, is the all-important circumstance. The

facts concerning it are not in substantial dispute. It is apparent that both parties are and have been in good faith in their respective understanding as to the date for trial, as their actions concerning it are and have been entirely consistent with their belief in the matter. Plaintiff and respondent understood that the cause was continued to May 5, 1914, the first day of the May term. Defendant and appellant in good faith understood and believed the continuance to have been to May 8th, 1914. No record was made, at the time, of the date to which continuance for trial was granted. A record was subsequently made by interlineation, reciting that the "case was continued to the first day of the May term on May 5th, 1914." This record was made by the clerk on direction of the judge, but not until after defendant had applied to be relieved from said default. Plaintiff appeared on May 5th, submitted proof, and judgment was awarded thereon, with defendant defaulting. But no formal order for judgment was applied for or given until after defendant's application to be relieved had been ruled upon. That no order for judgment was obtained and no judgment caused to be entered during this interval would appear to be conclusive proof that plaintiff's attorneys were not endeavoring to procure a judgment by default, but relied, instead, upon their understanding that the case had been continued to the first day of the May term. That the court entertained the same belief is equally apparent; otherwise it would have refused the proof, and kept the case open to a later date. But that defendant likewise acted in the utmost good faith is certain from his conduct. Without notice of his either actual or supposed default, counsel appears in court, having traveled some 60 miles to be present. The second deposition had arrived May 7th, and counsel appeared ready for trial May 8th. Other matters of conduct during said period intervening all concur to establish said counsel's good faith, and that the default, if any, was unintentional, as well as unknown until May 8th, and occurred through his actual mistake and under a situation refuting any bad faith. And such is the situation that must have been apparent to the lower court arising upon defendant's application to be relieved. By counsel's mistake and inadvertence, and without any fault of defendant, who has been most diligent, he has been denied a trial. To have granted the application would have been no denial of justice to plaintiff, but at the most only a short delay in trial, with monthly terms

of court following. Besides, in the instant case there is present a valid reason for the continuance granted April 22d, *viz.*, necessity for defendant's deposition, and without which in all probability defendant's counsel could not hope to prevail, and without which, had his counsel willingly proceeded to trial, he might have been guilty of carelessness or worse in the care of his client's interests. Then too, $25 terms was exacted, and paid for the short continuance granted. Defendant must have been admonished thereby that any future unnecessary delinquency on his part would not be tolerated. Under these circumstances it is impossible to believe that these terms were paid with any present intention on the part of his counsel to shortly thereafter default in the defense. An additional strong circumstance tending to excuse the default is that no unreasonable or inexcusable delay had occurred up to that time. The files disclose that the answer was interposed January 23d, in an action begun by substituted service of summons by publication, based upon an attachment, service of summons in which was not complete until January, 1914. Plaintiff very promptly served note of issue and notice of trial for the term beginning March 3, 1914. The case was immediately set on peremptory call for trial March 12th, and then continued, that defendant's deposition might be taken, to April 8th and again continued two weeks, to April 22d, for the same purpose. Thereupon the plaintiff discovered that the deposition meanwhile arriving was useless under the objections made, because of its defective authentication. The continuance in question was then had from April 22d to either May 5th or May 8th, according to the respective contentions. It further appears that the defendant was a resident of Canada, and a long distance from a postoffice, and that under these exceptional circumstances neither he nor his attorney was negligent in failing to earlier procure his deposition. Rather, it appears that all possible speed was used in taking and procuring said deposition, even to the extent of causing it to be transmitted by courier 35 miles in an endeavor to get the same returned in time for trial May 8th. All things considered, the case was most expeditiously brought at issue, and to trial thereafter. It cannot, then, be assumed that the defendant or his attorney permitted the default to procure more time, or had been dilatory. Nor is this the usual case where defendant had written notice of the date at which he must appear. In fact, it is at least a fair inference from

the record that the trial judge, who made no docket entries, but rather depended upon the clerk to keep the record, was somewhat in doubt on May 8th as to the 5th having been the correct date to which the continuance had been taken. Otherwise, he would not have called up the court stenographer to see if shorthand minutes were taken of the date. It also appears that one of the firm of attorneys for the plaintiff had made a memorandum April 22d, reciting the continuance as taken to May 5th, and that this memorandum had been resorted to by the clerk before the minutes of the adjournment were written up, and that, to that extent, the recollection of the clerk may have been influenced, and the minute of the proceedings may have been inadvertently made to record the wrong date. This, together with the interlineation of the date in the minutes, which interlineation was apparently made as an afterthought, at least tend to cast doubt upon the accuracy and reliability of the minutes. Clerk and judge have both testified. Both believe and assert their minutes to be correct, but testify to circumstances showing easily how they might be in error. All things considered, the evidence as to the date to which the adjournment was taken is fairly evenly balanced. And this is a circumstance to be considered as bearing upon the relief requested, because where the question is so closely balanced upon an issue of fact of whether a default actually existed or not, the defaulting party could be said to be entitled to more consideration as a matter of right than where no doubt existed as to his default, and the only question was of the sufficiency of his showing for relief therefrom.

It is almost elementary that this is a review of the exercise of the discretion of the lower court, and its denial of the application to be relieved from the default. It is an oft-adjudicated principle that it is only for a manifest abuse of such discretion exercised that the decision of the lower tribunal will be disturbed. Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228, and cases there reviewed. Under the record this court has before it all facts and circumstances known by the lower court, and is in a position to pass upon the issues presented, as advantageously as was that court, and for an abuse of discretion must reverse. Wannemacher v. Vance, 23 N. D. 634, 138 N. W. 3. It is also true that "the exercise of the court's discretion on such an application should tend in a reasonable degree to bring about a

trial on the merits, when the circumstances are such as to lead the court to hesitate upon the motion to open the default." Racine-Sattley Mfg. Co. v. Pavlicek, supra. On the whole, all things considered, applying these tests, the default should have been set aside and a trial allowed upon the merits. The order denying the application was an abuse of discretion.

There is no question of sufficiency of an affidavit of merits involved. The case was previously at issue on the merits, and no affidavit of merit was therefore necessary. All that was incumbent upon the defendant was to excuse by affidavit, or otherwise, the default, if any, in appearance for trial. Respondent argues that the reopening of the case would serve no good purpose, because the merits were indirectly before the trial court and passed upon, inasmuch as the deposition of the defendant stating the facts and constituting the evidence of his defense was on file in the case, and as such was considered by the court in the nature of an affidavit of merit. Or, in the language of counsel's brief, the deposition and defense "was before the trial court *in toto* when it was considering the motion for relief in question, in lieu of the usual affidavit of merits," and "that under the circumstances and for the purpose of such motion the court was justified in assuming that such deposition contained the defendant's whole defense. That there is no claim or intimation that it did not. And from the evidence of both parties thus before it the court could and did, in effect, conclude definitely that its decision would probably not be different upon another hearing, and that no legitimate purpose, therefore, would be served by granting such hearing. Its conclusion in that regard cannot well be challenged, for the trial court would, in any event, be a judge of the facts," a jury trial having been waived by failure to demand the same. The answer to these contentions is that the merits were in no wise before the court as upon a trial of fact. While the court might scan the deposition to determine that the defense interposed was in good faith, and not a frivolous one, and perhaps as bearing upon, if it did at all, the reason for the default, the court could not further than this pass upon the merits as upon a trial on the merits. As no affidavit of merits was necessary, it is difficult to understand how the deposition could be used on the contrary theory. It is equally hard to understand by what right the plaintiff could assume that the deposition of the defendant as a

witness in his own behalf would be the only testimony his counsel might see fit to offer in defense. Respondent's position is as untenable on this as upon the other matters presented.

It is therefore ordered that the default judgment taken and entered against defendant be set aside and a trial be granted upon the merits. Appellant will recover costs and disbursements on this appeal.

STATE OF NORTH DAKOTA v. F. L. GORDON.

(155 N. W. 59.)

Newspaper article — publication — public prejudice — county — judicial district — remedy against — motion for — change of venue — continuance.

1. The remedy against public prejudice existing throughout a county or judicial district, created by the publication of a newspaper article is a motion for a change of venue, and not for a continuance.

Publication — prejudice — proof of — fair trial — venue — change of.

2. Proof that prejudice exists, or that a derogatory article has been published in one of the cities of a county, is not proof that a fair trial cannot be had in the county at large, or that such county as a whole is prejudiced, and is not, therefore, sufficient to entitle one to a change of venue.

Change of venue — public prejudice — excitement — trial — postponement — appellate court.

3. In order to justify a change of venue on account of the excitement of public prejudice, it must be shown that such excitement or public prejudice is such that its natural tendency will be to intimidate or swerve the jury, and as the court in which the case is pending can much better determine the propriety of a postponement on this ground than the appellate court it requires a very strong showing to induce the upper court to interfere.

Rulings of trial judge — fair and impartial — prejudice or fear not presumed.

4. Prejudice or fear on the part of the trial judge on account of the publication of a newspaper article cannot be presumed where the record shows that the rulings of such judge were eminently fair.

Juryman — qualifications — misstatements published and read by — presumption — evidence — merits of case — trial court.

5. The mere fact that a newspaper article has been published in relation to

a case under consideration, and contains misstatements, does not itself disqualify a juryman, even though he may have read the same. Newspaper reports are ordinarily regarded as too unreliable to influence a fairminded man when called upon to pass upon the merits of a case in the light of evidence given under oath; and a juror, although he may have formed an opinion from reading such reports, is competent if he states that he is without prejudice and can try the case impartially, according to the evidence, and the court is satisfied that he will do so.

Trial judge — discretion — abuse of — appellate court — continuance — refusing — verdict — appropriate under evidence.

6. The appellate court will not hold that a trial judge abused his discretion in refusing a continuance in a criminal case on account of the publication of newspaper articles which it is claimed may have affected the judgment of the jury, where it affirmatively appears from the evidence in the case that the jury could not have honestly or intelligently returned any other verdict than the one which it did return.

Jury — panel — talesmen — impartial — verdict — appellate court — defendant's privilege — rights — voir dire.

7. The appellate court will not set aside a verdict of conviction on account of the fact that newspaper articles were published which may have influenced the jurymen, where there is no showing that an impartial panel or impartial talesmen could not have been obtained, or that defendant was denied his privilege of examining the jurymen on the *voir dire*, and of thus showing their prejudice and protecting his rights.

Intoxicating liquors — unlawfully keeping for sale — charge of — sales — evidence of — tending to prove charge.

8. Where a person is charged with the offense of unlawfully keeping intoxicating liquor for sale, evidence of sales is admissible as a circumstance tending to prove the crime charged.

Express company — delivery book — consignments of liquor — receipted for — by defendant — evidence — original bills of lading — not used in evidence — signature of defendant — receipting for liquor.

9. The delivery book of an express company in which various consignments of liquor were receipted for by the defendant is admissible in evidence in a prosecution for unlawfully keeping intoxicating liquor for sale, and in spite of the fact that the original bills of lading or shipping bills were not introduced, where the signature of such defendant appears in such book as a receipt for such liquor, and is proved to be his.

Defendant — signature of — criminal action — made at trial — for comparison — proof — admissible — handwriting.

10. The signature of the defendant in a criminal action, which is made by him in open court and without objection, is admissible in evidence for com-

parison, and in order to prove the genuineness of other handwriting claimed to be his.

Intoxicating liquor — unlawfully keeping for sale — action — liquor delivered to customers at place described — stored elsewhere — immaterial.

11. Where in an action for the unlawful keeping for sale of intoxicating liquor as a beverage, proof is made that liquor was on several occasions delivered to customers at the shop of the defendant, it is immaterial that the liquor itself was stored at some other place.

Intoxicating liquors — large quantities — receiving — evidence of unlawful purpose.

12. The receipt of large quantities of liquor is at least some evidence of the receipt of such liquor for unlawful purposes.

Intoxicating liquors — unlawfully keeping for sale — charge of — evidence — express agent — goods delivered by — abbreviations used in books.

13. No error is committed in a prosecution for the unlawful keeping for sale of intoxicating liquor, in allowing the express agent who delivered the goods to testify as to the meaning of abbreviations in his receipt book, such as "Liq.," "Cs.," and "Bx."

Opinion filed November 8, 1915.

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

Criminal prosecution for the unlawful keeping for sale of intoxicating liquors. Defendant convicted. Defendant appeals.

Affirmed.

Joseph Cleary, for appellant.

Wm. G. Owens, State's Attorney of Williams County, and *Henry J. Linde*, Attorney General, *Francis J. Murphy*, and *H. R. Bitzing*, Assistant Attorneys General, for respondent.

Statement of facts.

BRUCE, J. This is an appeal by the defendant from a conviction on the charge of "unlawfully keeping for sale, barter, and gift," intoxicating liquors as a beverage, between the 26th day of June, 1914, and the 31st day of December, 1914.

The information was filed on January 5th, 1915, and during a term of the district court, the preliminary examination being had on January 2d, 1915, at which time the defendant was bound over to the next term of the district court. Prior to the time of the present trial and

at the same term of court, the defendant had been tried on and acquitted of the charge of having committed the offense of unlawfully selling and giving away intoxicating liquors. It also appears that in the case at bar, very much the same evidence was necessarily introduced as in the former case, especially in relation to alleged sales, the sales being sought to be proved in the former case for the purpose of proving the direct charge of unlawfully selling intoxicating liquors, while in the present case they were introduced as tending to show the unlawful keeping for sale.

The first point on which defendant relies for a reversal of the judgment is that the court erred in refusing to set aside the information on the ground that the complaint which was filed on the preliminary examination was based merely on information and belief. The complaint, however, does not appear in the record on appeal, nor any record of any ruling of the court on the motion, nor does counsel make any argument upon the question in his brief. We therefore cannot consider it.

The next point raised is that the court erred in refusing to grant a continuance of the case upon the following affidavit:

State of North Dakota, } ss.
County of Williams. }

F. L. Gordon, being first duly sworn, upon his oath says that he is the defendant above named, that he had a preliminary examination in the above-entitled action on January 2, 1915, and was bound over to the next term of the district court on said date. That he had no knowledge or information that he was to be tried on the charge herein stated at this term of court until so informed by his attorney on January 5, 1915. That affiant was tried for the same or a similar criminal offense at the present term of court on December 15, 16, 1914, and that at said trial about twenty of the present jury panel were called and examined as to their qualification as jurymen, and several were excused, and twelve of the present panel of jurymen tried the issue, and that affiant was acquitted. That there are two newspapers published in Williston, with a wide circulation in the county of Williams and city of Williston, namely, the Graphic and the Williston Herald. That the Williston Herald purported to give an account of the proceedings and some of the incidents connected therewith in its issue on December 17, 1914,

and that a copy thereof is herewith attached and marked Exihibit "A." That the Williston Graphic in its issue of December 17, 1914, purported to give an account of said trial, and that the same is herewith attached and marked Exhibit "B." That affiant on information and belief alleges that said article in Exhibit "B" was copied in the grand Forks Herald and Bismarck Tribune, daily papers, each with a large circulation in this county, and was also copied in the daily papers in the cities of St. Paul and Minneapolis, in the state of Minnesota, and in some of the Eastern daily papers. That said report is untrue in many particulars, and has a tendency to and did ridicule this defendant, and was published, as affiant believes, with the intent and purpose of ridiculing the jury and coercing said jury by creating a public sentiment against the jury and their decision in the case above referred to. Affiant further alleges on information and belief that a campaign has been inaugurated against him for the purpose of influencing public sentiment against him, and preventing him from having a fair trial at the present term of this court. That it is generally represented in Williston that affiant has received shipments of twenty-four pints of whisky every day since the jury acquitted him, and that he has sold a large amount of whisky, and has offered to sell whisky to police in the city if they came along, all of which statements or rumors are untrue. Affiant further alleges that he is a man of limited means, that his financial resources were exhausted in the trial above mentioned, and that he is without money or means to employ such counsel as he desires for the trial at this term of court. That he verily believes that it would be so difficult as to be practically impossible to secure a jury to give him a fair and impartial trial from the present panel, and is informed that the selection of a jury would entail very large expense to this county and to himself for *per diem* of his attorney and witnesses. Affiant further alleges that he has been using intoxicating liquors to excess for a long time last past; that since his former trial, on December 16th, 1914, he has been making an effort to quit using intoxicating liquors, and has placed himself under the hands of a physician for treatment. That he is advised by his physician and knows from personal knowledge that his heart action is very bad, and believes that he is neither in a physical or mental condition to undergo the worry and strain of a trial at this term of the court. Affiant further alleges and believes that the conditions herein stated will not exist at the next term of this court. Affiant further alleges that the

transcript of the testimony taken at the preliminary examination was not filed in this court or accessible to the affiant's attorney until after the filing of the information herein and the arraignment of this defendant. Joseph Cleary appeared for affiant at the trial above mentioned, and has been acting for affiant up to the present time. That said attorney has informed the affiant that he is ill, and will probably not be in a physical and mental condition to take charge of the affiant's defense. That affiant feels that he cannot have a fair and impartial trial at this term of court, wherefore affiant prays that the trial in this case be continued until the next regular term of this court, at which time he believes the conditions herein stated will not exist, and will give him time to earn money to pay for his defense, and that the reasons why he cannot have a fair trial at the present term will not then exist.

(Signed) F. L. Gordon.

Subscribed and sworn to before me this 6th day of January, 1915.

Joseph Cleary,
U. S. Commissioner,
District of North Dakota.

The two exhibits attached to the foregoing affidavit were as follows:

Exhibit "A."

Juryman is arrested. Request for release of prisoner gets Spring Brook man in trouble. Few Cases in District Court—Gordon Acquitted—Horse Thief C : Two Years.

On a charge of misconduct as a juror, O. R. Printy, of Spring Brook, a member of the jury panel drawn for the December term of district court, was arrested by Sheriff Erickson Wednesday on a warrant issued by State's Attorney Burdick. After a hearing before Justice Fields, Printy asked to be tried in district court, and was therefore bound over. He gave a bond for $300, thereby securing his freedom until his case can be taken up. According to the statement of the state's attorney's office, Printy's arrest followed his attempt to secure the dismissal of the case against one of his friends arrested and held on a charge of "bootlegging." It is said Printy approached Mr. Burdick, asking that the culprit be released, as "it wasn't much of an offense anyhow." Printy

had just served on the jury which acquitted F. L. Gordon of the charge of keeping intoxicating liquor for sale at his barber shop on West Broadway. Also saw Sheriff. It is said that Printy also made the same request of Sheriff Erickson for the release of his friend and the dismissal of the case, and that thereupon the state's attorney swore out the warrant for his arrest for misconduct. The arrest of Printy was the most interesting feature of the present session of the district court, which opened Monday. The first case called on the criminal calendar was that of the State against F. L. Gordon, Gordon being charged with keeping intoxicants for sale. The trial consumed all day Tuesday and Wednesday morning. After the charge of the court the jury returned a verdict of "not guilty," and Judge Fisk ordered the prisoner released. The case of the State against Carl Staatz, charged with selling a forged instrument, was continued upon motion by Attorney Craven for the defense. Given two years. Joe Jerome, charged with grand larceny, for stealing a horse belonging to James C. Hanson, north of Zahl, last April, pleaded guilty to the charge Monday, and was sentenced to two years in the state penitentiary by Judge Fisk. In the case of Joseph Deogitz, charged with assault, the complaining witness could not be located, and the case was dismissed by the court. Gallagher and Fredericks, charged with selling liquor without a license, pleaded guilty and were sentenced to ninety days each in the county jail. C. J. Ackey, also arrested on a charge of bootlegging, pleaded guilty. As this was his first offense, Judge Fisk commuted his sentence and he was released.

Exhibit "B."

The Jury Turns Gordon Loose. Prof. Gordon Trial Ended Yesterday Morning—Verdict of Not Guilty.—The Jury—Oscar Swenson, W. B. Ezell, N. A. Lazier, Ed. J. Wright, John Joyce, W. H. Pingrey, H. M. Anneson, O. R. Printy, M. A. Anderson, W. H. Denny, J. C. Brinley, and Alof Netmanger.

Tuesday the case of Prof. F. L. Gordon, the barber, charged with keeping intoxicating liquors for sale, came up for trial. Three witnesses were called by the state. The first witness, the Vohs boy, testified that he had gone into the shop and asked for a bottle. Gordon had

gone out, and, after being gone a short time, came back with a bottle, which he gave him. The boy said he laid a dollar down on the case, and went out. He said he did not know what was in the bottle. He gave it to a friend who took several drinks out of it. Mr. Sipe testified that he got a bottle there. He wasn't sure how much, but he paid something for it. He knew what liquor was, he said, and that this was some kind of liquor. He said he drank out of the bottle, and it was hot stuff. The Great Northern Express agent testified as to shipments of liquor shipped in and billed out to Gordon. He said his records showed that Gordon got a case of liquor on September 2d, 44 pounds of liquor on September 11, another package of 15 pounds in September. In January he received three cases of liquor and one of beer. The records showed the following shipments for Gordon last year: October 8 package liquor 22 lbs.; October 23 package liquor 32 lbs.; October 24 package liquor 32 lbs.; October 30 a case of beer; November 5 package of liquor 25 lbs.; November 8 package of liquor 44 lbs.; November 12 a case of beer; November 17 a case of beer; November 24 package liquor 32 lbs.; December 20 package liquor 24 lbs.; December 29 package liquor 32 lbs.

Prof. Gordon was called to the stand and denied having sold any liquor. He said he was in poor health last year, and his physician (name not given) told him that he would have to drink liquor for his health. He testified that all he got was for his own use. In the cross-examination State's Attorney Burdick asked him about his health, and asked if he had been using the liquor for that purpose. He said, "yes." Asked if he was benefited by it, he said, "Sure, look how nice and fat and fine I am feeling now,"—or words to that effect. Mr. Burdick called his attention to the shipments received last September 23 and 24, and said he must have been feeling better or improving rapidly at that time, and Gordon said he was feeling fine then. He also testified that he was always able to attend to business. It is reported that the first vote of the jury was nine to three for conviction. As we glance over the record of the shipments which Gordon was supposed to have received, we marvel at his capacity, for he said he used it all himself. A man who could drink all this for his "health's sake," and still attend to business at all times, must have a remarkable balance wheel. The testimony of Mr. Sipe was amusing. His memory seemed to be some-

thing he forgot with. He didn't remember much of anything. In fact he did not seem to be very sure whether we had a month of June this year, or not. There has been comment from time to time as to the cause for the increased consumption of liquor *per capita* in this country in recent years. Several years ago the consumption was 4.07 gallons *per capita,* but now it has gone up to 22.79 gallons. However, the cause of considerable of this increase is now brought to light, and easily understood when one glances over the number of gallons which Prof. Gordon, according to his own testimony, got away with "all by himself." SOME MAN!

This objection needs some consideration, and a careful examination of the newspaper articles should be made. The distinction also should be borne in mind between a motion for a continuance, and a motion for a change of venue, and between a claim that the jury or panel is prejudiced or influenced, and a claim that public opinion has been so excited that a fair trial in the county cannot be had. The affidavit alleges in substance: (1) That the defendant had no knowledge that he was to be tried at that term; (2) that he was tried for the same or a similar offense at the same term of court, and at the first trial about twenty of the panel examined on the second trial were examined as jurymen; (3) that certain newspapers published in the city of Williston circulated items derogatory to the defendant, thereby creating a prejudice in the minds of the public and likewise in the minds of the jury; (4) that the defendant was advised by his physician that his heart action was bad, and that he was not in a physical or mental condition to undergo the worry and strain of a trial at the present term of the court.

There are in support of this affidavit none others. The statement of the defendant that he had been advised by his physician that he was unwell would hardly justify a continuance. There is, too, in the affidavit, no real proof of public excitement or prejudice. All that the affidavit states, and this is stated merely on information and belief, is that the newspaper articles were published, and that "a campaign has been inaugurated of this kind for the purpose of influencing public sentiment against him, and preventing him from obtaining a fair trial at the present term of court; that it is generally represented in Willis-

ton that the affiant has received shipments of twenty-four pints of whisky every day since the jury acquitted him, and that he has sold a large amount of whisky, and has offered to sell whisky to the police of the city if they came along, all of which statements or rumors are untrue. . . . That said report is untrue in many particulars, and has a tendency to and did ridicule this defendant, and was published, as affiant believes, with the intent and purpose of ridiculing the jury and coercing said jury by creating a public sentiment against the jury and their decision in the case above referred to." It is further alleged that the two papers, namely, the Williston Herald and the Williston Graphic, are published in Williston, with a wide circulation in the county of Williams and city of Williston. There is, however, no claim or proof that public sentiment was influenced throughout the county, or that for that reason a fair trial in the county could not be had. All that the defendant, indeed, claims in the affidavit, is "that he verily believes that it would be so difficult as to be practically impossible to secure a jury to give him a fair and impartial trial from the present panel, and is informed that the selection of a jury would entail very large expense to this county and to himself for *per diem* of his attorney and witnesses." The affidavit, in short, does not allege the public prejudice which would justify a change of venue, but is merely a claim that the particular panel may be unfairly influenced. There is no showing whatever that the sentiment throughout the county was such; that talesmen could not be secured, or that a new and unbiased panel could not be obtained. Section 10,787 of the Compiled Laws of 1913 provides that "when a criminal action is called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by either party, direct the trial to be postponed to another day in the same term or to the next term. Any cause that would be considered a good one for a postponement in a civil action is sufficient in a criminal action, whether urged by the state or by the defendant." Section 10,756 of the Compiled Laws of 1913 provides: "The defendant in a criminal action prosecuted by information or indictment in any district court of this state may be awarded a change of the place of trial, upon his petition on oath, or upon the oath of some credible person setting forth that he has reason to believe and does believe, and the facts upon which such belief is based, that he cannot receive a fair and impartial trial in the

county or judicial subdivision where said action is pending, upon any of the following grounds:

"1. That the prosecuting witness, or state's attorney, or other person appointed by the court to prosecute, or any person or corporation promoting said prosecution, has an undue influence over the minds of the people of the county or judicial subdivision where the action is pending; or,

"2. That the people of the county or judicial subdivision are so prejudiced against the defendant or the offense of which he is accused, that he cannot have a fair and impartial trial; or,

"3. That it is impossible to obtain a jury in the county or judicial subdivision that has not formed an opinion, as to the guilt or innocence of the defendant, such as would disqualify them as jurors; or,

"4. That any other cause exists in the county or judicial subdivision, where the action is pending, whereby the defendant would probably be deprived of a fair and impartial trial."

There is certainly no showing in the affidavit which would entitle the defendant to a change of venue, as there is no showing that the prejudice, if any, exists throughout the county or judicial subdivision.

Even, therefore, if the application be treated as a substitute for an application for a change of venue, there was no error committed in refusing to entertain it. It is also well established by the weight of authority that the proper motion in such a case is that for a change of venue, and not for a continuance. See 9 Cyc. 87, and cases cited; 9 Cyc. 189, and cases cited. It is, too, well established that in order to justify a change of venue or a continuance in those jurisdictions where a continuance is authorized, the excitement of public prejudice "must be such that its natural tendency would be to intimidate or swerve the jury; and as the court in which the cause is pending can much better determine the propriety of a postponement on this ground than the appellate court, it requires a very strong showing to induce the upper court to interfere." 9 Cyc. 189; Walker v. State, 136 Ind. 663, 36 N. E. 356.

As we have before intimated, no such strong showing is made. We cannot assume prejudice or fear on the part of the trial judge himself, as his rulings throughout the trial and his instructions to the jury were pre-eminently fair. There is, too, in the affidavit no real objection of

public excitement or prejudice. At the most, the claim is that there was an attack upon the jury, and the evil consequences of this attack are by no means apparent. There is nothing even to indicate an attack except the headline that the jury "turned Gordon loose," and the names of the jurymen on the former trial, some of whom served on the second trial. The articles, it is true, made fun of the contention of the defendant that he himself could have consumed all of the liquor which was receipted for by him at the express office. It perhaps, also, misstates the quantity of the liquor. In making fun of the defendant, however, the paper did nothing more than counsel for the state would have done or could have done in arguing the case to the jury, and we cannot very well say that newspaper articles which were published on December the 17th were in the minds of the jury, even if they had been read, when they tried the case and returned the verdict after the Christmas holidays and on January 22d; that is to say, over a month afterwards. There is, too, in the record, no evidence that any of the jurymen read or saw the articles. There is no record whatever of the examination of such jurymen, or of the answers they gave to the questions propounded them, and we must assume, therefore, that they properly qualified. So far, too, as the misstatements are concerned, if misstatements there were, although we depreciate exceedingly the publication of newspaper articles during the term of court which in any way reflect upon any of the litigants at such term, we can hardly say that prejudice is shown, or believe that we would be justified in overruling the discretion of the trial judge in the matter. "Newspaper reports [indeed] are ordinarily regarded as too unreliable to influence a fair-minded man when called upon to pass upon the merits of a case in the light of evidence given under oath; and it is now a well-settled rule that a juror, although he may have formed an opinion from reading such reports, is competent if he states that he is without prejudice, and can try the case impartially according to the evidence, and the court is satisfied that he will do so." 24 Cyc. 298.

We are not unmindful of the cases cited in the note in 46 L.R.A. (N.S.) 741, 744, and of the cases of Meyer v. Cadwalader, 49 Fed. 32, and Morse v. Montana Ore-Purchasing Co. 105 Fed. 337. The articles in the majority of these cases, however, were published during the particular trial, while in the case of Meyer v. Cadwalader, one of

the parties litigant seems to have been directly responsible for them. They were, in fact, interviews had with him, and which served as testimony which was not under oath, and given out of court. So, too, as we have before said, these matters are largely within the discretion of the trial judge, and his determination will not be reversed except upon a clear proof of abuse of that discretion. See note in 46 L.R.A.(N.S.) 745. It is also quite generally held that a case will not be reversed on such grounds, and even where the jury reads an article pending the proceedings, where "it affirmatively appears from the evidence in the case that the jury could not have returned, honestly or intelligently, any other verdict than the one that it did return." See State v. Williams, 96 Minn. 351, 105 N. W. 266; Burns v. State, 145 Wis. 373, 140 Am. St. Rep. 1081, 128 N. W. 987; Com. v. Chauncey, 2 Ashm. (Pa.) 90; note in 46 L.R.A.(N.S.) 747. We are satisfied that in the case at bar no other verdict than that which was rendered could have been honestly returned.

Anyway, even after the motion for a continuance had been denied, the defendant had the opportunity to challenge the panel and to show prejudice of the jurymen on the *voir dire* examination; and, there being no showing that an impartial panel or impartial talesmen could not have been obtained, or in fact that any of the jurymen were in fact disqualified, we must hold that the defendant had abundant opportunity to protect his rights; that there was no showing of prejudice; and that the trial judge did not abuse his discretion in overruling the motion.

The next point raised is alleged error in allowing different witnesses to testify as to having purchased whisky from the defendant, the objection being made that such evidence was incompetent, irrelevant, and immaterial, not within the issues, no foundation laid, and an attempt to prove a collateral offense. The collateral offense, of course, hinted at, was selling liquor in violation of law. It is well established, however, as was correctly charged by the court, that "such evidence is admissible as a circumstance tending to prove the crime charged; that is, that the defendant kept for sale intoxicating liquors as a beverage."

It is next urged that the court erred in allowing in evidence the delivery book of the express company, in which various consignments of liquor were receipted for by the defendant, and in spite of the fact that the original bills of lading or shipping bills were not introduced. This

evidence was perfectly competent. It was certainly evidence of the fact that the defendant received liquor at the express office, and it is immaterial how or by what means the liquor reached that office. It was evidence of receipt and delivery, even if not evidence of the order for or purchase thereof, and of the transmission. It is next objected that the express agent did not sufficiently identify the signature of the defendant. There is, however, no merit in this.

The witness testified that he thought he knew the signature of the defendant, that to the best of his knowledge and belief it was his signature, and in addition to this the defendant himself afterwards admitted that a number of the signatures were his, and in no case positively denied the genuineness of any of them. The general question in fact was asked him, "Have you any reason to believe, Mr. Gordon, that any of those signatures there appearing as F. L. Gordon receipting for those shipments are not your signature?" And the witness answered, "No, I haven't. I want the jury to understand that I used this liquor for my own use and the use of my family. Perhaps I have got a little left down there. I don't know how much."

And again:

Q. November 3d, 11, 13, and 20, Box. Liquor, 44 pounds. Do you want them to understand you used all of this for your own use?

A. Is my signature behind all of these?

Q. I think so. What is contained in those boxes of liquor, 44 pounds, that you receipted for?

A. I don't know. That is the box of bottles, 24 pints a case, in this shipment. I understand now that I am charged with the offense covering a different period of time than that in which I was found not guilty.

And again:

Q. Showing you the express records from July 9th, I will ask you if that is your signature which appears as receipting for a box of liquor, 44 pounds, on the 9th day of July?

A. Don't look like my F.

Q. I will ask you to sign your name F. L. Gordon on that slip of paper.

(Witness complies.)

Q. I will show you your signature, F. L. Gordon, receipting for two boxes of liquor on the 28 of July, and ask you if that is your signature.

A. It looks correct.

Counsel for state would offer in evidence Exhibit "A" as a sample of defendant's handwriting of his name, F. L. Gordon.

Counsel for defendant: Defendant objects to introduction of the exhibit as incompetent, no proper method of proving his signature, not made at the time or prior to the time of the alleged signature.

The Court: Overruled.

We thus see that the jury had ample means of comparing the signatures. Objection, it is true, was made to the introduction of the exhibit. No objection, however, was made to signing the exhibit on the ground of self-incrimination or any other ground. The objection merely was that it was no proper method of proving his signature, not made at the time or prior to the time of the alleged signature. The insufficiency of this objection must be apparent to all. Cochrane v. National Elevator Co. 20 N. D. 169, 127 N. W. 725; Gambrill v. Schooley, 95 Md. 260, 63 L.R.A. 428, 52 Atl. 500.

Much stress is also laid upon the proposition that the liquor was not actually kept for sale in the barber shop. The majority of the witnesses, it is true, testified that all they did was to nod at the defendant. That he usually went out, that they remained in the barber shop for some time, and then went into the back room and found a bottle on the bed; that they then dropped a dollar on the bed, took the bottle, and left. From this it is argued, and the defendant himself testified, that on several occasions at least, and the only occasions on which he admits having given the liquor to outsiders, he went out and purchased the liquor elsewhere as agent of his customer. There is, however, no proof that the money was given to him in the first instance with which to buy the liquor, or that any specific instructions were given to him. All there was was a nod or intimation of the customer that he was thirsty, or a question as to whether something could not be obtained. There is proof, too, that on one occasion the liquor was taken from a cupboard. The defendant himself admits that he was in the habit of bringing liquor down to the shop, but for his own consumption, and keeping it under the bed. The defendant also contends that the liquor, if kept anywhere, was at his house, and concedes that a large quantity was

kept at the house. The allegation of the information, however, is not specific as to the premises on which the liquor was kept. No objection was made to it on the ground of indefiniteness, and it seems to us to be immaterial whether the main supply was kept in the shop or in the house, as the delivery was certainly made from the shop where a temporary keeping must at any rate have been involved. The proof is clear that the defendant received large quantities of liquor. It is uncontroverted to our minds that between the 4th day of July and the 30th day of November he received seven cases of beer, one keg of beer, and one hundred and ninety-two pints of whisky, and that between November 3d and November 20th, two cases of beer and thirty-eight pints of whisky were delivered to him. This, in itself, is evidence of keeping for unlawful purposes. Klepfer v. State, 121 Ind. 491, 23 N. E. 287; State v. Dahlquist, 17 N. D. 40, 115 N. W. 81; State v. Reilly, 22 N. D. 353, 133 N. W. 914.

Nor is there any merit in the objection that the agent of the express company was allowed to explain the meanings of the abbreviations on his receipt book, such as "Liq.," which he explained stood for liquor, and "Bx.," which he explained as standing for box, and "Cs.," which he explained to be an abbreviation for cases. Such evidence is not only admissible (State v. McKone, 31 N. D. 547, 154 N. W. 256), but these abbreviations are so commonly used that the court may take judicial notice of their meaning. They are as commonly used, indeed, as the terms "O. K." and "E. & O. E." which are everywhere known and recognized.

The judgment of the District Court is affirmed.

LARS MARTINSON v. HELENA MOESZINGER KERSHNER et al.

(155 N. W. 37.)

Agency — not presumed — existence denied — burden of proof.

1. Agency will not be presumed, and where its existence is denied, the burden of proof is upon him who asserts its existence.

Note.—On the general question of effect of ratification by principal of unauthorized acts of agent, see note in 5 Am. St. Rep. 109.

Negotiable note — mortgage — assignee and owner — interest instalments — collected by mortgagee — permission of assignee — principal — authority to collect — possession.

2. The mere fact that the assignee and owner of a negotiable note and mortgage, while retaining possession of such securities, permits the original mortgagee, or the loan broker who negotiated the loan, to collect the interest instalments, does not confer upon such person, without possession of the securities, authority to collect the principal.

Agent's authority — extent of — will of principal — actual — apparent.

3. The extent of an agent's authority depends upon the will of the principal, and the latter will be bound by the acts of the former only to the extent of the authority, actual or apparent, which he has conferred upon the agent.

Responsibility assumed — ratification — unauthorized act — all material facts — must be made known by agent.

4. As a general rule, except in those cases wherein the principal intentionally assumes the responsibility without inquiry, or deliberately ratifies, having all the knowledge in respect to the act which he cares to have, any ratification of an unauthorized act or transaction of an agent must, in order to bind the principal, be shown to have been made by him with full knowledge of the material facts relative to the unauthorized transaction.

Opinion filed September 15, 1915. Rehearing denied November 15, 1915.

Appeal from a judgment of the District Court of Ward County, *Leighton*, J. Defendant appeals.

Reversed.

Bosard & Twiford, for appellants.

The mere collection of interest by the mortgage company would not be evidence of its authority to collect the principal, even if the authority so to do had not been in writing and specific and limited to the collection of the interest coupon forwarded for such purpose. Hollinshead v. John Stuart & Co. (Hollinshead v. Globe Invest. Co.) 8 N. D. 35, 42 L.R.A. 659, 73 Am. St. Rep. 742, 77 N. W. 89; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570.

The presumption is that no one has authority to collect a negotiable instrument, unless he has the same in his possession and can deliver it; and the debtor assumes all the risk in making payment to one not producing the instrument. Tappan v. Morseman, 18 Iowa, 499; Loizeaux v. Fremder, 123 Wis. 193, 101 N. W. 423; Kohl v. Beach, 107 Wis. 409, 50 L.R.A. 600, 81 Am. St. Rep. 849, 83 N. W. 657.

F. B. Lambert (*Elias Rachie,* of counsel), for respondent.

Very slight evidence will warrant a holding that a payment to an agent has been requested, and therefore ratified. Platt v. Schmitt, 117 Wis. 489, 94 N. W. 345.

Where instructions are given by the principal to the agent, couched in ambiguous language, he cannot hold the agent responsible for the consequences, if the agent in good faith put an interpretation upon the instructions not intended. Wilson v. La Tour, 108 Mich. 547, 66 N. W. 475; Church Asso. v. Walton, 114 Mich. 677, 72 N. W. 998; Bissell v. Dowling, 117 Mich. 646, 76 N. W. 100; Ziegan v. Stricker, 110 Mich. 282, 68 N. W. 122; Anderson v. First Nat. Bank, 4 N. D. 196, 59 N. W. 1029; Mechem, Agency, 2d ed. § 793; Hare v. Bailey, 73 Minn. 409, 76 N. W. 213.

The fact that the note being paid is not in the hands of the agent receiving payment is not conclusive as to the agent's want of authority to receive payment. Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. Rep. 138, 16 Pac. 762.

If a principal for any reason allows his agent to act beyond his actual authority, without objection, he is bound to those who are not aware of any want of authority, the same as though the power had been conferred. 1 Clark & S. Agency, pp. 503, 504.

One will be deemed to have ratified an unauthorized collection by an agent, where after making demand of his debtor for payment, he is informed that payment has been made to such agent, and he refrains from further attempt to collect from his debtor. 1 Clark & S. Agency, p. 337.

No particular words or form is necessary to the appointment of an agent.

Agency may be created by express words or acts, or it may be implied from the conduct of the parties. Geylin v. De Villeroi, 2 Houst. (Del.) 311; Fay v. Richmond, 43 Vt. 25.

Ostensible authority to act as agent may be conferred if the party to be charged as principal causes or leads third persons to trust in and act upon such apparent agency, either by words or conduct. Thomson v. Shelton, 49 Neb. 644, 68 N. W. 1055; Phoenix Ins. Co. v. Walter, 51 Neb. 182, 70 N. W. 938; 1 Mechem, Agency, § 717, pp. 506, 507;

Grant County State Bank v. Northwestern Land Co. 28 N. D. 479, 150 N. W. 736.

The fact and scope of an agency not created by writing, but implied from conduct of the principal, are questions of fact for the jury. 1 Clark & S. Agency, p. 526; Kasson v. Noltner, 43 Wis. 646; Phœnix Ins. Co. v. Walter, 51 Neb. 182, 70 N. W. 938.

Where there is sufficient evidence to sustain the findings of the trial court on questions of fact, they will not be disturbed. Thomson v. Shelton, 49 Neb. 644, 68 N. W. 1055.

CHRISTIANSON, J. On the 15th day of April, 1907, one Charles Besmehn was the owner of a quarter section of land in Ward county, in this state. And on that date, through the agency of one M. C. Egan, of Tagus, North Dakota, he obtained a loan on this land from the American Mortgage & Investment Company of St. Paul, Minnesota, and executed and delivered to this company a negotiable promissory note in the sum of $800, payable April 15th, 1912, together with a real estate mortgage upon the land in question to secure the payment of said note. The American Mortgage & Investment Company thereafter, on August 8, 1907, sold, assigned, and delivered the mortgage and the note secured thereby, to one C. Moeszinger, and the assignment of mortgage was filed for record in the office of the register of deeds of Ward county on August 15th, 1907. Moeszinger thereafter died, and his son Louis C. Moeszinger (the father of the defendant Helena Moeszinger Kershner) was appointed executor of the last will and testament of C. Moeszinger. Thereafter, on December 12, 1907, Louis C. Moeszinger as the executor of the estate of C. Moeszinger duly sold, assigned, and delivered the note and mortgage hereinbefore described, to the defendant Helena Moeszinger, who has been the holder and the owner of the note and mortgage at all times since December 12, 1907.

On the 4th day of September, 1907, Charles Besmehn sold the premises involved in this action to the above-named plaintiff, Lars Martinson, and conveyed the same to him by warranty deed, which was recorded in the office of the register of deeds of Ward county on October 25th, 1907.

The interest instalment due April 15, 1908, was paid to M. C. Egan, of Tagus, North Dakota, the loan agent who negotiated the loan. The interest instalment due April 15, 1909, was not paid, and on July 16th,

1909, the American Mortgage & Investment Company wrote Martinson as follows: "We are advised that you have purchased from Charles Besmehn the SE¼ Sec. 31–155–87, Ward county. We hold a mortgage of $800 against this land, and interest to the amount of $64 became due April 15th.

"Kindly send us a draft for this amount, adding interest from April 15th until the time when the money reaches us."

Thereafter, on July 19th, 1909, a draft was forwarded on behalf of the plaintiff, Martinson, to the Investment Company in payment of such interest. About March 31st, 1910, a draft in payment of the interest instalment due April 15th, 1910, was forwarded to the Investment Company, and on April 2d, 1910, the Investment Company acknowledged receipt of the payment in the following letter: "We acknowledge receipt of your favor of the 31st ultimo with inclosed draft for $64 in payment of interest on a mortgage of $800 on land now owned by Lars Martinson. Canceled coupon we will send you *as soon as we receive the same from the present holder of the mortgage.*"

The undisputed evidence shows that the defendant Helena Moeszinger Kershner in no manner authorized the Investment Company to collect either the interest or the principal of the loan. In fact she never had anything to do with the matter personally, but intrusted the handling of these investments to her father, Louis C. Moeszinger. On February 9th, 1912, Louis C. Moeszinger wrote the Investment Company a letter containing the following closing sentence, *viz.*, "I want to give you notice now that I want my money on all these loans when due. They are all too slow for me.

Yours very truly, L. C. Moeszinger."

Besmehn, Apr. 15/12. Curtis & Humphrey Nov. 1/12.

The correspondence shows that the plaintiff wrote the Investment Company requesting an extension of the loan. When this request was made or submitted to Moeszinger does not appear, but on April 17th, 1912, the Investment Company replied to such request as follows: "We have your favor inquiring if the Chas. Besmehn mortgage covering the SE¼ of Sec. 31–155–87 now owned by Mr. Martinson can be extended. This mortgage became due on April 15th, and we have just heard from our client to the effect that they cannot extend it, but wish to have the paper retired. We hope, therefore, to receive draft for

the amount, which is $854, with interest thereon at 8 per cent from April 15th until the money reaches us."

It is conceded that the note and mortgage involved herein were never, after their purchase by C. Moeszinger on August 8, 1907, in possession of the American Mortgage & Investment Company, but that such instruments at all times from and after December 12, 1907, were in the possession of Louis C. Moeszinger, as agent for his daughter, Helena Moeszinger Kershner, and that they remained in his possession until he forwarded them to the Scandinavian American Bank of St. Paul, Minnesota, for collection about May 1st, 1912, and that these instruments were afterwards returned to him by the bank, and remained in his possession until delivered to the attorneys for the defendant in this action.

The plaintiff, Martinson, paid the interest instalments which fell due in 1909, 1910, and 1911 to the Investment Company, and the Investment Company remitted the proceeds of such collections to Louis C. Moeszinger. About April 20th, 1912, the plaintiff also caused a draft payable to the American Mortgage & Investment Company for the amount of the principal and interest then remaining due on the mortgage to be forwarded to this company. The Investment Company misappropriated the funds, and thereafter failed, and a receiver was appointed to take charge of its affairs. The defendant and her father had no knowledge whatever of the fact that the principal of the mortgage indebtedness had been collected by, or paid to, the Investment Company until after it went into the hands of the receiver, and the defendant has never received any part of the principal sum and the last interest instalment due on the mortgage.

The defendant Helena Moeszinger Kershner caused the mortgage to be foreclosed by advertisement, and the premises were at such foreclosure sale held on April 19, 1913, purchased by the defendant, and certificate of foreclosure sale issued to her. The plaintiff thereupon brought this action to determine adverse claims and quiet title to the premises. The defendant Helena Moeszinger Kershner answered, asserting that she has a first lien upon the premises for the amount due upon the sheriff's certificate of foreclosure sale. The trial court rendered judgment in favor of the plaintiff. The defendant Helena Moeszinger Kershner has appealed to this court, and demanded a trial *de novo*.

It is conceded by both parties that the sole question involved in this case is one of agency. Respondent does not contend that any equitable estoppel exists in this case, but relies solely on the proposition that the American Mortgage & Investment Company was the agent of the defendant, duly authorized to receive payment of the mortgage indebtedness. It was incumbent upon the plaintiff to prove that the Investment Company had such authority.

In Corey v. Hunter, 10 N. D. 5, 12, 84 N. W. 570, this court said: "There are certain well-settled principles which are applicable in all cases involving the question of the existence of an agency, or the existence of an agent's authority. A person who deals with an agent does so at his peril. He is bound to know that the person with whom he deals is agent of the person whom he claims to represent, and he is also bound to know the extent of such agent's authority. Agency will never be presumed; but where its existence is denied, the burden of proof is upon him who affirms its existence, and the proof of such agency must be clear and specific." Plaintiff does not specify whether the authority relied on is actual or ostensible, but broadly asserts that the Investment Company as defendant's agent had authority to receive payment of the principal. Under our statute, "actual authority is such as a principal intentionally confers upon the agent, or intentionally or by want of ordinary care allows the agent to believe himself to possess." Comp. Laws 1913, § 6337. And "ostensible authority is such as the principal intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess." Comp. Laws 1913, § 6338.

There is no contention that the plaintiff relied on any statement of the defendant or her father, or that plaintiff had any knowledge of the contents of the correspondence between the Investment Company and Moeszinger. Hence, at the time plaintiff paid the principal to the Investment Company the only acts of which he had cognizance, and from which authority could possibly be inferred, was the fact that the Investment Company had collected the three interest instalments, for the years 1909, 1910, and 1911. And so far as the 1910 instalment was concerned, the letter, from the Investment Company acknowledging receipt of the payment, expressly informed the plaintiff that the In-

vestment Company did not have the interest coupon in its possession, but that it was in the hands of the then holder of the loan.

It is well settled, however, that the mere fact that the assignee and owner of a negotiable note and mortgage, while retaining possession of the securities, permits the original mortgagee, or the loan broker who negotiated the loan, to collect the interest instalments, is not sufficient to confer upon such person, without possession of the securities, authority to collect the principal of the mortgage indebtedness. "In the absence of express authority, or of circumstances from which actual authority can be reasonably inferred, possession of the securities is the crucial test of an agent's implied or apparent authority to receive payment; and if the agent has no such securities in his possession, the party who pays money to him assumes the burden of showing the authority of such person to receive the payment." Corey v. Hunter, 10 N. D. 5, 14, 84 N. W. 570. See also Hollinshead v. John Stuart & Co. (Hollinshead v. Globe Invest. Co.) 8 N. D. 35, 42 L.R.A. 659, 73 Am. St. Rep. 742, 77 N. W. 89; Stolzman v. Wyman, 8 N. D. 108, 77 N. W. 285; Trubel v. Sandberg, 29 N. D. 378, 150 N. W. 928; Loizeaux v. Fremder, 123 Wis. 193, 101 N. W. 423; Schultz v. Sroelowitz, 191 Ill. 249, 61 N. E. 92; John Stuart & Co. v. Asher, 15 Colo. App. 403, 62 Pac. 1051.

Plaintiff asserts, however, that the statement contained in the letter written by Moeszinger to the Investment Company on February 9th, 1912, wherein he says: "I want to give you notice now that I want may money on all these loans when due. They are all too slow for me,"—constitutes express authority to the Investment Company to act as agent for the defendant in collecting the principal of the mortgage indebtedness in question. Mr. Moeszinger, while testifying as a witness upon the trial, in response to a question asking him to explain what he meant by the statement, stated: "I meant by that remark that there would be no extension of the time of payment on these loans." Without considering the competency of this testimony, it may be noted that this is about all the force that can be attributed to this statement. The correspondence shows that Martinson had requested an extension of the loan from the Investment Company, but when this request was made, and when submitted to Moeszinger, does not appear from the evidence in this case. It is hard to understand how it can be seriously

asserted that this statement conferred upon the Investment Company authority to collect the principal of the mortgage indebtedness. We are entirely satisfied that no such construction can reasonably be placed thereon. "The agent's authority must be direct and specific, or the facts and circumstances must be of such a nature that the agent's right to act may be fairly implied." Trull v. Hammond, 71 Minn. 172, 73 N. W. 642–644. "It is, of course, a fundamental principle in the law of agency, that every delegation of power carries with it, by implication, the authority to do all those things which are reasonably necessary, and proper to carry into effect the main power conferred, and which are not forbidden. But the doctrine of implied authority goes no further than this." Burchard v. Hull, 71 Minn. 430, 74 N. W. 165. Apparent authority is that authority which an agent appears to have from that which he actually does have, and not from that which he may pretend to have, or from his actions on occasions which are unknown to and unratified by his principal. Oberne v. Burke, 30 Neb. 581, 46 N. W. 842. The principal is responsible only for the appearance of authority which is caused by himself, and not for an appearance of conformity to authority caused only by the agent. The extent of authority of an agent depends upon the will of the principal, and the latter will be bound by the acts of the former only to the extent of the authority, actual or apparent, which he has conferred upon his agent. Edwards v. Dooley, 120 N. Y. 540, 24 N. E. 827; Burchard v. Hull, 71 Minn. 430, 74 N. W. 164. "When the agency is to be inferred from the conduct of the principal, that conduct furnishes the only evidence of its extent, as well as of its existence. When the belief of the authority of an agent arises only from previous actions on his part as an agent, the persons treating with him must, on their own responsibility, ascertain the nature and extent of his previous employment." Corey v. Hunter, 10 N. D. 5, 12, 84 N. W. 570.

The only acts of Moeszinger on which the claim of authority of the Investment Company is based are merely that the Investment Company was permitted to collect the three interest instalments, supplemented by the statement contained in Moeszinger's letter of February 9th, 1912. There is no contention that Moeszinger ever permitted the Investment Company to collect the principal of other mortgages. On the contrary, the undisputed testimony shows that while Moeszinger

had handled some five or six other loans negotiated through the Investment Company, that he never collected the principal of any of these loans through the Investment Company, but always sent the papers to a bank for collection, the same as he did with the papers in this case. The recent case of Trubel v. Sandberg, 29 N. D. 378, 150 N. W. 928, also involved a transaction wherein the American Mortgage & Investment Company collected the principal due on a mortgage originally negotiated by it. In that case, also, the claim was made that the Investment Company was the agent of the holder of the mortgage securities, and as such agent had authority to receive payment of the principal and interest due on the mortgage. In that case the court held that the evidence failed to establish any authority, actual or ostensible, upon the part of the Investment Company to act as agent for the holder of the mortgage in receiving the money from the owner of the land. There is even less evidence to establish agency, either actual or ostensible, in the case at bar, than that presented in the case of Trubell v. Sandberg, and we are satisfied that the decision in that case must control here. The plaintiff in this case cannot be said to have paid the money to the Investment Company as agent for the defendant Helena Moeszinger Kershner. He paid it with knowledge that the Investment Company no longer owned the mortgage, and that at a prior time, when he paid the interest instalment, the Investment Company was unable to deliver the interest coupon until it was obtained from the holder of the mortgage. He paid it without ascertaining whether the Investment Company had any authority whatsoever to represent the then holder of the mortgage.

It is also argued that the defendant ratified the acts of the Investment Company. This argument is based upon the proposition that Moeszinger caused the papers to be sent to the Scandinavian American Bank for collection on May 1st, 1912, or some ten days after the money had been paid to the Investment Company. It is claimed that this constituted an attempt to collect from the Investment Company, and for that reason amounted to a ratification of the Investment Company's acts in collecting the principal.

The Investment Company received the first draft from the plaintiff on April 22, 1912, and a second draft for a $10 deficiency on May 5th, 1912. Moeszinger sent the papers to the bank for collection on May 1,

1912, and they were returned to him by the bank on July 9th, 1912. The undisputed evidence shows that Moeszinger had no knowledge of the fact that the plaintiff had paid the money to the Investment Company until in the fall of 1912. Hence, at the time the papers were sent, and during all the time they remained in the hands of the bank for collection, Moeszinger had no knowledge of the acts of the Investment Company, which it is asserted that he ratified. It is difficult to understand how he could ratify an act of which he had no knowledge.

As a general rule except in those cases where the principal intentionally assumes the responsibility without inquiry, or deliberately ratifies, having all the knowledge in respect to the act which he cares to have, any ratification of an unauthorized act or transaction of an agent must, in order to bind the principal, be shown to have been made by him with full knowledge of all the material facts relative to the unauthorized transaction. See 31 Cyc. 1263–1266; Mechem, Agency, § 129; Clark & S. Agency, § 106; see also Comp. Laws 1913, §§ 6331, 6335.

The judgment appealed from must be reversed. And the District Court of Ward County is directed to enter judgment and decree in favor of the defendant Helena Moeszinger Kershner, as prayed for in her answer. It is so ordered.

On Rehearing (Filed November 16, 1915).

CHRISTIANSON, J. Plaintiff in a petition for rehearing asserts that the decision of this court in Trubel v. Sandberg, 29 N. D. 378, 150 N. W. 928, cited and relied on in our former decision, is neither applicable to nor controlling in this case. In Trubel v. Sandberg, two questions of agency were presented: (1) Did Mrs. Trubel constitute Faber her agent to collect the mortgage indebtedness? (2) If so, did Faber in turn constitute the Investment Company her agent for the same purpose? The first question to be determined in that case was the authority of Faber. Upon that question Mrs. Trubel testified "that she had no dealings with the Investment Company, but had all her dealings with Faber, and that she had delivered over her money to Faber, relying upon his integrity to look after the matter for her." The testimony further showed that she purchased the loan involved in that case through

the agency of Faber, and that "as the interest coupons became due she clipped the same, and handed them to Faber, with the request that he collect the money for her." Mrs. Trubel also testified: "Knowing Mr. Faber as I did, and his connection with the bank, I was perfectly satisfied with anything he did in the way of looking after this mortgage investment." This court held that this testimony, when considered in connection with the undisputed fact that Faber did not have possession of the note and mortgage, and that these instruments were retained by Mrs. Trubel, was insufficient to establish agency on the part of Faber.

In the case at bar, it is again earnestly contended, on the petition for rehearing, that the following statement in a letter to the Investment Company gave actual authority to such company to collect the principal of the note and mortgage, regardless of the fact that such instruments were never delivered to the Investment Company, to wit: "I want to give you notice now that I want my money on all these loans when due. They are all too slow for me.

Yours very truly, L. C. Moeszinger."

Besmehn Apr. 15/12. Curtis & Humphrey Nov. 1/12.

It is not contended that the plaintiff had any knowledge of this letter at the time he paid the principal to the Investment Company; and no claim of ostensible authority is based thereon. The sole question is whether this statement, when considered in connection with the undisputed fact that the mortgage and notes in question were retained by the defendant, gave the Investment Company actual authority to collect the principal of the loan. We still believe that the statements in this letter are less evidence of actual authority than the authority with which Faber was invested, under the evidence of Mrs. Trubel. But this court held that Mrs. Trubel's testimony, when considered in connection with the fact that she retained the instruments of indebtedness, failed to show Faber's authority to collect the principal.

Plaintiff's counsel has cited numerous authorities to the effect that express authority to receive payment may be shown by other proof than the possession of the securities. We have said nothing to the contrary. We do not contend that want of possession is conclusive evidence of want of authority; but we do hold (and this rule is recognized by all the authorities cited by plaintiff's counsel), that as possession of evidences of indebtedness, in the absence of countervailing facts, clothes

the agent with apparent authority to collect the indebtedness, so want of possession of such papers, while not conclusive, is evidence of great importance tending to show want of authority. The presumption is that an agent who has possession of the security has authority to make collection thereof; and the presumption is also that an agent who does not have such possession has no authority to collect.

In Loizeaux v. Fremder, 123 Wis. 193, 101 N. W. 423, the supreme court of Wisconsin said: "Negotiability being established, there results the rule that the debtor's duty is to pay to the person who owns the note at the time of payment, or to an agent of such owner actually authorized to receive payment; that no payment to any other person can be of any effect unless made in reliance upon the actual possession of the note, or upon words or acts of the owner so unambiguously declaring the authority of such other person to receive such particular payment as to estop the owner from denying such authority. Possession of a negotiable instrument is generally the sole adequate evidence of apparent authority to collect upon which the debtor has any right to rely, or can, without negligence, do so. . . . This rule has been held sufficient to deny efficacy to such acts as permitting collection of interest, or even prior instalments of principal, which, in relation to other business not involving collection of negotiable paper, might well suffice to establish apparent agency. Commercial paper has always been favored in the law, not less for the ultimate benefit of the giver than of the holder, and the rule just referred to is in line with that policy. It is so simple, and, once understood, furnishes so easy and sure a means for both debtor and owner to protect themselves against unauthorized acts of others, that it ought not to be weakened or confused. The holder can always be safe by retaining the instrument in his possession; the debtor, by refusing payment without actual presentation." The rule laid down by the Wisconsin court was quoted with approval by this court in Trubel v. Sandberg, 29 N. D. 378, 150 N. W. 928, and is equally applicable in the case at bar.

Plaintiff had the burden of showing the authority of the Investment Company to receive payment. The only evidence of such authority is the statement in the letter. Against such is the strong presumption of want of authority, raised by the fact that the defendant retained the securities in her possession, as well as the positive evidence of Moes-

zinger that such authority was never conferred. We are agreed that plaintiff has failed to show that the Investment Company was authorized to receive payment of the principal of the mortgage indebtedness.

The former opinion will stand. A rehearing is denied.

COMPTOGRAPH COMPANY, a Corporation, v. CITIZENS BANK OF MINOT, a Corporation.

(155 N. W. 680.)

Trial court — findings of — evidence — supported by.

1. Evidence examined, and it is *held* that the trial court's findings are not contrary to, or unsupported by, the evidence.

Contract — change or modification of — action — based upon — proof — burden of.

2. A party who bases his cause of action upon a modification or change in a contract has the burden of establishing such fact.

Express contract — suit upon — implied contract — no recovery on.

3. Where plaintiff sues upon an express contract, he will not be permitted to recover on an implied contract.

Opinion filed November 16, 1915.

Appeal from a judgment of the District Court of Ward County, *Leighton*, J.

Plaintiff appeals.

Affirmed.

Garnett & Garnett (*Cowan & Adamson* and *H. S. Blood*, of counsel), for appellant.

The written contract contains the whole agreement of the parties. It so expressly provides. A warranty is an agreement. To hold that the statutory warranties apply to this sale would in effect create a new contract for the parties. Dowagiac Mfg. Co. v. Mahon, 13 N. D. 521, 101 N. W. 903.

There is no proof that plaintiff failed in any respect to carry out the contract. "Title passes to vendee when parties agree upon a present

transfer and the thing itself is identified." N. D. Stat. § 4990; Nichols & S. Co. v. Paulson, 6 N. D. 400, 71 N. W. 136; Witte Mfg. Co. v. Reilly, 11 N. D. 203, 91 N. W. 42.

Even if the statutory warranties applied, there is no proof that any of them operated or were intended to operate as a condition. N. D. Stat. § 5435; Hull v. Caldwell, 3 S. D. 451, 54 N. W. 100.

Defendant, by using the second or substituted machine, affirmed the contract. The substitution was made under the contract. Fred W. Wolf Co. v. Monarch Refrigerator Co. 252 Ill. 491, 50 L.R.A.(N.S.) 808, 96 N. E. 1063; J. L. Owens Co. v. Doughty, 16 N. D. 13, 110 N. W. 78; International Soc. v. Hildreth, 11 N. D. 262, 91 N. W. 70.

If defendant ever had a right to rescind, it did not do so within a reasonable time. J. L. Owens Co. v. Doughty, 16 N. D. 10, 110 N. W. 78; Houghton Implement Co. v. Doughty, 14 N. D. 331, 104 N. W. 516; Bruce v. Davenport, 5 Abb. Pr. N. S. 185; Knuckolls v. Lea, 10 Humph. 577; Prickett v. McFadden, 8 Ill. App. 197; Wilson v. Fisher, 5 Houst. (Del.) 395; Foster v. Rowley, 110 Mich. 63, 67 N. W. 1077; Rosenfield v. Swenson, 45 Minn. 190, 47 N. W. 718; Houston v. Cook, 153 Pa. 43, 25 Atl. 622.

There was no unconditional rescission. Poirier Mfg. Co. v. Kitts, 18 N. D. 556, 120 N. W. 558.

Thompson & Wooledge, for respondent.

There was no contract as to the second machine. Defendant had no opportunity before the second machine arrived to inspect it, and the rule is that the use of a machine for purposes of inspection is not an acceptance. Noble v. Olympia Brew. Co. 64 Wash. 461, 36 L.R.A. (N.S.) 467, 117 Pac. 241; Gay Oil Co. v. Roach, 93 Ark. 454, 27 L.R.A.(N.S.) 914, 137 Am. St. Rep. 95, 125 S. W. 122; 35 Cyc. 433, 434, 439, 440.

There was no executed sale, and defendant rescinded. Comp. Laws 1913, § 5994; Hooven & A. Co. v. Wirtz Bros. 15 N. D. 477, 107 N. W. 1078; Gay Oil Co. v. Roach, 27 L.R.A.(N.S.) 914, note; Noble v. Olympia Brew. Co. 36 L.R.A.(N.S.) 467, note; 35 Cyc. 440.

There was no waiver of warranties. 35 Cyc. 433, 439; Merchan's' & M. Sav. Bank v. Fraze, 9 Ind. App. 161, 53 Am. St. Rep. 341, 36 N. E. 378; Westby v. J. I. Case Threshing Mach. Co. 21 N. D. 575,

132 N. W. 137; Houghton Implement Co. v. Vavrosky, 15 N. D. 308, 109 N. W. 1024.

Delivery was conditional, and no title passed,—no completed sale. Colean Mfg. Co. v. Blanchett, 16 N. D. 341, 113 N. W. 614; Nichols & S. Co. v. Paulson, 6 N. D. 400, 71 N. W. 136.

CHRISTIANSON, J. Plaintiff brought this action to recover the purchase price of an adding machine which it is alleged defendant purchased from plaintiff. The material allegations of the complaint, aside from the allegation of corporate existence of the parties, are as follows: "That on or about the 21st day of November, 1910, the defendant purchased from the plaintiff a certain comptograph, complete with motor and stand, for the sum of four hundred sixty-seven and 20/100 ($467.20) dollars, under and by virtue of the agreement, hereunto attached marked exhibit 'A' and made a part hereof.

"That thereafter, and on or about the 10th day of March, 1911, the said comptograph was returned to the plaintiff and another machine substituted in its place, in accordance with the terms of the said written agreement, which said comptograph so substituted was received and accepted by the defendant.

"That under the terms of said agreement the defendant was to pay the sum of four hundred sixty-seven and 20/100 ($467.20) dollars, no part of which has been paid by defendant to plaintiff, except the sum of sixty-seven and 20/100 ($67.20) dollars."

The defendant's answer admits the corporate existence of the parties, but denies all other matters in the complaint; and further asserts that the defendant purchased the adding machine under a written agreement in words and figures as follows:

Comptograph Company
Chicago, Ill.

The undersigned hereby orders from you, upon the conditions hereinafter stated, comptograph described as follows:—Comptograph now in our possession, which is hereby accepted, No. —— Model 3 A Pattern 16 Complete with motor and stand—Sixty seven no/100 dollars Paid on this contract ————.

Purchase price to be Four hundred sixty seven no/100 dollars.

Terms: Net Cash in sixty (60) days. Net will be allowed for payment in full of invoice within ten (10) days of date thereof.

The Comptograph Company hereby agrees to keep comptograph covered by this agreement in complete repair, under ordinary usage, for the term of one year from date of invoice.

This guaranty does not contemplate that the Comptograph Company is to pay express charges on the machine if sent in for repairs.

Upon the refusal or neglect of purchaser to pay any sum due under this contract when the same may be due and payable, the entire purchase price, less any actual cash payment thereon, shall then and there become due and payable, and said purchase price shall thereupon be considered due and payable to Comptograph Company as liquidated damages for and on account of the breach of this contract by the purchaser.

It is expressly agreed that this contract shall not be canceled, and that it covers all agreements between the parties hereto relative to this transaction, and that neither party shall be bound by any representation or promise made verbally by any person, and which is not herein embodied and set forth.

Dated at Minot, N. D., this 21 day of Nov. 1910.

Citizens Bank of Minot,
H. H. Kemper, Pres.,
Purchaser.

On this 21 day of Nov., 1910, Comptograph Company hereby accepts and becomes a party to the above agreement and contract of sale.

Louis F. Dow & Co.
Comptograph Company
By I. I. Cherry,
Its Agent.

The answer further alleges that the defendant thereafter endeavored to use said adding machine in good faith, but that the same was defective and would not work, but would become locked, and that after making many attempts to use said machine, the defendant notified the plaintiff many times of the defects therein. That the machine at the time of its purchase and delivery had latent defects which had not been disclosed

to the defendant by plaintiff or by any person; such defects arising from the process of manufacturing; and that such latent defects were not discovered until after delivery and purchase of the machine; that the machine was manufactured by the plaintiff, and that it had been ordered and purchased for a particular purpose, to wit, for the purpose of an adding machine, and that it was not reasonably fit for such purpose and would not perform the purpose for which it was intended, all of which was unknown to the defendant at the time of the delivery and purchase. That the defendant gave the machine only ordinary usage, but that it would not work and became out of repair, and that defendant immediately notified plaintiff of such fact, but that plaintiff failed and neglected to keep said machine in repair as provided in the contract, for a period of one year, or for any length of time whatever. That thereafter, and on or about March 21, 1911, the plaintiff at his own instance, and without any request on the part of the defendant, forwarded to defendant another adding machine, and that said second machine was received by the defendant merely for examination and never accepted, and that defendant never ordered or requested plaintiff to forward or deliver the second machine. But that on attempting to use the second machine it was found that the same would not work and was not reasonably fit for the purpose of an adding machine, but had the same defects as the first machine, of which fact the plaintiff was notified; that the second machine was received about March 25, 1911, and returned July 17, 1911; that the first machine was returned about April 6, 1911, that both machines were returned in as good condition as they were received.

The cause was tried to the court without a jury, and the trial court made findings in favor of the defendant, and judgment was entered pursuant to such findings, and this appeal is from the judgment entered in favor of the defendant upon such findings. The only errors argued by appellant on this appeal, and, hence, the only ones which will be considered, are the assignments which challenge the correctness of certain findings, as well as the conclusions of law drawn by the court from the facts found. The evidence shows that about six or ten days prior to November 21, 1911, one Cherry, a representative of the Louis F. Dow Company, the agent of the plaintiff in this action, left an adding machine with the defendant bank. Afterwards on November 21,

1911, he again called and the written order or agreement set forth in defendant's answer was executed. The machine furnished did not prove satisfactory, and the defendant refused to pay for it. And sometime prior to March 25, 1911 (the record does not disclose the exact date), Mr. Cherry again called on the defendant, and at that time requested that the machine furnished and purchased under the written agreement be returned to the plaintiff. He also at that time suggested that he would send another machine.

Mr. Kemper, the president of the bank, in his testimony gives the following version of the conversation had at this time:—

Q. Did you ever order the second machine?

A. I did not.

Q. Now, Mr. Kemper, shortly before this first machine was returned, had Mr. Cherry been there at the bank?

A. He had, I think.

Q. Did you tell him what was the trouble with the first machine?

A. I did.

Q. And did he tell you to send the first machine in?

A. He did.

Q. And you sent it back?

A. Yes, sir.

Q. And to refresh your recollection I hand you memorandum and ask you—do you know about the date you sent in that first machine?

A. I can't give the exact date.

Q. I will hand you a memorandum marked exhibit "T", and ask you if, from that memorandum, you can state the date you shipped the first machine?

A. April 6, 1911.

Q. And it was forwarded by express?

A. It was.

Mr. Blood: I admit we got it Mr. Wooledge.

Q. And the machine was shipped at the Comptograph Company's request, or Mr. Cherry's?

A. It was.

Q. Did you tell Mr. Cherry to have a second machine forwarded?

A. No, sir.

Q. What did you tell him as to any other machine?

A. I told him I didn't think it would be necessary, didn't think the machine would give satisfaction.

Q. You wanted to be through with it?

A. We liked the comptograph machine better than the Burroughs, but it wouldn't do the work.

Q. When this second comptograph machine arrived, were you surprised to see it come?

A. In a way I was.

Q. What made you surprised?

A. Well, I didn't think they would have the nerve to send another one out.

Q. What was Mr. Cherry's conversation concerning the sending of a second machine to the bank, give it?

A. That we liked the comptograph machine, that it had features the Burroughs didn't have, but it wouldn't do the work, we were impressed favorably with the comptograph, but it wouldn't do the work, and he wanted to send another machine, and I said, "It is useless, we have to have a machine that we can use, we can't have a machine locked up every day, every two or three days," we didn't authorize—

I move that "authorize" be stricken out.

A. He said he would send us another machine, do that at his own risk but we felt it wouldn't give satisfaction.

Q. When the machine came it was boxed up, was it not?

A. It was.

Q. The reason you were surprised when the machine came, the second machine, was because Mr. Cherry had insisted upon sending you one?

Q. What was the reason?

A. I didn't think he would send me a machine. I felt it was all satisfactory when the—we proved the machine wouldn't do the work.

The testimony shows that some days after this conversation took place, the second machine arrived and was delivered at the bank by the express company. The first machine was immediately returned to, and accepted by, the plaintiff. The defendant submitted the second machine to trial for four or five days in all, and found the same defects

therein which existed in the first machine. Cherry, the sales agent, made his headquarters at Minot, where the defendant bank is situated, and came to the bank frequently,—every two or three weeks,—and would then look the machine over. This is true both as to the first and the second machine. The testimony, also, shows that complaint was made to Cherry the first time he called at the bank after trouble occurred during the trial of the second machine, and that he was then informed of the defect in the second machine. Mr. Kurth, the assistant cashier, who testified to this, says, however, that he cannot give the exact date, but that it might have been a week or even two weeks after the trouble occurred. The record does show, however, that on May 1, 1911, the defendant, in replying to a letter received from the Louis F. Dow Company regarding payment for the machine, wrote the Louis F. Dow Company, stating among other things: "We are experiencing the same trouble with this machine which we did with the other. We have, therefore, set it aside and quit using it. The machine is left here in the office at your disposal. Please advise what you want us to do." On May 9, 1911, the Louis F. Dow Company wrote defendant to the effect that it had turned the matter over to the plaintiff, and that the plaintiff had agreed to take the matter up direct with the defendant in consideration of the Dow Company relinquishing its claim for profits on the sale. And subsequently, about May 15, 1911, two representatives of the plaintiff called at the defendant bank to try to adjust the trouble.

Mr. Kurth, the assistant cashier, who had charge of the trial of the second machine, and largely conducted the negotiations with the two representatives, testified as follows in regard to what took place at this time:

Q. Now in regard to the second machine, you were there at the bank when it arrived?

A. Yes, sir.

Q. Now, did you have anything to do with unpacking the second machine?

A. I was there when it was unpacked.

Q. Did you use the second machine?

A. Yes, sir.

Q. How much did you use it?

A. Used it about five or six days.

Q. Then what happened?

A. It was locked up.

Q. When it was locked up it wouldn't work—you had to stop and use some other machine?

A. Couldn't use it.

Q. That would happen in the midst of the day's business?

A. Yes, sir.

Q. And you would have to start over again on another machine to make out your daily balance?

A. Yes, sir.

Q. Did that happen more than once?

A. I think it happened twice on that last one.

Q. On the regular daily work?

A. Yes, sir.

Q. Did you try to use it more than that on other work?

A. That was set aside when it locked up the second time.

Q. Did you pack it up?

A. Yes, sir.

Q. Now, were you present when a fellow came here from the East to examine that machine, the one that was supposed to be apart?

A. I know there was one.

Q. Where was the machine when that man came?

A. In the crate.

Q. That man was a stranger to you?

A. Yes, sir.

Q. What did he do?

A. He set it up again.

Q. And after he set it up, what did he do?

A. He wanted us to use it.

Q. And what—after he set it up did he pack the machine up again?

A. No.

Q. Did you tell him to?

A. Yes, sir.

Q. What did you tell him?

A. We told him we had the same trouble with the second machine

we had with the first one after it locked up the second time it was packed up while it was locked.

Q. Did you tell him to take the machine away?

A. I told him the machine was there at his disposal, we didn't want it.

Q. Did you tell him that you had packed it up once and didn't want to pack it up again?

A. Yes, sir.

Q. State what you did tell him?

A. We told him that we had used the first machine, and we found we had trouble, and we found the second machine with the same trouble as the first one they shipped, and that we had it packed up and ready to ship, but the company failed to tell us where they wanted it shipped, or when, and told them it was not necessary to take this machine out of the crate again because we weren't going to use it.

Q. Now you say with reference to this machine which arrived at the bank, the second machine, on or about March 21, 1911, you say you used it for five or six days, you mean you used it the first five or six days, you used it after it got locked up?

A. No.

Q. What do you mean?

A. We used it four or five days.

Q. Did it lock up?

A. Yes, sir.

The representatives of the plaintiff, however, went away leaving the machine at the bank. Some further correspondence was had, in none of which, however, did the defendant recede from its refusal to keep the second machine, and on June 17, 1911, the defendant returned the machine by express, without, however, prepaying express charges.

In order to avoid misunderstanding as to the facts, it may be stated that Cherry did not testify. It may also be stated that the undisputed evidence shows that the defendant never made any payment, but that the partial payment of $67.20, set forth in the complaint, was merely a special discount made by Cherry at the time the first machine was ordered.

Appellant's entire argument is predicated on the theory that the rights

of the parties are fixed by the written contract, dated November 21, 1910; that this contract contained the entire agreement between the parties and excluded all implied warranties. The latter contention seems contrary to the rule announced by this court in Hooven & A. Co. v. Wirtz Bros. 15 N. D. 477, 107 N. W. 1078, wherein it was said: "There is no conflict between the order and the implied warranties. The order does not state that the sale is made without warranties, neither does it state that the vender warrants only against certain defects, thus excluding all other warranties, whether express or implied, as was the case in Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903. The order is silent on the subject of warranties, save that it provides in effect that express warranties will not be recognized unless approved by the plaintiff in writing. The warranties which are thus prohibited by the written order are warranties by agreement, by contract, verbal or written, or express warranties. The prohibition does not extend to implied warranties which are not matters of agreement, but arise by operation of law. 'They are obligations which the law raises upon principles foreign to the actual contract. . . .' They are such as were implied at common law in case of sales under the circumstances stated in the statutes above quoted, and do not depend upon the agreement of the seller. Hoe v. Sanborn, 21 N. Y. 563, 78 Am. Dec. 163; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 114, 28 L. ed. 86, 88, 3 Sup. Ct. Rep. 537. The order contains no provisions excluding such warranties, and the defendants were clearly entitled to rely upon them." See also Sorg v. Brost, 29 N. D. 124, 127, 150 N. W. 455.

The conclusions we have reached in this matter, however, make it unnecessary for us to consider or determine what judgment should have been entered, or what the rights of the respective parties might have been, if such rights were fixed by the written contract.

This is not a case triable *de novo* in this court, but a case properly triable to a jury; the findings of the trial court stand in place of, and have the same effect as, special findings of a jury. The trial court found that the defendant "on April 6, 1911, at the request of said plaintiff, returned the said comptograph to said plaintiff, and the said plaintiff received the same in as good condition as when delivered to the defendant. That the said written contract between the parties then

and there was rescinded and terminated by mutual consent, and the said comptograph so returned by the defendant at plaintiff's request was received by the plaintiff and retained by plaintiff, and has never been returned to the defendant or offered to be returned." The trial court further found that the second machine was forwarded to the defendant against its consent, and that it refused to accept the same, and refused to consent to the substitution of the second machine under the written contract. These findings, in our opinion, have ample support in the evidence, and are therefore binding on this court.

Under the written contract, plaintiff not only sold the adding machine described therein to the defendant, but also agreed to keep the same "in complete repair, under ordinary usage, for the term of one year, from date of invoice." This machine was found defective. It was repeatedly out of order. Under plaintiff's contract it was required to keep the machine in complete repair. The agent who sold it examined the machine frequently. Finally he decided that the plaintiff would take the machine back. So he entered into a new agreement with the defendant, under the terms of which the adding machine described in the written contract was returned to, and accepted by, defendant. Thus far there is no dispute as to the new agreement. Defendant contends that this was the entire agreement, and that the contractual relations between the parties terminated. Plaintiff, however, claims that this was not the whole of the new agreement, but that it was understood that the written contract remain in full force, and its provisions apply to a second adding machine to be furnished by defendant in lieu of the machine which had been returned. Both parties rely upon the new agreement. Plaintiff not only accepted and retained the first machine, but predicates its cause of action upon the delivery of the second machine under the new agreement. Hence, it is obvious that no question is presented as to Cherry's authority to make the last agreement; it has been ratified by plaintiff, and it must recover thereunder if at all. Westby v. J. I. Case Threshing Mach. Co. 21 N. D. 575, 132 N. W. 137.

Plaintiff claimed that the written contract was not terminated, but remained in full force; and that the new agreement merely provided for a substitution of another adding machine under the original contract. Plaintiff had the burden of showing a right of recovery. This

included the burden of showing that the terms of the new or substituted agreement were such as plaintiff claimed. 9 Cyc. 761. The trial court found that this had not been proved, and that the agreement was as contended for by defendant. The finding is supported by the evidence and is binding upon this court.

Appellant also asserts that the defendant used the second machine for an unreasonable length of time, and thereby affirmed the contract of purchase. As we have already held, the rights of these parties are dependent, not upon the written contract, but upon the oral agreement under which the first machine was returned and the second machine sent out for trial. Under such oral agreement, no contract of purchase existed, but the second machine was sent on, not as a delivery under a contract of purchase, but for trial purposes only. Under these facts, any obligation on the part of the defendant to pay for the machine would arise by implication. As this suit is based upon an express contract, no recovery can be had herein upon an implied contract, even if the facts justified such recovery. Lowe v. Jensen, 22 N. D. 148, 132 N. W. 661; Yancey v. Boyce, 28 N. D. 187, 148 N. W. 539. The facts as found by the trial court, however, negative plaintiff's right to recover either upon express or implied contract.

The judgment of the trial court must be affirmed. It is so ordered.

AUSTIN JOHANNA v. THOMAS LENNON and A. L. Larson.

(155 N. W. 685.)

Fraud — duress — want of consideration — recovery — defeat of — action — negotiable check — indorse — infirmity — defect — bad faith.

1. In order to defeat recovery on the ground of fraud, duress, or want of consideration between the original parties, in an action by an indorsee against the maker of a negotiable check, complete and regular on its face, which was acquired by the indorsee for value before it was overdue or dishonored, it must be shown that the indorsee had actual knowledge of the infirmity or defect

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Note.—On the general question of circumstances sufficient to put purchaser of negotiable paper on inquiry, see note in 29 L.R.A.(N.S.) 351.

As to effect of fraud in inception of negotiable paper on rights of bona fide purchaser, see note in 11 Am. St. Rep. 309.

or knowledge of such facts as to amount to bad faith. American Nat. Bank v. Lundy, 21 N. D. 167, followed.

Indorsee — in due course — check — defenses — original parties.

2. It is *held* that the plaintiff is an indorsee in due course and as such holds the check involved in this action free from the defenses of fraud and duress and want of consideration, even though such defenses existed between the original parties.

Opinion filed November 16, 1915.

Appeal from a judgment of the District Court of Williams County, *Fisk*, J. Defendant Larson appeals.

Affirmed.

Wm. G. Owens and *E. A. Lohrke*, for appellant.

The evidence does not show that there was any consideration for the check upon which suit is brought. A third party takes a check subject to all defenses, and can receive no better title than the payee had. Comp. Laws 1913, § 7073.

Where fraud is shown at the inception of a negotiable instrument, the burden of proof of "holding in due course" is upon the holder. First Nat. Bank v. Flath, 10 N. D. 281, 86 N. W. 867; Vannatta v. Lindley, 198 Ill. 40, 92 Am. St. Rep. 270, 64 N. E. 735; Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 37 L. ed. 1063, 14 Sup. Ct. Rep. 94; Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427.

The maker has the right to intercept and cancel such an instrument at any time before it is honored and paid by the bank on which it is drawn. Yakima Valley Bank v. McAllister, 1 L.R.A.(N.S.) 1075, note, and cases there cited.

Thomas M. Cooney, for respondent.

It is only incumbent upon an indorsee of a negotiable check taken over by him before due or dishonored, to prove that he is the holder in due course, in good faith, and that he is a bona fide holder without notice of any defect. Rosenstein v. Berman, 116 Minn. 231, 133 N. W. 792.

Our statute presumes that any such instrument is issued for a valuable consideration. Comp. Laws 1913, § 6909.

The rule is that such an instrument is valid in the hands of a good-faith purchaser and holder, unless there is a statute declaring otherwise,

even though founded upon an illegal consideration. Comp. Laws 1913, § 6904; Rev. Cases 1905, § 6320, Comp. Laws 1913, § 6903; Arnd v. Sjoblom, 131 Wis. 642, 10 L.R.A.(N.S.) 842, 111 N. W. 666, 11 Ann. Cas. 1181; Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460, 112 Am. St. Rep. 370, 99 N. W. 399, 4 Ann. Cas. 353; Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724.

CHRISTIANSON, J. The plaintiff in this action seeks to recover of the defendant Larson, as maker, and the defendant Lennon, as indorser, upon the following check:—

Schafer, N. D.	*April 19 1909*	No. ————
	McKenzie County Bank	
Pay to	*Thomas Lennon*	or order, *$150.00*
One Hundred fifty		Dollars
		A. C. Larson

The complaint in substance alleges the execution and delivery by Larson to Lennon of the check; that Larson executed the check under the name of A. C. Larson, and falsely represented and pretended in the issuance of said instrument that this was in truth and fact his name, whereas his real name is A. L. Larson; that the defendant Thomas Lennon thereafter in due course of business for value transferred and assigned the check to the plaintiff by indorsing upon the back of said instrument his (Lennon's) name, and that plaintiff thereby became and is the owner and holder of the instrument; that the check was presented for payment to the bank on which it was drawn, and payment refused.

The answer admits the execution and delivery of the check and that payment was refused; and alleges that the same is without consideration, and that defendant's signature thereto was obtained solely by duress and fraud. The answer further denies that plaintiff is the holder of the instrument in due course, and alleges that plaintiff, prior to the

time of the transfer of the check to him, had actual notice that the check was without consideration, and that defendant's signature thereto was obtained by duress and fraud. The case was tried to a jury, but at the close of the testimony both parties moved for a directed verdict, whereupon the court discharged the jury, and subsequently made findings of fact and conclusions of law in favor of the plaintiff. Judgment was entered upon such findings, and the defendant Larson appeals from such judgment.

The sole question presented on this appeal is whether plaintiff was the good-faith holder of the check, in due course and for value. The evidence shows that on the day the check was issued, the defendant Larson was in Williston, where he and other parties played a game of poker. Some time after the game, the appellant gave the check which is involved in this action. The defendant Larson denies that he owed any money on account of the poker game.

Upon his direct examination he gives the following version of the execution and delivery of the check:

Q. Will you tell the jury how it happened that you gave this check, exhibit 12?

A. After we got through playing I went to a room—they had some whisky there, them fellows, and had been drinking, so I don't remember just exactly when I went into a room, but they had a room there, and they put me in that room, and some time during the night this Minneapolis man came in there, and he says: "I want that check now for $150," he said. I laid in bed there. He picked up my coat and got the check book, and he furnished the fountain pen, and he gave it to me, and I wrote it out to him, I signed it "A. C. Larson," so that I would be there with the check—if it would beat me to the bank I could get there and countermand it.

On his cross-examination he testified as follows:

Q. I show you a paper marked exhibit 1, and state if you ever saw that exhibit before?

A. Yes, sir.

Q. You wrote that instrument out, did you not?

A. Yes, sir.

Q. And signed it "A. C. Larson?"

A. Yes, sir.

Q. Drew it upon the McKenzie County Bank?

A. Yes, sir.

Q. For the sum of $150?

A. Yes, sir.

Q. And delivered it to Mr. Lennon?

A. No, sir.

Q. Who did you deliver it to?

A. It was another gentleman that came in my room and asked me to write the check in that name; I didn't know either one of them.

Q. And you wrote it in the name of Thomas Lennon?

A. He told me Thomas Lennon.

Mr. Lennon gives the following version of his connection with the transaction:

Q. You may state to the jury under what conditions you came in possession of that check?

A. This Minneapolis man that Mr. Larson speaks of, he is a Berthold man, his name is Patton, and the time I was working at Mondak he was a customer of mine. I had been in Williston—practically made my headquarters here at that time, and he came to me in the evening—I was laying in bed, rather the next morning after this supposed transaction happened, and he says, "I have a poker game here," and he says, "This man owes me a hundred and fifty dollars," and he says, "I wish," he says, "that you would let me make it out in your name because I am unknown in Williston—can't get it cashed." I says, "Sure, it is all right with me." Knowing that Mr. Larson was treasurer of McKenzie County, and Patton being a friend of mine and good customer, I knew they were both financially responsible, and I went down upon the street with this Mr. Patton and this check—the first man I saw was Mr. Johanna. At that time the hotel—I have forgotten the name of it—was run, I think was run,—it was called the Williston at that time.

Q. Were you present when that check was made out?

A. No, sir.

Q. And Mr. Patton came along out after you?

A. Yes, sir, but it is so long ago I can't recall it exactly, but it occurred to me Mr. Larson and he both, but Mr. Patton had the check in his possession and the first man I saw that I knew was Mr. Johanna and it was after banking hours. I says, "Joe, have you got any

money?" and he says, "Yes, I have got a little." "Have you got a hundred and fifty dollars?" "No." I told him there was a man here wanted to get away—he wanted this check cashed. He says, "I will give you $50 and my personal check." I says, "That is all right," and that was the way the transaction was done. I have never seen Mr. Patton since as I remember of; I don't think I have seen Larson until this morning.

Q. You got the hundred and fifty dollars from Johanna?

A. Yes.

Q. Were you in this poker game?

A. No, sir.

Q. Had nothing to do with it?

A. Not a thing, in fact, I couldn't swear that they were playing poker; I didn't see them play.

Q. Mr. Johanna didn't know what the check was given for?

A. No, sir, he didn't; he did it for me, as a personal favor to me.

Q. You have never paid Mr. Johanna anything on that check?

A. No, not a cent.

Mr. Johanna, the plaintiff, testified as follows regarding the cashing of the check:

Q. State to the jury how you cashed that check?

A. Mr. Lennon came in and asked me if I could cash a check, as the bank was closed; he asked me if I had any money, I said I did. He wanted me to cash the check. I told him I didn't have cash enough. He says, "Give me what cash you got and give me your personal check for the balance," and I did.

Q. How much cash did you give him?

A. Fifty dollars.

Q. And the balance?

A. Personal check for $100.

Q. Was that check afterwards returned to your account?

A. Yes, sir.

Q. Charged to your account?

A. It was.

Q. Paid?

A. It was.

The following facts are established by the undisputed testimony:

Thomas Lennon did not participate in the poker game, nor was he in the room while it was going on. The plaintiff, Johanna, cashed the check in good faith, paying Lennon the full amount thereof, without any actual notice or knowledge that the check was given without consideration. The check was regular and valid on its face, and properly indorsed by Lennon.

The evidence clearly is insufficient to establish the defenses of fraud and duress. Comp. Laws 1913, §§ 5846, 5848–5850. Nor is there any positive evidence that the check was issued in a gambling transaction, although the evidence raises a strong suspicion that such is the fact. There is, however, the positive testimony of Larson that he received no consideration for the check.

The check was a negotiable instrument. Comp. Laws 1913, § 6886, regular on its face, and regularly transferred to plaintiff, by the indorsement of the payee named therein, for value.

Appellant's counsel assert that plaintiff is not a bona fide holder of the check without notice, but that certain statements made by Lennon at the time the check was cashed were sufficient to put plaintiff on his inquiry as to the alleged infirmity in the instrument. We have set out the testimony showing what occurred at the time the check was cashed; and it is difficult to see how it can be seriously asserted that anything said at that time could lead a reasonable man to the conclusion that any infirmity existed in the instrument.

In the case of American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99, this court said: "This court held in First Nat. Bank v. Flath, 10 N. D. 281, 86 N. W. 867, on facts which we think make that case exactly in point, that where in an action on a negotiable note by an indorsee, the burden to prove a good-faith purchase has shifted to the plaintiff by the introduction of evidence showing fraud between the original parties thereto, the burden is sustained prima facie by showing a purchase for full value and before maturity. . . . In the same case it is held that good faith in the purchase of a negotiable note does not require the purchaser to make inquiries as to the purpose for which it was given or as to the existence of possible defenses, and that bad faith is imputed only from knowledge or notice of fraud or defenses, and that mere knowledge of suspicious circumstances will not defeat a recovery. The case cited was tried and decided before the enactment of the negotiable instruments law in this state, and if the law was cor-

rectly construed in the opinion from which we have quoted, the same principles apply with added force since the enactment of the negotiable instruments law, because we find that § 6358, Rev. Codes 1905, § 6941, Comp. Laws 1913, defines what constitutes notice of infirmity necessary to defeat recovery in a note obtained by fraud or negotiated in breach of faith. It reads: 'To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.' . . . The negotiable instruments law and particularly § 6358, supersedes and renders inapplicable the old sections quoted above [§ 6703, Rev. Codes 1905, § 7290, Comp. Laws, 1913, relative to constructive notice], if they were ever applicable, to the purchaser of negotiable instruments, and the suspicions of knowledge of facts sufficient to put a party on inquiry as to defects in title no longer necessarily constitute notice, or charge a party with notice of defenses on the purchase of commercial paper. He must have actual knowledge of the infirmity of defect, or knowledge of such facts as amount to bad faith." See also discussion of First Nat. Bank v. Flath, supra, and American Nat. Bank v. Lundy, supra, in McCarty v. Kepreta, 24 N. D. 395, 414, 48 L.R.A.(N.S.) 65, 139 N. W. 992, Ann. Cas. 1915A, 834.

What was said by this court in American Nat. Bank v. Lundy, supra, applies with equal force in the case at bar, and fully disposes of the question raised by appellant on this appeal.

We concur in the conclusion reached by the trial court, that the instrument involved in this case is a negotiable instrument, and that the plaintiff is the holder thereof in due course (Comp. Laws 1913, § 6937); and, hence, holds the same free from the defenses sought to be asserted by the defendant Larson. Comp. Laws 1913, § 6942; Drinkall v. Movius State Bank, 11 N. D. 10, 16, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724; Mooney v. Williams, 9 N. D. 329, 83 N. W. 237; 3 R. C. L. § 227; 5 R. C. L. §§ 56–60; Dan. Neg. Inst. § 197; Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460, 112 Am. St. Rep. 370, 99 N. W. 399, 4 Ann. Cas. 347.

The judgment appealed from is affirmed.

All concur.

WARD COUNTY, a Political Subdivision of the State of North Dakota, and a Public Corporation Organized and Existing under the Laws of the State of North Dakota, v. E. G. WARREN.

(155 N. W. 658.)

Action by county against superintendent of schools to recover overcharge of mileage. It is conceded that plaintiff must show that defendant collected for mileage that was not actually and necessarily traveled in the performance of his duties.

Superintendent of schools — county — mileage — overcharge — offers of proof — distances — actual and necessary travel — visiting schools.

1. (a) It was shown by the bills filed against Ward county that plaintiff collected mileage amounting to 5,703 miles for visiting school district No. 102. Plaintiff then sought to show by the clerk of the district court that the ordinary and usual road to Minot traveled by the residents of that vicinity was only about 17 miles. This testimony was supplemented by offers to prove that, during the time for which said mileage was charged, that defendant and his deputies were constantly traveling around the country visiting schools in an automobile, and that the bills filed showed charges from Minot to Drake and Plaza by railroad and thence by team to the district which lay about half way between Minot and Plaza. The rejection of this evidence was reversible error. If road conditions, weather, or other circumstances necessitated the extra mileage, the explanation rested with the defendant.

Mileage — charged for travel in visiting schools — must be actually and necessarily traveled — constructive mileage — evidence — competent.

(b) Plaintiff offered to show the distance from the various schools to Minot by the longest route necessarily, usually, and ordinarily traveled between such points during the period for which the charges were made. Also that more than 300 visits for which charges had been made from Minot to Drake, Plaza, etc., had in truth and fact been made overland from Minot. Also that the longest route necessarily, usually, and ordinarily traveled between schools to the city of Minot was less than the mileage charged by the defendant by from 20 to 210 miles per district. Also to prove by the deputy superintendents of schools that defendant in computing mileage employed constructive mileage rather than the actual mileage charged. Also that during the period covered by the action, and without loss to the efficiency of the school administration of the county, that defendant or his deputies could have visited seven or more schools on each trip before returning to the city of Minot, and by traveling the distance from the schools visited to the nearest railway station or town and from there to other schools. Plaintiff should have been allowed to prove the first four of those if it could do so by competent evidence.

Special school districts — independent — superintendents — visits to schools — mileage collected — evidence — competent.

(c) It was material for plaintiff to show that Kenmare, Ryder, and Berthhold were special school districts employing superintendents of their own. Such evidence was admissible even though defendant had certain duties which necessitated visits to those schools. The fact of their independent organization should be taken into consideration by the jury in determining whether or not defendant actually made the visits for which he collected mileage, and whether such mileage was necessarily traveled.

Cross-examination — mileage — method of computation.

(d) Plaintiff should have been allowed to cross-examine the defendant as to the manner in which mileage was figured in the presentation of his bills.

Cross-examination — witnesses — recollection — memory — refreshing.

(e) Plaintiff should have been allowed to examine the witness Peterson as to his recollection of certain visits made by him, and he should have been allowed to examine exhibit 29 to refresh his memory.

Visits to schools — automobile — distance necessarily traveled.

(f) Plaintiff should have been allowed to examine the witness Peterson as to whether or not a great many of the trips for which mileage had been charged by Drake and Ryder were in fact made by automobile directly from Minot.

Custom of chauffeur — automobile — route of travel — in visits — schools.

(g) Plaintiff should have been allowed to examine the chauffeur fully as to his custom in taking defendant and his deputies to the various school districts during the time for which mileage was charged by Drake, Ryder, etc.

Temporary records — showing method of travel — routes taken — destruction of — after suit brought — competent evidence.

(h) Plaintiff should have been allowed to prove, if it could, that defendant had destroyed his temporary records after the commencement of this action.

Verdict — direction of — superintendent of schools — constructive mileage charged — instructions by — to his deputies — bills — false — inaccurate — error.

2. The trial court at the close of the testimony, directed a verdict in favor of the defendant upon the first cause of action. At that time there was evidence from which the jury might have found that defendant had given directions to his deputies to charge constructive mileage around by Drake and Ryder when, in fact, the said mileage was made by a much shorter route; that during all of this time defendant and his deputies were constantly traveling by automobile, visiting many schools in a day. That the bills presented by the defendant were false and grossly inaccurate in that they did not always show the true mileage, the true date of the visit, nor even the name of the deputy who actually made the visit. There is evidence that many of the districts lying less than 40 miles

from the city of Minot were charged with mileage from 5,000 to 10,581 miles for a district. Under those circumstances it was error to take the case from the jury.

Costs — in trial court — taxation of — reversal.

3. In view of the reversal of this case it is unnecessary to pass upon the question of the taxation of costs in the trial below.

Opinion filed November 16, 1915.

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

Reversed.

R. A. Nestos, State's Attorney, and *Dorr Carroll*, Assistant State's Attorney, for appellant.

The defendant was practising a fraud upon plaintiff in presenting his bills of overcharge and collecting same, and the money paid him under these circumstances rendered him a trustee *de son tort* or a trustee *ex maleficio*. 8 Words & Phrases, p. 7134.

Equity impresses upon such money a constructive trust in favor of the one entitled to the same. Parrish v. Parrish, 33 Or. 486, 54 Pac. 352, Citing 2 Pom. Eq. Jur. § 1053; Brown v. Brown, 83 Hun, 160, 31 N. Y. Supp. 650; 38 Cyc. 2021; Lovell v. Hammond Co. 66 Conn. 500, 34 Atl. 511; Thomson v. Gortner, 73 Md. 474, 21 Atl. 371; Devlin v. Houghton, 202 Mass. 75, 88 N. E. 580; Heineman v. Steiger, 54 Mich. 232, 19 N. W. 965; Norman v. Eckern, 60 Minn. 531, 63 N. W. 170; Holland v. Bishop, 60 Minn. 23, 61 N. W. 681; Smith v. Zink, 81 Mo. App. 347; Stahl v. Dohrman, 23 Misc. 461, 51 N. Y. Supp. 396; Harris v. Lyon, 1 N. Y. City Ct. Rep. 450; Woodworth v. Kissam, 15 Johns. 186; Sheppard v. Shoolbred, 1 Car. & M. 61; Brown v. Doane, 86 Ga. 32, 11 L.R.A. 381, 12 S. E. 179; Hidden v. Jordan, 21 Cal. 92; Sandfoss v. Jones, 35 Cal. 481; Cameron v. Ward, 8 Ga. 245; Arnold v. Cord, 16 Ind. 177; Nelson v. Worrall, 20 Iowa, 469; Green v. Ball, 4 Bush, 586; Moore v. Tisdale, 5 B. Mon. 352; Martin v. Martin, 16 B. Mon. 8; Farnham v. Clements, 51 Me. 426; Hunt v. Roberts, 40 Me. 187; Laing v. McKee, 13 Mich. 124, 87 Am. Dec. 738; Jones v. M'Dougal, 32 Miss. 179; Dodd v. Wakeman, 26 N. J. Eq. 484; Rose v. Bates, 12 Mo. 30; Schmidt v. Gatewood, 2 Rich. Eq. 162; Fraser v. Child, 4 E. D. Smith, 153; Cousins v. Wall, 56 N. C. (3 Jones, Eq.) 43; Coyote Gold & S. Min. Co. v. Ruble, 8 Or. 284, 4 Mor.

Min. Rep. 88; Troll v. Carter, 15 W. Va. 567; Coyle v. Davis, 20 Wis. 564; Hoge v. Hoge, 1 Watts, 163, 26 Am. Dec. 52; Hodges & Co. v. Howard, 5 R. I. 149; M'Cullough v. Cowher, 5 Watts & S. 427; Kisler v. Kisler, 2 Watts, 323, 27 Am. Dec. 308; Wolford v. Herrington, 86 Pa. 39; Wheeler v. Reynolds, 66 N. Y. 227; Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696; Eley v. Miller, 7 Ind. App. 529, 34 N. E. 836.

Mingling such money with other funds does not divest the trust fund of its trust character. Van Alen v. American Nat. Bank, 52 N. Y. 1; Moses v. Murgatroyd, 1 Johns. Ch. 119, 7 Am. Dec. 478; Hopkin's Appeal, 7 Sadler (Pa.) 143, 9 Atl. 867.

A trustee is liable for trust money lost while mingled with his own, or while being used in his own business, no matter by what cause the loss occurs. Mumford v. Murray, 6 Johns. Ch. 1; De Jarnette v. De Jarnette, 41 Ala. 710; Heathcote v. Hulme, 1 Jac. & W. 122, 20 Revised Rep. 248; Mason v. Morley, 34 Beav. 471, 34 J. Ch. N. S. 422, 11 Jur. N. S. 459, 12 L. T. N. S. 414, 13 Week. Rep. 669; Frith v. Cartland, 2 Hem. & M. 417, 34 L. J. Ch. N. S. 301, 11 Jur. N. S. 238, 12 L. T. N. S. 175, 13 Week. Rep. 493; Pennell v. Deffell, 4 De G. M. & G. 372, 1 Eq. Rep. 579, 23 L. J. Ch. N. S. 115, 18 Jur. 273, 1 Week. Rep. 499; Ernest v. Croysdill, 2 De G. F. & J. 175; Ex Parte Geaves, 8 De G. M. & G. 291, 25 L. J. Bankr. N. S. 53, 2 Jur. N. S. 651, 4 Week. Rep. 536; Cook v. Addison, L. R. 7 Eq. 466, 38 L. J. Ch. N. S. 322, 20 L. T. N. S. 212, 17 Week. Rep. 480; Hart v. Ten Eyck, 2 Johns. Ch. 62; Case v. Abeel, 1 Paige, 393; Bobb v. Bobb, 89 Mo. 411, 4 S. W. 511; Schieffelin v. Stewart, 1 Johns. Ch. 620, 7 Am. Dec. 507; 2 Pom. Eq. 655; Utica Ins. Co. v. Lynch, 11 Paige, 520; Mumford v. Murray, 6 Johns. Ch. 1; Kip v. Bank of New York, 10 Johns. 63; Com. v. McAlister, 28 Pa. 486; Kellett v. Rathbun, 4 Paige, 102; Diffenderffer v. Winder, 3 Gill & J. 342; Jameson v. Shelby, 2 Humph. 198; West Branch Bank v. Fulmer, 3 Pa. 399, 45 Am. Dec. 651; McAllister v. Com. 30 Pa. 536; Royer's Appeal, 11 Pa. 36; Stanley's Appeal, 8 Pa. 431, 49 Am. Dec. 530; Matthew v. Brise, 6 Beav. 239; Macdonnell v. Harding, 7 Sim. 178, 4 L. J. Ch. N. S. 10; Freeman v. Fairlie, 3 Meriv. 38, 17 Revised Rep. 7; Wren v. Kirton, 11 Ves. Jr. 377; Massey v. Banner, 4 Madd. Ch. 413, 20 Revised Rep. 317; Fletcher v. Walker, 3 Madd. Ch. 73, 18 Revised Rep. 195; Rowth v. Howell, 3 Ves. Jr. 565; Verner's Estate, 6 Watts, 250; Peters v. Bain,

133 U. S. 670, 33 L. ed. 696, 10 Sup. Ct. Rep. 354; Brackenridge v. Holland, 2 Blackf. 383, 20 Am. Dec. 123; Jewett v. Dringer, 30 N. J. Eq. 308; Brakeley v. Tuttle, 3 W. Va. 126.

Interest thereon may be charged, either simple or compound, according to the facts. Re Commonwealth F. Ins. Co. 32 Hun, 79; Manning v. Manning, 1 Johns. Ch. 527; Schieffelin v. Stewart, 1 Johns. Ch. 620, 7 Am. Dec. 507; 3 Pom. Eq. Jur. § 1063.

When such funds are mixed with his own property, it is for him to distinguish his own, or lose it. Jewett v. Dringer, 30 N. J. Eq. 308; Lake Shore & M. S. R. Co. v. Hutchins, 37 Ohio St. 298; Kreuzer v. Cooney, 45 Md. 592; Wetherbee v. Green, 22 Mich. 318, 7 Am. Rep. 653; Moore v. Bowman, 47 N. H. 501; United States v. Thompson, 93 U. S. 586, 23 L. ed. 982; Diversey v. Johnson, 93 Ill. 569; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; First Nat. Bank v. Hummel, 14 Colo. 259, 8 L.R.A. 788, 20 Am. St. Rep. 257, 23 Pac. 986; Knatchbull v. Hallet, L. R. 13 Ch. Div. 696, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732, 36 Moak, Eng. Rep. 779, and cases there cited; Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118; San Diego County v. California Nat. Bank, 52 Fed. 59; Thompson v. Gloucester, City Sav. Inst. — N. J. Eq.—, 8 Atl. 97; Smith v. Combs, 49 N. J. Eq. 420, 24 Atl. 9; McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214; Francis v. Evans, 69 Wis. 115, 33 N. W. 93; Bowers v. Evans, 71 Wis. 133, 36 N. W. 629; Independent Dist. v. King, 80 Iowa, 497, 45 N. W. 908; Davenport Plow Co. v. Lamp, 80 Iowa, 722, 20 Am. St. Rep. 442, 45 N. W. 1049; Harrison v. Smith, 83 Mo. 217, 53 Am. Rep. 571; Stoller v. Coates, 88 Mo. 520; Myers v. Board of Education, 51 Kan. 87, 37 Am. St. Rep. 263, 32 Pac. 658; Peak v. Ellicott, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499; Ingraham v. Elliott, 30 Kan. 163; Continental Nat. Bank v. Weems, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802; Brocchus v. Morgan, 5 Cent. L. J. 53; 2 Lewin, Tr. & Trustees, 394, et seq.; Mechem, Agency, 526; Farmers' & T. Bank v. Kimball Mill. Co. 1 S. D. 388, 36 Am. St. Rep. 739, 47 N. W. 402.

"Discretion, when applied to a court of justice, means a sound discretion guided by law. It must be governed by rule, not by humor.

It must not be arbitrary, vague and fanciful, but legal and regular." Rex v. Wilkes, 4 Burr. 2527; Harris v. Harris, 31 Gratt. 16; State ex rel. Sea Isle City Improv. Co. v. Assessors of Taxes, 61 N. J. L. 476, 39 Atl. 1063; Lovinier v. Pearce, 70 N. C. 171; Miller v. Wallace, 76 Ga. 484, 2 Am. St. Rep. 48; People ex rel. Oebricks v. Superior Ct. 5 Wend. 114; Platt v. Munroe, 34 Barb. 291; Sharp v. Greene, 22 Wash. 677, 62 Pac. 147; Haupt v. Independent Teleg. Messenger Co. 25 Mont. 122, 63 Pac. 1033; State ex rel. Adamson v. Lafayette County Ct. 41 Mo. 221; Ex parte Mackey, 15 S. C. 322; Abbott v. L'Hommedieu, 10 W. Va. 677; Rose v. Brown, 11 W. Va. 123.

A cause should not be taken from the jury except for good and very strong reasons. There must not be any evidence upon which the jury could legally and rightfully base a verdict. Schuylkill & D. Improv. Co. v. Munson, 14 Wall. 442, 20 L. ed. 867; Pleasants v. Fant, 22 Wall. 120, 22 L. ed. 782; Marion County v. Clark, 94 U. S. 284, 24 L. ed. 61; Griggs v. Houston, 104 U. S. 553, 26 L. ed. 840; Bagley v. Cleveland Rolling Mill Co. 22 Blatchf. 342, 21 Fed. 159; Wittkowsky v. Wasson, 71 N. C. 451; Dwight v. Germania L. Ins. Co. 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654; Burke v. Witherbee, 98 N. Y. 562; Culhane v. New York C. & H. R. R. Co. 60 N. Y. 136; McKeever v. New York C. & H. R. R. Co. 88 N. Y. 667; Hyatt v. Johnston, 91 Pa. 200; Ryder v. Wombell, L. R. 4 Exch. 32, 38 L. J. Exch. N. S. 8, 19 L. T. N. S. 491, 17 Week. Rep. 167; Codding v. Wood, 112 Pa. 371, 3 Atl. 455; Note to Charon v. George W. Roby Lumber Co. 9 Western Rep. 591; Marcott v. Marquette, H. & O. R. Co. 47 Mich. 1, 10 N. W. 53; Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99; Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745.

If there is any evidence which in any way tends to prove a cause, or a defense, it is error to take the case from the jury. Stephens v. Brooks, 2 Bush, 137; Way v. Illinois C. R. Co. 35 Iowa, 585; Drakely v. Gregg, 8 Wall. 242, 19 L. ed. 409; Henry v. Rich, 64 N. C. 379; Hickman v. Jones, 9 Wall. 197, 19 L. ed. 551; Barney v. Schmeider, 9 Wall. 248, 19 L. ed. 648; Kelsey v. Northern Light Oil Co. 45 N. Y. 505, 13 Mor. Min. Rep. 497; Humiston v. Wood, 124 U. S. 12, 31 L. ed. 354, 8 Sup. Ct. Rep. 347; Marble v. Mellen, 145 Mass. 342, 14 N. E. 110; Hickman v. Cruise, 72 Iowa, 528, 2 Am. St. Rep. 256, 34 N. W. 316; Ross v. State, 82 Ala. 65, 2 So. 139; 24 Cyc. 193; Olson

v. Riddle, 22 N. D. 144, 132 N. W. 655; John Miller Co. v. Klovstad, 14 N. D. 435, 105 N. W. 164; Gooler v. Eidsness, 18 N. D. 338, 121 N. W. 83.

A controverted fact should never be taken from the jury where there is reasonable doubt as to the state of the evidence. Slattery v. Donnelly, 1 N. D. 264, 47 N. W. 375; Vickery v. Burton, 6 N. D. 245, 69 N. W. 193; McRea v. Hillsboro Nat. Bank, 6 N. D. 353, 70 N. W. 813; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Warnken v. Langdon Mercantile Co. 8 N. D. 243, 77 N. W. 1000; Pewonka v. Stewart, 13 N. D. 117, 99 N. W. 1080, 16 Am. Neg. Rep. 540.

In taxing costs the rule is well settled that there can be no apportionment, although both parties be successful in part, unless the statute so permits.

The party who obtains a judgment, even though in part only, for the relief demanded, is the prevailing party, and is entitled to costs. 11 Cyc. 28, and cases cited; New Marlborough v. Brewer, 170 Mass. 162, 48 N. E. 1089; Fowler v. Shearer, 7 Mass. 14; Fox v. Hale & N. Silver Min. Co. 122 Cal. 219, 54 Pac. 731.

Greenleaf, Bradford, & Nash, for respondent.

Where a declaration contains several counts for separate and distinct causes of action, on some of which plaintiff recovers, but on the others defendant is successful, each party is entitled to recover the costs incident to the counts on which he prevails. 5 Enc. Pl. & Pr. 143, 144; Allison v. Thompson, 2 Swan, 202; Boothe v. Cowan, 5 Sneed, 354; Acker v. McCullough, 50 Ind. 447; Litchfield v. Farmington, 7 Conn. 399; Sayles v. Briggs, 1 Met. 291; Meacham v. Johes, 10 N. H. 126.

BURKE, J. Defendant was the county superintendent of schools of Ward county, and as such was entitled to charge said county, in addition to his salary, 10 cents for each mile actually and necessarily traveled by himself and his deputies in the performance of their duties. From the 1st of August, 1910, to the 7th of January, 1913, defendant presented to the county commissioners of said county for audit and payment, mileage bills totaling 176,375 miles, for which he was paid the sum of $17,667.50.

This action is brought by the county upon two counts. Under the first it is alleged that defendant overcharged the county in the sum of

$11,817.50, because 118,175 miles were not actually and necessarily traveled. The second cause of action alleges that said defendant received various moneys belonging to the county of Ward which he had not deposited with the treasurer promptly, but held for his own personal use an unreasonable time. Under this count interest in the sum of $384 was demanded. Upon the trial defendant conceded that if he had received money from the county for which there was no corresponding actual and necessary travel, the county could recover, but insisted that each and every mile for which a charge had been made was not only actually traveled, but a necessity had existed for the exact mileage made. Plaintiff offered in evidence much testimony, and many of the assignments of error relate to the refusal of the trial court to allow this testimony to go to the jury. At the close of the trial below the trial court directed the jury to return a verdict in favor of the defendant upon this first count. This ruling of the trial court is assigned as error. The second count of the complaint was submitted to the jury, which returned a verdict in favor of the county in the full amount demanded. Plaintiff, thereupon, taxed as costs the witness fees of all of his witnesses, both those used upon the first count and those used upon the second count. Upon relaxation the court, however, receded from this position and allowed the costs only upon the second cause.

To keep this opinion within printable limits, we can give only the briefest extracts from the testimony. The bill of particulars furnished by the plaintiff to defendant alone covers 92 pages of the printed abstract, containing something like 2,000 items covering something over 118,000 miles of travel.

(1) This paragraph will be devoted to the question of whether or not testimony properly admissible was rejected by the trial court.

(a) We will consider under this subdivison evidence offered as to the distance between the courthouse and the districts visited by the defendant or his field deputies, by the ordinary and usual road of travel between these points. Also evidence offered as to the usual road of travel between said school districts and the nearest railroad station. Also evidence as to the distance by the nearest road usually, ordinarily, and necessarily traveled between the courthouse and points visited by the defendant and his field deputies.

One King, witness for the county, testified that he was clerk of school district No. 102, and was asked:

Q. Do you know what the distance is from school No. 2 by the ordinary and usual road of travel to the city of Minot?

Objected to on the ground and for the reason that the question assumes an ordinary and usual course of travel, and if accepted as the criterion in this case would limit the county superintendent to travel over this road that this witness concludes is the usual and ordinary mode of travel, and exclude him from making what at the time of the visit was a feasible route.

Sustained.

Further he was asked:

Q. In getting to the city of Minot, is it not a fact that practically all of the road from the nearest corner of your township in to Minot follows the section lines?

A. Yes, sir.

. . . . . .

Q. Does that road following the section lines go by school No. 2? Objected to as incompetent, irrelevant, and immaterial, as having no probative force, and not tending to prove or disprove the county superintendent of schools has or has not traveled the number of miles claimed by him in the several bills filed here, and improper order of proof, and necessarily limits the superintendent to the use of one road to the school, whether the same was at the season feasible or not, or whether it was feasible in connection with his other work and it is not a proper criterion.

Sustained.

He was further asked:

Q. Do you know what the distance is from the corner of your township, the greatest distance from the city of Minot by the ordinary and usual route of travel to the city of Minot,—I mean thereby, the corner located the greatest distance from Minot being the southwest corner of the township?

Objected to as incompetent, irrelevant, and immaterial.

Sustained.

These and other similar assignments of error constitute one group.

It is conceded by defendant that the county can recover for any sum paid defendant unless the mileage was actually and necessarily traveled. The testimony of the witness King had a tendency to prove overcharges. He testifies that Minot was his trading point; was situated 16 or 17 miles distant, and the ordinary traffic went by these schoolhouses. The bills presented by the superintendent to the county for visiting this particular district were before the jury at the time. We have taken the trouble to summarize those visits. Beginning November 11, 1910, and ending December 19, 1912, a period of slightly over two years, we find it was visited upon the following dates and the following mileage charged:

Date.	Mileage.
November 11, 1910	48 Miles.
May 1, 1911 (and one adjoining district)	248 "
May 17, 1911 (and one adjoining district)	272 "
June 8, 1911	254 "
June 9, 1911	246 "
June 19, 1911	44 "
June 23, 1911	230 "
June 27, 1911	244 "
August 2, 1911 (and one adjoining district)	238 "
September 11, 1911	54 "
September 12, 1911	40 "
September 22, 1911	246 "
October 9, 1911 (and one adjoining district)	298 "
October 31, 1911 (and one adjoining district)	246 "
November 3, 1911 (and one adjoining district)	250 "
November 6, 1911 (and one adjoining district)	118 "
November 8, 1911 (and one adjoining district)	106 "
December 8, 1911	246 "
December 11, 1911	246 "
May 6, 1912	246 "
June 4, 1912	44 "
August 29, 1912	38 "
September 2, 1912 (and one adjoining district)	240 "
September 4, 1912 (and one adjoining district)	96 "
September 6, 1912 (and one adjoining district	244 "
September 13, 1912 (and one adjoining district)	251 "
November 21, 1912 (and one adjoining district)	250 "
November 26, 1912	36 "

Date.	Mileage.
December 11, 1912 (and one adjoining district)	248 Miles.
December 18, 1912 (and one adjoining district)	264 "
December 19, 1912	72 "

—making a total of 5,703 miles traveled during the two and one-half years in visiting township 153, range 84, some 17 miles from Minot, which is situated in township 155, range 83. In this period defendant collected from Ward county for visiting the same, $570. During the same time the county offered to prove that defendant had an automobile in which he and his deputies were constantly riding. Plaintiff also offered to prove by the school registers, testimony of the teachers, directors, and pupils, that on many—if not all—of those visits the superintendent or his deputy came to the school in an automobile. The defendant had been obliged to admit, when confronted with the visitors' registers, that the visits made were not always given correctly in the bill filed with the county. In some instances being four or five days in error. He also was obliged to admit, when confronted with the registers, that the visits were not always made by the deputy named in the bill filed with the county. He was also obliged to admit that he had changed the mileage in the bills which had been returned to his office by the deputies, and had destroyed the original memoranda given to him by his deputy. Supplementing this testimony and those offers, plaintiff attempted to show the longest road ordinarily used by the people of that community in traveling from these schools to Minot, in order that the jury might find whether or not this mileage had in truth been made, or, if made at all, whether it had been necessarily made. It seems that a mere recital of this proposition would show its admissibility without argument. The rule is well settled that the more difficult a proposition, the greater leniency should be allowed in introducing evidence. In view of the admitted inaccuracies of the bills filed, it was very difficult to trace this mileage, especially at a time several years distant, and for this reason the trial court should have allowed the plaintiff much more latitude. Circumstantial evidence under those circumstances is admissible if it has fair bearing upon the issues. Plaintiff's attorney had a perfect right to show the distance from Minot to this district by these ordinary roads, and if he had been allowed to prove other matters improperly excluded would have made a very

creditable showing of overcharge in this district. If, as hinted in defendant's objection, road conditions, absence from home of the directors, and similar circumstances might have increased this mileage, those facts could readily be shown either upon cross-examination of the witness King or by other witnesses. These matters are so peculiarly within the defendant's knowledge that it is not asking too much of him to explain to the jury any unusual circumstances attending those trips. Defendant had not arbitrary discretion in the matter of visiting these schools, and should have used the same discretion and judgment that he would have, had it been a private venture. The jury had the right to say whether, under all of the circumstances, thirty-one separate visits were needed to this district during twenty-five months. They had a right to say whether or not those visits had, in truth, been made. They had a right to find whether it was necessary that at least twenty of them should be made around by Drake. They had a right to say whether it was necessary that five distinct visits should be made in June, 1911, with a total mileage of 1,018 miles, or whether those visits should have been combined so as to save money for the taxpayers. They had a right to say whether or not it was necessary that visits should be made on the 8th and 9th of June of that year, or whether or not those visits were made; and, if made, whether defendant had a right to charge mileage back to Minot each night. They also have a right to say whether it was necessary to visit this district on the 3d, 6th, and 8th of November, 1911, charging mileage back each night. Upon another trial plaintiff will be allowed to show all of those circumstances having any fair relevancy to the subject. It was error to exclude this evidence.

(b) After his ineffectual attempt to show the distance from the various schools to Minot, appellant made the following offer of proof: "At this time the plaintiff offers to prove by the clerks of the school district of Ward county, by teachers and by the deputy county superintendents of Ward county, during the period covered by this action, the following facts: What the distance was from the city of Minot to the most remote corner of each school district in said district in Ward county during the period between August 1, 1910, and January 6, 1913, by the longest route necessarily, usually, and ordinarily traveled between such points. And also the distance from each schoolhouse in each of these districts to the nearest railroad station, and the distance from such rail-

road station to the most remote corner of each of said districts by the longest routes necessarily, usually, and ordinarily traveled between such points during the above-mentioned period. (2) And the plaintiff further offers in open court to prove by teachers and school officers that more than 300 visits have been made by the defendant and his deputies to the above schools and to school districts numbers 94, 58, 122, 79, 53, 151, 149, 131, 123, 95, Douglas, Ryder, 85, 138, 120, 92, 111, 102, 106, 150, 130, 152. Directly from Minot overland to a specific district or place in the district, and returning overland, when the mileage charged and received by the defendant was figured by rail from Minot through Drake to such school district and returning by the same route; and to prove by these witnesses that the mileage so actually traveled was less than the mileage charged in each instance by from 110 to 120 miles, and that the said defendant has been overpaid by Ward county to that extent.

(3) "And the plaintiff in open court further offers to prove by the clerks of the school districts of Ward county, North Dakota, and the teachers thereof during the period covered by the action, that in certain and specific instances constituting the great majority of the trips for which charges have been made by the superintendent as shown in exhibits 1–35, inclusive, the longest route necessarily, usually, and ordinarily traveled between such school or school officer and the city of Minot is less than the mileage charged by the defendant in the said bills, by from 20 to 210 miles, and that, by reason of the said, defendant had been overpaid during the period covered by this action in the sum of $7,000."

(4) "The plaintiff in open court further offers to prove by the men who were deputy superintendents of Ward county during the period covered by this action, that in computing mileage which Ward county paid, as shown by exhibits 1–31 inclusive, each deputy figured the mileage to such school or school officer visited by him at a certain invariable distance, and irrespective of the route actually followed on such visit, and that in a certain number of trips it was figured by section lines."

(5) "The plaintiff in open court further offers to prove by the clerks of the school district of Ward county and the teachers thereof, during the period covered by this action, that, without loss to the efficiency of

the school administration of the county, the defendant or his deputies could have visited seven or more schools on each trip, before returning to the city of Minot, and that by traveling the distance from the school visited to the nearest railroad station or town and from there to other schools, computing the distance as above offered, that more than $6,000 in mileage would have been saved Ward county."

Paragraphs 1–3 and 5 of this offer were objected to upon many grounds, and the whole offer upon grounds among which is that it contains more than one distinct offer of proof, two of which were not objectionable to the defendant. The offer was repeated in several forms, and objection sustained each time until it finally was narrowed down to the following: "At this time the plaintiff in open court offers to prove by the men who were deputy superintendents of Ward county, during the period covered by this action, that in computing the mileage which Ward county paid, as shown by exhibits 1–31, inclusive, each deupty figured the mileage to such school or school officer visited by him at a certain, invariable distance, and irrespective of the route actually followed on such visit, and that on a certain number of trips it was figured by section lines." To this last offer there was no objection. For brevity we have excluded the offers as they were changed and submitted by the plaintiff. We will content ourselves, however, with saying that the first four paragraphs of the offer as made were not, to our mind, objectionable, and should have been allowed by the court. As already stated, the more difficult the task, the more lenient should be the rulings of the court, and not the more severe.

(c) Plaintiff attempted to introduce evidence showing that the school districts in Kenmare, Ryder, and Berthhold were special school districts during all or a part of the time for which the superintendent received mileage for their inspection. This offer of proof was met with the objection that it was incompetent, irrelevant, and immaterial; that the rights of the plaintiff and the defendant with respect thereto were defined by statute. This objection was sustained. We think the rejection of the offer was error, regardless of whether the superintendent had some business in those districts or not. Conceding, without deciding, that defendant had certain duties connected with these districts, which necessitated visits thereto, yet the fact that there are special districts employing superintendents of their own, partially at least under

local supervision, should be taken into consideration in determining whether or not any unnecessary visits were made to those districts.

(d) While defendant was upon the stand upon cross-examination under the statute, he was asked to explain instructions given his deputies relative to the mileage that they should charge.

After answering certain questions he was asked:

How would you figure the mileage if you had no automobile?

A. Figure by rail mostly, and livery drives out to towns that are close to rail.

Q. Now, then, the question is in going to a certain school in a certain district, how, according to your instructions to the deputies, would they figure the mileage?

Objected to as calling for a conclusion of the witness, incompetent, irrelevant, and immaterial.

The Court: It seems he has answered it about as nearly as he can. An examination of the evidence shows that the witness had not answered the question excepting to say that his instructions were to charge the mileage just the same as though defendant had not owned an automobile. What the county desired to know was whether or not the deputies were instructed to charge constructive mileage? This the defendant not only did not answer, but evidently was evading when the court stopped the examination and told the jury that the witness had answered the question. This error was highly prejudicial.

(e) The deputy Peterson, while on the stand as a witness for the plaintiff, was asked whether or not by reference to a map showing the school districts of Ward county, he could testify as to the route taken by him upon a certain date where mileage had been charged around by Drake and Ryder. The question was:

Examining exhibit 29 and refreshing recollection from an examination of that, could you tell as to what district was visited on that trip?

Defendant's counsel thereupon asked him as follows:

Any opinion you would have in regard to it would be gathered entirely from the exhibit, would it not?

A. I could tell better after looking at it.

Q. Look at it.

Q. You would have no independent recollection as to what visit it

was, and you would have no impression except what is conveyed by the piece of paper, isn't that the truth?

A. I don't remember it.

Q. You would have no independent recollection of it, would you?

A. No, sir.

Defendant's counsel then objected to the testimony, because he had no independent recollection of the matter, and it is incompetent, irrelevant, and immaterial for that reason.

Sustained.

If this witness, by refreshing his memory from a map and the bills filed with the county, could testify that the trip was, in fact, made overland by the short mileage, it would tend in a measure to show that the county had been defrauded, and it, therefore, was relevant. Its exclusion was error.

(f) While the witness Peterson was on the stand he was asked regarding instructions given to him by the defendant relative to the manner in which mileage should be charged. He was asked:

Q. Were you instructed by the county superintendent, the defendant in this case, when visiting in the southern part of this county, to figure the mileage by railroad through Drake to some town on the Drake-Plaza branch of the Soo and from there up to the school visited and returning by the same route whether you traveled by land or by rail?

. . . . . .

A. Well, what schools was that—the schools of the vicinity of that branch?

Q. Yes, amplify the question I would say to the schools that were nearer to some town on that branch than they were to Minot or to any town on the main line on the Great Northern or the main line of the Soo southeast.

A. Yes.

Q. And did you, in figuring this mileage which you submitted to the superintendent, follow those instructions?

A. I did.

. . . . . .

Q. A great many of the trips made into districts 122, 92, . . .

Douglas, . . . Ryder . . . were made by automobile directly from Minot were they not?

Objected to as incompetent, irrelevant, and immaterial, not admissible under the pleadings or the bill of particulars, not tending to prove or disprove any of the allegations of the complaint or answer. Sustained.

We can see no theory upon which the objection to this question was sustained. This witness was the identical man for whose travel an enormous bill had been presented to the county. A fair inference from the mileage charged was that he had traveled from Minot to Drake, from Drake to Ryder, and from Ryder out into the country. When he was asked whether or not upon these trips he had gone overland from Minot he was not allowed to answer. This error is prejudicial. Again the same witness is asked: "Now, then, from among the visits made by you between August 1, 1910, and January 6, 1913, and for which such memorandum or record was handed by you to Mr. Warren, do you at this time recollect one or more trips that were made directly across the country from Minot by automobile, by you into the territory or into the district we have just enumerated?"

Objected to as incompetent, irrelevant, and immaterial, having no probative force, not within the issues or the bill of particulars, and for the reason the witness has heretofore in this examination identified his trip from the original bill and testified thereon.

Sustained.

The exclusion of this testimony is also reversible error.

(g) While the chauffeur was upon the stand, as hereinafter mentioned, he testified that during the years 1911 and 1912 he had been employed practically all of the time by the defendant in driving an automobile. He was asked:

Q. Now in making those trips did you occasionally, or did you at times, have two or three of the office force; that is, the superintendent and his deputies in the automobile with you, taking them out to schoolhouses or school officers?

Objected to as incompetent, irrelevant, and immaterial, already having been testified that that was the mode of visiting schools.

Sustained.

Again he was asked:

Q. During the time you were so employed, you were using the automobile practically every day, were you not?

Objected to as leading and suggestive, putting the words in the witness's mouth, not calling for a statement of fact.

Sustained.

Q. How much of the time approximately was employed, that is of each week or month in making trips from Minot to the schools of the county?

Objected to as calling for the conclusion of the witness, not referring to any specific trip, not tending to prove or disprove any of the allegations of the complaint.

Sustained.

Q. Were some of the trips made by you with the automobile taking the superintendent or his deputies to the schools and school districts and school officers of Ward county made into the southern part of the county being the territory around or north of Max and around Douglas, Ryder, and Makoti?

Objected to as incompetent, irrelevant, and immaterial, indefinite.

Sustained.

Again he was asked:

Q. How many trips can you recollect now that were made during that time to Ryder?

A. I have not the slightest idea.

Q. There were a great many?

Objected to as incompetent, irrelevant, and immaterial, indefinite, not tending to prove or disprove any of the allegations of the complaint or furnish any basis upon which a verdict could be rendered one way or the other.

Sustained.

Again:

Q. During the time you were driving the car in the summer or fall of 1912, with the exception of the period between October 14th, and October 25th, the roads of Ward county were they in good shape?

Objected to as leading and suggestive, putting the words in the witness's mouth, not calling for a statement of fact by the witness, not

tending to prove or disprove any of the allegations of the complaint, and calling for a conclusion of the witness.

Sustained.

The exclusion of this testimony was error. The county was trying to prove that during the time that defendant presented bills showing mileage into this country by the long route by Drake and Ryder and some constructive mileage, he and his deputies were, in fact, traveling every day in an automobile and that the roads were good. This was material and should have been received.

(h) It is also error in the trial court to sustain objections asked of the defendant as to the whereabouts of his temporary records. If, as conceded by the defendant, the bills presented to the county were inaccurate in that they did not always show the true date when the visit was made, nor the name of the deputy making it, nor always the month in which it was made, and that after the commencement of this action much memoranda were destroyed by the defendant, the jury would have the right to take the loss of the records into consideration in determining whether or not fraudulent charges had been made. Upon another trial this evidence must be received. We have not covered all of the questions raised by appellant upon the admission of testimony, nor do we think it necessary to mention any more. Those given above, if fairly followed upon a new trial, will dispose of all of the questions and allow plaintiff to prove his case by such evidence as is at this time procurable.

(2) The next question arising upon the record is whether or not the trial court erred in directing a verdict at the close of the testimony in favor of the defendant upon the first cause of action. In view of the fact that so much testimony was improperly rejected, a decision of this question is more or less academic, but we have no hesitancy in saying that the evidence offered and received at the former trial was sufficient to take the case to the jury. It must be remembered that, to constitute a legal charge against the county, the mileage must have not only been made, but must have been necessarily made, and whether there was a necessity for the trips with which the county had been charged was a question of fact for the jury. While the burden of proof is upon Ward county to show that no necessity existed for much of this mileage, yet this could be proved by circumstantial evidence, and much of that existed in the case. The bills themselves offered in evidence show that for

slightly over thirty months a charge was made for 176,375 miles. The bills themselves also show that in many instances districts lying within a few miles of Minot were visited not once, but many times, and mileage charged from Minot to Drake, Drake to—say—Max, Ryder, or Plaza, and then by team out to the district. The mere fact of the existence of the bills in this condition was a circumstance of sufficient force to go to the jury as proving that the mileage had not, in fact, been made in the manner for which the charge was made. Taken in connection with the testimony of the defendant himself and his deputies, as to the manner in which those charges were made, it presents enough evidence to sustain a verdict in plaintiff's favor. In this connection we will quote briefly from defendant's testimony as to the manner in which those charges were made:

Q. There were some of these trips into those districts already enumerated where the trips were made by automobile across the country, where you figured mileage from Minot to Drake, Drake to some town on the Drake-Plaza line on the Soo and to the school and returning by the same route?

A. Yes.

. . . . . .

Q. However, on some of the trips made into that series of districts by automobile across the country, you figured the constructive mileage around by Drake with railroad mileage?

A. I have just said so.

Q. And it is true is it?

A. I think so.

Again he was asked regarding the instructions that he had given to his deputies as to how they should charge mileage against the county:

Q. There is one matter you partly covered in which I did not get clear, and that is in regard to the instructions given by you to your deputies as to figuring the rail mileage.

. . . . . .

Q. That is what we are asking you.

A. All right. I told the deputies to charge mileage, that is the third repetition. I answered the same question before, and that is to charge the mileage the same as though I did not own an automobile. The same

as though we were in Minot and took a visit by livery and railroad, absolutely and exclusively.

. . . . . .

Again he testifies:

Q. Have you not already testified that in some of those cases where the mileage was figured by Drake, you traveled across the country?

A. Yes.

Again he testifies:

Q. At the time the deputies reported to you the mileage covered on making a trip, and other items that you have already testified to, did you not also indicate on that memorandum the date on which the visit was made?

A. In nearly all cases.

Q. Why was it not then corrected so as to make these bills correct in that particular also?

A. Because it was not required. And it makes no difference in the school work and it wasn't anybody's business.

Again he testifies:

A. In connection with that, I want to correct an answer I made yesterday in regard to adding to the deputies' accounts. I was thinking the matter over, and I am of the opinion that when a trip was overlooked in the previous month—and there was those once in a while—I would put it in with another trip made by that man the next month, instead of making a separate item of it.

Q. What you claim now is that, instead of correcting the bill, that you would add it into another trip into the same district?

A. Not necessarily into the same district. Possibly, but not necessarily—might be added to the same district or some other district to make it appear that it was that month's business instead of the past month.

Defendant also testified to a trip made by himself personally as follows:

Q. On October 3, I find you personally made a combined visit to 62, which is Tatman township north of Minot, and to 53, which is Rushville, directly south of Minot, can you by an examination of the bill recollect by what means of conveyance that trip was made?

A. I cannot tell you how any of the trips were made.

Q. Do you have among the records of your office any record, note, or memoranda that would indicate in the case of any of these trips in exhibits 1–31, by what conveyance the trip was made?

A. There is absolutely no record as to how trips were made and the temporary record for my own guidance was made.

Q. Then what became of the temporary record?

A. Destroyed, the same as any other temporary record, thrown in the waste basket as of no further use.

Besides the testimony of the defendant himself, which — as we have said — was sufficient to sustain a judgment that much of the mileage had been unnecessarily traveled, or not traveled at all, there is the testimony of the deputies, from which we will quote briefly. Mr. Peterson testified that he was one of the deputies:

Q. Were you instructed by the county superintendent, the defendant in this case, when visiting in the southern part of this county to figure the mileage by railroad through Drake to some town on the Drake-Plaza branch of the Soo, and from there up to the school visited and returning by the same route, whether you traveled by land or by rail?

A. Well, what schools was that—the schools of the vicinity of that branch?

Q. Yes, to amplify the question, I would say to the schools that were nearer to some town on that branch than they were to Minot or to any town on the main line of the Great Northern or the main line of the Soo southeast.

A. Yes.

Q. And did you in figuring this mileage, which you submitted to the superintendent, follow out these instructions?

A. I did.

Q. A great many of the trips made into districts 122 . . . etc. Douglas . . . Ryder . . . were made by automobile directly from Minot were they not?

Objected to as incompetent, irrelevant, and immaterial, not admissible under the pleadings or the bill of particulars, not tending to prove or disprove any of the allegations of the complaint or answer.

Sustained.

. . . . . .

Q. In reference to school districts 62, 63, 144, and northeast school of 36, were you instructed by the superintendent to charge mileage by rail by Granville to either Deering or Glenburn from there to the school and returning by the same route, whether you made the trip by automobile or otherwise?

A. As to that, in making a trip like that by rail if I went around to Deering and drove out, I would charge for it accordingly, and if I made the same trip by auto to the same school, I would put down the mileage as though it were made by rail, and from the closest railroad point.

Q. That was the rule followed as to the whole of Ward county, by rail to the closest railroad town and out to the school in figuring the mileage?

A. That was the rule I followed in putting down by mileage, possibly with some exceptions. I was trying to think of some exceptions, but I guess that rule holds good, I won't make any exception to it.

Q. Do you know whether that was the rule followed by Mr. Warren and the other deputies?

A. They could testify better as to that.

Q. I am asking whether you know, that was all?

A. I presume so.

Q. You have no actual knowledge of that?

(No response)

The testimony of the other deputies is very similar. Besides the above testimony of the superintendent and his deputies and the bills filed by him, there is the testimony regarding specific instances where the mileage was charged around by Drake when the visit to the school was made by a much shorter route from Minot. As one instance, we cite a trip made shortly before Thanksgiving, 1912.

Mr. Peterson, one of the deputies, testified:

Q. Who was with you at that time?

A. Wendt, Waller, Warren, and McEown.

Q. You were traveling by automobile?

A. Yes, sir.

Q. Where had you been?

A. We had been visiting some schools beyond there.

Q. Do you remember in what district?

A. I don't remember.

Q. Examining exhibit 29 (defendant's bill to the county for November, 1912), and refreshing your recollection from an examination of that, could you tell as to what district was visited on that trip?

. . . . . .

(Objection sustained to this evidence)

Q. In coming to Mr. Hillesland's place . . . do you now remember your last stop prior to coming to his place?

A. We came from the south.

Q. Did the four of you on that day visit different schools, or did you all visit the same school?

A. Well, we did not visit the same school; no, sir.

Q. You visited different schools?

A. I visited a school myself.

Q. While you were visiting that school were the others there waiting for you or gone on?

A. They had gone on.

. . . . . .

Q. You may examine exhibit 40, and state whether from that book you could ascertain—

A. That was made the day before Thanksgiving.

. . . . . .

Q. From what place did you start in your automobile on which these visits were made?

A. We started from Minot.

Q. The superintendent and each one of the deputies visited one school?

A. I answered that before; I said I visited one school and the others went on.

Q. You went to the first one and were dropped from the automobile, were you?

A. I don't remember that.

Q. And then you returned by automobile or stopped at Hillesland's place on your return?

A. Yes.

This testimony is corroborated by the other deputies and by Mr. Hillesland. With this in mind we take up the bills for said dates, and find that on the 21st of November defendant presented to the county

a bill for Peterson visiting district 152, mileage 292 miles. On the same date for Waller visiting district 92, 254 miles; and for Wendt visiting district 102 and 149, 250 miles, and for the defendant one day previous for visiting district 73, 80 miles. The evidence of the school register, and of the other deputies, and of the chauffeur, taken together, was sufficient to justify the jury in finding, if it had been submitted to them, that this particular trip was made by the four of them together in an automobile from Minot, covering mileage something less than 50 miles and return, and that a charge was made for traveling 876 miles. Upon this incident alone a jury would be amply justified in finding defendant had been overpaid at least $75. As we have said, we give this single instance. There are others in the record. More than this, there is ample evidence in the record from more than a dozen witnesses that, during this period, defendant and his deputies were constantly traveling by automobile visiting four, five, or six schools a day.

The chauffeur McEown testifies that he had been employed by dedefendant in 1911 and 1912, and had driven to all parts of the county with the superintendent and his deputies. He was asked:

Q. In making those trips that you were driving the automobile during 1911 and 1912, did you at times leave either the superintendent or one of the deputies at various schoolhouses around the county?

A. I did.

Q. At the time of making these trips, did you make a record of the trips so made?

A. I did not.

. . . . . .

Q. During the summer of 1911 and 1912, you were employed in the capacity of driver practically all of the summer of those two years?

A. Yes, practically.

The bills presented by defendant to the county are in evidence, and show that almost without exception charges were made by the longest possible mileage in visiting the districts lying between Minot and Plaza.

It seems to be the theory of the defendant that, unless the question regarding excessive or unnecessary mileage excludes every possibility of the defendant's innocence, that it should be rejected. This rule, if enforced, would exclude every iota of evidence in existence. As already

stated, the county had a right to show all of the circumstances surrounding defendant's work. They had a right to show the distance to the various schools, the conditions of the roads, the fact that defendant and his deputies were in daily use of an automobile, that there were inconsistencies in the bills rendered, that there was a failure of the defendant to keep proper books and memoranda, or that he had destroyed such memoranda, if it had once existed, that the bills filed were not properly itemized to be readily investigated by the county, that the records of the school districts did not show some of the visits for which charges were made. In fact, the county should be allowed to prove all of these various circumstances which might, taken together, prove conclusively that overcharges were made. The fact that no question could be broad enough to include all of these items is no reason why the questions should be shut out one at a time. Even after the exclusion of most of the testimony offered, there was nevertheless enough evidence upon which the jury might have found for the plaintiff in some sum. In paragraph 1 of this opinion we have given an itemized statement of mileage charged against school district No. 102. That district was selected because it was the one in which the witness King resided. In order that defendant's conduct should not be judged by one district alone, we have selected at random over the territory between Minot and the Drake-Plaza line fifteen other districts, and give the mileage charged in each instance.

No. of District	Miles from Minot (Average Section Line)	Mileage charged during thirty months.
53	30	10,581
79	25	9,727
149	20	7,771
111	32	7,067
92	30	6,985
150	25	6,578
120	28	6,308
152	25	6,088
95	28	5,854
85	36	5,683
106	20	5,633
122	30	5,544
138		5,430
123	16	5,047
130	20	3,010

This mileage was collected from the county in a period of two and one-half years. We might add that, in the compilation, this court was unable to find among the files one of the bills against the county, so that the figures given in all instances are smaller than those for which the county has actually paid.

The county expresses its willingness to pay to the defendant for every mile which he has actually and necessarily traveled, and admits that the burden of proof is upon the plaintiff to show overcharges. Notwithstanding this burden of proof, we believe the evidence which we have above outlined should have been submitted to the jury, and that the jury would be justified in finding from the distances given by residents of the district, the mileage actually and necessarily traveled, and, under proper instructions from the trial court, render judgment in favor of the county for the balance.

(3) In view of this decision it is unnecessary to determine whether or not the costs were properly assessed below, as they all must be ultimately taxed against the defendant. Judgment of the trial court is reversed, and the case remanded for further proceedings.

Goss, J., not sitting.

STATE OF NORTH DAKOTA v. JACOB CHRISTMAN.

(155 N. W. 26.)

Murder — manslaughter — conviction — appeal — error — rebuttal evidence — verdict — degree of proof.

Defendant was tried for murder in the first degree for killing one Becker February 14, 1915. He was found guilty of manslaughter in the first degree, and sentenced to ten years' imprisonment, and appeals, assigning error in the exclusion of testimony offered, and challenging the sufficiency of the evidence to support conviction. *Held:*

That error was committed in the exclusion of testimony bearing on the issues; that the order of proof on the trial wherein what was properly a part of the main case of the state was permitted to be put in on rebuttal was prejudicial; that the verdict is not sustained by that degree of proof necessary

to sustain the conviction under the law, and the verdict and judgment thereon are, therefore, ordered set aside.

Opinion filed October 20, 1915. Rehearing denied November 19, 1915.

From a judgment of conviction rendered by the District Court of Mercer County, *Hanley,* J., defendant appeals.

Reversed and a new trial is granted.

Geo. I. Reimestad and *Miller, Zuger, & Tillotson,* for appellant.

The homicide occurred in the defendant's dwelling, his home, and while the deceased was intent upon the commission of a crime. His assaults upon defendant in the presence of defendant's wife and children and in their home had continued for some time. Defendant had the right to protect and defend himself and his home; but there is no legal evidence of the commission of any crime by defendant. People v. Tomlins, 213 N. Y. 240, L.R.A. —, —, 107 N. E. 496; Beard v. United States, 158 U. S. 550, 39 L. ed. 1086, 15 Sup. Ct. Rep. 962, 9 Am. Crim. Rep. 324; Runyan v. State, 57 Ind. 80, 26 Am. Rep. 52, 2 Am. Crim. Rep. 318; Hurd v. People, 25 Mich. 405; Morrison v. Com. 67 L.R.A. 541, note; Staten v. State, 30 Miss. 619; Cochran v. State, 28 Tex. App. 422, 13 S. W. 651, 8 Am. Crim. Rep. 496; Richardson v. State, 7 Tex. App. 486; State v. Haslet, 16 N. D. 426, 113 N. W. 374; Smith v. State, 68 Ala. 424.

Deceased was in the attitude of an assailant upon the defendant in his own premises. The right of self-defense sometimes implies the right of attack. One who has reasonable ground to believe, and does believe, that another intends to do him great bodily harm, need not wait until such other gets the advantage of him, but may act at once. State v. Matthews, 148 Mo. 185, 71 Am. St. Rep. 594, 49 S. W. 1085, 11 Am. Crim. Rep. 681.

John L. Cass, State's Attorney, and *H. L. Berry,* Special Prosecutor, for respondent.

There was a sufficient showing of circumstances in this case for the jury to find that the shooting was in the heat of passion. People v. Poole, 159 Mich. 350, 134 Am. St. Rep. 726, 123 N. W. 1093; State v. Bulling, 105 Mo. 204, 15 S. W. 367, 16 S. W. 830.

Goss, J. The defendant was informed against, and tried for murder in the first degree, and convicted of the included offense of manslaughter in the first degree, and sentenced to ten years' imprisonment. The appeal raises questions of error in the admission of evidence and instructions, and it is also strenuously urged that the verdict is contrary to law and insufficient to sustain the conviction.

The homicide occurred February 14, 1915, within the dwelling house of the defendant, where Henry Becker was killed by a gunshot wound. The defendant was fifty-seven years of age. Becker, the deceased, was a young, vigorous, and athletic man, much larger, heavier, and stronger than defendant. Deceased was a trespasser in defendant's dwelling, where he met his death, and at the time he was shot he was, or shortly prior thereto had been, mauling and terrorizing defendant, who, to protect himself from Becker, had taken his shotgun, loaded it with a shell, and awaited another onslaught. On arrival at the house about dark, Becker had ~~forced entr~~ance into the house by pushing the door open while the wife of defendant was doing her utmost to hold it shut and keep him out. This, the state questions, but there is no foundation in the record from which to successfully challenge the fact. Becker was under the influence of liquor. Earlier that afternoon, an hour or two before, he had followed Christman into the house of a neighbor, John Pfennig, tried to provoke a fight with defendant, and there accused Christman of giving his mother a bad name, pulled off his sweater, and, in the presence of Mrs. Pfennig and her children, committed an unwarranted assault and battery upon him, striking and cuffing defendant, who seemed powerless to protect himself, and who, to escape, fled from Pfennig's house, and, running to the rig of Albert Krukenburg, ordered him to drive him home, stating to Krukenburg at that time, "Oh God! They almost killed me. Drive as fast as you can; he will shoot us both dead." What transpired in Pfennig's house is testified to by Mrs. Pfennig, as well as by defendant himself. Her testimony corroborates his throughout. The state would treat this assault as a trivial matter, but it is important as indicating the frame of mind in which it left the defendant, as being in abject terror of Becker. John Pfennig was not in the house, but soon after the occurrence saw Becker, who went into the house with him, and said: "I gave it to Christman." He later asked Pfennig to take him over to Christman's because "he wanted to

fix it up with Christman." Pfennig smelled liquor off Becker's breath. He also saw Christman running fast some fifty or sixty steps or more, when escaping from Becker and into the sleigh of Krukenburg. Pfennig and wife are witnesses for the defense and Krukenburg for the state.

Earlier events that day should here be narrated. While defendant was at his home at 10 or 11 o'clock that Sunday morning, Becker and Krukenburg drove up and entered Christman's house. Christman was about to take Phillip Werner home, some 4 miles away. Becker volunteered to take Werner home. Before leaving, Krukenburg asked for some alcohol for his sick wife, and some was given him. Becker demands a bottle of it, as his children had a cough, he said. This, Christman refused, but, evidently to avoid trouble, Mrs. Christman put some alcohol in a catsup bottle, which she gave him. The four men then left for Werner's. On the way back the team ran away when near Pfennig's. There is some conflict in the evidence as to who was driving when this occurred. The defendant thinks that Becker was driving just before that, and, because he was driving too fast, Krukenburg took the reins from Becker, who then stood up and swung his arms to frighten the team. Krukenburg says that he was driving; that Becker had gotten out of the rig some little time before, and fallen down and just overtaken them shortly before the runaway, which he says was occasioned by the whiffletree coming loose. A fair inference is that all three were more or less intoxicated. Defendant was greatly excited by the runaway, and left in fright for Pfennig's house, where subsequent events there left him in great fear of Becker doing him serious bodily injury. This is borne out by the fact that he required Krukenburg to drive him home without waiting for or allowing Becker to come along, as Becker was purposely left behind at Pfennig's. Defendant testifies that when he got home just about dark he was cold and immediately went to bed, his wife assisting him, and he fell asleep.

The wife testifies:

Q. And how long after your husband returned did Henry Becker come?

A. I had just put my husband to bed, to sleep, when I come out of the room and saw Henry Becker coming.

Q. About how long was that?

A. About five minutes.

Q. Henry Becker came into the house?

A. Yes, he came in. I did not want to let him in. I was afraid of him, and I held the door and he pushed the door against me and came in.

The witness had already testified that when she saw Becker coming she got frightened and that she held the door shut, because she was afraid they would get into a quarrel.

She was then asked by defendant's counsel:

Q. Had your husband told you before that that Becker and he had had some trouble?

On objection made, witness was not allowed to answer this question. It was error not to permit this answer. The wife then testifies that when Becker entered the house "he took father at the throat and dragged him around." She also says that Becker was raving around the house, had his shirt open; that Becker said he "wanted to shed blood on Christman's place this evening," and "they were pulling one another around and then I went away to get help." She went about a quarter of a mile to where Jacob Christman, Jr., a married son of defendant, lived. What she said there was stricken out of the record, but the wife hastily returned home, followed by her daughter-in-law, who took another and nearer route back to defendant's dwelling. The mother arrived a very short time before the daughter-in-law, although the two evidently arrived almost simultaneously. Becker was just coming out of the bedroom into the kitchen, and stood in front of the kitchen table, and asked the wife, "Why did she call Anna." Anna, arriving on the scene at this moment, Becker turned to her, and asked Anna why the old lady had "called Jacob, what we wanted of him," quoting from her testimony. And Anna inquired, "What have they [Becker and defendant] got all day with one another?" At that instant a shot came from the bedroom, where defendant was holding a shotgun, the charge from it killing Becker instantly. In the room at the time were the two women, two children, and Becker. The room was 11 x 13 feet. The shot came through a doorway. The muzzle of the shotgun was within 20 feet from Becker when he was shot. The charge entered his head from nearly front and above the left temple. His head was partially turned to the left, so that the charge did not come directly from the front, but

entered from a point an inch or two above the outer corner of the right eye, blowing his brains out. Defendant removed the body to without the door, leaving it upon a sort of dirt porch at the entrance. Neighbors came, among them, relatives of Becker. They remained in the house until toward morning. One of them, Mrs. Morast, testifies to a narration of events made during that period by defendant's wife, and not in the presence of the defendant. The foregoing are the facts briefly stated.

The defendant testified. He admits holding the gun at the time its discharge killed Becker, but claims it was fired accidentally, and while he was holding it in anticipation that Becker would again attempt to do him bodily harm, in which event he would have shot him, as he was in terror of Becker. That he did not know the women had returned. That he had sent his wife for his son Jake for help. But the wife says that she saw help was needed and went on her own accord. Defendant says that while she was gone he took the crying baby out of the cradle, and held it in his arms and lit the lamp, holding the baby, thinking that Becker would not assault him while he had the child in his arms. Afterwards he put the baby down and managed to get hold of the shotgun. He attempted to get out through a window, but found the window was nailed in. His boy, Phillip, eight years old, was in the bedroom with him, crying. That he ordered Becker out of the house; that Becker did not go, but replied that "he wanted to make it good again," evidently desiring to make it up with the defendant, who replied saying, "No, this time you go to court." That soon the gun went off accidentally as defendant closed its breach. Defendant testifies to its having before this accidentally discharged that way, on account of the firing pin striking the cartridge and exploding it in closing the breach. The gun is in evidence and seems strongly to bear out defendant's contention that it can be accidentally discharged very easily. Defendant admits placing the cartridge in the gun and holding it with the breach open in readiness, believing that Becker would attack him again, when he intended to use the gun on Becker, although he had no intent whatever to shoot him at the time the gun was discharged. That some little time before the shooting Becker had said to him: "You old dunder-weather! If you don't want to fix up with me, I will give you your share."

The state's case was largely put in on rebuttal and in a way that was

clearly very prejudicial to the defense. The witness Krukenburg was not called until in rebuttal, and was allowed to narrate occurrences from the morning until the evening, nearly all, if not all, of which was more properly a part of the state's main case, and all of which was received over objection as improper rebuttal. This witness, besides corroborating the defendant as to his request to Krukenburg to "drive as fast as you can, he will shoot both of us dead," also states that defendant said when leaving Pfennig's: "It may come as ever it wants to, I will shoot Henry Becker down," a statement that does not at all fit in with the conduct, situation, and circumstances of a man in defendant's position, trying to get home and out of danger, and fleeing from an assaulter and at a time when he was unmistakably in terror of him. Much is made by the state of this statement, which together with the testimony of Mrs. George Morast, also introduced on the state's rebuttal, constitute the most damaging testimony against the defendant and that upon which the jury must have based conviction. She testified in rebuttal to having entered defendant's house about ten o'clock that evening and to having stayed there until half past three and that during said period she was sitting on a bed near the wife of the defendant. The following is her testimony: "Q. At that time there did she (Mrs. Christman) use the following words in speaking to you and Mrs. Buechler (sister of deceased Becker) 'My husband was sitting on a chair in the kitchen and he got up and went into the bedroom and I thought he was going to get his tobacco, but he got a cartridge from the clothespress and then he shot.' " A. "She said everything but I don't know if he was sitting or standing." Q. "At that time did she use substantially the following words in speaking to you and Mrs. Buechler 'My husband was sitting on a chair in the kitchen and he got up and went into the bedroom and I thought he was going to get his tobacco but he got a cartridge from the clothespress and then he shot,' or words to that effect?" A. "She said everything, only she did not say if he was sitting or if he was standing."

The state has very ingeniously briefed this case. It has used as much cleverness in its endeavor to sustain this verdict as it used in obtaining it, but in its brief are found many statements either without or contrary to the record. On the first page of the brief is found the following statement, wholly unwarranted and without any foundation in the record: "Defendant is known to his family as a man of violent and revengeful

nature, hasty temper and one who threatens to shoot on the slightest provocation." Again, on page 17 it reiterates: "Defendant always threatens to shoot on the slightest provocation and his family knew it." There is no evidence of this. Again is found in the brief: "While riding along with Albert Krukenburg the defendant told him 'it may come as ever it wants to, I will shoot Henry Becker down.'" Counsel is within the record in making this statement, but a few lines later he follows it with this: "No one knows what he told his wife, but in all probabilities he told her what was in his mind, namely, 'It may come as ever it wants to, I will shoot Henry Becker down.'" In fact the wife was not permitted to testify to what defendant told her when he came home. To support her testimony that she was frightened at Becker's arrival soon after her husband had gone to bed and as supporting her declared reason why she held the door shut against Becker's entrance, she was asked: "Had your husband told you before that that Becker and he had some trouble?" Mr. Berry: "Objected to as calling for the conclusion of the witness, not admissible in evidence and self serving." "Sustained." "Exception." Defendant, relative to this incident, had previously testified as follows: "When you got home, what did you do?" "I said to my wife that I got a beating from Henry Becker and it was worth my life that I was in Pfennig's house; otherwise, he would have killed me. I asked my wife to fix up my bed. I was freezing. And she done it and I told her I was awfully tired." "Did you go to bed right away?" "Yes." The exclusion of this testimony, offered by the wife as sustaining her husband's testimony, and explaining her own conduct in refusing Becker entrance, was prejudicial error. But the statement above quoted from the state's brief is contrary to what the record shows was told his wife, so far as that was permitted to be shown.

The brief of the state is again quoted from: "The theory of the state is that Mrs. Christman went to get help to save the life of the man who wanted 'to make it good again' and to keep her husband from doing what he had threatened to do, namely, shoot Henry Becker down. Mrs. Christman returned before Anna and had been at home ten or fifteen minutes before Anna arrived. During her absence the light had been lit and placed on the table in the kitchen. The whole family were sitting in the kitchen with Becker where the light was lit and everything

was peaceable, excepting the mind of the defendant. Then the defendant got up from his chair in the kitchen and went into the dark bedroom and from the sound his wife thought he was going to get his tobacco, but he must have got a cartridge from the shelf. The defendant being in the heat of passion loaded his shot gun and while they were peaceably talking, the deceased was shot by the defendant from the dark bedroom. One of the last things he said to Anna was 'I want to make up with the old man and he won't let me.'" This theory of the state is largely contrary to and unsupported by the evidence. Under the facts no such period of time elapsed after Mrs. C. returned before Anna's arrival. That she left for help in order to save Becker from her husband is flatly contrary to all the evidence or any reasonable deduction from it. The evidence tending to substantiate the statement that all was "quiet on the Potomac" consists almost entirely of the statement of Mrs. Morast, which was admissible for no other purpose than to impeach the testimony of Mrs. Christman. It is admitted by the state in the record that any statements Mrs. Christman made to that witness were not made in the presence of the defendant and are not, therefore, substantive proof of the actual conditions surrounding the shooting. The state cannot avail of such statements to sustain its theory, where it could not prove its case in the first instance by said statements. Except for impeachment purposes, they would have been excluded as purely hearsay.

And prejudicial error was committed in excluding Mrs. Christman's answer to the question asked her by defendant's counsel: "Why did you go away to get help?" That it would tend to disprove the theory of the state that she went to save Becker from her husband sufficiently demonstrates that she should have been permitted to give her reason for acting as she did. Her answer might have had an important bearing on the result. Especially so if the same argument was made by the state to the jury as is made in the state's brief on this appeal. This error alone would justify reversal. And it was error not to permit Mrs. Pfennig to state of what she was afraid under objection made and sustained.

The state would sustain conviction because defendant is impeached by Krukenburg as to who was driving before the runaway and some hours before the shooting. Though defendant was thus impeached it

furnishes no substantive proof of the situation of the parties at the time of the homicide or that the same was criminal.

On the whole the circumstances of this case strongly favor defendant. These two young men visited his home wholly unsolicited that Sunday forenoon. Becker succeeded in getting liquor, over defendant's protests, and evidently through the kindness of defendant's wife, who thought it better to give him some rather than run the risk of trouble with him. All left in good spirits and friendly. Hours afterward they round up at a neighbor's just after a runaway has scared the defendant, who recalled that a year or two before while Becker was driving a half a mile from that place a young man was killed in a runaway. Then defendant is unjustifiably assaulted in the presence of the neighbor's wife and within her house. Becker, not defendant, was the aggressor and was in an ugly frame of mind. He succeeded in greatly frightening defendant, even according to Krukenburg, who evidently is antagonistic to defendant. That the old man was still in fear is apparently shown by his insistence upon being taken home immediately, in his desire to keep away from Becker and avoid trouble and by Becker's being left behind. No matter what his mind was toward Becker apparently he was doing his best and all that he could do to avoid him; and he succeeded in doing so and reached his own home in safety, wherein he had a right to stay and to defend himself. Becker breaks into the house thereby evincing anything but an intent to be law-abiding or friendly toward defendant and his family and this too within a reasonably short time after defendant had been assaulted and maltreated by him in the neighbor's house. The state argues that because he expressed an intent to the neighbor to fix things up with the old man that he went down there only with intent to make his peace. But he had no business there, no matter what his motives were that afternoon. Nor does the fact that he was under the influence of liquor alter the situation in favor of the state. Rather the contrary, as a drunken man, ugly when drunk, may be dangerous and devoid of reason. The undisputed and accepted fact remains that almost immediately upon his arrival defendant's wife left for help, evidently to protect her family from Becker. Whether this was done on her own volition or at her husband's order is immaterial, except if by the latter, it tends to show that he at that time in good faith believed that help was necessary to protect himself and family from

imminent danger. And Becker was still there when the wife and assistance returned after she had run half a mile for aid; and at the very moment he is shot he is bullying the women by demanding why they went for help. Besides there is every reason to believe deceased had assaulted the old man before the wife left, just as she says he did. Otherwise, in all probability, she would not have gone or have been sent for help. And the testimony of the daughter-in-law is that on her return, in looking through a window, she saw these men, Becker and the defendant, scuffling and pushing one another around. Becker emerges into the kitchen just as she appears with help as he supposed. He was not in a very peaceable or a very pleasant frame of mind. He must have anticipated he would have to answer for his being there and for what he had done.

Another very important circumstance tending to sustain defendant's plea of self-defense is that there is wholly wanting any proof of incentive or motive on defendant's part for killing his neighbor. He had not enticed Becker to his home;—on the contrary he had fled there for refuge and to escape from him and in such a way as to prevent Becker from following him. No enmity is shown; on the contrary, that morning the two were friendly. At no instance had defendant been the aggressor. Always he had been the one imposed upon and abused. Conclusions ordinarily to be drawn would seem to establish the verdict to be contrary to the overwhelming weight of the evidence.

Some of the errors discussed are not saved by specifications and assignments of error. Decision does not turn on them nor upon any one ruling in particular. But from an examination of the entire record it appears that prejudicial error was committed in the order of proof on trial and on the exclusion of testimony having an important bearing upon the issues of fact involved; and that the guilt of defendant is not established to that degree necessary to authorize an appellate court to find it to have been found upon substantial, though conflicting evidence, and to its satisfaction: 12 Cyc. 731 C; Armstrong v. State, 17 L.R.A. 484, and note (30 Fla. 170, 11 So. 618); Hill v. State, 21 L.R.A. (N.S.) 878, and note (55 Tex. Crim. Rep. 407, 117 S. W. 134); 1 Hayne, New Tr. & App. § 97; Dickey v. Davis, 39 Cal. 565.

The judgment of conviction is set aside and a new trial granted.

W. N. JOHNSON v. E. D. KELLY.

(155 N. W. 683.)

Action in conversion against a sheriff for property sold on execution in a suit between third parties. The sheriff justifies under execution levy. *Held:*

Conversion — sheriff — action against — execution — evidence — jury — question of fact.

1. There was sufficient evidence to require the submission to the jury of the fact and character of plaintiff's alleged ownership.

Restaurant business — merchandise — fixtures — sales in bulk law.

2. The articles were utensils, fixtures, and equipment used in conducting a restaurant business. *Held*, it did not constitute any part of a stock of merchandise and fixtures within the meaning of chapter 247, Sess. Laws 1913 (Comp. Laws 1913, §§ 7224–7228), commonly known as the sales in bulk law.

Sales in bulk law — application — merchandise — fixtures.

3. The sales in bulk statutes apply only to stocks of merchandise and fixtures, or goods a part of a merchandise stock which are kept for sale as such.

Instructions — misleading — prejudicial — verdict.

4. The instructions were given under the theory that the bulk sales law applied, and could not have been other than misleading, confusing, and prejudicial. As it is impossible to determine whether the verdict was based upon the erroneous assumption that the bulk sales law applied, or whether the sale was fictitious or fraudulent in fact, the verdict and judgment thereon must be set aside.

Opinion filed November 22, 1915.

From a judgment of the County Court of increased jurisdiction of Ward County, *William Murray*, J., plaintiff appeals.

Reversed and remanded.

E. R. Sinkler, for appellant.

The so-called sales in bulk law only applies to merchants; a transfer

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Note.—Cases on the question of what kind or classes of property are within the operation of bulk sale statutes later in time than those included in the note in 2 L.R.A.(N.S.) 331, referred to in the opinion in this case, will be found in notes in 25 L.R.A.(N.S.) 758; and 45 L.R.A.(N.S.) 495.

As to what are fixtures within the meaning of bulk sale statutes, see note in 34 L.R.A.(N.S.) 218.

under such law must be of a stock of merchandise, or merchandise and fixtures pertaining to such business. Sess. Laws 1913, chap. 247.

W. H. Sibbald (*Francis J. Murphy,* of counsel), for respondent.

Defendant was entitled to justify his seizure of the goods upon the theory that the same was the property of the person against whom the process which he executed was directed. Such person was plaintiff's alleged vendor. The pleadings and the evidence furnish foundation for such defense. Dearing v. McKinnon Dash & Hardware Co. 165 N. Y. 78, 80 Am. St. Rep. 708, 58 N. E. 773.

Goss, J. Suit for conversion against the defendant as sheriff, to recover the value of property sold on execution levy at the suit of a third party. The sheriff refused to deliver possession of said property to plaintiff upon his verified demand therefor. Defendant justifies under the levy. The jury, by general verdict, found for the defendant, and plaintiff appeals.

The first question raised is whether there is sufficient conflict in the proof to warrant the submission to the jury of the question of the fact and character of his ownership. It is unnecessary to pass upon this further than to state, in view of a necessary retrial, that there is sufficient evidence in the record from which the jury might have found adversely to plaintiff upon these questions.

Error is specified and assigned upon instructions. These were given upon the theory that the sale was one covered by the law governing sales in bulk of stocks of merchandise, as declared by chapter 247 of the Session Laws of 1913 (Comp. Laws 1913, §§ 7224–7228), amending chapter 221 of Sess. Laws 1907, substantially the uniform bulk sales law. See note in 2 L.R.A.(N.S.) 331, naming the states having substantially the same statutes on sales in bulk. This drastic measure is leveled only at sales, transfers, or assignments in bulk "of any part or the whole of a stock of merchandise or merchandise and fixtures pertaining to the conducting of said business otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller." Comp. Laws 1913, § 7224. It destroys secret assignments, sales, or transfers of stocks of merchandise or stocks of merchandise and fixtures in fraud of creditors. Everett Produce Co. v. Smith Bros. 2 L.R.A.(N.S.) 331, and note (40 Wash. 566, 111 Am. St. Rep. 979,

82 Pac. 905, 5 Ann. Cas. 798). It certainly does not apply to the furniture, fixtures, and utensils used in the operation of this restaurant business, without proof that a merchandise business was conducted in connection with or incidental to said restaurant business. Washington has held the contrary under their law as to a sale of a restaurant stock in Plass v. Morgan, 36 Wash. 160, 78 Pac. 784, but practically recedes from this holding in Albrecht v. Cudihee, 37 Wash. 206, 79 Pac. 628 and Everett Produce Co. v. Smith Bros. supra. The decision in Plass v. Morgan is based upon the terms of their bulk sales statute voiding sales of "*any* stock of goods, wares, and merchandise." The word "any" was held to broaden the statute, making it apply to "any stock," which therefore covered restaurant stocks. Our statute does not so read, but by its plain terms applies only to stocks of merchandise or goods a part of "mercantile stock or supply which is kept for sale." Albrecht v. Cudihee, supra, and notes in 25 L.R.A.(N.S.) 758, and 45 L.R.A. (N.S.) 495, citing much authority unanimously supporting our conclusion. The specific goods levied upon and the subject of this action for conversion are a baking oven and base, a steam table, oak desk, showcase, 8 dining tables, 34 chairs, counter, stand, and kitchen table. It is not proved that these articles constitute any part of a stock of merchandise kept for sale, nor is there proof that these articles were used in a mercantile business as fixtures used to facilitate merchandising. There was no evidence upon which to base the instruction given.

Respondent urges in his brief that even though there is no foundation in the evidence for such an instruction, yet "it is quite clear from the record that the instruction was nonprejudicial," and "moreover the instructions covering this ground were so hedged about and qualified by the court as to its application that it would require a presumption of 'wilful ignorance' on the part of the jury to conclude that these considerations entered into the verdict." After giving substantially the terms of the statute to the jury, and thereby inferentially giving them to understand there was sufficient basis in the proof to warrant their considering whether this sale was one condemned by the statute, the instruction concludes as follows: "In this connection I charge you it is for the jury to say whether said Hazlett was a merchant, and whether the sale to the plaintiff in this action was of a part of a whole stock of merchandise or merchandise and fixtures pertaining to the conduct

of said business otherwise than in the ordinary course of trade in the regular process of the business, and, if so, then whether or not the law as above set forth was complied with. If it was not complied with, then you should find for the defendant for the dismissal of this action. Should the jury find that the said Hazlett was not a merchant, and that the property described and in issue in this lawsuit is not any part of the whole of a stock of merchandise or merchandise and fixtures, as above set forth, then I charge you the sale to the plaintiff would be a legal sale so far as the foregoing law is concerned." The property was no part of a merchandise stock or of the fixtures of a stock of merchandise and fixtures. And there was no proof of any attempt by plaintiff in his alleged purchase of the goods to comply with the sales in bulk law or to recognize the fixtures as a part of a stock of merchandise and fixtures, and no issue of fact on that question is presented by the proof. No instruction under the sales in bulk law should have been given. Hence the whole instruction was based upon the contrary erroneous assumption, and could not do otherwise than tend to mislead and confuse the jury. It is impossible to determine whether the verdict was returned upon the assumption that the provisions of the bulk sales law had not been complied with, or whether it was based upon the real issue presented of whether the sale was fictitious or fraudulent or bona fide. It must be held that the instruction was prejudicial. As heretofore stated, there is sufficient evidence in the record to have sustained a verdict based upon a fraudulent or fictitious transfer. The judgment must be reversed and the cause remanded for retrial.

W. E. FISK v. WM. FEHRS and Mrs. Wm. Fehrs.

(155 N. W. 676.)

Judgment — decree — compliance with — voluntary — payment — performance — appeal — no bar to — reversal — rights — waiver — conditions imposed — relief.

1. Even a voluntary compliance with the judgment or decree of a court by payment or performance is no bar to an appeal for its reversal, particularly when repayment or restitution may be enforced, or the effect of compliance may

be otherwise undone in case of a reversal, and the mere payment of costs by an unsuccessful litigant, even though voluntary, is not such an acquiescence in or recognition of a judgment, order, or decree as will constitute a waiver of the right to appeal unless perhaps in some instances when such payment is voluntarily made in compliance with a condition imposed by the court on granting relief asked by the appellant.

New trial — order refusing — evidence — newly discovered — cumulative — discretion — abuse of.

2. An order refusing a new trial on the ground of newly discovered evidence will not as a rule be deemed an abuse of discretion where the evidence alleged to have been newly discovered is merely cumulative.

New trial — newly discovered evidence — refusal — due diligence — showing made.

3. A refusal to grant a new trial on the ground of newly discovered evidence will not be deemed an abuse of discretion where due diligence in obtaining the same was not shown.

New trial — grounds for — newly discovered evidence — discretion of court — result — different — another trial.

4. The granting of a new trial on the ground of newly discovered evidence is a matter which rests largely within the discretion of the trial court, and in no case will such discretion be interfered with on appeal, and a refusal to grant such new trial be looked upon as an abuse of discretion, where the affidavits do not show such new evidence as will probably lead to a different result on another trial.

Opinion filed November 22, 1915.

Appeal from the District Court of Adams County, *Crawford*, J. Action in claim and delivery. Appeal from an order denying a motion for a new trial on the ground of newly discovered evidence and also from the original judgment. Judgment for defendants. Plaintiff appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an action in claim and delivery against the alleged vendee of personal property to recover the possession of the same under a claim of ownership in the plaintiff, and not in the vendor. The property was brought to Adams county, North Dakota, in the month of April,

1910, by Irl V. Fisk, the son of the plaintiff and appellant, W. E. Fisk.

The question at issue is whether the property belonged to the son, Irl V. Fisk, and was sold by him to the defendants and respondents, Wm. Fehrs and Mrs. Wm. Fehrs, or belonged to his father, the appellant, W. E. Fisk. A verdict in the case was rendered for the defendants and judgment for the costs of the action entered thereon on the 27th day of December, 1912. On the 20th day of January, 1913, this judgment was paid by the plaintiff and the satisfaction entered of record. On the 7th day of October, 1913, a motion for a new trial was made on the ground of newly discovered evidence; the affidavits in support of and in opposition to the same being as follows:

"W. E. Fisk, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action, that at the trial of said action before this court, this plaintiff contended that he was the owner of certain articles of personal property described in the files herein, and the defendants contended that they had become the owners of the same by purchase from one Irl V. Fisk, in whose possession this plaintiff had left the property; that said Irl V. Fisk was a material witness on the part of this plaintiff, and that before the commencement of this action and while the same was pending, this plaintiff made inquiries as to the whereabouts of this said Irl V. Fisk, by going personally to his last known place of residence, near Grand River, Perkins county, South Dakota, and there making inquiries of person residing near by; that affiant addressed letters to the said Irl V. Fisk, at Grand River, South Dakota, and Hettinger, North Dakota, but that the same were unanswered; that said Irl V. Fisk is the son of affiant, and that affiant was unable to learn of his whereabouts from the fall of 1910 until the 1st of August, 1913, when the said Irl V. Fisk was ill in a hospital at the city of Superior, in Douglas county, state of Wisconsin, and sent to affiant for aid. Affiant further states that he is informed and believes, and on such information states, that if a new trial of this cause be granted by the court, the said Irl V. Fisk will testify that this plaintiff never gave to him the property in question in this suit; that he, the said Irl V. Fisk, never sold or transferred or in any way disposed of the same, or any part thereof, to the defendants, but that, as appears from his affidavit herein, he was frightened by the representations and state-

ments of defendant, and left the state of South Dakota and county of Perkins, wherein he resided. Affiant further states that this affidavit is made for the purpose of securing a new trial of the above-entitled action. Further affiant saith not."

Affidavit of Mary Fisk: "Mary Fisk, being first duly sworn, deposes and says that she is the mother of Irl V. Fisk, and the wife of the above-named plaintiff; that from and after the month of December, 1910, she had no knowledge of the whereabouts of said Irl V. Fisk, until about the 1st of August, 1913, when she was informed that he was sick in a hospital in Superior, Wisconsin, where she later found him; that of her own knowledge she knows that the said W. E. Fisk, the plaintiff above named, made continual efforts to find said Irl V. Fisk, and requested affiant to write letters making inquiry as to his whereabouts; that affiant wrote letters to A. L. Fisk, Clinton, Iowa, and T. Fisk, La Porte, Indiana, and Superior, Wisconsin, making inquiry as to the whereabouts of said Irl V. Fisk, but that she was unable to learn where he had gone. Further affiant saith not."

Affidavit of Lewis W. Bicknell: "Lewis W. Bicknell, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action, and was present and conducted the trial thereof at the city of Hettinger, North Dakota, before this court, at an adjourned term thereof, on or about the 18th day of November, 1912; that said trial resulted in a verdict in favor of the defendant on all the issues; that the above-entitled action involved the question of the ownership of certain articles of personal property, and, as will more fully appear from the files of said action, of record in this court, the question before the court was whether, as a matter of fact, said articles of personal property were sold to the defendants by one Irl V. Fisk, and whether the said property was given to said Irl V. Fisk by the plaintiff herein; that Irl V. Fisk was a material witness on the part of the plaintiff, and that at the time of commencing this action, and before the trial thereof, the plaintiff made efforts to locate said Irl V. Fisk, but that the whereabouts of said Irl V. Fisk were to plaintiff unknown. Affiant further states that he himself made inquiries as to the whereabouts of said Irl V. Fisk, by going personally to his last-known address, and there making inquiry of one Henry Stolzenburg, of Grand River, Perkins county, South Dakota, and of Adolf Frahm, of the same place,

and of Mrs. Fehrs, one of the defendants in the above-entitled action, and of George W. Becker at Hettinger, North Dakota, and at the post-office or store at Grand River, South Dakota, but affiant could not learn where the said Irl V. Fisk then was. Affiant further states that he is informed and believes, and on such information and belief states the fact to be, that the said Irl V. Fisk will testify that the plaintiff herein never gave the articles of personal property described in the files of this case to him, the said Irl V. Fisk, and that he, the said Irl V. Fisk, never sold the same, or any part thereof, to the defendants or either of them; that the testimony is material to this cause, and, as shown herein, and by the accompanying affidavits of Irl V. Fisk, Mary R. Fisk, and W. E. Fisk, could not have been produced at the former trial of this cause; that this evidence is newly discovered by plaintiff, the circumstances of which more fully appear in the accompanying affidavits. That this affidavit is made by affiant for the purpose of moving for a new trial in the above-entitled action. Further deponent saith not."

Affidavit of Irl V. Fisk: "Irl Fisk, being first duly sworn, says that he is the son of the plaintiff above named, and that in the summer of 1910 he lived in Perkins county, South Dakota, about 12 miles from the town of Hettinger, North Dakota; that he was living on a homestead, and that he had on said homestead one pair of iron gray mules, one pair of geldings, two milch cows and two calves, a wagon, a drill, harrows, plows, and other machinery and harnesses. That all of said property belonged to the plaintiff, the father of this affiant. That about the month of August, 1910, the above-named defendant stated to this affiant that there was a thousand dollars reward offered for his capture and that he had better immediately leave the country. Affiant further says that he was greatly frightened and did immediately leave the state; that neither his father nor his mother knew where he was until less than three weeks ago; that among other places he has been in Michigan, and sailing on the Great Lakes, and is now confined in St. Mary's Hospital in the city of Superior, Wisconsin; at which hospital he has been for the past two months. Affiant further says that he did not sell any of said property to said defendant William Fhers [Fehrs], and that said William Fhers [Fehrs] did not pay him anything for said property, and that he gave him no right, title, or interest in said property in any manner whatsoever. Affiant further says that he makes this affidavit

of his own accord and at the request of his mother for the purpose of aiding his father in securing a new trial in the above-entitled action. Affiant further says that his mother has been in the city of Superior in attendance on him for the past ten days."

The affidavits in opposition were as follows: Affidavit of Paul W. Boehm: "Paul W. Boehm, being first duly sworn, deposes and says that he is one of the attorneys for the defendants in the above-entitled action, and was present and assisted at the trial thereof before the court and a jury at the November, 1912, term of the district court held at Hettinger, Adams county, North Dakota. That at said trial the parties appeared in person and by their attorneys, and submitted the testimony of numerous witnesses. That among other testimony introduced by the plaintiff was that of the plaintiff, his wife Mary Fisk, Peter Paulson, and Henry Stolzenberg. That each of said witnesses testified that Irl Fisk made no claim to the property involved in the action, and that he stated it belonged to his father the plaintiff. That, consequently, the evidence of Irl Fisk to such a fact would be only corroborative of that already adduced. Further deposing, affiant says that the evidence of the defendants, witnesses proved that the plaintiff at different times stated he had given said property to his son to start him in farming, and that said Irl Fisk held, handled, sold, and traded the same as his own, without any objection being made thereto until more than two years after his son had disposed of the same; this in spite of the fact that the plaintiff well knew of his son's leaving his homestead in the summer of 1910 and never returning to the same. Affiant says, further, that at the said trial of this action, evidence, corroborated by many witnesses, was introduced showing exactly what consideration Irl Fisk had received for each article of personal property traded and sold to this defendant and to others; when, where, how, to whom, and for what consideration said Irl Fisk had disposed of all of the chattels involved herein; that these facts were proved by such a preponderance of evidence that no testimony on the part of Irl Fisk would be likely to lead to a different verdict or result. That the newly discovered evidence mentioned in the affidavits of the plaintiff, his wife, and son, filed in support of this motion, is nothing more than cumulative; and coming from the son of the plaintiff and from an interested party, that it would necessarily be of little weight. Further deposing affiant says that upon

the verdict of the jury impaneled to try this case as aforesaid, judgment was duly entered therein in favor of the defendants and against the plaintiff. That thereon costs were duly taxed in the case, and that on the 20th day of January, 1913, said judgment for costs was duly paid and satisfied. Affiant says further that the trial of said action was held before the Honorable W. C. Crawford, district judge for the tenth judicial district, and that the Honorable Samuel L. Nuchols, before whom this motion is made, took no part in the said trial of this case. That the evidence introduced at said trial was conflicting, and that the verdict rendered by the jury was fully justified thereby."

Affidavit of Wm. Fehrs: "Wm. Fehrs, being first duly sworn, deposes and says that he is the defendant in the above-entitled action, and now and for the past six years and more has resided in Adams county, North Dakota, with his postoffice address at Hettinger. That he is well acquainted with W. E. Fisk and with Mary E. Fisk, his wife, who are residents of Day county, South Dakota, and that he has known them for more than ten years last past. Further deposing, affiant says that he was living on his homestead near Hettinger, North Dakota, at the time Irl V. Fisk first came there to start farming operations. That he met said Irl Fisk at that time and assisted him in getting settled. That at said time, to wit, in the spring of 1910, said Irl Fisk told this affiant and many others that his father gave him the personal property involved herein, for the purpose of starting him in farming on his homestead. That said Irl Fisk had uninterrupted possession of said personalty from the time he came out here up to the time he sold or traded it or took it with him on his way to Canada in August, 1910, and that the plaintiff, W. E. Fisk, made no claim or demand for the same until the starting of this action over two years later; and this in spite of the fact that he well knew of said Irl Fisk's departure from the vicinity of Hettinger and his absence up to the fall of 1912. That after said Irl Fisk's wife had secured a divorce from him in the spring of 1912, and more than two years after Irl Fisk's desertion of his wife and departure from Adams county, North Dakota, this action was commenced. Further deposing, affiant says that in the spring of 1910, he had several conversations with said W. E. Fisk, the plaintiff, in the home of this affiant and on the homestead of said Irl Fisk, and that said W. E. Fisk therein told this affiant that he had given his son Irl

the personalty involved herein to start him out in life and set him up on his new homestead. Further that he never at any time told said Irl Fisk there was a reward out for his arrest as alleged in the affidavit of said Irl Fisk, but that it was well known in the vicinity of affiant's residence that he had been accused of shooting a certain mare belonging to Henry Stolzenberg, of Grand River, South Dakota; that he had admitted having done so, to one Cleve Stolzenberg, and had made promises to settle the matter; that a warrant for his arrest was subsequently sworn out and attempts made to catch him in South Dakota. Further that said Henry Stolzenberg, then a deputy sheriff of Perkins county, South Dakota, for a long time after said Irl Fisk's flight from the vicinity of Hettinger, endeavored to locate him for the purpose of making the arrest, and twice arrested parties who were suspected of being said Irl Fisk. That, however, said Irl Fisk never returned to Perkins county thereafter, nor to his wife and child, and the plaintiff herein did not make any claim to any of the personalty involved herein until two years after, although he well knew of his absence from the county and state."

Affidavit of Clara Brown: "Clara Brown, being first duly sworn, deposes and says that she is a resident of Perkins county, South Dakota, with her postoffice at White Butte, South Dakota. That prior to October, 1912, she resided in Adams county, North Dakota, for a period of about five years, with her address at Hettinger. That on the 28th day of July, 1910, she was married to Irl Fisk, whose affidavit is annexed to the notice of motion for new trial in the case of W. E. Fisk v. Wm. Fehrs and Mrs. Wm. Fehrs, and that she has read the said affidavit. Further deposing, affiant says that at the time she married said Irl Fisk, he had in his possession the personal property mentioned in his said affidavit excepting the pair of geldings, one milch cow, and two calves, which he had previously traded away. That at the time of said marriage and at all times this affiant lived with said Irl Fisk he had possession of the personal property mentioned in said affidavit except such as he had traded off as aforesaid, and that he always claimed the same as his own, and that it had been given to him by his father to start him, the said Irl Fisk, in farming. That on August 3, 1910, this affiant accompanied her husband, said Irl Fisk, on an overland trip to Bonetrail, North Dakota, and Marmon, North Dakota, where they stayed

during the threshing season. That when said Irl Fisk left Adams county on said trip he took with him one team of mules and one team of geldings and a pair of ponies. That, however, with the exception of the mules, these were not the ones he possessed at the time of affiant's marriage with said Irl Fisk, he having previously made several trades. That on said overland trip said Irl Fisk traded a pair of geldings he had with him for a brown mare, and at Marmon, North Dakota, he sold the team of ponies to one Dan Helms, of Marmon, North Dakota. Further deposing, affiant says that, after her marriage to said Irl Fisk and up to their arrival at Marmon, she was in constant communication with Mary E. Fisk, the mother of said Irl Fisk, who well knew of his movements,—of his removal from Hettinger to the Canadian line, and of his subsequent desertion of this affiant. That said Irl Fisk left this affiant in November, 1910, and never thereafter returned to her, utterly failing to support her, although he left her with but little money. Further deposing, affiant says that in the spring of 1912 this affiant obtained a decree of divorce from said Irl Fisk on the grounds of desertion and nonsupport. That after leaving this vicinity in the fall of 1910, said Irl Fisk never returned, and that said Mary E. Fisk and her husband well knew of his departure, and up to the time of said divorce never concerned themselves about the personal property above mentioned, although this affiant was in frequent communication with them. Further deposing, affiant says that the said affidavit of said Irl V. Fisk is in many respects misleading and absolutely false in many others. Further deposing, affiant says that her former husband, in affiant's presence and hearing, told Dan Helms, of Marmon, North Dakota, that he had shot a certain horse, neighbor's horse, in South Dakota, and that that was why he had left the country."

The motion for a new trial was denied and from the order denying the same and from the original judgment for costs this appeal is taken.

Lewis W. Bicknell and *O. H. Aygarm,* for appellant.

The applicant for a new trial on the ground of newly discovered evidence must show due diligence in his attempt to prepare for the former trial; such evidence must not be merely cumulative, and it must be material, and of such weight as to lead to the belief that a different

result would be reached on a new trial. 29 Cyc. 881 et seq., 906; Perry v. Cedar Falls, 87 Iowa, 315, 54 N. W. 225.

For the purposes of the motion the newly discovered evidence must be regarded as true. Goldsworthy v. Linden, 75 Wis. 24, 43 N. W. 656.

It is immaterial that the new facts go to prove some point in issue at the former trial. Such is not the test of the question as to the propriety of granting a new trial. Waller v. Graves, 20 Conn. 305; Guyot v. Butts, 4 Wend. 579; Parker v. Hardy, 24 Pick. 246; Smith v. Meeker, 153 Iowa, 655, 133 N. W. 1058.

Even though the evidence appears to be cumulative, still if it is of such apparent strength that it would be likely to produce a different result, the new trial ought to be granted. Wilson v. Seaman, 15 S. D. 103, 87 N. W. 577; St. Paul Harvester Co. v. Faulhaber, 77 Neb. 477, 109 N. W. 762; Parsons v. Lewiston, B. & B. Street R. Co. 96 Me. 503, 52 Atl. 1006, 12 Am. Neg. Rep. 38; Cleslie v. Frerichs, 95 Iowa, 83, 63 N. W. 581; 49 Cyc. 916, and cases cited under note 98.

Boehm & Jackson, for respondents.

It is the rule that a new trial will not be granted on cumulative or impeaching evidence, unless it is so strong that it would lead to a different result. The trial court must be satisfied on this point, and its ruling, ordinarily, will not be disturbed. Libby v. Barry, 15 N. D. 286, 107 N. W. 972; Smith v. Mutual Cash Guaranty F. Ins. Co. 21 S. D. 433, 113 N. W. 94.

The offered newly-discovered evidence must tend to prove or disprove some material issue in the case. If it relates to mere collateral matters, it is not sufficient. State v. Brandner, 21 N. D. 310, 130 N. W. 941; Ernster v. Christianson, 24 S. D. 103, 123 N. W. 711; Breeden v. Martens, 21 S. D. 357, 112 N. W. 960; Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; Lunschen v. Ullom, 25 S. D. 454, 127 N. W. 463; Oberlander v. Fixen, 129 Cal. 690, 62 Pac. 254.

The court is without jurisdiction to consider this appeal. The notice of appeal and undertaking must be served within year from the notice of entry of judgment. This was not done. Wilson v. Kryger, 26 N. D. 77, 51 L.R.A.(N.S.) 760, 143 N. W. 764.

After a judgment has been entered and satisfied by the defeated party, he cannot bring up to the appellate court for review an extinguished

judgment. Re Black, 32 Mont. 51, 79 Pac. 554; Borgalthous v. Farmers' & M. Ins. Co. 36 Iowa, 250; Smith v. Patton, 128 Ala. 611, 30 So. 582; Plano Mfg. Co. v. Rasey, 69 Wis. 246, 34 N. W. 85.

BRUCE, J. (after stating the facts as above). The first answer that is made by respondent to appellant's motion for a new trial on the ground of newly discovered evidence, and claim of an abuse of discretion on the part of the trial judge in refusing the same, is that appellant is estopped by reason of the fact that he paid the judgment for costs and had the same satisfied of record. There is no doubt authority for counsel's contention, and it is not without merit. The better and more generally accepted rule, however, and the one which we prefer to adopt, is "that even a voluntary compliance with the judgment or decree of the court by payment or performance is no bar to an appeal or writ of error for its reversal, particularly where repayment or restitution may be enforced, or the effect of compliance may be otherwise undone in case of a reversal," and that "the mere payment of costs by an unsuccessful litigant, even though voluntary, is not such an acquiescence in or recognition of a judgment, order, or decree as will constitute a waiver of the right to appeal . . . unless [perhaps in some instances where such] . . . payment is voluntarily made in compliance with a condition imposed by the court on granting relief asked by the appellant." See 3 C. J. 675, 679, and cases cited.

We are not prepared, however, to hold that the learned trial judge abused his discretion in the case at bar. The evidence was largely cumulative, and the introducing the new element or claim that the vendor was persuaded by the purchaser to leave the country went merely to prove or disprove the main question of ownership. So, too, and even if this element were new, no great advantage could come to the plaintiff and appellant by an attempted proof thereof, as the affidavits which are filed by the respondent, as well as a letter which was written by the alleged vendor himself, clearly prove that he was a fugitive from justice and had good reason for his departure. The affidavit of the son (the vendor) on which the motion for a new trial was based, also, it is true, denies the sale, but this is merely subsidiary to the question of title, and if the appellant did not own the goods it is immaterial how the possession by the defendants was acquired. The main objection to the

motion, however, is that there is no satisfactory showing of diligence or of good faith. The son, the vendor, sold to or left the property with the respondents in the summer of 1910, and no inquiry seems to have been made by the appellant in relation thereto until the spring of 1912, nor was the suit brought until July, 1912. During all of this time the plaintiff and appellant knew that his son was a wanderer and had left the state of South Dakota. Before the starting of the lawsuit, his wife received a letter from her son from some point in Michigan. She swers that she received no letter from Grand River, South Dakota, since 1910, and yet the only inquiries that appear to have been made were in South Dakota, and "by addressing letters to the said Irl V. Fisk at Grand River, South Dakota, and Hettinger, North Dakota, but that the same were returned." On the trial, too, whenever questions were asked by defendants' counsel as to the whereabouts of the son, strenuous objection was made thereto by the appellant, and the objections were sustained by the court.

The general rule appears to be that the granting of a new trial on the ground of newly discovered evidence is a matter which rests largely within the discretion of the trial court, and that in no case will such discretion be interfered with on appeal and a refusal to grant such new trial be looked upon as an abuse of discretion when the affidavits do not show "such new facts as will probably lead to a different result on another trial." Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; Hayne, New Tr. & App. § 91; McGregor v. Great Northern R. Co. 31 N. D. 471, 154 N. W. 261; Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419; State v. Cray, 31 N. D. 67, 153 N. W. 425. Here no such probability appears. The son's (Irl V. Fisk's) affidavit as to the ownership of the mules is directly contradicted by his letter to his wife soon after he left, and dated December 17, 1910, and in which he says: "I offered the mules to Frank Bulls for $250, and he had to ship the big box and the other stuff, and when you folks want to sell them and the wagon, harness, and tent tarpaulin for that money on a year's time write Axel Larsen, Clinton, N. D." It is also inconceivable that if the plaintiff was the owner of the property he would have made no claim for it, nor, as far as the record shows, paid any attention to it, or attempted to put anyone in charge of it, until the spring of 1912, when he himself admits that as early as the winter of 1910 he knew that his son had left

the country, and that he had from that time some information, at least, as to where the property was, "partly from letters written by his son to his wife" and "partly from other sources."

This is not a case where the person seeking the new trial was dragged into court by his opponent without due opportunity for the preparation of his defense, but where he himself started the action, after having had nearly two years in which to obtain his information and to find his witnesses.

The judgment and order appealed from are affirmed.

FISK, Ch. J., being disqualified, did not participate, and W. L. NUESSLE, District Judge, sat in his stead.

FRISBY E. DIEHL v. EDWARD P. TOTTEN.

(155 N. W. 74.)

Defendant, while a candidate for office published the communication set forth in the opinion. Upon contest it is claimed that such publication disqualifies him from holding such office under the corrupt practice act.

Corrupt practice act — county judges — within its provisions — constitutional questions — lower court — must there be properly raised — appellate court.

1. Conceding that members of the United States Senate and Congress from this state and state officers subject to impeachment may not be removed from office under the corrupt practice act, yet a good and valid piece of legislation remains. The office of county judge comes within the provisions of said act. Moreover in the case at bar constitutional questions were not sufficiently raised in the lower court.

Action — legal capacity to maintain.

2. Under the facts in this case plaintiff has shown a legal capacity to maintain the action.

Note.—On the analogous question of validity of agreement to accept less than the legal amount of compensation for a public office, see note in 36 L.R.A.(N.S.) 244; and as to agreement to divide fees or salary of public officer, see notes in 12 L.R.A. (N.S.) 612, and 43 L.R.A.(N.S.) 422.

On the general question of agreements tending to influence elections, see note in 51 L.R.A.(N.S.) 549.

County judge — election — candidate for — publication to electors — salary — offer to refund in part — corrupt practice act — violation of.

3. The publication in question, which contains the following language: "I pledge the people of Bowman county that if elected to that position I will turn back into the treasury of the county all salary above the amount of $1,500 a year,"—is *held* to be a violation of the corrupt practice act and disqualifies defendant from holding such office.

Opinion filed October 11, 1915. Rehearing filed November 24, 1915.

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

Purcell, Divet, & Perkins, for appellant.

The statute in question, the corrupt practice act, is unconstitutional. It is general in its terms and assumes to apply to all candidates for public office. Its consequences are also general,—applying to all who seek the public favor in an election. Const. §§ 47–173, 196, 197; U. S. Const. § 5, art. 1.

A separation of a statute to sustain a part can only be resorted to when it affirmatively appears that the legislature would have enacted the part sought to be sustained, independent of the other part, if the vice had been called to its attention. McDermont v. Dinnie, 6 N. D. 278, 69 N. W. 294; Angell v. Cass County, 11 N. D. 265, 91 N. W. 72; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962.

"These are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable even though the other parts should fail." O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458; Chicago, M. & St. P. R. Co. v. Westby, 47 L.R.A.(N.S.) 106, 102 C. C. A. 65, 178 Fed. 619; State ex rel. Selliger v. O'Connor, 5 N. D. 629, 67 N. W. 824.

"If the different portions of the statute are so interwoven and interdependent that the rejected portion furnishes to an appreciable extent the consideration or inducement for the passage of the act, then the entire enactment must be rejected." McDermont v. Dinnie, 6 N. D. 283, 69 N. W. 294; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Spraigue v. Thompson, 118 U. S. 90,

30 L. ed. 115, 6 Sup. Ct. Rep. 988; Chicago, M. & St. P. R. Co. v. Westby, 47 L.R.A.(N.S.) 97, 102 C. C. A. 65, 178 Fed. 619; State ex rel. Selliger v. O'Connor, 5 N. D. 629, 67 N. W. 824; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Cella Commission Co. v. Bohlinger, 8 L.R.A.(N.S.) 542, 78 C. C. A. 467, 147 Fed. 419, and cases cited; Butts v. Merchants' & M. Transp. Co. 230 U. S. 126, 57 L. ed. 1422, 33 Sup. Ct. Rep. 964; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678.

The statute is wholly penal, and that it is punishment that is intended as the end to be attained. If this is true, the officer charged is entitled to have the question of his guilt determined by a jury. The statute cannot go to the right of an elected party to occupy the office to which he has been elected. 15 Cyc. 393–398.

The criminal court can pronounce a judgment of disfranchisement. Baum v. State, 157 Ind. 282, 55 L.R.A. 250, 61 N. E. 672; State ex rel. Crow v. Bland, 41 L.R.A. 297, 46 S. W. 440; People ex rel. Akin v. Kipley, 171 Ill. 44, 41 L.R.A. 785, 49 N. E. 229.

The plaintiff has no standing because of the fact that he received the second highest number of votes at the election. He was the incumbent in office preceding the election in question, and was a candidate for reelection to the same office. By the so-called failure of the election or qualification of the defendant, the repudiated candidate comes into no right. Therefore, he has not capacity to maintain this action. State ex rel. Clawson v. Bell, 13 L.R.A.(N.S.) 1013, and cases cited in the note, 169 Ind. 61, 124 Am. St. Rep. 203, 82 N. E. 69.

It is only where an officer is elected and qualified and where no vacancy exists, that there can be a holdover. Taylor v. Sullivan, 45 Minn. 309, 11 L.R.A. 272, 22 Am. St. Rep. 729, 47 N. W. 802; State ex rel. Atty. Gen. v. Seay, 64 Mo. 89, 27 Am. Rep. 206; State ex rel. Elliott v. Bemenderfer, 96 Ind. 374.

It must be shown that sufficient votes were obtained by the improper means charged to change the result of the election. Especially is this true where the officer is at most only guilty of a mistake. People ex rel. Bush v. Thornton, 25 Hun, 456; State ex rel. Dithmar v. Bunnell, 131 Wis. 198, 110 N. W. 177, 11 Ann. Cas. 560; State ex rel. Leonard v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

Emil Scow, for respondent.

The office of county judge is an elective office. Such officer is elected for a term of two years, and until his successor has been elected and has qualified. If no successor is "elected and qualified," he becomes a holdover. State ex rel. Bickford v. Fabrick, 16 N. D. 94, 112 N. W. 74; Jenness v. Clark, 21 N. D. 150, 129 N. W. 357, Ann. Cas. 1913B, 675.

The offer made by the contestee to return back to the treasury of the county a certain portion of his legal and fixed salary, if the voters would elect him, was a violation of the corrupt practice act of this state, and disqualified him from holding such office of county judge. Such act should be liberally construed. Nelson v. Gass, 27 N. D. 357, 146 N. W. 537, Ann. Cas. 1915C, 796; Adams v. Lansdon, 18 Idaho, 483, 110 Pac. 280; Whaley v. Thomason, 41 Tex. Civ. App. 405, 93 S. W. 212; Healy v. State, 115 Md. 377, 80 Atl. 1074; State v. Milby, 26 Wash. 661, 67 Pac. 362; State ex rel. Newell v. Purdy, 36 Wis. 213, 17 Am. Rep. 485; State ex rel. Dithmar v. Bunnell, 131 Wis. 198, 110 N. W. 177; State ex rel. Clements v. Humphries, 74 Tex. 466, 5 L.R.A. 217, 12 S. W. 99; Leonard v. Com. 112 Pa. 607, 4 Atl. 220.

An election secured by a candidate for public office by means of offers to voters to perform the duties of the office for less than the legal fees is void. State ex rel. Atty. Gen. v. Collier, 72 Mo. 13, 37 Am. Rep. 417; State ex rel. Bill v. Elting, 29 Kan. 397.

The figures as to the valuation and population of the county were easily ascertainable by the appellant at the time he made his offer to the voters, and he cannot now be heard to say that he did not know them. He could have known them, and he ought to have known them, and he will be presumed to have known them. Vinal v. Core, 18 W. Va. 38; Ohio Valley Coffin Co. v. Goble, 28 Ind. App. 362, 62 N. E. 1025; State v. Ransberger, 106 Mo. 135, 17 S. W. 290; State v. White, 37 L.R.A.(N.S.) 1177, and note, 237 Mo. 208, 140 S. W. 896; Jarrell v. Young, Smyth, Field Co. 23 L.R.A.(N.S.) 376, and note, 105 Md. 280, 23 L.R.A.(N.S.) 367, 66 Atl. 50, 12 Ann. Cas. 1.

Appellant told the taxpayers of the county "that his offer, if elected, would reduce to some extent the tax burden." If it would have such effect, it certainly was something of value that he promised. Watson v. State, 39 Ohio St. 123, 4 Am. Crim. Rep. 71; Carrothers v. Russell, 53 Iowa, 346, 36 Am. Rep. 222, 5 N. W. 499.

"All elections by the people shall be by secret ballot, subject to such regulations as shall be provided by law." Const. § 129; Fitzmaurice v. Willis, 20 N. D. 372, 127 N. W. 95.

Appellant was just as ineligible to the office at once and upon the making and publishing his offers to the voters and taxpayers, as though he had been an alien, under age, or disqualified in any other manner. Jenness v. Clark, 21 N. D. 150, 129 N. W. 357, Ann. Cas. 1913B, 675; State ex rel. Bickford v. Fabrick, 16 N. D. 94, 112 N. W. 74.

Such a promise as appellant made to the electors is clearly within the condemnation of the statute and adjudicated cases. State ex rel. Dithmar v. Bunnell, 131 Wis. 198, 110 N. W. 177.

BURKE, J. Diehl was the duly elected, qualified and acting judge of the county court in and for Bowman county, North Dakota, for the years 1913–14. At the general election to choose his successor, held in November, 1914, he was a candidate for re-election and was opposed by Totten. Shortly prior to said election Totten caused to be published in a newspaper of general circulation in said county an article in the following words:

Political Advertisement.
EDWARD P. TOTTEN
For
COUNTY JUDGE
READ HIS PLATFORM AND PLEDGE
(Photograph of Edward P. Totten)
TO THE VOTERS AND TAXPAYERS OF
BOWMAN CO.

In the situation existing in our county to-day, the first duty is to cut down expenses and save the people's money. All unnecessary expenditures should be stopped and rigid economy should be the watchword all along the line. The present heavy load upon the tax-burdened people of this county should be lightened and the public welfare made the first consideration.

The foregoing is a leading plank in the platform upon which I am

seeking election to the office of county judge, and, as evidence of the sincerity of my stand thereon, I pledge the people of Bowman county that, if elected to that position, I will turn back into the treasury of the county all salary above the amount of $1,500 a year. When my opponent went into office two years ago the salary of county judge took a sudden and unexplained leap of several hundred dollars, rising to $1,800 a year, and, while he has been receiving an average of $1,700 during his term, he has left nothing undone to increase that amount and add still further to the burdens of taxation under which the people are laboring. The sum of $1,500 is fair and ample compensation for the work of the office of county judge, brings the salary down to the same basis as that of the auditor and the treasurer, and under all the circumstances is sufficient for any man who does not regard the taxpaying public as a "cow to be milked." It will reduce to some extent the tax burden and should give an effective start to a much-needed movement toward strict economy in all county affairs. The records of this county will prove that, during my service as state's attorney some years ago, more money was turned into the treasury through my activities than the entire cost of maintaining the state's attorney's office, including salary and all expenses, and the taxpayers thereby relieved. Performance while in office ought to be an earnest of the above platform and promise, and I most heartily invite your support and vote for the office of county judge on that record and upon that pledge.

Cordially and sincerely yours,
Edward P. Totten.

At about the same time he wrote personal letters to nearly, if not quite, all of the voters of said county in the following words:

Office of
Edward P. Totten
Lawyer
Bowman, North Dakota.

Dear Sir:—

As a candidate for the office of county judge, I most cordially request the support of your vote and influence at the election. During my

term of service as state's attorney a few years ago more money was turned into the county treasury through my activities than the entire cost of maintaining the state's attorney's office, including salary and all expenses, thus relieving the people of some of the tax burden. This record for economy and efficiency ought, I feel, to entitle my candidacy now to your most earnest consideration, as I am sure you are interested in securing the best available service at the least expense to the people. You will certainly agree with me that we need greater economy in the handling of county affairs, and, as an evidence of the sincerity of my stand upon that issue, I pledge you that, if you will elect me to the office of county judge, I will turn back into the treasury all of the salary above $1,500 a year, which will result in a saving of several hundred dollars to the taxpayers. Under the stress of the hard conditions now existing among our people, due to repeated crop failures, I feel that your servants, the county officers, should do all in their power to keep down the burdens of taxation, even to the extent of making personal sacrifices in the interests of the people. Will you, by your vote, back me on that proposition? During most of the term of the present incumbent of the office, who is my opponent, the salary has been $1,800, and he has been very active in trying to keep up the assessment so as to increase the salary to the highest possible figure. In the midst of the hard times prevailing in this country, I leave it to you whether such action on the part of Mr. Diehl shows that deep interest in the welfare of the people which you rightfully expect of a public officer.

The position of judge calls for the very highest degree of fairness and impartiality in the disposition of the matters coming before the court, and I submit that, among the entanglements and common interests of a law partnership such as that in which Mr. Diehl has been recently engaged, is certainly not the place to look for those extremely necessary qualifications. It would be most unreasonable to expect that the intimate relations existing between Mr. Diehl and his law partner should not produce feelings and prejudice which would make it impossible for him, as county judge, to act with fairness and impartiality where his partner's interests were involved. Particular instances could be given, but it is perhaps sufficient to say that in several cases marked partiality toward that partner has been very noticeable, and has had the effect of weakening materially respect for the decisions of the court.

The letter sent out by that partner in the last campaign, and his present activities along similar lines, in his strenuous efforts to place Diehl on the bench of the county court, where he could be of service to him, furnishes conclusive proof, if any were needed, of the truth of these statements. There ought to be no "partnership business" in the county court, and if you see fit to elect me to that place, you may rest assured that the present favoritism will end, and that all parties will receive the fair and impartial treatment to which they are entitled.

My name appears in the Democratic column, the second column on the ballot, and upon my record of economy in office in former years and my pledge to work for the saving of the people's money in county affairs, I most earnestly solicit your vote and influence at the coming election. As I have been unable to call on you and talk over these and other matters relating to the interests of our county, I am writing you this personal letter, and sincerely hope you will see your way clear to give me your support, which will be heartily appreciated.

Assuring you of my best wishes for your success, I am

Cordially and sincerely yours,

E. P. Totten.

Totten received a majority of the votes cast, whereupon on November 16, 1914, he was served with notice of contest by Diehl upon the grounds that the publication of the first article and the mailing of the second constituted a violation of the corrupt practice act, being article 9 of chapter 11 of the Political Code, Comp. Laws 1913, and particularly §§ 935 and 942 thereof. The said contest was tried in the court below and resulted in findings of fact against the contestee, and judgment was entered accordingly. Contestee appeals, raising, as he says, three practical propositions:

(1) That §§ 923–944, inclusive, Comp. Laws 1913, are unconstitutional. The corrupt practice act attempts to govern the election of all officers, even including United States Senators and members of Congress from this state. It is pointed out that the election of United States Senators and Members of Congress is a matter within the jurisdiction of the United States government; that the election of the members of the local legislature is a matter entirely governed by the legislature itself, and that § 196, Constitution of North Dakota, pro-

vides that the "governor and other state and judicial officers, except county judges, justices of the peace and police magistrates, shall be liable to impeachment. . . ." That § 197 reads: "All officers not liable to impeachment shall be subject to removal for misconduct, malfeasance, crime or misdemeanor in office, or for habitual drunkenness or gross incompetency in such manner as may be provided by law." It is conceded by plaintiff, for the purpose of argument, that in so far as the corrupt practice act provides for the removal of United States Senators, Congressmen, and state officials subject to impeachment from office, it may be unconstitutional, but it is insisted that the remaining provisions of the act relating to county offices, justice of the peace, and other offices not subject to impeachment, is valid.

It is unnecessary for us to express any opinion as to the constitutionality of the sections attacked, for the reason that the same was not raised in the lower court. But it does seem that the provisions of the corrupt practice act would apply to the office of county judge regardless of whether it affected other officials. Even if it be conceded that the United States Senators, members of the legislature, and officers subject to impeachment cannot be so removed, we would still have a valid enactment. The rule to be observed in such cases is first stated in McDermont v. Dinnie, 6 N. D. 278, 69 N. W. 294, where it is said: "In many cases, statutes have been thus destroyed in part and upheld in part. But that can only be done where the statute remaining after the elimination of the unconstitutional portion is in itself a complete law capable of enforcement, and such a one as it is presumed the legislature would have passed without the rejected portions. If the different portions of the statute are so interwoven and interdependent that the rejected portion furnishes—to an appreciable extent—the consideration or inducement for the passage of the Act, then the entire enactment must be rejected."

The matter was again construed in Angell v. Cass County, 11 N. D. 265, 91 N. W. 72, where the same rule is followed, and the quotation taken from Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962, follows: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void because unconstitutional; but these are cases where the parts are so distinctly sepa-

rable that each can stand alone, and where the court is able to see and to declare that the intention of legislature was that the part pronounced valid should be enforceable even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact." This court has adhered to this rule on several occasions since, the latest being Malin v. Lamoure County, 27 N. D. 140, at 154, 50 L.R.A. (N.S.) 997, 145 N. W. 582, where it is said: "The rule is well established that where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter depending upon each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed that the legislature would have passed the one without the other." See Cooley Const. Lim. 7th ed. 246. Also Chicago, M & St. P. R. Co. v. Westby, 47 L.R.A.(N.S.) 97, 102 C. C. A. 65, 178 Fed. 619.

Applying the rules above announced to the facts before us, we have legislation complete in every respect. To be sure, it provides for depriving of office all officers including United States Senators, members of the legislature, and officers for whom the Constitution has provided means for impeachment. The only changes necessary to leave the act indisputably constitutional is to subtract such officers from the phrase "all officers," used in the said act. We see no reason why the remainder of such act cannot stand alone, nor do we see any reason why the legislature would not have enacted the same had they known that certain officers could not be deprived of office in this manner. We conclude, therefore, that they would have enacted the act with those omissions, and that said enactment is constitutional in all respects. Nor do we think there is anything in appellant's contention that he has been deprived of a trial by jury. This proceeding is not in the nature of a criminal action. The loss of the office may be a punishment, but so may be the rendition of a judgment for money in a civil action. Neither is penal. To be sure, §§ 16 and 21 of the act use the word "conviction," but that is a misnomer. Nor is the act unconstitutional because it defines no procedure. Section 942, Comp. Laws 1913, reads: "If upon the trial of any action or proceeding under the provisions of this article for the contesting of the right of any person declared to be nominated

to any office or elected to any office, or to annul or set aside such election, or to remove any person from his office, it shall appear that such person was guilty of any corrupt practice, illegal act, or undue influence in or about such nomination or election, he shall be punished by being deprived of the nomination or office as the case may be, and the vacancy therein shall be filled in the manner provided by law." It seems that the legislature intended this to apply to election contests, actions in quo warranto, actions to remove from office, or other proceedings. No matter what the form of action, if the fact developed that the corrupt practice act had been violated, punishment must follow. But, as a matter of fact, those issues are not really before us. The question of the constitutionality of the act was not raised in the trial below. This appeal is merely from the findings of fact in the lower court, and we are concerned merely with the points raised.

(2) Under this heading appellant insists that Diehl has not legal capacity to maintain this action. Section 1046, Comp. Laws 1913, reads: "Any person claiming the right to hold an office, or any elector of the proper county desiring to contest the validity of an election or the right of any person declared duly elected to any office in such county, shall give notice thereof. . . ." Section 1048, Comp. Laws 1913, reads: "Such contest may be brought by a person claiming such office on his own motion, in his own name as plaintiff but such contest cannot be brought by any other person unless the notice of contest is indorsed with the approval of the state's attorney of the county, or in case of his absence or refusal to approve it, with the approval of the judge of the district court." The action before us is a contest. Diehl claimed the office. His contest complaint stated a cause of action. During these contest proceedings it developed that Totten had issued the objectionable literature and under the plain reading of § 942, Comp. Laws 1913, he was deprived of the office. Diehl unquestionably could maintain the contest.

(3) We now reach the principal contention of appellant: to wit, that the judgment is wrong on the merits. In appellant's brief we are reminded that the corrupt practice act aims only at the use of money corruptly, and that respondent in the case before us acted from high motives and with no intention to directly or indirectly bribe the voters of the county. He says: "In this case there is no corrupt intent, no

wilful wrongdoing, but merely a mistake as to the legal rights of the parties, brought about by public discussion of the question whether the old officer was not collecting a larger compensation than he was entitled to, the defendant having acted . . . in all good faith and with all law-abiding intentions, . . . he is not morally unfit to hold the office, but is possessed with the highest integrity." There is much to support this contention. Had Totten in any manner imagined his offer would be construed as a bribe to the voters, he would not have made it, but nevertheless we cannot accept his interpretation of his language. While the amount involved is small, to approve it would utterly defeat the purposes of the corrupt practice act. If appellant offered his services to the county for $300 per year less than the legal salary, another person might offer to do the work for $1,000 below the salary, and there would, in truth, be nothing to prevent some rich aspirant from offering to donate to the county treasurer huge sums of money and performing the services gratis. That this would be an evil is too plain for argument, and that such conduct was in the contemplation of the corrupt practice act is also plain. We have set forth both documents circulated by appellant in full, in order that anyone reading this opinion may have the same before them. From the letter it will be noted that appellant pledges to turn back into the treasury all of the salary above $1,500 a year, which will result in the saving of several hundred dollars to the taxpayers. He further says: "During most of the term of the present incumbent of the office, the salary has been $1,800." While $600 for a term, divided among the taxpayers of the county is a small item, yet it is an entering wedge which it is well to resist. The corrupt practice act should be liberally construed with the view to its enforcement for the public interest and the purity of elections. Nelson v. Gass, 27 N. D. 357, 146 N. W. 537, Ann. Cas. 1915C, 796. This has been the holding of other states under statutes similar to our own.

The "candidate who . . . offers a voter any money or other property for his vote will be denied the office which in this way he is seeking to obtain . . . though the bribery was indirectly attempted, by an offer to discharge the duties of the office at less than the stated salary, . . . or, even though the bribery consists only in an offer to make a donation to some public purpose." State ex rel. Bill v. Elting, 29 Kan. 397.

"An election secured by a candidate for public office by means of offers to voters to perform the duties of the office for less than the legal fees is void." State ex rel. Atty. Gen. v. Collier, 72 Mo. 13, 37 Am. Rep. 417. In Wisconsin it is stated in regard to the following offer made by a candidate for the same office: "If I shall be elected to the office of county judge I will draw all papers necessary in the settlement of estates and give the necessary advice free." The Wisconsin court held that such promise was clearly within the condemnation of the statute.

Appellant, probably through youth and inexperience, looked upon this act as one of generosity or even justice to the taxpayers of his district, and probably never for a moment realized the construction that would be put upon his words by others. As we have already said, however, the words speak for themselves, and we cannot take appellant's interpretation thereof. That being the case, the best interests of all concerned demand an enforcement of the plain provisions of the corrupt practice act. The judgment of the trial court depriving appellant of said office is affirmed.

BURKE, J. (on rehearing). A rehearing was granted in this case upon the proposition involved in ¶ 2 of the opinion. Nothing was advanced, however, which changes our conclusion. Upon the reargument, appellant challenges the conclusion of the trial court "that the contestant, Frisby E. Diehl . . . is entitled to hold said office, and to receive the emoluments thereof until his successor as such county judge is duly and legally elected and qualified according to law."

In his original brief it is said: "Appellant's formal assignments of error raise three practical, general propositions: First, the constitutionality of the statute, §§ 923–944, inclusive; second, the rights given to plaintiff as a private citizen to maintain this action; third, the correctness of the court's determination from the facts, that the offer to return a part of the salary of the office to the treasurer of the county constituted an offer to give something of value to the electors."

We would not, however, be inclined to hold appellant's counsel to a waiver of the other questions if they fairly arose upon the record. However, they do not so arise. Diehl's right to the office as a hold-over was not involved in the contest, and the trial court should not have passed upon this question. Section 173 of our Constitution provides

that the county judge shall hold office for two years and until his successor is duly elected and qualified according to law. The question now sought to be raised is whether Totten was elected and qualified so as to terminate Diehl's term of office. It is evident that no matter how this is decided, Diehl is still the *de facto* county judge of Bowman county, entitled to receive salary until such time as a successor is chosen and qualifies. Whether such successor should be chosen by election or appointment is another question entirely. As this matter is not before us, we express no opinion thereon. The trial court merely states, in the language of our Constitution, that Diehl would hold over until his successor should be chosen. It could not decide in advance the question of the legality of the selection of such successor.

THE THOMAS MANUFACTURING COMPANY, a Corporation, v. O. A. ERLANDSON and A. Erlandson, Copartners Doing Business under the Firm Name and Style of the Erlandson Lumber Company.

(155 N. W. 652.)

Defendants were served with the summons and complaint in this action the 5th of August, 1913. September 12, 1913, they appeared by attorney and demanded a bill of particulars. After argument such demand was refused, and defendants were given ten days in which to file an answer. Instead of complying with the order, defendants on the 3d of October, 1913, interposed a demurrer raising substantially the same grounds covered by the motion. Plaintiff then moved to strike the demurrer as frivolous. This notice failed to state any day of any month or year for its return, but merely that it was returnable before district judge at the village of Mott on Wednesday at 1 o'clock P. M., or as soon thereafter as counsel could be heard. The attorney upon whom this notice was served, however, was told at the time that said motion was returnable October 15, 1913, and was invited by plaintiff's attorney to ride with him in his automobile to said hearing. Only two terms are held each year in Mott, and the dates thereof are fixed by law. The motion to strike the demurrer was not opposed and was allowed by the trial court. Under the circumstances, it is *held:*

Demurrer — motion to strike — notice — time and place — default — appearance — attorneys — pleadings — terms of court.

1. That the defendants were duly apprised of the return day of the motion to

strike the demurrer and were not justified in allowing the matter to go by default.

Answer — extension of time — court — order of granting — demurrer.

2. The filing of a demurrer was in violation of the order which allowed the filing of an answer.

Demurrer — frivolous — without leave of court — striking — motion for — merits — pleading.

3. It was not error to strike the demurrer as frivolous because (a) defendants had not obtained leave of court to interpose such demurrer; (b) the complaint was not upon its face demurrable; and (c) defendants were in default and presented no affidavit of merits.

The order of the trial court refusing to vacate said default judgment is affirmed.

Opinion filed November 26, 1915.

Appeal from the District Court of Adams County, *Crawford,* J.

Affirmed.

E. C. Wilson, for appellants.

Defendants had the right to demur, under the leave of the court granted them to serve answer; answer means to plead over. They were entitled to notice of the motion to strike their demurrer. Rev. Codes 1905, §§ 7330, 7335, Comp. Laws 1913, §§ 7950, 7955.

Defendant's demurrer should have been sustained, and therefore it was not frivolous. Friesenhahn v. Merrill, 52 Minn. 55, 53 N. W. 1024.

A demurrer should not be stricken out where there is room for debate as to the sufficiency of the pleading to which demurrer is directed, or where an attorney of ordinary intelligence might have interposed a demurrer in good faith. Hatch & E. Co. v. Schusler, 46 Minn. 207, 48 N. W. 782; Dunnell's Minn. Dig. Pl. No. 656; Olsen v. Cloquet Lumber Co. 61 Minn. 17, 63 N. W. 95; Jaeger v. Hartman, 13 Minn. 55, Gil. 50; State v. Torinus, 22 Minn. 272; Perry v. Reynolds, 40 Minn. 499, 42 N. W. 471; Hurlburt v. Schulenburg, 17 Minn. 22, Gil. 5; Morton v. Jackson, 2 Minn. 219, Gil. 180.

Striking a demurrer as frivolous is in effect the same as overruling it after argument, and in either event the demurrant should be allowed to plead over. Friesenhahn v. Merrill, 52 Minn. 55, 53 N. W. 1024; Dunnell's Minn. Dig. Pl. 657; Malone v. Roby, 62 Wis. 459, 22 N. W.

575; Diggle v. Boulden, 48 Wis. 477, 4 N. W. 678; Potter v. Holmes, 74 Minn. 508, 77 N. W. 416.

The corporate existence of the plaintiff should have been alleged, and the omission of such allegation is fatal. Further, two distinct causes of action cannot be pleaded as one. Rev. Codes 1905, § 7361; Bliss, Code Pl. §§ 246, 258; State v. Chicago, M. & St. P. R. Co. 4 S. D. 261, 56 N. W. 894.

In actions to recover the value of services or property, there must be an allegation of the value of same. Jasper v. Hazen, 2 N. D. 401, 51 N. W. 583; Maxwell, Code Pl. p. 88; Elliott v. Caldwell, 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845; Hewitt v. Brown, 21 Minn. 163; Dean v. Leonard, 9 Minn. 190, Gil. 176; Starkey v. Minneapolis, 19 Minn. 203, Gil. 166; Gaar, S. Co. v. Fritz, 60 Minn. 346, 62 N. W. 391.

"The statement of indebtedness is but a conclusion of law." Bliss, Code Pl. 335, citing Lienan v. Lincoln, 2 Duer, 670; Bowen v. Emmerson, 3 Or. 452; Pom. Code Rem. 544; Moore v. Hobbs, 79 N. C. 535; Foerster v. Kirkpatrick, 2 Minn. 210, Gil. 171; Holgate v. Broome, 8 Minn. 243, Gil. 209; Keller v. Struck, 31 Minn. 466, 18 N. W. 280; Bowen v. School Dist. 10 Neb. 265, 4 N. W. 981.

The term, "there is now due and owing," in such an action as this one, is but a conclusion, and not a statement of any fact. Pioneer Fuel Co. v. Hager, 57 Minn. 76, 47 Am. St. Rep. 574, 58 N. W. 828; Stephens' Pl. § 53, and note; Penn Mut. L. Ins. Co. v. Conoughy, 54 Neb. 123, 74 N. W. 422.

Boehm & Jackson, for respondent.

Default judgment cannot be set aside without an affidavit of merits and the showing of a good defense on its face. Black, Judgm. § 324; Hingtgen v. Thackery, 23 S. D. 329, 121 N. W. 839; Whitbread v. Jordan, 1 Younge & C. Exch. 303, 4 L. J. Exch. in Eq. N. S. 38; Doyle v. Teas, 5 Ill. 250; Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 25, 84 N. W. 581; Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 391; Braseth v. Bottineau County, 13 N. D. 344, 100 N. W. 1082; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228; Johannes v. Coghlan, 23 N. D. 588, 137 N. W. 822.

Notice to an attorney who has appeared is notice to his client. Melms v. Pabst Brewing Co. 93 Wis. 153, 57 Am. St. Rep. 914, 66 N. W. 518; Point Pleasant v. Greenlee, 63 W. Va. 207, 129 Am. St. Rep. 971, 60 S. E. 601.

A writ attested on the first day of the month and made returnable on the first Monday of said month is not void. If it is sufficiently clear that a person of ordinary intelligence could read and understand the date actually meant, it is sufficient. Culver v. Brinkerhoff, 180 Ill. 548, 54 N. E. 585; Greenleaf v. Roe, 17 Ill. 474; Scales v. Labar, 51 Ill. 232; Constantine v. Wells, 83 Ill. 192; Powell v. Clement, 78 Ill. 20.

Where a movant fails to show any defense, and it clearly appears that the demurrer was filed for delay, no relief will be granted. Curry v. Janicke, 48 Kan. 168, 29 Pac. 319; Day v. Mertlock, 87 Wis. 577, 58 N. W. 1037; 3 Am. & Eng. Enc. Law, § 286.

Defendant's appearance and taking part in the motion to reopen the default was in effect an argument on the original motion for judgment, and constituted notice. Gray v. Gates, 37 Wis. 614; Grantier v. Rosecrance, 27 Wis. 488.

If there was any irregularity in the original motion to strike the demurrer, it was waived by such after appearance, motion, and argument. Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095; Henry v. Henry, 15 S. D. 80, 87 N. W. 522; Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151; Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 252.

The joining of several causes of action does not necessarily render a complaint demurrable. Randall v. Johnstone, 20 N. D. 493, 128 N. W. 687; 31 Cyc. 117; 23 Cyc. 376; Rev. N. D. Codes 1905, § 6870; Larson v. Great Northern R. Co. 108 Minn. 519, 121 N. W. 121; Dickerson v. Hamby, 96 Ark. 163, 131 S. W. 674; Cone v. Ivinson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933; 6 Enc. Pl. & Pr. 386; Erickson v. Child, 87 Minn. 487, 92 N. W. 1130; Wyckoff, Seamans & Benedict v. Bishop, 98 Mich. 352, 57 N. W. 170.

A plainly frivolous demurrer will be stricken out. Morgan v. Harris, 141 N. C. 358, 54 S. E. 381.

BURKE, J. On the 5th day of August, 1913, the defendant Erlandson was personally served with the summons and complaint in this action. The complaint reads as follows:

The plaintiff complains and alleges:

I. For a first cause of action that the plaintiff is a corporation duly

organized and existing under and by virtue of the laws of the state of Ohio.

II. That the defendants, O. A. Erlandson and A. Erlandson, are co-partners, doing business under the fictitious firm name and style of the Erlandson Lumber Company, with their main office in the village of Hettinger, Adams county, North Dakota.

III. That on or about the 10th day of August, 1910, the plaintiff and the defendants herein entered into an agreement and contract in writing by which the plaintiff agreed to sell and deliver and the defendants agreed to purchase and accept 60 Thomas grain drills, said drills to be delivered to said defendants between the 1st day of January, 1911, and the 20th day of September, 1911.

IV. That thereafter by mutual agreement between the plaintiff and the defendants herein, and before the delivery of the said grain drills, said agreement or contract was modified wherein the plaintiff agreed to deliver and the defendants agreed to accept 45 Thomas grain drills to be delivered to said defendants at the same time as above specified for the said 60 grain drills.

V. That between the 11th and the 20th days of January, 1911, pursuant to the said contract and agreement the plaintiff delivered to the said defendants the said 45 Thomas grain drills, amounting in all to the sum of three thousand eight hundred fifty-nine dollars ($3,-859), and in addition thereto at the same time certain extras for said drills amounting to the sum of sixty-five dollars ($65), amounting in all to the sum of three thousand nine hundred twenty-four dollars ($3,-924), no part of which has ever been paid except as hereinafter stated, the same being long past due.

VI. For a second cause of action, the plaintiff alleges the foregoing preliminary statement of facts, and further alleges that between the 20th day of January, 1911, and the 19th day of August, 1911, the plaintiff sold and delivered to the said defendants at their special instance and request certain repairs for the said drills amounting in all to the sum of two hundred forty-seven and 39/100 dollars ($247.39), no part of which has ever been paid except as hereinafter stated, the same being now past due and payable.

VII. For a third cause of action herein the plaintiff alleges the foregoing preliminary statement of facts, and further alleges that on or

about the 2d day of March, 1911, at the special instance and request of said defendants, the plaintiff sold and delivered to said defendants certain hay tools and implements amounting in all to the sum of six hundred twenty-eight dollars ($628), no part of which has ever been paid except as hereinafter stated, the same being past due and payable.

VIII. That there is now due and owing to the plaintiff from the said defendants on account of the above and foregoing causes of action the sum of four thousand seven hundred ninety-seven and 39/100 dollars ($4,797.39), less the sums of one thousand seven hundred thirteen and 25/100 dollars ($1,713.25), credits allowed defendants for cash paid during the months of February, April, and June, 1911, and October, 1912, together with storage for one year on certain machinery of said plaintiff now in charge of the defendants, together with interest thereon at the rate of 8 per cent per annum according to said agreement from and after November 1, 1911.

Wherefore, plaintiff demands judgment against said defendants and each of them for the sum of three thousand eight-four and 14/100 dollars ($3,084.14), together with interest thereon at the rate of 8 per cent per annum from and after November 1, 1911, with its costs and disbursements.

On the 12th day of September, E. C. Wilson, a member of the bar of this state, filed his general appearance on behalf of both of the defendants. At the same time he served upon plaintiff's attorneys a notice of motion to make said complaint definite and certain, which motion was in the following words:

"Take notice, that at chambers in Dickinson, North Dakota, on Wednesday the 27th day of August, 1913, at the hour of 3 o'clock in the afternoon of that day, defendants will make a motion to said court and therein ask that the complaint in the above-entitled action be amended by making the same more definite and certain, in the respects, to wit:

"First: As to whether the grain drills mentioned in paragraphs III. and IV. were contracted for at an agreed price, or whether the charges therefor are the reasonable values thereof.

"Whether the price or value of each drill is the same, and, if not the same, then by stating the different values and prices.

"Naming the state in which the agreement and contract mentioned in paragraph III. was entered into.

"Naming the place where the delivery of the drills mentioned in paragraph V. was made.

"Second: Stating the true firm name and style of the defendants, in place of the 'fictitious' name and style as alleged in paragraph II. of the complaint.

"Third: As to whether or not it is the claim of the plaintiff, that defendants bought the 'certain extras' referred to in paragraph V., and, if so, then whether same were so bought under a contract, or were simply delivered at the request of the defendants, and whether the price that is charged therefor is the agreed price or is the reasonable value thereof.

"Fourth: What is meant by the words 'foregoing preliminary statement of facts' as used in paragraph VI., and as to whether the $247.30 there named is the agreed price of the repairs there mentioned or is the reasonable value thereof.

"Fifth: What is meant by the words 'foregoing preliminary statement of facts' as same are used in paragraph VII., and what is meant therein by the words, 'certain hay tools and implements,'—whether they be pitchforks or hay-tedders, and as to the number of each for which recovery is sought, and as to whether the $628 there mentioned is a contract price or is the reasonable value of such tools and implements.

"Giving the number and kind of each of such tools and implements and the price or value of each.

"Sixth: At what place or places and in what state, plaintiff delivered to defendants the various extras, repairs, tools, and implements mentioned in said complaint.

"Seventh: As to whether or not the plaintiff was a corporation at the various times of entering into the contract and agreement, and the delivering of the various articles of personal property named in the complaint.

"Eighth: As to whether or not the defendants were doing business under a firm name or style, at the time they entered into the agreement and contract and ordered and received the various articles of personal property, and, if so, whether they acted under their fictitious names or in their true name and style as a copartnership."

After argument before the trial court, said motion was denied and

an order entered which, among other things, recites that it is "ordered that the motion of the defendants be and the same is in all things denied and overruled, and that the plaintiff have ———— dollars costs in said motion, and that said defendants serve their said answer to said complaint within ten days from the service of this order."

Defendants did not serve any answer, but on the 3d of October interposed a demurrer to the complaint upon the ground that several causes of action had been improperly united, and that said complaint did not state facts sufficient to constitute a cause of action. The following day plaintiff's attorneys served upon said E. C. Wilson a motion for judgment upon the pleadings in the following language:

"Please take notice that upon the pleadings heretofore served herein, the plaintiff will move the honorable district court in and for Adams county, North Dakota, at the village of Mott, in the county of Hettinger in said state, on Wednesday at 1 o'clock P. M. on said day, or as soon thereafter as counsel can be heard, for an order striking out the demurrer of the defendants herein, as sham, frivolous, and irrelevant, and made for the purpose of delay, and made contrary to the order of the court herein issued on the 23d day of September, 1913, in said cause, and for judgment on the pleadings or such other and further order or relief as the court may grant."

Wilson indorsed thereon the following:

"Due personal service of the within notice of motion admitted this 4th day of August, 1913. E. C. Wilson, Defendants' Attorney."

One of plaintiff's attorneys also filed an affidavit to the effect that at the time of the service of said notice he informed said attorney that October 15, 1913, was the date set for the hearing of the same at Mott, Hettinger county, North Dakota, where the district judge would then be holding a term of court, and that on the 14th of October, the day before the date set for said hearing, plaintiff's attorney went to the office of the defendants' attorney and asked him to ride in his automobile to Mott with him the next morning for the hearing, but that said Wilson replied that he did not have the time to go to Mott. Upon the hearing on said October 15, 1913, the trial court made the following order:

"On reading and filing the pleadings in this action, and the notice of this motion duly served on the attorney for the defendants, E. C. Wilson,

and after hearing Boehm & Jackson, attorneys for the plaintiff, and no one appearing in opposition thereto:

"Ordered, That the demurrer of the defendants herein be stricken out as frivolous; that the plaintiff have judgment for the relief demanded in the complaint, with the costs of this motion taxed at ——— dollars, and the costs of this action to be taxed by the clerk."

Judgment was duly entered upon this order, whereupon defendants' attorney applied to the court to vacate such order and judgment. This application is based upon the affidavit of E. C. Wilson, who states that he is and has at all times been attorney for the defendants above named. That he, nor either of said defendants, had never known of said order until November 5th; that said defendants have a good and valid defense on each and every cause of action attempted to be set up in the complaint on the merits; that defendants have acted in good faith in every move, etc.; that the said demurrer was interposed because of an understanding upon affiant's part that the questions which he had attempted to raise in his motion to make the complaint more specific should have been raised in this manner; that the notice to strike his demurrer as frivolous was not returnable upon any day certain. This affidavit was opposed by one of plaintiff's attorneys, giving the facts which we have already outlined. There is, however, no disputed question of fact arising upon the two affidavits. The trial court refused to vacate said motion and this appeal follows.

Appellant in his brief calls attention to the fact that a large amount of money is involved in the litigation; claims that his clients were acting in good faith without negligence, as they thought, and were seeking to be informed as to what the plaintiff was suing them for and upon what contracts; that they had a right to demur in the order of court which allowed them to answer within ten days; that they are entitled to notice of motion to strike the demurrer; and that, in truth, the demurrer was not sham nor frivolous.

(1) The first question for consideration is whether or not the notice served upon the defendants' attorney was sufficient to apprise him of the motion to strike his demurrer. It will be noted that the only return date mentioned was Wednesday at 1 o'clock P. M. of said day. However, the notice states that it was on for hearing at the village of Mott in the county of Hettinger of said state, and contained addi-

tional proviso that said motion would be brought on as soon thereafter as counsel could be heard and the affidavit of plaintiff's attorneys, that at said time and place he told defendants' attorney that the 15th of October was the date, and has not in any manner been contradicted. Defendants' attorney also knew that a term of court would be in progress at said time and place, and there is little doubt in the minds of this court that he knew, or with very slight effort could have learned, of the exact date of the return of the motion. He was, therefore, not justified in allowing the matter to go by default. See: 1 Black. Judgm. § 324; Hingtgen v. Thackery, 23 S. D. 329, 121 N. W. 839; Whitbread v. Jordan, 1 Young & C. Exch. 303, 4 L. J. Exch. in Eq. N. S. 38; Doyle v. Teas, 5 Ill. 250; Point Pleasant v. Greenlee, 63 W. Va. 207, 129 Am. St. Rep. 971, 60 S. E. 601; Curry v. Janicke, 48 Kan. 168, 29 Pac. 319; Day v. Mertlock, 87 Wis. 577, 58 N. W. 1037; Gray v. Gates, 37 Wis. 614; Grantier v. Rosecrance, 27 Wis. 488; Whitmore v. Behm, 22 N. D. 280, 133 N. W. 300, and cases cited, therein.

(2) Were the defendants as a matter of right entitled to file their demurrer rather than an answer? It will be remembered that they had attempted to have the complaint made more specific and had failed, but were given ten days in which *to answer*. In violation of this order, however, this demurrer was interposed, and the question arises whether or not the permission to answer necessarily included permission to demur.

In Cashman v. Reynolds, 56 Hun, 333, 9 N. Y. Supp. 614, it is held otherwise. To the same effect is Kelly v. Downing, 42 N. Y. 71; Newton v. White, 42 Iowa, 608; and we fully agree with the decisions therein announced.

The defendants were, therefore, in default at the time the judgment was entered against them, and should have made their application under the statutes governing in such cases.

(3) Appellant insists that it was error to strike out the demurrer as frivolous, even though he were in default of an answer. Three replies can be made to this contention, either one to our minds conclusive. First, defendants had not obtained leave of court to interpose this demurrer, and, second, the complaint was not upon the merits vulnerable. This demurrer covered exactly the same grounds as the

motion to make more definite, and was, therefore, frivolous. 6 Enc. Pl. & Pr. 346.

Erickson v. Child, 87 Minn. 487, 92 N. W. 1130; Wyckoff, Seamans & Benedict v. Bishop, 98 Mich. 352, 57 N. W. 170.

Third, the application of the defendants to reopen the case contained no affidavit of merits.

The order of the trial court is accordingly affirmed.

WILLIAM SHORTRIDGE v. WILLIAM STURDIVANT and John Weinberger, Garnishee, and Farmers & Merchants State Bank of Kenmare, North Dakota, a Corporation, Intervener.

(155 N. W. 20.)

Garnishee's liability — measure of — relation and responsibility to defendant — recovery — in what cases.

1. A garnishee's liability is measured by his responsibility and relation to the defendant; and the plaintiff in a garnishment action cannot recover against the garnishee unless the defendant could recover against such garnishee in an action in defendant's own name and for his own use.

Mortgaged chattels — sale of — consent by mortgagee — condition — sale by public auction — proceeds of sale — applied on mortgage debt — lien not waived — as to unpaid purchase price — garnishment — not subject to.

2. Where a mortgagee consents to a sale of mortgaged chattels on the condition that such sale be held at public auction under the supervision of, and that the purchase price for such chattels be paid by the purchasers to, the mortgagee's agent, the mortgagee does not waive the lien of the mortgage so as to render the unpaid purchase price due from a purchaser at such sale, subject to garnishment in an action brought against the defendant by an unsecured creditor.

Opinion filed October 18, 1915. Rehearing denied November 26, 1915.

Note.—In holding that the consent of a mortgagee to a sale of the mortgaged property may be conditional, and that when the purchaser is informed of such condition the consent does not become effective until the condition is performed, this case seems to be in harmony with the few other cases that have considered the question, as shown by a review thereof in a note in 43 L.R.A.(N.S.) 302.

This is an appeal from a judgment of the District Court of Ward County, *Leighton,* J. Garnishee and intervener appeal.

Reversed.

P. M. Clark, for appellants.

Plaintiff's right to recover against the garnishee is dependent upon the defendant's right to recover from the garnishee. The plaintiff can occupy no better position against the garnishee than that of the defendant in the action. If defendant could recover nothing from the garnishee, plaintiff can recover nothing. Bedford v. Kissick, 8 S. D. 586, 67 N. W. 609; 15 Current Law, 2086; What Cheer Sav. Bank v. Mowery, 149 Iowa, 114, 128 N. W. 7; Webber v. Bolte, 51 Mich. 115, 16 N. W. 257; Thomas v. Gibbons, 61 Iowa, 50, 15 N. W. 593; 20 Cyc. 1060; 1913 Cyc. Ann. 2302; Bacon v. Felthous, 103 Minn. 387, 15 N. W. 205; Steltzer v. Condon, 139 Iowa, 754, 118 N. W. 39; Wunderlich v. Merchants' Nat. Bank, 109 Minn. 468, 27 L.R.A.(N.S.) 811, 134 Am. St. Rep. 788, 124 N. W. 223, 18 Ann. Cas. 212.

There is nothing technical about an equitable assignment. No particular form is necessary. 4 Cyc. 48; Moore v. Lowrey, 25 Iowa, 336, 95 Am. Dec. 791; Martin v. Maner, 10 Rich. L. 271, 70 Am. Dec. 223; 2 R. C. L. p. 614.

Where mortgaged chattels are sold under an agreement between the mortgagor and mortgagee that the proceeds of the sale are to be applied on the mortgage debt, the lien of the mortgage is not waived, and such funds are not subject to garnishment at the hands of a general creditor of the mortgagor. Fuller v. Rhodes, 78 Mich. 36, 43 N. W. 1085; Field v. New York, 6 N. Y. 179, 57 Am. Dec. 435.

An assignment of the proceeds of expected future sale of goods is valid in equity, and equity will seize upon such proceeds, under such an assignment, as soon as they come into existence. East Lewisburg Lumber & Mfg. Co. v. Marsh, 91 Pa. 99; Ely v. Cook, 9 Abb. Pr. 377, 2 Hilt. 418; Bibend v. Liverpool & L. F. & L. Ins. Co. 30 Cal. 86; Bergson v. Builders' Ins. Co. 38 Cal. 541; Stover v. Eycleshimer, 46 Barb. 91.

A. W. Gray and *Karl H. Stoudt,* for respondent.

The agreement of the mortgagee with the mortgagor to allow the mortgagor to sell the mortgaged property constitutes a waiver and release of the mortgage lien. New England Mortg. Secur. Co. v. Great

Western Elevator Co. 6 N. D. 412, 71 N. W. 130; Sammons v. Kearney Power & Irrig. Co. 8 L.R.A.(N.S.) 406, cases cited thereunder; Maier v. Freeman, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357; Peterson v. St. Anthony & D. Elevator Co. 9 N. D. 55, 81 Am. St. Rep. 528, 81 N. W. 59.

Such an agreement is a substitution of the mortgagor's personal obligation for the mortgaged security. Harper v. Neff, 6 McLean, 390, Fed. Cas. No. 6,089.

The subject of sale must be property, the title to which can be immediately transferred from seller to buyer. Rev. Codes 1905, § 5395.

An assignment in law is a transfer or setting over of property or some right or interest therein from one person to another. 2 R. C. L. 539–29 and cases cited; Garretsie v. VanNess, 2 N. J. L. 20, 2 Am. Dec. 333.

A mere possibility or expectancy, not coupled with an interest, could not at common law be the subject of transfer. 2 R. C. L. § 4, p. 596; O'Neil v. William B. H. Kerr Co. (O'Neil v. Helmke) 124 Wis. 234, 70 L.R.A. 338, 102 N. W. 573; Leitch v. Northern P. R. Co. 5 Ann. Cas. 65, and note, 95 Minn. 35, 103 N. W. 704; Field v. New York, 6 N. Y. 179, 57 Am. Dec. 435.

Such an agreement and sale of mortgaged property render the proceeds wherever found, before they pass into the hands of the mortgagee, subject to levy and seizure under execution, at the hands of a general creditor of the mortgagor. Maier v. Freeman, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357; Brackett v. Harvey, 91 N. Y. 221; Murray, D. & Co. v. McNealy, 86 Ala. 234, 11 Am. St. Rep. 33, 5 So. 565; Lane v. Starr, 1 S. D. 107, 45 N. W. 212, and cases cited; White Mountain Bank v. West, 46 Me. 15; Smith v. Clark, 100 Iowa, 605, 69 N. W. 1011; Smith v. Crawford County State Bank, 99 Iowa, 282, 61 N. W. 378, 68 N. W. 690.

CHRISTIANSON, J. This is an appeal from a judgment in plaintiff's favor in a garnishment action. The undisputed facts are as follows: The defendant, Sturdivant, desired to hold a public auction for the purpose of selling certain personal property. The greater portion of such property was covered by chattel mortgages in favor of the inter-

vener, Farmers & Merchants State Bank of Kenmare, and S. H. Lowe & Company, and Norma State Bank. In order to arrange for such a sale a conference was held at the intervener bank, attended by the defendant and the authorized officers of the three mortgagees above mentioned. At such meeting it was agreed "between the said Sturdivant and said creditors that a public sale should take place in the near future, and that the proceeds of the property sold should be applied to the creditors having a first mortgage upon the particular property sold. That the sale should be supervised by A. G. Engdahl (the cashier of the intervener bank), and clerked by him, and that he should receive all moneys from said sale, and was to apportion the same among the several creditors, pursuant to the said agreement."

In accordance with such agreement, a public sale was held by the defendant, Sturdivant, at his residence in Ward county, on December 9, 1912. All the various purchasers, with the exception of the garnishee, Weinberger, made settlement with, and paid the purchase moneys to, Engdahl. The garnishee, Weinberger, purchased certain property at such sale, including some oats. The oats were contained in a bin, but the exact quantity was unknown. Weinberger agreed to pay 26 cents per bushel for the oats, and as the quantity was unknown he could not make settlement until this was ascertained. Several days prior to the sale, the defendant had informed Weinberger that the intervener bank held chattel mortgages on all of his property, and at the time of the sale the defendant again informed Weinberger that he must make settlement with Engdahl. The garnishee, Weinberger, therefore, at the time of his purchase at such auction saw Engdahl and arranged to come to the bank the next morning, and make settlement for the property purchased,—it being understood that in the meantime Weinberger should haul and weigh the oats. For some reason Weinberger failed to call and settle with Engdahl next morning, and, in the afternoon and prior to settlement with Engdahl, the plaintiff, who is an unsecured creditor of defendant, brought this garnishment action, and served papers therein upon Weinberger, as garnishee.

It is conceded that all the property purchased by Weinberger was covered by valid chattel mortgages in favor of the three mortgagees heretofore mentioned, and that the rights of all three of such mortgagees to the proceeds of the property purchased by Weinberger were

assigned to and held by the intervener. There is no contention that the indebtedness sought to be garnished constituted a surplus over and above the mortgage indebtedness; but it is conceded that after the application of the proceeds of the sale (including the sum due by Weinberger), there will still remain a portion of the mortgage indebtedness unpaid. The plaintiff stands squarely on the proposition that the mortgagees by consenting to the sale released their mortgages, and that the proceeds of the sale belonged to the defendant free and clear of any valid claim in favor of such mortgages. The trial court sustained the contentions of the plaintiff, and rendered judgment in favor of the plaintiff and against the garnishee and intervener. The garnishee and intervener have appealed from such judgment.

Section 7567, Compiled Laws, provides that "any creditor shall be entitled to proceed by garnishment . . . against any person . . . who shall be indebted to or have any property . . . in his possession or under his control belonging to such creditor's debtor."

The principal question to be determined in this action is whether Weinberger was indebted to the defendant. If Weinberger was indebted to Sturdivant for his own use, then such indebtedness was subject to garnishment; but if he was not so indebted, then there was nothing subject to garnishment, and the judgment against him would be erroneous. The mere fact that Weinberger purchased property formerly belonging to Sturdivant does not necessarily control. The question is, To whom did the purchase moneys belong? Did this indebtedness or unpaid price belong to Sturdivant, or did it belong to the intervener? Plaintiff's right to recover against the garnishee is predicated entirely upon defendant's right to recover in his own name and for his own use against the garnishee. Unless the defendant could so recover, neither can the plaintiff.

"A plaintiff by garnishment cannot place himself in a superior position as regards a recovery than is occupied by the principal defendant. The garnishee's liability is measured by his responsibility and relation to the defendant. He can be charged only in consistency with the subject of his contract with the defendant. And if, by any pre-existing bona fide contract his accountability has been removed or modified, it follows that the garnishee's liability is correspondingly effected, for the garnishment cannot change the nature of the contract between the

garnishee and the defendant, nor prevent the garnishee from performing his contract with third persons. . . . When a garnishee has contracted with the principal debtor that he will pay the money or deliver the property to some third person, then the plaintiff in garnishment cannot recover, because he is only placed by the garnishment in the position of the principal defendant, who could not himself recover from the person made the garnishee." Shinn, Attachm. & Garnishment, § 516.

"In order that a creditor may maintain garnishment proceedings, there must be a subsisting right of action at law by defendant in his own name, and for his own use, against the garnishee." 20 Cyc. 983. See also Melin v. Stuart, 119 Minn. 539, 138 N. W. 281; Bedford v. Kissick, 8 S. D. 586, 67 N. W. 609; Timm v. Stegman, 6 Wash. 13, 32 Pac. 1004; Waples, Attachm. & Garnishment, § 363; Atwood v. Tucker (Atwood v. Roan) 26 N. D. 622, 632, 51 L.R.A.(N.S.) 597, 604, 145 N. W. 587, 591.

It is true that a mortgagee who consents to a sale of mortgaged property thereby waives the lien, and will be estopped to assert the existence thereof as against the purchaser. But it is equally true that where the mortgagee does not consent to the sale or otherwise waive the lien, then the purchaser of mortgaged personal property takes the same subject to the lien of the mortgage. Hence, the authorities generally recognize the fact that the mortgagee may consent to a sale, either conditionally or unconditionally. And when a conditional consent is given, and the purchaser is informed of such conditions; and the conditions imposed relate directly to matters connected with the sale itself, and not merely to promises or acts to be performed by the mortgagor after the completion of the sale,—then the consent does not become availing or effective until the condition is performed. This principle is approved by the courts and text writers generally. See Cobbey, Chat. Mortg. § 875; Jones, Chat. Mortg. § 661; Dodson v. Dedman, 61 Mo. App. 209; Sanford v. Mumford, 31 Neb. 792, 48 N. W. 876; Watson v. Mead, 98 Mich. 330, 57 N. W. 181; Jones v. Webster, 48 Ala. 109; Mariner v. Patten, 28 S. D. 163, 132 N. W. 685; 7 Cyc. 48.

In the case of Whitney v. Heywood, 6 Cush. 82, the supreme court of Massachusetts held that, where the parties to a mortgage indorsed thereon an agreement that, if the mortgagor should sell any of the

property, the mortgagee should discharge all claim on the same upon the receipt of the money therefor, that this agreement was conditional, and gave no authority to the mortgagor to devest the mortgagee's interest in the property by a sale, except upon a performance of the condition of paying the purchase money to him. The purchaser in such case, if he knew of the agreement, knew all its qualifications and conditions precedent, and was properly bound by them. If he had no such knowledge, and the mortgage was duly recorded, he bought the property subject to the mortgage, and was bound to know that the mortgagor had no right to sell.

Plaintiff's counsel cites the decision of this court in the case of New England Mortg. Secur. Co. v. Great Western Elevator Co. 6 N. D. 407, 71 N. W. 130, as authority upon the proposition that a mortgagee by consenting to a sale thereby waives the lien. The principles enunciated in that case are doubtless good law, but they have no application to the facts in the case at bar. In that case the mortgagee authorized the mortgagor generally to sell and receive payment for the mortgaged property. The purchaser acted upon the authority thus given, and bought the property from the mortgagor and paid him therefor. The mortgagee appointed the mortgagor as its agent for the purpose of selling and receiving payment for the property, and this court very properly held that under such circumstances the mortgagee would not be permitted to assert the lien against the purchaser and thereby penalize him because the mortgagee's agent misapplied the proceeds of the sale. The facts in the case at bar are radically different. Sturdivant was given no general authority to sell; and he was given absolutely no authority to receive payment. Sturdivant had no right to sell the mortgaged personal property unless he obtained the consent of the mortgagees. The mortgagees consented to a sale only under certain conditions. Under the conditions imposed, it was not contemplated that Sturdivant should have any control over the sale, or receive one cent of the proceeds of the sale of the mortgaged chattels. The sale was to be held by an auctioneer under the supervision of Engdahl, the managing officer of the intervener bank. The purchasers were required to make, and actually did make, settlement with Engdahl. There is nothing to indicate that the mortgagees would have consented to a sale under any other conditions; or that they intended to waive the liens of their

mortgages. The very conditions imposed indicated that they did not intend to waive such liens, as the sale was authorized only upon the conditions that the mortgagees receive the proceeds of the sale of the mortgaged property. And in order to safeguard the interests of the mortgagees, it was further provided that the managing officer of the intervener should supervise the sale and receive payments for the property sold. The mere agreement to permit a sale under these conditions did not indicate any intent to waive the lien of the mortgagees; and the question of waiver is largely a question of intent. Wonser v. Walden Farmers' Elevator Co. 31 N. D. 382, 153 N. W. 1012. While it is true that the mortgagees agreed to release their mortgages and permit the property to be sold under the conditions specified by them, still the mortgages remained of record, apparently valid liens, and the garnishee purchased with knowledge of such liens, and agreed at the time of purchase to pay the purchase moneys to Engdahl, the representative of the mortgagees.

In the case at bar, however, we are not concerned with the question of whether the mortgagees could assert the liens of their mortgages as against the purchaser, in case the conditions imposed were not performed. That is not the condition here. The question here presented is whether the defendant (the mortgagor) could so assert. Because the plaintiff in this case, with respect to the intervener and the garnishee, stands in the position of the defendant, and has no better right to the proceeds of the sale than the defendant would have thereto. It seems quite clear that the defendant could not be heard to say that the release which the mortgagees agreed to give (upon the conditions imposed by them) became operative, unless he first shows a compliance with the conditions thus imposed. We reach the conclusion that the proceeds of the sale were neither owned nor claimed by the defendant, but belonged to the mortgagee holding a first lien on the particular personal property sold. Both Weinberger and Sturdivant recognized this fact at the time of the auction sale, at which time Weinberger at the request of Sturdivant agreed to make settlement with Engdahl, and pay him for the property purchased at the auction. The unpaid purchase moneys in the hands of the garnishee, Weinberger, therefore, belonged not to the defendant, but to the intervener, and hence could not be applied in payment of a debt which defendant owed the plaintiff. It necessarily

follows that the judgment appealed from is erroneous. It is therefore ordered that the District Court reverse its judgment and dismiss the garnishment action.

MONTANA EASTERN RAILWAY COMPANY v. FRED C. LEBECK, Lora E. Lebeck, A. M. Gardner, Florence S. Gardner, Lower Yellowstone Water Users Association, and McKenzie County.

(155 N. W. 648.)

Condemnation suit — evidence — value — land — adapted to subdivision — lots, into — theory.

1. When the plaintiff in a condemnation suit first offers evidence as to values on the assumption that the land involved is adapted for subdivision into town lots, he cannot predicate error upon the subsequent admission of evidence on the part of defendant based on the same assumption.

Instructions — nonprejudicial.

2. Certain instructions examined, and *held* nonprejudicial.

Action — condemnation — compensation — value of land — purposes used — present value — uses.

3. In a condemnation action, compensation is not to be estimated simply with reference to the value of the land to the owner for the purpose it is then used, but with reference to what its present value is in view of the uses to which it is reasonably capable of being put.

Theory — damages — proof of — method — accepted and acted upon — trial court — on appeal.

4. When a certain theory as to the method of proving damages is accepted and acted upon by the parties in the trial court as a proper one, it must be adhered to on appeal.

Questions — objections — sustained — facts — offer of proof — error — assignment of.

5. Where an objection to a question propounded to a witness is sustained, and the competency of the question is not apparent on its face, the party must

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Note.—That the adaptability of agricultural or unused lands for building lot purposes may be considered in estimating the damages to be allowed on condemnation of the property has been decided in many cases, as shown by a review of all the authorities in a note in 15 L.R.A.(N.S.) 679.

offer to prove the facts sought to be elicited before he can assign error upon the ruling on the objection. Halley v. Folsom, 1 N. D. 325, followed.

Conflicting evidence — verdict — based upon — supreme court — not interfered with.

6. A verdict based on conflicting evidence cannot be set aside as unsupported by the evidence.

Opinion filed November 29, 1915.

Appeal from a judgment and an order denying a new trial of the District Court of Williams County, *Fisk,* J. Plaintiff appeals.

Affirmed.

W. B. Overson and *Murphy & Toner,* for appellant.

The right of the plaintiff to condemn the mentioned strips of land is free from doubt. Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; Pitznogle v. Western Maryland R. Co. 119 Md. 673, 46 L.R.A.(N.S.) 319, 87 Atl. 917; State ex rel. Dominick v. Superior Ct. 52 Wash. 196, 21 L.R.A.(N.S.) 448, 100 Pac. 317.

The evidence is insufficient to support the verdict. The facts, upon which opinion evidence of witnesses is based, must be proved with reasonable certainty, and knowledge of such witnesses, or the subject about which they are testifying, must be clearly established. Goodwin v. State, 96 Ind. 557; Fremont, E. & M. Valley R. Co. v. Lamb, 11 Neb. 592, 10 N. W. 493; Dunham's Appeal, 27 Conn. 192; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Roe v. Taylor, 45 Ill. 485; American Bible Soc. v. Price, 115 Ill. 623, 5 N. E. 126; Carthage Turnp. Co. v. Andrews, 102 Ind. 138, 52 Am. Rep. 653, 1 N. E. 364; Beaubien v. Cicotte, 12 Mich. 459; Re Pinney, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; State v. Erb, 74 Mo. 199; Schlencker v. State, 9 Neb. 241, 1 N. W. 857; Re Vanauken, 10 N. J. Eq. 186; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Baltimore & O. R. Co. v. Schultz, 43 Ohio St. 270, 1 N. E. 324, 54 Am. Rep. 805; Shaver v. McCarthy, 110 Pa. 339, 5 Atl. 614; Jones v. Fuller, 19 S. C. 66, 45 Am. Rep. 761; Harrison v. Rowan, 3 Wash. C. C. 580, Fed. Cas. No. 6,141.

The testimony of nonexpert opinion witnesses must be based upon proved, tangible facts, within their knowledge. Chicago, K. & W. R. Co. v. Donelson, 45 Kan. 189, 25 Pac. 584; St. Louis, I. M. & S. R. Co. v. Yarborough, 56 Ark. 612, 20 S. W. 515.

The possibility of percolation or seepage occurring after the trial is mere guesswork, and not a fact, nothing of the kind being proved as having occurred before the trial. Consolidated Home Supply Ditch & Reservoir Co. v. Hamlin, 6 Colo. App. 341, 40 Pac. 582; Manufacturers' Natural Gas Co. v. Leslie, 22 Ind. App. 677, 51 N. E. 510, 19 Mor. Min. Rep. 566.

No right that was not affected by the taking for the original right of way is shown to have been interfered with, and conditions in such respect were not changed. 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; Kimble v. White Water Valley Canal Co. 1 Ind. 285; Gordon v. Tucker, 6 Me. 247; Fowle v. New Haven & N. Co. 112 Mass. 334; 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. 565; 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; Bell v. Chicago, B. & Q. R. Co. 74 Iowa, 343, 37 N. W. 768; Pingery v. Cherokee & D. R. Co. 78 Iowa, 438, 43 N. W. 286.

Damages are to be assessed on the basis that the work will be constructed and operated in a skilful and proper manner. Jones v. Chicago & I. R. Co. 68 Ill. 380; Fremont, E. & M. Valley R. Co. v. Whalen, 11 Neb. 585, 10 N. W. 491; Neilson v. Chicago, M. & N. W. R. Co. 58 Wis. 516, 17 N. W. 310; Blakeley v. Chicago, K. & N. R. Co. 25 Neb. 207, 40 N. W. 956; Jackson v. Portland, 63 Me. 55; Setzler v. Pennsylvania Schuylkill Valley R. Co. 112 Pa. 56, 4 Atl. 370; March v. Portsmouth & C. R. Co. 19 N. H. 372; Nason v. Woonsocket Union R. Co. 4 R. I. 377; 1 Lewis, Em. Dom. 1105, 1106; Spencer v. Hartford, P. & F. R. Co. 10 R. I. 14.

Compensation must be fixed with reference to the value of the property in view of its character and use at the time of estimating damages. Tri-State Teleph. & Teleg. Co. v. Cosgriff, 19 N. D. 771, 26 L.R.A. (N.S.) 1171, 124 N. W. 75; Powers v. Hazelton & L. R. Co. 33 Ohio St. 429; Cedar Rapids, I. F. & N. W. R. Co. v. Ryan, 37 Minn. 38, 33 N. W. 6; Currie v. Waverly & N. Y. Bay R. Co. 52 N. J. L. 381, 19 Am. St. Rep. 452, 20 Atl. 56; New Britain v. Sargent, 42 Conn. 137; Clark v. Pennsylvania R. Co. 145 Pa. 438, 27 Am. St. Rep. 710, 22

Atl. 989; Calumet River R. Co. v. Moore, 124 Ill. 329, 15 N. E. 764; 10 Am. & Eng. Enc. Law, 1114.

The instructions of the court are the law of the case for the jury, and a verdict disobedient thereto is one contrary to law, and should be set aside. Freel v. Pietzsch, 22 N. D. 113, 132 N. W. 779; Abbott, Civil Jury Trials, § 8, p. 505; Valerius v. Richard, 57 Minn. 443, 59 N. W. 534; Cincinnati, I. St. L. & C. R. Co. v. Darling, 130 Ind. 376, 30 N. E. 416; Dent v. Bryce, 16 S. C. 14; Declez v. Save, 71 Cal. 552, 12 Pac. 722; South Florida R. Co. v. Rhodes, 25 Fla. 40, 3 L.R.A. 733, 23 Am. St. Rep. 506, 5 So. 633; Bushnell v. Chicago & N. W. R. Co. 69 Iowa, 620, 29 N. W. 753; Union P. R. Co. v. Hutchinson, 40 Kan. 51, 19 Pac. 312; Kansas City, Ft. S. & M. R. Co. v. Furst, 3 Kan. App. 265, 45 Pac. 128; Rafferty v. Missouri P. R. Co. 15 Mo. App. 559; Jacobs v. Oren, 30 Or. 593, 48 Pac. 431; Hulett v. Patterson, 6 Sadler (Pa.) 22, 8 Atl. 917; Reynolds v. Keokuk, 72 Iowa, 372, 34 N. W. 167; Murray v. Heinze, 17 Mont. 368, 42 Pac. 1057, 43 Pac. 714; Boyesen v. Heidelbrecht, 56 Neb. 570, 76 N. W. 1089; Pepperall v. City Park Transit Co. 15 Wash. 176, 45 Pac. 743, 46 Pac. 407; Felton v. Chicago, R. I. & P. R. Co. 69 Iowa, 577, 29 N. W. 618; Brown v. Wilson, 45 S. C. 519, 55 Am. St. Rep. 779, 23 S. E. 630; Emerson v. Santa Clara County, 40 Cal. 543.

There was no competent evidence of damage to lands other than those taken or used. The proper measure of damages in condemnation cases is the difference between the value of the land before and after taking. San Diego Land & Town Co. v. Neale, 88 Cal. 50, 11 L.R.A. 604, 25 Pac. 977; Young v. Harrison, 21 Ga. 584; 2 Lewis, Em. Dom. p. 947; 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; Springer v. Chicago, 135 Ill. 552, 12 L.R.A. 609, 26 N. E. 514.

Admissions of the owner of lands so taken, as to their value, are material, and proof of same is competent. Lewis, Em. Dom. p. 958; Brown v. Calumet River R. Co. 125 Ill. 600, 18 N. E. 283; Central Branch, U. P. R. Co. v. Andrews, 37 Kan. 162, 14 Pac. 509; 10 Am. & Eng. Enc. Law, 1154; East Brandywine & W. R. Co. v. Ranck, 78 Pa. 454; Patch v. Boston, 146 Mass. 52, 14 N. E. 770.

The jury cannot estimate damages on their own responsibility; they must keep within the evidence. A theory to the contrary, adopted by the trial court in his charge, is erroneous and prejudicial. Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; 11 Enc. Pl. & Pr. 1145; Baker v. Ashe, 80 Tex. 356, 16 S. W. 36; Haight v. Vallet, 89 Cal. 249, 23 Am. St. Rep. 465, 26 Pac. 897.

R. J. Cowles and *Palmer, Craven, & Burns,* for respondents.

Defendants were clearly entitled to have the question as to the adaptability of the property to uses other than as farm property, submitted to the jury. It is an element which the jury has the right to consider in estimating damages. Petersburg School Dist. v. Peterson, 14 N. D. 344, 103 N. W. 756; Montana R. Co. v. Warren, 6 Mont. 275, 12 Pac. 641; Chicago, K. & N. R. Co. v. Davidson, 49 Kan. 589, 31 Pac. 131; Sherman v. St. Paul, M. & M. R. Co. 30 Minn. 227, 15 N. W. 239; Russell v. St. Paul, M. & M. R. Co. 33 Minn. 210, 22 N. W. 379; Washburn v. Milwaukee & L. W. R. Co. 59 Wis. 364, 18 N. W. 328; Alexian Bros. v. Oshkosh, 95 Wis. 221, 70 N. W. 162; Seattle & M. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720; 15 Cyc. 726; Missouri, K. & T. R. Co. v. Roe, 15 L.R.A.(N.S.) 679, and note, 77 Kan. 224, 94 Pac. 259; 1 Thomp. Trials, § 247; McReynolds v. Burlington & O. River R. Co. 106 Ill. 152; Montana R. Co. v. Warren, 6 Mont. 275, 12 Pac. 641; Chicago, K. & N. R. Co. v. Davidson, 49 Kan. 589, 31 Pac. 131.

Where there is substantial evidence, the verdict of the jury will not be disturbed on appeal, because the evidence for the respective parties is conflicting. Taylor v. Jones, 3 N. D. 235, 55 N. W. 593; Becker v. Duncan, 8 N. D. 600, 80 N. W. 762; Flath v. Casselman, 10 N. D. 419, 87 N. W. 988; Omaha Southern R. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557; Snouffer v. Chicago & N. W. R. Co. 105 Iowa, 681, 75 N. W. 501; Duluth & W. R. Co. v. West, 51 Minn. 163, 53 N. W. 197.

The jury is presumed to have followed the instructions of the court. Chicago, M. & St. P. R. Co. v. Brink, 16 S. D. 644, 94 N. W. 422.

CHRISTIANSON, J. Plaintiff appeals from a judgment and an order denying its motion for a new trial in a condemnation proceeding where-

in the defendants Fred C. Lebeck, Lora E. Lebeck, A. M. Gardner, and Florence S. Gardner were awarded a verdict for $2,363. The tract of land involved adjoins the town site of Fairview, which is located partly in the state of Montana and partly in McKenzie county, North Dakota. Prior to the taking of the strip involved in this action, the plaintiff railway company had acquired a right of way for its railway across respondents' lands; and, also, acquired certain other lands for side tracks and roundhouse site, etc., and the main track of the road had been graded and substantially completed. At a point a short distance to the east of the east boundary line of the tract of land involved, and extending north and south, there was a lateral irrigation ditch which extended across appellant's right of way as well as across the proposed side tracks and roundhouse site. About June 28 1913, plaintiff entered upon the lands of the defendants some distance to the east of the southwest corner thereof, and built a ditch extending northerly to the north line of its right of way; and from thence easterly and parallel with said right of way, to a point on said lateral ditch near the eastern boundary line of the tract of land involved in this controversy. This new ditch was constructed by taking earth along the line of such ditch, building a foundation therefrom, and forming an elevated ditch from 3 to 5 feet above the natural surface of the ground, with borrow pits extending along the line of the ditch. For right of way for this "diverted ditch," the plaintiff took, and by these condemnation proceedings sought to acquire, 7.42 acres of respondents' land. The strip of land sought to be condemned forms a part of a 160 acre tract of irrigated land, located in the Yellowstone Valley.

As already stated the tract of land involved in this action adjoins the platted portion of the town site of Fairview, and the particular strip sought to be acquired by the condemnation proceedings occupies that portion of said tract immediately adjacent to the town site. The record shows that some of defendants' witnesses testified that the strip of land sought to be condemned, and other portions of the remaining tract immediately adjacent thereto, was suitable for subdivision into town lots or suburban tracts for residence purposes. Appellant's counsel contends that this element of value was speculative; that this testimony was therefore improper, and should have been excluded.

The so-called town-lot theory was first injected into this lawsuit, not

by defendants, but by the plaintiff. In plaintiff's case in chief, it offered testimony tending to show the value of the strip taken, and the damage to the remainder of the tract from which the strip was taken. Among the witnesses produced by plaintiff to prove these facts was one Richardson, who testified that in his opinion the value of the strip of land taken by the railroad company and sought to be acquired by the condemnation proceedings was $50 per acre. On cross-examination he testified that the strip taken adjoined the town site of Fairview, and that in fixing such valuation he also took into consideration the fact that the railroad company at that time was already built across the land, and that the railroad company had contemplated and planned to build a roundhouse upon the quarter section of land involved in this action.

Thereupon, on redirect examination, the following questions were asked by plaintiff's counsel:

Q. Assuming that the particular property concerned is fitted for use as town lots, do you consider it would be damaged?

A. No, sir, it would not.

Q. There is an old ditch all the way for a half mile along the south end of this farm?

A. Yes, sir.

Q. That is there yet?

A. Yes, sir.

Q. And if this land is fitted for subdivision into lots that ditch will be there?

A. Yes, sir.

Q. If the land is subdivided into lots Lebeck won't have any use for irrigating, will he?

A. No, sir.

This is the first testimony offered on this subject. No attempt was made by plaintiff's counsel to have this testimony stricken out. Afterwards upon the presentation of defendants' case, testimony was also offered, upon the question of value. It will be seen that plaintiff's counsel, in examination of the witness Richardson, asked his opinion as to value and resultant damages upon the assumption that the particular property involved was fit for subdivision as town property. It seems self-evident that, as plaintiff offered expert evidence upon this assumed

state of facts, it was equally competent for the defendants to do so. It would indeed be a strange rule of evidence which would permit one party to a controversy to introduce testimony tending to establish a certain fact and exclude evidence offered by the other party upon the same question.

While this element of damage was injected into the lawsuit by the plaintiff, still the trial court in its instructions limited the jury's consideration thereof in such manner as to eliminate the danger of the jury indulging in any speculation as to what effect future contingencies might have upon the damages sustained by defendants. In its instructions the court said: "You are further instructed that while it is proper for witnesses, in making their estimate of damages to be allowed the defendants, to take into consideration any use to which you believe from the evidence the property in question may be profitably appropriated, yet you are not bound to base your verdict upon the supposition that it would be appropriated to a use other than that to which it is now devoted. In other words if, from the evidence, it appears that said property in question on June 28, 1913, might profitably have been appropriated or adapted to other uses than agricultural or farming, then the witnesses might take that fact into consideration in making their estimate of the damages sustained; but you as jurors are not bound to base your verdict upon that supposition that it would be appropriated to a use other than that to which it was then devoted.

"I instruct you, gentlemen of the jury, that you cannot allow defendants any damages on the theory that the town of Fairview may spread out to Lebeck's land, and the land thereby become valuable for use as town lots, because such damages are too remote and speculative."

Appellant, also, predicates error upon the first instruction quoted. It is contended that this instruction is contrary to the latter instruction, and hence erroneous. We are unable to see how, under the evidence, in this case, appellant could be prejudiced by this instruction.

The undisputed evidence in the case showed that the tract in question adjoined the platted portion of the town site of Fairview, then a town with a population of a few hundred people; that the plaintiff railway company had completed its plans to make Fairview a division point on this new line, and had, prior to the taking of the strip involved

herein, purchased about 30 acres of the same quarter section as a site for its roundhouse, side tracks, and other accommodations required at such division point. The testimony also showed that the strip involved, and the remainder of the tract from which the strip was taken, were nice level land, fitted for subdivision into small suburban tracts or lots for homes.

The defendants in this case were entitled to receive for the taking of the strip of land for the use intended by the plaintiff a sufficient sum to compensate them (1) for the actual value of the 7.42-acre strip taken; (2) for the damages (the difference between the cash market value, before and after the taking of the strip, and the construction of the ditch thereon), if any, which would accrue to the portion of the larger tract not sought to be condemned by reason of its severance from the strip taken, and the construction of the ditch thereon. Comp. Laws 1913, § 8223. It is true, compensation should be awarded in view of conditions existing and apparent at the time of the assessment of damages (Comp. Laws 1913, § 8224); and remote, speculative, uncertain, and imaginary damages should not be allowed. This does not, however, mean that courts and juries must shut their eyes and refuse to see matters which are then apparent, from which reasonable men would reasonably infer that the property taken in the near future naturally would be applied to some other use for which it is adapted. Such facts, while to some extent prospective, nevertheless enter into and frequently largely determine its market values at the time the property is taken.

Since damages must be assessed once for all for all damages present or prospective caused by the taking and the proper construction and operation of the work, the adaptation of the land for a certain purpose may be considered even though the land is not used for that purpose at the time of the taking. 14 Am. & Eng. Enc. Law, 1061. And in determining such adaptability regard should be had "to the existing business or wants of the community, or such as may be reasonably expected in the near future." Little Rock & Ft. S. R. Co. v. McGehee, 41 Ark. 202; See also 15 Cyc. 715; Petersburg School Dist. v. Peterson, 14 N. D. 344, 350, 103 N. W. 756.

"He whose land is taken for a railroad is to be equally protected. He is to receive all that equity and justice require, when the nature and extent of the property and rights to be affected are considered. The

corporation acquire the right to construct their road in any suitable and proper manner, for their own convenience and public accommodation, and the right to vary and change that construction, within the established limits of the road, from time to time, forever, until the state resume the right and privilege of the corporation, or until the charter be altered, repealed, or annulled. Accordingly, the commissioners or jury should take into consideration and appraise all damages, direct or consequential, present and prospective, certain and contingent, which may be judged by them fairly to result to the landowner by the loss of his property and rights, and the injuries done thereto. . . . And, for any loss or injury which results from building the road in a suitable and proper manner, the landowner can maintain no action against the company; the whole matter is concluded by the award of the commissioners or the verdict of the jury on appeal; for, where the legislature authorizes an act the necessary consequence of which is to damage the property of another, and at the same time prescribes the particular mode in which the damage shall be ascertained and compensated, he who does the act cannot be liable as a wrongdoer.

"The damages awarded by the commissioners must be regarded as a full compensation for all the injury which the landowner may sustain, then or at any future time, from any cause which the commissioners were bound, or had a right to consider; so that it can never afterwards be made a question whether, in fact, the commissioners have or have not considered any particular cause of damage legitimate for their consideration. It must be taken that they have done their duty in considering all such causes, and that the party who has acquiesced in their decision, without appeal, is satisfied that they have done so. Or in case of a submission to a jury, it must be understood that they have been governed by the same principles." Lewis, Em. Dom. 3d ed. § 819, p. 1446; Dearborn v. Boston, C. & M. R. Co. 24 N. H. 179, 186.

"If a tract of which the whole or a part is taken for a public use possesses a special value to the owner which can be measured by money, he is entitled to have that value considered in the estimate of compensation and damages. Compensation is not to be estimated simply with reference to the value of the land to the owner in the condition in which he has maintained it but with reference to what its present value is in view of the uses to which it is reasonably capable of being put.

If a part of a lot or tract is taken, the owner may, in order to prove the injury to the remaining part, show the uses to which it might profitably be applied before and after the taking. All facts which contribute to produce injury, as that the residue is put into a worse condition for a particular use, or for the use for which it was designed, or that it is rendered useless for a profitable purpose, may be considered. In determining the uses of which the property is capable, it is necessary to have regard to the existing business or wants of the community, or such as may reasonably be expected in the immediate future. This does not mean that the estimate may be based on any future profits that may be derived from the property when improved for a particular use when the business wants of the community may make it profitable to use the land in that particular way, but it means only that the fact of the property's capability or adaptability to the use may be considered as an element of its present value. The land must be shown to be marketable for the particular purpose, or that there is a reasonable expectation of some demand at some time for the use of the land for that purpose. The particular use to which the property is adapted or applied, although a proper matter to be considered, is not controlling as to the value; witnesses may be required in estimating the market value to show its value for other purposes also." 15 Cyc. 724.

"It would be difficult to enumerate the various elements of damages proper to be considered when part of a tract is taken. The shape and size of the parcel or parcels which remain, the difficulty of access and of communication between the different parts, inconvenience and disfigurement caused by the taking, any interference with the drainage of the land, or with the flow of surface water, or with the water supply, are recognized by all authorities as proper items to be taken into account in assessing the damages. . . . Every element arising from the construction and operation of the work or improvement which, in an appreciable degree, is capable of ascertainment in dollars and cents, that enters into the diminution or increase of the value of the particular property, is properly to be taken into consideration in determining whether there has been damage and the extent of it. Remote, imaginary, uncertain, and speculative damages should be disregarded. . . . The condition of the property before and after the taking may always be shown. Damages must be assessed once for all for all damages

present or prospective caused by the taking and by the proper construction and operation of the works." Lewis, Em. Dom. 3d ed. § 739.

The instructions above quoted limited the jury in its consideration of the use of the property to the evidence in the case, and eliminated from its consideration any speculation as to prospective values by reason of the possibility of the growth of the town of Fairview. When these instructions are considered as a whole, together with the evidence in the case, plaintiff has no cause for complaint.

Appellant's counsel next contends that in proving damages an improper method was pursued. The record discloses that the witnesses, in their testimony as to resultant damages, were not confined to a statement of the value of the property before and after the taking of the strip of land, but were permitted to give their opinions as to the damage sustained by reason of such taking. There is a square conflict in the authorities as to the admissibility of such opinions. In Jones, Commentaries on Evidence, § 388, it is said: "But there is a class of cases in which there is a decided conflict of authority as to the admissibility of opinions as to the amount of damages in condemnation proceedings. The courts of many of the states, perhaps a majority, hold that in such cases witnesses cannot state the amount of damages sustained thereby, on the ground that the amount of damages is the very subject referred to the jury. These courts confine the witnesses to a statement of the value of the property before and after its condemnation. But in many states and with much reason it is held that opinions as to the damage sustained in such cases should be received in evidence. These decisions are based upon the reasoning that, inasmuch as the amount of damages in such proceedings depends entirely upon opinions as to the value before and after the condemnation, and as these opinions are competent, it can make no material difference whether the witness gives his opinion as to the amount of damages at once or whether he is allowed simply to state to the jury his opinion as to values from which the opinion as to damages must necessarily follow by the process of subtraction. The tendency of the later decisions seems to be in favor of this rule."

While this court apparently has never ruled on the precise question, we believe that the rule universally adopted in the trial courts of this state is the one which confines the witness to a statement of the value of the remainder of the property before and after the taking of a part

thereof. This rule is also in harmony with the measure of damages fixed by our statutes (§ 8223, Comp. Laws 1913), and instructions as to the measure of damages heretofore approved by this court. See Tri-State Teleph. & Teleg. Co. v. Cosgriff, 19 N. D. 771, 780, 26 L.R.A. (N.S.) 1171, 124 N. W. 75. Still it is difficult to see any substantial difference between the two rules. The result is virtually the same. But in the case at bar, however, plaintiff is in no position to complain even though the method adopted was erroneous, as it was first adopted by plaintiff. Every witness examined by plaintiff's counsel testified in this manner. Defendant's counsel merely followed the same method pursued by plaintiff's counsel. If it was error, it was first perpetrated by plaintiff's counsel. Plaintiff will not be permitted to take a position in this court inconsistent with that assumed in the court below. The theory pursued in the trial court will be adhered to on appeal. 3 C. J. §§ 618, 628, 631.

In plaintiff's case in chief, a witness Mavity testified that he operated a moving picture show in Fairview. He was thereupon asked the following question: "Q. Has Mr. Lebeck ever authorized you to run an ad for him upon your curtain wherein he stated and authorized you to state upon the curtain that he would sell an acre lot in this southwest quarter of 32 for as small a sum of money as any lot was being sold in Fairview?" An objection to this question was sustained, and error is assigned upon such ruling. This question called for an answer which would give the contents of the advertisement on the curtain, and hence the competency of the evidence was at least doubtful. If answered in the affirmative what would it have proved? There was no evidence offered to show the smallest sum lots in Fairview were being sold for (if such testimony would have been competent.) No offer of proof was made showing what evidence would have been given if the witness had been permitted to testify. The trial court's ruling was not erroneous. Halley v. Folsom, 1 N. D. 325, 48 N. W. 219; 3 C. J. § 736; See also Owen v. Portage Teleph. Co. 126 Wis. 412, 105 N. W. 924, 19 Am. Neg. Rep. 612.

Plaintiff next contends that the evidence is insufficient to support the verdict. The sole specification of insufficiency is as follows: "The plaintiff specifies wherein the evidence is insufficient to support or justify the verdict as follows:

"The court instructed the jury that they could not allow damages on the theory that the town of Fairview, Montana, might spread out and Lebeck's land became a part of it, and be used as town lots. That they could not consider the question of whether or not a crossing had been provided across the ditch and right of way of the plaintiff, and that they could not allow any damages for the severing of the strip to be used as right of way for the ditch, and these instructions became a part of the law of the case. That the defendants' witnesses based their testimony as to the value of the land and damages, according to their own statements, almost wholly upon the town-lot proposition, the severing of the land, and the lack of crossings, and hence the verdict for $2,363 is not justified or supported by the evidence, is excessive, and clearly the result of passion and prejudice, and is against the instruction of the court and the law of the case.

"It further appears from the evidence of the witnesses for the defendants that their estimate of damages varies from $1,000 to $2,000, and hence it is apparent that the opinion of these witnesses cannot be reconciled on any other theory than that they were speculating on future possibilities."

This specification attacks the competency of the witnesses, and the weight to be given to their opinions rather than the sufficiency of the testimony actually given. The witnesses were residents of that vicinity, familiar with the land in question. They all stated that they were familiar with its value. "The weight to be given to their testimony was for the jury, to be measured by the intelligence of the witnesses, and their ability to pass upon such values. St. Louis, K. & N. W. R. Co. v. St. Louis Union Stock Yards Co. 120 Mo. 541, 25 S. W. 399. In Lewis, Em. Dom. § 437, it is said: 'This is a question the determination of which is left mostly to the discretion of the trial judge. . . . It is not necessary that the witnesses should have been engaged in the real-estate business. Intelligent men who have resided a long time in the place, and who are acquainted with the land in question, and say they know its value, are competent, although they are merchants or farmers, and have never bought or sold land in the place. . . . The value of such opinions depends upon the intelligence of the witness, and the knowledge and experience which he possesses in such matters, and is in all cases a question for the jury.'" Union Elevator

Co. v. Kansas City Suburban Belt R. Co. 135 Mo. 353, 36 S. W. 1071; See also Minneapolis, St. P. & S. Ste. M. R. Co. v. Nester, 3 N. D. 480, 57 N. W. 510.

There was a square conflict as to values, both the actual value of the strip taken and the resultant damages to the larger tract. The verdict, while considerably in excess of the values fixed by plaintiff's witnesses, is considerably less than those fixed by defendants' witnesses. It therefore appears that the jurors used their own judgment in determining the compensation to be allowed. This was their province. The verdict has support in the evidence, and is binding on this court.

The judgment and order appealed from must be affirmed. It is so ordered.

CARL WEIST v. FARMERS STATE BANK of Bentley North Dakota, a Corporation.

(155 N. W. 17.)

Action for damages for alleged conversion of grain and also for alleged wrongful procurement of a real estate and chattel mortgage. Evidence examined, and *held:*

Conversion of grain — chattel mortgage — wrongful procurement of — damages — action for — sale of grain — consent.

1. That the plaintiff consented to have the grain sold and the proceeds delivered to the bank; therefore there was no wrongful conversion.

Misrepresentations — reliance upon — contract — translation of interpreter — conspiracy.

2. That there were no misrepresentations made to, and relied upon by plaintiff, by the bank or its officers. The undisputed testimony is that the bank cashier explained fully and fairly his proposition to an interpreter. This is the testimony of both the cashier and the interpreter. The only claim made by defendant is that the contract as translated to him was different. The interpreter was furnished by plaintiff himself, and there is no evidence of any conspiracy between defendant and said interpreter.

Opinion filed October 13, 1915. Rehearing denied November 29, 1915.

Appeal from the District Court of Hettinger County, *Crawford,* J. Reversed.

Crane & Stone, for appellant.

"The legal wrong denominated 'conversion' is any unauthorized act of dominion or ownership exercised by one person over personal property belonging to another." 38 Cyc. 2005.

A defendant cannot be held for conversion unless he had actual or constructive possession of the property. 38 Cyc. 2018B, 2; Jaggard, Torts; Frome v. Dennis, 45 N. J. L. 515.

Dominion means the right in a corporal thing, from which arises the power of disposition and of claiming it from others. 14 Cyc. 866.

An appropriation of the proceeds of the sale of a chattel which was authorized by its owner will not justify an action for conversion of the chattel. 38 Cyc. 2023, 13.

There is no evidence of fraud in this case. There is no evidence that defendant made any misrepresentation, or had any intention to deceive or defraud, or that plaintiff relied upon same to his injury. Plaintiff furnished and relied upon his own interpreter. 20 Cyc. 12 A, 123 M; Nelson v. Grondahl, 12 N. D. 130, 96 N. W. 299.

Where an instruction assumes the possible existence of a state of facts, which the jury have no right to find, there being no evidence in support thereof, reversible error is committed. Bowie v. Spaids, 26 Neb. 635, 42 N. W. 700; Crete v. Childs, 11 Neb. 252, 9 N. W. 55.

Exemplary damages cannot be given unless there is proof of actual damages, or some kind and amounts. Rev. Codes 1905, § 6562, Comp. Laws 1913, § 7145; Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026; 20 Cyc. 142–4.

Where fraud is involved it is the duty of the court to define and instruct upon the subject. 20 Cyc. 123 M, 127 N, and notes.

J. K. Murray, for respondent.

The trial court had no jurisdiction to direct copies of exhibits to be transmitted in lieu of the originals, without good cause being shown and without notice. Comp. Laws 1913, § 7822; Jasper v. Hazen, 1 N. D. 210.

Appellant has also failed to attach to the statement a detailed index. Rule 38 Sup. Ct. Rules, 29 N. D. XXXIX.

Appellant has failed to serve upon respondent or his attorney copies of the exhibits. Comp. Laws 1913, § 7655; 16 Cyc. 847.

Conversion consists of a positive tortious act, a wrongful detention of personal property of another, an exclusion or defiance of the owner's rights, a withholding of possession under a claim of title antagonistic to the owner. Taugher v. Northern P. R. Co. 21 N. D. 111, 129 N. W. 747.

The placing of a mortgage by one upon the crops of another is conversion. Mead v. Mead, 115 Minn. 524, 132 N. W. 1133; McDonald v. Bayha, 93 Minn. 139, 100 N. W. 679; Lee Tung v. Burkhart, 59 Or. 194, 116 Pac. 1066; Continental Gin Co. v. De Bold, 34 Okla. 66, 123 Pac. 159.

One who aids or abets a conversion is guilty of conversion. Heater v. Penrod, 2 Neb. (Unof.) 711, 89 N. W. 762; Continental Gin Co. v. De Bord, 34 Okla. 66, 123 Pac. 159.

It is the substantial injury inflicted that constitutes the gravamen of the action for conversion. State v. Omaha Nat. Bank, 59 Neb. 483, 81 N. W. 319.

Obtaining chattels by duress or fraud is conversion. 38 Cyc. 2020, 2037.

The gist of a fraudulent misrepresentation is the producing of a false impression upon the mind of the other party, and the means of accomplishing this result are immaterial. 20 Cyc. 14.

Exemplary damages may be given even though there is no actual damage, provided the surrounding circumstances warrant. Arzaga v. Villalba, 85 Cal. 191, 24 Pac. 656; Rhyne v. Turley, 37 Okla. 159, 131 Pac. 695.

The charge of the court should be read and considered as a whole. State v. Finlayson, 22 N. D. 233, 133 N. W. 298.

There is a conflict in the evidence, and this has been settled by the jury, and their verdict is binding and conclusive. Wheaton v. Liverpool & L. & G. Ins. Co. 20 S. D. 62, 104 N. W. 850.

BURKE, J. Action for conversion of grain, joined with an action for damages alleged to have been sustained by reason of plaintiff being

induced to execute certain real estate and chattel mortgages. The facts leading up to the litigation are as follows: Plaintiff is a farmer of foreign birth, speaking English with difficulty. He was the owner of a government homestead upon which he resided with his family. The defendant bank owned a quarter section of land in his neighborhood, known as the David land, and in October, 1910, plaintiff called at the bank and negotiated for its purchase from one Hendricks, cashier of the bank. Hendricks did not talk German, and plaintiff, although talking some English, did not feel capable of carrying on the negotiations in that language himself, and procured one Gross to act as an interpreter. As a result of the conversation there was prepared and executed a deed from the defendant bank to plaintiff. There were also executed by the plaintiff and his wife mortgages back upon this tract for the full purchase price. At the same time there was executed and delivered to the bank by plaintiff and his wife a mortgage upon the homestead, and there was also executed and delivered to the bank a chattel mortgage upon the crops growing upon the homestead. This chattel mortgage is in error in reciting the wrong quarter of the section, but this is entirely immaterial to this lawsuit. Plaintiff insists that the mortgages were obtained by fraud, and were contrary to the agreement as he understood it. We quote briefly from his testimony:

Q. Now when Hendricks got the contract drawn up, did you ask him through Gross what was in the contract?

A. Yes, sir.

Q. Did you ask Gross to ask Hendricks what was in that contract that Hendricks had drawn up?

A. Yes, sir.

Q. Did you see Gross then speaking to Hendricks?

A. Yes, sir.

Q. Then did you see Hendricks speak to Gross?

A. Yes, sir.

Q. And what did Gross tell you then that Hendricks had said about it?

A. Just as we talked the deal over, the contract was drawn up—the team of horses that I am to give, and that is the way the contract was drawn up.

Q. Do you know how many papers you signed up that day?

A. I could not just remember.

Q. Did your wife sign a paper too?

A. Yes.

Q. Was she present all the time?

A. Yes.

Q. What did you think you were signing when you signed up those papers there?

A. I thought, just as he told me, that I was signing the contract.

Q. Contract for what?

A. For the David land.

Q. Did you think you were signing the mortgage?

A. No, sir.

Q. If you had known that the papers you were signing that day was a mortgage on your homestead would you have signed them?

A. No, sir.

Q. If you had known that these papers you were signing up that day were anything different than a contract for a sale of the David land and a chattel mortgage for two horses would you have signed the papers?

A. No.

. . . . . .

Q. Look at your signatures thereon. Is that your signature?

A. Yes, sir.

Q. And the other one, too?

A. Yes, sir.

Q. Is that your wife's signature?

A. Yes, sir.

Q. Did you ever knowingly or intentionally sign those mortgages?

A. No, sir.

. . . . . .

Upon cross-examination plaintiff showed considerable knowledge of English, and admitted he had been in this country seven years, and had had many business transactions, involving the giving of more than a dozen mortgages. In fact the cross-examination was conducted very largely without an interpreter. Plaintiff admitted that he had borrowed considerable money from the bank besides the transaction involving the

sale of the land, and that they held security of various kinds upon his crops. Plaintiff also admitted having procured the interpreter that was used at the time of the transaction involving the David land at the bank. Hendricks testified that he was cashier of the bank at the time mentioned, and acted for the bank in that transaction, but was not connected therewith at the time of the trial. He tells a straightforward story as to the transaction. He is corroborated by the interpreter, Mr. Gross, who testifies in part as follows:

Mr. Weist came over one morning in the store and was telling he was going to buy some land from the Farmers State Bank, . . . and he wanted me to come over and talk. . . . He would have to sign those papers he said. He was going to buy a quarter of land at $2,200. I do not known just what the amount was, but he was giving a mortgage back on his homestead and a mortgage back on the place. . . . He came back in the afternoon, and he wanted me to go over and help to fix up that deal. I did not go over at first. He said I was the only one in town that could speak German and he would like to have me go over there, and so I went along.

Q. Who was present at the time you want over with Carl Weist?

A. Mr. Botten, Mr. Hendricks, Carl Weist, his wife, and myself. That is all I know. . . . Mr. Botten gave me some papers, there was some mortgages . . . there was one deed. . . .

Q. I will ask you to state whether or not you told Mr. Weist in German what the contents of these instruments were.

A. Yes, sir.

Q. And at that time did those papers that you explained, these mortgages, exhibits B and C, conform to the terms that Mr. Weist had previously told you were the terms of the purchase of that land?

A. Yes, sir.

. . . . . .

Q. Can you state whether or not these are the notes that are signed for these exhibits?

A. Yes, sir.

. . . . . .

Q. Did you read them and explain their contents to Mr. Weist?

A. Yes, sir.

Q. Was anything said by Mr. Weist in regard to the amounts of the notes?

A. He said there was one $800 and one $1,000 note.

Q. And you read those papers sufficiently to explain their contents for the purpose of explaining what they were about to Mr. Weist?

A. Yes, sir.

Q. Were there any other papers signed at that time?

A. Yes, sir. There was a chattel mortgage.

Q. Did you read over the chattel mortgage?

A. Yes, sir.

Q. So that the contents of that chattel mortgage were explained to Mr. Weist?

A. Yes, sir.

Whatever the transaction really was there is no dispute about the following facts: That Weist procured his own interpreter; that Hendricks made the proposition plain to Gross, the interpreter, exactly according to the notes and mortgages executed; that all of the papers were in fact executed by Weist and his wife. The only dispute that really exists is whether or not Gross, the interpreter, correctly interpreted the bank's proposition to plaintiff. In other words, the dispute is entirely between the plaintiff and his own interpreter.

The bank placed of record the various mortgages, and in the fall of 1912 attempted to collect from Weist the interest upon the various mortgages as well as the other indebtedness which Weist owed to the bank. There is not much dispute as to what happened at that time. Weist says that he raised, in 1912, 700 bushels of wheat on his homestead and 300 bushels on the David quarter. That he threshed the David quarter first, and put the grain in the bin, and then threshed his homestead and put the grain in on top of the other. That he started to haul out the wheat to an elevator where the agent's name was Huber.

Plaintiff testifies:

Q. Why did you haul it in?

A. They (the bank) told me that I had to haul it in; they got a mortgage, and if I did not they would have me locked up.

Q. Who told you that?

A. Grest (collector for the bank).

Q. Did you believe that?

A. Yes, sir.

Q. Why did you believe such a statement as that?

A. I thought it was the same as in Russia; that if I did not do it they could lock me up for it.

. . . . . .

Q. How many bushels of grain did you haul in to the elevator?

. . . . . .

A. About 800 bushels.

Q. Did you know who got the money for this grain you hauled in to the elevator?

A. The bank.

Q. Now when you came in with your first load of grain did you have a talk with the elevator man?

A. Yes, sure. I wanted the money and he would not let me have it.

Q. Well, where did he tell you to go to fix up matters?

A. I should go to Grest.

Q. Did you go to Grest?

A. Yes, sir.

Q. What did you say and what did Grest say about the grain?

A. Grest said that I could not get any money.

Q. What did he say?

A. He said they had it in mortgage.

Q. What did you say?

A. I said, "Not to my knowledge."

Q. What did you say then?

A. Sure, we have got it.

Q. What did you say then?

A. Well, then I says, "You won't let me have any money." "No, sir," he says.

Q. What did he say then?

A. I said, "Well I won't haul any more." "Well," he says, "you have got to bring it in."

Q. Well, did you get any money that day from him?

A. Five dollars cash, $5 money.

Q. Who got the grain checks that day for the grain?

A. Why, he gave me a receipt. I went out to Huber and Huber wrote out a check. I went back to the bank that day and gave it to him and he gave me $5. . . . Huber wrote out the check and told me to go up to the bank with it, and I did go to the bank, and he told me that that fellow would accept that check.

. . . . . .

Q. Now did you ever get any more out of that grain than the $5?

A. Yes, $15 more, he gave me.

Q. Who gave you that?

A. Grest.

Q. When did he give you this $15? That same time you got the $5?

A. No, it was afterwards—three or four days afterwards.

Upon cross-examination he admitted that he owed the bank, outside of the land contract.

Q. Do you know how much you owed the Bentley State Bank outside of the land contract in 1912?

A. One hundred and twenty-five dollars on the seed grain, and $132 on the horse and then a few small items—$10, the small notes that I borrowed in 1911.

Q. And 1912?

A. In 1912, I did not borrow any money, outside of $135.

Q. Have you any idea how much it was that you borrowed in 1911 in these small amounts?

A. It was around $30. I am not quite sure.

Q. And did you get your note back for the $125 you gave receipt?

A. I think I got a note that size, but am not quite sure.

Q. And did you get a note for $132 that you gave for the horse?

A. No, not that I remember.

Q. You would remember it, Carl, wouldn't you, if you had or had not?

A. No.

Q. When was it that you got the $125 note—after they took your wheat?

A. It was around that time.

Q. And they did not give you any other note than the $125 note when you took your wheat?

A. And the small notes. . . . I think I hauled the wheat in about a week.

Q. You hauled it all to the Huber elevator?

A. Yes.

. . . . . .

Q. You just hauled it in there, and he weighed it and you drove away?

A. Yes, sir.

. . . . . .

Q. How long after you brought in the first load was it that you had this talk with Grest?

A. It was the same day.

. . . . . .

Q. And after you hauled in the first load did anybody tell you to haul it in?

A. Yes.

Q. Who?

A. Grest.

Plaintiff brings this action, as we have stated, on two counts: First, he seeks to recover damages in the sum of $600 for the value of the grain which he claims the bank converted, together with $400 exemplary damages. Second, he seeks to recover damages for the wrongful and fraudulent procurement of the mortgage upon his homestead whereby he claims he has been damaged in various sums including such items as the following: "That by reason of the aforesaid promise of plaintiff he has been unable to obtain credit or money; that he has been unable to properly farm his land; that he has been unable to obtain the necessaries of life for himself, wife and children; he has suffered damages in property or personal rights in the sum of $5,000." These and various other items of like nature run the damages claimed to the sum of $12,500, for which relief is prayed. At the close of plaintiff's case, and again at the close of the trial, defendant moved for a verdict in his favor upon the grounds that the undisputed evidence shows as

to the first cause of action there was a delivery of the grain to the elevator and payment therefor from the proceeds to the defendant bank with plaintiff's knowledge and consent, and therefore the action of conversion will not lie. As to the second cause of action, that the undisputed evidence shows a contract evidenced by the various mortgages, superseding all oral negotiations,—which were assented to by the plaintiff as his free and voluntary act, after an investigation by his own interpreter. Those motions were denied and this appeal results.

(1) We will not repeat the evidence above set forth but merely refer to it. From a perusal thereof it is evident that the grain in question was hauled to the elevator and the proceeds paid to the bank after an agreement to that effect had between Weist and the bank. Having consented to this transaction, he cannot now urge conversion by the bank. See 38 Cyc. 2023. The evidence shows that the bank had a seed lien upon some of the grain and upon some also a chattel mortgage, which read upon the S. W. ¼ section 8, whereas plaintiff's homestead was the S. E. ¼ of that section. We do not believe that plaintiff should take advantage of this mistake, however, but the matter is not material. Plaintiff having consented that the grain be sold and the proceeds delivered to the bank, it removes all possibility that the same was wrongfully converted. Gaertner v. Western Elevator Co. 104 Minn. 467, 116 N. W. 945. In reaching this conclusion we do not go to the trouble of setting out defendant's version of the conversation. We accept that of the plaintiff as correct. The court should have directed a verdict in defendant's favor upon the first cause of action.

(2) We have set out hereinbefore extracts of the evidence covering the second cause of action. As we pointed out in the statement of facts, there is nobody to contradict Hendricks' version of the contract. The offer that he made on behalf of the bank was that plaintiff should give a mortgage back upon the David quarter and also upon the homestead. This he transmitted to plaintiff's interpreter. The interpreter says that he received this offer in the exact language that Hendricks says it was given. Thus far there is no dispute. We may assume, for the purposes of this argument, that plaintiff misunderstood his own interpreter, or we may even assume that the interpreter incorrectly transmitted the message, or even intentionally misled the plaintiff. There is not the slightest evidence that defendant conspired with the inter

preter or knew of the misrepresentation. Plaintiff relied entirely upon his own interpreter to obtain the proposition from the bank, and, having satisfied himself of the bank's proposition, accepted it. Two years elapsed before he gave any sign that he had been mistaken or deceived. We do not need to spend much time upon this proposition. To set aside the mortgages given under the sanctity of his own acknowledgment, plaintiff must show their invalidity by evidence that is clear and convincing, and that leaves no doubt in the mind of the chancellor. Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; Security State Bank v. Rettinger, 31 N. D. 240, 153 N. W. 971. In the case at bar he not only has not done this, but he has offered no evidence whatever showing fraud or deceit upon the part of the bank. The only explanation he offers is that his own interpreter must have deceived him. See 20 Cyc. 123M. It cannot be claimed that the defendant bank made a material misrepresentation to him. The evidence is uncontradicted that Hendricks made no misrepresentations whatever, either to the defendant or to his interpreter. Weist does not attempt to personally know the nature of Hendricks' language at time of contract. He does not attempt to say that it was other than given by Hendricks and Gross. Therefore, how can he say that there was misrepresentation? If plaintiff has been deceived, it is by Gross, his interpreter; and Gross is the person liable for any resultant damage, rather than the bank. The trial court should have directed a verdict for the defendant upon this cause also.

This disposes of the case, and renders it unnecessary to discuss the other errors assigned. Judgment of the trial court is reversed and the action ordered dismissed.

W. G. HARVISON v. LOUISA B. GRIFFIN and Thomas P. Griffin and J. I. Case Threshing Machine Company, a Foreign Corporation.

(155 N. W. 655.)

Real estate — mortgages — securities — marshaling of — purchaser — foreclosure.

1. G. gave three mortgages upon his land. The first covers all of sec. 33, and the southeast quarter and south half of the northwest quarter of sec. 27, all in township 137, range 67, and this mortgage is owned by plaintiff H., who seeks to foreclose the same as to the land in sec. 27, he having released such mortgage as to sec. 33 upon payment by the grantee of the mortgagor, one B. of his *pro rata* share of the indebtedness owed plaintiff. The second ran to N. and was assigned to defendant and appellant, the Case Company, and covers all the land above described. The third covers merely the land in sec. 27, and runs to appellant, the Case Company. The latter mortgage was foreclosed by advertisement in June, 1910, and went to sheriff's deed on June 6, 1911, the appellant company being the purchaser. Such purchase took place prior to the release by the plaintiff of the land in section 33 and after B's purchase from the mortgagor of said section 33. The appellant seeks to compel plaintiff to marshal his securities by restoring to the land not covered by the third mortgage. *Held*, under the facts, that such attempted defense is untenable.

Equitable rule — marshaling of securities.

2. The equitable rule as to marshaling of securities as embodied in § 6716 of the Compiled Laws of 1913 (§ 6140, Rev. Codes 1905) is explained and applied in the opinion, and it is held not to sustain appellant's contention.

Mortgage — foreclosure of — title under — mortgagee — purchaser — rights of — third party — mortgage lien of purchaser — extinguished — debt satisfied.

3. Appellant purchased and obtained the title through the foreclosure of its mortgage, not as mortgagee, but as purchaser, and thereby obtained only such rights as any third-party purchaser might have obtained, and by such purchase its mortgage lien was extinguished and its debt satisfied.

Note.—As to the general rule of marshaling assets and securities, see note in 59 Am. Rep. 389.

As to marshaling assets for benefit of mortgagor, see note in 47 L.R.A.(N.S.) 302.

And for authorities on rule as to inverse order of alienation as affected by assumption of mortgage, see note in 39 L.R.A.(N.S.) 359.

Foreclosure sale — bids at — by holder of inferior lien — places value on property — subject to first mortgage — position of — same as stranger — grantee — debt and mortgage — assuming — extent of.

4. By its bid at the foreclosure sale the Case Company voluntarily placed a value upon the equity subject to the first mortgage of the amount of its bid, and it stands in no more favorable position than would any stranger who had purchased at the sale. Such purchaser could not urge that the land in section 33 owned by a prior grantee from the mortgagor should be first applied towards the satisfaction of plaintiff's mortgage, except to the extent that such prior grantee had assumed and agreed to pay such indebtedness.

Purchaser — at mortgage sale — title acquired — same of mortgagor — at date of mortgage foreclosed — equity — prior liens — subject to.

5. By its purchase through the foreclosure proceedings culminating in the issuance to it of the sheriff's deed, the Case Company acquired the same title which the mortgagor possessed at the date of the delivery of the mortgage, which was his equity subject to the prior liens.

Foreclosure sale — value fixed by bids — presumption — prior existing liens.

6. It is presumed that the Case Company bought the land at the foreclosure sale at its full value, less the amount of prior existing liens thereon.

Property — lien upon — sale of — extinguished lien — marshaling securities — rule of — right to invoke.

7. The Code (Comp. Laws 1913, § 6721), expressly provides that "the sale of any property on which there is a lien in satisfaction of the claim secured thereby extinguishes the lien thereon." The instant, therefore, that appellant's lien was thus satisfied, its right to invoke the rule as to marshaling securities ceased.

8. The doctrine that a court of equity will, under certain circumstances, treat a mortgage as still existing after the lien thereof has been extinguished, has, for reasons stated in the opinion, no application under the facts in the case at bar.

Opinion filed November 29, 1915.

Appeal from the District Court of Stutsman County, *Coffey*, J. From a judgment in plaintiff's favor, defendant J. I. Case Threshing Machine Company appeals.

Affirmed.

Knauf & Knauf and *Upham, Black, Russell & Richardson*, for appellants.

Where one has a mortgage on several tracts of land, and subsequent thereto the mortgagor mortgages a portion thereof to another party, and the first mortgagee has notice of the interest and mortgage of the

subsequent mortgagee, the law places upon the first mortgagee the duty to so conduct himself with reference to his first mortgage as not to impair the security of the subsequent incumbrancer. Rev. Codes 1905, §§ 4690, 6140, Comp. Laws 1913, §§ 5218, 6716; Union Nat. Bank v. Moline, M. & S. Co. 7 N. D. 201, 73 N. W. 527; 3 Pom. Eq. Jur. 1414; Gotzian v. Shakman, 89 Wis. 52, 46 Am. St. Rep. 820, 61 N. W. 304; Irvine v. Perry, 119 Cal. 352, 51 Pac. 544, 949.

As a purchaser of a portion of the premises covered by the first mortgage, the right of appellants was to have the property sold on foreclosure in satisfaction of such mortgage in the inverse order of its alienation. Merced Security Sav. Bank v. Simon, 141 Cal. 11, 74 Pac. 356; Civil Code, §§ 2899, 3433; Kent v. Williams, 114 Cal. 537, 46 Pac. 462; Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; Mack v. Shafer, 135 Cal. 113, 67 Pac. 40; Re Levin Bros. 139 Cal. 350, 63 Pac. 335, 73 Pac. 159; Orvis v. Powell, 98 U. S. 176, 25 L. ed. 238; National Sav. Bank v. Creswell, 100 U. S. 641, 25 L. ed. 714.

Where a mortgagor of land sells part of it to one, and afterwards the residue to another, the mortgage rests upon the last conveyed. Chase v. Barnard, 64 N. H. 615, 17 Atl. 410; Merchants' State Bank v. Tufts, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760; Howser v. Cruikshank, 122 Ala. 256, 82 Am. St. Rep. 76, 25 So. 206.

At the time Baylies obtained the deed to the land, and for a long time prior thereto, appellant company had the right to insist that the lands in section 33 be first sold under the mortgage. Under the sheriff's deed the purchaser acquired all the rights which were held by the mortgage. That being a right held by the mortgage, it is still a right in the company, under its deed. 3 Pom. Eq. Jur. 1225, and note; Northwestern Land Asso. v. Harris, 114 Ala. 468, 21 So. 999; 2 Jones, Mortg. 5th ed. 1620; 2 White & T. Lead. Cas. in Eq. 297; Whittaker v. Belvidere Roller Mill Co. 55 N. J. Eq. 674, 38 Atl. 295; Irvine v. Perry, 119 Cal. 352, 51 Pac. 544, 949.

Geo. W. Thorp and *Russell D. Chase,* for respondent.

The mortgagee, after becoming the purchaser for the full amount of the indebtedness, cannot claim any rights by virtue of the mortgage, after having extinguished the same and putting himself in the same

position as any other purchaser. Ledyard v. Phillips, 47 Mich. 305, 11 N. W. 170.

The purchaser at a foreclosure sale takes the same title that the mortgagor had at the time of the execution and delivery of the mortgage foreclosed, and subject to the liens. North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466, 29 L.R.A.(N.S.) 517, 138 Am. St. Rep. 717, 117 N. W. 453; 27 Cyc. 1492; 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.

Such purchaser is only concerned with the state of the title at the date of execution and delivery of such mortgage. Nichols v. Tingstad, 10 N. D. 172, 86 N. W. 694; Kuhnert v. Conrad, 6 N. D. 215, 69 N. W. 185; Belleville Sav. Bank v. Reis, 136 Ill. 242, 26 N. E. 646; 27 Cyc. 1383, 1488.

"A mortgage is a lien upon everything that would pass by a grant of the property, and upon nothing more." Rev. Codes 1905, § 6162, Comp. Laws 1913, § 6738.

"The sale of any property on which there is a lien in satisfaction of the claim secured thereby extinguishes the lien thereon." Rev. Codes 1905, chap. 74, § 6145, Comp. Laws 1913, § 6721.

"The sale is made and completed, and the title passes on the execution and delivery of the sheriff's deed in foreclosure proceedings. North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466, 29 L.R.A.(N.S.) 517, 138 Am. St. Rep. 717, 117 N. W. 453.

"Where property is sold subject to a prior lien such property stands charged with its satisfaction." Lyons v. Godfrey, 55 Neb. 755, 76 N. W. 464.

If the mortgagor pays off the mortgage, or if the parcel remaining in his hands is sold in full satisfaction of it, he cannot call upon his grantees for any reimbursement. Equality of equities destroys all right and liability of rateable contribution. 3 Pom. Eq. Jur. 3d ed. § 1224; 2 Jones, Mortg. §§ 1091, 1092, 1620, 1621.

The rule is that if one party has a mortgage or lien upon two pieces of property, and another party has a mortgage or lien upon one of such pieces of property only, the latter has a right in equity to compel the former to resort first to the property upon which he has an exclusive lien, for its satisfaction, if that course is necessary, for the satisfaction

of the claims of both parties, whenever such course will not trench upon the rights or operate to the prejudice of the first party. 1 Story, Eq. Jur. § 633.

But, in such case, the party complaining must show damages. Union Nat. Bank v. Moline, M. & S. Co. 7 N. D. 201, 73 N. W. 537.

Where a creditor who has his debt secured by two funds has received full satisfaction out of either, equity will not interfere. Before assets or securities can be marshaled, the necessity for so doing must appear. Franklin v. Warden, 9 Minn. 124, Gil. 114; Hull v. Carnley, 17 N. Y. 202; State v. Weston, 17 Wis. 108; Manning v. Monaghan, 23 N. Y. 539; Duester v. McCamus, 14 Wis. 308; Quinnipiac Brewing Co. v. Fitzgibbons, 73 Conn. 191, 47 Atl. 130; 4 Pom. Eq. Jur. 3d ed. § 1414.

"The rule of marshaling does not prevail except where both funds are in the hands of the common debtor of both creditors." 26 Cyc. 932; Carter v. Neal, 24 Ga. 346, 71 Am. Dec. 136; Citizens' State Bank v. Iddings, 60 Neb. 709, 84 N. W. 78; Lee v. Gregory, 12 Neb. 282, 11 N. W. 297.

And such rule applies only as between different creditors. 26 Cyc. 936.

When a mortgagee takes possession under a mortgage, and sells the property, the amount realized at the sale is conclusive on all parties as to the value of the property, and the amount to be applied on the indebtedness. First Nat. Bank v. Northwestern Elevator Co. 4 S. D. 409, 57 N. W. 77.

The rights of others, and of the prior lienholder, cannot be prejudiced by the marshaling of securities. 27 Cyc. 1366.

Every conveyance by deed, mortgage, or otherwise of real estate, etc., shall be void as against any subsequent purchaser in good faith, or as against any attachment, . . . or judgment.

The notice referred to as having been given, and of which respondent knew, as appellant claims, is not authorized by statute, and the recording of the same did not constitute constructive notice to anyone. Sarles v. McGee, 1 N. D. 365, 26 Am. St. Rep. 633, 48 N. W. 231; 2 Devlin, Real Estate, 3d ed. §§ 711, 715; Wade, Notice, § 119, and cases cited.

The party seeking the marshaling of securities must make a demand for such relief, and that the same be done under the statute. The mere

recording of a notice is not sufficient. Rev. Codes 1905, § 6140, Comp. Laws 1913, § 6716; 26 Cyc. 935.

Notice to an agent to bind the principal must be notice with reference to some duty within the agent's authority; it must be given to the agent for the benefit of the principal during the existence of the agency. 31 Cyc. 1587, ¶ 4.

A conspiracy cannot result from an agreement between two parties to perform a legal act. 8 Cyc. 645–647.

The burden of proof is on the party alleging fraud. Abbott, Proof of Facts, p. 496; 20 Cyc. 120.

The right of appellant here is the same as that of a stranger or outside party. 2 Jones, Mortg. § 1622; Kellogg v. Rand, 11 Paige, 59.

FISK, Ch. J. This litigation arose in the district court of Stutsman county and comes here for trial *de novo*. The question for decision is whether defendant, J. I. Case Threshing Machine Company, possesses the right which it attempts to assert of compelling plaintiff to marshal the securities covered by his mortgage. None of the material facts are in dispute. Briefly stated, they are as follows: On December 26, 1906, defendants Louisa B. and Thomas P. Griffin being the owners of all of section 33, and the S.E.¼ and S.½ of N.W.¼ of section 27, township 137, range 67, mortgaged the same to one J. J. Nierling to secure the payment of $5,000 and interest. Nierling assigned such mortgage on March 11, 1907, to Amus H. Lamp, who on October 14, 1911, assigned same to the plaintiff, who seeks by this action to foreclose the same. On March 12, 1907, the Griffins mortgaged all of such lands to J. J. Nierling to secure the payment of $900, and on October 3, 1910, Nierling assigned the same to the Case Company. On September 10, 1907, the Griffins mortgaged to the Case Company the S.E.¼ and the S.½ of N.W.¼ aforesaid to secure the payment of $2,895. After executing the three mortgages aforesaid, the Griffins on March 11, 1910, conveyed to F. A. Baylies by warranty deed, all of section 33, such grantee assuming and agreeing to pay a certain proportion of the encumbrances against said section 33. Such agreement is contained in the deed, and is as follows: "Subject to encumbrances amounting to five thousand five hundred fifty-eight and no-100 ($5,558) dollars, which said F. A. Baylies assumes and agrees to pay with all interest from the 25th day

of February, 1910. Said encumbrances consist of mechanics' liens, amounting to seven hundred fifty and no/100 ($750) dollars; taxes, one hundred seven and 64/100 ($107.64) dollars; accrued and delinquent interest, four hundred seventy-six and 36/100 ($476.36) dollars; first and second mortgages, four thousand two hundred twenty-four and no/100 ($4,224) dollars, being the *pro rata* of first mortgage of five thousand and no/100 ($5,000) dollars, given to J. J. Nierling December 26, 1906, and *pro rata* of second mortgage of nine hundred and no/100 ($900) dollars, given to J. J. Nierling March 12, 1907, both mortgages covering 880 acres, being all of section 33 and the S.E.¼ of section 27, and the S.½ of the N.W.¼ of section 27, all in township 137, range 67, Stutsman county, North Dakota, the payment of said encumbrances to apply to the satisfaction of said liens on section 33."

Thereafter and in June, 1911, F. A. Baylies conveyed said section 33 to the present owner, Jennie B. Baylies. The third mortgage running to the Case Company was foreclosed by it, the sale being made on June 4, 1910, at which sale said company became the purchaser, and no redemption having been made, it acquired title on June 6, 1911, by sheriff's deed to the land covered by its mortgage. Subsequent to its foreclosure of the third mortgage aforesaid, the Case Company, as assignee of the second mortgage, caused foreclosure thereof, and at the sale F. A. Baylies became the purchaser of the S.E.¼ and S.½ of N.W.¼ of section 27 for $375, and all of section 33 was bid in by the Case Company for $854.98. Thereafter and on June 6, 1911, the Case Company as owner of S.E.¼ and S.½ of N.W.¼ redeemed such land from Baylies and on March 18, 1911, Baylies as owner of section 33 redeemed the same from the Case Company.

Thereafter and on November 2, 1911, plaintiff, Harvison, in consideration of a *pro rata* payment in proportion to the relative acreage, satisfied his first mortgage as to section 33, and seeks by this action to foreclose on the land of the Case Company for the balance due him. The Case Company urges that it was the duty of plaintiff and his assignor to resort first to section 33 for payment of his mortgage, and that by releasing his security as to that section he has lost his right to the extent of the value of section 33 to look to its said lands for any balance which may be unpaid on such mortgage. In other words, it urges the equitable rule of marshaling securities as embodied in our Code at § 6716, Com-

piled Laws of 1913. This section reads: "When one has a lien upon several things and other persons have subordinate liens upon, or interests in, some but not all of the same things, the person having the prior lien, if he can do so without risk of loss to himself or of injustice to other persons, must resort to the property in the following order, on the demand of any party interested:

1. To the things upon which he has an exclusive lien.

2. To the things which are subject to the fewest subordinate liens.

3. In like manner inversely to the number of subordinate liens upon the same thing; and,

4. When several things are within one of the foregoing classes, and subject to the same number of liens, resort must be had:

(a) To things which have not been transferred since the prior lien was created.

(b) To the things which have been so transferred without a valuable consideration; and,

(c) To the things which have been so transferred for a valuable consideration in the inverse order of the transfers."

This statute is merely declaratory of the general equity rule, which rule was quite elaborately stated and applied by this court in Union Nat. Bank v. Moline, M. & S. Co. 7 N. D. 201, 73 N. W. 527. Counsel do not differ as to such rule, but merely as to the proper application thereof. Respondent's counsel state that they have no quarrel with any of the numerous authorities cited and relied on by appellant's counsel; but they insist that such rule has no application to the facts in the case at bar. In other words, they in effect concede, as we understand their brief, that if the Case Company, instead of acquiring title to the S.E.¼ and the S.½ of the N.W.¼ through the foreclosure sales, had remained merely as owner of the mortgage liens thereon, the rule of the statute would have applied in full force, and the contention of appellant's counsel would have been unanswerable. They point with much emphasis to the fact that the Case Company by foreclosing its mortgages and securing title had wiped out its liens and had fully satisfied its claims, and that it stands in the same relation to the land as would a stranger to the mortgages who had purchased at the foreclosure sales and secured sheriff's deeds, and that it is conclusively presumed that its bid at such foreclosure sale was made with knowledge of the first mortgage and subject

thereto. In other words, by its voluntary bid, it placed a value upon the equity subject to the first mortgage of the amount of such bid. We think there can be no doubt as to the correctness of the proposition that the Case Company stands in no more favorable position than would a stranger who had purchased at the sale (27 Cyc. 1721 b, and cases cited), and we deem it entirely clear that such a stranger would not be heard to urge such a defense as is here urged. As is well stated by respondent's counsel: "If a third party had purchased the S.E.¼ and S.½ of the N.W.¼ of 27 under the company's mortgage foreclosures, at the same prices that were bid under these foreclosures, the purchase price would have been applied to the extinguishment of the Case Company's indebtedness and the discharge of the lien, and Case Company could have found no fault because they would have received the entire amount of their debt against the Griffins, but the fact that the statute gives them the right to purchase at their own sale and under their own foreclosure and power does not give them any greater right than any other purchaser at the sale. Whatever amount they bid is credited on the indebtedness, and, if sufficient to pay the indebtedness, operates to wholly extinguish the same and to release and satisfy the mortgage, and they then become, when a deed is issued, the owner of the premises, subject to prior encumbrances, the same as any other purchaser. If the mortgagee purchaser at such a sale had any rights more valuable as a purchaser than a third-party purchaser, it would necessarily result in unfair competition at the public sale. The mortgagee after becoming the purchaser, for the full amount of the indebtedness, certainly cannot claim any rights by virtue of the mortgage, after having extinguished the same and putting himself in the same position as any other purchaser. Avon-by-the-Sea Land & Improv. Co. v. Finn, 56 N. J. Eq. 808, 41 Atl. 360; Ledyard v. Phillips, 47 Mich. 305, 11 N. W. 170." Had the Case Company desired to invoke the equity rule as against the owner of the first mortgage and the fee owner of section 33, it might have done so by foreclosing by action, making the holder of such prior mortgage and also the owner of section 33 parties. It, however, chose to foreclose by advertisement, and thereby ultimately acquired absolute ownership of the land subject to plaintiff's mortgage through its voluntary bid at the sale, without urging that the securities be marshaled under such statutory rule. By its purchase at the foreclosure sale, the

Case Company acquired the same title which the mortgagors possessed at the time the mortgage was executed and delivered which was a title encumbered by the prior liens. In other words, it acquired through the sheriff's deed the same rights, and none other, that the mortgagors possessed at the date of the mortgage, or which were subsequently acquired by them, which was the equity subject to the prior liens. North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466, 29 L.R.A. (N.S.) 517, 138 Am. St. Rep. 717, 117 N. W. 453; Nichols v. Tingstad, 10 N. D. 172, 86 N. W. 694; 27 Cyc. 1488, 1491; Comp. Laws 1913, § 8087.

The Case Company is presumed to have bought the land at its full value, less the amount of indebtedness secured thereon by prior liens, and its mortgage was thereby paid and extinguished. Belleville Sav. Bank v. Reis, 136 Ill. 242, 26 N. E. 646; 27 Cyc. 1383.

"The sale of any property on which there is a lien in satisfaction of the claim secured thereby extinguishes the lien thereon," Comp. Laws 1913, § 6721. Its liens having been extinguished, it leaves plaintiff's mortgage as the only existing lien from and after the date of the sheriff's deed. How, therefore, can the Case Company successfully urge the application of the rule as to marshaling securities? Its demand for the marshaling of securities was not served upon the plaintiff's assignor until after it had acquired title subject to such mortgage. It was at such time in no more favorable position to require of plaintiff or his assignor such marshaling of securities than was the mortgagor, who was the owner previous thereto. On the other hand, Baylies, the grantee of section 33, having purchased prior to the date of appellant's purchase, might with propriety assert that section 33 should not be looked to for more, at least, than its *pro rata* share of the indebtedness secured by the plaintiff's mortgage. 3 Pom. Eq. Jur. 3d ed. § 1224; 2 Jones, Mortg. §§ 1091, 1092, 1620, 1621. The record discloses that Baylies assumed and has paid the *pro rata* share of the first and second mortgages, and plaintiff by this action seeks to subject the land in section 27 which appellant owns, to its *pro rata* share. We see no valid reason why he cannot legally do so. The instant that appellant's liens were satisfied, its right to invoke the rule as to marshaling securities ceased. It was no longer necessary for its protection that it should invoke such rule. The object sought to be accomplished

thereby no longer existed. In support of these conclusions are the following: 1 Story, Eq. Jur. § 633; Union Nat. Bank v. Moline, M. & S. Co. 7 N. D. 201, 73 N. W. 527; Franklin v. Warden, 9 Minn. 124, Gil. 114; Hull v. Carnley, 17 N. Y. 202; State v. Weston, 17 Wis. 108; Manning v. Monaghan, 23 N. Y. 539.

It should be borne in mind that the appellant acquired title through the foreclosure sale, not as mortgagee, but as purchaser, and consequently, as before stated, its rights are no greater than those of a stranger, had such a third party purchased the premises.

Appellant suggests that a court of equity may treat a mortgage as still alive where the interests of the mortgagee require this to be done. This is, no doubt, abstractly correct, but this equitable doctrine is invoked only where the equities demand that it be done. Having purchased the premises, not as a mortgagee, but as any other purchaser, a mere stranger to the mortgage, might have done, we see no tenable ground for invoking such doctrine. Furthermore, we fail to see wherein appellant's equities preponderate over those of respondent. We have carefully considered § 6716 of the Compiled Laws of 1913 (§ 6140, Rev. Codes 1905), as herein quoted at length, as well as the many authorities cited by appellant's counsel, and we are unable to perceive how they support appellant's contention. Upon a careful reading of such cases, they all may, we think, be readily distinguished and differentiated from the facts in the case at bar. Appellant places much reliance upon the case of Whittaker v. Belvidere Roller Mill Co. 55 N. J. Eq. 674, 38 Atl. 289. At first blush, the 6th paragraph of the syllabus would seem to support appellant's contention. It reads: "The purchaser at a foreclosure sale under a second mortgage receives the title which the mortgagor had at the time of the delivery of that mortgage, and, attendant upon that title, he takes the right which the second mortgagee received to have the assets marshaled, and he may assert this equity against the subsequent voluntary and fraudulent grantee of the mortgagor."

The facts of that case are somewhat complicated and too numerous to justify a restatement in this opinion. What was really held, however, in so far as such holding is pertinent to the case at bar, was that the title acquired by one Miller, who purchased at a foreclosure sale under a second mortgage which covered only a portion of the lands covered

by the first mortgage, related back to the title which passed by such second mortgage, and conveyed to him the estate which such mortgagor possessed in the mortgaged premises on the date of the delivery of that mortgage, with all its attendant equities. And, "attendant upon that title," he obtained the right which the second mortgagee received to have the assets marshaled as against the mortgagor and his fraudulent grantees. In other words, having purchased the estate covered by the second mortgage which the mortgagor possessed at the date of the delivery of such mortage, and there being no prior valid conveyances of the lands covered only by the first mortgage or other accrued equities intervening, Miller was entitled as against the mortgagor, Adam B. Searles, and his fraudulent grantee, Roderick B. Searles, to have the lands not owned by him first sold and the proceeds applied towards the satisfaction of the first mortgage. The controversy merely involved the respective rights of Miller and of Adam B. Searles, the mortgagor and his said fraudulent grantee. The first mortgagee did not resist Miller's claim to have the securities marshaled, nor, for that matter, could he successfully do so under the facts, for Miller was the only valid purchaser of any portion of the mortgaged premises, except the Roller Mills Company, which company purchased the lot covered by the second mortgage and by the deed assumed and agreed to pay both mortgages.

It is quite apparent that the holding would have been otherwise had there been, as in the case at bar, a transfer of the portion of the lands covered by the first, and not by the second, mortgage, to a good-faith purchaser for value prior to Miller's purchase under the foreclosure of the second mortgage. The New Jersey court, in so far as the point here involved is concerned, merely recognized and enforced the general rule which requires a resort, first, to the mortgaged property which has not been transferred. In other words, it ordered that the security be marshaled in the inverse order of its alienation subsequent to the delivery of the first mortgage, and it recognized Miller as a purchaser from the mortgagor of the lot embraced in the second mortgage, and as such purchaser entitled to invoke the rule in his behalf, there having been no valid transfer of the other security. As we read it, the case does not support appellant's contention.

It follows from what we have above stated, that the judgment appealed from was correct and it is accordingly affirmed.

OLMFREDER SEVERTSON v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation.

(155 N. W. 11.)

Facts disputed — jury trial — directed verdict — railway company — street crossing — city — accident — stopping of trains — sidewalk.

1. It is error to take a case from the jury and to direct the verdict for the defendant where, though the facts are seriously disputed, there is evidence to show that a railway train was stopped on or immediately before a street crossing in a city, and that plaintiff's intestate, an old man, immediately before said accident, was seen struggling in the middle of the track a short distance in front of the engine, and either on the sidewalk which crossed the track or some 7 or 8 feet beyond it, and that, after he began to so struggle, the railway company started its engine and the cars thereto attached, and ran over said deceased.

Railway company — stopping of trains — on public street — city — starting trains — warning before.

2. A railway company has no right, when it stops a train upon a public street of a city, to start it without giving ample warning and acquainting itself of the fact as to whether or not there are travelers upon said street or at or near said crossing who may be in danger.

Contributory negligence — question of fact — for jury — railroad crossing — pedestrian attempting to cross — train standing still — starting.

3. It is a matter of fact for the jury, and not of law for the court, to decide whether a traveler upon a public street of a city is guilty of contributory negligence who attempts to cross a railroad track behind and south of a freight or gondola car attached to an engine pointing away from him, and with several cars north and attached thereto, and when such engine or train of cars is standing still either on or near said crossing, and there are no gates or flagmen at the same.

Opinion filed November 30, 1915.

Appeal from the District Court of Walsh County, *Kneeshaw*, J. Action to recover damages for personal injuries by wrongful act. Judgment for defendant. Plaintiff appeals.

Reversed.

M. A. Hildreth and *H. C. De Puy*, for appellant.

Where the facts as to the acts which it is contended constitute con-

tributory negligence are in dispute, the question is one for the jury, and it is error for the court to take such a case from the jury, or to direct a verdict. Rober v. Northern P. R. Co. 25 N. D. 394, 142 N. W. 22; McNamara v. New York C. & H. R. R. Co. 136 N. Y. 650, 32 N. E. 765; Wilson v. Southern P. R. Co. 62 Cal. 164; Painton v. Northern C. R. Co. 83 N. Y. 8; 2 Thomp. Neg. §§ 1697, 1699, 1700; Patterson, Railway Acci. Law, p. 156, cases cited in foot notes; Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 377, 121 N. W. 830; Johnson v. Great Northern R. Co. 12 N. D. 420, 97 N. W. 546; Braun v. Buffalo General Electric Co. 200 N. Y. 495, 34 L.R.A. (N.S.) 1089, 140 Am. St. Rep. 645, 94 N. E. 206, 21 Ann. Cas. 370; Richmond & D. R. Co. v. Powers, 149 U. S. 43, 44, 37 L. ed. 642, 643, 13 Sup. Ct. Rep. 748, 7 Am. Neg. Cas. 369.

The doctrine of the last clear chance is the settled law of this jurisdiction. Welsh v. Fargo & M. Street R. Co. 24 N. D. 463, 140 N. W. 683; and cases cited.

Contributory negligence is no defense, if the defendant railway company, by the exercise of ordinary care, could have discovered that deceased was in a position of peril in time to have averted the accident. Harrington v. Los Angeles R. Co. 140 Cal. 514, 63 L.R.A. 238, 98 Am. St. Rep. 85, 74 Pac. 15; Thompson v. Salt Lake Rapid Transit Co. 16 Utah, 281, 40 L.R.A. 172, 67 Am. St. Rep. 621, 52 Pac. 92; Baltimore Consol. R. Co. v. Rifcowitz, 89 Md. 338, 43 Atl. 762; Hart v. Cedar Rapids & M. City R. Co. 109 Iowa, 631, 80 N. W. 662; Miller v. Cedar Rapids Sash & Door Co. 153 Iowa, 735, 134 N. W. 411; Ramsey v. Cedar Rapids & M. C. R. Co. 135 Iowa, 329, 112 N. W. 798; Murray v. St. Louis Transit Co. 108 Mo. App. 501, 83 S. W. 995; St. Louis S. W. R. Co. v. Thompson, 89 Ark. 496, 117 S. W. 541; 2 Thomp. Neg. 1476; Costello v. Third Ave. R. Co. 161 N. Y. 317, 55 N. E. 897; Bittner v. Crosstown Street R. Co. 153 N. Y. 76, 60 Am. St. Rep. 588, 46 N. E. 1044, 1 Am. Neg. Rep. 642; Wasmer v. Delaware, L. & W. R. Co. 80 N. Y. 212, 36 Am. Rep. 608; Silliman v. Lewis, 49 N. Y. 379; Austin v. New Jersey S. B. Co. 43 N. Y. 75, 3 Am. Rep. 663; Haley v. Earle, 30 N. Y. 208; Weitzman v. Nassau Electric R. Co. 33 App. Div. 585, 53 N. Y. Supp. 905; McKeon v. Steinway R. Co. 20 App. Div. 601, 47 N. Y. Supp. 374; Bump v. New York, N. H. & H. R. Co. 38 App. Div. 60, 55 N. Y. Supp. 962.

affirmed in 165 N. Y. 636, 59 N. E. 1119; Kenyon v. New York C. & H. R. R. Co. 5 Hun, 479; Radley v. London & N. W. R. Co. L. R. 1 App. Cas. 754, 46 L. J. Exch. N. S. 573, 35 L. T. N. S. 637, 25 Week. Rep. 147; Davies v. Mann, 10 Mees. & W. 546, 12 L. J. Exch. N. S. 10, 6 Jur. 954, 19 Eng. Rul. Cas. 190; Isbele v. New York & N. H. R. Co. 27 Conn. 393, 71 Am. Dec. 78; Trow v. Vermont C. R. Co. 24 Vt. 487, 58 Am. Dec. 191; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; 1 Shearm. & Redf. Neg. 5th ed. § 99; Patterson, Railway Acci. Law, § 58; Acton v. Fargo & M. Street R. Co. 20 N. D. 435, 129 N. W. 225.

It is the duty of courts, when a motion for directed verdict is made, to give a construction to the evidence most favorable to the opposite party. Warnken v. Langdon Mercantile Co. 8 N. D. 243, 77 N. W. 1000; Bohl v. Dell Rapids, 15 S. D. 619, 91 N. W. 315; Marshall v. Harney Peak Tin Min. Mill. & Mfg. Co. 1 S. D. 350, 47 N. W. 290; Merchants' Nat. Bank v. Stebbins, 15 S. D. 280, 89 N. W. 674; John Miller Co. v. Klovstad, 14 N. D. 435, 105 N. W. 164; Ernster v. Christianson, 24 S. D. 103, 123 N. W. 711.

Photographs may be used in evidence, subject to explanation of conditions found after an accident, if taken at or shortly after the accident. Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co. 24 N. D. 40, 138 N. W. 976.

It is not an absolute duty that a traveler should look and listen for an approaching train. Johnson v. Seaboard Air Line R. Co. 163 N. C. 431, 79 S. E. 690, Ann. Cas. 1915B, 598, 4 N. C. C. A. 627.

It is the duty of a railway company to guard the rear end of its train while being moved over the street crossings in a city, and it is neglect of duty not to do so, and where such failure is the proximate cause of an accident or injury, then the question is for the jury. Cameron v. Great Northern R. Co. 8 N. D. 125, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Coulter v. Great Northern R. Co. 5 N. D. 568, 67 N. W. 1046.

Watson & Young and *E. T. Conmy,* for respondent.

There was a total failure of proof to sustain the allegations of the complaint, and plaintiff was properly nonsuited. A railroad company

should not be held liable for injury occurring at a defective point in a sidewalk some distance from the street crossing. Rev. Codes 1905, § 3324; Lynch v. Cleveland, C. C. & St. L. R. Co. 20 Ohio C. C. 248, 11 Ohio C. D. 243.

Neither is a railroad company liable for an injury resulting from its crossing being out of repair, unless it had notice of such fact, or the defect existed a sufficient length of time to justify the presumption of notice. Mann v. Chicago, R. I. & P. R. Co. 86 Mo. 348; Nixon v. Hannibal & St. J. R. Co. 141 Mo. 425, 42 S. W. 945; 38 Cyc. "Trial" 1547; 19 Decen. Dig. "Trial," § 159; Cooke v. Northern P. R. Co. 22 N. D. 266, 133 N. W. 303; Woodward v. Northern P. R. Co. 16 N. D. 38, 111 N. W. 627.

Plaintiff's intestate was guilty of contributory negligence. A pedestrian approaching a railway track is held to a strict duty to ascertain if there are any trains coming, before going on the track. Kallmerten v. Cowen, 49 C. C. A. 346, 111 Fed. 297; Korrady v. Lake Shore & M. S. R. Co. 131 Ind. 261, 29 N. E. 1070; Young v. Old Colony R. Co. 156 Mass. 178, 30 N. E. 560; Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 702, 24 L. ed. 542, 7 Am. Neg. Cas. 345; Watson v. Mound City Street R. Co. 133 Mo. 246, 34 S. W. 573; Hansen v. Chicago, M. & St. P. R. Co. 83 Wis. 631, 53 N. W. 910; Wendell v. New York C. & H. R. R. Co. 91 N. Y. 428; 3 Elliott, Railroads, pp. 342, 343, also § 1168; Northern P. R. Co. v. Freeman, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763; Wabash R. Co. v. Tippecanoe Loan & T. Co. 178 Ind. 113, 38 L.R.A.(N.S.) 1167, 98 N. E. 64; Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co. 24 N. D. 40, 138 N. W. 976.

Where negligence is claimed, it must be shown that it was the proximate cause of the injury. Voehl v. Delaware, L. & W. R. Co. — N. J. —, 59 Atl. 1034.

A question of fact of which there is no evidence cannot be submitted to the jury. Schneider v. Pennsylvania Co. 1 Sadler (Pa.) 290, 3 Atl. 23; Baltimore & O. R. Co. v. Anderson, 22 C. C. A. 415, 43 U. S. App. 673, 75 Fed. 811; Shearm. & Redf. Neg. § 57.

The doctrine of last clear chance has no application under the facts as they appear here. This is not a case of wilful injury or one where

the company has failed to exercise reasonable care, after the discovery of a traveler on or about to cross its tracks. 3 Elliott, Railroads, § 1175.

Where the negligence is concurrent, and not wilful, or the result of lack of reasonable care, contributory negligence is a defense. Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; Sweeney v. New York Steam Co. 117 N. Y. 642, 22 N. E. 1131; Baltimore & O. R. Co. v. Hellenthal, 31 C. C. A. 414, 60 U. S. App. 156, 88 Fed. 116; Dunworth v. Grand Trunk Western R. Co. 62 C. C. A. 225, 127 Fed. 307; Louisville & N. R. Co. v. East Tennessee, V. & G. R. Co. 9 C. C. A. 314, 22 U. S. App. 102, 60 Fed. 993; Gilbert v. Erie R. Co. 38 C. C. A. 408, 97 Fed. 747; Missouri P. R. Co. v. Moseley, 6 C. C. A. 641, 12 U. S. App. 601, 57 Fed. 921; Denver & B. P. Rapid Transit Co. v. Dwyer, 20 Colo. 132, 36 Pac. 1106; Johnson v. Baltimore & P. R. Co. 6 Mackey, 232; Richmond & D. R. Co. v. Didzoneit, 1 App. D. C. 482; Cullen v. Baltimore & P. R. Co. 8 App. D. C. 69; Murphy v. Deane, 101 Mass. 455, 3 Am. Rep. 390; Bouwmeester v. Grand Rapids & I. R. Co. 63 Mich. 557, 30 N. W. 337; Denman v. St. Paul & D. R. Co. 26 Minn. 357, 4 N. W. 605; Mobile & O. R. Co. v. Roberts, —Miss. —, 23 So. 393; Isabel v. Hannibal & St. J. R. Co. 60 Mo. 475; Zimmerman v. Hannibal & St. J. R. Co. 71 Mo. 477; Yarnall v. St. Louis, K. C. & N. R. Co. 75 Mo. 575; Union P. R. Co. v. Mertes, 35 Neb. 204, 52 N. W. 1099; Valin v. Milwaukee & N. R. Co. 82 Wis. 1, 33 Am. St. Rep. 17, 51 N. W. 1084; Little v. Superior Rapid Transit R. Co. 88 Wis. 402, 60 N. W. 705; Philadelphia & R. R. Co. v. Hummell, 44 Pa. 375, 84 Am. Dec. 457; Cincinnati, H. & D. R. Co. v. Kassen, 49 Ohio St. 230, 16 L.R.A. 674, 31 N. E. 282, 6 Am. Neg. Cas. 179; Neet v. Burlington, C. R. & N. R. Co. 106 Iowa, 248, 76 N. W. 677, 5 Am. Neg. Rep. 26; Dyerson v. Union P. R. Co. 74 Kan. 528, 7 L.R.A.(N.S.) 132, 87 Pac. 680, 11 Ann. Cas. 207; Hope v. Great Northern R. Co. 19 N. D. 438, 122 N. W. 997; Gast v. Northern P. R. Co. 28 N. D. 118, 147 N. W. 793; Dunworth v. Grand Trunk Western R. Co. 62 C. C. A. 225, 127 Fed. 307; Illinois C. R. Co. v. Ackerman, 76 C. C. A. 13, 144 Fed. 959, 20 Am. Neg. Rep. 248; Boyd v. Southern R. Co. 115 Va. 11, 78 S. E. 548, Ann. Cas. 1914D, 1017; Burnett v. Atchison, T. &

S. F. R. Co. 172 Mo. App. 51, 154 S. W. 1135; Graf v. Chicago & N. W. R. Co. 94 Mich. 579, 54 N. W. 389; Powers v. Iowa C. R. Co. 157 Iowa, 347, 136 N. W. 1049; Morton v. Southern R. Co. 112 Va. 398, 71 S. E. 561; Wilson v. Illinois C. R. Co. 150 Iowa, 33, 34 L.R.A.(N.S.) 687, 129 N. W. 340.

A railroad company owes to a trespasser only the duty to refrain from wilfully and wantonly injuring him after his peril has been discovered. O'Leary v. Brooks Elevator Co. 7 N. D. 554, 41 L.R.A. 677, 75 N. W. 919, 4 Am. Neg. Rep. 451; Cumming v. Great Northern R. Co. 15 N. D. 611, 108 N. W. 798; Wright v. Minneapolis, St. P. & S. Ste. M. R. Co. 12 N. D. 159, 96 N. W. 324; McDonald v. Minneapolis, St. P. & S. Ste. M. R. Co. 17 N. D. 606, 118 N. W. 819; Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054; Clair v. Northern P. R. Co. 22 N. D. 120, 132 N. W. 776; Reinke v. Minneapolis, St. P. & S. Ste. M. R. Co. 23 N. D. 182, 135 N. W. 779; New York, N. H. & H. R. Co. v. Kelly, 35 C. C. A. 571, 93 Fed. 745; Craig v. Mount Carbon Co. 45 Fed. 448; Illinois C. R. Co. v. Arnola, 78 Miss. 787, 84 Am. St. Rep. 645, 29 So. 768; Christian v. Illinois C. R. Co. 71 Miss. 237, 15 So. 71; Barker v. Hannibal & St. J. R. Co. 98 Mo. 50, 11 S. W. 254; Riley v. Missouri P. R. Co. 68 Mo. App. 652; Egan v. Montana C. R. Co. 24 Mont. 569, 63 Pac. 831; Anderson v. Chicago, St. P. M. & O. R. Co. 87 Wis. 195, 23 L.R.A. 203, 58 N. W. 79; Louisiana Western Extension R. Co. v. McDonald, — Tex. Civ. App. —, 52 S. W. 649; Ward v. Southern P. Co. 25 Or. 433, 23 L.R.A. 715, 36 Pac. 166; McMallen v. Pennsylvania R. Co. 132 Pa. 107, 19 Am. St. Rep. 591, 19 Atl. 27; Terry v. New York C. R. Co. 22 Barb. 574; Camden, G. & W. R. Co. v. Young, 69 N. J. L. 193, 37 Atl. 1013, 3 Am. Neg. Rep. 436; State Use of Ricketts v. Baltimore & O. R. Co. 69 Md. 494, 9 Am. St. Rep. 436, 16 Atl. 210; Tennis v. Inter-State Consol. Rapid Transit R. Co. 45 Kan. 503, 25 Pac. 876; Thomas v. Chicago, M. & St. P. R. Co. 114 Iowa, 169, 86 N. W. 259; Birmingham R. Light & P. Co. v. Jones, 153 Ala. 157, 45 So. 177.

Where the accident might have happened in several different ways, plaintiff must show by a preponderance of the evidence that it happened in a way for which defendant is liable. Meehan v. Great Northern R. Co. 13 N. D. 443, 101 N. W. 183; Garraghty v. Hartstein, 26 N. D. 148, 43 N. W. 390; Kern v. Snider, 76 C. C. A. 201, 145 Fed.

327; Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000; Balding v. Andrews, 12 N. D. 267, 96 N. W. 305, 14 Am. Neg. Rep. 615; Koslowski v. Thayer, 66 Minn. 150, 68 N. W. 973; Yaggle v. Allen, 24 App. Div. 594, 48 N. Y. Supp. 827; Chesapeake & O. R. Co. v. Heath, 103 Va. 64, 48 S. E. 508; Consumers' Brewing Co. v. Doyle, 102 Va. 399, 46 S. E. 390; Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537; Kenneson v. West End Street R. Co. 168 Mass. 1, 46 N. E. 114, 1 Am. Neg. Rep. 446; Kemp v. Northern P. R. Co. 89 Minn. 139, 94 N. W. 439.

It is the general rule, where the evidence as to negligence is in conflict, that a scintilla of evidence is not sufficient to carry the case to the jury. Fuller v. Northern P. Elevator Co. 2 N. D. 220, 50 N. W. 359; Duncan v. Great Northern R. Co. 17 N. D. 610, 19 L.R.A. (N.S.) 952, 118 N. W. 826; Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000; Garraghty v. Hartstein, 26 N. D. 148, 143 N. W. 390; Chesapeake & O. R. Co. v. Stock, 104 Va. 97, 51 S. E. 161; McDonald v. Cole, 46 W. Va. 186, 32 S. E. 1033.

It is a question of law for the court as to whether or not there is any legal evidence in the case to submit to the jury, or whether such evidence could sustain a verdict, if given. Bowman v. Eppinger, 1 N. D. 25, 44 N. W. 1000; Finney v. Northern P. R. Co. 3 Dak. 270, 16 N. W. 500; People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451; Kelsey v. Northern Light Oil Co. 45 N. Y. 509, 13 Mor. Min. Rep. 497; Neuendorff v. World Mut. L. Ins. Co. 69 N. Y. 389; Baulic v. New York & H. R. Co. 59 N. Y. 365, 17 Am. Rep. 325; Toomey v. London, B. & S. C. R. Co. 3 C. B. N. S. 146, 27 L. J. C. P. N. S. 39, 6 Week. Rep. 44; Hyatt v. Johnston, 91 Pa. 200; Pleasants v. Fant, 22 Wall. 120, 22 L. ed. 782; Griggs v. Houston, 104 U. S. 553, 26 L. ed. 840; Marion County v. Clark, 94 U. S. 284, 24 L. ed. 61; Bagley v. Bowe, 105 N. Y. 179, 59 Am. Rep. 488, 11 N. E. 386; Bulger v. Rosa, 119 N. Y. 460, 24 N. E. 853; Longley v. Daly, 1 S. D. 257, 46 N. W. 247; Marshall v. Harney Peak Tin Mill. & Mfg. Co. 1 S. D. 350, 47 N. W. 290; Peet v. Dakota F. & M. Ins. Co. 1 S. D. 462, 47 N. W. 533; Pirie v. Gillitt, 2 N. D. 255, 50 N. W. 710; Richmire v. Andrews & G. Elevator Co. 11 N. D. 453, 92 N. W. 819; Balding v. Andrews, 12 N. D. 267, 96 N. W. 305, 14 Am. Neg. Rep. 615; McMillen v. Aitchison, 3 N. D. 183, 54 N. W. 1030; Elliott v. Chicago, M. &

St. P. R. Co. 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; Reynolds v. Great Northern R. Co. 29 L.R.A. 695, 16 C. C. A. 435, 32 U. S. App. 577, 69 Fed. 808; McKeever v. Homestake Min. Co. 10 S. D. 599, 74 N. W. 1053; Fisher v. Porter, 11 S. D. 311, 77 N. W. 112; Chicago, R. I. & P. R. Co. v. Driggers, 1 Ind. Terr. 412, 45 S. W. 124; Rollison v. Wabash R. Co. 252 Mo. 525, 160 S. W. 994.

Opinion on Rehearing.

Statement of facts.

BRUCE, J. (This opinion is written after rehearing had.) This is an appeal from a judgment which was entered on a verdict directed for the defendant company. The action is brought by a widow to recover damages for the death of her husband, which was occasioned by an accident at a railway crossing in the city of Grafton, North Dakota. The deceased, Joseph Severtson, was seventy-two years of age. He had a crippled foot, which, in walking, he raised 3 or 4 inches and kicked out to the side. The tracks of the railway company run north and south, and on the day of the accident the deceased approached the same from the west, walking along the south side of what is known as Fifth street, in the city of Grafton, with his head down and apparently, according to some witnesses, not looking for a train. The train came from the north, and his view to the north was clear and unobstructed, that is to say, from a point 47 feet from the center of the track he could see up the track 72 feet; 20 feet from the track he could see up the track 100 feet; 15 feet away he could see up the track 120½ feet, and 10 feet away he could see up the track 169½ feet. Forty-five feet east of the crossing there appears to have been a house track, and at the crossing two tracks, on the westerly one of which the train which occasioned the accident was running, and which train consisted of a coal car, north of which were a tender and engine, and still north of which were several box cars. This train was being backed from the north down the side track. Two witnesses, Barr, a blacksmith, and Given, a drayman, testified as to having first seen the deceased at a distance of about 8 feet from the track. Given testified that he was looking directly at the deceased from a point about 80 feet west of the

place of the accident, and while driving on Fifth street. He was thus in a position not merely to clearly see the deceased as the day was clear, and it was broad daylight, but to gauge the distance between the deceased and the approaching car, and to tell when the car started to move. He testified that he first saw the deceased a distance of 6 or 7 feet from the crossing, and at the time he was walking probably 7 or 8 feet south of the sidewalk which is constructed on the south side of Fifth street. He testified that the train was backing up the track at the rate of 3 or 4 miles an hour; that Severtson was walking with his head down; that he had a pail, a saw, and a loaf of bread; that he did not seem to pay any attention to the train; that he did not look north to see where the train was coming from; that he (Given) was approaching the crossing all the time, as he wanted to get over; that the deceased did not pay any attention to the train; that he was on the middle of the track when he was hit and about 8 or 9 feet south of the sidewalk; that immediately after the accident he (the witness) examined the crossing, and that it looked like any other crossing, and there were no holes or anything else there; that it was a nice, clear day, and that the sun was shining.

The witness Barr testified that at the time of the accident he was standing at the front door of his shop, which appears to have been about 125 feet west of the crossing, and on the north side of the street; that when he first saw the deceased the latter was about 5 or 6 feet from the crossing; that at the time the train was backing down the track at a rate of about 4 or 5 miles an hour; that he saw Severtson step onto the track and turn around and throw up his hands, and that then the train hit him; that the deceased was then in about the center of the track; that when approaching the track the deceased was walking with his head partly down; that the witness did not see him look until he got onto the track; that at the time he was struck the deceased was about 5 or 6 feet south of the south edge of the sidewalk; that the deceased had a hitch in his leg and threw it out when he walked.

One Hoag, the driver of a grocery wagon, was also a witness to the accident. He testified that at the time of the accident he was sitting on his delivery wagon, on the house track, east of the crossing, right in the middle of the crossing, and about 40 feet from where the accident occurred; that the deceased, Severtson, was coming east, that when

walking Severtson would throw out one foot and then plant the other one; that it was difficult to make Severtson hear and one had to shout pretty loud; that he examined the crossing after the accident; that he saw a few indentations on the ground,—none with reference to the planking.

One Cabots, the engineer of the train, testified that he was coming with his train from East Grand Forks and going to Pembina; that he stopped at Grafton and unloaded some freight; that after that he shoved his train over the crossing and backed it south to the Sixth street crossing; that he then cut off his engine, and went and did some switching on the mill track; that is, north of the Fifth street crossing; that his engine was facing north, and that he was on the east side of the engine; that is to say, on the right-hand side; that he had one car behind the engine and four cars ahead; that his train had not stopped from the time he left the mill spur coming south and until after the accident had occurred; that he was watching both in front and behind to see about the track; that ahead of him was a car and tender going south; that the box car and tender did not interfere with his view west of the track; that he could not see west of the track for a considerable distance over the tank of the tender; that he was looking, but he did not see a soul; that the bell was ringing as he was approaching the crossing; that his train was traveling possibly 4 or 5 miles an hour; that a train of that size traveling at the rate it was traveling could be stopped in a car length or a car and a half; that each car was 40 feet; that his brakeman, Koochenbecker, was riding on the gondola car; that there was a local freight train north of the Fourth street crossing; that it had come from the north, Pembina; that if his train was coming 1 mile an hour it would take possibly a car length to stop it; that he had been engaged in moving cars possibly twenty minutes before the accident; that he had been switching across that crossing ten minutes or perhaps fifteen; that his train had not stopped from the time he pulled back until he stopped after the accident. The record also shows that the mill spur referred to was more than a block north of the place of the accident.

The fireman, P. M. Brantl, testified that his attention was first called to the accident when he heard a farmer hollering, and when his engine was south of the Fifth street crossing; that he was sitting on his box,

looking south toward the crossing and toward the switch, looking both north and south; that there was the brakeman Koochenbacker on the south end of the car; that he saw him pretty close to the crossing; that he was standing on the car end; that he was inside of the car, the gondola; that he was looking out south; that as he got up to the crossing the brakeman disappeared from his line of vision; that he did not know where he went; that it was a clear day.

The witness Bradford testified that he was a brakeman on the train; that as they pulled up to the depot as they arrived at Grafton they unloaded some freight and pulled their train up to the Fifth street crossing; that he then cut off their engine, and ran down the main line and back across the elevator track, and backed over the Fifth street crossing and coupled onto an empty gondola, and went across the Fifth street crossing to the mill track, which was more than a block to the north; that they picked up some cars at the mill track; that they were coming down off the mill track with the engine and one car behind the engine, that would be south of the engine and six cars ahead of it; that they backed up and across the said crossing, and backed up to the main line, and backed up again to clear the switch; that the train had run the length of two and one-half cars when they picked up the empty gondola car; that the gondola car was south of the Fifth street crossing about the length of a car and a half; that after that they cut off two cars and backed up a short distance to clear the switch, and that he signaled the engineer to come ahead; that the engineer did not respond, and that he afterwards found that an accident had happened; that the bell was ringing at the time; that the remains of the deceased were about 40 or 50 feet south of the crossing; that he did not see the man killed; that the train had gone about a car and a half length south of the crossing when he discovered the remains.

B. W. Barnes testified that he was the conductor of the train that came into Grafton on the day in question; that he was around seeing that the switching was done right; that one brakeman was on the rear car and the other brakeman on the car ahead of the engine; that it was a clear day.

The witness Koochenbecker testified that he was working as a brakeman on the freight train; that they arrived at Grafton at about 11:30 in the morning; that they unloaded their local freight, and backed

up off the main track; that they then went over to the elevator track to do their switching; that they went up to the mill to take on five or six cars there; that they then backed up intending to make a switch, came up and made the switch, and then the accident occurred; that he got into the gondola car at about 20 feet from the mill spur and about a block from the mill; that he got on the rear of the tender; that he got into the car and walked down the center of it, and walked towards the engine in coming out on the mill-track spur; that he was looking out to see that nobody got hurt; that he stayed in the car until they backed over the crossing; then he got out of the car on the east side of the car and from the south end; then he walked toward the engine to relay signals north across Fifth street; that the car practically stopped at the switch; that he thought it was then he saw the deceased Severtson, he could not state the exact distance, but he should judge that Severtson was about 15 feet from the passing track in a southerly direction, and that he was not on the sidewalk; there was only one girl on the sidewalk; it was a clear day; the bell was ringing on the train; that he was on the train when it passed the crossing.

The witness Shell testified that he was relief agent of the St. Hilare Lumber Company; that his attention was called to the accident by the shouting of a farmer named Jestrand; that he walked over and saw somebody was hurt; that the body was 40 feet, or something like that, south of the crossing; that he noticed the saw and bundles probably 20 or 30 feet south of the sidewalk; that the body was further south; that he examined the crossing, but did not find any break or tear in it; that he could not notice any holes in the crossing; that he attempted to put his heel between the west rail and the planking on the street, that he could not get it in except lengthwise; that he wore a six shoe; that he could not swear positively, but that he thought that the bell was ringing; that it was a clear day.

The witness Sloge testified that he came to Grafton about the 1st of November; that he was a claim agent of the company; that he measured the distance between the west rail of the elevator track and the plank with a metallic tape, and found it to be 2½ inches; that he measured it at the south edge of the planking and back a little from the south edge.

So far the testimony is undisputed that the accident did not occur on

the sidewalk at all, but south of it; that there was no defect in the sidewalk, and that the deceased carelessly walked in front of the moving train.

We have now to determine whether the testimony of the plaintiff's witnesses furnishes any evidence which could have been submitted to the jury. The first witness, Severt Severtson, does not pretend to know anything about the accident or to have seen the same, but testifies merely as to the earnings of his brother,—his monetary value. The second witness, Frank Jestrand, is the only witness who saw the accident. He is a farmer, sixty-eight years of age. He testified that at the time of the accident he was 150 feet south of the crossing on Fifth street, the railroad running north and south; that it seemed to him there was a train on the north side of the depot and one on the south side of the depot; that the train on the north of the depot was standing still; that he observed the deceased approaching the crossing going in an easterly direction; that as the deceased was coming along, he (the witness) was going north to the lumber yard; that as he (the deceased) was coming east the train was standing north of the street line and he saw the man on the track; that he noticed he was jerking his foot trying to get loose; that he saw the man trying to jump, his left foot was caught or tied down by something. He tried to hop around and jerk his foot four or five times; that if he had his foot tied down he could illustrate how it was. "The left foot was caught. He was facing north toward the cars. Nobody was on the car. It was in plain view of me. I saw the fireman and engineer in the cab. They were north from this man about the length of one car. I am trying to tell what I saw. I saw him trying to get loose, and when he could not get loose he lifted up his hand a way and put it against the car after the car came close enough. He had something in his hand. It looked like a tin pail, but I could not say, and the car was coming onto him all the time, and he did not get his foot loose and the car pitched him over—side-face down like. I was probably 150 feet away. I did not know whether the train did or did not stop but kept right on. It stopped pretty nearly opposite me when it got 150 feet further south. He was close to the west rail when he raised his hand up when the car was approaching. I was facing north and the train came pretty slow, maybe a mile an hour. I did not see anybody there at the crossing. I was coming down town to the lumber yard. I

crossed the street on the south side of the depot and went north. I turned into that vacant space on the south side of the depot. My horses were walking. I was in a lumber wagon and high box. When I first saw Severtson he was about half way between the hotel and the tracks. That would be about 15 or 20 feet from the track. This train was on the south side of the depot. I was standing north of the depot,—north of Fifth street. It must have been right on the street, I do not know how far. I do not know how far the train was north of the street when I first saw it. I think it was past the Fifth street crossing. It was standing on the west track. The train that I saw was standing still. I would not swear that there was only one train to the north, but there was only one or two trains, and I know that there was one positively. The train I saw was standing still. I first noticed the train move when I was about 150 feet from it. It was not moving when I first saw it. I know when it started moving first. When the steam escaped from the cocks you could tell by the exhaust, and that is what I base my judgment on as to the time when it started to more. I did not notice whether the man walked or limped. When I first saw him he was about 15 or 20 feet from the track. The train did not move when I saw this man first. He was right on the track when I noticed the train started to move. The train was standing still when Mr. Severtson was 15 or 20 feet from the crossing."

"Q. Which did you watch, Mr. Severtson or the train?

"A. I watched the man coming across the street, but I lost sight of him. I did not pay any attention to him until I saw him in line with the cars.

"Q. After you saw him about 15 or 20 feet from the cars, I mean the track, you looked up to see the train, and the train had just started to move at that time, is that right?

"A. No, I just noticed the train had started to move about the same time Mr. Severtson tried to get loose from the spot where he was fast. I could not see how far he was from the sidewalk. No, because it was in line north from me, and I was looking straight at it. It was probably ten seconds after Mr. Severtson got onto the track before the train struck him, if not more. I was watching to see if somebody was not going to pull him off. Mr. Severtson was on the south side of the street. He was not walking in the middle of the road.

"Q. Do you know if he was walking on the sidewalk or in the open space you came through?

"A. No, he was walking on the sidewalk. There was no men on the train that ran Mr. Severtson down, I mean on the end of the car.

"Q. You would not say there was not a man on the east side of the car?

"A. I am telling you I could see it as long as the train did not block it like, or the cars.

"Q. You do not want to tell us you could see through that box car or see the east side?

"A. No, I said I could see the East side until the car blocked the view.

"Q. How much of that east side of that car could you see?

"A. If I was a good way north I could see a good way east. I was to the west and south of this track at that time. I did not notice any planks torn or any place where a man's foot could have been caught. I believe it was kind of foggy. I could see all right. I had no trouble at all in seeing. I could not have seen anybody get off that train on the east side. I was about 30 feet west of the track. The angle of vision on the line measuring from where I stood would be about straight."

The witness De Puy testified for the plaintiff that his attention was called to the accident shortly after it happened; that he went down and made observations; that he made measurements; that on the day following the accident he saw marks or indications as to whether or not a man had been caught there between the rails and the plank—between the rails and the planking of the west track—next to the inside of the west rail. It would be on the sidewalk if the sidewalk extended between the rails. It was not a part of the wagon road part of it. The planks between the rails run parallel with the rails and between the rails, and on the west side there was a space of a trifle over 2½ inches. The top of the plank next to the west rail, about from 1 foot to 18 inches north of the south end of the plank, on the west edge of the plank and at the upper surface of the planking there was an abrasion, or a mark in the wood, and there were some small slivers from the edge of the plank at the point of this abrasion that were lifted up from the edge of the plank, at the end of the planking, probably 2 feet. "Now I wish to describe what I saw on the day of the accident. The day of the acci-

dent, and shortly after 12 o'clock I saw on the ground between the ties a mark. This mark would be located probably 2 feet east of the west rail of this west track at a point from 16 to 18 inches south of the south end of the planking. The marks on the ground at the north end were rather shallow. The mark was about the length of a man's shoe, about 8 or 9 inches long, east and west. This mark ran away from the plank for approximately a foot and a half, perhaps not that far, maybe 14 inches. It ran in a southerly direction, starting, as I say, very shallow and running down deeper until it was considerably over an inch or two. It was just such a mark as a person's foot would make if it scraped along the ground. I would imagine, but I would not be prepared to testify to that now, that there is a planking about 20 feet long running in the center of the street where the teams go. All I inspected was the extension of the sidewalk. I found the distance between the west rail and this extension of the sidewalk to be a trifle over 2½ inches. I measured it in two or three places. The planking next to the rail was not worn off very much. The west plank between the rails of the particular crossing in question was distant 2 9/16 inches—about 2½ inches from the inside surface of the rails. The upper surface of the planks at the point where I measured were about 5/16 of an inch below the upper surface of the west rail."

Ole Hanson testified that one leg was broken about the ankle and the other was crushed over the heel. The heel was crushed. It was the left foot that was crushed at the heel. Severtson had coarse working shoes on. The shoe on the left foot appeared as if something heavy had struck it at the point near the small toe, and it was cut right up behind the heel there. A part of the leather was cut through. It looked as if it had been torn. The heels were on both shoes, and, on the leg where the shoe was not torn, the leg was broken just above the shoe top.

In addition to this testimony, and having immediate bearing on the question before us, is the testimony of the witness Hollie Hanson, who testified:

I was at my elevator at the hour of the accident. I was painting the casing of the east window in the office. I was on the inside of that building. The window that I was painting was at the east end near to the track, that is, within 5 feet of what is known as the passing track. I

never measured it. I am giving my best judgment. I was facing the window. I heard someone hollering. Just previous to the time I heard this hollering I had seen a train on that track.

Q. Did you see a particular car on that track?

A. I did. It was a gondola. It was opposite the window. *It was standing still. Just previous to the time that I heard this hollering it started to move south before I heard the hollering. It was probably a minute or a minute and a half before I heard this hollering that it started to move south. Just a very short time before. Then I heard the hollering.* When I first heard it I did not pay much attention to it, but the second time I heard them cry, "There is a man under the car," and then I ran out. I went out into the street, and I seen Mr. Jestrand pointing toward the train, and as other parties went over to the train I followed over. I was among the first to get there.

Q. Did you see a saw or any parts of a saw?

A. I did. *I saw the blade and a part of the woodwork.* The blade was detached from the woodwork. *It was on the east rail lying crosswise south of the crossing about 3 or possibly 3½ feet,* I would imagine. Not to exceed 3½ feet. I afterward looked at the crossing.

Q. Did you see any mark or marks on the west edge of the west plank of this particular crossing?

A. Yes, sir. There was a dent in the planking with slivers. The saw was lying across the east rail. *The gondola car stopped while in front of my window. I could see the wheels of the car. They were not going around. The car was standing still.* I saw the hind wheels of the tender and the front wheels of the gondola. I did not see this bread and saw and things when I first came out. I took particular notice of the bread first when I had gotten between the crossing and the east passing track. It was between the east rail of the elevator and the south rail of the main track, and about 10 or 12 feet south of the sidewalk. The bread and the blade of the saw were not in the same place.

Q. Was the rest of the saw down there where the bread was?

A. Pieces of it. The blade of the saw was lying across the east rail. I did not measure the distance. I did not step it off. I am just giving by judgment. *I examined the crossing after the train had pulled off. It was slivered a little. I saw the slivers on the west plank near the*

east rail at the south end, at the south edge of the plank—at the west end I believe.

Q. Right in the corner of it?

A. No, on the west side of the edge of the west side.

Q. What kind of a sliver was it?

A. It was just like anything had been pulled across there and pulled out. The pail was between the rails right underneath one of the trucks of the car, in the neighborhood of 10 feet from the crossing. I would judge. The blade of the saw was between 3½ and 4 feet from the crossing, but it would not be more than 4 feet. I never stopped to measure it.

In addition to this, and as tending to show that the train stopped immediately before the accident, and that the brakeman on the train saw the deceased approaching the track and within 15 feet of it, even though not upon the sidewalk, and immediately before the accident, we refer again to the testimony of the brakeman Koochenberger in which he says:

I got into the gondola car about 200 feet from the mill track or mill spur and about a block from the Fifth street crossing. I got on the rear of the tender. There was a stop sometime after I got into the car. I stepped into the car and walked toward the center of it,—walked toward the engine in coming out on the mill-track spur. I was doing nothing but looking out to see that nobody got hurt. I looked out. I stayed on until we backed over the crossing, and then I had no more right to be on there, because the crossing was blocked. I then got out of that car, on the east side of the car and on the south end of the car. I then walked up toward the engine to relay signals. I walked north across Fifth street.

Q. You say you got down off this car just as the end of the gondola went over the crossing—I mean over the street?

A. It practically stopped. It stopped at the switch.

Q. Did you just clear the street?

A. It blocked the crossing but it was over about a car length, I should judge.

Q. After you got down did you see Mr. Severtson?

A. I did not know it was him, but I would judge it was because of the bundles I picked up afterwards. I think it must have been him.

Q. Where was he when you saw him at that time?

A. I could not state the exact distance, but I would judge about 15 feet from the passing track in a south direction of that sidewalk. He was not near the sidewalk. He was not on the sidewalk. There was only one girl on the sidewalk. It was a clear day. I had no trouble in seeing. The bell was ringing. The gondola car is 36 feet long. It was a combination flat car or one we put sides onto. The sides were about 3 feet, 6 inches, I would judge.

On cross-examination he said:

I stayed on the car until it passed this clear up to Fifth street. I got onto the car and walked to the south end. I stayed on it. I did not get off until it stopped over the crossing. I was with the train when it backed down to the Fifth street crossing all the while. I saw a man that I took for the deceased over in this district. Well, I took it to be that man. The train was backing south.

Q. Was he in your line of vision from that time?

A. After I got off the car it was impossible to see anybody. I got off the car on the east side of the right-hand side. I then walked up toward the engine figuring on relaying signals.

Q. After you did that when did you first find out a man had been killed on the crossing there?

A. After I came back to see what the engine had stopped for. It was my first intimation that I had killed somebody.

Q. The four marks that you made here is where you observed the man going toward the crossing?

A. I would judge. I do not know that he went to the crossing.

Q. Was he going fast or slow?

A. Slow.

Q. And that was all that you saw until you found out somebody was killed?

A. I observed different people on the right of way.

Q. And that was all that you had seen of this man?

A. Yes, sir.

Q. When did he disappear from your vision?

A. When I got off from the car.

Q. And you got off the car where?

A. Right over the crossing.

At the close of the testimony the trial judge directed a verdict for the defendant, saying: "The question for us to consider is whether this view of the case was correct, or whether there was not some creditable evidence in the record which would leave the matter for the consideration of the jury and not of the court." The theory of the trial judge evidently was that the witness Jestrand was not in a position to be able to judge in any way as to where the plaintiff's intestate was at the time of the accident, or as to whether the train was moving or not before the deceased got upon the track, and that the evidence is conclusive that the deceased was not injured upon the sidewalk at all; that he therefore could not have gotten his foot caught in the sidewalk; that the evidence showed that the deceased had a marked peculiarity in his walk; that the witness Jestrand must have based his conclusion that he was caught, on the fact that he saw him kick out his foot, and which kicking was occasioned by the peculiarity mentioned. He also seems to hold that the evidence shows conclusively that the deceased was guilty of contributory negligence, and this no doubt largely upon the assumption that the deceased was south of the sidewalk and was therefore a trespasser.

There is in the evidence much in support of this view of the case, yet we cannot refrain from holding that the matter was one for the jury, and not one for the court. The witness Jestrand was only 150 feet from the crossing. It was a clear day. He was 30 feet from the track so that his angle of vision was different from what it would have been if he had stood straight in front of the approaching engine. It is quite clear to us that a man standing at that distance from an engine could tell whether it was moving or not, and it is also quite clear that he could see if a brakeman was at the end of the car and even on the side opposite from him and looking around the end of the car. It is also quite clear to us that he could approximate in a measure the speed of the train and could tell when that train started to move. He testified positively that the deceased was caught in the track before the train started to move, and that it was standing still a few moments before the accident. The testimony of the witness Hollie Hanson is that he himself was within a short distance of the track, immediately west of the same, and that before the accident the train was standing still opposite the window which he was painting. If this was the case the train was on or near the street and standing still just prior to the accident, and

this testimony and the testimony of Jestrand positively contradicts the testimony of the defendant's witnesses that the train did not stop after leaving the mill track. There is also evidence in the record given by the witness Hanson that the blade of the saw was found within 3 or 4 feet of the sidewalk and to the south of it. This is clearly consistent with the idea that deceased when injured was on the sidewalk or very close to it. There is also some evidence that there were indentations in the boards, and evidence that something that might very well have been the heel of a shoe had been dragged along and crushed into the same. There is, it is true, no positive evidence that the railway company was negligent in the construction of the crossing. The evidence, in fact, shows that the distance between the rail and the planking was approximately the legal distance of 2½ inches. There is also evidence that the deceased wore a number ten shoe, and testimony that the heel of a number ten shoe would not go into a space of 2½ inches if the wearer was walking straight across the track. It is a matter of common knowledge, however, that the heels of even number ten shoes vary greatly in size, and that the size of the shoe is really no indication of the size of the heel, and there is no proof in the evidence of the actual size of the heels of the shoes worn. It is also a matter of common knowledge that the heels of shoes, except perhaps rubber heels, are longer than they are broad, and it is by no means improbable that the deceased caught his foot lengthwise in the track rather than crosswise. The tendency of the deceased to kick his foot out to the side would, in fact, suggest this idea. There is evidence, also, that the rail of the track was raised above the sidewalk some $\frac{7}{16}$ of an inch, while the statute requires it to be level. This difference, we know, is trifling, but it is great enough so that it might obstruct the sole of a worn shoe. It is quite probable, indeed, that the combination of the raised rail, the lameness of the deceased, and the distance between the rail and the planking, occasioned the deceased to be caught therein. It is by no means improbable, also, that even if the deceased was not on the sidewalk, he from fear, lameness, or some other reason had been delayed while on the track and rendered unable to move, and the evidence of the witness Jestrand is positive that immediately prior to the accident the deceased was trying to get loose from the spot where he was fast; and that he (Jestrand) was watching to see if somebody was not coming to pull him off.

Even if this evidence does not show that the railway company was negligent in the construction of its crossing, it does tend to show that immediately prior to the accident the deceased was caught in the track, and that in spite of that fact, and while he was within a short distance of the train, the train was started and pushed against him. The evidence of the plaintiff also tends to show that no lookout was kept, and it must be apparent to everyone that if the engineer or brakeman had looked ahead, or a proper lookout had been kept, the man must have been detected in his perilous position.

It is of course well established, that in a case of this kind we cannot be governed by the mere preponderance of the evidence, or by what our verdict would be if we ourselves were sitting upon the jury, but whether there was sufficient evidence to go to the jury at all, and we are not allowed to ignore the evidence of the plaintiff unless the physical facts make it absolutely unbelievable. Such being the case, we cannot refrain from holding that the matter was one for the jury, and not one for the court to pass upon. We realize that the doctrine of the scintilla of evidence has been abrogated in this state, but we have more than a scintilla.

We are not prepared to say that if, as plaintiff's witnesses testified, the train was standing on or near the street, with the front of the engine pointing northward, it was contributary negligence as a matter of law for the deceased to have walked around it to the south. A railway company has no right, when it stops a train upon a public street of a city, to start it without giving ample warning and acquainting itself with the fact as to whether there are any travelers who are liable to be in danger. So, too, though the deceased may have been walking some few feet south of the sidewalk, and though technically speaking a trespasser, we cannot say that this act was negligence which contributed to the injury, as he would have been none the less in danger if he had been walking upon and had been caught upon the sidewalk.

It must be remembered that, according to the witnesses mentioned, the train was standing in the street or just beyond it. It was the duty of the company to keep a lookout for travelers. It was its duty not to start the train until it had ascertained that no one was in the danger line. If it had done this it must have seen the deceased even though he was walking some few feet south of the sidewalk. It is really immater-

ial, indeed, whether he was caught on the sidewalk or whether he was caught at all, as, according to the witness Jestrand, he was detained and struggling in the middle of the track before the train started, no matter from what cause. It is not necessary, under the decisions as we view them, that the defendant in such a case should actually have seen the injured party. It is sufficient that it should have seen him.

It seems to be clear from the testimony of the brakeman Koochenbecker that he saw the deceased when he was near the track. It is clear that if he had looked he would or should have seen him, and it was for the jury to say from the evidence in the case whether the deceased was caught in the track; whether the train was started after such fact, and whether, under the circumstances, the defendant was negligent in starting and operating its train. It was, in fact, for the jury to say whether the train, as testified to by the witnesses Jestrand and Hanson, and even hinted at by the witness Koochenbecker himself, stopped before making the crossing, and whether the plaintiff's intestate was seen or should have been seen approaching the track and about to cross the same, and whether he was caught or delayed in the track before the train started, and whether, in short, by the exercise of due care the accident could have been averted. Whether he himself was guilty of contributory negligence, too, was a matter for the jury to pass upon. We cannot say as a matter of law, indeed, that a railway company which has stopped its train near to or upon a public crossing can start the train without using proper precautions to warn and protect one who has been seen approaching its tracks and about to cross, and can escape liability for the reason that when crossing the same the deceased walked a few feet south of the sidewalk and off the regular highway, and, for all that we know, did so in obedience to the very natural instinct of getting as far away as possible from a dangerous object which at any time might, by carelessness or other means, be put in operation.

The judgment of the District Court is reversed and a new trial is ordered.

B. F. FELTON v. MIDLAND CONTINENTAL RAILROAD, a Railway Corporation.

(155 N. W. 23.)

Contributory negligence — evidence — open to different conclusions — question 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, the question of contributory negligence is one of fact to be determined by the jury.

Evidence — conflicting — proximate cause — conclusions — jury — question for.

2. Where the evidence is conflicting, or the proximate cause of an injury depends upon a state of facts from which different minds might reasonably draw different inferences, the question of proximate cause is one of fact for the jury.

Defense not raised on trial — supreme court — will not consider — general rule.

3. As a general rule, a defense not raised in the trial court will not be considered by the appellate court.

Testimony — witness — former trial — admissible in later trial — same issue — same parties — nonresident — without court's jurisdiction.

4. The testimony given by a witness on a former trial, and which has been taken down in full by the official court stenographer, is admissible in evidence upon another trial of the same issues between the same parties in a case wherein it is shown that the witness is a nonresident, and not within the jurisdiction of the court.

Opinion filed October 30, 1915. Rehearing denied November 30, 1915.

Appeal from a judgment of the District Court of Stutsman County, *Coffey*, J. Defendant appeals.

Affirmed.

Buck & Jorgenson, for appellant.

Note.—The statement of the court in this case, that the courts differ as to the conditions upon which the testimony of a witness given on a former trial between the parties may be admitted in evidence, is borne out by the authorities, as shown by a full review thereof in a note in L.R.A.1916A, 990.

As to contributory negligence of driver of automobile at railroad crossing, see note in 46 L.R.A.(N.S.) 702.

In actions based upon the negligence or omission of a statutory duty by a railroad company in regard to its road, a recovery, as in other cases, may be denied on account of contributory negligence. Reynolds v. Missouri, K. & T. R. Co. 70 Kan. 340, 78 Pac. 801, 17 Am. Neg. Rep. 228; Ward v. Paducah & M. R. Co. 4 Fed. 862; Marshall & E. T. R. Co. v. Petty, — Tex. Civ. App. —, 134 S. W. 406; Atchison, T. & S. F. R. Co. v. Jones, 110 Ill. App. 626; Millhouse v. Chicago, St. L. & P. R. Co. 7 Ohio C. C. 466, 4 Ohio C. D. 682; Gulf, C. & S. F. R. Co. v. Simonton, 2 Tex. Civ. App. 558, 22 S. W. 285; Sherman v. Chicago, R. I. & P. R. Co. 93 Ark. 24, 123 S. W. 1182; Hearne v. Southern P. R. Co. 50 Cal. 482; Southern R. Co. v. Jay, 137 Ga. 60, 72 S. E. 503; Ferrier v. Chicago R. Co. 185 Ill. App. 326; Chicago & A. R. Co. v. Barnett, 56 Ill. App. 384; Baltimore & O. S. W. R. Co. v. Ayers, 119 Ill. App. 108; Chicago, P. & St. L. R. Co. v. Zetsche, 135 Ill. App. 622; Wabash R. Co. v. Tippecanoe Loan & T. Co. 178 Ind. 113, 38 L.R.A.(N.S.) 1167, 98 N. E. 64; Payne v. Chicago & N. W. R. Co. 108 Iowa, 188, 78 N. W. 813; Dieckmann v. Chicago & N. W. R. Co. 145 Iowa, 250, 31 L.R.A.(N.S.) 338, 139 Am. St. Rep. 420, 121 N. W. 676; Chicago R. Co. v. Bartley, — Kan. —, 53 Pac. 66; Tatum v. Rock Island, A. & L. R. Co. 124 La. 924, 50 So. 796; Illinois C. R. Co. v. Sumrall, 96 Miss. 860, 51 So. 545; Gumm v. Kansas City Belt R. Co. 141 Mo. App. 306, 125 S. W. 796; Crabtree v. Missouri P. R. Co. 86 Neb. 33, 136 Am. St. Rep. 663, 124 N. W. 932; Hoopes v. West Jersey & S. R. Co. 65 N. J. L. 89, 47 Atl. 27, 8 Am. Neg. Rep. 274; Runyon v. Central R. Co. 25 N. J. L. 556; Koehler v. Rochester & L. O. R. Co. 66 Hun, 566, 21 N. Y. Supp. 844; Spencer v. New York C. & H. R. R. Co. 123 App. Div. 789, 108 N. Y. Supp. 245; Legg v. Erie R. Co. 141 App. Div. 876, 126 N. Y. Supp. 451, 124 N. Y. Supp. 8; Coleman v. Atlantic Coast Line R. Co. 153 N. C. 322, 69 S. E. 251; Gosa v. Southern R. Co. 67 S. C. 347, 45 S. E. 810; Galveston, H. & S. A. R. Co. v. Matula, 79 Tex. 577, 15 S. W. 573, 19 S. W. 376; International & G. N. R. Co. v. Dyer, 76 Tex. 156, 13 S. W. 377; Galveston, H. & S. A. R. Co. v. Polk, — Tex. Civ. App. —, 63 S. W. 343; Gulf, C. & S. F. R. Co. v. Shieder, — Tex. Civ. App. —, 26 S. W. 509; Bassford v. Pittsburgh, C. C. & St. L. R. Co. 70 W. Va. 280, 73 S. E. 926; McCann v. Chicago, M. & St. P. R. Co. 44 C. C. A. 566, 105 Fed. 480, 9 Am. Neg. Rep. 417; Royle v.

Canadian Northern R. Co. 14 Manitoba L. Rep. 275; Atkinson v. Grand Trunk R. Co. 17 Ont. Rep. 220.

In such cases it is the duty of one to exercise ordinary care in protecting his property; and the amount of care is proportionate to the degree of danger. Cottle v. New York, N. H. & H. R. Co. 82 Conn. 142, 72 Atl. 727; Elliott v. New York, N. H. & H. R. Co. 84 Conn. 444, 80 Atl. 283; Reed v. Queen Anne's R. Co. 4 Penn. (Del.) 413, 57 Atl. 529; Louisville, N. A. & C. R. Co. v. Stommel, 126 Ind. 35, 25 N. E. 863; Cincinnati, H. & I. R. Co. v. Butler, 103 Ind. 31, 2 N. E. 138; Cleveland, C. C. & St. L. R. Co. v. Cyr, 43 Ind. App. 19, 86 N. E. 868; Goodrich v. Burlington, C. R. & N. R. Co. 97 Iowa, 521, 66 N. W. 770; St. Louis & S. F. R. Co. v. Knowles, 6 Kan. App. 790, 51 Pac. 230; Harlan v. St. Louis, K. C. & N. R. Co. 65 Mo. 22; Riley v. Missouri P. R. Co. 69 Neb. 82, 95 N. W. 20; Central R. Co. v. Moore, 24 N. J. L. 824; Weber v. New York C. & H. R. R. Co. 58 N. Y. 451.

But greater care and diligence are required according as the peculiar locality and circumstances of the case seem to call for greater caution. Martin v. Baltimore & P. R. Co. 2 Marv. (Del.) 123, 42 Atl. 442; Wabash, St. L. & P. R. Co. v. Wallace, 110 Ill. 114; Southern R. Co. v. Winchester, 127 Ky. 144, 105 S. W. 167; Morris v. Chicago, M. & St. P. R. Co. 26 Fed. 22.

Approaching a crossing at a speed which renders it difficult if not impossible to avoid an accident, after discovering the danger, is negligence barring a recovery. Wilds v. Hudson River R. Co. 24 N. Y. 430, 23 How. Pr. 492; Morse v. Erie R. Co. 65 Barb. 490; Martin v. New York C. & H. R. R. Co. 21 N. Y. Supp. 919.

Where a person knows or ought to know of dangers at a crossing, and fails to use care and caution, as a prudent person should do under like circumstances, he cannot recover, even though the railroad company was negligent. Haas v. Grand Rapids & I. R. Co. 47 Mich. 401, 11 N. W. 216; Gulf, C. & S. F. R. Co. v. Greenlee, 62 Tex. 344; Duncan v. Missouri P. R. Co. 46 Mo. App. 198; Pakalinsky v. New York C. & H. R. R. Co. 82 N. Y. 424; Metropolitan Trust & Sav. Bank v. Chicago, B. & Q. R. Co. 150 Ill. App. 407; Chicago & E. R. Co. v. Sutherland, 88 Ill. App. 295; Bjork v. Illinois C. R. Co. 85 Ill. App.

269; Baltimore & O. R. Co. v. Stumpf, 97 Md. 78, 54 Atl. 978, 14 Am. Neg. Rep. 57; Louisville & N. R. Co. v. Eckman, 137 Ky. 331, 125 S. W. 729.

Neither is the degree of care required lessened in an emergency, if his perilous position is due to his own negligence. Central of Georgia R. Co. v. Foshee, 125 Ala. 199, 27 So. 1006; Peck v. New York, N. H. & H. R. Co. 50 Conn. 379; Richfield v. Michigan C. R. Co. 110 Mich. 406, 68 N. W. 218; Cincinnati, H. & D. R. Co. v. Murphy, 18 Ohio C. C. 298, 10 Ohio C. D. 195; Chesapeake & O. R. Co. v. Hall, 109 Va. 296, 63 S. E. 1007; Liermann v. Chicago, M. & St. P. R. Co. 82 Wis. 286, 33 Am. St. Rep. 37, 52 N. W. 91; Macon & W. R. Co. v. Winn, 26 Ga. 250; Texarkana & Ft. S. R. Co. v. Bullington, — Ark. —, 47 S. W. 560; Weller v. Chicago, M. & St. P. R. Co. 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532; Martin v. Little Rock & Ft. S. R. Co. 62 Ark. 156, 34 S. W. 545; Chicago, R. I. & P. R. Co. v. Bednorz, 57 Ill. App. 309; Quinn v. Chicago & E. R. Co. 162 Ind. 442, 70 N. E. 526; Louisville & N. R. Co. v. Lucas, 30 Ky. L. Rep. 359, 98 S. W. 308, 30 Ky. L. Rep. 539, 99 S. W. 959; Sosnofski v. Lake Shore & M. S. R. Co. 134 Mich. 72, 95 S. W. 1077; Buckley v. Flint & P. M. R. Co. 119 Mich. 583, 78 N. W. 655; Collins v. New York C. & H. R. R. Co. 92 Hun, 563, 36 N. Y. Supp. 942; Rusterholtz v. New York C. & St. L. R. Co. 191 Pa. 390, 43 Atl. 208; Schmidt v. Philadelphia & R. R. Co. 149 Pa. 357, 24 Atl. 218; Pennsylvania R. Co. v. McTighe, 46 Pa. 316; International & G. N. R. Co. v. Locke, — Tex. Civ. App. —, 67 S. W. 1082; White v. Chicago & N. W. R. Co. 102 Wis. 489, 78 N. W. 585.

If plaintiff knew of another way which was safe, he was bound to take it. McAdory v. Louisville & N. R. Co. 109 Ala. 636, 19 So. 905; Nashville, C. & St. L. R. Co. v. Ragan, 167 Ala. 277, 52 So. 522; Evans v. Charleston & W. C. R. Co. 108 Ga. 270, 33 S. E. 901; Reynolds v. Missouri, K. & T. R. Co. 70 Kan. 340, 78 Pac. 801, 17 Am. Neg. Rep. 228; Artman v. Kansas Cent. R. Co. 22 Kan. 296; Maryland Electric R. Co. v. Beasley, 117 Md. 270, 83 Atl. 157; Slattery v. New York, N. H. & H. R. Co. 203 Mass. 453, 133 Am. St. Rep. 311, 89 N. E. 622; Schonhoff v. Jackson Branch R. Co. 97 Mo. 151, 10 S. W. 618; Harper v. Missouri, K. & T. R. Co. 70 Mo. App. 604; Sonn v. Erie R. Co. 66 N. J. L. 428, 49 Atl. 458, 10 Am. Neg. Rep. 315;

Gramlich v. Railroad Co. 9 Phila. 78; International & G. N. R. Co. v. Lewis, — Tex. Civ. App. —, 63 S. W. 1091, 64 S. W. 1011; Texas & P. R. Co. v. Neill, — Tex. Civ. App. —, 30 S. W. 369; Evans v. Charleston & W. C. R. Co. 108 Ga. 270, 33 S. E. 901; Denver v. Hubbard, 29 Colo. 529, 69 Pac. 508; Weston v. Troy, 139 N. Y. 281, 34 N. E. 780; Guthrie v. Swan, 5 Okla. 779, 51 Pac. 562, 3 Am. Neg. Rep. 460; Gerdes v. Christopher & S. Architectural Iron & Foundry Co. 124 Mo. 347, 25 S. W. 557, 27 S. W. 615; Kornetski v. Detroit, 94 Mich. 341, 53 N. W. 1106; McCool v. Grand Rapids, 58 Mich. 41, 55 Am. Rep. 655, 24 N. W. 631; Cole v. Scranton, 4 Lack. Leg. News, 287; Bowman v. Ogden City, 33 Utah, 196, 93 Pac. 561; Pierce v. Wilmington, 2 Marv. (Del.) 306, 43 Atl. 162; Henderson v. Burke, 19 Ky. L. Rep. 1781, 44 S. W. 422; Columbus v. Griggs, 113 Ga. 597, 84 Am. St. Rep. 257, 38 S. E. 953, 10 Am. Neg. Rep. 28; Moore v. Huntington, 31 W. Va. 842, 8 S. E. 512; Muller v. District of Columbia, 5 Mackey, 286; Harrigan v. Brooklyn, 42 N. Y. S. R. 625, 16 N. Y. Supp. 743; Carswell v. Wilmington, 2 Marv. (Del.) 360, 43 Atl. 169; Roe v. Crimmins, 10 Misc. 711, 31 N. Y. Supp. 807, affirmed in 155 N. Y. 690, 50 N. E. 1122; Buchholtz v. Radcliffe, 129 Iowa, 27, 105 N. W. 336, 19 Am. Neg. Rep. 219; Friday v. Moorhead, 84 Minn. 273, 87 N. W. 780; Marshall v. Belle Plaine, 106 Iowa, 508, 76 N. W. 797; Swanwick v. Monongahela City, 36 Pa. Super. Ct. 628; Idlett v. Atlanta, 123 Ga. 821, 51 S. E. 709; Evans v. Brookville, 5 Pa. Super. Ct. 298; Rusch v. Davenport, 6 Iowa, 443; Griffin v. New York, 9 N. Y. 456, 61 Am. Dec. 700.

Even if a railroad company in the construction or maintenance of its road is guilty of negligence or of the omission of some statutory duty, there can be no recovery unless such negligence or omission was the proximate cause of the injury. Chapin v. Sullivan R. Co. 39 N. H. 53, 75 Am. Dec. 207; Gulf & C. R. Co. v. Sneed, 84 Miss. 252, 36 So. 261; Biggerstaff v. St. Louis R. Co. 60 Mo. 567; Grau v. St. Louis, K. C. & N. R. Co. 54 Mo. 240; St. Louis Southwestern R. Co. v. Johnson, 38 Tex. Civ. App. 322, 85 S. W. 476; Gulf, B. & G. N. R. Co. v. Tucker, 38 Tex. Civ. App. 224, 85 S. W. 461; 29 Cyc. 488, and cases cited in note 29; Missouri, K. & T. R. Co. v. Dobbins, — Tex. Civ. App. —, 40 S. W. 861; 29 Cyc. 490, and

cases cited in note 41; Ward v. Chicago, M. & St. P. R. Co. 102 Wis. 215, 78 N. W. 442; Deisenrieter v. Kraus-Merkel Malting Co. 97 Wis. 279, 72 N. W. 735; Seith v. Commonwealth Electric Co. 241 Ill. 252, 24 L.R.A.(N.S.) 978, 132 Am. St. Rep. 204, 89 N. E. 425; Strobeck v. Bren, 93 Minn. 428, 101 N. W. 795; Mahogany v. Ward, 16 R. I. 479, 27 Am. St. Rep. 753, 17 Atl. 860; Flagg v. Hudson, 142 Mass. 288, 56 Am. Rep. 674, 8 N. E. 42; Cohen v. New York, 113 N. Y. 537, 4 L.R.A. 406, 10 Am. St. Rep. 506, 21 N. E. 700; Jackson v. Bellevieu, 30 Wis. 250; Roberts v. Wisconsin Teleph. Co. 77 Wis. 592, 20 Am. St. Rep. 143, 46 N. W. 800; Bishop v. Belle City Street R. Co. 92 Wis. 143, 65 N. W. 733; Salzer v. Milwaukee, 97 Wis. 471, 73 N. W. 20.

If no danger exists in a condition except because of an independent cause, such condition is not the proximate cause. Frassi v. McDonald, 122 Cal. 400, 55 Pac. 139, 772; Peoria v. Adams, 72 Ill. App. 662; Leavitt v. Bangor & A. R. Co. 89 Me. 509, 36 L.R.A. 382, 36 Atl. 998, 1 Am. Neg. Rep. 605; Carter v. J. H. Lockey Piano Case Co. 177 Mass. 91, 58 N. E. 476; Seccombe v. Detroit Electric R. Co. 133 Mich. 170, 94 N. W. 747; Wheeler v. Norton, 92 App. Div. 368, 86 N. Y. Supp. 1095; Trapp v. McClellan, 68 App. Div. 362, 74 N. Y. Supp. 130; Missouri, K. & T. R. Co. v. Dobbins, — Tex. Civ. App. —, 40 S. W. 861; Burton v. Cumberland Teleph. & Teleg. Co. — Ky. —, 118 S. W. 287; Houston & T. C. R. Co. v. Gerald, — Tex. Civ. App. —, 128 S. W. 166, 172; The Santa Rita, 173 Fed. 413, 416; Elliott v. Allegheny County Light Co. 204 Pa. 568, 54 Atl. 278, 13 Am. Neg. Rep. 600; Walters v. Denver Consol. Electric Light Co. 12 Colo. App. 145, 54 Pac. 960, 5 Am. Neg. Rep. 5; Willis v. Armstrong County, 183 Pa. 184, 38 Atl. 621; Smith v. Texas & P. R. Co. 24 Tex. Civ. App. 92, 58 S. W. 151, 8 Am. Neg. Rep. 352; De Maet v. Fidelity Storage, Packing & Moving Co. 231 Mo. 615, 132 S. W. 732; Miehlke v. Nassau Electric R. Co. 129 App. Div. 438, 114 N. Y. Supp. 90; St. Louis Southwestern R. Co. v. Pool, — Tex. Civ. App. —, 135 S. W. 641, 647; Fogg v. Nahant, 98 Mass. 578, 106 Mass. 278; McFarlane v. Sullivan, 99 Wis. 361, 74 N. W. 559, 75 N. W. 71; Mahogany v. Ward, 16 R. I. 479, 27 Am. St. Rep. 753, 17 Atl. 860.

The testimony given by a witness on a former trial, while not hearsay, is clearly substitutionary, and cannot be read upon a later

trial unless it is clearly shown the witness cannot be produced, or his deposition taken. 16 Cyc. 1095, 1096, and cases cited in notes 24 and 25; Sullivan v. State, 6 Tex. App. 319, 342, 32 Am. Rep. 580.

And due diligence must appear. Vandewege v. Peter, 83 Neb. 140, 119 N. W. 226; Authorities cited in 16 Cyc. 1098, note 32.

S. E. Ellsworth, for respondent.

"On a demurrer to evidence the court is substituted in place of the jury as judge of the facts, and everything which the jury might reasonably infer from the evidence is to be considered as admitted." Bank of United States v. Smith, 11 Wheat, 171, 6 L. ed. 443; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454.

Where the evidence is in conflict upon material issues, the case is for the jury. Zink v. Lahart, 16 N. D. 56, 110 N. W. 931; Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; Carr v. Minneapolis, St. P. & Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972; Vickery v. Burton, 6 N. D. 245, 69 N. W. 193; Choctaw, O. & W. R. Co. v. Wilker, 16 Okla. 384, 3 L.R.A.(N.S.) 595, 84 Pac. 1086.

Or where the evidence is such that reasonable minds might draw different conclusions. Stone v. Northern P. R. Co. 29 N. D. 480, 151 N. W. 36; Wilson v. Northern P. R. Co. 30 N. D. 456, L.R.A.1915E, 991, 153 N. W. 429.

A railroad company must maintain a safe and convenient crossing, making it, as far as possible, as safe and convenient to the public as it would have been had the railroad not been built. Comp. Laws 1913, §§ 1934, 4621, 4686, 4687; 33 Cyc. 925–927; Raper v. Wilmington & W. R. Co. 126 N. C. 563, 36 S. E. 115; Whitby v. Baltimore, C. & A. R. Co. 96 Md. 700, 54 Atl. 674.

The citizen on the public highway is bound to exercise only ordinary care, and when he is injured by a railroad company, it is no answer to his claim for redress that notwithstanding the omission of their signals, he might, by greater vigilance, have discovered the approach of the train. Dusold v. Chicago G. W. R. Co. 162 Iowa, 441, 142 N. W. 213; Ernst v. Hudson River R. Co. 35 N. Y. 9, 90 Am. Dec. 761; Draper v. Ironton, 42 Wis. 696; Choctaw, O. & W. R. Co. v. Wilker, 16 Okla. 384, 3 L.R.A.(N.S.) 595, 84 Pac. 1087; Lillstrom v. Northern P. R. Co. 53 Minn. 464, 20 L.R.A. 587, 55 N. W. 624, 12 Am. Neg. Cas. 131; Cunningham v. Thief River Falls, 84 Minn. 21, 86

N. W. 763, 10 Am. Neg. Rep. 106; Atchison, T. & S. F. R. Co. v. Henry, 60 Kan. 322, 56 Pac. 486, 5 Am. Neg Rep. 593.

Such questions might be honestly answered differently by different men, and they are for the jury. Gray v. Scott, 66 Pa. 345, 5 Am. Rep. 371; Deering, Neg. §§ 16–24; Beach, Contrib. Neg. 38; Lincoln v. Gillilan, 18 Neb. 114, 24 N. W. 444; Orleans v. Perry, 24 Neb. 831, 40 N. W. 417; Brown v. Brooks, 85 Wis. 290, 21 L.R.A. 255, 55 N. W. 395; Missouri P. R. Co. v. Baier, 37 Neb. 235, 55 N. W. 913; American Waterworks Co. v. Dougherty, 37 Neb. 373, 55 N. W. 1051; Omaha & R. Valley R. Co. v. Brady, 39 Neb. 27, 57 N. W. 767; Guthrie v. Swan, 5 Okla. 779, 51 Pac. 562, 3 Am. Neg. Rep. 460; 4 Am. & Eng. Enc. Law, 34; Beach, Contrib. Neg. pp. 39, 40; Jeffrey v. Keokuk & D. M. R. Co. 56 Iowa, 546, 9 N. W. 884; 2 Thomp. Trials, p. 1172, § 18; Shearm. & Redf. Neg. § 31.

A railway company crossing a public highway is bound to keep the approaches to the crossing in safe condition for the public to travel on. See v. Wabash R. Co. 123 Iowa, 443, 99 N. W. 106; Maltby v. Chicago & W. M. R. Co. 52 Mich. 108, 17 N. W. 717.

Testimony of a witness given at a former trial and reduced to writing by the official stenographer may be read in evidence at a later trial between the same parties and as to the same issues, where such witness is a nonresident and not in the jurisdiction of the court. State v. Moeller, 24 N. D. 165, 138 N. W. 981; Starkie, Ev. p. 310; 1 Greenl. on Evidence, § 163, and note; 1 Phillipps, Ev. 393, and note 114; Minneapolis Mill Co. v. Minneapolis & St. L. R. Co. 51 Minn. 304, 53 N. W. 639; King v. McCarthy, 54 Minn. 190, 55 N. W. 960; Atchison, T. & S. F. R. Co. v. Osborn, 64 Kan. 187, 91 Am. St. Rep. 189, 67 Pac. 547.

Christianson, J. This is an action to recover damages for personal injuries, and the injury to plaintiff's automobile, alleged to have been caused by defendant's negligence in failing to construct and maintain a good and sufficient crossing over its line of railway at a point where such line of railway intersected one of the public highways in La Moure county, in this state. The cause was submitted to a jury, which returned a verdict in favor of the plaintiff for $700. Judgment was entered pursuant to such verdict, and this appeal is from the judgment.

Appellant assigns as error the trial court's rulings: (1) In denying

defendant's motion for a directed verdict; (2) in admitting in evidence the testimony given by the witness Fees, upon a former trial of this action. In his argument of these errors, appellant's counsel presents the following three propositions: 1. That the plaintiff was guilty of contributory negligence as a matter of law. 2. That the proximate cause of injury was not the negligence of the defendant in failing to construct and maintain a good and sufficient crossing, but the negligence of the township officials in failing to construct and maintain a roadway at the foot of the easterly approach of the crossing constructed by the defendant. 3. That the court erred in admitting in evidence the testimony given by the witness, Fees, upon the former trial of the action. We will consider these propositions in the order stated.

Plaintiff's cause of action is predicated upon defendant's failure to construct and maintain a good and sufficient crossing over its line of railway at a point where such railway intersected a public highway. Under the laws of this state it is provided: "All railway companies operating a line of railway in this state shall build or cause to be built and kept in repair good and sufficient crossings over such line at all points where any public highway in use is now or may hereafter be intersected by the same." Comp. Laws 1913, § 4686.

"Such crossing shall be constructed as follows:

"1. Of a grade of earth on one or both sides of the railroad track as the location may require, 20 feet in width, the middle point of which shall be as nearly as practicable at the middle point of the highway and such grade shall be of such slope as shall be necessary for the safety and convenience of the traveling public.

"2. Plank shall be firmly spiked on and for the full length of the ties used in the roadbed of such railway where such crossing occurs and shall be laid not more than one inch apart except where the rail prevents; the plank next inside of the rail shall not be more than 2½ inches from the inside surface of such rail and the plank used in the crossing shall not be less than 3 inches in thickness and so laid that the upper surface of the plank shall be on a level with the upper surface of the rail; such plank shall extend along the railway the entire width of the highway grade and in no case less than 20 feet." Comp. Laws 1913, § 4687.

"Every corporation constructing, owning or using a railroad shall

restore every stream of water, watercourse, street, highway, plank road, toll or wagon road, turnpike or canal across, along or upon which such railroad may be constructed to its former state or to such condition as that its usefulness shall not be materially impaired, and thereafter maintain the same in such condition against any effects in any manner produced by such railroad." Comp. Laws 1913, § 4621.

The complaint charged that defendant had failed to comply with the statute in the following particulars: (1) That the grade or approach was not 20 feet in width, but throughout was of a width not exceeding 12 feet; (2) that the slope on either side of the approach to the railroad track was not gradual and convenient, but steep and difficult of ascent; (3) that the grade was not constructed of firm and solid materials that would bear throughout its passage a vehicle in ordinary use, for purposes of travel; (4) that the crossing was so constructed and the grade so steep that persons approaching from the west side were not sufficiently elevated when entering upon the approach to see over the embankment and know whether or not other persons in vehicles were approaching from the other side. The answer sets up two defenses. The first defense is in effect a general denial. The second defense is that the injuries, if any, were caused by plaintiff's contributory negligence.

The crossing in question is between the stations of Millarton and Nortonville, on the line of railway of the defendant railway company. And the evidence shows that at the time of the construction of such line of railway, it intersected at right angles a public highway at the point where such crossing is constructed and the accident occurred. And in order to complete the construction of its line of railway it became necessary for the defendant, at this point, to raise above the level of the public highway an embankment of earth to the height of about 10 feet. The defendant railway company subsequently constructed a crossing at this point, but the witnesses all agreed that this crossing was not 20 feet in width. The various witnesses testified that its width was only about 17 feet up near the track, and, a short distance from the track, converged to a width of about 12 feet, and that the greater portion of the embankment was of the latter width. The witnesses all agreed that it was a steep and difficult crossing. On July 14, 1913, plaintiff, accompanied by his wife, was driving in an automobile, and approached this crossing from the west. He had never been over it before, and did

not know anything about the approach on the east side of the track. It was apparent to plaintiff that the grade was steep and somewhat narrow, and that some work of construction or repair had recently been done upon it. Plaintiff's automobile was an Overland five-passenger car of standard width. On reaching the foot of the approach on the west side of the railroad, he was about 75 or 80 feet distant from the track, but, owing to the height of the embankment and the steepness of the descent, he could not see over the railroad track and down or along the approach on the east side. Just as plaintiff's automobile passed upon the railroad track, he, for the first time, had a view of the east approach, and observed that this was narrow and very steep, and that another automobile containing four persons had stopped at the foot of the approach, and that the driver of that car was engaged in cranking the automobile. The man thus engaged shouted, and plaintiff applied the brakes and stopped his car, the rear wheels of which were then on the track. Plaintiff testified that about this time, he observed a speeder or track velocipede about 40 rods away approaching the crossing upon the railroad track from the north or left side, and that he therefore concluded to get the auto off the track. Plaintiff further testified that the east approach was so steep that he did not dare to go over on the east side for fear his automobile would slide down and collide with the automobile at the foot of the approach. That he therefore stated to the driver in the other automobile that he would back over to the west side of the railroad track, and see if he could not arrange to let him pass. Plaintiff thereupon backed his automobile as slowly as possible, carefully observing the hind wheels so as to be certain not to get too close to the edge of the embankment. When the automobile had reached a point where the front wheels were about 8 or 10 feet west of the railroad track, and the outer hind wheel 18 inches or 2 feet from the edge of the embankment, the earth of which the grade was constructed suddenly gave way, and slid down the side, carrying the automobile with it. This occurred so suddenly that plaintiff did not have time to escape from the car, and when it reached the bottom of the embankment the car toppled over, and plaintiff was caught between the side thereof and the earth beneath.

At the conclusion of all the testimony, the defendant moved for a directed verdict solely on the ground that, "that any injury that the plaintiff received or that was received by his automobile, was caused di-

rectly and the proximate cause thereof was the carelessness and negligence of the plaintiff himself." Appellant's counsel contends that this motion should have been granted, and argues earnestly that plaintiff was guilty of contributory negligence as a matter of law.

The statute enjoins upon the railroad company the duty of constructing a crossing in a certain manner, and while it is true that travelers are required to exercise ordinary care in protecting themselves and their property from injury, still they have a right to believe that the railroad company has performed its duty. See 33 Cyc. 925–927. The crossing in question was constructed by the railroad company for the purpose of giving travelers an opportunity to cross the tracks at that point, and the plaintiff endeavored to do so, and when he found himself on the top of the track where he could not remain by reason of the velocipede approaching from the north, for the first time he became aware that the railroad company had failed to comply with its statutory duty of constructing a sufficient approach on the east side. Under the circumstances plaintiff was required to use the same care which an ordinarily prudent man would exercise under the same circumstances. It is conceded by appellant's counsel that all conflict in the evidence must be disregarded and all doubtful points construed most favorably to the plaintiff; and that all inferences which a jury might reasonably draw from the facts proved will be regarded as established. The rule is well settled that in all cases where 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. "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." McGregor v. Great Northern R. Co. 31 N. D. 471, 154 N. W. 261. See also Stone v. Northern P. R. Co. 29 N. D. 480, 151 N. W. 36; Wilson v. Northern P. R. Co. 30 N. D. 456, L.R.A.1915E, 991, 153 N. W. 429; Omaha & R. Valley R. Co. v. Brady, 39 Neb. 27, 57 N. W. 767; Guthrie v. Swan, 5 Okla. 779, 51 Pac. 562, 3 Am. Neg. Rep. 460.

We are all agreed that plaintiff was not guilty of contributory negligence as a matter of law, and that the trial court properly submitted this question to the jury.

Appellant's next proposition is that defendant's negligence was not the proximate cause of the injury, but that the proximate cause of such injury was the negligence of the road officials of the township in failing to contruct and maintain a roadway at the foot of the easterly approach, of such width as to furnish room for two vehicles to pass. We do not believe that under the evidence there is any merit in this contention. At least, the evidence is such that the court could not say as a matter of law that the negligence or omission of the township officials constituted the proximate cause of the injury. While it is true that where the facts are undisputed, the question of proximate cause is one of law to be determined by the court, still it is equally true that where the evidence is conflicting, or the proximate cause of an injury depends upon a state of fact from which different minds might reasonably draw different inferences, then it is properly a question for the jury. 29 Cyc. 632, 633.

We are satisfied, however, that appellant is in no position to raise this question at this time. While the answer put in issue the allegations of the complaint, including the charge of negligence on the part of defendant, still the undisputed testimony of all the witnesses showed that the defendant had not constructed a crossing complying with the statutory requirements. And while the question of defendant's negligence was an issue under the pleadings, still the case was tried in the court below upon the theory that the amount of plaintiff's damages, if any, and plaintiff's contributory negligence, constituted the only issues between the parties. The court's instructions were formulated upon this theory, and they are conceded to be correct as no exception was taken to any portion thereof. Defendant's motion for a directed verdict was based solely upon the ground that plaintiff's right of recovery was barred by his contributory negligence. It is well settled that new questions cannot be presented and litigated for the first time in the appellate court, and defendant cannot be heard to urge this new theory of defense for the first time on this appeal. 3 C. J. §§ 590, 618, 639 et seq.

Appellant's third proposition is that the court erred in admitting the testimony of the witness, Frank Fees, given upon a former trial of

the case. The testimony in question related solely to the value of the automobile at the time of, and after, the injury it received by falling down the side of the embankment. In his complaint, plaintiff claimed damages for injuries to the automobile in the sum of $200. Plaintiff also testified fully upon this subject, hence the testimony of Fees was merely cumulative. The testimony of Fees, as already stated, was given on the first trial of this action, which occurred on July 3, 1914. At that time he was examined and cross-examined by the same attorneys who conducted the second trial, and his testimony was taken down in full by the official stenographer of the trial court. Before the second trial, plaintiff made inquiries of friends and acquaintances of Mr. Fees at the place of his residence, and was informed that he was out of the state.

Plaintiff also wrote him at West Point, Nebraska, the place to which Fees had removed; but at the time of the second trial had not heard from or been able to locate him. Plaintiff also caused a subpœna to be issued and placed in the hands of the sheriff of the county for service, and the sheriff made return that he was unable to make service thereof upon Mr. Fees by reason of his being out of the state.

The plaintiff also called as a witness one Anderson, an employer of the witness Frank Fees, and Anderson testified that Fees left his employ in August, 1914; that shortly after leaving Anderson's employment Fees went to West Point, Nebraska, and has been continuously absent from Jamestown since that time. Upon this showing, a transcript of the testimony of Frank Fees made by the official stenographer of the court from his notes taken at the first trial was read to the jury. This transcript was used under a stipulation between counsel that no objection was made to the testimony on account of the form in which it was introduced. The only objection urged to the admission of this testimony was that no sufficient foundation had been laid for its introduction.

The courts differ as to the conditions under which the testimony of a witness given on a former trial of the same issues between the same parties should be admitted in evidence. This question was considered by the supreme court of Minnesota in the case of Minneapolis Mill Co. v. Minneapolis & St. L. R. Co. 51 Minn. 304, 53 N. W. 639, 642; and in the opinion written by Judge Mitchell, the court said: "The admis-

sion of the testimony of a witness on a former trial is frequently inaccurately spoken of as an exception to the rule against the admission of hearsay evidence. The chief objections to hearsay evidence are the want of the sanction of an oath, and of any opportunity to cross-examine, neither of which applies to testimony given on a former trial. The real objection to such evidence is that it is only the testimony of someone else as to what the witness swore to on the former trial; and, before the day of official reporters in our trial courts, the accuracy or completeness of such evidence depended entirely upon the fallible memory of those who heard the witness testify. It can be readily seen why, under such circumstances, courts were disinclined to admit such evidence except in cases of actual necessity. But where the words of a witness as they come from his lips are taken down in full by an official court stenographer, this objection does not apply. We do not see why such testimony is not as satisfactory and reliable as a new deposition, taken out of the state, would be. Rules on such subjects should be practical, and subject to modification as conditions change."

In discussing the same matter, Jones (Jones, Ev. § 342) says: "The fact that a witness is beyond the jurisdiction of the state, or of the court, is generally a sufficient excuse for not producing him. Hence, if it is shown that a witness is absent from the state, or a nonresident, or out of the jurisdiction of the court, or if his place of residence is unknown, testimony given by him upon a former trial, and correctly preserved, is admissible in evidence on a subsequent trial of the same cause. It makes no difference whether his testimony was given in the form of a deposition or orally, if it has been preserved in the manner pointed out by law. Testimony of a witness given at a former trial is admissible when his presence at the second trial of the same case cannot be procured. If it is impossible to secure the presence of a witness who has testified at the first trial of the case, it is proper to admit evidence of an unsuccessful effort to find him, in order to lay the foundation for admitting his testimony given on the former trial." See also State v. Moeller, 24 N. D. 165, 138 N. W. 981; King v. McCarthy, 54 Minn. 190, 55 N. W. 960; Atchison, T. & S. F. R. Co. v. Osborn, 64 Kan. 187, 91 Am. St. Rep. 189, 67 Pac. 547. No error was committed in the admission of this testimony. This disposes of all questions presented by appellant.

The judgment appealed from must be affirmed. It is so ordered.

ELIZA W. HARRIS and John P. Jackson, Partners, Doing Business as Harvey Harris & Company, v. PETER J. VAN VRANKEN.

(155 N. W. 65.)

Real estate broker — lands listed for sale — purchaser found — sale agreement made — refusal of landowner to sell — damages — action for — will lie.

1. Action by real estate brokers against the seller for refusing to convey land to a purchaser to whom plaintiffs had negotiated a sale after defendant had listed the land with them for sale. *Held:*

An action for damages will lie under such circumstances.

Damages — measure of — commissions — resulting from sale.

2. That the measure of damage is the amount plaintiffs would have received as commissions from the intending purchaser had defendant complied with his contract and conveyed to such purchaser who was ready, able, and willing to pay both purchase price and commissions.

Chain of title — abstract — names — discrepancies in — contract — breach of.

3. Defendant had agreed with the purchaser to furnish an abstract of title showing perfect record title. The record disclosed that a deed in defendant's chain of title was taken to one "Krups," grantee, and that the next grant was executed by one "Krepps." The purchaser took exception to this title of record. Defendant failed and neglected to produce on demand original deeds, or to cure the defects, except a statement by affidavit that the grantee and the grantor so named were the same person. Defendant refused to convey unless the purchaser would accept such record title. *Held:*

That the title was not marketable, and that defendant, and not the intending purchaser, breached the contract.

Double contract — sale and purchase — commissions — damages.

4. That the contract negotiated amounted to a double one under which defendant agreed to convey to plaintiffs' purchaser, with the purchaser agreeing to purchase of defendant and to defendant's knowledge to pay commissions to

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Note.—There is an almost unbroken current of authority to the effect that, in the absence of a stipulation to the contrary in the contract between a real estate broker and his principal, the former is entitled to his commissions if, acting in good faith, he procures a purchaser willing, able, and ready to take the property upon the terms offered by the principal and the sale fails because of a defect in the principal's title. The authorities on this question are exhaustively reviewed in notes in 43 L.R.A. 609; 3 L.R.A.(N.S.) 576; and 24 L.R.A.(N.S.) 1182.

plaintiffs. Defendant's purchase price was fixed with a commission payable from the purchaser to plaintiffs. Louva v. Worden, 30 N. D. 401, a recent decision of this court to recover commissions from the seller for a purchase negotiated, distinguished.

Demurrer — complaint — evidence — rulings of court.

5. Demurrers to the complaint and to the evidence offered were properly overruled.

Opinion filed June 19, 1915. Opinion on rehearing filed November 30, 1915.

From a judgment of the District Court of Burleigh County, *Nuessle,* J., defendant appeals.

Affirmed.

Hanley & Sullivan, and *Miller & Zuger,* for appellant.

"Verbal" offers to agent are not sufficient; they must be made to principal. Johnson Bros. v. Wright, 124 Iowa, 61, 99 N. W. 103.

Where compensation is not fixed by contract, recovery must be on basis of *quantum meruit.* Boysen v. Robertson, 70 Ark. 56, 68 S. W. 243; Ford v. Brown, 120 Cal. 551, 52 Pac. 817; Kennedy v. Merickel, 8 Cal. App. 378, 97 Pac. 82; Turnley v. Michael, 4 Tex. App. Civ. Cas. (Willson) 363, 15 S. W. 912; Chezum v. Kreigbaum, 4 Wash. 680, 30 Pac. 1098, 32 Pac. 109; Matheney v. Godin, 130 Ga. 713, 61 S. E. 703; Allen v. Clopton Realty Co. — Tex. Civ. App. —, 135 S. W. 242.

A real estate broker to sell land for a net price is not entitled, in the absence of a contract therefor, to the excess over such price, as he may obtain for the land. Wilson v. Mason, 158 Ill. 304, 42 N. E. 134; Hammond v. Crawford, 14 C. C. A. 109, 35 U. S. App. 1, 66 Fed. 425; Keys v. Johnson, 68 Pa. 42; Olsen v. Jodon, 38 Minn. 468, 38 N. W. 485; Richards v. Jackson, 31 Md. 250, 1 Am. Rep. 49; Dorrington v. Powell, 52 Neb. 440, 72 N. W. 587; Felts v. Butcher, 93 Iowa, 414, 61 N. W. 991; Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724; Brandrup v. Britten, 11 N. D. 376, 92 N. W. 453.

Where a parol offer is relied on by plaintiffs, they must allege such parol offer to have been made by the purchaser to the defendant. Such offer to the broker is not sufficient. Johnson Bros. v. Wright, 124 Iowa, 61, 99 N. W. 103, and cases cited; Ford v. Brown, 120 Cal. 551, 52 Pac. 817; Manton v. Cabot, 4 Hun, 73; Owen v. Ramsey, 23 Ind. App. 285, 55 N. E. 247.

Where an express contract of employment is relied upon, it must be proved as alleged. Castner v. Richardson, 18 Colo. 496, 33 Pac. 163; Kane v. Sherman, 21 N. D. 249, 130 N. W. 222; Patterson v. Torrey, 18 Cal. App. 346, 123 Pac. 224.

There was no agreement for compensation, and recovery can only be had upon *quantum meruit*. Turnley v. Michael, 4 Tex. App. Civ. Cas. (Willson) 363, 15 S. W. 912; Scott v. Hartley, 126 Ind. 239, 25 N. E. 826; Chezum v. Kreigbaum, 4 Wash. 680, 30 Pac. 1098, 32 Pac. 109; Boysen v. Robertson, 70 Ark. 56, 68 S. W. 243; Matheney v. Godin, 130 Ga. 713, 61 S. E. 703; Allen v. Clopton Realty Co. — Tex. Civ. App. —, 135 S. W. 242; Ford v. Brown, 120 Cal. 551, 52 Pac. 817; Manton v. Cabot, 4 Hun, 73; Owen v. Ramsey, 23 Ind. App. 285, 55 N. E. 247.

A broker to procure purchasers for land, to be entitled to any compensation, must prove that he found and produced to defendant a person ready, willing, and able to buy and pay, and who offered to buy at the price and on the terms alleged. Johnson Bros. v. Wright, 124 Iowa, 61, 99 N. W. 103; Flynn v. Jordal, 124 Iowa, 457, 100 N. W. 326, and cases cited; Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105; Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200; McGavock v. Woodlief, 20 How. 221, 15 L. ed. 884; O'Brien v. Gilliland, 4 Tex. Civ. App. 42, 23 S. W. 244; Cullen v. Bell, 43 Minn. 226, 45 N. W. 428; Dent v. Powell, 93 Iowa, 711, 61 N. W. 1043; Neiderlander v. Starr, 50 Kan. 766, 32 Pac. 359; Carter v. Owens, 58 Fla. 204, 25 L.R.A.(N.S.) 736, 50 So. 641; Watters v. Dancey, 23 S. D. 481, 139 Am. St. Rep. 1071, 122 N. W. 430; Cone v. Keil, 18 Cal. App. 675, 124 Pac. 548; Grindstaff v. Merchants' Invest. & T. Co. 61 Or. 310, 122 Pac. 46.

The conditions of the contract were not fulfilled in any respect. Halsell v. Renfrow, 14 Okla. 674, 78 Pac. 118, 2 Ann. Cas. 286.

A broker may not speculate with his principal's property, without the knowledge and consent of the principal, but must account for all profits. Borst v. Lynch, 133 Iowa, 567, 110 N. W. 1031; Young v. Hughes, 32 N. J. Eq. 372; Pratt v. Patterson, 112 Pa. 475, 3 Atl. 858; Martin v. Bliss, 57 Hun, 157, 10 N. Y. Supp. 886; Carter v. Owens, 58 Fla. 204, 25 L.R.A.(N.S.) 736, 50 So. 641.

"Man cannot serve two masters." O'Meara v. Lawrence, 159 Iowa,

448, 141 N. W. 312; Henderson v. Vincent, 84 Ala. 99; Ford v. Brown, 120 Cal. 551, 52 Pac. 817; Morey v. Laird, 108 Iowa, 670, 77 N. W. 835; Carpenter v. Fisher, 175 Mass. 9, 55 N. E. 479; Phinney v. Hall, 101 Mich. 451, 59 N. W. 814; Ballinger v. Wilson, — N. J. Eq. —, 53 Atl. 488; Martin v. Bliss, 57 Hun, 157, 10 N. Y. Supp. 886.

Courts cannot supply omissions in contract. Johnson v. Plotner, 15 S. D. 158, 86 N. W. 926; Schmeling v. Kriesel, 45 Wis. 325; Potts v. Whitehead, 20 N. J. Eq. 55; Colson v. Thompson, 2 Wheat. 336, 4 L. ed. 253.

In order to obtain specific performance of a contract, its terms should be so precise as that neither party can reasonably misunderstand them. Bailey v. Ogden, 3 Johns. 399, 3 Am. Dec. 509; Meyer Land Co. v. Pecor, 18 S. D. 466, 101 N. W. 39; Chambers v. Roseland, 21 S. D. 298, 112 N. W. 148.

Perfect title means a title free from reasonable doubt. Woodward v. McCollum, 16 N. D. 43, 111 N. W. 623.

Newton, Dullam, & Young, for respondents.

The findings of the trial court have the same weight as the verdict of a jury and are presumed to be correct, and unless they are against the clear preponderance of the evidence, they must stand. Ruettell v. Greenwich Ins. Co. 16 N. D. 546, 113 N. W. 1029; James River Nat. Bank v. Weber, 19 N. D. 702, 124 N. W. 952.

A plaintiff must allege and prove all facts necessary to entitle him to recover, upon the theory outlined by his pleading. 19 Cyc. 274; Hayes v. McAra, 166 Mich. 198, 35 L.R.A.(N.S.) 117, 131 N. W. 535; Hamlin v. Schulte, 34 Minn. 534, 27 N. W. 301; Grosse v. Cooley, 43 Minn. 188, 45 N. W. 15; McDonald v. Smith, 99 Minn. 42, 108 N. W. 291; Fulton v. Cretian, 17 N. D. 335, 117 N. W. 344.

Courts, in construing contracts, should regard that construction placed upon it by the parties themselves. Moore v. Beiseker, 77 C. C. A. 545, 147 Fed. 367; Willard v. Monarch Elevator Co. 10 N. D. 400, 87 N. W. 996; Canfield v. Orange, 13 N. D. 622, 102 N. W. 313.

Where a broker for the sale of lands finds a buyer who is willing and ready to buy and pay on the terms required by the owner of the land, or principal, and communicates the facts to another agent of the same principal, he commits no fraud by not disclosing the amount of excess he is to receive, over the net price. Deming Invest. Co. v. Meyer,

19 Okla. 100, 91 Pac. 846; Townsend v. Kennedy, 6 S. D. 47, 60 N. W. 164; Reed, Stat. Fr. § 341; Allgood v. Fahrney, 164 Iowa, 540, 146 N. W. 42.

It is not a question of the ability of the prospective purchaser to procure the money to pay for the land, but the test is, his ability and circumstances to respond in damages for a breach of his contract to purchase. Butler v. Baker, 17 R. I. 582, 33 Am. St. Rep. 897, 23 Atl. 1019; McCabe v. Jones, 141 Wis. 540, 124 N. W. 486; Stoutenburgh v. Evans, 142 Iowa, 239, 120 N. W. 59, 19 Ann. Cas. 1048; Hart v. Hoffman, 44 How. Pr. 168; Hackley v. Draper, 60 N. Y. 88; White v. Glasby, 101 Mo. 162, 14 S. W. 180; Grosse v. Cooley, 43 Minn. 188, 45 N. W. 15; McDonald v. Smith, 99 Minn. 42, 108 N. W. 291; Hamlin v. Schulte, 34 Minn. 534, 27 N. W. 301.

Concealment of the identity of the purchaser from his principal will not preclude the owner from recovering his commissions on a sale of land, where there does not appear that there was anything in the facts and circumstances to render that fact important. Veasey v. Carson, 177 Mass. 117, 53 L.R.A. 241, 58 N. E. 177; Feist v. Jerolamon, 81 N. J. L. 437, 75 Atl. 751.

The seller's title to the land is not free from reasonable doubt. The title is not marketable. The defendant himself recognized that his title was not right. The vendor gave for his reason for withdrawing the land from sale, that he no longer needed the money to be paid down. Hubner v. Reickhoff, 103 Iowa, 368, 64 Am. St. Rep. 191, 72 N. W. 540; 4 Words & Phrases, p. 3380.

He cannot, after litigation is started, assign and rely upon another and different reason. Donley v. Porter, 119 Iowa, 542, 93 N. W. 574; Weaver v. Snow, 60 Ill. App. 624; Smith v. Keeler, 151 Ill. 518, 38 N. E. 250; Blood v. Shannon, 29 Cal. 393.

Goss, J. This action is by real estate brokers to recover damages for defendant's breach of contract in refusing to convey to a third person a section of land belonging to defendant, and for which plaintiffs had, at his solicitation, secured said third person as a purchaser, and who had agreed with defendant to buy. The plaintiffs' damages arise from defendant preventing their securing commissions from the purchaser by breaching the contract. A general demurrer was interposed

to the complaint, and the order overruling it is the first error assigned. The material parts of the complaint will be set forth at length.

It is alleged that plaintiffs are real estate brokers engaged in buying and selling real property on commission for others "to the knowledge of the defendant." That defendant was the owner of said section of land. "That on and prior to the said 21st day of September, 1906, the defendant had employed the plaintiffs to sell such real property, and had directed and authorized them to offer for sale and to sell the same for, and at the price of, $15 per acre net to him, and that on or about said date they offered the same to one Julius C. Kunze, then of the town of Lewis, and state of Iowa, at and for the price of $17 per acre; and that the said Julius C. Kunze then and there offered to buy the same at said price, upon the terms and conditions of a payment of $1,780, down, of which $1,280 was the plaintiffs' profit and commissions and as to the net price to the defendant and terms of payment thereof, as follows, *viz.:* $500 cash on delivery by the defendant of a contract for a warranty deed conveying the land free from all encumbrances whatsoever when the terms of the contract are complied with by such purchaser,—such purchaser to pay an additional $1,300 on or before the 1st day of March, 1907, and the balance of the purchase price to be paid in six equal annual payments, with interest at the rate of 6 per cent per annum, payable annually,—the defendant to furnish an abstract showing perfect title continued to date; when purchaser has paid one fourth of the purchase price, defendant to give him a warranty deed and take back a mortgage for the unpaid balance due on the purchase price,—the purchaser to have the privilege of paying at or before maturity. That said Julius Kunze was then and there able, ready, and willing and ever since said time has been able, willing, and ready to carry out and perform said offer; and that thereupon on the said day the plaintiffs submitted said offer to the defendant, in writing, and that thereupon, to wit, the 24th day of September, 1906, the defendant accepted such offer in writing and thereby entered in a contract for the sale of such property for and at the price of $15 per acre net to him." That defendant refused to "carry out said agreement for the sale and conveyance of such real property," and still refuses to do so, of which he has notified plaintiffs, who demanded that he comply with his contract. Then follows the allegation of damage, "that by reason of the premises

and the defendant's refusal to carry out his said agreement hereinbefore shown, the plaintiffs have lost the commission and profit that otherwise they would have received upon the sale and conveyance of said real property, to wit, the sum of $2 per acre upon said 640 acres contained in said section 21 being the aggregate amount of twelve hundred and eighty dollars ($1,280)." Prayer is for damages in the sum of $1,280 and interest. The complaint may properly be subdivided and epitomized as follows: (1) Defendant listed the land with plaintiffs for sale at $15 per acre net to him. (2) They offered to sell it to Kunze for $17 per acre cash. (3) Instead of accepting that offer, Kunze made a counter-proposition to plaintiffs that he would buy it at $17 per acre with a cash payment down of $1,780, "of which $1,280 was the plaintiffs' profit and commissions," and coupled with it the following offer: "As to the net price ($15 per acre) to the defendant," with "terms of payment thereof to defendant of said purchase price," *viz.*, "$500 cash on delivery by defendant of a contract for warranty deed conveying the land free of all encumbrances whatsoever," with time on terms stated as to the balance of the $15 per acre coming to defendant, over the $500 cash. (3) That plaintiffs immediately submitted in writing said offer (of Kunze) to defendant; and (4) that on September 24, 1906, the defendant accepted in writing such offer of Kunze's so communicated to defendant through plaintiffs; and (5) defendant executed said contract and "thereby entered into a contract for the sale of such property "for and at the price of $15 per acre net to him" (defendant); (6) that he subsequently refused to convey, and plaintiffs lost a profit of $2 per acre, or $1,280, which they would have received from Kunze and which sum they demand as damages resulting to them from defendant breaching said contract.

These brokers were not the agents, strictly speaking, of defendant to sell, but only to procure a purchaser. Hayes v. McAra, 35 L.R.A. (N.S.) 116, and note (166 Mich. 198, 131 N. W. 535); Fulton v. Cretian, 17 N. D. 335, 117 N. W. 344, distinguishing this action in principle from those similar to Ballou v. Bergvendsen, 9 N. D. 285, 83 N. W. 10. See also Brandrup v. Britten, 11 N. D. 376, 92 N. W. 453, and Larson v. O'Hara, 8 Ann. Cas. 849, and note (98 Minn. 71, 116 Am. St. Rep. 342, 107 N. W. 821). But if considered defendant's brokers, they may have an interest antagonistic to him, arising out of

the transaction negotiated when he had as here shared full knowledge that they were acting for both, and no fraud is involved, 4 R. C. L. 262–277, and authority there cited. The complaint pleads that defendant knew plaintiffs were real estate brokers, and listed with them his land for sale at a net price to him. And he authorized them to offer it for sale with no other restrictions upon the selling price, except the implied one that good faith would be exercised toward him, and the property would be sold as advantageously as possible for defendant. They offered it at $17 per acre to Kunze, presumably for cash. Had Kunze accepted and paid cash without further negotiations or understanding between plaintiffs and defendant as to commissions for negotiating the sale, the recent decision of Louva v. Worden, 30 N. D. 401, 52 N. W. 689, would apply (quoting from the syllabus) "where the owner lists real property for sale with a broker at a net price, such broker, in the absence of an express contract to that effect, is not entitled to receive as a commission all the selling price in excess of such list price, but is merely entitled to a reasonable commission not exceeding such excess." Had nothing further been said about commissions, and had Kunze bought for cash when the land was offered him, there would have been no express contract that the margin of $2 per acre should be commission and profit to plaintiffs. All that plaintiffs could then have recovered would have been the reasonable value of services rendered and upon a *quantum meruit*. But right here enter facts entirely distinguishing this case fram Louva v. Worden, supra. Kunze did not accept the offer of the defendant by his brokers to him, but instead came back with a different offer, to wit, to pay $15 per acre net to defendant and $1,280 to plaintiffs as their commission for negotiating for Kunze a purchase at $15 net to defendant and upon Kunze's terms as specified. Thus at this point in the negotiations these brokers were communicating not defendant's offer or their own for defendant, to Kunze; but instead, Kunze's offer to defendant made through them, of $15 net to defendant with a $2 per acre margin to them as brokers, constituting plaintiffs on its acceptance by defendant brokers for both parties with commissions agreed upon in amount and from whom payable. This was a legitimate offer to make and for the brokers to act upon. Defendant knew their position, and that they were not exclusively his agents, but merely go-betweens with compensation agreed up-

on. Said offer or arrangement defendant accepted immediately, and partially executed it. Under it defendant was receiving as the purchase price full $15 per acre net upon terms sanctioned and agreed upon by him. From the complaint defendant, with knowledge that the $2 per acre in cash would be taken by plaintiffs as commissions, and that he should have the $15 per acre net to him, accepted the same in writing. This agreement he subsequently violated by refusing to perform it. To such a case Louva v. Worden, supra, has no application. Defendant, knowing the terms of the contract, knew the injury that would result to plaintiffs from its breach, and wilfully breached it, thereby subjecting himself to resulting damages, the measure of which was the profit coming not from defendant, but from Kunze, and which amount Kunze was ready, willing, and able to pay, when defendant performed. The law of this case must not be confused with the measure of recovery with the suit brought against the seller, who, under the contract, agrees to pay a compensation for selling. Here the sale was not made for the seller alone, nor was the purchaser procured solely for the seller. This would have been a different case had Kunze's offer been that he would pay defendant $17 per acre but with the condition that defendant should pay commissions. The burden would then be upon plaintiffs to establish a contract, either express or implied, that defendant, not Kunze, should pay the $2 per acre to them margin as their profits, and be parallel in facts with Louva v. Worden. But the complaint is evidently drawn to avoid just that situation, in that it pleads that the offer is made to the brokers with their commission specified, and with the seller's net price to him specified, together with terms in detail; that such offer, impliedly the entire offer concerning both brokerage commission and the net stipulated purchase price to defendant, was accepted by defendant. That such contract does not need to be in writing to empower the broker to negotiate a sale has the support of the weight of authority. Mechem on Agency, 2d ed. 1914, § 2434, reading: "These agreements with the broker to pay a commission for finding a purchaser for real estate are not within the statute of frauds, and hence are valid though not in writing." Many cases are cited supporting the text, among them 9 L.R.A.(N.S.) 933, the note to which also cites much authority. See also notes in 35 L.R.A.(N.S.) 116, Dotson v. Milliken, 209 U. S. 237, 52 L. ed. 768, 28 Sup. Ct. Rep. 489,

and 4 R. C. L. 300. The contract is pleaded, however, as a written one with a written acceptance.

It is true that, as stated in 19 Cyc. 301, "as a rule a contract negotiated by a broker in behalf of a principal cannot found a right of action in favor of the broker against the other contracting party." However, there is an exception supporting a recovery under circumstances similar to those in suit. See Livermore v. Crane, 26 Wash. 529, 67 Pac. 221, 57 L.R.A. 401, the syllabus reading: "Refusal to comply with a contract to purchase real estate by reason of which the broker who negotiated the sale is deprived of his commissions, will render the intending purchaser liable for the damages thereby inflicted on the broker, *although he had agreed to look to the seller for his commissions.*" This case cites Cavender v. Waddingham, 2 Mo. App. 551, and Atkinson v. Pack, 114 N. C. 597, 19 S. E. 628. This last case is identical in facts with the one at bar. The following is from the opinion in Livermore v. Crane, *viz.:* "The second case mentioned is Atkinson v. Pack, supra, where it was in effect determined that a real estate broker negotiating a sale of land for a person who agreed with him in writing to convey it to the intending purchaser from whom he was to receive his commission may maintain an action for breach of contract upon refusal of such person to convey, upon showing that the purchaser was ready to take and pay therefor. It was said in this case: 'There were plainly two contracts made by plaintiffs,—the one with defendant, the effect of which was that plaintiffs would provide a purchaser of the land at the agreed price, commissions to be paid by the purchaser; the other with the purchaser, that he would pay the plaintiffs' commissions upon the conclusion of the sale. If, through the negotiation of plaintiffs, the parties had been brought together and had concluded the trade between them, the plaintiffs would have been entitled to their commissions from . . . the purchaser according to the terms of their contract. But this action is for damages. The gravamen of the charge is that defendant committed the wrong and injury upon plaintiffs by a refusal without cause to comply with his contract with plaintiffs to sell the land to plaintiffs' principal, with the distinct understanding that plaintiffs were to be compensated by the purchaser. The natural effect and consequence of this refusal by defendant was the loss by plaintiffs of their commissions.' *It would seem to be immaterial whether in the original negotiation or*

the sale, the plaintiff was the agent of the vendor or the purchaser. The complaint here is for the violation of the contract to purchase, from which violation damages directly result to plaintiff." To same effect, see Eells v. Parsons, 11 Ann. Cas. 475, and note (132 Iowa, 543, 109 N. W. 1098); Weaver v. Richards, 144 Mich. 412, 6 L.R.A.(N.S.) 855–860, 108 N. W. 382; Metzen v. Wyatt, 41 Ill. App. 487; Bishop v. Averill, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024. The pleader may have drawn the complaint under this precedent. It is not subject to demurrer.

Defendant answered, alleging "the fact to be that on or about the month of September, 1906, plaintiffs wrote defendant, stating that they could get $15 per acre net to this defendant for said land" on terms identical with those pleaded in the complaint as Kunze's offer, except reference to the $1,280 therein mentioned as plaintiffs' profit and commissions or any reference to $17 per acre as the purchase price. The answer continues: "That thereafter in September, 1906, defendant informed plaintiffs that he would be willing to accept such offer; that thereafter neither this plaintiff nor anyone else attempted or offered to carry out the terms of said offer; but on the contrary plaintiffs continually made and suggested modifications of said offer to this defendant, which were not accepted by him. Further answering, defendant alleges that neither the plaintiffs nor anyone else ever complied with the conditions of said offer, although often requested to do so by this defendant." All other matters in the complaint were denied.

Thus the fact that an offer was made by Kunze through plaintiffs to defendant stands admitted, but the answer denies its acceptance by defendant as made. The issues tendered for proof under the pleadings resolved simply to the terms of the offer as to commissions, and whether defendant violated the agreement to transfer. Findings were filed supporting all matters contained in the complaint and judgment entered thereon for $1,895.25 damages.

Previous to May 15, 1906, defendant had quoted plaintiffs a selling price on said land. On that date he writes them: "I would not want to divide section 21. Please change the price to 15 per acre net to me, one fourth cash balance easy at 6 per cent." Plaintiffs showed Kunze this land on September 7th and offered it to him at $17 per acre. Next day they wrote defendant: "We showed the land to an Iowa man

yesterday, but he has not enough money for the cash payment you ask. . . . We can get you $15 per acre net to you on the following terms: The purchaser to pay you $500 cash, on the delivery from you of a properly executed contract for a warranty deed, conveying the land free from all encumbrances whatsoever when the terms of the contract are complied with by him. He to pay you an additional $1,300 on or before the 15th of March, 1907, and the balance to be paid in six equal payments, with interest at 6 per cent per annum, interest to be paid annually. *You to furnish an abstract showing perfect title.* . . . Wire us if you accept the offer."

This letter was not replied to, presumably because defendant was a traveling man and away from home. So, on September 21, 1906, plaintiffs wrote him a duplicate of their first letter, against asking him to "wire us if you accept the offer."

Defendant replied by telegram on September 24th: "I accept your proposition of fifteen net to me," and followed it with a letter reading: "I inclose you abstract to section 21. If you will kindly turn over to Mr. Byrne and have him bring this down to date, I will mail him a check. If your man is ready can see no reason why you can't close this deal this week." This was in reply to the following under date of September 29th from plaintiffs to defendant: "The First National Bank of this city notified us to-day that there was deposited with them $250 earnest money to be applied on the purchase price of section 21. Please send the abstract to Mr. Byrne, of this city, the official abstracter, to be continued to date and then delivered to us for examination. We will forward it to the purchaser for his examination. The purchaser is ready to pay his first payment as soon as his attorney pronounces the title all right. Please attend to the sending of the abstract on receipt of this letter, as we wish to close this sale as rapidly as possible." Upon receipt of defendant's reply above set forth, they wrote him October 3d: "Your letter inclosing the abstract was this day received. We took it to the abstracter to have it continued to date, and expect to get it to-morrow. As soon as we get it from Byrne, we will send it to the purchaser as he wishes his attorney to pass on the title." Apparent defects in the title are mentioned. October 4th, plaintiffs wrote defendant stating at length some half dozen defects in record title as appeared from the completed abstract. One of these arose because a grantor

"Krups" had deeded in the name "Krepps." Affidavits were recorded in an attempt to cure these defects, and the abstract of title was continued and forwarded to Kunze. During all this time, by letter, plaintiffs had fully explained all delays to both purchaser and defendant. On October 15th they wrote Kunze: "We send you herewith the abstract for section 21, and believe you will find it shows perfect title." On October 22d, he replied: "I send you abstract and objections as found by my attorney. Wish you would see to it to have the objections corrected." The principal objection was the variance between "Krepps" and "Krups." Defendant was then asked by plaintiffs to produce the original deeds concerned, that the record might be corrected. He could not find them. Meanwhile plaintiffs forwarded a contract of sale to Kunze for his execution. He answers: "Yours of November 12th, with contract inclosed, received. Will return them properly signed upon receipt of abstract showing that title is good. Hope to hear from you soon." Of all these facts and all reasons for delay, defendant was promptly and fully notified by plaintiffs, who also offered to attend to and pay the expenses of an action to quiet title. Defendant made no objection to the sale as being carried forward, but tacitly consented to it and its terms. Plaintiffs gave him the name of Kunze, the purchaser. In reply to a long letter of October 27th, of plaintiffs to defendant, fully apprising him of all reasons for delay, and urging that the deeds in question be produced, defendant wrote plaintiffs on November 3d: "It loks to me like a clear case of sparring for time on the part of *your* customer. As land values are increasing fast in North Dakota, I shall be obliged to use my own judgment about closing this sale, at all after this long delay." To this letter plaintiffs replied three times under dates of November 6th, 14th, and 21st, fully stating circumstances, assuring defendant that Kunze was not seeking any delay, but was anxious and ready to close the deal as soon as the defect in the title could be cured, and that "your money is ready just as soon as you give good title and deliver a contract for title as per your agreement." "Kunze is now ready, and has been ready all the time, to fulfil his part of the agreement, and the delay is no fault of his," and to produce the deed,—"if you can find this deed it will clear the title;" and "that in case you cannot find the deed we will bring suit to quiet title at our expense, *as we have sold the property and must deliver it.*"

"Kunze, as we wrote you before, has a deposit in the First National Bank of this city as payment on your section, to be delivered to you *when you furnish a good title.*" They also took up a search for the lost deed with Mrs. Krepps, receiving from her a telegram that the "deed is not among Mr. Krepps's papers," of which fact they notified defendant immediately. In spite of this on November 23d, defendant wrote plaintiffs: "Your letter of the 14th received. I regret very much to be obliged to call this deal off. The time has now passed when I need the first payment. The time the attorneys are taking is away beyond all reason, and objections they are offering in the face of the affidavit I sent you from Krepps makes me feel the old deed from Moss to Krepps will help them very little. It is always easy for attorneys to pick flaws in an abstract of title, and in this case it seems to me they have gone the full length. Any reasonable expense you have been to in trying to clear this title, I will pay. Next year when I put this land on the market I will give you the exclusive agency." Notwithstanding this, plaintiffs, while informing Kunze of the situation, still continued negotiations, attempting to put the deal through. The defendant refused to do anything further. On January 18, 1907, he writes plaintiffs, "You have my abstract for section 21. Am anxious to have title to this land cleared up, so in the future there will be no delay in giving the buyer a perfect title. As I wrote you in November, I want to give you the exclusive sale of this land for 1907, so wish you would kindly look this matter up and hope to hear from you in the near future." Thus he acknowledged his record title was defective. On the trial, defendant was called for cross-examination under the statute, and admitted that he had procured Kunze's name from plaintiffs, and that in January or February he had written one or more times to Kunze in an attempt to close the sale to Kunze without dealing through plaintiffs. This is a clear evidence of an intent to deprive plaintiffs of their commissions, and inferentially that that was the reason defendant refused to perfect his title and convey according to his agreement. There is ample proof of Kunze's ability to perform. The letters show the utmost of good faith on his part as well as on the part of the plaintiffs. Defendant had agreed to "furnish an abstract showing perfect title" in him by his acceptance of plaintiffs' propositions in their letters of September 8th and 14th. The evidence sustains the findings, and estab-

lishes beyond question the acceptance and entering into of the contract by defendant to convey upon the terms set forth in the complaint and admitted in the answer, and that defendant knew plaintiffs had commissions coming from Kunze on the sale being consummated. And that he wilfully and without cause refused to furnish as he agreed to do, as a condition precedent to payment to him or acceptance of his title by Kunze, an abstract of title showing perfect title in defendant to the land he had agreed to convey. Defendant deliberately breached the contract.

Assignments of error taken to the reception of evidence, the denial of defendant's motion to dismiss made at the close of the case, and exception to the findings, are all covered by the foregoing discussion.

The assignment based upon the overruling of defendant's objection to all testimony because the complaint did not state a cause of action, a demurrer *ore tenus,* was disposed of when it was held that the complaint was not subject to demurrer.

The many exceptions to the findings are likewise not well taken because the findings are but the equivalent of a restatement of the allegations of the complaint. They must, therefore, be held sufficient to support a judgment.

Defendant claims that there is no proof of plaintiffs' employment by him. The proof is sufficient to show an employment to find a purchaser and to establish that plaintiffs were virtually go-betweens as to both parties, with the full understanding and acquiescence of both. Defendant's letters refusing to convey recognize a liability of defendant to them under an employment. He offers to compensate them for moneys he has caused them to expend in perfecting his title, and promises that next year he will give them the exclusive sale of this land. His last letter in January, 1907, desires them to clear title. There is sufficient evidence to sustain the finding of employment if it be considered that an employment is necessary. The findings have the force of a verdict.

Defendant seeks to apply to the findings the rule announced in Louva v. Worden, and states that defendant never agreed to give the $2 per acre excess as commissions. Plaintiffs' recovery does not stand upon that hypothesis. Nor do the findings for reasons heretofore discussed at length.

Appellant urges that "plaintiff must first prove that he has found and produced to the defendant a person ready, willing, and able to buy, and who offered to the defendant to buy on the terms alleged." What has been said on the sufficiency of the evidence answers this contention and fully justifies the finding that such a purchaser was found willing, ready, and able to purchase and was produced to the defendant, who was notified thereof, and of the fact that the plaintiffs virtually had sold to him. Only defendant's defective title prevented a consummation of that sale, and kept defendant from receiving his full price, as well as prevented plaintiffs from receiving their commissions from Kunze. 19 Cyc. 246; Flynn v. Jordal, 124 Iowa, 457, 100 N. W. 326.

Appellant says there is no evidence that Kunze's offer to plaintiffs was ever submitted to defendant, and that "the offer submitted must have been the identical offer received by plaintiffs or there could have been no acceptance." This rule of law has no application under the facts. The seller accepted the offer communicated, agreeing to receive in full of the purchase price $15 per acre net to him, and treating buyer as plaintiffs' purchaser. In his letter of October 1, he says: "If your man is ready, can see no reason why *you* can't close this deal this week." In his telegram of acceptance he says, "I accept your proposition of fifteen net to me." In his letter of November 3d, he says: "It looks to me like a clear case of sparring for time on the part of your customer." In his letter of January 18, 1907, he says, as an excuse for violating his contract and to escape liability, "I want to give you the exclusive sale of this land for 1907." It would appear that defendant assumed he did not have the land listed exclusively with plaintiffs even at the time when plaintiffs were selling it. Defendant's liability is fixed by the offer that he accepted and the resulting contract, it not being vitiated by fraud or bad faith on the part of the plaintiffs. Nothing of that kind is pleaded. While defendant was under obligation to convey he was under no contract liability for commissions, except as it is incidental to the breach of his contract with both Kunze and plaintiffs.

Assignments are based upon the denial of the motion to dismiss as well as upon the findings wherein appellant erroneously assumes that an obligation rested upon Kunze to pay $500 cash when defendant accepted

his offer. Defendant overlooks that this payment was conditioned only upon Kunze's receipt and approval of an abstract of title, showing perfect record title in defendant. That defendant so understood his obligation is established by his own act in attempting to furnish such an abstract. This matter has already been discussed.

Appellants contend that under the construction of the word "net" in Louva v. Worden, 30 N. D. 401, 152 N. W. 689, the measure of damages would be the reasonable value of the plaintiffs' services rendered, and that no evidence was offered thereof, but instead a recovery was had upon the theory of a right to recover the $2 per acre excess as upon contract. The plaintiffs' measure of damages is not determined by the terms of plaintiffs' contract with defendant, if any there be. Instead his recovery is for damages resulting from defendant's breach of the contract with Kunze. Defendant had agreed with plaintiffs to convey to their customer upon the terms and with knowledge that plaintiffs were receiving a profit as go-betweens for consummating the purchase and sale. The meaning of the word "net" is in nowise involved except as it might limit the purchase price defendant was to receive. The measure of damages must be the profit coming to them from Kunze. That defendant did not know its exact amount is immaterial, inasmuch as he knew or had reason to believe commissions would be due plaintiffs from Kunze, and he was not misled. Plaintiffs did not endeavor to conceal anything from him. Before breaching his contract he could have ascertained any resulting damages. He knew they were getting their commissions from Kunze and had accepted the offer to convey to Kunze with knowledge of and upon that condition. No one would contend (under the proposition made by letter by plaintiffs to defendant and accepted by him as the basis for subsequent dealing) otherwise than that plaintiffs would look elsewhere than to defendant for their profits. Had the deal been consummated and the purchase effected at $15 per acre as between the seller and the purchaser with no $2 per acre margin, and were the plaintiffs here suing for the reasonable value of their services, defendant could urge as a complete defense that the price he was to receive was net to him with the plaintiffs to obtain payment for their services from the purchaser; and could cite excerpts from all his letters emphasizing the truth of his contention. Every communication, from the telegraphic acceptance to the close of correspondence, from

him is in harmony with such a defense. If he was obligated to plaintiffs to transfer to their purchaser (that he was, see Cavender v. Waddingham, 2 Mo. App. 551–555), he was liable to them for a breach by him of that obligation and resulting damages to plaintiffs, the measure of which under Atkinson v. Pack, 114 N. C. 597, 19 S. E. 628, under parallel facts is declared as "the amount he (broker) would have received as commission from the intending purchaser had defendant complied with his contract."

It has been stated that it was immaterial that defendant did not know plaintiffs were to receive from Kunze $2 per acre as their profits. The damages recoverable are controlled by the common-law rule for breach of contract, codified in § 7146, Comp. Laws 1913. They are "the amount which will compensate the party aggrieved for all detriment caused thereby, or which in the ordinary course of things would be likely to result therefrom." The question next arises as to whether the full amount of the commission must have been in the contemplation of the parties when defendant agreed to convey to plaintiffs' purchaser. Many different common-law rules apply according to the class of property and the circumstances. Where the parties contract with reference to personal property having a market price, they contract with reference to market price in case of breach of contract, and the market price usually limits the recovery. Where the property has no market price, recovery usually may be had of all reasonable damages actually sustained. But, where property is purchased with knowledge had by the vendor that the vendee intends to resell it to fulfil a contract of sale already made, the vendor will be held to contract with reference to the profits, whether known or unknown, that his purchaser may make from reselling to the subpurchaser, and damages equivalent to such a profit may be recovered of the vendor where he defaults in fulfilling his obligation. Such a contract is analogous to the one at bar. The contract to convey was made with reference to and included the collateral contract that would arise simultaneously between plaintiffs and their purchaser, and under which, to defendant's knowledge, plaintiffs would make their profits for the entire transaction. This must be held to have been within defendant's contemplation when he contracted with reference thereto. And also when he breached the contract by refusal to convey inferentially at least *mala fides*. 8 Am. & Eng. Enc. Law,

590 et seq.; note in 52 L.R.A. 209–240 et seq. citing much authority. Beck v. Staats, 16 L.R.A.(N.S.) 768, and note (80 Neb. 482, 114 N. W. 633); Houston & T. C. R. Co. v. Wright, — Tex. Civ. App. —, 46 S. W. 884; Sanderlin v. Willis, 94 Ga. 171, 21 S. E. 291; 13 Cyc. 155 D; Sutherland, Damages, 3d ed. §§ 75–78; Sedgw. Damages, 9th ed. §§ 148, 156–158, 161–163; Munson v. McGregor, 49 Wash. 276, 94 Pac. 1085; Also 8 R. C. L. pp. 462, 463; Missouri P. R. Co. v. Peru-VanZandt Implement Co. 73 Kan. 295, 6 L.R.A.(N.S.) 1058, 117 Am. St. Rep. 468, 85 Pac. 408, 87 Pac. 80, 9 Ann. Cas. 790, 20 Am. Neg. Rep. 334.

Distinctions are drawn by the authorities as to the good faith of the vendor in entering into and in breaching the contract; and the prevailing rule is that when the vendor acts *mala fides* the rule of damages applicable to torts is applied as the measure of damages resulting from breach of the contract. And the vendor is held in damages for the full loss of profits that would have accrued to the injured party from his bargain but for the breach of contract by the vendor. Notes in 52 L.R.A. 242 and 16 L.R.A.(N.S.) 771, citing much authority. And this case at bar is clearly within the *mala fides* rule, as stated. Defendant capriciously, arbitrarily, and entirely without justification, refused to either convey or permit plaintiffs to perfect his title at their expense by an action for that purpose, as they offered to do to enable him to convey to a willing purchaser, ready to wait until title could be perfected and the transfer made. Not only that, but soon after thus breaching his contract, and apparently to quiet plaintiffs he assures them that he will allow them the exclusive sale of said land for the coming year, and then secretly attempts to resell independently of plaintiffs, to the very person with whom he had a short time before been dealing through plaintiffs; whom he knew was plaintiffs' customer, and whose name and address he procured from them, and because of which former deal through them he knew was an able and satisfactory purchaser, because he had in the first deal accepted him as such. This is proved by defendant's letters and from his own cross-examination. This is ample to warrant a finding that he refused to convey in order to prevent plaintiffs from realizing their profits on a deal all but consummated, and that defendant attempted thereby to secure their profits himself by selling direct to plaintiffs' customer presumably for $17 per acre, the full price such

purchaser would have paid in the first instance. Under such circumstances the measure of damages recoverable by plaintiffs is the amount of profits lost by the defendant's refusal to convey, the amount sued for. Ward v. McQueen, 13 N. D. 153, 100 N. W. 253.

Plaintiffs raise many objections to the sufficiency of the contract of sale. The evidence shows the contract to have been reduced to writing and identical with the accepted offer to defendant and was transmitted through plaintiffs to Kunze for his signature and was approved and accepted in terms by him, he writing that "will return them properly signed upon receipt of abstract, showing that the title is good." Every detail was thus made definite. This establishes Kunze was prima facie ready and willing to purchase. Flynn v. Jordal, 124 Iowa, 457, 100 N. W. 326. The reason why the sale was not consummated was nothing of that kind, but was solely because of the condition of the record title. As to this it will not be presumed that "Krups" and "Krepps" are one and the same person, in the absence of proof under the reasoning of the recent holding of Turk v. Benson, 30 N. D. 200, L.R.A.1915D, 1211, 152 N. W. 354. And under Bruegger v. Cartier, 29 N. D. 575, 151 N. W. 34, and note in 38 L.R.A.(N.S.) 3, the title proffered was not a marketable one. Kunze had a right to refuse acceptance of such title. Judgment is ordered affirmed.

Goss, J. (after rehearing had). As stated in the foregoing opinion, this case subdivides into (1) discussion of the sufficiency of the complaint under the demurrer, and (2) alleged errors of law at the trial. The first half of the main opinion was devoted to the first question. The second will now be more fully treated.

Upon the trial there is found a departure from the theory upon which the issue was tendered in the pleadings.

Trial was had upon the theory, entertained by both the counsel and the court, that the proof was sufficient to establish an implied contract that the $2 per acre excess in selling price over the "net" price to defendant was commissions to the brokers for procuring a purchaser. The sufficiency of the evidence to establish this contract, whether it be termed an express or implied contract, according to the construction placed upon the letters and defendant's acceptance, never occurred to either of the parties to challenge for a moment until new counsel

entered the case on this appeal. Many other points were raised on trial, but not this. Many of the trial questions, in fact all of them mentioned in the defendant's motion to dismiss at the close of the case for failure of proof, have been abandoned on appeal. Instead, for the first time, the sufficiency of the evidence to establish the implied or express contract for commissions is attacked. It would be useless to recite the record to verify this, as it is beyond contradiction. Throughout trial is was tacitly assumed that the commission plaintiffs were entitled to was $2 per acre, and that this was to come not from Van Vranken, but from Kunze; but that because the fund coming from Kunze out of which they were to be taken never came into existence because Kunze never paid over the full amount of it, defendant asserted that damages could not be recovered of him. That contention is one that has been urged in similar cases. It may be found advocated in Hayes v. McAra, 166 Mich. 198, 131 N. W. 535, 35 L.R.A.(N.S.) 116, on page 118, also for a recovery of real estate brokerage commissions. A theory of defense upon trial clearly outlined was adopted by defendant, perhaps after a search of precedent. The reason for this change in defense is readily apparent. This cause was tried in September, 1913. Judgment was entered October 7th that year. New counsel for defendant appear with his trial counsel on this appeal. Said new counsel first appearing in this action subsequent to the judgment appealed from are those who prosecuted the appeal in Louva v. Worden, 30 N. D. 401, 152 N. W. 689, decided in May, 1915. Said counsel have briefed this appeal along the same lines that they successfully urged and obtained a reversal under in Louva v. Worden, and they emphatically contend that this case must be controlled by that precedent. Therefore, for the first time and on appeal, defendant presents a new issue, *i. e., whether the accepted theory of the trial was correct in assuming that the $2 margin was the plaintiffs' commission.* They urge on appeal, as they contended in Louva v. Worden, that the recovery can only be for a reasonable commission, and that as the action is based upon the contract instead of upon the *quantum meruit* it must fail; and that the recovery allowed upon the opposite theory on the trial that the evidence was sufficient to establish a contract right to commissions at $2 per acre was erroneous either as proof of or upon the measure of damages. This is an entire change of front and a change

on appeal from the accepted theory on the trial. That on appeal the parties are held to the theory upon which trial was had, whether right or wrong, has become well established. But a few of the recent adjudications are: Peterson v. Conlan, 18 N. D. 205, 214, 119 N. W. 367, where the parties were not permitted to change front and after trying a case upon a common-law theory of liability, on appeal attempt to sustain recovery as upon a statutory liability; and in Movius v. Propper, 23 N. D. 452, 136 N. W. 942, wherein it is said: "The case was tried in the court below upon the theory that he should account to plaintiffs for such use, and this court, in deciding the case, will not permit a change in the theory of the case thus adopted by the parties in that court." Both opinions were by the present chief justice. See also Lynn v. Seby, 29 N. D. 420, L.R.A.—, —, 151 N. W. 231, wherein, quoting from the syllabus, it is stated: "Judgment was awarded on the theory that the complaint constituted a basis for the recovery. Defendant now seeks to urge on appeal that as the complaint is upon an *express contract,* judgment as upon *quantum meruit* should not have been ordered. Held, that on the record this constitutes an attempt to change the theory of trial, and the appellate court will pass upon the same issues only as those presented to the trial court, and will not permit defendant to urge the additional issue that the complaint is insufficient to support the judgment." The attempt in Lynn v. Seby was identical to that here made. The parties on this appeal can no more change the theory of trial concerning the proof than they can as to the pleadings. Authority might be multiplied. Appellant is attempting to do the impossible, *i. e.,* change his theory of trial to bring it under, and that it may be controlled by, precedent lately announced, that, had it been availed of at the trial perhaps might have favored him. This eliminates the major portion of appellant's brief.

However, it may be remarked in passing that Louva v. Worden, announces no doctrine necessarily controlling to effect a dismissal of this case. This is a law action for damages and a law appeal presenting a review of error only. If the evidence be sufficient, under the voluminous correspondence and the written acceptances by defendant of the terms of sale proposed by plaintiffs to him, to have taken to the jury the question of fact of whether it was understood between the parties that plaintiffs' commissions should come from Kunze, and not from de-

fendant, and that the $15 per acre should be net to the seller, with the broker to receive any excess in selling price as his commissions from the purchaser, then Louva v. Worden cannot control. And there is substantial proof that such was the understanding. It is at least sufficient to have carried the question to the jury for its determination as a matter of fact. It is to be noted that this case is to be differentiated from Louva v. Worden in many particulars. There was here no mere listing for sale, but instead *an acceptance of an offer* of purchase on terms designated by the seller as "net" to him.

Exception is taken to our findings in the main opinion that Kunze's name and address was procured by defendant from plaintiffs. The evidence fully justifies that finding. Defendant testifies that prior to negotiations he did not know of Kunze, and that he "never saw him." That defendant was a traveling salesman, with Iowa his field for work. The correspondence gives Kunze's name and his residence as in Iowa. In their first letter, plaintiffs stated they had showed defendant's land "to an Iowa man yesterday." Again, in their letter to defendant of October 3d they stated, "As he lives in Iowa this must take about a week before we can get the opinion of his attorney." In their letter of November 14th to defendant plaintiffs state, "Mr. Kunze, the purchaser, is ready to pay the balance of the first payment to you whenever the title is clear." This is reiterated in their letter to him of November 21st. And defendant himself writes to Kunze in February following his refusal in November to transfer title to him.

Defendant testifies:

Q. Did you not write to Kunze in the month of February, 1907, asking him why the deal with Harvey Harris & Company was not closed?

A. Yes, *I wrote him,* but I don't remember what I wrote him.

Q. To that effect, was it not?

A. *I think it was.*

Q. *Did you not write him asking him,* if the title is clear so your attorney would consider it good, *will you then be willing to close the deal?*

A. *I may have done it.*

Kunze, evidently in honesty and fair dealing, wrote to plaintiffs concerning defendant's corresponding with him. Kunze waited until January 25, 1907, the date of his last letter to plaintiffs, before recalling his deposit with the bank here on the purchase. On that date he writes: "I am sorry that this is delayed so long, but insist title shall be good. I do not want to get into a lawsuit. If owner don't come to terms soon I shall withdraw the deposit in the bank. It will soon be the 1st of March and too late to send a tenant." The only terms open was that record title be furnished by defendant. Defendant admits that in February he is corresponding with Kunze concerning closing the deal, while on January 18th it is proved by his letter that he had written plaintiffs, "I am anxious to have title to this land cleared up so, in the future, if the land is sold, there will be no delay in giving the buyer a perfect title. As I wrote you in November, I want to give you the exclusive sale of the land in 1907, so wish you would kindly look this matter up and hope to hear from you in the near future." The next month he is writing Kunze direct, ignoring plaintiffs. If it be said that he intended to deal with Kunze through plaintiffs, and had no ulterior motive in writing Kunze, then why did he write him at all after he had written plaintiffs the letter of November 23d, stating, "I regret very much to be obliged to ask you to call this deal off. The time is now past when I need the first payment?" He admits attempting to deal in February. The proof discloses plaintiffs to have been in ignorance of this, as they ascertained it not from defendant, but from Kunze. The only reasonable conclusion from defendant's testimony and his letters is that, after they had put him in touch with a buyer, either he intended to deal independent of plaintiffs and defeat any claim for commissions, or he had learned that plaintiffs were making $2 per acre margin as commission and desired it for himself. In either event his conduct was reprehensible.

Nor can he, under the issues tendered and the proof made, question Kunze's ability to pay. Dotson v. Milliken, 209 U. S. 237, 52 L. ed. 768, 28 Sup. Ct. Rep. 489, an analogous case for real estate commissions earned by finding of a purchaser. The syllabus directly applicable reads: "The inability of the prospective purchaser to complete the purchase is not available as an afterthought to defeat the right of the broker employed to find a purchaser to recover his agreed commissions,

where the sale failed wholly through the fault of the owner, who made no objection to the purchase." Also Hannan v. Moran, 71 Mich. 261, 38 N. W. 909; Condict v. Cowdrey, 5 N. Y. Supp. 187; Hugill v. Weekley, 64 W. Va. 210, 15 L.R.A.(N.S.) 1262, 61 S. E. 360; Putter v. Berger, 95 App. Div. 62, 88 N. Y. Supp. 462; Seidman v. Rauner, 51 Misc. 10, 99 N. Y. Supp. 862; Frank v. Connor, 107 N. Y. Supp. 132; Roberts v. Kimmons, 65 Miss. 332, 2 So. 736; Davis v. Lawrence, 52 Kan. 383, 34 Pac. 1051; Conkling v. Krakauer, 70 Tex. 735, 11 S. W. 117; Smye v. Groesbeck, — Tex. Civ. App. —, 73 S. W. 972; Sullivan v. Hampton, — Tex. Civ. App. —, 32 S. W. 235; Krahner v. Heilman, 16 Daly, 132, 9 N. Y. Supp. 633; Hart v. Hoffman, 44 How. Pr. 168; Buckingham v. Harris, 10 Colo. 455, 15 Pac. 817; Goss v. Broom, 31 Minn. 484, 18 N. W. 290; Cook v. Kroemeke, 4 Daly, 268, 269; McFarland v. Lilliard, 2 Ind. App. 160, 50 Am. St. Rep. 234, 28 N. E. 229; Harwood v. Diemer, 41 Mo. App. 49. All these are brokerage cases closely analogous. Consult exhaustive note in 43 L.R.A. 593, at page 609, under "Defective title," citing scores of cases. Also note in 44 L.R.A. 593. No branch of the law is better settled than that defendant cannot be heard to urge the inability of Kunze to pay as a defense under the record facts. The cases of Watters v. Dancey, 23 S. D. 481, 139 Am. St. Rep. 1071, 122 N. W. 430, and Dent v. Powell, 93 Iowa, 711, 61 N. W. 1043, relied upon by appellant, do not apply. In both there was a failure of proof of *willingness* to buy. In the former the opinion states, "There is no evidence that Bell was ready and willing to make the purchase." In the latter case the purchaser refused to complete his purchase, and the holding from the syllabus is, "It is not sufficient that it could have been made by suit" against the purchaser, as the seller cannot be compelled to resort to suit to complete the purchase that the brokers may collect their commission.

But the proof discloses that half the initial payment had been on deposit in the bank since the first week of negotiations, and that Kunze was ready to forward the balance with the signed contract at any time that the admitted defects in record title were cured. Munson v. McGregor, 49 Wash. 276, 94 Pac. 1085. Defendant's letters admit that his record title is defective. Under the authorities it was not a merchantable title. The burden was upon him to make it one. Instead,

without cause, he capriciously refused to comply with his part of the contract and deliberately breached it. A tender by Kunze of performance "would have been a useless formality, because the defendant had unequivocally repudiated his contract." Canfield v. Orange, 13 N. D. 622–628, 102 N. W. 313. The time never came when it became necessary for Kunze to advance any money. His preparedness, however, is sufficiently shown, even considering it as raised. Any possible inference that he might have been a mere dummy purchaser for plaintiffs is disproved. There being no error in the record warranting reversal, the judgment is affirmed. As rehearing has been had, remittitur will go forward at once.

MARY J. CRISP v. STATE BANK OF ROLLA, a Corporation.

(155 N. W. 78.)

Cause — parties — theory of — trial — motion for new trial — appeal — different theory on — theory on trial — governs in supreme court.

1. Parties cannot try their causes on one theory and when defeated on that line assume a different position on a motion for a new trial or in the appellate court, and the theory of the case which was adopted by the trial court with the acquiescence of the parties will govern in the appellate court for the purpose of review.

Bank check — payee — name of forged in indorsement — cashed by intermediate bank — action against — by payee — trover — conversion.

2. Where a bank check which is sent by mail is intercepted on its way, and the indorsement of the payee forged thereon, and the check cashed by an intermediary bank which in turn forwards the check to its correspondent, and through its correspondent to the drawee bank, and collects the amount thereof from such drawee bank and correspondent in order to reimburse itself for the money paid on the forged indorsement, the payee of such check may ratify the delivery to the person who intercepted the check without ratifying the forged indorsement, and may maintain an action of trover against the intermediary bank for the conversion of such check.

Inadmissible evidence — received on the trial — error cured — withdrawal — instructions — rule as to — exception to rule — effect of must be removed — jury — new trial.

3. There is an exception to the general rule that where inadmissible evidence

is admitted during a trial, the error of its admission is cured by its subsequent withdrawal before the trial closes and by an instruction to the jury to disregard it, and that is that where the evidence thus admitted is so impressive that. in the opinion of the appellate court, its effect was not removed from the minds of the jury by its subsequent withdrawal or by an instruction of the court to disregard it, the judgment will be reversed on account of its admission and a new trial will be granted.

Check — payee — suit against bank — conversion — letters — self-serving declaration — res gestæ — no part of — error — instructions.

4. Where in a suit against a bank by the payee of a check for the conversion of such check and the wrongful payment of it to the husband of such payee, and the questions at issue are whether the plaintiff ever received the check or the money, or ever authorized the indorsement of her name upon it by her husband and the payment to such husband of the amount thereof, a letter which is written to a lawyer of the plaintiff and who presumably sent the check, and which letter was written over a year after the date of the cashing of the check, and in which the plaintiff states: "I received your letter this evening, . . . and was horrified to hear that I received my money a year ago, $257.75. Pray, for God's sake, tell me to whom it was sent. I swear before God I never received one cent,"—is a self-serving declaration, and not a part of the *res gestæ*, and where such letter is read to the jury the error and prejudice of its introduction is not cured by a subsequent instruction which directs the jury to disregard it.

Opinion filed November 30, 1915.

Appeal from the District Court of Rolette County, *Buttz*, J. Action of trover for the conversion of a check. Judgment for plaintiff. Defendant appeals.

Reversed.

Statement of facts by BRUCE, J.

This is an action for the conversion by the defendant of a certain bank check which was drawn on the Stockman's National Bank of Montana, the complaint alleging that "on or about the 2d day of April, 1905, the plaintiff was the owner and lawfully entitled to the possession 'thereof,' and that *thereafter* and on or about the 2d day of May, the defendant wrongfully and unlawfully obtained possession thereof and thereupon wrongfully and unlawfully appropriated and converted the same to its own use." The answer denied generally all of the allegations of the complaint excepting

such as were admitted and qualified, its qualification being that "on or about the 22d day of April, 1905, it cashed a certain check for the plaintiff, which said certain check was referred to in plaintiff's complaint and described therein in words and figures, but the defendant alleges that said bank check was cashed for the plaintiff by the defendant at the plaintiff's special instance and request, and the money paid to the plaintiff and the plaintiff's husband, and that said bank check was indorsed and made payable to the defendant as a receipt for said money, at the plaintiff's special instance and request, by indorsement made thereon by the plaintiff's husband at the plaintiff's special instance and request, and by her authority," etc. To this answer the plaintiff replied, denying the allegation of the payment by authority, but admitting and adding "that the said Charles Crisp (the husband) indorsed said check, but such indorsement was wholly without authority from the plaintiff, and without her knowledge and consent, and without any express custom on plaintiff's part."

The plaintiff introduced evidence tending to show that the check was sent her by the administrator of her former husband's estate, but without direct authorization, and that its sending was not known to her until a year after it had been cashed by the defendant bank, and which bank was an intermediary merely, the check being drawn on the Stockman's National Bank of Montana. She claims, and the evidence tends to show, that her present husband intercepted the letter and indorsed her name thereon without her authority, and had the same cashed by the defendant bank, and that she has never received any of the proceeds thereof. Evidence, on the other hand, was introduced by the defendant bank concerning a visit by an officer of such bank to the plaintiff before the check was paid, and of her authorization of such payment. This testimony, however, was emphatically denied by the plaintiff.

The case was tried upon the theory that the only issue in the case was whether or not the payment to and indorsement by the husband was authorized by the wife. No exceptions appear to have been taken to the instructions, nor are they, with one exception, incorporated in the record, which is before us. From a judgment in favor of the plaintiff the defendant appeals.

H. E. Plymot and *Cowan & Adamson* and *H. S. Blood,* for appellant.

Neither possession or right to possession at time of alleged conversion is shown in plaintiff, nor is her ownership established. Nor is there shown a wrongful appropriation of the check by the bank. Parker v. First Nat. Bank, 3 N. D. 87, 54 N. W. 313; Simmons v. McConville, 19 N. D. 787, 125 N. W. 304; Hodge v. Eastern R. Co. 70 Minn. 193, 72 N. W. 1074; Ring v. Neale, 114 Mass. 111, 19 Am. Rep. 316; Glass v. Basin & B. S. Min. Co. 31 Mont. 21, 77 Pac. 302.

The check would be effective upon delivery. No delivery is shown. Marvin v. M'Cullum, 20 Johns. 228; Eastman v. Shaw, 65 N. Y. 528; King v. Fleming, 72 Ill. 21, 22 Am. Rep. 131; Woodford v. Dorwin, 3 Vt. 82, 21 Am. Dec. 573; Talbot v. Bank of Rochester, 1 Hill, 295; Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326; Buehler v. Galt, 35 Ill. App. 225; Wright v. Ellis, 1 Handy (Ohio) 546.

Even if the check had been delivered to plaintiff she could not maintain an action against the bank to recover money paid out on her forged indorsement. Morgan v. Bank of State, 11 N. Y. 405; First Nat. Bank v. Whitman, 94 U. S. 347, 24 L. ed. 231.

Where on the trial inadmissible evidence is received over objection, and thereafter, and at the close of the case, is withdrawn, and the trial court admonishes the jury to disregard it entirely, the error of admitting it is not cured by such admonition or instruction. Where such evidence is impressive in its nature, the harm in admitting it cannot be cured or removed by any instruction from the court. Its effect still remains. Maxted v. Fowler, 94 Mich. 106, 53 N. W. 921; Boydan v. Haberstumpf, 129 Mich. 137, 88 N. W. 386; Nelson v. Spears, 16 Mont. 351, 40 Pac. 786; State Bank v. Dutton, 11 Wis. 371; Remington v. Bailey, 13 Wis. 336; Hanson v. Johnson, 141 Wis. 550, 124 N. W. 506; Armour & Co. v. Kollmeyer, 16 L.R.A.(N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78; Juergens v. Thom, 39 Minn. 458, 40 N. W. 559; Whittaker v. Voorhees, 38 Kan. 71, 15 Pac. 874; Dykes v. Wyman, 67 Mich. 236, 34 N. W. 561.

The law is that delivery of commercial paper, either active or constructive, is necessary to its completion. Jones v. Deyer, 16 Ala. 221; Gordon v. Adams, 127 Ill. 223, 19 N. E. 557; Palmer v. Poor, 121 Ind. 135, 6 L.R.A. 469, 22 N. E. 984.

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

Where a party proceeds upon a certain well-defined theory at the trial, he cannot abandon it and adopt a new theory on his motion for a new trial or on appeal. The theory adopted and pursued at the trial must control throughout. Marshall v. Andrews, 8 N. D. 364, 79 N. W. 851; Paulson v. Ward, 4 N. D. 100, 58 N. W. 792; Wright v. Sherman, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093; Loomis v. LeCocq, 12 S. D. 325, 81 N. W. 633; Bidgood v. Monarch Elevator Co. 9 N. D. 632, 81 Am. St. Rep. 604, 84 N. W. 561; Valiquette v. Clark Bros. Coal Min. Co. 83 Vt. 538, 34 L.R.A.(N.S.) 440, 138 Am. St. Rep. 1104, 77 Atl. 869; William Deering & Co. v. Russell, 5 N. D. 319, 65 N. W. 691; 3 Cyc. 243; Diggs v. Way, 22 Ind. App. 617, 51 N. E. 429, 54 N. E. 412; Carroll v. Drury, 170 Ill. 571, 49 N. E. 311; Snyder v. Snyder, 142 Ill. 60, 31 N. E. 303; Middlekauff v. Zigler, 10 Kan. App. 274, 62 Pac. 729; Flaherty v. Miner, 123 N. Y. 382, 25 N. E. 418; Luckie v. Schneider, — Tex. Civ. App. —, 57 S. W. 690; 2 Cyc. 670.

Rulings by the trial court on the receiving of evidence will not be received by the supreme court unless exceptions are duly taken. Waterhouse v. Jos. Schlitz Brewing Co. 16 S. D. 592, 94 N. W. 587; State v. Harbour, 27 S. D. 42, 129 N. W. 565; Redwater Land & Canal Co. v. Jones, 27 S. D. 194, 130 N. W. 85; F. Mayer Boot & Shoe Co. v. Ferguson, 19 N. D. 496, 126 N. W. 110.

Questions not raised in the court below cannot be presented in the supreme court, especially where an attempt appears to change the theory. Marshall v. Andrews, 8 N. D. 364, 79 N. W. 851; Peteler Portable R. Mfg. Co. v. Northwestern Adamant Mfg. Co. 60 Minn. 127, 61 N. W. 1024; Broughel v. Southern New England Teleph. Co. 72 Conn. 617, 49 L.R.A. 404, 45 Atl. 435.

(This opinion is written after a rehearing).

BRUCE, J. (after stating the facts as above). The principal ground for a reversal which is urged by the defendant in this case, and which was apparently urged upon the motion for a new trial, is that the evidence does not show that the check came into the possession of the plaintiff before the time of the alleged conversion, and

that therefore the action of trover will not lie. It is contended that, no delivery having been made, the check at such time was the property of the maker, and not of plaintiff, and that the plaintiff, therefore, has no ground of complaint, as the liability of such maker to her is still existing, the debt never having been paid. This objection, however, comes too late. The case was twice tried, and the point does not appear to have been raised until the motion for a new trial was made in the second action.

The delivery of the check to the plaintiff or to her agent, and her right to the possession thereof at the time of its payment by the defendant bank, is admitted by the answer; for, although the answer denies the allegations of the complaint, "except as herein expressly admitted, qualified, or explained," it expressly alleges that the check "was cashed for the plaintiff at the plaintiff's special instance and request, and the money paid to the plaintiff or to the plaintiff's husband, and that said check was indorsed and made payable to the defendant as a receipt for said money at plaintiff's special instance and request, with indorsement made thereon by plaintiff's husband at plaintiff's special instance and request and by her authority, and that the defendant cashed said check by virtue of the authority given by the plaintiff to the plaintiff's husband to indorse said check, and to receive the money thereon for her use and benefit, and that the defendant cashed said check for the plaintiff as aforesaid in the regular course of business and under an express custom on the part of the plaintiff giving her husband authority to generally cash and indorse her checks for her and to receive the money thereon."

The question of ownership of the check, and the right to the possession thereof at the time of the alleged conversion, was and is therefore expressly eliminated from the case, and the only question at issue, and in fact the only question that was tried in the district court, was whether the husband had the right to indorse the same, that is to say, whether such indorsement was made with the consent of the wife.

It is now too late to urge that the check had not been received by the plaintiff, or that she was not entitled to the possession thereof, and that therefore the cause of action would not lie. Cushing v. Pires, 124 Cal. 663, 57 Pac. 572; McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278. It is well established, indeed, that "parties cannot elect to try their

causes on one theory in the lower court, and when defeated on that line assume a different position in the appellate court" (3 Cyc. 243), and that "the theory of the case which was adopted by the trial court with the acquiescence of the parties will govern in the appellate court for the purpose of review." 21 Enc. Pl. & Pr. 664; Marshall v. Andrews, 8 N. D. 364, 79 N. W. 851.

It is also quite clear that if a delivery to the plaintiff was in fact made or must be assumed the action of trover will lie, since the defendant bank, in order to reimburse itself for the payment which was made to the husband, transmitted the check and collected the same from its correspondents, who in turn collected it from the drawee bank. So, too, it would seem that a person to whom a check is sent by mail, and which check is intercepted and cashed with a fraudulent indorsement thereon by a third party, may ratify the delivery without ratifying the forged indorsement. "This brings us to the question," says Mr. Justice Lurton, of the Supreme Court of the United States, then a member of the supreme court of Tennessee, "as to whether this check was ever delivered to the complainant; for it is insisted that if there has been no delivery to him that he has no such title to the instrument as will enable him to maintain a suit against the bank. Whether this check was sent to complainant and miscarried, and fell into the hands of a stranger, or whether it was left with the bank to be credited to the complainant, who kept his account there, and by oversight this credit was not given, is all matter of conjecture. How this check ever reached the bank we are unable, from the proof, to determine. All we can say is that we are satisfied that it never came into the hands of complainant. Someone undoubtedly received it from Muse. *By suing the bank upon this check, complainant may and does ratify the receipt of the check from Muse.* It is as if it had been received by an agent for the use and benefit of the complainant. *Omnis ratihabitio retro trahitur et mandato priori æquiparatur*—a subsequent ratification has a retrospective effect, and is equivalent to a prior command. Broom, Legal Maxims, 837. 'This is a rule,' says Mr. Broom, 'of very wide application.' . . . 'No maxim,' remarks Mr. Justice Story, 'is better settled in reason or law than this maxim; . . . at all events, where it does not prejudice the rights of strangers.' [Fleckner v. Bank of United States, 8 Wheat. 363, 5 L. ed. 637.] As illustrative of the application of the rule the

author cites the case where the goods of A are wrongfully taken and sold. The owner may either bring trover against the wrongdoer, or may elect to consider him as his agent, and adopt the sale, and bring *an action for the price.* Smith v. Hodson, 4 T. R. 211. So, in another case it was said: 'That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent and by and with all the consequences which follow from the same act done by his previous authority.' [Wilson v. Tumman, 6 Mann. & G. 242.] Broom, Legal Maxims, 871. The bank is not prejudiced by this subsequent ratification, for it dealt with the check as the property of the complainant, and undertook to pay to him or his order. *The effect of this ratification is simply to make the check the property of the complainant. It does not ratify the collection of the check* by one whose act in receiving it is subsequently ratified, *and agency to receive a check payable to order implies no authority to indorse it in the name of the payee,* or to collect it without such indorsement. In the case of Dodge v. National Exch. Bank, a certificate of indebtedness by the government to Dodge was remitted by mail to the paymaster for a check. The mail was robbed, and the certificate presented by the thief to the paymaster, and a check demanded. The latter, without requiring proof of the identity of the holder of the certificate, issued a check payable to Dodge or order, and took up the certificate. The indorsement of Dodge was forged and the check paid. Subsequently Dodge sued the bank and recovered, the court holding that he might ratify the taking of the check for the certificate, and sue upon it as an accepted check. 20 Ohio St. 234, 5 Am. Rep. 648. See, to same effect, Graves v. American Exch. Bank, 17 N. Y. 207. The decree of the chancellor is reversed, and judgment for complainant against the bank for the amount of the check, and interest from filing of bill, and all the cost of the cause. See Pickle v. Muse (Pickle v. People's Nat. Bank) 88 Tenn. 380, 7 L.R.A. 931, 17 Am. St. Rep. 900, 12 S. W. 919.

The cases cited by counsel for appellant, namely, Talbot v. Bank of Rochester, 1 Hill, 295; Garthwaite v. Bank of Tulare, 134 Cal. 237,

66 Pac. 326; Buehler v. Galt, 35 Ill. App. 225, 227, and National Bank v. Millard, 10 Wall. 152, 19 L. ed. 897, in no way hold to a different doctrine. In the last case the action was brought against the drawee bank, and the court merely held that a payee of a check which was intercepted before delivery could not maintain an action against the drawee bank, as there was no privity between him and the bank, the bank's contract being with the maker of the deposit merely. In the case of Buehler v. Galt, 35 Ill. App. 225, there was no proof that the check ever reached the person to whom it was mailed, and the only question at issue was whether the mailing of it constituted a delivery. The court held that the postoffice in the case was the agent of the sender, and that the debt which it was sent to pay had never been paid. In the case of Talbot v. Bank of Rochester, 1 Hill, 295, Talbot, the owner of a certificate of deposit in the bank of L. caused it to be indorsed with directions that it should be paid to W. & Co., and then transmitted to them by mail, though without their knowledge or request. It never reached W. & Co., and was stolen on its way, and their names forged upon it, after which it came into the hands of the Bank of Rochester, the defendants, in the course of business, who collected the money on it from the Bank of L., supposing themselves to be the owners. But it was held in this case that the owner of a certificate of deposit who indorses it payable to another, and sends it to him by mail and without his knowledge, retains the property in it until the indorsee receives it, and that such a one had the election either to sue the Bank of Rochester, the intermediary bank, in trover as for the conversion of the certificate, or to recover the amount in an action for money had and received. In this case, however, the indorsee of the certificate of deposit, W. & Co., asserted no right of ownership in it, and provided that one who has the right of possession may assert that right, the case is authority for just such an action as is brought in the case at bar. It holds, in short, that an intermediary bank which cashes a check on a forged indorsement, and then collects that check from the drawee bank in order to reimburse itself, *has converted that check.* We can see no reason why, if no ratification had been made, the owner or payee of the certificate of deposit would have been able to maintain an action of trover against the intermediary bank, the indorsee of such check could not do the same thing, in other words, ratify or accept the delivery, though not the forgery.

In the case of Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326, the questions before us were not considered nor involved.

The only serious question, therefore, is whether a new trial should be ordered on account of the action of the trial court in admitting in evidence plaintiff's exhibit "C," which was unquestionably a self-serving declaration, and which was a letter sent by the plaintiff to her attorney in the West on September 24, 1906, and over a year after the cashing of the check, which was some time prior to May 2, 1905, and in which she stated that she had never received the money, and asked to whom it had been sent. There was in the case the close question of fact as to whether the payment to the husband and the indorsement by him was made with the plaintiff's consent, and this letter could not, in our opinion, have failed to have had its influence upon the jury. It is true that at the end of the trial the letter was withdrawn, and the jury was instructed to disregard it, but it was not until after the letter had been read to the jury and the poison had been administered. It is true, also, that the letter said nothing about the fact as to whether the indorsement had been authorized, but if the statements therein contained were believed by the jury, such indorsement could not have possibly been authorized, as the import of the letter clearly is that the wife knew nothing of the sending of the money. Otherwise why did she ask to whom it was sent? "I received your letter this evening," the letter states, "and was horrified to hear that I received my money a year ago, $257.75. Pray, for God's sake, tell me to whom it was sent. I swear before God I never received one cent." It is true that at the end of the trial this letter was withdrawn and the jury was instructed to disregard it. We can hardly see, however, how its prejudicial influence could at that late day have been eliminated. To authorize such a procedure in such a case, indeed, and under such a close question of facts and in the face of so apparent a prejudice, and to hold that the withdrawal of the testimony would correct the error, would be to hold that in any and every case a litigant may introduce prejudicial and self-serving declarations, read them to the jury, and then, after the poison has been instilled, correct the error by asking to have the testimony withdrawn. It is argued, we know, by counsel for the plaintiff that he subjected the cashier of the bank who had testified to obtaining the consent of the wife to the indorsement to a rigorous cross-examination, and that in such exam-

ination the witness was made to contradict himself. It is also argued that after the jury had retired they asked for a copy of this cross-examination, and that same might be read to them, and that soon after such reading they agreed upon a verdict. From this it is argued that it was the cross-examination of the cashier that was decisive of the case, and not the letter in question. Such a conclusion, however, goes too far and is hardly warranted. The cross-examination of the cashier may have decided one or two or a number of the jurymen, but we cannot presume that it decided or influenced all. We realize that the general rule is that "if inadmissible evidence has been received during a trial, the error of its admission is cured by a subsequent withdrawal before the trial closes, and by an instruction to the jury to disregard it, or even by an instruction to disregard without more, the view being taken that such an instruction is equivalent to striking the improper evidence out of the case." There is an exception to the rule, however, which is as well established as is the general rule itself, and that is that "where the evidence thus admitted is so impressive that in the opinion of the appellate court its effect is not removed from the minds of the jury by its subsequent withdrawal, or by an instruction of the court to disregard it, the judgment will be reversed on account of its admission, and a new trial will be granted." See 38 Cyc. 1441–1443; State v. McGahey, 3 N. D. 293, 55 N. W. 753; Bishop v. Chicago, M. & St. P. R. Co. 4 N. D. 536, 62 N. W. 605; Thomp. Trials, § 723; Armour & Co. v. Kollmeyer, 16 L.R.A.(N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78; Hopt v. Utah, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; Waldron v. Waldron, 156 U. S. 363, 381, 39 L. ed. 453–458, 15 Sup. Ct. Rep. 383; Throckmorton v. Holt, 180 U. S. 552–567, 45 L. ed. 663–671, 21 Sup. Ct. Rep. 474; Whittaker v. Voorhees, 38 Kan. 71, 15 Pac. 874; Tourtelotte v. Brown, 4 Colo. App. 377, 36 Pac. 73; Taylor v. Adams, 58 Mich. 187, 24 N. W. 864; Foster v. Shepherd, 258 Ill. 164, 45 L.R.A.(N.S.) 167, 101 N. E. 411, Ann. Cas. 1914B, 572; Chicago Union Traction Co. v. Arnold, 131 Ill. App. 599; Sinker v. Diggins, 76 Mich. 557, 43 N. W. 674; Wojtylak v. Kansas & T. Coal Co. 188 Mo. 260, 87 S. W. 506; Chicago, M. & St. P. R. Co. v. Newsome, 98 C. C. A. 1, 174 Fed. 394.

Nor was this error and prejudice waived by the alleged consent of counsel for the defendant to its withdrawal. The record in the case

shows that after the defendant had rested his case the plaintiff moved to withdraw the letter, and at the conclusion of the offer stated, "I do not presume you will have any objection to that," to which counsel for defendant replied, "No, I haven't any objection," and that the court then asked, "You have no objection to that?" and counsel for defendant replied, "No, I have no objection." From this it is argued that the withdrawal was consented to, and that, therefore, counsel for defendant cannot argue any prejudice. What else, we may ask, could counsel for defendant have done? If he had objected to the withdrawal of the letter, then counsel for plaintiff would no doubt have argued that he waived the error of its admission and consented to it, and in effect kept such objectionable evidence in the case against plaintiff's wishes, and that therefore he could not impute prejudice upon what might be termed invited error. Had defendant, instead of plaintiff, moved to strike out said evidence, and the motion had been granted, the granting of his motion would hardly have waived the error of its erroneous admission. How, then, can consent to its being stricken out on motion of his adversary waive the original error?

It is true that counsel for the defendant might have stated that he did not object to its withdrawal, but still insisted upon his original objection, but this would have been merely stating what the law implies. The only recourse the court then would have had would have been to dismiss the jury. We hardly, however, think that this should be insisted upon, as the jury, in spite of the erroneously admitted evidence, might have found a verdict for the objector, and in that case the expense and delay of a new trial would have been unnecessary. It is to be remembered that this motion on the part of the plaintiff to withdraw the evidence was made at the end of the case, where nothing remained but the submission to the jury, and did not occur at the beginning or in the middle of the trial. We are not unaware of the case of Furst v. Second Ave. R. Co. 72 N. Y. 542, which, upon casual reading, seems to express an *obiter* opinion different from that announced herein. But upon a close examination it will be seen that the reasoning in the main supports our holding herein. A new trial was granted because of reception of erroneous and prejudicial statements, the effect of which on the jury would not have been overcome by striking out said statements. To quote: "The *offer* of the plaintiff's counsel, if accepted, would not have

caused the jury to overlook this evidence when they came to consider the case, and it is impossible to say that it did not have some influence upon them." This is exactly our conclusion and basic reason for reversal.

Nor is there any merit in the contention that the letter was, after all, a part of the *res gestæ* and therefore admissible. It was clearly and palpably a self-serving declaration. It would be hard to imagine a more effective or dangerous one. It was written six months after the alleged payment of the check and after it should have been received. There was ample time and opportunity for reflection and a strong temptation to "the playing of a part." It was not a spontaneous utterance which was the result of the principal act. It was therefore inadmissible.

We realize, of course, that this case has been twice tried and that the proceedings have been long delayed. Such fact, however, should not be allowed to prejudice the rights of the defendant.

The judgment of the District Court is reversed and a new trial is ordered.

CHRISTIANSON, J. (dissenting). It is with reluctance that I dissent, as I know that the majority members regret as much as I do the necessity (as they see it) of ordering a new trial of this action. But the conclusion reached by them in so doing is, in my judgment, so unfortunate and so erroneous that I cannot conscientiously assent thereto.

In order to properly present my views, it is necessary to refer to, and quote from, the record regarding the admission of the letter, plaintiff's exhibit "3." The plaintiff testified that the first knowledge she had of the fact that the defendant bank had received and cashed the check was about September 16 or 19, 1906, and she fixed these dates, because on these dates she received letters from her attorney Stranahan at Fort Benton, Montana, and that, on the day after she received one of the letters, she wrote the letter exhibit "3." She testified that she wrote this letter at about the time she learned that the defendant bank had converted the check. The letter, exhibit "3," was thereupon offered in evidence, and the defendant's counsel interposed thereto the following objection: "Object to the introduction of exhibit 3 as incompetent, irrelevant, and immaterial, and on the further ground that it is not a part of the transaction in suit or a part of the *res gestæ;* and on the further ground that it does not tend to prove or disprove any issue in this case,

or any admission of liability on the part of the State Bank of Rolla to the plaintiff herein."

The record shows that before ruling on the objection, the trial court asked defendant's counsel if he had any argument or authority to submit in support of the objection. To which defendant's counsel replied that he stood on the objection,—refusing, or at least failing, to either argue the proposition or submit authority. The plaintiff's counsel, however, submitted authority; and, after examination thereof and further examination of the plaintiff for the purpose of laying a better foundation, exhibit "3" was admitted in evidence. The defendant's counsel made no detailed objection at this time, but merely stated that he renewed his former objection.

Immediately following the cross-examination of the last witness produced by defendant, exhibit "3" was withdrawn.

The record shows that, at the time of such withdrawal, the following took place:

Mr. Sennett: At this time, if the court pleases, the plaintiff withdraws the offer of exhibit 3 in evidence, and moves to strike the same out on the grounds and for the reasons as advanced by defendant's counsel, and asks the court that the jury pay no attention to exhibit 3 in arriving at their verdict in this action. I don't presume you have any objection to that?

Mr. Plymat: *No, I haven't any objection.*

The Court: You have no objection to that?

Mr. Plymat: *No, I have no objection.*

The Court: Gentlemen of the jury, you have heard this motion with reference to the letter, exhibit 3, that has been read to you here. You will pay no attention now whatever to that letter. That is out of the case. The case stands just as though that letter had never been in the case at all. Pay no attention to anything that was in the letter. It must not be considered by you at all in your deliberations in this case.

The record does not show that either party had finally rested at the time exhibit "3" was withdrawn, although as a matter of fact no evidence was offered by either side subsequent to its withdrawal.

The case was thereafter argued to the jury, and no contention is made

that any reference was made to this excluded testimony in argument. In its instructions to the jury the court said: "Now, gentlemen of the jury, there was an exhibit offered in evidence in this case, exhibit 3, being a letter written by Mrs. Crisp to her attorney, Mr. Stranahan, and afterwards this letter was stricken from the record, and it now has no place in this case, and you will not consider this letter or the contents of it in any way, shape, or manner in arriving at your verdict."

On February 10, 1913, defendant's counsel (the same attorney who conducted the trial) served notice of motion and motion for a new trial, noticed to be heard on February 28, 1913. One of the grounds of such motion was: "Error in law relative to the introduction and admission in evidence of the depositions in said cause." No specific error was assigned upon the admission of the letter exhibit "3." This motion for a new trial was apparently abandoned. Additional counsel was thereafter retained by the defendant, and a statement of case was prepared and presented for settlement, and settled by the trial judge on July 19, 1913. There were in all some fifty-nine specifications of error incorporated in the statement of case. The one relating to exhibit "3," being specification number 20, was in the following language, *viz.:* "Overruling defendant's objection to the introduction in evidence of plaintiff's exhibit '3.'" On July 24, 1913, defendant's counsel served upon plaintiff's counsel a notice of motion for a new trial, noticed to be heard on August 9, 1913. No specific mention was made in the papers then served of the alleged erroneous admission of exhibit "3" in evidence, but the only statement of error of law set forth in, or attached to, such notice of motion, was the following general assignment, to wit: "Errors in law occurring at the trial and excepted to by defendant being specifications of error one to fifty-nine inclusive incorporated in the statement of case."

Under the provisions of the 1913 practice act, the trial judge is required to file with all orders granting or refusing a new trial "a written memorandum concisely stating the ground on which his ruling is based." This memorandum constitutes a part of the judgment roll. Comp. Laws 1913, § 7690. The memorandum in this case is as follows: "This case has been twice tried to a jury. The first trial resulted in a disagreement and the second in a verdict for plaintiff. Mrs. Crisp was a widow and married Crisp. Her share of her first husband's estate was

sent to her by bank check from Montana. The check was cashed at the defendant bank by her husband, being indorsed in name of herself and Crisp in the handwriting of Crisp. She claims that she never authorized the signature, and that for two years she did not know that the check had been sent to her.

"The cashier of the bank swore positively at both trials that he personally went to plaintiff with the check, and that she told him the indorsement was all right, and that he should pay the check. The case was tried both times on this theory,—that the bank really had a proper indorsement. But the jury found that the plaintiff told the truth.

"This is a motion for a new trial.

"*H. E. Plymat, Cowan, Adamson, & Blood,* appear for the defendant; *L. H. Sennett, Cuthbert & Smythe,* appear for plaintiff. In this connection, however, it is only fair to state that Cowan, Adamson, & Blood had nothing to do with the trial and only appear on this motion.

"On the motion for a new trial the defendant insists for the first time that, even though the indorsement was never authorized, nevertheless there can be no recovery, because the check, having been sent by mail and having been stolen, never became her property, so that the defendant could have converted it. In other words the defendant asks this court to prolong this litigation by raising an entirely new issue on this motion for the first time,—by inference admitting the falsity of its testimony on both of the other trials. Courts, judges, and lawyers are being severly criticized, and in many instances justly so, for the delays of the law, expensive litigation, and over-indulgence in technicalities. This case is an example. The defendant's position, if sustained, would result, too, in much further litigation, circuity of action, and a multitude of suits with probably no different results,—and cannot be tolerated.

"The motion will be denied."

The memorandum decision indicates that on the motion for a new trial no particular reliance was placed on the general assignment of error, or the alleged erroneous admission of exhibit "3." Apparently the trial court's attention was not called thereto, except by the general assignment contained in the record. The point there relied on was the new theory of defense, then for the first time presented. And on this appeal practically the whole of appellant's brief is devoted to a presentation of that same proposition.

Compiled Laws 1913, § 7656, reads: "A party desiring to make a motion for new trial or to appeal from a judgment or other determination of a district court or county court with increased jurisdiction, shall serve with the notice of motion or notice of appeal, a concise statement of the errors of law he complains of, and if he claims the evidence is insufficient to support the verdict or that the evidence is of that character that the verdict should be set aside as a matter of discretion, he shall so specify. . . ."

It is apparent that under the provisions of this section, the same particularity is required in the statement of errors presented to the trial court on a motion for new trial as is required on appeal. Will this court say that in a case of appeal wherein there are over fifty different rulings excepted to on the trial, that a mere general statement referring to them collectively is a sufficient statement of the errors of law complained of? Every reason for requiring specific statements of the different errors of law complained of on appeal applies with equal force to motions for new trial.

Certainly under the present practice where all instructions are deemed excepted to, a general statement served with the notice of appeal or motion for new trial, of "errors of law in instructions to the jury," would be disregarded as insufficient. The assignment involved in this case is even more general. An examination of the assignments of error attached to the statement of case shows that the first fifty-eight of the errors assigned relate to rulings in the admission or exclusion of evidence, and the fifty-ninth assignment challenges the sufficiency of the verdict to entitle plaintiff to judgment. It is now virtually conceded that fifty-eight of the fifty-nine errors specified were without merit. They are not even considered worthy of argument, but have been waived. It is conceded that if the trial judge had taken the time to explore the record, and examined the first nineteen and the last thirty-nine of the fifty-nine errors included in such general assignment, he would have found no error.

It is elementary that every presumption is in favor of the ruling of the trial court, which must be sustained unless appellant affirmatively shows error. And in order to do so, appellant has the burden of presenting to this court a record affirmatively showing that the grounds which he now urges for a reversal were properly presented to the trial

court for determination. See Davis v. Jacobson, 13 N. D. 430, 432, 101 N. W. 314. It seems to me that the record in this case shows affirmatively that this was not done. The general assignment was insufficient to present to the trial court the specific error now relied upon. The new and valuable work, Corpus Juris, states the law on this subject to be as follows: "A general assignment of error that the court erred in admitting or excluding evidence is insufficient to present any question for review. The particular error relied upon must be specified. Speaking more specifically, the assignment must point out the particular evidence, the admission or exclusion of which is claimed to be erroneous, or such evidence must be set out in the assignment of error. If the error assigned is refusal of the court to permit a witness to answer a question, the assignment must show what answer the witness was expected to make, its materiality, and that the judge was informed thereof at the time of the ruling. So the assignments of error should state the questions or offers, the objections made thereto, and the rulings of the court thereon; and it has been held that a mere reference to the record for such information is insufficient." 3 C. J. § 1519.

"Different errors in regard to the admission or exclusion of evidence should not be joined in one assignment, for if any of the rulings complained of are correct the assignment must be overruled." 3 C. J. § 1520. See also Willoughby v. Smith, 26 N. D. 209, 144 N. W. 79; Schmidt v. Carpenter, 27 S. D. 412, 131 N. W. 723, Ann. Cas. 1913D, 296; Northern Grain Co. v. Pierce, 13 S. D. 265, 83 N. W. 256; 38 Cyc. 1405; 29 Cyc. 947, and authorities cited under note 9.

But even if the alleged error is considered, it constitutes no ground for reversal.

Appellant's counsel consented to a withdrawal of the exhibit. At the time of such consent, a motion was pending to strike the exhibit, *"upon the grounds"* of the objection formerly made by defendant's counsel. It is true, an objection once made need not be repeated, and that error in the admission of evidence is not waived by failure to move to strike such evidence. But that is not the condition here. In this case testimony was admitted over objection. Afterwards the opposing counsel conceded the merits of the objection, and in effect moved that the objection be allowed. The court's ruling in striking the exhibit was in effect based upon a stipulation of counsel. The exception on which

appellant predicates error was based upon the overruling of his objection. Can it be said that appellant's counsel manifested an intent to insist upon this exception, when he agreed without any qualification or condition that the very foundation upon which his exception rested be removed? A question of waiver is largely a question of intent. One of two things is true,—either defendant's counsel intended to waive the exception to the admission of the testimony, or he did not. If he intended to waive it, it is waived, just as effectively as if a formal stiplation had been entered into to that effect at the time. That he did not intend to rely upon such exception is manifested not only by his conduct at the time of the trial, but by the recitals in the motion for new trial served on February 10, 1913, wherein specific error is assigned on the admission of certain depositions, but no mention is made of exhibit "3." If at that time defendant's counsel had placed any reliance upon such error, it seems self-evident that it would have been specifically asserted. If defendant's counsel intended to rely upon his exception at the time the exhibit was withdrawn, the trial court was entitled to be so informed.

It seems to me that the doctrine of waiver applies with peculiar force in this case. See State v. Glass, 29 N. D. 620, 638, 151 N. W. 229. A party cannot speculate upon what answer a witness will make to a certain question. Hogen v. Klabo, 13 N. D. 319, 100 N. W. 847. Yet the conclusion reached by the majority is based upon the theory that counsel may speculate upon the answer of a jury. In order to sustain the conclusion reached by my associates, it must be found that defendant's counsel, at the time of the withdrawal of exhibit "3," had a secret intent in his mind undisclosed to the trial court. If he had any such intent, he should have expressed it and asked for the appropriate relief. He at that time received at the hands of the trial court the very relief requested, *viz.*, the withdrawal of the exhibit, and the court's caution to the jury to disregard the evidence. If, in addition to this relief, he wanted a discharge of the jury and the impaneling of another, he should have so requested. Concededly plaintiff's counsel did not want this. He wanted to see what the jury would do first. He was willing to take his chances on the verdict, and it was only when his speculation had failed to result in a finding in his favor that complaint is made because

the trial court failed to read the secret purpose contained in counsel's mind.

The rule has been repeatedly laid down by this court that error cannot be predicated upon the trial court's failure to instruct on certain matters of law arising upon the evidence, in absence of a request for appropriate instructions. See State v. Lesh, 27 N. D. 166, 145 N. W. 829; State v. Glass, 29 N. D. 620, 151 N. W. 229, and authorities cited therein. In this case the majority hold that the trial court should have granted not only the relief agreed upon, but have gone further, and, in absence of any request, or an intimation that either party so desired, discharged the jury, and directed the impaneling of a new jury to try the case.

But I am satisfied defendant's counsel had no such intent, or secret reservation of mind. This alleged error was merely an afterthought even on the part of the additional counsel, and is, in reality, presented for the first time on this appeal. The majority opinion refers to Furst v. Second Ave. R. Co. 72 N. Y. 542. In that case incompetent evidence was admitted over objection. The plaintiff's counsel offered that the answer be stricken out, but defendant's counsel declined the proposal, and the court held that an acceptance of such proposal would have amounted to a waiver of the exception. The court said: "The plaintiff's counsel then proposed to have the answer stricken out, it appearing from the answer that it was merely matter of opinion. The defendant's counsel declined to accept this proposition, and elected to retain his exception. *The court made no ruling and gave no instruction to the jury on the subject.* The former rulings, the exceptions thereto, and the objectionable testimony, all remain in the case. The defendant's counsel had the legal right after the evidence had been admitted, in spite of his repeated objections, to insist upon his exception, and it was not his duty to waive it, as he would have done by accepting the proposal of the plaintiff's counsel." In the New York case the evidence was not withdrawn by the court. The jury was not cautioned to disregard it. The objecting counsel fairly informed the trial court and adverse party of his nonwaiver. The facts in the case at bar are diametrically opposite. Defendant's counsel consented to the withdrawal. The trial court positively and unequivocally told the jury to disregard the exhibit. Plaintiff's counsel in withdrawing the exhibit, in the presence of the jury,

conceded that the objection made by the defendant's counsel was well taken, and moved that the exhibit be withdrawn upon the grounds stated in such objection.

The majority opinion concedes the general rule that the erroneous admission of evidence is cured by its subsequent withdrawal, but holds that the case at bar falls within the exception to the rule. " 'The question,' said Durfee, Ch. J., in discussing this point, 'is, Did the withdrawal take the testimony out of the case? If it did, it is to be considered as if it had never been admitted. We think the withdrawal, being by consent of court, is to be regarded as the act of the court, and that, in contemplation of law, it purged the case absolutely of the testimony.' The conclusion was that, while it would rest within the discretion of the trial court to grant a new trial for the admission of illegal testimony subsequently withdrawn by counsel,—yet a judgment could not be reversed on exceptions for this reason." Thomp. Trials, 2d ed. § 723.

The court's instructions to the jury in the case at bar were specific and emphatic. They could not be misunderstood. This question was considered by the Supreme Court of the United States in Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141, 10 Am. Neg. Cas. 593. The court said: "Upon the trial below, the plaintiff was allowed, against the objection of the defendant, to make proof as to his financial condition, and to show that, after being injured, his sources of income were very limited. This evidence was obviously irrelevant. The plaintiff, in view of the pleadings and evidence, was entitled to compensation, and nothing more, for such damages as he had sustained in consequence of injuries received. But the damages were not, in law, dependent in the slightest degree upon his condition as to wealth or poverty. It is manifest, however, from the record, that the learned judge who presided at the trial subsequently recognized the error committed in the admission of that testimony. After charging the jury that the measure of plaintiff's damages was the pecuniary loss sustained by him in consequence of the injuries received, and after stating the rules by which such loss should be ascertained, the court proceeded: 'But the jury should not take into consideration any evidence touching the plaintiff's pecuniary condition at the time he received the injury, because it is wholly immaterial how much a man may have accumulated up to

the time he is injured; the real question being, how much his ability to earn money in the future has been impaired.'

"Notwithstanding this emphatic direction that the jury should exclude from consideration any evidence in relation to the pecuniary condition of the plaintiff, the contention of the defendant is that the original error was not thereby cured, and that we should assume that the jury, disregarding the court's peremptory instructions, made the poverty of the plaintiff an element in the assessment of damages; and this, although the record discloses nothing justifying the conclusion that the jury disobeyed the directions of the court. To this position we cannot assent, although we are referred to some adjudged cases which seem to announce the broad proposition that an error in the admission of evidence cannot afterwards be corrected by instructions to the jury, so as to cancel the exception taken to its admission. But such a rule would be exceedingly inconvenient in practice, and would often seriously obstruct the course of business in the courts. It cannot be sustained upon principle, or by sound reason, and is against the great weight of authority. *The charge from the court, that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence.* Any other rule would make it necessary, in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval."

Certain authorities are cited in the majority opinion to justify the conclusion reached; but in my opinion the cases cited do not support such conclusion. I will discuss the various cases cited in their order:

State v. McGahey, 3 N. D. 293, 55 N. W. 753. In this case the defendant was convicted of assault with intent to kill. A witness volunteered concededly incompetent testimony, which was stricken out

by the court on motion, and this court held that, in the absence of a request for an instruction, no error was committed by the trial court in failing to instruct the jury to disregard such testimony.

Bishop v. Chicago, M. & St. P. R. Co. 4 N. D. 536, 62 N. W. 605. In this case plaintiff's counsel, upon cross-examination of the engineer who operated the locomotive, elicited certain testimony showing that there were no air brakes on the train, as well as the distance in which the train could have been stopped if there had been air brakes. The trial judge subsequently struck out all of this testimony on the ground that it had not been shown that the air brake was an ordinary appliance in railway management, and that, therefore, the testimony so elicited was incompetent. This court held that the error, if any, in the admission of such testimony, was cured by its withdrawal. In its opinion the court said: "There is a conflict of authority as to whether the explicit withdrawal of evidence, when done by the court in charging the jury, will operate to cure an error which may be involved in its admission. *Prima facie, and under the prevailing rule, such withdrawal does cure the error.* Thomp. Trials, §§ 723, 351, and cases cited in the notes. Also, Id. § 2354, and State v. McGahey, supra. We think no inflexible rule need be laid down in this case. In the case under consideration the verdict has ample support in the evidence, aside from the evidence relating to air brakes, which was withdrawn. We are of the opinion that under the circumstances existing in this case the admission of the evidence, followed by its subsequent withdrawal by the court, could not have operated to prejudice the substantial rights of the defendant." These are the only cases from this court cited in the majority opinion, and both cases are authority against, rather than for, the conclusion reached by the majority.

Armour & Co. v. Kollmeyer, 16 L.R.A.(N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78. This was an action for personal injuries. Testimony was admitted tending to show that the injuries caused plaintiff to lose sexual power. A motion to strike such testimony because the same was "not a matter of damages, and not pleaded," was denied. At the close of the direct examination of the last witness who testified to this fact, plaintiff sought to amend his complaint by an averment stating such consequential damages. The application to amend being refused, the plaintiff moved to strike the testimony, which motion was granted,

and the trial court at the close of the trial instructed the jury to disregard the evidence so stricken. The appellate court refused to pass on the question of whether the evidence was admissible, but for the sake of the opinion conceded that the evidence so stricken was inadmissible. The court, after stating the general rule that the error in receiving inadmissible evidence is cured by its subsequent withdrawal before the trial closes, or by an instruction to the jury to disregard it, as well as the exception to the rule, said: "The case falls under the rule, rather than under the exception. The objectionable evidence was withdrawn by the plaintiff himself, and the court told the jury to disregard it before the plaintiff rested. *It was not before the jury when the case was argued to them, and at the close of the argument the court again instructed them to disregard it.* The other evidence of injury in the case was sufficient to sustain the verdict for the amount of damages which the jury found. *The jury could not have misunderstood the repeated instruction of the court to disregard the testimony here challenged, and the presumption is that they faithfully discharged their duty.*"

Hopt v. Utah, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614. In this case defendant was convicted of murder. Upon the trial a physician was permitted to testify (over objection that the same was not proper expert testimony) to the fact that the blow which caused the death of the deceased was delivered from behind and above the head of the person struck and from the left to the right. The testimony was afterwards stricken out on motion of the prosecuting attorney, and the jury instructed to disregard it. In the opinion the court said: *"If it was erroneously admitted, its subsequent withdrawal from the case, with the accompanying instruction, cured the error.* It is true, in some instances there may be such strong impressions made upon the minds of a jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error. But such instances are exceptional. The trial of a case is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken, when an error in the admission of testimony can be corrected by its withdrawal with proper instructions from the court to disregard it. We think the present case one of that kind."

Waldron v. Waldron, 156 U. S. 361, 39 L. ed. 453, 15 Sup. Ct. Rep.

383. This was an action for alienation of affections, wherein the plaintiff was awarded a verdict of $17,500 for the alienation of her husband's affections. The plaintiff had obtained a divorce from her husband before the commencement of the action for alienation of affections, and one of the defenses asserted in the alienation suit was that plaintiff had no right to maintain the action, for the reason that the relation of husband and wife had ceased to exist between the plaintiff and her former husband, and that as a matter of fact her former husband was at the time of the commencement of the action for alienation of affections, the husband of the defendant. The fact of such divorce was admitted in the pleadings, but plaintiff's counsel offered the record in the divorce action, and the same was received over objection that such record was *res inter alios,* and the plaintiff could not be permitted to make proof for herself by offering her own petition as evidence in her favor and thus disparage the character of the defendant. The court in admitting the record repeatedly declared that it was admitted solely for the purpose of proving the fact of the divorce, and that the averments in the petition and other matters reflecting on the defendant were not to be disclosed or read to the jury. In their argument to the jury, however, the attorneys for the plaintiff intentionally perverted the evidence so introduced, and repeated to the jury averments contained in the petition in the divorce action, and applied the evidence thus introduced in direct contravention of the rulings of the court. In discussing this question the United States Supreme Court said: "When the record of the divorce proceedings was offered by the plaintiff objection was made thereto, and thereupon the court admitted *it to prove the fact of the divorce alone, expressly limiting it to such purpose, and forbidding the reading or stating to the jury any of the averments found in the petition which in any way reflected upon the defendant.* When the statute of Indiana was admitted, over objection, its introduction was allowed solely for the purpose of showing the law under which the divorce was granted. Having thus obtained the admission of the record and the statute for qualified and restricted purposes, *plaintiff's counsel, in their closing argument to the jury, used these instruments of evidence for the general purposes of their case, repeated to the jury some of the averments in the petition which assailed the plaintiff's character, and put those allegations in juxtaposition with the statute of Indiana on the*

subject of divorce and the testimony of certain witnesses, in order to produce the impression upon the minds of the jury that the decree of divorce had been granted on the ground of adultery between the defendant and Waldron. Indeed, the fact is that the counsel, after referring the jury to the evidence which was not in the record, stated to them, in effect, that it established the fact, or authorized the fair inference, that the decree of divorce had been rendered on the ground of adultery with Mrs. Alexander, and therefore conclusively established the right of the plaintiff to recover in the present case. . . .

"We come now to the last contention, which is this, that, conceding misuse was made of the record and other evidence, yet, as the misuse was corrected by the final charge of the court, therefore the error was cured. *Undoubtedly it is not only the right, but the duty, of a court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is made, it is equally clear that, as a general rule, the cause of reversal is thereby removed.* State v. May, 15 N. C. (4 Dev. L.) 330; Goodnow v. Hill, 125 Mass. 589; Smith v. Whitman, 6 Allen, 562; Hawes v. Gustin, 2 Allen, 406; Dillin v. People, 8 Mich. 369; Specht v. Howard, 16 Wall. 564, 21 L. ed. 348. There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court. . . .

"The case here, we think, comes within the exception. *The charge made in the complaint was a very grave one, seriously affecting the character of the defendant below. The record, which was admitted for a limited purpose, had no tendency to establish her guilt of that charge, if used only for the object for which it was allowed to be introduced.* This is also true of the Indiana statute, and of the other testimony relating to the divorce proceeding. The admission of the record and other testimony having been thus obtained, in the closing argument for plaintiff, all the restrictions imposed by the court were transgressed, and the evidence was used by counsel in order to accomplish the very purpose for which its use had been forbidden at the time of its admission.

"Indeed, when the statements made by plaintiff's counsel in opening

are considered, it seems clear that the failure to obtain the admission of the divorce proceedings in full left the case in such a condition that much of the subsequent testimony introduced, while it proved nothing intrinsically, was well adapted to fortify unlawful statements which might thereafter be made in reference to those proceedings. *Thus the case in its entire aspect was seemingly conducted in such a manner as to render the illegal use of evidence possible, and to cause the harmful consequences arising therefrom to permeate the whole record and render the verdict erroneous.* Our conviction in this regard is fortified by the fact that, although the unauthorized use of the evidence occurred in the final argument of the counsel for plaintiff, who first addressed the jury, and was then and there objected to and exception reserved, the same line of argument, in an aggravated form, was resorted to by the counsel who followed in closing the case. Indeed, the language of this counsel invited the jury to disregard the finding of the court, by looking beneath the facts which were lawfully in evidence."

Throckmorton v. Holt, 180 U. S. 552, 45 L. ed. 663, 21 Sup. Ct. Rep. 474. In this case certain opinion evidence was offered as to the genuineness of the testator's signature, based in whole or in part upon the composition of the paper, the expressions contained in it, and the legal or literary attainments of the testator. The court subsequently, in its instructions, instructed the jury to disregard any opinions as to the genuineness of the testator's signature in so far as the same were based upon anything but the handwriting of the instrument; and that opinions based in whole or in part upon the composition or the expressions contained in the papers, or the legal or literary attainments of the testator, were withdrawn from the consideration of the jury, but that all other evidence admitted in the case bearing upon the legal attainments and literary style of the testator remained as competent evidence for the consideration of the jury along with the other evidence in the case bearing upon the questions of the genuineness of the papers. The court held that the particular instructions under the facts in that case did not cure the error in the admission of such testimony. In deciding the case, however, the court uses certain language which clearly differentiates that case from the case at bar, and in effect makes the case an authority against the conclusion reached by the majority in this case. The court said: *"There may also be a defect in the language of the at-*

tempted withdrawal, whether it was sufficiently definite to clearly identify the portion to be withdrawn. This evidence was regarded upon the trial as of considerable importance. The question of its admissibility was raised in the early stages of the trial, and the evidence was excluded. It was again raised while the case was with the contestants and the evidence admitted at their instance, and several witnesses sworn in regard to it. After that an effort was made on the part of the proponents to give testimony in their favor on this question, and it was refused as not rebutting in its character. It is not a case, therefore, of the introduction of merely irrelevant evidence, such as was stated in Pennsylvania Co. v. Roy, 102 U. S. 452, 26 L. ed. 142, 10 Am. Neg. Cas. 593; nor like the case of Hopt v. Utah, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614, *where the testimony of a single witness, a physician, as to the direction from which the blow was delivered,* had been admitted, and where it was held that if it had been erroneously admitted, its subsequent withdrawal from the case with the accompanying instructions cured the error. *That was a plain question of evidence on a single point, and on the part of one witness only.*

"Here was a case where several witnesses gave opinions in regard to the handwriting in the disputed paper, based upon their knowledge of the handwriting of Judge Holt, and also based upon their familiarity with his legal attainments and with his characteristics of style and composition, while others based their opinions upon handwriting only. *Which were the witnesses that based their opinions partly upon both foundations, the jury could not be expected to accurately recall after a long trial lasting several weeks. Nevertheless it was called upon to separate and cast aside that portion of the evidence which had been based upon such facts, and, after excluding that evidence, determine as to the value of the remaining opinions based upon knowledge of handwriting only.* It is at least questionable whether the case does not come within the exception to the rule by reason of the possible impression produced upon the jury during the long trial, in which the evidence of several witnesses upon this point was given after much opposition and long argument as to its admissibility."

Whittaker v. Voorhees, 38 Kan. 71, 15 Pac. 874. This was an action for conversion, and incompetent testimony regarding declarations of plaintiff's vendor was admitted over objection. The trial court after-

wards instructed the jury to disregard such evidence. The appellate court refused to order a new trial for the alleged error, and affirmed the judgment.

Tourtelotte v. Brown, 4 Colo. App. 377, 36 Pac. 73. This case involved a promissory note. The question at issue was whether the note was genuine or forged. The maker of the note was dead, and the note was presented as a claim against the maker's estate. Upon the trial of the case, the court admitted in evidence the transcript of the testimony of a witness, Stipes. This testimony tended to prove the note a forgery. This testimony was given by Stipes in a different proceeding, to which the plaintiff was not a party. The appellate court held that the erroneous admission of this testimony was not cured by its subsequent withdrawal. The instructions to the jury were not nearly as emphatic as those in the case at bar. The testimony offered was that of a witness who did not testify upon the trial. It pretended to be Stipes's sworn version of the matter given upon a judicial proceeding.

Taylor v. Adams, 58 Mich. 187, 24 N. W. 864. This was an action for personal injuries received by plaintiff at the hands of defendant and his servants in forcibly ejecting her from a dwelling house. Testimony was erroneously admitted showing that defendant had and exhibited a revolver, to prevent other persons from entering the building. The revolver did not enter into the assault involved in the action, and at the time of its admission the trial court stated as a reason for its admission that "it tends to characterize and throw light upon the transaction." The incident did not occur in presence of the plaintiff. The court in holding that the subsequent withdrawal of this testimony did not cure the error in its admission, among other things, said: "It not unfrequently occurs that the real facts in the case raising the vital questions upon which the determination of the rights of the parties depend are completely obscured before the jury by the introduction of testimony of a sensational character, accompanied by explanatory statements of counsel which have no proper place in the proceedings."

Foster v. Shepherd, 258 Ill. 164, 45 L.R.A.(N.S.) 167, 101 N. E. 411, Ann. Cas. 1914B, 572. This was an action for damages for wrongfully causing the death of plaintiff's husband. Plaintiff recovered a verdict for $7,750. The defendant claimed that he shot and killed the deceased, believing in good faith that the deceased was about to com-

mit a burglary upon defendant's residence. In the language of the Illinois court, plaintiff's whole case "was predicated upon the theory that the deceased was on his way from his store to his mother's residence, where he expected to spend the night, at the time he was killed, and any proof made which tended to bear upon that question is of vital importance." One Drake was called, and over specific objection was permitted to testify that the deceased was to spend the night with his mother. Drake's former answers indicated that his conclusions were based on hearsay. Defendant's counsel made specific objection on the ground that the question called for a conclusion and a conversation, and requested that before the witness be permitted to answer such questions, it be shown whether the witness had secured his information through a conversation. The objection was overruled, and the request denied, and the witness permitted to testify. On cross-examination it was shown that Drake's testimony was based on what he claimed the deceased had told him in a conversation a considerable time before the shooting. Drake's testimony, together with the testimony of the deceased's mother as to his custom to come to her house when his wife was away, was the only evidence on this vital subject. In holding that the admission of the incompetent evidence was not cured by its subsequent withdrawal, the court mentioned the fact *that only general instructions to the jury were given to disregard the stricken testimony.* The court, also, held that the record affirmatively showed that plaintiff's counsel was guilty of deception and bad faith in introducing the testimony of Drake. The court said: "The fact that this testimony was apparently elicited by counsel for defendant in error with the full knowledge that it was incompetent and must therefore be stricken adds to the gravity of the situation. This case was hotly contested. Able counsel were employed on either side, and this was the second time the case had been tried. There is every indication that the most careful and skilful preparation had been made on both sides for the trial. It is improbable that the witness Drake was called to the stand and interrogated on this subject without a full knowledge on the part of counsel for the defendant in error as to the subjects concerning which he would testify and the source of his information. The manner in which the questions were framed, the fact that counsel themselves refrained from making the preliminary examination suggested, the promptness with which they

agreed that the testimony should be stricken, all indicate a knowledge of the situation. The whole circumstance leads one to the conclusion that it was the purpose of counsel to get this incompetent statement before the jury and to secure the benefit of the impression it would make, even though it must be immediately stricken from the record." Even in this case, however, two members of the court dissented, the dissenting members contending that the error in the admission of Drake's testimony was cured by striking the same.

Chicago Union Traction Co. v. Arnold, 131 Ill. App. 599. This was an action for personal injuries. The jury returned a verdict for $10,000 from which Mrs. Arnold remitted $6,000, and judgment was thereupon rendered for $4,000. "Against the objection of appellant Dr. McGregor was permitted to testify that appellee suffered from womb trouble, that an operation of her pelvic organs disclosed that she had retroversion and inflammation of the womb. This testimony was admitted upon the theory that this condition of her female organ was directly attributable to the accident as its proximate cause. This was entirely without foundation in fact, and after the testimony in relation thereto was before the jury, on motion of appellant at the close of the evidence for appellee, with the acquiescence of appellee, it was stricken out."

There is nothing in the opinion to indicate that the court cautioned the jury to disregard the testimony. As its reason for holding that the striking out of this evidence did not cure the error in its admission, the court said: "The largeness of the verdict and the remittitur of 60 per cent of it by appellee is cogent, and, as near as can be, conclusive evidence to this court that the jury were influenced to the detriment of appellant by its temporary admission, that though the evidence in form was stricken from the record, it still remained in the minds of the jury and unduly influenced them in their verdict."

Sinker v. Diggins, 76 Mich. 557, 43 N. W. 674. This was an action to recover the unpaid balance of the purchase price for a certain sawmill. The defendants sought to recoup damages for certain defects in the mill. They were permitted to introduce evidence as to certain speculative damages, tending to show large damages. It was conceded the damages could not be recovered, and that the evidence tending to prove them should have been excluded. The evidence was not stricken

out or withdrawn, but in its general instructions the court, after referring to the damages in question, said: "But, in any event, gentlemen, you need not be troubled with this part of the case, and you need not consider it." In considering the question of whether this instruction cured the error, the court said: "It is evident that no such damages could be recovered, and it was error to admit the testimony, which was not cured by the withdrawal of it *by the general charge of the court.* Here was a claim presented that the defendants, or McIntyre, in whose shoes they stood, had been furnished with a mill in such a defective condition and so worthless that the more lumber he cut, and the longer he continued its use, the greater damages he sustained. This idea found lodgment in the minds of the jury, and that it may have been wholly removed from their minds by the court withdrawing that part of the case from them we cannot say. *It may have had some influence in reducing a claim of over $1,300 to $76.26.*"

Wojtylak v. Kansas & T. Coal Co. 188 Mo. 260. This was an action for personal injuries, occasioned by the falling of the roof of the mining room in which plaintiff was employed. A large verdict was returned. Regarding the evidence introduced, and the court's reasons for holding that the error in admission thereof was not cured by its subsequent withdrawal, the court said: "Thus plaintiff was permitted to prove that three quarters of an hour after the accident occurred some of the fellow workmen of the plaintiff were so enraged at the pit boss 'that they wanted to lick him for sending plaintiff in there,' which is the expression used by one of the counsel in putting one of the questions, and 'that Jim was going to fight with Tom about it,' which was used in putting another question, and also to prove that one of the workmen said to the pit boss, 'See now what you get for telling him to go to work.' After having gotten this damaging testimony before the jury, both in the questions of the counsel and by the answers of the witnesses, the counsel offered to withdraw the statement made by the witness, and then the stenographer was required to read it in full to the court in the presence of the jury. . . . *In view of the very large verdict obtained by the plaintiff,* we are much impressed with the fact that this evidence contributed in no small degree to the amount of the verdict. There is every probability of the jury having been influenced by it. *While it*

may not of itself have been a reversible error, the manner of getting it before the jury must be considered unfair practice."

Chicago, M. & St. P. R. Co. v. Newsome, 98 C. C. A. 1, 174 Fed. 394. This was an action for personal injuries resulting to plaintiff from his ejection from defendant's train. I quote from the opinion: "Against the objection of the defendant the trial court allowed plaintiff to read in evidence as part of his case the testimony of one Eckfeldt, given at the preceding trial. Eckfeldt had promised to be present at the last trial, but failed to appear, and his testimony was read from the stenographic notes of the reporter. This was error. (Citing cases.) Later, it having been discovered that, under the statutes regulating the mode of proof in actions at law in the courts of the United States, the evidence was not admissible, plaintiff asked the court to withdraw it from the jury; *but defendant asked that a mistrial be declared, and that the case be tried to another jury.* The court denied defendant's request, and directed the jury to disregard the evidence and to consider the case as if it had not been given. Of this action the defendant complains. . . . The testimony of Eckfeldt covers 37 pages of the record, and it bore upon the important and vital issues touching the conduct of the plaintiff and the brakeman whose acts are alleged to have given rise to the cause of action. The plaintiff, Eckfeldt, and another witness, all of whom were trespassers riding on the train without lawful right, testified substantially to the same facts, and upon their testimony the plaintiff's case practically depended. The evidence improperly admitted was not confined to some particular fact, circumstance, or feature that was brought distinctly and clearly to the attention of the jury; but it was only identified by the court by the naming of the witness. It was so voluminous and so interwoven and connected with the mass of plaintiff's evidence as to be incapable of adequate separation, and we think it was impossible for the jury, however, desirous of obeying the direction of the court, to escape entirely the influence of it."

I shall not attempt to further discuss or distinguish the cases cited in the majority opinion. Obviously they do not support the conclusion reached by my associates. Nor do I believe that any well-considered authority can be found supporting such conclusion. While innumerable authorities may be cited to the contrary, see, 12 Enc. Ev. pp. 212, 215; 38 Cyc. 1440.

In the case at bar the only question was whether the plaintiff authorized her husband to indorse and cash the check. Chard, the cashier of the bank, swore positively that he went to see the plaintiff with the check, and that she informed him the indorsement was all right. The plaintiff denied this conversation. The only question in issue was whether this conversation took place. The plaintiff claimed she did not know the check had been cashed until about two years thereafter, and, as already stated, she fixed the date when she first received such knowledge as about the date that exhibit "3" was written. The letter injected no new issue into the lawsuit. It was merely Mrs. Crisp's written words,—not under oath. It added nothing to what Mrs. Crisp had already related under oath. It did not form part of the conversation in dispute. It was complete in itself. It could easily be separated from the rest of the evidence.

In order to sustain the conclusion reached by the majority, it must be said that the jury wilfully and intentionally violated their oaths as jurors, and in defiance of the court's instructions considered exhibit "3" as evidence, in spite of the fact that plaintiff's counsel in open court conceded that the objections of the defendant's counsel thereto were well taken; and in spite of the fact that the court at the time of the withdrawal, and in its instructions specifically and unequivocally told the jury that exhibit "3" was not evidence and must be disregarded. Jurors are presumed to be men of intelligence, and certainly they must be presumed to have sufficient intelligence to understand these instructions; and if they did, then, in order to sustain the conclusion reached by the majority, it must be said that they wilfully and intentionally violated their oaths as jurors and considered as evidence that which they had been specifically informed was not evidence. I do not believe that this court is justified in so finding. The record indicates deliberation on the part of the jury, and consideration of the testimony bearing on the real point in issue.

The conclusion reached by the majority is in direct conflict with the rules applied in determining the qualifications of jurors. A man who has formed an impression as to the merits of the case, gathered from newspaper reports, general rumors, or even general conversations with persons claiming to know the facts, is not thereby disqualified to serve as a juror, if it satisfactorily appears to the court that notwithstanding

such impression he can, and will, fairly and impartially try the case on the testimony adduced and the court's instructions. 24 Cyc. 290 et seq.; State v. Ekanger, 8 N. D. 559, 80 N. W. 482. In State v. Ekanger, supra, this court speaking through Chief Justice Bartholomew said: "The shades and degrees of intelligence and candor are as numerous as the individuals, and the trial judge before whom the party appears, and who may himself examine the juror, and note all his mental characteristics, is the person best qualified to determine whether or not the juror can fairly and impartially try the case on the evidence notwithstanding any impression he may have." The same identical reasoning applies in this case. The trial judge saw these jurors; he saw and heard the witnesses. His judgment as to whether the juror violated his instructions, and whether the ends of justice required a new trial, is necessarily more likely to be correct than that of the members of this court who have only the cold, lifeless paper record before them.

In my opinion the judgment and order appealed from should be affirmed.

AMANDA BAUR v. ROBERT BAUR.

(155 N. W. 792.)

Divorce — action for — trial de novo — desertion — children — alimony — property — division of — application for order — allowance — ability to pay — affidavits — showing — relief.

Action for divorce. Trial *de novo*. Divorce was granted to the husband for desertion, but the children—four girls aged from six to nine years—were given to the mother, and the father ordered to pay $10 per month for their support. All of the property was awarded to the father. Application was made to the trial court to increase the allowance and for a division of the property. This application was denied by the trial court. Said application was based upon affidavits showing that the sum of $10 per month was inadequate for the family needs, but no showing was made that the father was able to contribute a larger allowance. This court, therefore, is unable to grant any relief.

Opinion filed December 6, 1915.

Appeal from the District Court of Renville County, *Leighton*, J.
Affirmed.
Opinion of the court by BURKE, J.
Grace & Bryans, plaintiff and appellant.
C. O. Lee and *Greenleaf, Bradford, & Nash*, for defendant and respondent.

BURKE, J. Plaintiff brought an action for divorce against defendant, her husband, in October, 1913. Findings of fact and conclusions of law were made to the following general effect: That plaintiff and defendant married in Iowa in 1901; that plaintiff, the wife, was a citizen of the United States and a resident of the state of Missouri for more than a year prior to the commencement of this action, and was, therefore, not a resident in good faith of the state of North Dakota for one year next preceding the date of the commencement of said action; that the defendant is a citizen of North Dakota and of the United States and was such at the time his bill for divorce was filed; that plaintiff, the wife, had treated the defendant in an extremely cruel and inhuman manner; that she was a woman of ungovernable temper, addicted to the use of vile and obscene language; that during the marriage she used indecent and profane language towards the defendant in the presence of the children and in the presence of others; that she had written indecent letters to defendant; had constantly and wrongfully accused him of infidelity, and that said conduct, with similar other acts mentioned, had caused defendant mental worry and physical injury; that by reason of such conduct defendant's health was greatly undermined, and that during all of said times defendant had conducted himself in a proper manner. For this conduct the defendant was granted a divorce. It was further held that there were born as the issue of said marriage, four girls, one aged six, twins aged eight, and one aged nine. It was further found that the defendant had filed upon and received title to a quarter section of land in Renville county; that defendant had made and executed a quitclaim deed to said premises in favor of his wife to be used by her in case of his death and in lieu of a will. It was further found that the wife had wrongfully deserted the husband, and such desertion constituted an additional ground for divorce. There is no finding as to the value of the said real estate nor encumbrances against the same,

nor of the wealth of either of the parties. It is further found that, owing to the youth of the children, the mother was the proper person to have their care, and the father was ordered to pay the sum of $10 a month towards their support for a period of seven years, after which time the father was to pay the sum of $7 per month for a period of five years. Judgment was entered upon this order, served and filed upon the 14th of April, 1914. This order was evidently based upon § 4405, Comp. Laws 1913, which reads as follows: "When divorce is granted, the court shall make such equitable distribution of the property of the parties thereto as may seem just and proper and may compel either of such parties to provide for the maintenance of the children of the marriage and make such suitable allowance to the other party for support during life or for a shorter period as to the court may seem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects." Late in June, 1914, application was made to the trial court to amend said judgment and allow to the plaintiff additional alimony and one half of all the property owned by the parties at the time of the entry of said decree; for alimony and attorneys' fees, and that the said defendant be restrained from alienating, encumbering, or selling the property during the minority of the children. Such application was based upon the affidavit of Mrs. Baur, stating that she had no property except some few personal effects and a little money given to her by her mother. That the only other means she had to support herself and children was by her own work and labor, and that owing to the tender age of said children it was difficult for her to secure any kind of work. She makes no showing as to the actual expenses of maintaining the children, nor of the earning capacity of her husband. Supplemental to her affidavit is one by her attorney, in which he states that the homestead in question was worth the sum of $4,000, and that the cattle, horses, machinery, and other personal property owned by defendant aggregated the sum of $800. That defendant had certain interest in his father's estate valued at $500, and that he was an able-bodied man; no mention, however, is made of his debts nor net worth or income. There is another affidavit by one Trowl, merely stating that Mrs. Baur had no property of her own sufficient to support herself and four children, and that $10 a month was insufficient for that purpose.

After a hearing upon the merits the trial court denied the application for alimony and a division of the property, but did allow the restraining order. Instead of making a separate order to this effect, an amended judgment was filed reiterating those things held in the former judgment, denying the prayer of the plaintiff for the relief sought, but allowing the injunction. This appeal is from such order and amended judgment. The evidence adduced at the trial of the divorce case is not before us, and there is no showing excepting that contained in the three affidavits which we have mentioned. They fall far short of convincing us that the trial court was in error. While $10 a month is clearly inadequate for the support of the four children, and the same should be increased if the father's means justify it, still upon the showing made we cannot say that the father is able to contribute more. The trial court heard the evidence in the main case, saw the parties, and is in a much better position to judge of this matter than are the members of this court. For anything that appears upon this showing, said farm may be encumbered heavily and the immediate means of the father required in saving the property. Section 4405, Comp. Laws 1913, vests large discretion in the trial court, which should only be reversed for abuse. Said section contemplates that in certain cases the mother should be required to contribute to the support of the children, and in case of sickness even to the support of the husband. The section further provides for a new hearing when any change in the circumstances necessitates a modification of the decree. Possibly upon a further showing plaintiff can obtain a further allowance, but we are unable from the information before us to grant the same. The order of the trial court is affirmed.

STATE OF NORTH DAKOTA, EX REL. HENRY J. LINDE, Attorney General, and Henry Amerland, Relator, v. FRANK E. PACKARD, George E. Wallace, H. H. Steele, State Tax Commission of the State of North Dakota, and as members of Such State Tax Commission, H. H. Kennedy, Robert B. Boyd, Henry Heath, Thomas C. Hockridge, William H. Lakey, County Commissioners of the County of Cass, and Addison Leech, County Auditor of the County of Cass, and as such auditor of the County of Cass.

(155 N. W. 666.)

Action to restrain the Tax Commission from enforcing chapter 255, Session Laws of 1915.

Tax Commission — action to restrain — Publici juris — state — sovereignty of — multiplicity of suits — writ of prohibition — original — private suitor — upon his relation.

1. Following State ex rel. Shaw v. Harmon, 23 N. D. 513, it is held that the question here presented is *publici juris*, directly affects the sovereignty of the state, will prevent a multiplicity of suits, is timely brought, and, therefore, this court will issue its original prerogative writ of prohibition upon the relation of a private suitor.

Statutes — Constitution — in contravention of.

2. Chapter 255, Session Laws of 1915, is in contravention of § 175 of the State Constitution.

Opinion filed December 10, 1915.

Original writ of prohibition.

Writ issued.

Lawrence & Murphy, for plaintiff.

"The power to raise revenue by taxation is a necessary attribute of sovereignty which may be exercised by the legislature, subject only

Note.—For a review of the authorities on the question of prohibition against proceeding under unconstitutional statute, see note in 1 L.R.A.(N.S.) 843, and on the question as to when writ of prohibition lies generally, see notes in 12 Am. Dec. 604; 18 Am. Dec. 238; and 111 Am. St. Rep. 929.

to the restrictions imposed by the Federal or state Constitution." Re Lipschitz, 14 N. D. 622, 95 N. W. 157.

The act in question provides a fixed and arbitrary rate of taxation upon one class and subject of property without reference to the amount of revenue necessary to be derived from the citizens of the state for public purposes, and it is violation of the Constitution. State Const. §§ 174, 179.

It is a method of taxation that amounts to discrimination. Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 317; 37 Cyc. 727, 728.

Taxes are burdens and charges imposed by the legislature upon persons and property to raise money for public purposes. 37 Cyc. 706; Carondelet use of Reuter v. Picot, 38 Mo. 125.

The power of a legislature to levy or to authorize the levy of a tax, and to create or authorize the creation of a public debt to be paid by taxation, is limited to its exercise for a public purpose. Dodge v. Mission Twp. 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 827.

The decision of the question whether a tax or a public debt is for a public or private purpose is not a legislative, but a judicial, function. A legislature cannot make a private purpose a public purpose by its mere fiat.

"It is the policy of the law to raise taxes no faster than they are likely to be needed," and while all reasonable presumptions may be made in favor of the necessities of a new region, no presumption can stand, when overthrown by facts. Michigan Land & Iron Co. v. L'Anse Twp. 63 Mich. 700, 30 N. W. 331.

An ordinance purporting to make a permanent rate for manufacturers, merchants, banks, and trust companies, based on income, licenses, and franchises, which shall be unaffected by the fact that the rate on other property, on an ad valorem basis, may go up or down as the years go by, is void. George Schuster & Co. v. Louisville, 124 Ky. 189, 89 S. W. 689.

The Constitution intends only that a sufficient amount of taxes shall be levied and collected each year to defray the estimated expenses of such year. State ex rel. Garrett v. Froehlich, 118 Wis. 129, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50.

"The plan embodied in the Constitution contemplates confining the

object of the state appropriations and taxation as near to the people as is practicable." State ex rel. Owen v. Donald, 160 Wis. 21, 151 N. W. 333; Warden v. Fond du Lac County, 14 Wis. 618; Dalrymple v. Milwaukee, 53 Wis. 179, 10 N. W. 141; Chicago & N. W. R. Co. v. State, 128 Wis. 653, 108 N. W. 557; Cooley, Taxn. 3d ed. 22–24.

State burdens must rest on a public, state-wide constitutional purpose. State ex rel. New Richmond v. Davidson, 114 Wis. 563, 58 L.R.A. 739, 88 N. W. 596, 90 N. W. 1067; State ex rel. Jones v. Froehlich, 115 Wis. 32, 58 L.R.A. 757, 95 Am. St. Rep. 894, 91 N. W. 115, 118 Wis. 129, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50.

The framers of the Constitution clearly intended to limit the raising of revenue by taxation, to the needs and purposes of each year. People ex rel. Thomas v. Scott, 9 Colo. 422, 12 Pac. 608; Re Appropriations, 13 Colo. 316, 22 Pac. 464; People ex rel. State University v. State Board, 20 Colo. 220, 37 Pac. 964; State ex rel. Lenhart v. Hanna, 28 N. D. 583, 149 N. W. 574.

Neither the tax commission nor other taxing power can levy a tax "for no purpose." If a levy of two mills would be sufficient to raise enough revenue for the maintenance of the government, this would be the *limit of power* regardless of the Constitution limitation of 4 mills. State ex rel. Lenhart v. Hanna, 28 N. D. 583, 149 N. W. 575.

"The taxes generally assessed for the state bear a proportion to the amount to be raised, and all taxable property, except that paying specific taxes, is charged with a given and equal per cent upon its assessed value." Pingree v. Auditor General (Pingree v. Dix) 120 Mich. 95, 44 L.R.A. 684, 78 N. W. 1025; Western U. Teleg. Co. v. Omaha, 73 Neb. 527, 103 N. W. 89.

A rule of valuation adopted by those whose duty it is to make assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, its enforcement will be restrained. Houston v. Baker, — Tex. Civ. App. —, 178 S. W. 820.

Each man in the state, county, and city is equally interested, in proportion to his property, in maintaining the state, county, and city governments, and in that proportion should bear the burdens equally. Wheeler v. Weightman, — Kan. —, L.R.A.1916A, 846, 149 Pac. 978.

If there is a discrimination against any species of property, imposing an unconstitutional burden thereon, the law cannot be sustained. Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 306.

"The state has no right to take the property of individuals presently and afford them no possible return, merely because the storehouse, being filled, will be opened sometime, depending upon Providence and the majority as to when, for the enrichment or comfort of the people then in being, in which the taxpayer had no special interest which reasonably demands any such sacrifice." State ex rel. Owen v. Donald, 160 Wis. 21, 151 N. W. 366; Madary v. Fresno, 20 Cal. App. 91, 128 Pac. 343.

The act does not state distinctly the object of the same. "No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied." State Const. § 175.

This means an act of the general legislature, unless there is a provision of the Constitution that is self-executing. Southern R. Co. v. Kay, 62 S. C. 28, 39 S. E. 785; State ex rel. Nieman v. Fangbouer, 14 Ohio C. C. 104, 12 Ohio C. D. 801; State v. Klectzen, 8 N. D. 286, 78 N. W. 984, 11 Am. Crim. Rep. 324.

"The law nowhere prescribes the object or use to which the money so paid is to be applied. There seems to be nothing to prevent its being extended for any legitimate county purpose or public improvement. Malin v. Lamoure County, 27 N. D. 140, 50 L.R.A.(N.S.) 997, 145 N. W. 582.

This section of the Constitution is mandatory, and the failure of the act to specify the purpose for which the tax is levied is fatal. Com. v. United States Fidelity & G. Co. 121 Ky. 409, 89 S. W. 251; Chesapeake, O. & S. W. R. Co. v. Com. 129 Ky. 318, 108 S. W. 248, 111 S. W. 334; Southern R. Co. v. Hamblen County, 115 Tenn. 526, 92 S. W. 238; Farmers' & M. Nat. Bank v. School Dist. 35 Okla. 506, 130 Pac. 548.

The act is void and ineffective in that it does not provide for any application, apportionment, or distribution of the revenue raised thereby. State Const. § 175; State v. Klectzen, 8 N. D. 291, 78 N. W. 984, 11 Am. Crim. Rep. 324.

Frank E. Packard, George E. Wallace, and *H. H. Steele,* for respondents.

"Money and credits" are included in and covered by the general laws of the state of North Dakota, referring to taxable property, and wholly independent of the provisions of the 1915 law, being chapter 255, are taxable property. The law contemplates that such property shall be listed, assessed, and taxed, and the acts done, looking to such end, have ample authority. Comp. Laws 1913, §§ 2074, 2075, 2077, 2088; State ex rel. Dorgan v. Fisk, 15 N. D. 229, 107 N. W. 191; State v. Superior Ct. 111 Am. St. Rep. 925, note C, on p. 938.

This action is improvidently instituted. The plaintiff has a plain remedy at law. The remedy by writ of prohibition does not lie. State ex rel. Terminal R. Asso. v. Tracy, 237 Mo. 109, 37 L.R.A.(N.S.) 448, 140 S. W. 888; Shortt, Extr. Legal Rem. 3d ed. ¶ 767, B, § 436; Wilson v. Berkstresser, 45 Mo. 286; 32 Cyc. 602, note 21; State v. Superior Ct. 111 Am. St. Rep. 925, note E, p. 943; State ex rel. Dawson v. St. Louis Ct. of Appeals, 99 Mo. 221, 12 S. W. 662; State ex rel. Kenamore v. Wood, 155 Mo. 455, 48 L.R.A. 596, 56 S. W. 476; 16 Enc. Pl. & Pr. 1094; High, Extr. Legal Rem. 2d ed. ¶¶ 1716, 1752; Wood, Mandamus, 147; Lloyd, Prohibition, 48; State ex rel. Brown v. Klein, 116 Mo. 259, 22 S. W. 693; State ex rel. Hofmann v. Scarritt, 128 Mo. 331, 30 S. W. 1026; State ex rel. Alderson v. Moehlenkamp, 133 Mo. 134, 34 S. W. 468; Wand v. Ryan, 166 Mo. 646, 65 S. W. 1025; Schubach v. McDonald, 179 Mo. 163, 65 L.R.A. 136, 101 Am. St. Rep. 452, 78 S. W. 1020; State ex rel. McNamee v. Stobie, 194 Mo. 14, 92 S. W. 191; Delaney v. Police Ct. 167 Mo. 679, 67 S. W. 592.

Remedy by way of injunction is not available under the facts set forth in the plaintiff's complaint. Frost v. Flick, 1 Dak. 131, 46 N. W. 508; 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. 112, 90 N. W. 260; Torgrinson v. Norwich School Dist. 14 N. D. 16, 103 N. W. 414; Bismarck Water Supply Co. v. Barnes, 30 N. D. 555, L.R.A. 1916A, 965, 153 N. W. 454; Merchants' State Bank v. McHenry County, 31 N. D. 108, 153 N. W. 386; Cooley, Taxn. 3d ed. p. 772, and the cases in note 2, also pp. 1415, 1445; Clarke v. Ganz, 21 Minn.

387; Savings & Loan Soc. v. Austin, 46 Cal. 417; 2 Dill. Mun. Corp. 4th ed. § 924; Laird Norton Co. v. Pine County, 72 Minn. 409, 75 N. W. 723; Odlin v. Woodruff, 22 L.R.A. 699, note; Dows v. Chicago, 11 Wall. 109, 20 L. ed. 65, 7 Rose's Notes (U. S.) pp. 403–407; Frost v. Flick, 1 Dak. 131, 46 N. W. 508, and numerous other cases; State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663.

"The case stands upon the naked averment that the law is unconstitutional, and the inspection fee illegal—the remaining averments wholly failing to make a case under any decision of this court for injunctive relief."

The existence of the former law of this state is not denied; that he has property subject to taxation thereunder is also not denied. State ex rel. Kenamore v. Wood, 155 Mo. 425, 48 L.R.A. 601, 56 S. W. 474; 22 Cyc. 885, and note 20; 32 Cyc. 607, and note 46; Re Schumaker, 90 Wis. 488, 63 N. W. 1050; Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65; Shelton v. Platt, 139 U. S. 596, 35 L. ed. 276, 11 Sup. Ct. Rep. 646; Verdin v. St. Louis, 131 Mo. 106, 33 S. W. 480, 36 S. W. 52; 16 Am. & Eng. Enc. Law, 360.

Public policy demands that no needless restrictions be placed upon the securing of the necessary means for conducting the government. Bismarck Water Supply Co. v. Barnes, 30 N. D. 555, L.R.A.1916A, 965, 153 N. W. 454.

The court has no jurisdiction to restrain a co-ordinate branch of the state government. This is true even though the law under which they seek to act is unconstitutional. In a proper action at law, such questions may be properly raised and passed upon. People ex rel. Alexander v. District Ct. 29 Colo. 182, 68 Pac. 242; Frost v. Thomas, 26 Colo. 222, 77 Am. St. Rep. 259, 56 Pac. 899; Walton v. Develing, 61 Ill. 201; Throop, Pub. Off. 842; High, Inj. § 1326; People ex rel. Tucker v. Rucker, 5 Colo. 455; Re Fire & Excise Comrs. 19 Colo. 482, 36 Pac. 234; Gubelle v. Epley, 1 Colo. App. 199, 28 Pac. 89; People ex rel. Engley v. Martin, 19 Colo. 565, 24 L.R.A. 201, 36 Pac. 543; Lewis v. Denver City Waterworks Co. 19 Colo. 236, 41 Am. St. Rep. 248, 34 Pac. 993; People ex rel. Sutherland v. The Governor, 29 Mich. 320, 18 Am. Rep. 89; Story, Eq. Jur. 12th ed. § 955a; State ex rel. Young v. Hall, 135 La. 420, 65 So. 596; Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Smith v. Myers, 109 Ind. 1, 58 Am. Rep.

375, 9 N. E. 692; Hawkins v. The Governor, 1 Ark. 570, 33 Am. Dec. 346; Thompson v. Canal Fund Comrs. 2 Abb. Pr. 248.

"The courts of this state have no power to restrain by injunction the acts of officers of the law who are proceeding under authority of a law of the state. That such law is unconstitutional forms no ground for granting such injunction." Western R. Co. v. De Graff, 27 Minn. 1, 6 N. W. 341; 2 High, Inj. 2d ed. § 1326; Mississippi v. Johnson, 18 L. ed. 437, note; De Chastellux v. Fairchild, 15 Pa. 18, 53 Am. Dec. 570.

The law in question is not unconstitutional. State ex rel. Winona Motor Co. v. Minnesota Tax Commission, 117 Minn. 159, 134 N. W. 643; Mutual Ben. L. Ins. Co. v. Martin County, 104 Minn. 179, 116 N. W. 572; State v. Farmers' & M. Sav. Bank, 114 Minn. 95, 130 N. W. 445, 851; State ex rel. Hilderbrandt v. Fitzgerald, 117 Minn. 192, 134 N. W. 728.

BURKE, J. Plaintiff brings this action to restrain the State Tax Commission from enforcing the provisions of chapter 255, Sess. Laws 1915. This legislation had its origin in the popular belief that moneys and credits had in the past escaped taxation, but that the owners of said property were morally, if not legally, justified in taking some measure to avoid the payment of a 7 per cent or 8 per cent tax, which necessity doled out to the inhabitants of some of our cities, when the banks and other reputable depositaries would pay but 4 per cent and 5 per cent for the use of said money. It was, therefore, suggested by some of the people who interest themselves in legal reforms that, if a special and lighter rate were imposed upon money and credits, this class of property and the assessor would be able to get better acquainted. The only obstacle that presented itself was the Constitution, which, it seems, favored the theory of taxing all classes of property at the same rate, and contained several provisions inconsistent with this new theory of taxation. The reformers, however, proceeded to meet these obstacles in the very commendable manner of a constitutional amendment, and in the fall of 1914 the voters adopted a concurrent resolution (chapter 103 of the Session Laws of 1913), changing § 176 of the Constitution of North Dakota. After the amendment, our Constitution read as follows: "Taxes shall be uniform upon the same class of property, in-

cluding franchises within the territorial limits of the authority levying the tax, and shall be levied and collected for public purposes only, but the property of the United States and of the state, county and municipal corporations shall be exempt from taxation; and the legislative assembly shall by a general law exempt from taxation property used exclusively for school, religious, cemetery, charitable or other public purposes, and personal property to any amount not exceeding in value $200 for each individual liable to taxation; provided, that all taxes and exemptions in force when this amendment is adopted, shall remain in force, in the same manner and to the same extent until otherwise provided by statute." This section takes the place of old § 176, which provided that laws shall be passed taxing by uniform rule all property according to its true value in money. After the adoption of this amendment, the legislature enacted chapter 255, Sess. Laws 1915, which reads as follows:

"Section 1. Definition. Tax Rate.— 'Money' and 'credits' as the same are defined in § 2074 of the Compiled Laws of 1913, are hereby exempted from taxation other than that imposed by this act and shall hereafter be subject to an annual tax of 2 mills on each dollar of the fair cash value thereof. But nothing in this act shall apply to money or credits belonging to incorporated banks situated in this state.

"Section 2. How Listed.—All 'money' and all 'credits' taxable under this act shall be listed in the manner provided in § 2095 of the Compiled Laws of 1913, but such listing shall be upon a separate blank from that upon which other personal property is listed.

"Section 3. Tax Commission to Prepare Instructions. Form of Return. Blanks.—The North Dakota Tax Commission shall annually prepare instructions for bringing in the lists required by the preceding section. They shall prepare and distribute through the county auditors to the assessors, a form for the return which the taxpayers are required to make by this act, and this form shall state the rate of taxation and be printed on a separate sheet, and shall be entirely distinct from the forms prepared for the returns of other classes of property. Such forms shall require only aggregate sums of credits and of moneys.

"Section 4. Litigated Taxes.—Any assessment of money and credits heretofore made, the legality of which has been placed in litigation and the collection of the tax thereon has been enjoined and is now

pending in the court may be compromised and settled by payment at the rate of 25 mills on the assessed valuation of such moneys and credits.

"Section 5. Emergency.—Whereas, this act should be effective upon the assessment of taxes for the year 1915, an emergency exists and this law shall go into effect upon its passage and approval."

Acting under this new law the Tax Commission of North Dakota took steps looking to an assessment of the moneys and credits of our taxpayers in general and of our relator, Mr. Amerland, incidentally, whereupon this action was instituted. It is claimed by relator that § 255, Sess. Laws 1915, violates clauses of the Constitution to which no amendments have been made. We will quote briefly from his brief: "The petitioner alleges that the said legislative act violates several of the provisions of the Constitution of the state of North Dakota, all of which said alleged violations are set out in full in said petition. In said petition some ten alleged grounds of invalidity or unconstitutionality are set forth. While we respectfully insist upon the merits of each and every one of such propositions, there are, in our opinion, a limited number of questions which are so conclusive as to the invalidity and unconstitutionality of this law that we shall not discuss all of said ground of invalidity. . . . We, therefore, present for consideration to this court what we contend to be three unquestionable and direct violations of the fundamental law of this state. First, the act in question provides a fixed and arbitrary rate of taxation upon one class and subject of property without reference to the amount of revenue necessary to derive from the citizens of the state for public purposes. Second, the act in question does not state distinctly the object of the same; third, the act in question is void and ineffective in that it does not provide for any application, apportionment, or distribution of the revenues raised thereby." The Tax Commission and other defendants, instead of meeting this constitutional attack, dispute the right of plaintiff to maintain the action and the jurisdiction of this court to entertain the proceedings. This divides the controversy into two essential parts: First, Can the action be maintained? second, Is the act unconstitutional?

(1) The Tax Commission argues that: (a) the remedy of prohibition is not available under the facts disclosed by plaintiff's petition; (b) that the remedy by way of injunction is not available under the facts set

forth in plaintiff's complaint; and (c) that the court has not jurisdiction to restrain a co-ordinate branch of the state government. Under (a) they urge that the Tax Commission has jurisdiction of the matters of the taxation of petitioner's moneys and credits, and that the same is taxable either under this new law or under the old law, and that, therefore, petitioner has no grievance. We do not believe this argument sound. Section 8470, Comp. Laws 1913, provides: "The writ of prohibition is the counterpart of the writ of mandamus. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." While the Tax Commission may have jurisdiction of the subject of taxation, they are, nevertheless, governed by the Constitution and the laws of the state, and can only exercise their powers under legal authority. If the new law, as contended by the relator, is unconstitutional, they have no authority to act thereunder, and it is not a sufficient answer to say it might have acted legally by a return to the procedure of the old law. The mere fact that under the new law moneys and credits are to be taxed but 2 mills, whereas under the old law the tax would have been very much higher, does not confer any constitutional or legislative powers upon the Tax Commission, nor should it defeat relator's right to resist an illegal, though small, assessment. If the Tax Commission, therefore, is acting outside of its jurisdiction, the writ of prohibition is the proper remedy. See 32 Cyc. 606; State ex rel. Dorgan v. Fisk, 15 N. D. 219, 107 N. W. 191; State ex rel. Ladd v. District Ct. 17 N. D. 285, 15 L.R.A. (N.S.) 331, 115 N. W. 675; Bismarck Water Supply Co. v. Barns, 30 N. D. 555, L.R.A.1916A, 965, 153 N. W. 454; See also notes in 22 L.R.A. 699; 69 Am. Dec. 198; 49 Am. Rep. 287; 23 Am. Rep. 622; 53 Am. Rep. 110; 16 L.R.A.(N.S.) 807; 8 L.R.A.(N.S.) 125; 7 Am. St. Rep. 484; 98 Am. St. Rep. 865; and 105 Am. St. Rep. 122.

Defendants maintain that the complaint itself shows that the relator has another remedy, to wit, to pay the taxes and sue to recover the same. Cases cited by them, however, like Merchants' State Bank v. McHenry County, 31 N. D. 108, 153 N. W. 386, show the law under which the tax is levied, constitutional.

It is claimed that the court has no jurisdiction to interfere with a co-ordinate branch of the state government. However, it is not against

any lawful act of the Tax Commission that restraint is sought, but against actions, as alleged, exceeding their powers; therefore, under the allegations of the complaint the Tax Commission are mere trespassers against the rights of the relator. This subject has been so thoroughly covered in the recent case of Bismarck Water Supply Co. v. Barns, that we will not further pursue the same.

Our conclusion generally is that prohibition is the proper remedy, if under the facts of the case relator has any remedy in a court of equity. We are aware that the mere fact that relator is called upon to pay an illegal tax affords no grounds for equitable interference. In addition to his grievance, relator must show to this court other facts sufficient to bring the case within the jurisdiction of a court of equity. The grounds appearing here which we think sufficient to answer this requirement are as follows: The matter is clearly *publici juris*. Every taxpayer of the state of North Dakota may have moneys and credits subject to the demands of this law. The state, every county, township, city, or village is directly interested, thus affecting the sovereignty of the state. Such being the case, this action may prevent a great multiplicity of suits. The action is timely brought by the relator upon his own behalf and upon that of all other persons similarly situated, thus preventing any defense to grow through laches. In cases where the sovereignty of the state is directly involved, this court is vested with large discretion in determining whether, under the particular facts of such case, a showing has been made which appeals to its original powers. The holdings of our court along this line began with: State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 385; State ex rel. McDonald v. Holmes, 16 N. D. 457, 114 N. W. 367; State ex rel. Steel v. Fabrick, 17 N. D. 532, 117 N. W. 860; State ex rel. Shaw v. Harmon, 23 N. D. 513, 137 N. W. 427; and the later cases from our own court, already cited. See also State ex rel. Owen v. Donald, 160 Wis. 21, 151 N. W. 331.

Our conclusion then is that the matter is of sufficient public importance; directly affects the sovereignty of the state; is calculated to prevent a multiplicity of suits, and the relator is timely in his action. Therefore, this court should exercise its powers and take original jurisdiction of the subject-matter. Further, that prohibition is the proper remedy to invoke these powers.

(2) We now reach the question of the constitutionality of house bill No. 255. The history of this legislation is enlightening, and as it has a vital bearing upon the results of this suit we will take a moment to review it. Chapter 285 of the Minnesota Session Laws of 1911 provided for the taxation of moneys and credits. The Tax Commission of Minnesota attempted to collect a nominal fee from the Winona Motor Company. Resistance being made, the matter reached the supreme court of Minnesota, who handed down a decision, February 9, 1912, upholding said law against the constitutional attack made thereupon. Some person who was, undoubtedly, familiar with the Minnesota legislation and litigation, drafted house bill 331, and presented it to the North Dakota 1915 legislature. A comparison of this bill with the Minnesota law shows that ours was modeled thereafter, and the author, no doubt, hoped that if it became a law three years after the Minnesota court had declared it constitutional, it would stand the tests of the North Dakota courts. As originally drafted, it contained 14 sections; § 5 providing for the listing of the property under oath and inspection; § 6 providing that the list furnished the assessor should be received as true; § 7 providing for action in case of failure of the person assessed to list his moneys and credits; § 8 providing for an estimate and for errors; § 9 providing for the amount assessable and providing for a change of domicil; § 10 providing that the property shall be listed in a separate book; § 11 providing for a review and equalization; § 12 authorizing the auditor to compute the tax and providing for the listing and collection; § 13 providing for the apportionment of the moneys among the various funds; § 14 providing for repeal of all acts in conflict therewith. If the author of the bill was familiar with the Minnesota legislation, there was somebody with influence in the legislature who was equally familiar with § 175 of our state Constitution and the case of State v. Klectzen, 8 N. D. 286, 78 N. W. 984, 11 Am. Crim. Rep. 324. Following the history of said bill, we find at page 785 of senate journal 1915, the following: "Your committee on taxes and tax laws to whom was referred house bill No. 331, a bill for an act relating to the taxation of personal property known as moneys and credits, have had the same under consideration, and recommend that the same be amended as follows:

"In line five, § 1 of the printed bill, strike out the word 'three' and insert in lieu thereof the word 'two.'

"Strike out all of said bill after § 2, and add the following:

"Section 3. Tax Commission to Prepare Instructions. Form or Return Blanks.—The North Dakota Tax Commission shall annually prepare instructions for bringing in the lists required by the preceding section. They shall prepare and distribute through the county auditors to the assessors, a form for the returns which the taxpayers are required to make by this act, and this form shall state the rate of taxation and be printed on a separate sheet, and shall be entirely distinct from the forms prepared for the returns of other classes of property. Such forms shall require only aggregate sums of credits and of moneys.

"Section 4. Litigated Taxes.—Any assessment of money and credits heretofore made, the legality of which has been placed in litigation, and the collection of the tax thereon has been enjoined and is now pending in the court, may be compromised and settled by payment at the rate of taxation as provided in § 1 of this act.

"Section 5. Emergency.—Whereas this act should be effective upon the assessment of taxes for the year 1915, an emergency exists and this law shall go into effect upon its passage and approval. And when so amended recommended the same do pass."

This report was adopted, and upon the very last day of the session the bill was passed in both houses. This is a simple chapter from the history of the bill as disclosed by the public records of which this court can take judicial notice. Section 175 of the state Constitution reads as follows: "No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied." In State v. Klectzen, 8 N. D. 286, 78 N. W. 984, 18 Am. Crim. Rep. 324, and at page 291 of the state report, it is said: "All taxes, whether state, county, city or school, are paid into the county treasury; . . . but the disposition to be made of the proceeds of taxes when collected depends wholly upon the terms of the law under which each is levied and collected. In this respect the statute in question is wholly silent. The provisions of § 175 of the state Constitution are clear and unambiguous, and the same are mandatory upon the legislature and hence we are compelled to hold that the statute is repugnant to the Constitution."

Every word quoted applied with equal force to chapter 255 as mutilated by its enemies. There is no doubt that the author of the amendment was familiar with said decision, and deliberately rendered the bill unconstitutional. Whether he succeeded in settling the lawsuit, which throws its dark shadow over § 4 of the bill, as passed, we do not know.

The facts recited make it plain that the law clearly violated § 175 of the Constitution, and the writ of prohibition must issue.

We might add, in passing, that the attempt to attach an emergency clause to chapter 255, Sess. Laws 1915, was in contravention of the initiative and referendum amendment to the state Constitution, and that said law, even if constitutional, would not have applied to the taxes which were attempted to be collected.

CLARENCE J. WILLBUR v. JOHN L. JOHNSON and Neil W. Gillies.

(155 N. W. 671.)

Equitable action to compel a reconveyance of land and for consequential damages. At the close of the trial, upon motion, the court dismissed the two causes of action. Plaintiff immediately asked for reinstatement, and that the trial proceed, and that two parties be joined which the court had, in the rulings on the motions to dismiss, held to be necessary parties. This request was granted conditioned upon terms, the allowance of which was over plaintiff's objection and protests, and which terms he failed to pay after he had procured one extension of time in which to make payment. Later, on motion noticed for hearing, the action was dismissed over plaintiff's written objections challenging the propriety of all previous rulings.

Held:

Reconveyance of land — equitable action — necessary parties — dismissal of action — reinstatement — terms — proper parties.

1. Under the facts, more fully stated in the opinion, the persons ordered brought in as additional parties, while proper parties, were not necessary parties to the action.

Action — parties to — dismissal — nonjoinder.

2. That the action should not have been dismissed because of their nonjoinder as parties to the action.

Judgment — persons bound by.

3. That said persons, having appeared in court and testified in plaintiff's behalf, and by their affidavits denied any interest in the subject-matter of the action, and requested judgment to be entered in plaintiff's favor if he was otherwise entitled to it, had undertaken to control to that extent the plaintiff's case, and would be bound by the judgment.

Dower — right of — barred — court of equity — necessary parties.

4. That as to one of said parties, the wife of plaintiff, the necessity for whose joinder as a party to the action was only to bar her right of dower of lands in controversy situated in a foreign state, a court of equity could obviate such necessity under the plaintiff's offer to prove that she would join with him in a deed to said lands, by an interlocutory decree conditioning his recovery upon conveyance by her of her dower interest in said lands. As full relief in equity could have been granted, she was not a necessary party.

Relief — nonjoinder — parties — waiver — error — findings and conclusions.

5. Where full relief could thus be afforded, the right to raise the question of nonjoinder of parties had been waived by failure to raise the same by demurrer or answer, and it was error to dismiss the action upon a motion at the close of the case. The court should have proceeded with the trial, and made its findings and conclusions.

Order for continuance — challenge of — right to — waiver.

6. Plaintiff has not waived his right to challenge the propriety of the order for continuance because he has not asked for the order made over his protests.

Terms — payment of — extension of time — rights — waiver.

7. Although he attempted to raise the money to pay the $75 terms imposed as a condition precedent upon his further proceeding, and was unable to make such payment, and in his endeavor to comply with said order requested and obtained a thirty days' extension of time to raise said amount for said purpose, plaintiff has not waived his right to question the imposition of said terms.

Order for terms — benefits — adversary — appeal — review on.

8. Under said order for terms, all benefits and advantages accrued to plaintiff's adversary, and plaintiff was conferring benefits instead of receiving them, and his ineffectual attempt to comply with the order was of no substantial benefit to him or loss to the adversary. Hence he does not lose his right to review on appeal the order for terms.

Estoppel — appeal — order — acquiescence in — unqualified — benefits — substantial.

9. To estop a party on appeal from challenging an order, his acquiescence therein must have been unqualified, and the benefits received by him as a basis for estoppel must have been substantial.

Order for terms — vacation of — defendant's rights — unaffected — estoppel — propriety of order — right to question.

10. As a vacation of the order for terms will not deprive defendants of any substantial advantage accruing because of the delay occasioned by plaintiff's attempt to comply with the order for terms, plaintiff is not estopped on this appeal from challenging the propriety of said order.

Proof by plaintiff — incomplete — dismissal of action — judgment — reversal — new trial.

11. As plaintiff was not permitted to complete his proof upon equitable issues, or upon the issue of damages involved, trial *de novo* will not be had, but the judgment entered will be reversed, and the order for terms vacated, and a new trial will be ordered upon all causes of action.

Opinion filed November 19, 1915.

From a judgment of the District Court of Morton County, *Nuchols*, J., plaintiff appeals.

Reversed and remanded.

R. H. Neely, and *Jorgenson & Eggen*, for appellant.

Every action must be prosecuted in the name of the real party in interest. Rev. Codes 1905, § 6807; Comp. Laws 1913, § 7395; Edmison v. Zborowski, 9 S. D. 40, 68 N. W. 288; McKinney v. Jones, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381; Lenoch v. Yoss, 157 Iowa, 314, 136 N. W. 542.

Where a person appears as a witness in an action then pending, and testifies that she has no interest in the action, she is not a necessary party to the action. Gruber v. Baker, 20 Nev. 453, 9 L.R.A. 302, 23 Pac. 858.

Where persons appear as witnesses, and in their testimony expressly disclaim all interest in the subject-matter of the bill, this renders them unnecessary parties. McConnell v. McConnell, 11 Vt. 290; 15 Enc. Pl. & Pr. p. 625; Edinger v. Heiser, 62 Mich. 598, 29 N. W. 367.

Assuming that such a person is a necessary party, the objection is waived by failure to demur or raise the question by answer. Rev. Codes 1905, § 6858; Comp. Laws 1913, § 7447; Mather v. Dunn, 11 S. D. 196, 74 Am. St. Rep. 788, 76 N. W. 922; Ross v. Wait, 4 S. D. 584, 57 N. W. 497; Lenoch v. Yoss, 157 Iowa, 314, 136 N. W. 542.

Where the adding of names of persons as parties does not vary or change the cause of action, and does not create the need of an ad-

journment, it should be permitted without cost. Rev. Codes 1905, § 6880, Comp. Laws 1913, § 7479; Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310; Hunt v. Rooney, 77 Wis. 258, 45 N. W. 1084.

It is the business of courts to enforce and protect rights, and not to look for technicalities with which to defeat rights. Nashua Sav. Bank v. Lovejoy, 1 N. D. 211, 46 N. W. 411.

The deeds to defendants were null and void. Henniges v. Paschke, 9 N. D. 490, 81 Am. St. Rep. 588, 84 N. W. 350; Lund v. Thackery, 18 S. D. 113, 99 N. W. 856; Ellis v. Wait, 4 S. D. 454, 57 N. W. 229.

Where defects exist in a complaint, and are supplied by the answers, such defects are cured, and the evidence relative to such subject should have been received. Omlie v. O'Toole, 16 N. D. 126, 112 N. W. 677; Bliss, Code Pl. § 437; Pindall v. Trevor, 30 Ark. 249; Tilleny v. Wolverton, 46 Minn. 256, 48 N. W. 908; Durand v. Preston, 26 S. D. 222, 128 N. W. 129.

It was error for the court to deny the plaintiff's request to amend his complaint to conform to the proof,—especially when all of the omitted facts have been supplied by the answer and proof of defendant. Anderson v. First Nat. Bank, 5 N. D. 80, 64 N. W. 114.

During his agency the defendant Gillies could not become a purchaser of the subject-matter of his agency, without plaintiff's consent. Ibid.; Jansen v. Williams, 36 Neb. 869, 20 L.R.A. 207, 55 N. W. 279; McNutt v. Dix, 83 Mich. 328, 10 L.R.A. 660, 47 N. W. 212; Boswell v. Cunningham, 32 Fla. 277, 21 L.R.A. 54, 13 So. 354.

Robert F. Nash and *John F. Sullivan,* for respondents.

If there was an irregularity in the making of the order of the trial court, the appellant is in no position to take advantage of it, because he was a beneficiary of the order. Freeman v. Clark, 28 N. D. 578, 149 N. W. 565; Ugland v. Farmers' & M. State Bank, 23 N. D. 536, 137 N. W. 572; Gould v. Duluth & D. Elevator Co. 3 N. D. 96, 54 N. W. 316; Taylor v. Taylor, 5 N. D. 58, 63 N. W. 893; May v. Cummings, 21 N. D. 287, 130 N. W. 828.

Neither can he complain of the fact that the court imposed terms upon the order allowing the amendment. This matter is purely in the discretion of the court. Rev. Codes 1905, §§ 6882, 6883, Comp. Laws 1913, §§ 7481, 7482; North Dakota Co. v. Mix, 25 N. D. 81, 141 N. W. 68.

A party asking to amend his pleading, and obtaining permission to do so, may reject such permission when it is only given upon terms which he does not accept. But he cannot accept such order so far as it is to his benefit, and reject the rest. McKain v. Mullen, 29 L.R.A.(N.S.) 25, note; Smith v. Rathbun, 75 N. Y. 122.

A plaintiff threatened with a nonsuit, who asks and gains permission to amend and postpone the trial, upon payment of terms, waives his right to appeal from the order of the court. Austin v. Wauful, 36 N. Y. S. R. 779, 13 N. Y. Supp. 184; Weichsel v. Spear, 15 Jones & S. 223; Rev. Codes 1905, § 6884, Comp. Laws 1913, § 7483.

Where a judgment is irregularly entered in the district court, a motion is the proper remedy. Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937; Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; 31 Cyc. 386; Carter v. Paige, 3 Cal. Unrep. 64, 20 Pac. 729; Morris v. Thomas, 80 App. Div. 47, 80 N. Y. Supp. 502.

Assignments of error not discussed in appellant's brief are presumed abandoned, and will not be considered in the supreme court. Nokken v. Avery Mfg. Co. 11 N. D. 399, 92 N. W. 487; Schmidt v. Beiseker, 19 N. D. 35, 120 N. W. 1096; Senn v. Connelly, 23 S. D. 158, 120 N. W. 1097; Sioux Falls Pressed Brick Co. v. Board of Education, 25 S. D. 36, 125 N. W. 291; Bolte v. Equitable Fire Asso. 23 S. D. 240, 121 N. W. 773.

In the absence of a showing otherwise, it will be presumed that the law of a given state is the common law. Comp. Laws 1913, § 7936; Hanson v. Great Northern R. Co. 18 N. D. 324, 138 Am. St. Rep. 768, 121 N. W. 78; 10 Am. & Eng. Enc. Law, 125, 204.

If the persons whom the court ordered to be made parties were not so brought in, the decree would not be conclusive as to them. Eyster v. Hatheway, 50 Ill. 521, 99 Am. Dec. 537; Borchert v. Borchert, 141 Wis. 142, 123 N. W. 628.

Where the agreement by a grantee in a deed to support the grantor for life also provides for the payment of money to third persons, and the payment is made a charge upon the land, the third persons are necessary parties to an action by the grantor to cancel the contract for failure to provide. Young v. Young, 157 Wis. 424, 147 N. W. 362.

All the owners who joined in a deed are necessary parties to an action to set it aside. 6 Cyc. 320, 322; Rogers v. Penobscot Min. Co.

83 C. C. A. 380, 154 Fed. 606; Pom. Rem. & Rem. Rights, 2d ed. ¶ 419.

Where a necessary party has been omitted, the court should, of its own motion, require the omission to be corrected before further proceedings. 30 Cyc. 141; Dedrick v. Charrier, 15 N. D. 515, 125 Am. St. Rep. 608, 108 N. W. 38.

Deeds executed and delivered, with the name of the grantee omitted, are not void; and where it is understood that further hearings of the court shall be had if plaintiff amends his complaint, and further proof is offered, supplying such omissions, the supreme court, on appeal in such case, will refuse a trial *de novo*. Mapes v. Metcalf, 10 N. D. 601, 88 N. W. 713; Nichols & S. Co. v. Stangler, 7 N. D. 102, 72 N. W. 1089; Campbell v. Smith, 8 Hun, 6, 71 N. Y. 26, 27 Am. Rep. 5; McClung v. Steen, 32 Fed. 373; Wilkins v. Tourtellott, 28 Kan. 825; Ormsby v. Johnson, 24 S. D. 494, 124 N. W. 436; McCleery v. Wakefield, 76 Iowa, 529, 2 L.R.A. 529, 41 N. W. 210.

Where complaint is amended during trial to render certain testimony admissible, plaintiff should be required to pay all costs before trial. Ruellan v. Stillwell, 23 N. Y. Civ. Proc. 243, 56 N. Y. Supp. 344; Hayes v. Kerr, 39 App. Div. 529, 57 N. Y. Supp. 323; Bates v. Salt Springs Nat. Bank, 43 App. Div. 321, 60 N. Y. Supp. 313; Foerst v. Empire L. Ins. Co. 44 App. Div. 87, 60 N. Y. Supp. 393; Thilemann v. New York, 71 App. Div. 595, 76 N. Y. Supp. 132; Dunham v. Hastings Pav. Co. 109 App. Div. 514, 96 N. Y. Supp. 313; Cohen v. Husson, 3 How. Pr. N. S. 130.

Goss, J. This action is in equity to compel a reconveyance of exchanged real estate and for damages. Issue was joined and a trial had, wherein, after submission of his proof, plaintiff rested. Thereupon both causes of action were separately dismissed on motion of defendants, the court ruling orally that two persons, *viz.*, plaintiff's wife, Teressa Willbur, and his mother-in-law, Anna B. Cummings, both of whom had testified in plaintiff's behalf and were present in court, were necessary parties to the action. Plaintiff then asked to reopen the case for the purpose of naming them as additional parties, "and for the purpose of introducing evidence to show that the plaintiff and his wife are ready, willing, and able to return to the defendants a deed to the

land conveyed to them in the state of Tennessee." Defendants objected, and demanded time to plead to said new parties, and terms to recompense them for the continuance of the case. Plaintiff desired to proceed with the trial, and objected to terms, stating that "requiring him (plaintiff) to put up any costs would practically mean that he could not come into court" again. The cause was continued, and the two persons named were ordered to be brought in as parties, and directed to plead, with the usual time allowed defendants for answer or demurrer; and $75 terms was imposed upon plaintiff, same to be paid at the time of the serving of the pleadings bringing in said additional parties, as a condition precedent to plaintiff taking any further steps in the action. No payment of terms was made. Soon thereafter a notice to dismiss the action for noncompliance with said order was noticed. At the hearing plaintiff opposed a dismissal of the action, and asked for further time within which to raise the money to pay the terms, as appears from the affidavit of his attorney, reciting his inability to pay the terms as a reason for their nonpayment. The court thereupon extended the time for their payment from the 19th of August to the 18th of September. The latter date expired with no payment of terms made, or compliance with the order as to service of pleadings or bringing in of the additional parties. On September 27th a motion to dismiss because of such noncompliance was again presented. Upon that hearing plaintiff's counsel appeared, and by written objection challenged the propriety of the order made in the first instance compelling the bringing in of said additional defendants, setting out that they were proper but not necessary parties; that the objection of nonjoinder of parties was one that could not be taken advantage of by motion, or otherwise than by demurrer or answer, and that any objection on that ground to parties plaintiff accordingly had been waived because not so raised, and calling attention to the fact that said parties had been present at the trial, and were in the courtroom, and "would have then and there testified that they had no interest whatever in the subject-matter of the action, had the court granted the plaintiff's motion and allowed them to so testify," and that the terms imposed were prohibitive of further proceedings on plaintiff's part, because he was unable to pay them. These are set forth in affidavits, including those of Teressa Willbur and Anna B. Cummings, disclaiming any interest in the subject-matter of the action. The only

reason for Teressa Willbur as a party to the action arose from the fact that in the exchange plaintiff had taken over some Tennessee real estate, and under the law, it being presumed that the foreign law is the common law, she would have a dower interest in said Tennessee property. In her affidavit of disclaimer of interest, offered in opposition to the motion to dismiss, she stated that "if she has any interest in said land she is now and always has been ready, willing, and able to sign and execute any instrument that the court might direct," in case a retransfer was decreed. The motion was granted, without findings or conclusions being made, but upon the evidence submitted, and the cause was dismissed with prejudice and with costs as for noncompliance with the terms order. Plaintiff appeals and demands a trial *de novo.*

Respondents contend that the appellant is estopped from urging error, because "the court, acting on the request and motion of the appellant, granted leave to amend the pleadings on plaintiff's behalf against the objections of the defendants, and the plaintiff acquiesced in the order, and consented to the continuance of the case in order to so plead. The plaintiff did not specifically acquiesce, but not taking objections to the question waived all rights to such objection, and by his acts in the matter showed that he desired the continuance of the action, and in order to comply with the order of the court, made at plaintiff's request, it was necessary to continue the action. That such order and continuance were made for the benefit of the plaintiff and at his request, and that plaintiff could not be aggrieved thereby." The first question presented, then, is whether plaintiff can review the propriety of the order imposing terms.

The record discloses that plaintiff's request to be permitted to make these persons additional parties was only done because the court had ruled that if they were not made parties the action would be summarily dismissed. In fact, the court had already orally ordered it dismissed before the motion was made, and in making the motion the plaintiff treated the case as dismissed, and asked a vacation of the order of dismissal. But the action was still pending and not dismissed, in the absence of a proper written order of dismissal filed or entered. But taking his cue from the court, and to avoid dismissal, plaintiff made the request, but with the understanding and intent on his part to immediately proceed with the trial, and that there should be no delay in the

progress of the trial. This request was not granted unconditionally, because of the objections of the defendants, and their demand for time to plead, and their counsel's insistence upon the allowance of terms in their favor. So when the court allowed said additional parties to be brought in, it was upon terms as a condition precedent thereto over plaintiff's objections, with which terms plaintiff was unable to comply. The election to bring said parties into the action was thus made under compulsion. Plaintiff should not be held to waive his right to have the propriety of such an order reviewed, unless from his conduct subsequent to the making of the order it must be said that his intention "to waive (such right of appeal) must be unmistakable," as "the right of appeal is always favored," quoting from Wishek v. Hammond, 10 N. D. 72, at page 75, 84 N. W. 587. "A plaintiff who elects, under compulsion of an order of court, to strike out one of two causes of action and to proceed upon the other, instead of allowing his action to be dismissed, does not thereby waive his right to object to such compulsory order, but is entitled to abide his time for the correction of the error upon a final appeal." Jones v. Johnson, 10 Bush, 649. See note in McKain v. Mullen, 29 L.R.A.(N.S.) 1. By the mere electing, on the court's order, to bring in said additional parties under penalty of suffering a dismissal, appellant has not waived his right to challenge the propriety of the order bringing them in, or its necessity, or the error, if any, in the proceedings leading up to said order.

But has appellant by subsequent proceedings, by acquiescence in the order, by attempting to comply with it, precluded himself from challenging it and the prior proceedings in the trial? It is to be noticed that the order is an interlocutory one, and is in no sense a judgment. In accepting the benefit of the extension of time granted at his request, he was not accepting benefits under a judgment. But in fact he was accepting no benefits, as he was obtaining none. Nor was his adversary parting with any advantage. Had the tables been turned, and plaintiff been in the position of the defendants, and the terms had been paid him, he would have been accepting benefits, which acceptance would have estopped him to question the regularity and validity of the prior proceedings under which the benefit was derived. Boyle v. Boyle, 19 N. D. 522, 126 N. W. 229. But merely temporary acquiescence in the order to the extent of making an endeavor to comply with its terms,

and this under compulsion, should not be held to waive the right to have the same reviewed on appeal. The rule applicable is accurately stated in the closing paragraph to the note in 29 L.R.A.(N.S.) 1, at page 37, in the following language: "The foundation of the rule is the receipt by the plaintiff in error, or appellant, of some benefit or advantage by or under the judgment or decree of which he complains. If, therefore, he declines the benefit and puts aside the advantage, or if all the benefits and advantages accrue to his adversary, so that he confers instead of receives them, or if he ineffectually attempts, and so fails to get the benefits,—in any of these cases he does not lose his right to prosecute a writ of error or maintain an appeal." See also 3 C. J. 675, 679, and cases cited. All benefits have accrued to plaintiff's adversary. His ineffectual attempt to pay benefits to them should not deny him his rights on this appeal. The holdings of this court have always been in accord with the doctrine that, before rights on appeal can be said to have thus been estopped, substantial benefit must have been enjoyed by the appellant to the detriment of the defendant, and to an extent to involve the judgment appealed from. In Williams v. Williams, 6 N. D. 269, 69 N. W. 47, quoted with approval in Tuttle v. Tuttle, 19 N. D. 748, at page 750, 124 N. W. 427, it is said: "The test is this: Suppose the judgment should be reversed, will the appellant thus hold some substantial advantage to which she would not have been entitled had not the judgment been rendered?" Quoting further from Tuttle v. Tuttle, reference is made to Tyler v. Shea, 4 N. D. 377, 50 Am. St. Rep. 660, 61 N. W. 468, wherein it was said: "It is held that the plaintiff cannot accept what the judgment gives him, and then by appeal pursue a course which may overthrow the right of which he has availed himself, and it seems to make the test this, namely: That if a reversal of a judgment and a new trial may result in the decision showing that the plaintiff was not entitled to what the former judgment gave him, then the appeal should be dismissed on showing that a benefit has been accepted." By necessary inference these holdings are that the advantage derived or benefit gained by the appellant under the order or judgment challenged on appeal must be what can be termed substantial. Here it can be said to be no more than mere acquiescence for a short period, evidenced by an attempt to comply with the order to do something which would have been of substantial benefit to the ad-

versary. Nor is the short respite obtained in keeping the suit from being earlier dismissed, or dismissed at the close of the trial, such a benefit. Had the suit been dismissed immediately, defendants would have possessed all they now enjoy so far as this action and subject-matter involved is concerned. The propriety of the order for judgment given for nonpayment of terms, therefore, must be considered.

This order cannot be sustained unless the persons ordered to be brought into the action were necessary, as distinguished from proper, parties to the suit. They could have been made parties, either plaintiff or defendant. It must also be conceded that plaintiff was the real party in interest, both under the contract of sale made by him to defendants and the transfer thereunder, and in and to the property transferred by him. That one of the quarters of land stood in the name of Cummings did not authorize her to sue or claim benefits under said contract between these contracting parties. Defendants are not in position to assert that she has any interest in said land, because she has parted therewith, delivering title thereto to defendants in pursuance of plaintiff's contract of sale with them. They dealt with plaintiff, and received the deed as an assignment of rights in the land from, by, and under the contract, although clothed with that right by deed direct from the third party to them. They are grantees of plaintiff as assignees of his rights under his contract with the third party, and they must claim and possess any rights they have under that assignment, and cannot be heard to claim adversely thereto. It would be unheard of to permit them to retain title to this land, received as the fruits of the contract with plaintiff, and still assert that, inasmuch as the premises came to them by grant from another, that the plaintiff could not rescind and compel reconveyance by them to him of whatever interest they are vested with, without the third party, a mere nominal party to the transaction, being made a party to the suit.

That plaintiff is the real party in interest must be conceded under the proof disclosing him to be the equitable owner of the land sold under his contract with defendants. Our statutes require suit to be prosecuted in the name of the real party in interest. Section 7395, Comp. Laws 1913. That the holder of the equitable title is the real party in interest within the meaning of the statute, see Gruber v. Baker, 20 Nev. 453, 9 L.R.A. 302, 23 Pac. 858, a very similar case, and note in 64 L.R.A.

581, at 592, that "the general rule is that the equitable owner of the claim sued upon may sue as the real party in interest, under statutes requiring an action to be brought in the name of the real party in interest."

But there is another reason negativing the necessity of the joinder of Cummings. She was present and testified to having heard Johnson consummate the deal trading her land as his own for this Tennessee property, and to her having deeded her land to defendants "for the purpose of carrying out this trade with Johnson." That she was present when the "deal was closed up, when the deeds were delivered;" that she knew "that her land was being traded in by Johnson as a part of the deal and delivered her deed to carry out that trade." Before entry of judgment on the motion, the trial court had before it her verified disclaimer of interest, wherein she recited that "affiant does not and has not since the execution of said deed claimed any interest in said land that will not be fully protected by a judgment as prayed for by the plaintiff, and that her claim in this matter is for the balance of the purchase price against the plaintiff, but she has no interest in the subject-matter of this action." To this extent she has undertaken to control the plaintiff's case, and waived her rights, if any she had, to be made a party thereto, and estopped herself to claim the contrary, or assert rights antagonistic to any judgment that might have been rendered, as she will be bound by it as effectually as though she was a party to the action. This is the settled law of this jurisdiction. Boyd v. Wallace, 10 N. D. 78, 84 N. W. 760, quoted and applied in Hart v. Wyndmere, 21 N. D. 383, at page 398, 131 N. W. 271, Ann. Cas. 1913D, 169. She was bound as effectually as though she was a party, so far as the defendants were concerned, and this judgment of dismissal binds her as it does the plaintiff.

As to Teressa Willbur, wife of plaintiff, she would probably be estopped as effectually as A. B. Cummings, although possibly a question might arise as to her right to orally assign or otherwise waive her right of dower in the Tennessee land, under the statute of frauds. See discussion of the effect of the statute of frauds on assignment of dower, in Smith on the Law of Fraud, §§ 366, 367, citing much authority; Stitt v. Smith, 13 L.R.A.(N.S.) 723, and note (102 Minn. 253, 113 N. W. 632.) But her dower right may be conceded as neither waived

nor lost; still she may not be a necessary party, and would not be such if her affidavit before the court, filed prior to the time judgment was awarded, be taken as true, wherein she states "she is now and has always been ready, willing, and able to sign or execute any instrument that the court may direct; that she approves the action by the plaintiff, and that she desires that a decree be made in accordance with the prayer of the plaintiff herein." No good reason appears why she should not have been taken at her word, or at least have been allowed to have testified on that matter, plaintiff offering her as a witness on the question, in the offer of proof made as a part of the request to reopen the case. The court might have fully protected any rights of defendants against any dower rights of the wife of plaintiff by entering an interlocutory decree, after findings and conclusions made as a basis therefor, providing for the filing, for delivery to the defendants, of the joint deed of plaintiff and wife to defendants of the Tennessee land within a time limit named, and conditioned plaintiff's recovery, upon compliance with said order, if plaintiff was otherwise entitled to recover. This would have easily obviated all question of the necessity of joinder of the wife as a party.

What has been said has been upon the assumption that a court of equity will not treat the failure of the defendants to raise the nonjoinder of these two persons as parties by demurrer or answer under the provisions of §§ 7442–7447. These statutes require the matter to be raised by demurrer if the defect of parties appears on the face of the complaint, and if not, to be taken by answer, and if not raised either by demurrer or answer, "the defendant shall be deemed to have waived the same." The objection was waived under the terms of the statute and a line of decisions in this state construing it. State ex rel. Viking Twp. v. Mikkelson, 24 N. D. 175, 139 N. W. 525; Van Gordon v. Goldamer, 16 N. D. 323, 113 N. W. 609; Clements v. Miller, 13 N. D. 176, 100 N. W. 239; Olson v. Shirley, 12 N. D. 106, 96 N. W. 297; Ross v. Page, 11 N. D. 458, 92 N. W. 822; James River Nat. Bank v. Purchase, 9 N. D. 280, 83 N. W. 7.

Under no sufficient hypothesis can the order and judgment be sustained. The court should either have made findings and conclusions and entered judgment, or retained the case for further proceedings on trial. As the cause of action for damages depended upon the establish-

ment of the right to a retransfer, that cause of action should not have been eliminated, as it was, until determination on the merits of the equitable features of the case, after which the issue of damages would arise. A trial of this issue on the merits was prevented. While the case is here on appeal for trial *de novo,* the case was but partially tried, and a retrial is necessary. A new trial is therefore granted on all causes of action involved. Plaintiff will recover costs on appeal, and the judgment entered against him in the action is ordered vacated.

B. L. SHUMAN v. MARTIN O. RUUD.

(155 N. W. 688.)

Judgment — motion for new trial — order on — appeal from both — not duplicitous.

An appeal from a judgment entered on August 7, 1915, and also from an order subsequently entered denying a motion for a new trial, is not duplicitous.

Opinion filed December 18, 1915.

Appeal from the District Court of Pierce County; *Burr,* J. Action by B. L. Shuman against Martin O. Ruud. Judgment for plaintiff, and defendant appeals.

Motion to dismiss appeal denied.

Paul Campbell for the motion.

R. E. Wenzel, contra.

PER CURIAM. Plaintiff had judgment in the court below on August 7, 1915. Thereafter, and on August 25th, a motion for a new trial was denied, and the defendant has appealed both from the judgment and from such order.

Respondent moves to dismiss the appeal upon the ground that same is duplicitous. He relies, in support of his motion, upon certain authorities from other jurisdictions, and also upon the cases of Prondzinski v. Garbutt, 9 N. D. 239, 83 N. W. 23; Kinney v. Brotherhood of American Yeomen, 15 N. D. 21, 106 N. W. 44; Sucker State Drill Co. v. Brock, 18 N. D. 8, 118 N. W. 348; Paulsen v. Modern Woodmen, 21

N. D. 235, 130 N. W. 231; Shockman v. Ruthruff, 28 N. D. 597, 149 N. W. 680.

The motion is clearly untenable, and must be denied. The case of Prondzinski v. Garbutt is the only case cited which supports respondent's contention, and the rule there announced was expressly repudiated in Kinney v. Brotherhood of American Yeomen, 15 N. D. 21, 106 N. W. 44. The latter authority has been followed in the Sucker State Drill Co. Case and also in Shockman v. Ruthruff, 28 N. D. 597, 149 N. W. 680, and the practice is now firmly settled in this state to the effect that an appeal from a judgment and from an order made after judgment is not duplicitous.

Motion denied.

JOHN EATON v. ED. DELAY, Ed. Jones, and P. S. Dunn.

(L.R.A.—, —, 155 N. W. 644.)

Negotiable instruments law — sum — payment — place of — parties — relation — medium of payment — change of either — material alteration.

1. Under the negotiable instruments law in force in this state, any change or addition which changes the date; the sum payable, either for principal or interest; the time or place of payment; the number or the relations of the parties; the medium or currency in which payment is to be made; adds a place of payment where no place of payment is specified; or alters the effect of the instrument in any respect,—is a material alteration. (Comp. Laws 1913, § 7010.)

Promissory note — maturity — alteration — reference memorandum — written on margin — time of payment — extension — not material alteration.

2. A promissory note is not materially altered where the holder, at or after the maturity thereof, writes in its margin the words "May 1st, 1913," as a reference memorandum of a promise made by him to the principal maker, at the time the words were written, to extend the time of payment from December 1, 1912, to May 1, 1913.

Opinion filed December 22, 1915.

Appeal from a judgment of the District Court of Ramsey County; *Buttz*, J. Plaintiff appeals.

Reversed.

R. Goer and *J. B. Wineman,* for appellant. *Miller & Zuger* attorneys on oral argument.

The parties here signed the note as makers; they are absolutely liable, and required to pay it; they cannot afterwards be heard to assert the contrary. Wolstenholme v. Smith, 34 Utah, 300, 97 Pac. 329; Rev. Codes 1905, § 6421; Comp. Laws 1913, § 7004.

The signers were all principal debtors; none were mere sureties, and none were discharged. A mere memorandum reference written in the margin of a promissory note, stating a future date for payment, is not a material alteration. Northern State Bank v. Bellamy, 19 N. D. 509, 31 L.R.A.(N.S.) 149, 125 N. W. 888; Dow v. Lillie, 26 N. D. 512, L.R.A.1915D, 754, 144 N. W. 1082; Richards v. Market Exch. Bank Co. 81 Ohio St. 348, 26 L.R.A.(N.S.) 99, 90 N. E. 1000; Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525; Vanderford v. Farmers' & M. Nat. Bank, 105 Md. 164, 10 L.R.A.(N.S.) 129, 66 Atl. 47; National Citizens' Bank v. Toplitz, 81 App. Div. 593, 81 N. Y. Supp. 422, affirmed in 178 N. Y. 464, 71 N. E. 1; Cellers v. Meachem (Sellers v. Lyons) 49 Or. 186, 10 L.R.A.(N.S.) 133, 89 Pac. 426, 13 Ann. Cas. 997; Murphy v. Panter, 62 Or. 522, 125 Pac. 292; Wolstenholme v. Smith, 34 Utah, 300, 97 Pac. 329; Bradley Engineering & Mfg. Co. v. Heyburn, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170; Hunter v. Harris, 63 Or. 505, 127 Pac. 786; Fritts v. Kirchdorfer, 136 Ky. 643, 124 S. W. 882; Lumbermen's Nat. Bank v. Campbell, 61 Or. 123, 121 Pac. 427; 1 Bouvier's Law Dict. 155 under title "Alteration," and authorities cited; 2 Enc. Pl. & Pr. 142; 2 Am. & Eng. Enc. Law, 184.

The alteration mentioned by our statute means a physical alteration of the body of the note. Rev. Codes 1905, §§ 6426, 6427; Comp. Laws 1913, §§ 7009, 7010; Morrill v. Otis, 12 N. H. 472; Moore v. Macon Sav. Bank, 22 Mo. App. 684.

It must be such an alteration as changes the instrument. State Solicitors' Co. v. Savage, 39 Fla. 703, 23 So. 413; Cambridge Sav. Bank v. Hyde, 131 Mass. 77, 41 Am. Rep. 193.

The identity of the contract must be destroyed. Wade v. Withington, 1 Allen, 561; Com. v. Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 Am. Dec. 126; Belknap v. National Bank, 100 Mass. 376, 97 Am. Dec. 105; Hewins v. Cargill, 67 Me. 554.

In this case the original note remained the same as before. Stone v. White, 8 Gray, 589; Drexler v. Smith, 30 Fed. 754; 2 Dan. Neg. Inst. ¶¶ 1373–1375; 1 Whart. Ev. ¶ 565; 1 Greenl. Ev. ¶¶ 566–568; Cambridge Sav. Bank v. Hyde, 131 Mass. 77, 41 Am. Rep. 193.

Such a writing or memorandum as the one here before us is no part of the instrument; and, in any event, the holder may explain the same. Theopold v. Deike, 76 Minn. 121, 77 Am. St. Rep. 607, 78 N. W. 977.

The writing was a mere reference memorandum, forming no part of the instrument. J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 466, 92 N. W. 826; Wicker v. Jones, 159 N. C. 102, 40 L.R.A. (N.S.) 69, 74 S. E. 801, Ann. Cas. 1914B, 1083; Huff v. Cole, 45 Ind. 300; Burnham v. Gosnell, 47 Mo. App. 637; Hutches v. J. I. Case Threshing Mach. Co. — Tex. Civ. App. —, 35 S. W. 60; American Nat. Bank v. Bangs, 42 Mo. 450, 97 Am. Dec. 349; Iowa Valley State Bank v. Sigstad, 96 Iowa, 491, 65 N. W. 407; Roberds v. Laney, — Tex. Civ. App. —, 165 S. W. 114; Hensler v. Watts, 113 Iowa, 741, 84 N. W. 666; Prudden v. Nester, 103 Mich. 540, 61 N. W. 777; Reed v. Culp, 63 Kan. 595, 66 Pac. 616; Boutelle v. Carpenter, 182 Mass. 417, 65 N. E. 799; Wolferman v. Bell, 6 Wash. 84, 36 Am. St. Rep. 126, 32 Pac. 1017; Stroud v. Thomas, 139 Cal. 274, 96 Am. St. Rep. 111, 72 Pac. 1008; Lyndon Sav. Bank v. International Co. 78 Vt. 169, 112 Am. St. Rep. 900, 62 Atl. 50; Cass County v. American Exch. State Bank, 9 N. D. 263, 83 N. W. 12; Byers v. Harris, 67 Iowa, 685, 25 N. W. 879; Fisherdick v. Hutton, 44 Neb. 122, 62 N. W. 488; Johnson v. Weber, 70 Neb. 467, 97 N. W. 585; Sawyer v. Campbell, 107 Iowa, 397, 78 N. W. 56; Rouse v. Wooten, 140 N. C. 557, 111 Am. St. Rep. 875, 53 S. E. 430, 6 Ann. Cas. 280; Delaware County Trust, S. D. & Title Ins. Co. v. Haser, 199 Pa. 17, 85 Am. St. Rep. 763, 48 Atl. 694; Barnes v. Van Keuren, 31 Neb. 165, 47 N. W. 848.

Flynn & Traynor, for respondents.

There is a distinction between the words "discharge" and "avoid." We contend that the instrument was "avoided" as to the sureties. Rev. Codes 1905, §§ 6426, 6427; Comp. Laws 1913, §§ 7009, 7010.

When a negotiable instrument is materially altered without the assent of all parties liable thereon, it is "avoided," except as against a party who himself made, authorized, or assented to the alteration. Rev. Codes 1905, § 6426; Comp. Laws 1913, § 7009.

Any alteration which changes the time of payment, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration. Rev. Codes 1905, § 6427; Comp. Laws 1913, § 7010.

So far as the face of the note is concerned, the effect of the instrument as to the time of payment has been changed by the addition of the words, "extended to May 1st, 1913;" and the mere writing itself presumes a consideration. Rev. Codes 1905, § 5325, Comp. Laws 1913, § 5881; Corbett v. Clough, 8 S. D. 176, 65 N. W. 1074; Niblack v. Champeny, 10 S. D. 165, 72 N. W. 402.

The writing changes the time of payment, and is material. Rev. Codes 1905, §§ 6426, 6427, Comp. Laws 1913, §§ 7009, 7010; 8 Cyc. 29, note 92; 2 Am. & Eng. Enc. Law, p. 228; 1 Dan. Neg. Inst. §§ 149, 150; 2 Cyc. 208; Sanders v. Bagwell, 32 S. C. 238, 7 L.R.A. 743, 10 S. E. 946; Flanigan v. Phelps, 42 Minn. 186, 43 N. W. 1113; Warrington v. Early, 2 El. & Bl. 763, 23 L. J. Q. B. N. S. 47, 2 C. L. R. 398, 18 Jur. 42, 2 Week. Rep. 78.

A written instrument may be varied by a memorandum in the margin; and that the terms of such memorandum are entitled to the same efficacy as if they had been contained in the body of the instrument is well established. Tuckerman v. Hartwell, 14 Am. Dec. 225, note p. 232; Wheelock v. Freeman, 13 Pick. 165, 23 Am. Dec. 674; Sanders v. Bagwell, 32 S. C. 238, 7 L.R.A. 743, 10 S. E. 946; National Ulster County Bank v. Madden, 114 N. Y. 280, 11 Am. St. Rep. 633, 21 N. E. 408; Polo Mfg. Co. v. Parr, 8 Neb. 379, 30 Am. Rep. 830, 1 N. W. 312; Joyce, Defenses to Commercial Paper, §§ 154, 155, 179; 2 Cyc. 142; Pelton v. San Jacinto Lumber Co. 113 Cal. 21, 45 Pac. 12; 2 Dan. Neg. Inst. §§ 1373, 1377; Post v. Losey, 111 Ind. 74, 60 Am. Rep. 677, 12 N. E. 121; Washington Finance Corp. v. Glass, 74 Wash. 653, 46 L.R.A.(N.S.) 1043, 134 Pac. 480.

The law regards not the purpose or the effect of such a change. It is enough that the change results in bringing into existence a contract upon which the minds of the parties did not meet. 14 Harvard L. Rev. 241; Ames-Brewster Controversy, Brannan, Neg. Inst. Law, 2d ed. 162 et seq.

CHRISTIANSON, J. The plaintiff, at the solicitation of the defendant Delay, agreed to loan him $575, upon the condition that the joint promissory note of the three defendants, Delay, Jones, and Dunn, for that amount be executed and delivered to the plaintiff. The note was executed and delivered, and the defendant Delay received from the plaintiff the full amount of the loan agreed upon. The note as delivered to plaintiff was in words, figures, and form as follows:

$575.00 Extended to .... Extended to .... Extended to .... Extended to .... No.	Devils Lake, North Dakota, March 26, 1912. December 1 1912 (without grace) after date I promise to pay to the order of John Eaton ..... Five hundred seventy five & no/00 .... DOLLARS with interest at the rate of twelve per cent per annum (payable annually) until paid. Payable at the FIRST NATIONAL BANK of Devils Lake, North Dakota. Value received. Ed Delay P. O. Address ..... Ed Jones P. S. Dunn

About December 1, 1912, at the request of the defendant Delay, the plaintiff agreed to extend the time of payment to May 1, 1913. The defendant Delay thereafter paid the interest due on the note up to December 1, 1912, such interest payment being received by plaintiff on December 4, 1912. About this time (the record fails to disclose the exact date) plaintiff inserted in the margin of the note a notation of the extension. The note with this notation added is in words, figures, and form as follows:

$575.00 Extended to May 1st 1913 Extended to .... Extended to .... Extended to .... No.	Devils Lake, North Dakota, March 26, 1912. December 1 1912 (without grace) after date I promise to pay to the order of John Eaton ..... Five hundred seventy five & no/00 .... DOLLARS with interest at the rate of twelve per cent per annum (payable annually) until paid. Payable at the FIRST NATIONAL BANK of Devils Lake, North Dakota. Value received. Ed Delay P. O. Address ..... Ed Jones P. S. Dunn

The note not being paid, the plaintiff on October 4th, 1913, instituted this action. The complaint is in the usual form. The defendant Delay defaulted; but the defendants Jones and Dunn answered, asserting as a defense that they executed the note only as sureties for the accommodation of the defendant Delay, and in no other capacity; that the note was never presented to them for payment, and that on the day the note became due the plaintiff accepted a payment from the defendant Delay in the sum of $375, and agreed with said Delay to extend the balance due on said note until March 1, 1913. That shortly thereafter the defendant Delay paid the further sum of $45 in consideration of such extension, and that on or about March 1, 1913, the time of payment was again extended until September 1, 1913. That all of such extensions were granted without the knowledge or consent of the answering defendants. The cause came on for trial upon such pleadings. At the close of the testimony defendants' counsel moved for a directed verdict. The motion was denied, and after the denial of such motion defendants' counsel asked leave to amend the answer by inserting therein the defense that the note was materially altered by changing the time of payment thereof. This motion was granted.

No further evidence was offered, nor was the motion for a directed verdict renewed after the answer was amended.

The court submitted the issues framed by the pleadings to the jury, and the jury returned a verdict in favor of the plaintiff for the full amount claimed by him. Subsequently defendants moved for judgment notwithstanding the verdict. This motion was granted, and this appeal is from the judgment thereafter entered in favor of the defendants Jones and Dunn.

Defendants' counsel no longer relies upon the defense interposed in the original answer, but concedes that under the decision of this court in First Nat. Bank v. Meyer, 30 N. D. 388, 152 N. W. 657, the defendants Jones and Dunn were primarily liable, and hence were not discharged by an extension of time of payment. The only defense relied upon by defendants' counsel on this appeal is the one presented by the amendment, *viz.*, that the note was materially altered by plaintiff's inserting in the margin thereof the words "May 1st 1913;" and that such alteration avoided the note as against the defendants Jones and Dunn, under the provisions of § 7009, Comp. Laws 1913.

A material alteration under the negotiable instruments law is: "Any alteration which changes:

"1. The date.

"2. The sum payable, either for principal or interest.

"3. The time or place of payment.

"4. The number or the relations of the parties.

"5. The medium or currency in which payment is to be made.

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect." Comp. Laws 1913, § 7010.

No objection was made to the introduction of the note in evidence on the ground of alteration, or that it constituted a contract different from that signed by the defendants, or upon any other grounds. Defendants' answer alleges that the agreement to extend payment of the note was made on the day it fell due; but the evidence shows that the interest payment was not received or indorsed on the note until three days after the note matured. There is no contention, either in the pleadings or in the proof, that the extension was made or the notation written in the margin of the note until after it became due.

The space wherein the notation was made constituted no part of the note. It was separated from the body of the note, in a manner, and the printed portions thereof were such as, to indicate clearly that this space was to be utilized by the holder of the note for memoranda for his convenience and guidance. It is true that courts have held that under certain circumstances memoranda made on the back or in the margin of a note may constitute a part of the contract. But we are aware of no authority holding a notation of the character and made under the circumstances involved in the case at bar to be a part of the contract, or the addition or erasure thereof to constitute a material alteration.

In Bay v. Shrader, 50 Miss. 326, the court said: "The test of the materiality of such memoranda or indorsement on the back of the instrument is the time and the intent and purpose of it. If made before or at the time of the execution of the instrument, it may be parcel of it, and may control the obligation in some important particular. . . . If such memoranda are at the foot or on the back of the note or other instrument, when executed, they constitute a part of the contract. But being disconnected from the body of the instrument to which the maker's name is signed, it forms no original part of it, until shown to have been upon it when executed." And in Theopold v. Deike, 76 Minn. 121, 77 Am. St. Rep. 607, 78 N. W. 977, the supreme court of Minnesota, speaking through the distinguished jurist, Judge Mitchell, said: "To constitute a mutilation of a note or other contract which will avoid it, there must be some change or alteration in the writing constituting the evidence of the contract, so as to make it another and different instrument, and no longer evidence of the contract which the parties made. The ground upon which the doctrine rests is that such an alteration avoids the instrument; that it destroys the identity of the contract. A memorandum of a payment indorsed by the holder on the back of a promissory note is no part of the contract of the parties. The original note, which constituted the evidence of their contract, remains intact. The memorandum of payment is merely evidence against the holder of the fact of the payment, and is of no more effect than if made on a separate piece of paper. Cambridge Sav. Bank v. Hyde, 131 Mass. 77, 41 Am. Rep. 193. Writing on the back of an instrument may be such as to form a part of the contract itself, and in such a case an alteration of the indorsement would constitute an altera-

tion of the written evidence of the contract of the parties; but a memorandum of a partial payment indorsed by the holder on the back of a promissory note is not of this character. It is neither a contract nor any part of a contract, but a mere acknowledgment, in the nature of a receipt of payment, which is open to contradiction or explanation by parol."

The reasoning of the supreme courts of Mississippi and Minnesota in the two cases above cited is entirely applicable to the case at bar. The notation in the margin of the note was made after it became due. The contract evidenced by the note signed by the defendants remained unchanged. The contractual effect of the note, and the rights and liabilities of the makers thereof, were in no manner affected. The contract remained exactly the same as it was at the time of its execution and delivery. The notation in the margin did not become a part of the contract, or affect the defendants in any particular. The only party affected was the holder of the note. As an indorsement of payment on a note is evidence against the holder tending to show such payment, so the notation in the margin in the case at bar, in case of dispute, would have been some evidence—as an admission against his interest—against the holder of the note tending to establish an agreement for extension, but it would not of itself have been evidence against or established any such agreement against the makers. The notation in the margin does not purport to be a part of the contract signed by the defendants. It clearly shows that it was merely a memorandum for the convenience and guidance of the holder of the note, and had reference to some understanding outside, and subsequent to the delivery, of the note. "A promissory note is not materially altered by writing thereon a memorandum which is purely collateral to, and independent of, the promise or contract which it contains. And the placing of a mere reference memorandum on a promissory note will not constitute a material alteration of the instrument." 2 Am. & Eng. Enc. Law, 227, 228. See also Carr v. Welch, 46 Ill. 88; Merritt v. Boyden, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; Howe v. Thompson, 11 Me. 152; Bay v. Shrader, 50 Miss. 326; Krouskop v. Shontz, 51 Wis. 204, 37 Am. Rep. 817, 8 N. W. 241; Cambridge Sav. Bank v. Hyde, 131 Mass. 77, 41 Am. Rep. 193; Horton v. Horton, 71 Iowa, 448, 32 N. W. 452; Johnson Harvester Co. v. McLean, 57 Wis. 258, 46 Am. Rep.

39, 15 N. W. 177; Fisk v. McNeal, 23 Neb. 726, 8 Am. St. Rep. 162, 39 N. W. 616; Maness v. Henry, 96 Ala. 454, 11 So. 410; Richards v. Market Exch. Bank Co. 81 Ohio St. 348, 26 L.R.A.(N.S.) 99, 90 N. E. 1000; State Solicitors' Co. v. Savage, 39 Fla. 703, 23 So. 413; Moore v. Macon Sav. Bank, 22 Mo. App. 684; Bachellor v. Priest, 12 Pick. 399; American Nat. Bank v. Bangs, 42 Mo. 450, 97 Am. Dec. 349; Morrill v. Otis, 12 N. H. 466; Mente v. Townsend, 68 Ark. 391, 59 S. W. 41; 1 Enc. Ev. 787; 2 Am. & Eng. Enc. Law, 227; 2 Cyc. 210; 2 C. J. 1212, 1213.

While not material to a determination of this action, it may be observed, in passing, that the cause was submitted to the jury on the theory that the answering defendants were secondarily liable, and that hence any extension of the time of payment by the holder would relieve them from liability, provided such agreement of extension was supported by a consideration. The court submitted to the jury the question of whether there was any consideration for the extension, and the jury found that there was no consideration therefor.

Defendant's counsel places great reliance upon the decision of the Minnesota supreme court in the case of Flanigan v. Phelps, 42 Minn. 186, 43 N. W. 1113, which, it is asserted, is direct authority in support of their contention that the note involved in this case was materially altered. An examination of that decision shows that it is not susceptible of the construction for which defendant's counsel contends. In that case the contract itself was altered by the insertion of the following stipulation in the body of the note, above the signatures of the makers, "Privilege of extension for 30 days after maturity given." It seems too clear for argument that the decision in that case can have absolutely no bearing upon the question presented in the case at bar. In that case the contract itself was changed by the insertion of a stipulation over the signatures of the contracting parties, whereby the time of payment was extended conditionally for thirty days.

The defendants also rely upon the decision of the supreme court of Washington in the case of Washington Finance Corp. v. Glass, 74 Wash. 653, 46 L.R.A.(N.S.) 1043, 134 Pac. 480. In that case the contract itself was changed in this, that the accommodation makers signed a note for $15,000, with the understanding that a loan for this amount was to be made by the payee named in the note to the principal maker. After

the execution by the accommodation makers, but before delivery, the contract was changed and the loan reduced to $11,000. And in order to effect this change, an indorsement was made on the note, of a fictitious payment of $4,000, thereby in effect changing the note from a note for $15,000 to a note for $11,000. In discussing the effect of the indorsement the court said: "Whether an indorsement made in good faith after the instrument has been given currency would be material alteration we are not called upon to decide. We are quite clear, however, that the indorsement of a fictitious payment as a condition precedent to the acceptance, negotiation, discount, or delivery of a note to original payee or lender of the money changes 'the effect of the instrument' as well as the sum payable, and is an act proscribed by the statute." It is unnecessary for us to enter into any further discussion of the Washington decision, or express any opinion as to the soundness of the conclusions there reached. But it is obvious that that decision can have no application to the facts in the case at bar. In that case the effect of the contract itself was changed by the indorsement on the note prior to its delivery. In that case the terms and legal effect of the contract were changed after it was signed by the accommodation makers. The memorandum or indorsement on the contract was made for the express purpose of changing the legal effect of the contract as signed. The note which the holder sought to enforce against the accommodation makers was in effect a note for $11,000; the note they signed was a note for $15,000. The note had no contractual effect until delivered. The contract signed by the accommodation makers was changed in amount before it was delivered. That is not the condition here. In the case at bar it is conceded that the notation was made after the note had become due, and then only as a memorandum of plaintiff's gratuitous promise to the defendant delay to extend the time of payment of the note until May 1, 1913.

Respondent also cites and relies on Woodworth v. Bank of America, 19 Johns. 391, 10 Am. Dec. 239, as an authority in point. That case involved the liability of an indorser. No place of payment was mentioned in the note, and the material alteration found consisted of the following words written in the margin of the note: "Payable at the Bank of America." That case, under the then existing practice in New York, was decided by the state senate. The majority opinion

was written by Senator Skinner, and concurred in by seventeen other senators. An extended minority opinion was prepared by that great jurist, Chancellor Kent, and concurred in by nine senators. In the minority opinion Chancellor Kent said: "To conclude, then, I think that the following propositions are well founded: . . . That such a memorandum, made out of the body of the note, and being a mere intimation of the place of payment, was no part of the contract; but it was sufficient to justify the holder to call at such a place for payment, and being refused he had a right to look to the indorser. This is a clear, settled rule in England, and it has been repeatedly recognized in this country and in this state."

No good purpose would be served by any further discussion of the various authorities bearing on this question. We are agreed that the notation made in the margin of the note in the case at bar formed no part of the note, and in no manner altered it, but was a mere memorandum.

The judgment appealed from is reversed, and the trial court is directed to vacate the same and reinstate the judgment entered on the verdict.

On Petition for Rehearing (Rehearing denied December 22, 1915).

CHRISTIANSON, J. Respondents have filed a petition for rehearing herein. A consideration of such petition and the authorities therein cited only more fully confirms our belief in the correctness of our former opinion upon the merits of the appeal, and we are therefore entirely agreed that the petition for rehearing should be denied.

But in the former opinion, certain questions of practice were discussed, and in their petition for rehearing defendant's counsel request that, even though a rehearing be denied, the former opinion be modified by eliminating therefrom that portion relating to such questions of practice. While we have no reason to doubt the correctness of our views upon such questions of practice, as expressed in the former opinion, still, in view of the fact that consideration thereof is not necessary to a determination of the merits of this appeal, we have decided to grant the request of defendants' attorneys. The former opinion has there-

fore been modified and the portion relating to such practice question eliminated therefrom.

In order to avoid any misunderstanding it may be stated that the original opinion has not been reported, and the foregoing opinion constitutes the decision of this court in this case.

JOHN D. COOK v. NORTHERN PACIFIC RAILWAY COMPANY.

(155 N. W. 867.)

Congress — Carmack amendment — state regulations — contracts — interstate shipments — freight.

1. Under the Carmack amendment (act of Congress of June 29, 1906) it was the clear intention of Congress to remove from the realm of state regulations and restrictions all contracts involving interstate shipments of freight and live stock.

Carriers — interstate shipments — common law — common carrier — special contract — with shipper — limitation of liability — just and reasonable — negligence.

2. The liability imposed by the Federal statutes upon carriers of interstate shipments is the liability imposed by the common law upon a common carrier; and such liability may be limited or qualified by special contract with the shipper,

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Note.—By the great weight of authority, a carrier may stipulate in his contract of shipment that, as a condition precedent to bringing suit for any loss or injury to live stock, the shipper must give notice of his claim within a certain time, or before the stock is taken from the place of destination or delivery, or is mingled with other stock. But it is just as generally held that the requirements of the stipulation as to time must be reasonable, and not of such a nature as to work undue hardship upon the shipper, or unduly permit the carrier to escape the consequences of his negligence. But what is a reasonable stipulation in one case may not be in another, and, as shown by a review of the authorities in a note in 7 L.R.A.(N.S.) 1041, the courts not infrequently determine the reasonableness or unreasonableness of the time allowed with reference to the actual facts as they afterwards developed, that is, with reference to the question whether the time allowed proved, under all the circumstances of the case as they afterward developed, reasonably sufficient for the shipper to ascertain the nature and extent of his loss or damage, and to give notice of his claim.

provided the limitation or qualification be just and reasonable, and does not exempt the carrier from liability due to its negligence.

Special contract — stipulation — damages — action — live stock — time limit to bring action — unreasonable and void.

3. A stipulation in such special contract, that no action to recover damages for loss or injury to live stock, etc., shall be sustained unless commenced within sixty days after the damage shall occur, is held unreasonable and void.

Opinion filed September 20, 1915.

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

Action by John D. Cook against the Northern Pacific Railway Company.

From a judgment in defendant's favor, plaintiff appeals.

Reversed and remanded for a new trial.

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

"Everything that the jury might reasonably infer from the evidence is to be considered as admitted." Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454.

"Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void." Comp. Laws 1913, § 5927; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Act of June 29, 1906, 34 Stat. at L. 584, chap. 3591, Comp. Laws 1913, § 8563.

Whether or not such a contract is reasonable is a question for the court to determine, and in each case depends upon the peculiar circumstance disclosed by the evidence. New York C. R. Co. v. Lockwood, 17 Wall. 357, 380, 381, 21 L. ed. 627, 640, 641, 10 Am. Neg. Cas. 624; Southern Exp. Co. v. Caldwell, 21 Wall. 264, 22 L. ed. 556.

"In an action where there is a plea of a special contract in defense, limiting or conditioning the carrier's liability, the burden is upon the carrier not only to show a valid special contract, but also to allege and prove the facts and circumstances showing the stipulations to be reasonable. Houtz v. Union P. R. Co. 33 Utah, 175, 17 L.R.A.(N.S.) 628, 93 Pac. 439; Texas & P. R. Co. v. Reeves, 90 Tex. 499, 59 Am. St.

Rep. 830, 39 S. W. 564; Central Vermont R. Co. v. Soper, 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 888; Adams v. Colorado & S. R. Co. 49 Colo. 475, 36 L.R.A.(N.S.) 412, 113 Pac. 1010.

A limitation of time within which to bring action may be waived by failure to object to the form of a defective notice, or by any conduct of the carrier calculated to induce, and which has induced, the owner to delay the bringing of suit beyond the time stipulated. 6 Cyc. 509, and cases cited; Gulf, C. & S. F. R. Co. v. Stanley, 89 Tex. 42, 33 S. W. 112.

Watson & Young and *E. T. Conmy,* for respondent.

The shipment here in question is interstate, and comes under the Carmack amendment to the Hepburn act, and the decisions of the Federal and United States courts are controlling. Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Hepburn Act of June 29, 1906, 34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8592; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; 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 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 35 Sup. Ct. Rep. 155; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Bartles Northern Oil Co. v. Jackman, 29 N. D. 236, 150 N. W. 576.

The condition in the contract requiring that suit be commenced in two months is valid and enforceable. Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 18 L. ed. 170; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624; Southern Exp.

Co. v. Caldwell, 21 Wall. 264, 22 L. ed. 556; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Central Vermont R. Co. v. Soper, 1 C. C. A. 341, 59 Fed. 879; Ginn v. Ogdensburg Transit Co. 29 C. C. A. 521, 57 U. S. App. 403, 85 Fed. 985; Cox v. Central Vermont R. Co. 170 Mass. 129, 49 N. E. 97; North British & M. Ins. Co. v. Central Vermont R. Co. 9 App. Div. 4, 40 N. Y. Supp. 1113, affirmed in 158 N. Y. 726, 53 N. E. 1128; McCarty v. Gulf, C. & S. F. R. Co. 79 Tex. 33, 15 S. W. 164; Thompson v. Chicago & A. R. Co. 22 Mo. App. 321; 6 Cyc. 508 and cases cited; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 671–673, 57 L. ed. 690, 697, 698, 33 Sup. Ct. Rep. 397.

Estoppel, to be available, must be pleaded, and this rule has been adopted in this state. Borden v. McNamara, 20 N. D. 225, 127 N. W. 104, Ann. Cas. 1912C, 841; Parliman v. Young, 2 Dak. 184, 4 N. W. 139, 711; 8 Enc. Pl. & Pr. 7; 16 Cyc. "Estoppel," 806–808.

"A waiver of a provision on the back of a shipping receipt, exempting the carrier from liability, unless notice of loss or damage is given within a specified time, is not available to a shipper in an action against the carrier, unless pleaded by the shipper." Frey v. New York C. & H. R. R. Co. 114 App. Div. 747, 100 N. Y. Supp. 225; Eureka F. & M. Ins. Co. v. Baldwin, 62 Ohio St. 368, 57 N. E. 57; Griffith v. Newell, 69 S. C. 300, 48 S. E. 259; Essex v. Murray, 29 Tex. Civ. App. 368, 68 S. W. 736; R. L. Cox & Co. v. Markham, 39 Tex. Civ. App. 637, 87 S. W. 1163; Fauble v. Davis, 48 Iowa, 462; List & Sons Co. v. Chase, 80 Ohio St. 42, 88 N. E. 120, 17 Ann. Cas. 61; Neuberger v. Robbins, 37 Utah, 197, 106 Pac. 933; Thompson v. St. Charles County, 227 Mo. 220, 126 S. W. 1044; McCall Co. v. Segal, — Tex. Civ. App. —, 126 S. W. 913; Re Warner, 158 Cal. 441, 111 Pac. 352; Feuchtwanger v. Manitowoc Malting Co. 109 C. C. A. 461, 187 Fed. 713; Iola Portland Cement Co. v. Ullmann, 159 Mo. App. 235, 140 S. W. 620; Symms-Powers Co. v. Kennedy, 33 S. D. 355, 146 N. W. 570; 9 Cyc. "Contracts" 727; Clegg v. St. Louis & S. F. R. Co. 122 C. C. A. 273, 203 Fed. 971; Great Northern R. Co. v. O'Connor, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380, 8 N. C. C. A. 53; Riddlesbarger v. Hartford F. Ins. Co. 7 Wall. 386, 19 L. ed. 257; Central Vermont R. Co. v. Soper, 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed.

879; Ginn v. Ogdensburg Transit Co. 29 C. C. A. 521, 57 U. S. App. 403, 85 Fed. 985.

Even a forty-day limitation in which to bring action has been held legal and valid. Gulf, C. & S. F. R. Co. v. Trawick, 68 Tex. 314, 2 Am. St. Rep. 494, 4 S. W. 568; Gulf, C. & S. F. R. Co. v. Gatewood, 79 Tex. 89, 10 L.R.A. 419, 14 S. W. 913; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 672, 57 L. ed. 698, 33 Sup. Ct. Rep. 397.

Fisk, C. J. Plaintiff and appellant seeks to recover damages from defendant railway company upon a special contract entered into on March 9, 1907, for the transportation of certain horses and other property from the Minnesota transfer to McHenry, in this state. He alleges in his complaint that through the negligence of the defendant in handling the car in which such horses were transported, and through unreasonable delay in transporting the car, such horses were greatly injured, which injury resulted in the death of several of the horses, and permanent injuries to the remainder. This action was commenced in April, 1913, but in October, 1908, plaintiff brought an action to recover damages connected with this same shipment, basing his action not on the contract, but upon the defendant's common-law liability. In such former litigation the defense interposed was that the parties had entered into a special contract governing such shipment, and that their rights and liabilities should be measured by such contract. Such defense was sustained, both in the trial court and in this court. Cook v. Northern P. R. Co. 22 N. D. 266, 133 N. W. 303. For a general statement of the facts we refer to the opinion in that case.

The contract in suit is the ordinary stock contract used by the defendant company, and contains, among other things, a statement that the shipment is made "at the published tariff rate which applies to shipments under a limited liability contract, the same being a reduced rate made upon the terms and conditions following, which are admitted and accepted by the undersigned shipper as just and reasonable, that is to say:" Then follow numerous stipulations, among which are the following:

"3. And it is hereby further agreed that the value of the live stock to be transported under this contract does not exceed the following mentioned sums, to wit: Each horse, seventy-five dollars; each mule,

seventy-five dollars; each stallion, one hundred dollars; each jack, one hundred dollars; each ox or steer, fifty dollars; each bull, fifty dollars; each cow, thirty dollars; each calf, ten dollars; each pig, ten dollars; each sheep or goat, three dollars; such valuation being that whereon the rate of compensation to said carrier for its services and risks connected with said property is based."

"6. The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injuries to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock.

"7. It is further agreed and provided that no suit or action to recover any damages for loss or injury to any of said stock, or for the recovery of any claim by virtue of this contract, shall be sustained by any court against said company, unless suit or action shall be commenced within sixty (60) days after the damage shall occur, and on any suit or action commenced against said company after the expiration of said sixty (60) days, the lapse of time shall be taken and deemed conclusive evidence against the validity of said claim, any statute to the contrary notwithstanding."

Plaintiff offered testimony tending to show negligence on the part of the company in handling such car, and the resulting damage occasioned thereby. Also that he served notice upon the station agent of the defendant company at McHenry on March 18th, and before the stock had been removed from McHenry, of his claim for damages, and rested. Thereupon counsel for defendant moved for a directed verdict, basing the motion upon the ground, among others, that plaintiff failed to commence his action within the period of sixty days as stipulated in the contract, which motion was granted; and it is this ruling which constitutes the chief complaint of appellant on this appeal.

If the stipulation requiring suit to be brought within sixty days is valid and binding, then, of course, the ruling of the court in directing the verdict in defendant's favor must be sustained; for, concededly, no action was brought until long after such time had elapsed.

In construing such stipulation, as well as the other provisions of the contract, it is settled beyond question by the highest court in our

land that the contract, being one covering an interstate shipment, is removed from the realm of local state regulations and restrictions, and the same is regulated and controlled exclusively by the laws of Congress, and the liability of the defendant must therefore be determined by the laws of Congress as construed by the United States courts. Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155. In both of these cases it was squarely held that the provisions of § 20 of the act of February 4, 1887, as amended by the act of June 29, 1906, 34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563, known as the Carmack amendment, manifested a purpose on the part of Congress to take possession of the subject of the liability of a carrier by railroad for interstate shipments, and that the regulations therein should supersede all state regulations upon the same subject. Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

It goes without saying that these decisions of the Supreme Court of the United States are absolutely controlling upon the state courts. As said by this court in the recent case of Bartels Northern Oil Co. v. Jackman, 29 N. D. 236, 150 N. W. 576: "The decisions of the Supreme Court of the United States on Federal questions are absolutely controlling when the same questions are presented in state courts, and the latter have no alternative but to follow the Federal authorities." As before stated, the contract in suit covering, as it does, an interstate shipment, falls clearly within the Carmack amendment aforesaid. This being true, we are next to inquire whether the stipulation in the contract requiring suit to be commenced within sixty days is valid and enforceable. Referring to the decisions of the United States Supreme Court, and especially to Adams Exp. Co. v. Croninger, supra, we find it there announced that the liability imposed by the Federal statute upon carriers of interstate shipments is the liability imposed by the common law upon a common carrier, and that such liability may be limited or qualified by special contract with the shipper, *provided the limitation or qualification be just and reasonable,* and does

not exempt the carrier from responsibility for damages due to its negligence. In this connection see also Missouri K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397. In the opinion in the latter case Mr. Justice Lurton, in passing upon the validity of a stipulation in a special contract limiting the time in which suit might be brought to the period of ninety days from the loss or happening of any damage, said: "The court below held that the stipulation in the shipping contract, that no suit shall be brought after the lapse of ninety days from the happening of any loss or damage, 'any statute or limitation to the contrary notwithstanding,' was void.

"It is conceded that there are statutes in Missouri, the state of the making of the contract, and the state in which the loss and damage occurred, and in Texas, the state of the forum, which declare contracts invalid which require the bringing of an action for a carrier's liability in less than the statutory period, and that this action, though started after the lapse of the time fixed by the contract, was brought within the statutory period of both states.

"The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack amendment of the Hepburn act of June 29, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed, is a Federal question to be determined under the general common law, and, as such, is withdrawn from the field of state law or legislation. Adams Exp. Co. v. Croninger, supra; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176. The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence. Adams Exp. Co. v. Croninger, and Michigan C. R. Co. v. Vreeland, cited above; York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 18 L. ed. 170; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624; Southern Exp. Co. v. Caldwell, 21 Wall. 264, 267, 22 L. ed. 556, 558; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151.

"The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the court. Such stipulations have been sustained in insurance policies. Riddlesbarger v. Hartford F. Ins. Co. 7 Wall. 386, 19 L. ed. 257. A stipulation that an express company should not be held liable unless claim was made within ninety days after a loss was held good in Southern Exp. Co. v. Caldwell, 21 Wall. 264, 22 L. ed. 556. Such limitations in bills of lading are very customary, and have been upheld in a multitude of cases. We cite a few: Central Vermont R. Co. v. Soper, 1 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 879; Ginn v. Ogdensburg Transit Co. 29 C. C. A. 521, 57 U. S. App. 403, 85 Fed. 985; Cox v. Central Vermont R. Co. 170 Mass. 129, 49 N. E. 97; North British & M. Ins. Co. v. Central Vermont R. Co. 9 App. Div. 4, 40 N. Y. Supp. 1113, affirmed in 158 N. Y. 726, 53 N. E. 1128. Before the Texas and Missouri statutes forbidding such special contracts, short limitations in bills of lading were held to be valid and enforceable. McCarty v. Gulf, C. & S. F. R. Co. 79 Tex. 33, 15 S. W. 164; Thompson v. Chicago & A. R. Co. 22 Mo. App. 321. See cases to same effect cited in 6 Cyc. p. 508. The provision requiring suit to be brought within ninety days is not unreasonable."

After a thorough research we find no case decided by the United States Supreme Court upholding a similar limitation where the time fixed for bringing suit was less than ninety days, but counsel for respondent cite two decisions from state courts upholding, as reasonable, stipulations fixing the time at forty days. These are Gulf, C. & S. F. R. Co. v. Trawick, 68 Tex. 314, 2 Am. St. Rep. 494, 4 S. W. 568; Gulf, C. & S. F. R. Co. v. Gatewood, 79 Tex. 89, 10 L.R.A. 419, 14 S. W. 913. But it will be noticed that in neither of the contracts involved in these cases does it appear that there was a stipulation similar to that in the contract in the case at bar, requiring notice of loss or injury to be given by the shipper to the carrier before the stock has been removed from the place of destination or mingled with other stock,

and in the last case cited the carrier notified the plaintiff twenty-five days after the delivery, that his claim would not be paid.

The question of whether such a stipulation is reasonable depends to a considerable extent upon the purpose sought to be subserved by such stipulation, which is to appraise the carrier promptly, to the end that it may protect itself against fraudulent and unjust claims for damages. Were it not for the sixth stipulation above referred to, requiring notice to be given by the shipper before the stock is removed from the point of destination and mingled with other stock, we might feel inclined to uphold the seventh stipulation requiring suit to be brought within sixty days, as not unreasonable; but we think, in the light of such prior stipulation, it is manifestly unreasonable to limit plaintiff to sixty days in which to commence his action.

Another reason which prompts us in arriving at this conclusion is the fact that although plaintiff made prompt claim to damages by serving upon the station agent of the defendant company at McHenry a written notice, defendant took no action thereon at all, and by its silence no doubt lulled the plaintiff into a sense of security in waiting, and we think he was justified in delaying action in the hope and belief that his claim would be finally adjusted. In view of these facts, defendant does not stand in a favorable light before the court in urging such defense, and we think it should be held to have waived such stipulation.

Another consideration which has some weight with us in arriving at the above conclusion is the fact that plaintiff did not, and in the nature of things could not, within the limited time fixed in such stipulation, know of the extent of the injuries inflicted upon the stock through defendant's negligence. In this connection we approve the language of the supreme court of Texas in Gulf C. & S. F. R. Co. v. Stanley, 89 Tex. 42, 33 S. W. 112. The shipping contract in that case contained a clause limiting the time for bringing action to "forty days next after the loss or damage shall have occurred." Upon the trial it was disclosed that at a certain place *en route* the cattle were unloaded for feeding and watering, and were crowded together in muddy pens in such numbers that it was impossible for them to take sufficient food and water, and that, in consequence, some died and others were greatly injured. In its opinion the court said: "The defendant, by counsel,

asked the court to charge the jury that, if the notice was not given, the plaintiff could not recover, and also, in effect, that if the suit was not instituted within forty days from the time the cause of action accrued, it was not bound. Both of these charges were refused, and their refusal brings up the question as to the validity of the two stipulations in the contract which have been quoted. A stipuation of the character of these in question, to be valid, must be reasonable. At the time the cattle were reshipped at Purcell, the plaintiff, according to his own testimony, knew that his cattle had been crowded in pens and had suffered for the want of food and water, but did not know the extent of his damages. Under the circumstances, he could, at most, have made only a vague complaint, which would have subserved no useful purpose to either party. It was by no means certain that any serious loss would ensue, and if the contract is to be construed as requiring notice in such a case, we think it must be held unreasonable."

In the case of New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624, the Supreme Court of the United States held that a condition in a contract with an express company limiting the right of action to ninety days was reasonable, but the property was entirely lost and never delivered. In the recent case of Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, in which the same period of time was held to be a reasonable limitation, the cattle whose loss was made the basis of the claim for damage were killed instantaneously by reason of a negligent derailment of the train. The doctrine of neither case is applicable to the facts of the case at bar. There the damage was immediately determinable, and the full period of ninety days without a waiver on the part of the railroad company was allowed plaintiff in which to bring his action.

In Southern Exp. Co. v. Caldwell, 21 Wall. 264, 22 L. ed. 556, the court, in considering the question of whether the period of ninety days was a reasonable limit in which the shipper might make claim to damages, held such stipulation reasonable, but added: "Possibly such a condition might be regarded as unreasonable if an insufficient time was allowed for the shipper to learn whether the carrier's contract had been performed."

In the case at bar, as before stated, the full damage to plaintiff was

not and could not have been known within the time stipulated for the commencement of an action, for but two out of eight horses were killed or died from injuries at St. Cloud, the point where it is alleged that the defendant's chief act of negligence in the handling of the car took place. Plaintiff contends that another horse died in the following November, and still another in December, 1907, and one in the following year, and the last one within three months of the trial of this action. We therefore think that there is much force in appellant's contention that it was impossible for him to know within such period of sixty days anything definite with reference to the extent of his damage, and that, as applied to the facts in this case, such stipulation is unreasonable.

In this connection we call attention to the recent case of Pierson v. Northern P. R. Co. 61 Wash. 450, 112 Pac. 509, which involves contract stipulations the same as in the case at bar, and wherein the Washington court, under facts similar to those here involved, held unreasonable the stipulation requiring written notice to be given to some officer or station agent of the company before the stock was removed from the place of destination or mingled with other stock. The court said: "This clause of the contract would perhaps be effectual in some cases; but in a case like the present, where the nature and extent of the injuries to the animals surviving could not be ascertained with any degree of certainty within the limited time provided in the contract, the stipulation is unreasonable and inapplicable,"—citing numerous authorities. Upon parity of reasoning it seems to us that the other stipulation, requiring suit to be commenced within sixty days, should likewise be held under these facts to be unreasonable.

In addition to the above authorities see valuable note to the case of Hafer v. St. Louis Southwestern R. Co. 30 Ann. Cas. 866, where many authorities are collected on the subject. See also Texas & P. R. Co. v. Langbehn, — Tex. Civ. App. —, 158 S. W. 244, and Pacific Coast Co. v. Yukon Independent Transp. Co. 83 C. C. A. 625, 155 Fed. 29.

It has been held, and we think properly, that where a shipping contract limits the time within which an action for damages must be brought, such time must be not only reasonable, but there must be prompt action on the part of the carrier in denying its liability, to the end that the shipper may be duly apprised of the fact that suit will be

necessary. Lasky v. Southern Exp. Co. 92 Miss. 268, 45 So. 869. See also James v. Chicago, R. I. & P. R. Co. 81 Kan. 23, 105 Pac. 40.

In view of our conclusion, which leads to a reversal of the judgment, it is but fair to the learned trial judge to state that he was evidently influenced in his decision by certain language found in our former opinion, which he construed as a holding to the effect that the contract in question was in all things valid. The use of such language was perhaps unfortunate, but nevertheless the fact remains that the question as to the validity of each of the various stipulations in such special contract was not before us for decision on that appeal, and any such expression was therefore mere *dictum*. All that we were required to decide, and all that was there decided, was that plaintiff could not maintain his action in tort on the common-law liability when the proof showed that he entered into a special contract governing the rights and liabilities of the parties pertaining to such shipment.

Regarding the validity of the stipulation limiting the extent of defendant's liability we are not called upon to express an opinion. Such question was neither passed upon by the trial court nor argued in the briefs of counsel. It would therefore be improper for us to consider it at this time.

Judgment reversed, and a new trial ordered.

BURKE, J., being disqualified, did not participate, Honorable W. L. NUESSLE, Judge of Sixth Judicial District, sitting in his stead.

A. L. MILLER and Clyde Webber, Copartners Doing Business under the Firm Name and Style of Miller & Webber, v. NATIONAL ELEVATOR COMPANY, a Corporation.

(155 N. W. 871.)

Grain — special property in — action — thresher's lien — damages — elevator company — conversion — evidence — demurrer to on trial.

1. In an action by persons having a special property in certain grain by virtue of a thresher's lien, to recover damages against an elevator company for the alleged conversion of a portion of such grain, the complaint is construed

and *held* not vulnerable to attack at the trial by a demurrer to the evidence for alleged insufficiency of its allegations to state a cause of action.

Memorandum book — accounts — entries — accurate — verified — must be.

2. Plaintiffs were permitted, over defendant's objection, to introduce in evidence a certain memorandum book kept by plaintiff Miller purporting to show the number of bushels threshed. The record discloses that plaintiff Webber furnished such data to his partner from a memorandum made by him sometime prior thereto. The accuracy of such entries was in no way verified. *Held*, for reasons stated in the opinion, that the admission of such exhibit constituted prejudicial error.

Special property — value of — competent evidence — defendant's liability.

3. It was incumbent upon plaintiffs to prove by competent testimony the value of their special property in the grain, for such value fixes the maximum limit of defendant's liability.

Instructions — jury — new trial.

4. The specification challenging certain instructions to the jury is not passed upon, as it does not appear that the questions involved will arise on another trial.

Opinion filed December 22, 1915.

This is an appeal from the District Court of Bottineau County; *Burr*, J., action by A. L. Miller and Clyde Webber, copartners, against the National Elevator Company. From a judgment in plaintiffs' favor, defendant appeals.

Reversed, and a new trial ordered.

Cowan & Adamson and *H. S. Blood*, for appellant.

To state a cause of action in conversion, the complaint must show that plaintiff is the owner or has a special property in the subject of conversion, that he is entitled to its possession, and that defendant wrongfully converted it. Parker v. First Nat. Bank, 3 N. D. 87, 54 N. W. 313; Simmons v. McConville, 19 N. D. 787, 125 N. W. 304; Hodge v. Eastern R. Co. 70 Minn. 193, 72 N. W. 1074; Ring v. Neale, 114 Mass. 111, 19 Am. Rep. 316; Glass v. Basin & B. S. Min. Co. 31 Mont. 21, 77 Pac. 302.

Plaintiffs must establish a demand for the property. They must allege and prove it. Parker v. First Nat. Bank, 3 N. D. 90, 54 N. W. 313.

Entries in books made by private parties are not admissible in evi-

dence, unless they are made contemporaneously with the facts to which they relate, by persons having knowledge of them, and are corroborated by competent evidence. Chaffee v. United States, 18 Wall. 516, 21 L. ed. 908.

The grain threshed must have been grown on the land described in the complaint and lien statement, or there is no lien. Parker v. First Nat. Bank, supra; Martin v. Hawthorn, 3 N. D. 412, 57 N. W. 87.

Resort must first be had to the property on which one has an exclusive lien, if the same can be done without loss, before property on which others have subsequent liens can be sold and applied, where proper demand is made. Union Nat. Bank v. Moline, M. & S. Co. 7 N. D. 201, 73 N. W. 527.

No appearance for respondent.

FISK, C. J. Plaintiffs, who claim to have had a thresher's lien covering certain grain purchased by defendant elevator company, brought this action against it to recover damages alleging an unlawful conversion of such grain. Plaintiffs prevailed in the district court, and from the judment, and also from an order denying a new trial, defendant appeals. No brief has been filed or appearance made in this court by respondents.

Appellant served and filed numerous specifications of error, challenging various rulings of the trial court in the admission of testimony and in denying its motions for a directed verdict; also in giving certain instructions and in refusing to give others requested by it. The sufficiency of the evidence to justify plaintiffs' recovery is also challenged by numerous specifications. In view of the fact that specifications numbered one, three, and seven are the only ones argued in the brief, the others are deemed abandoned, and will not be further noticed.

Specification one challenges the correctness of the ruling in denying defendant's objection to the admission of any evidence under the complaint, upon the ground of its alleged failure to state facts sufficient to constitute a cause of action, the particular points being that it nowhere sufficiently alleges facts showing plaintiffs' special property by virtue of their thresher's lien upon, nor plaintiffs' right to the immediate possession of, such grain. We quote from the brief: "The complaint in paragraph seven reads: "That by virtue of the facts hereinbefore

recited, the plaintiffs had a special property in, and were entitled to the immediate possession of, all of the personal property hereinbefore described." This is not an unrestricted general allegation that the plaintiffs have an interest in and are entitled to the possession of the property described, held by some courts to be sufficient allegations of ownership and right to possession to sustain an action in conversion, when joined with the allegations that defendant wrongfully converted the property.

In order to state a cause of action in conversion the complaint must show: (1) That plaintiff is the owner of or has a special interest in the property, and the value of such special interest. (2) That he is entitled to its possession. (3) That the defendant has wrongfully converted it. Parker v. First Nat. Bank, 3 N. D. 87, 54 N. W. 313; Simmons v. McConville, 19 N. D. 787, 125 N. W. 304; Hodge v. Eastern R. Co. 70 Minn. 193, 72 N. W. 1074; Ring v. Neale, 114 Mass. 111, 19 Am. Rep. 316; Glass v. Basin & B. S. Min. Co. 31 Mont. 21, 77 Pac. 302.

The complaint is deficient in both one and two. Had it merely recited that plaintiffs had a special interest in and were entitled to the immediate possession of the property, and had there stopped, it would have been sufficient under some of the authorities; but it recites that the plaintiffs had a special property in it, and were entitled to its immediate possession by virtue of the facts hereinbefore recited. Consequently the sufficiency or insufficiency of the allegations of interest in and right to possession is governed by the sufficiency or insufficiency of the facts recited to show such interest in and right to possession.

The interest claimed by the plaintiffs being merely a thresher's lien, the owner of the grain, or, if it had been sold, the purchaser, was entitled to possession until the plaintiffs' right to foreclose their lien had arrived and they had demanded possession for the purpose of foreclosing their lien.

The right to foreclose could not come into being except upon maturity of the indebtedness for the threshing, and possession in the defendants could be made wrongful only by a demand by plaintiffs for possession, made after maturity of the indebtedness. Since the complaint recites neither the maturity of the indebtedness nor demand for possession,

the plaintiffs are not entitled to the possession by virtue of the facts hereinbefore recited.

It is observed that the above argument is predicated upon the assumption that plaintiffs' cause of action is necessarily in trover or conversion, as was likewise assumed by this court in Parker v. First Nat. Bank, 3 N. D. 87, 54 N. W. 313 (relied on by appellant), and in numerous later cases involving somewhat analogous facts. Even granting the correctness of such assumption, we are inclined to disagree with counsel's contention. The complaint in substance alleges: That plaintiffs at all times mentioned were the owners and operators of a threshing rig, and on or about September 1, 1912, were employed by one Titus to do the threshing of the grain grown during that year on certain described premises, at the agreed price of 10 cents per bushel for wheat, and 6 cents per bushel for oats; that pursuant to such contract, and between September 27, 1912, and October 1, 1912, they threshed for said Titus such crops, amounting to 3,107½ bushels of wheat and 2,650 bushels of oats; that no part has been paid; that on October 14, 1912, they filed their verified claim for a threshing lien. Then follows paragraph 7; "That by virtue of the facts hereinbefore recited, the plaintiffs had a special property interest in, and were entitled to the immediate possession of, all of the personal property hereinbefore described," and paragraph 8; "That at Antler, on October 14, 1912, defendant, then being in possession of such grain, unlawfully converted the same to its own use, to plaintiffs' damage in the sum of $469.75."

Paragraph 7 may be eliminated entirely, as stating mere legal conclusions, and yet we think the complaint sufficiently states a cause of action for conversion of the grain covered by plaintiffs' lien, especially as against attack at the trial. The complaint in Parker v. First Nat. Bank, supra, is not set out in the opinion in that case, but it appears from such opinion that the lien statement was not incorporated in or made a part of the complaint, as was done in the case at bar. Furthermore, the complaint in such case, which was attacked by demurrer, failed to show that any lien statement containing the necessary recitals of fact, as required by the statute, was ever filed, nor did the complaint allege that plaintiff was the owner of the threshing machine. That case does not support appellant's contention, nor has our attention been called to any authority which does.

But conceding for the sake of argument that the complaint fails to state a good cause of action in conversion, does it follow from this that the ruling complained of was erroneous? We think not. With due deference to the views of this court, as formerly constituted, in Parker v. First Nat. Bank, supra, and later cases following its reasoning, to the effect that in this kind of cases the plaintiff's remedy is in trover or conversion, we are satisfied that this is clearly incorrect. Such doctrine necessarily leads to the untenable conclusion that there can exist a wrong without a remedy, for manifestly plaintiffs, even conceding that they are not entitled to the immediate possession of the grain, are or may be injured in their lien rights by an unlawful conversion of the grain covered by their lien. It is therefore an unwarranted conclusion to say that trover or conversion must lie, or the injured lienee is remediless. A plaintiff under the Code is not required to label his cause of action as at common law; and if he states facts entitling him to relief under any form of action at common law, it is sufficient. This was expressly recognized by Mr. Chief Justice Corliss in his opinion in Black v. Minneapolis & N. Elevator Co. 7 N. D. 129, 73 N. W. 90. We quote: "If, on common-law principles, the plaintiff could not recover for damages for an injury to his possessory right, because he had no such right, he cannot now recover such damages. The old distinctions in the manner of stating the cause of action are abolished. It is not necessary that the plaintiff should plead with all the technical precision of the common law. It is sufficient if he spreads out the facts upon the face of his pleading; and it is not even important that he should correctly name the nature of his cause of action. But it is still true that, if his facts do not show a right to possession, but only a right to have his lien respected, he cannot recover the value of the property as damages for the disturbance of the right to possession, but only the amount of the special injury he has sustained by an unlawful interference with his rights. Nor can it be said that the Code has abolished even the names of different causes of action. It is still true, as formerly, that an action to secure the possession of a specific chattel is an action of replevin, and that a suit to recover damages for the wrongful taking thereof is an action for conversion; and bar and bench will continue to recognize these inherent distinctions, despite all legislative efforts to obliterate them. We do not hold that plaintiff should have

failed because he has sued in trover, and has not shown a conversion. His complaint warranted a recovery on the theory of a special injury to his lien rights. But he failed in his proof. The owner of the wheat subject to the lien had an undoubted right to sell it to anyone. He who bought it would take it subject to the lien, but it is also true that he would succeed to all the owner's rights. The defendant purchased the grain subject to the lien, but it had the same right to retain possession, as against the plaintiff, that the owner had. The plaintiff's remedy was not to recover possession, and then foreclose his lien, but to obtain possession in the foreclosure action itself. His demand upon the defendant did not render it liable for an action to recover the value of the wheat, or for damages to his security. The lien rights of a party are injured only when the property is placed beyond his power to reach it for purposes of foreclosure. So far as we know from this record, the property which is subject to the plaintiff's lien is still in the possession of the defendant, and can be taken by plaintiff in an action to foreclose his lien. All that was proved in the case was the fact of a purchase of the wheat by defendant, and the further fact that it had refused on demand to deliver the property to the plaintiff. In buying the grain, its act was lawful, and was not an invasion of the plaintiff's rights. When it refused to deliver up the property, it merely subjected itself to an action in equity to foreclose the lien. Such an action has not been brought. This suit is either for the conversion of this wheat, or to recover damages for the injury to the plaintiff's rights as a lienholder. By nothing that it has done has the defendant subjected itself to either liability. It does not appear that it has mixed the grain with other grain, or has shipped it out of the state." See also 6 Cyc. 686, 691 and cases cited. We quote from Cyc. at page 691: "Where plaintiff has a lien on the property injured, he may maintain an action on the case, where the injuries complained of diminish the value of his security or operate to make it ineffectual." As correctly stated in the note to the above text: "This doctrine is based on the theory that the wrong is done to property of which plaintiff has neither the possession nor the right to possession; and since trespass, detinue, or trover will not lie, the law for the injury to plaintiff's rights will afford a remedy by an action on the case,"— citing numerous cases, among which is that of Goulet v. Asseler, 22 N.

Y. 225, a very instructive case upon this point. It is true, as disclosed in Goulet v. Asseler, that the measure of damages in actions on the case differs from the measure of damages in trover and conversion. This, however, is not important upon the present inquiry as to the sufficiency of the complaint to state a cause of action. It follows that appellant's specification of error number one is without merit.

Specification number three challenges the correctness of the ruling admitting in evidence exhibit one, such exhibit being a memorandum book kept by plaintiff Miller, purporting to show the amount of grain threshed for Titus as alleged, and made up of figures concededly furnished him by his partner, Webber, who took them sometime prior thereto from a reading of the tally on the separator weighing machine.

Such exhibit was, we think, clearly inadmissible, and the ruling admitting the same constituted prejudicial error. Aside from this exhibit there was no testimony introduced from which a finding as to the amount of the grain threshed could be made. Manifestly, it was necessary for plaintiffs to prove by competent testimony the value of their special property in this grain, for that is the limit of their damage, and that is dependent, of course, upon the amount of grain threshed by them for this man, Titus. It does not appear that the entries in this exhibit were made contemporaneously with the transactions to which they relate, and this it was incumbent upon the plaintiff to show. Chapter 118, Laws of 1907. Moreover, it affirmatively appears that the book, exhibit one, is not a book of original entries, and there is a signal failure to furnish any proof of the accuracy of such entries. Had such proof been supplied by showing that plaintiff Webber furnished to his partner the correct figures as to the number of bushels threshed, and that the latter correctly transcribed such figures into exhibit one, such exhibit might have been competent as a memorandum of the transactions, to be used to refresh the recollection of the plaintiffs. But, as before stated, no such showing was made.

Specification number seven calls in question the correctness of certain instructions to the jury. There is much force in the contentions of appellant's counsel under this specification, but we deem it unnecessary to pass thereon at this time, as it does not appear that these questions will necessarily arise upon another trial.

For the foregoing reasons the judgment appealed from is reversed and the cause remanded for a new trial.

BUTLER BROTHERS, a Corporation, v. JOHN J. SCHMIDT and Jacob M. Schmidt, Copartners under the Firm Name and Style of Schmidt Brothers.

(155 N. W. 1092.)

County court — action commenced in — increased jurisdiction — venue — change of — district court — other county — party prevailing — entitled to costs.

Where an action is commenced in a county court with increased jurisdiction, and a change of venue is thereafter ordered to the district court of another county, under the provisions of § 8954 Comp. Laws, the prevailing party is entitled to have costs taxed and allowed as in a county court having increased jurisdiction.

Opinion filed December 28, 1915.

An appeal from the District Court of Sheridan County. Honorable *W. L. Nuessle,* J.

Reversed and remanded.

Geo. H. Stillman, for appellant.

Where an action is properly begun in county court of increased jurisdiction, and the trial is changed to the district court of another county, the prevailing party is entitled to tax the costs as they would have been taxable and allowed had the trial proceeded where commenced. Laws of 1909, § 28, chap. 80; Rev. Codes 1905, §§ 7174, 7178, 7182, 8445, Comp. Laws 1913, §§ 7790, 7794, 7798, 9108.

Harry E. Dickinson, for respondents.

Costs must be taxed according to the law governing in the court where the trial is had. Actions must be commenced in the proper courts, as to the amounts involved, in order that costs shall follow. Rev. Codes 1905, § 7794, Comp. Laws 1913, § 8429; De Smet Twp. v. Dow, 4 S. D. 163, 56 N. W. 84.

CHRISTIANSON, J. The above-entitled action was originally commenced in the county court of Wells county (the same being a county court having increased jurisdiction), to recover the sum of $25.98, with interest from March 4, 1907, upon an amount for merchandise

sold and delivered by plaintiffs to defendants. The defendants are residents of Sheridan county, in this state, and, under the provisions of § 8954, Compiled Laws 1913, they demanded a change of venue from the county court of Wells county to the district court of Sheridan county. The action thereafter came on for trial in the district court of Sheridan county, and resulted in a judgment in favor of the plaintiff for the full amount sued for. The total amount of the recovery being $39.10, the trial court refused to allow costs to the plaintiff on the ground that the amount recovered was less than $50, and that under the provisions of § 7794, Compiled Laws, the plaintiff in an action (in the district court) for the recovery of money is not entitled to costs, unless he recovers $50 or more. Plaintiff appeals from such decision. The sole question presented for our determination is whether the plaintiff is entitled to recover costs.

The allowance of costs in any case depends entirely upon the terms of the statute. A court has no inherent right to award costs, but should award costs to such party and in such cases only as the statute directs. 5 Enc. Pl. & Pr. 110; 11 Cyc. 24. See also Tracy v. Scott, 13 N. D. 577, 580, 101 N. W. 905. Section 8954, Compiled Laws 1913, provides that an action may be commenced in the county court of any county in the state, subject to removal for cause; but that when the action is not commenced in the proper county, the place of trial may be changed to the proper county; and that if the county to which a change of venue is demanded or ordered "does not have a county court with increased jurisdiction, in that event a change of venue shall be granted and had to the district court of the proper county; and said action shall be tried and determined in such district court as if the same had originally been commenced in such district court, *but costs shall be taxed and allowed as in a county court having increased jurisdiction.*"

Respondents' counsel argues that this law is harsh and oppressive,—and puts a premium upon the institution of actions for small claims in county courts with increased jurisdiction. With the wisdom of the legislative policy this court is not concerned. That is purely a matter for the legislature. If an amendment is desirable, it must be obtained through legislative enactment. The intent of the law is plain, and it is the duty of this court to construe the statute under considera-

tion so as to give effect to such legislative intent, as expressed therein. The plaintiff in this action was entitled to recover costs as in a county court having increased jurisdiction, and the provisions of § 7794, Compiled Laws, have no application, except in so far as they may be applicable to the taxation of costs in the county court having increased jurisdiction. The decision of the trial court denying costs to the plaintiff is reversed, and the cause remanded, with directions that costs be taxed and allowed in favor of the plaintiff as in a county court having increased jurisdiction.

STATE OF NORTH DAKOTA EX REL. S. C. SNODGRASS v. J. P. FRENCH, as Sheriff of Burleigh County.

(155 N. W. 687.)

Habeas corpus — writ of — rape — crime of — penalty — statute — amendment — ex post facto law — saving clause — construction — implication — district court — jurisdiction — sentence.

Relator, who seeks to regain his liberty through a writ of habeas corpus, was convicted during the present month of the crime of rape in the second degree, and was sentenced to a term of four years in the penitentiary. The law prescribing the penalty, and in force at the date of the offense, was amended at the last session of the legislative assembly, and the old statute was expressly repealed by the provisions of the new law, and a greater penalty prescribed, such new statute taking effect on July 1st, 1915, and embracing no saving clause as to past offenses. *Held:* That such new statute is, as to relator, an *ex post facto* law, and he cannot be punished thereunder. *Held*, further, that § 7316 of the Compiled Laws of 1913 prescribed a general saving clause which is applicable, and must be read into the new statute by necessary implication. Hence, the district court had jurisdiction to impose sentence under the former statute, and the writ is accordingly quashed.

Opinion filed December 30, 1915.

A writ of habeas corpus was issued out of the supreme court on petition of the relator. On hearing such writ quashed.

Register & Register for relator.

H. R. Berndt, State's Attorney of Burleigh County, and *Miller, Zuger Tillotson, contra.*

FISK, Ch. J. A writ of habeas corpus was issued on application of petitioner, who claims to be illegally restrained of his liberty by the sheriff of Burleigh county by virtue of a commitment issued pursuant to a judgment of conviction of the crime of rape in the second degree.

Petitioner's sole contention is that the district court of Burleigh county was without any jurisdiction to impose sentence against him, for the reason that the statute in force on May 19, 1915, the date the crime was committed, was expressly repealed by chapter 201 of the Laws of 1915, which took effect July 1st, 1915, and which increased the punishment for such offense, and contained no saving clause as to offenses committed while the former statute was in force; in other words, that the new statute as to him is *ex post facto* and void. It is conceded by counsel for the state that petitioner's contention is sound, provided there is no saving clause; but they assert that while the new statute contains no saving clause, that this fact is not decisive, for the reason that the legislature, by § 7316 of the Compiled Laws of 1913, prescribed a general saving clause, which governs and controls. This statute was inherited from territorial days, and is § 2133 of the Civil Code of 1887. It reads as follows: "The repeal of any statute by the legislative assembly shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." Such statute was borrowed *verbatim* from the Federal statutes (see § 13, chapter 2, title 1, U. S. Rev. Stat. 1878, Comp. Stat. 1913, § 314). This statute was construed in United States v. Barr, 4 Sawy. 254, Fed. Cas. No. 14,527, also in United States v. Ulrici, 3 Dill. 532, Fed. Cas. No. 16,594.

If such statute applies to criminal cases, as we think it clearly does, then the one question remaining is the power of the legislature to enact the same. That it possessed such power, we think is beyond question. By its provisions, it does not purport to bind subsequent legislatures, but merely to control when subsequent legislatures have not other-

wise ordained. It is a very wise and salutary provision, and ought not to be declared invalid unless its invalidity is clearly apparent, and we are far from reaching this conclusion.

In the light of this statute we are agreed that as to prior offenses the repealing statute did not operate to effect the repeal of the former law fixing the punishment. It will be presumed that the legislature, in enacting the repealing statute without a special saving clause, had in mind such general saving clause provision, and the same will be read into and deemed a part of the new statute by necessary implication. These views have ample support in the authorities. See State v. Smith, 62 Minn. 540, 64 N. W. 1022; People v. McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61, and authorities cited. The case of State v. Smith, supra, is directly in point, and both the reasoning and conclusion of the Minnesota court meet with our full approval.

Writ quashed.

A. J. WIRTZ, C. H. Wirtz, and W. W. Wirtz, Copartners as Wirtz Brothers v. OTTO WOLTER and Scandia American Bank, a Corporation.

(155 N. W. 1092.)

Mortgage — note — renewal — indebtedness of first note and mortgage — other claims included — prior mortgage not extinguished — no express agreement for.

The giving of a renewal note and mortgage for the amount of the indebtedness covered by the first note and mortgage and other indebtedness does not operate to satisfy and extinguish such prior note and mortgage, in the absence of an express agreement to that effect.

Opinion filed December 31, 1915.

Appeal from the District Court of Mountrail County; *Frank E. Fisk*, J. From a judgment in defendant's favor, plaintiff appeals.

Affirmed.

Van R. Brown, for appellants.

The last mortgage given and delivered for the same debt secured by a

prior mortgage, but including other indebtedness, did not cancel the first or prior mortgage, but it was obliterated by the second or new mortgage, which was substituted for the old one. It was the last and really the only, agreement standing between the parties. Stow v. Russell, 36 Ill. 18; Hargrave v. Conroy, 19 N. J. Eq. 281; Bradway v. Groenendyke, 153 Ind. 508, 55 N. E. 434; Smith v. Bettger, 68 Ind. 254, 34 Am. Rep. 256; Thacher v. Dinsmore, 5 Mass. 299, 4 Am. Dec. 61; Apthorp v. Shepard, Quincy (Mass.) 298, 1 Am. Dec. 6; Mason v. Douglas, 6 Ind. App. 558, 33 N. E. 1009; Nixon v. Beard, 111 Ind. 137, 12 N. E. 131.

Thomas M. Cooney, for respondent.

Where a new mortgage on property is executed in renewal of an existing one, whether for the same amount or not, the new mortgage will not operate as a discharge of the original security, unless by express agreement, or the intention of the parties so to do is clear and certain. 7 Cyc. 68, subdiv. E, and cases cited; Miller v. Griffin, 102 Ala. 610, 15 So. 238; Cobbey, Chat. Mortg. 472, and cases cited; City Bank v. Radtke, 87 Iowa, 363, 54 N. W. 436; Jones, Chat. Mortg. § 644; Dempsey v. Pforzheimer, 86 Mich. 652, 13 L.R.A. 388, 49 N. W. 465; Howard v. First Nat. Bank, 44 Kan. 549, 10 L.R.A. 537, 24 Pac. 986.

Nothing but payment in fact of the debt, or the release of the mortgage, will discharge it. Packard v. Kingman, 11 Iowa, 219; Crosby v. Chase, 17 Me. 369; Hadlock v. Bulfinch, 31 Me. 246; Gregory v. Thomas, 20 Wend. 19; Morse v. Clayton, 13 Smedes & M. 381; Alferitz v. Ingalls, 83 Fed. 964; Griffith v. Grogan, 12 Cal. 323; Crary v. Bowers, 20 Cal. 86; Austin v. Bailey, 64 Vt. 367, 33 Am. St. Rep. 932, 24 Atl. 245; Miller v. Griffin, 102 Ala. 610, 15 So. 238.

Fisk, C. J. The facts in this case were all stipulated by counsel, and the findings of fact by the trial court are in accord with such stipulation, appellants' sole contention being that the conclusions of law are not warranted by such facts.

The appeal raises but one question for our consideration, and that is whether a renewal note and mortgage given for the amount of the indebtedness covered by the old note and mortgage operates in law to supersede such prior note and mortgage. In the light of the conceded

fact as found, that nothing has been paid on either of such notes or mortgages except an amount realized from a foreclosure sale, and, further, that the creditor never released, nor agreed to release, any of the securities taken by it, we have no hesitancy in answering such question in the negative. As we glean from the brief of counsel for appellant, he seems to labor under the impression that because the creditor took a renewal note and mortgage covering the same debt and security, that such act operated in law to satisfy and extinguish the first note and mortgage. This is not the law, nor do the authorities cited by appellant support his contention. These authorities are: Stow v. Russell, 36 Ill. 18; Hargrave v. Conroy, 19 N. J. Eq. 281; Bradway v. Groenendyke, 153 Ind. 508, 55 N. E. 434; Smith v. Bettger, 68 Ind. 254, 34 Am. Rep. 256; Thacher v. Dinsmore, 5 Mass. 299, 4 Am. Dec. 61; Apthorp v. Shepard, Quincy (Mass.) 298, 1 Am. Dec. 6; Mason v. Douglas, 6 Ind. App. 558, 33 N. E. 1009; Nixon v. Beard, 111 Ind. 137, 12 N. E. 131.

If any authority is needed in support of our views, see 7 Cyc. 1011, and numerous cases cited; also many late cases cited in supplement to above work. See also the more recent case of State Bank v. Mutual Teleph. Co. 123 Minn. 314, 143 N. W. 912, and exhaustive note to this case as reported in Ann. Cas. 1915A, 1082.

Judgment affirmed.

PRICE E. MORRIS v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.

(155 N. W. 861.)

Directed verdict — motion for — new trial — motion for — sufficiency of evidence — appeal — raised for first time on appeal.

1. Where a motion is not made for a directed verdict, or the sufficiency of the evidence to support the verdict challenged by motion for new trial, the sufficiency of the evidence to sustain the verdict cannot be raised for the first time on appeal and by an alleged specification of error to that effect, served with the notice of appeal.

Error — specifications of — founded on error below — trial court — sufficiency of evidence — ruling on — must be invoked — question raised in supreme court.

2. Specifications of error so taken must be founded upon some alleged error committed below, for its basis. And where a ruling upon the sufficiency of the evidence has not been invoked in the trial court, no error of law has been committed, and the sufficiency of the evidence to justify the verdict cannot be passed upon under an alleged specification of error.

Insufficiency of evidence — question raised by appellant — general verdict — favorable to — cannot be raised.

3. A specification by plaintiff, appellant, of insufficiency of the evidence to justify the verdict presents no question calling for a review of the evidence, where the jury have found for the defendant by a general verdict, establishing that the evidence was insufficient to sustain a verdict for plaintiff.

Evidence — verdict — merits — justified by.

4. As the practice questions involved since the 1913 practice act are new, the evidence has been examined, and it has been ascertained that the verdict is justified thereunder on the merits.

Opinion filed December 17, 1915. Rehearing denied December 31, 1915.

An appeal from the district court of Foster county; *Coffey*, J.

Affirmed.

T. F. McCue, for appellant.

Where a prima facie case is made out, and there is no question of fact to go to the jury,—questions controverted by evidence,—the case still having been submitted to the jury, and the jury having found its verdict clearly contrary to the evidence, it should be set aside. Crane v. Morris, 6 Pet. 598, 8 L. ed. 514; United States v. Wiggins, 14 Pet. 334, 10 L. ed. 481; Kelly v. Jackson, 6 Pet. 622, 8 L. ed. 523; Emmons v. Westfield Bank, 97 Mass. 243; State ex rel. Turner v. Turner, 104 N. C. 571, 10 S. E. 606; Blough v. Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560.

Where the verdict is without support in the evidence, it will be set aside on appeal. Fuller v. Northern P. Elevator Co. 2 N. D. 220, 50 N. W. 359; McArthur v. Dryden, 6 N. D. 438, 71 N. W. 125; Martin v. Orndorff, 20 Iowa, 217; Leater v. Sallack, 31 Iowa, 477; Miller v. Mutual Ben. Ins. Co. 34 Iowa, 222; Carlin v. Chicago, R. I. & P. R. Co. 37 Iowa, 316.

Edward P. Kelly, for respondent.

Where the evidence is wholly insufficient to sustain a verdict if given, a directed verdict in favor of the other party is proper. Miller v. Northern P. R. Co. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215.

A prima facie case must be based upon competent, reasonable, and believable testimony. Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 25 N. D. 145, 141 N. W. 204.

Goss, J. For the facts, consult the first opinion in this case, at 25 N. D. 136, 141 N. W. 204. At the close of the first trial a verdict was directed for defendant upon a theory of a failure of proof of loss of grain. A carload of barley was shipped from Bordulac, in this state, to Superior, Wisconsin. There was a difference of 4,960 pounds between initial and terminal weights as made under the proof. On plaintiff's appeal in the former case it was held that the proof was sufficient to entitle plaintiff to a jury finding upon the fact of loss, and amount thereof, if any. On the second trial, the finding of the jury was adverse to the plaintiff and for dismissal. From judgment entered thereon, plaintiff appeals, without moving for new trial below. In his specification of error served with his notice of appeal, he has alleged that the verdict is contrary to the evidence, and that the evidence is insufficient to sustain the verdict, and that upon the whole record the plaintiff is entitled to verdict and judgment.

As plaintiff failed to obtain a ruling in the trial court upon the sufficiency of the evidence by failing to move for a directed verdict in his behalf, or move for a new trial upon said ground, he has no error of law below upon which on appeal he can seek a review. An erroneous ruling upon a motion for directed verdict is an error of law, and is reviewable on appeal from the judgment; and in cases where the evidence is insufficient to support the verdict, and where the sufficiency of the evidence to support the verdict has been tested by motion for directed verdict, or motion for new trial upon said ground, and overruled, and an error of law exists because of such ruling, the same may be challenged on appeal, and the appellant may claim the evidence as insufficient to support the verdict, pointing out wherein it is insufficient, and in this court invoked a review of the alleged error committed below, but

not otherwise. Such was the practice before the passage of chapter 131, Sess. Laws 1913, commonly known as the practice act, and such is still the law. Wilson v. Kryger, 29 N. D. 28, 149 N. W. 721; State ex rel. Leu v. Coffey, 28 N. D. 329, 148 N. W. 664; Willoughby v. Smith, 26 N. D. 209, 144 N. W. 79. Section 4 thereof (§ 6756, Comp. Laws 1913) does not change the prior settled practice in such respect. While the language of the act is somewhat ambiguous, and possibly susceptible of a contrary construction, undoubtedly it was not intended to permit virtually a retrial in this court of the sufficiency of the evidence to sustain a verdict, where the lower court was never asked to pass upon that question. And it ought not to be so construed. The record in this case is a splendid illustration of the operation of such a construction as is contended for by plaintiff. In the lower court plaintiff sat mute, assuming, as did the court and opposing counsel, that the evidence was sufficient to justify submitting the ultimate conclusion of fact and law to the jury for their determination under instructions. The jury found adversely to plaintiff. Appellant now on appeal seeks to urge something not spoken of below, and perhaps an afterthought, to wit, the sufficiency of the evidence to justify submission of the cause to the jury on the fact. To sustain his contention will establish a precedent to permit a party to purposely omit to raise the issue of sufficiency of the evidence in the trial court and before the court fully familiar with all phases of the proof, speculate upon the outcome of a verdict and his ability to recover at the jury's hands, and then, if the verdict happens to be unfavorable, for the first time on appeal invoked a review of the sufficiency of the evidence to sustain it; and that too without having laid any basis in law therefor, having invoked no ruling below upon that question, either on trial or on motion for a new trial. Such procedure would not only be unfair to trial courts, and litigants as well, but also would consume the time of this court in passing upon issues of fact,—virtually a trial anew of facts on appeal. Until the legislature says in plain language that this was intended, it is our duty to lay no such traps for error, nor assume to pass upon questions not raised below and not amounting to errors of law.

But it may be claimed that by § 7843, Comp. Laws 1913, a provision of the 1913 practice act that "no motion for a new trial shall be necessary to obtain on appeal a review of any question of law or of the suf-

ficiency of the evidence unless," etc., which, coupled with § 7656, Comp. Laws 1913, a part of the same practice act specifying what shall be stated in a specification of insufficiency of the evidence, that the legislature has endeavored to permit an appellant to challenge for the first time on appeal the sufficiency of the evidence to sustain a verdict. But the very statute in question in which the right must be claimed, if at all, grants only "on appeal a review of any question of law or of the sufficiency of the evidence." To be reviewed here it must have been first passed upon elsewhere in such a way as to commit error of law in the first instance. Where the sufficiency of the evidence has not been raised below, an examination of it here would not be a *review* of it as sufficient to sustain the verdict. Before the passage of the practice act, inquiry in this court in jury cases was confined to a review of error only. Rev. Codes 1905, § 7226, Comp. Laws 1913, § 7842. No innovation in that respect was intended by the 1913 practice act, notwithstanding it dispensed with the necessity of making a motion for new trial in certain instances, to obviate which was the matter probably uppermost in the mind of those preparing the legislation, §§ 7656 and 7847, Comp. Laws 1913. There could have been no intent to change this from a court of review of error into a court in which to examine for the first time the sufficiency of evidence to sustain a verdict or jury's findings.

We might mention that the specification that the evidence is insufficient to sustain the verdict of dismissal is an incongruous one, raising no error on appeal. The jury dismissed because of insufficiency of evidence to sustain a verdict for plaintiff, and their verdict is challenged as based upon insufficient evidence. Under this specification appellant has urged on appeal that the verdict is contrary to the evidence, which would have been a proper specification, but under which he would have had no standing because he had not obtained a ruling thereon by a motion for a directed verdict. Apparently appreciating that such would be the holding, appellant has very skilfully attempted to indirectly accomplish the same thing by alleging the evidence as insufficient to sustain a verdict, which verdict has held in effect the evidence would be insufficient to sustain plaintiff's cause of action. Obviously counsel cannot do by indirection what he could not accomplish directly under a proper specification of error.

However, that plaintiff may not be foreclosed of a consideration of the merits, the fact will be reviewed. Appellant reasons that inasmuch as on the first trial the proof was held sufficient to take the case to the jury over a motion for directed verdict of dismissal, and the proof is substantially the same in this case, with the added circumstance of testimony offered in defense, he is entitled to a verdict upon the theory of there being no substantial conflict in the evidence. Under certain kinds of evidence, such as documentary proof, plaintiff might be correct, but where, from the very nature of the proof made, a doubt is cast as to it making prima facie proof of the ultimate fact, the rule is different. Prima facie proof of negligence, such as would take the case to the jury for determination, does not necessarily establish a right to a finding of negligence from the jury. The court has its province in determining, as a matter of law, that the proof is sufficient to be weighed by the trier of fact, the jury, and the jury has its province to determine the ultimate fact. And in each instance each determination is made independent of the other. Here the ultimate fact is largely controlled by the credibility of the witnesses and the accuracy of the weights taken under the circumstances, with other proof or want of proof of shortage. That the court submitted the issue to the jury would be the equivalent of finding that sufficient evidentiary facts exist to invoke the jury's determination of what was the truth of the matter, the ultimate conclusion of fact to be drawn from the evidentiary facts. In determining this question it was for the jury to weigh, reject, or take for granted the evidence, under settled rules concerning credibility of witnesses and the like, including facts of which the jury could take judicial notice. These questions are so fully discussed in the prior opinion as not to need reiteration here. The question was one for the jury, and they have determined it.

Judgment is affirmed, with costs.

CHRISTIANSON, J., concurring specially. I concur in an affirmance of the judgment on the ground that the verdict on which it is based was justified under the evidence. I also heartily concur in what my brother Goss says about the policy (generally adopted and recognized) which prohibits a party from raising on appeal any question on which the trial court was not required to rule. I think this policy should apply especially where it is sought to impeach the verdict of a jury on the

ground that it is contrary to, or unsupported by, the evidence. But while I think this is the better policy, still I am inclined to believe that the legislature by the 1913 practice act intended to permit the question of the sufficiency of the evidence to sustain the verdict to be raised on appeal, even though such insufficiency had not been raised in the court below, either by motion for a directed verdict or by motion for a new trial.

It is true that under the former practice the sufficiency of the evidence could not be reviewed on appeal, unless it was challenged in the court below, either by motion for a directed verdict or by motion for a new trial. But under the 1913 practice act, however, it is provided that "no motion for a new trial shall be necessary to obtain, on appeal, a review of any questions of law *or of the sufficiency of the evidence,* unless, before the taking of the appeal, the judge shall notify counsel of the party intending to take the appeal that he desires such motion to be made." Comp. Laws 1913, § 7843.

In harmony with this provision, § 7656, Compiled Laws 1913, provides that "a party desiring . . . *to appeal from a judgment* . . shall serve with the . . . notice of appeal a concise statement of the errors of law he complains of, and if he claims the evidence is insufficient to support the verdict . . . he shall so specify."

If the legislature intended that a motion for a directed verdict or a motion for new trial must be made in order to obtain a review of the sufficiency of the evidence, then that portion of § 7656 requiring specifications of insufficiency of the evidence to be served with the notice of appeal, and that portion of § 7843 providing that no motion for new trial shall be necessary to obtain a review on appeal of the sufficiency of the evidence, are unnecessary and meaningless; because if a motion for a directed verdict is made and denied, such ruling becomes an error of law which is deemed excepted to, and it is unnecessary to serve specifications of insufficiency of the evidence in order to obtain a review of such ruling. If a motion for new trial is made, such insufficiency of the evidence must be specified upon such motion. In either case no necessity exists for serving with the notice of appeal specifications of the insufficiency of the evidence. Therefore, while I agree with the policy announced in the majority opinion, it seems to me that the construction placed upon the present practice act is not in accord with the legislative intent.

STATE OF NORTH DAKOTA v. H. C. JENSEN.

(155 N. W. 793.)

Opinion filed January 5, 1916.

Appeal from District Court, Golden Valley County; *Crawford,* J.
Motion to dismiss appeal.
Motion granted.
Honorable Henry J. Linde, Attorney General, and *Honorable Clement L. Waldron,* State's Attorney, for the motion.
No appearance *contra.*

PER CURIAM. Respondent moves, on due notice, to dismiss the appeal for want of prosecution. No appearance is made in opposition to the motion.

The grounds of the motion are supported by affidavit of the state's attorney of Golden Valley county, stating in substance that appellant was convicted in the district court of that county at the January, 1915, term, and that thereafter an appeal was taken to the supreme court; that on August 14th the appeal papers were transmitted to the clerk; that no further steps whatever have been taken to perfect such appeal, and appellant has not procured a transcript of the testimony taken at the trial, nor has he filed any brief in such cause, and he has wholly neglected, without cause, to perfect and prosecute such appeal. In view of such showing we deem the motion well taken, and it is accordingly ordered that such appeal be, and the same is hereby, dismissed.

ADOLPH SUNDAHL v. FIRST STATE BANK OF EDMUNDS.

(155 N. W. 794.)

Interest — taken in advance — loans — usury.

1. Plaintiff borrowed $300 of defendant bank in 1911, giving therefor his

Note.—On the general question of purchase of paper at discount as usury, see note in 43 L.R.A.(N.S.) 211.

promissory note for $340.90, due in one year and bearing no interest until after maturity.

Held, not usurious under § 5166, permitting banking associations to deduct or withhold from the amount of the loan one year's interest at 12 per cent per annum taken in advance.

Usury — jury — instructions.

2. Many of the claimed items of usury should have been eliminated, by instructions, from the consideration of the jury.

Promissory note — interest on — bank — evidence — good faith.

3. Where many items entered into the consideration for which the note was given, and the dispute of fact turned on whether certain amounts were disbursed by the bank for plaintiff, or instead paid by him, it was error to exclude evidence of good faith of the bank in the transaction, as the intent to take usurious interest would be in issue.

Proof — exclusion of — books — consideration — error.

4. Exclusion of proof by the bank books showing the items entering into the consideration for the note was error.

Opinion filed January 6, 1916.

An appeal from a judgment of the District Court of Stutsman County; *Coffey,* J. Defendant appeals.

Reversed.

Knauf & Knauf and *Engerud, Holt, & Frame,* for appellant.

The statute recognized the rule generally prevailing without the aid of any statute, that it is not usurious to charge and collect interest at the lawful rate in advance. Fleckner v. Bank of United States, 8 Wheat. 338; Moore v. Bank of the Metropolis, 13 Pet. 302, 10 L. ed. 172; Maine Bank v. Butts, 9 Mass. 49; Agricultural Bank v. Bissell, 12 Pick. 586; Lloyd v. Williams, 2 W. Bl. 792; Manhattan Co. v. Osgood, 15 Johns. 162; Bank of Utica v. Phillips, 3 Wend. 408; Marvine v. Hymers, 12 N. Y. 223; Hawks v. Weaver, 46 Barb. 164; Lyon v. State Bank, 1 Stew. (Ala.) 442; Cole v. Lockhart, 2 Ind. 631; English v. Smock, 34 Ind. 115, 7 Am. Rep. 215; Bank of Burlington v. Durkee, 1 Vt. 403; Newell v. National Bank, 12 Bush, 57; Stribbling v. Bank of the Valley, 5 Rand. (Va.) 132; McGill v. Ware, 5 Ill. 29; Mitchell v. Lyman, 77 Ill. 525; Brown v. Scottish-American Mortg. Co. 110 Ill. 235; Willett v. Maxwell, 169 Ill. 540, 48 N. E. 473; Tepoel v. Saunders County Nat. Bank, 24 Neb. 815, 40 N. W. 415;

Vahlberg v. Keaton, 51 Ark. 534, 4 L.R.A. 462, 14 Am. St. Rep. 73, 11 S. W. 878; Bank of Newport v. Cook, 60 Ark. 288, 29 L.R.A. 761, 46 Am. St. Rep. 171, 30 S. W. 35; Tholen v. Duffy, 7 Kan. 405; State Bank v. Hunter, 12 N. C. (1 Dev. L.) 100; Mackenzie v. Flannery, 90 Ga. 590, 16 S. E. 710; Ticonic Bank v. Johnson, 31 Me. 414; Goodale v. Wallace, 19 S. D. 405, 117 Am. St. Rep. 962, 103 N. W. 651, 9 Ann. Cas. 545.

The only difference is that in those cases the courts read into the usury statute, by judicial construction, a rule which the North Dakota statute declares in express terms. Moore v. Bank of the Metropolis, 13 Pet. 302, 10 L. ed. 172; Vahlberg v. Keaton, 51 Ark. 534, 4 L.R.A. 462, 14 Am. St. Rep. 73, 11 S. W. 878; Bank of Newport v. Cook, 29 L.R.A. 761 with extended notes (60 Ark. 288, 46 Am. St. Rep. 171, 30 S. W. 35); McGill v. Ware, 5 Ill. 29; Mitchell v. Lyman, 77 Ill. 525; Willett v. Maxwell, 169 Ill. 540, 48 N. E. 473; Marvine v. Hymers, 12 N. Y. 223; Lyon v. State Bank, 1 Stew. (Ala.) 442; Cole v. Lockhart, 2 Ind. 631.

It shall be lawful to receive such interest according to the ordinary usage of banking associations. Comp. Laws 1913, § 5166.

The bank books were sufficiently identified as evidence. Comp. Laws 1913, § 7909.

In a proper case, the court has power to reduce or add to the amount of the verdict, where there is a mere error of computation, and the record furnishes the data showing the error or just what should have been done. Fletcher Bros. v. Nelson, 6 N. D. 94, 69 N. W. 53; Carpenter v. Dickey, 26 N. D. 176, 143 N. W. 964.

But the court cannot speculate as to what the jury intended, and thus amend the verdict. Minot v. Boston, 201 Mass. 10, 25 L.R.A.(N.S.) 311, 86 N. E. 783; Fiore v. Ladd, 29 Or. 528, 46 Pac. 144; Crich v. Williamsburg City F. Ins. Co. 45 Minn. 441, 48 N. W. 198; Acton v. Dooley, 16 Mo. App. 449; Watson v. Damon, 54 Cal. 278; Goggan v. Evans, 12 Tex. Civ. App. 256, 33 S. W. 891.

M. C. Freerks, for respondent.

An assignment of error must be made so that the court may ascertain from the brief just what is meant. 2 Enc. Pl. & Pr. 943; Minot Flour Mill Co. v. Swords, 23 N. D. 571, 137 N. W. 828.

The appellate court will not search for errors not clearly and properly assigned. State v. Cleveland, 23 S. D. 335, 121 N. W. 841.

Local commercial usages must be pleaded. 12 Cyc. 1097.

A custom introduced as an affirmative defense should be specifically pleaded. Templeman v. Biddle, 1 Harr. (Del.) 522; Lindley v. First Nat. Bank, 76 Iowa, 629, 2 L.R.A. 709, 14 Am. St. Rep. 254, 41 N. W. 381; Turner v. Fish, 28 Miss. 306; Hayden v. Grillo, 42 Mo. App. 1; Anderson v. Rogge, — Tex. Civ. App. —, 28 S. W. 106; Norwood v. Alamo F. Ins. Co. 13 Tex. Civ. App. 475, 35 S. W. 717.

Where a transaction is within the statutes against usury, the usage of trade as to such transaction cannot be received in evidence to show that it is not usurious. Jones v. McLean, 18 Ark. 456; 12 Cyc. 1097; Daquin v. Colron, 3 La. 387; Harrod v. Lafarge, 12 Mart. (La.) 21; Bank of Utica v. Smalley, 2 Cow. 770, 14 Am. Dec. 526; Bank of Utica v. Wager, 2 Cow. 712; New York Fireman Ins. Co. v. Ely, 2 Cow. 678; Dunham v. Gould, 16 Johns. 367, 8 Am. Dec. 323; Dunham v. Dey, 13 Johns. 40; Gore v. Lewis, 109 N. C. 539, 13 S. E. 909; Niagara County Bank v. Baker, 15 Ohio St. 68; Greene v. Tyler, 39 Pa. 361; Smetz v. Kennedy, Riley L. 218; Cooper v. Sanford, 4 Yerg. 452, 26 Am. Dec. 239.

Loans on "personal security" do not include loans made on real estate security. There is a distinction in the statute. Cleveland v. Shoeman, 40 Ohio St. 176; Pittsburgh Locomotive & Car Works v. State Nat. Bank, 1 N. Y. Week. Dig. 332, Fed. Cas. No. 11,198; Montgomery Nat. Bank v. McCleaster, 2 Pa. Dist. R. 546; 6 Words & Phrases, 5362; Merrill v. National Bank, 173 U. S. 131, 43 L. ed. 640, 19 Sup. Ct. Rep. 360; Colorado Sav. Bank v. Evans, 12 Colo. App. 334, 56 Pac. 981.

Goss, J. This appeal is from a judgment finding defendant bank to have taken usurious interest, and penalizing it in double the amount of the interest so taken. Numerous errors are assigned. The principal one underlying the whole case concerns the computation of interest, where the deduction of interest to maturity is made in advance at the time of the taking of the note. Several alleged usurious transactions, consisting of overcomputation of advance interest, are charged. One only will be taken as illustrative of all. Plaintiff procured in cash, or

its equivalent, the sum of $300, giving therefor his note due in one year with no interest until after maturity, for the aggregate amount as of principal and interest earned at maturity, of $340.90. Is this transaction usurious? is the law question presented. Plaintiff contended upon trial, and urges on this appeal, that but 12 per cent on the $300, or $336, could thus be taken; or he says if it be conceded that if defendant could exact 12 per cent in advance, it could but charge 12 per cent interest upon the interest, $36, which, added to the interest and principal, would authorize at the most a note for $340.32, and that as this note was taken for $340.90, the entire interest charge was usurious, and double that amount, or $81.80, should be recovered on that cause of action. The trial court agreed with plaintiff concerning his interpretation of the law governing computation of advance interest, and instructed the jury explicitly "that the interest rate should be figured upon the money or value *received* by the borrower," and it could not exceed 12 per cent per annum on that amount, and "if you find by calculation that said sum (the amount of interest taken) is a greater rate than is permitted by the statute (12 per cent per annum) and as defined in these instructions, then the same is usurious;" and again: "The lender is allowed to withhold interest for one year at 12 per cent per annum, in advance at the time of the making of the loan, but any greater rate of interest is usurious." "The test of the existence of usury is, Will the contract as performed result in producing to the lender a rate of interest greater than is allowed by law, and was that result intended?" Besides this, during the trial the court examined the cashier of defendant bank, who transacted for it the alleged usurious loan, at some length as to the manner of his computation of the interest, and in such a way that the jury could not well have believed therefrom that the transaction was other than usurious, and showing that the trial court through the trial, as well as in its instructions, adopted respondent counsel's view of the law as to computation of advance interest. So the error, if such, is basic and prejudicial.

The question is but one of calculation of interest. For every dollar of the face of the note the borrower must be paid at least 88 cents (see extended note in 29 L.R.A. 761, citing scores of cases); and the question resolves to simply how much upon this basis the face of the note must be to enable the borrower to obtain $300 in cash. He must there-

fore give a note for $340.90, exactly the amount for which this one was taken. There is no usury in the transaction concerning the $340.90 loan, nor any of them made, unless it be the loan for $701.35, mentioned in the complaint. Tholen v. Duffy, 7 Kan. 405; Agricultural Bank v. Bissell, 12 Pick. 586; Fleckner v. Bank of United States, 8 Wheat. 338, 5 L. ed. 631; Vahlberg v. Keaton, 51 Ark. 534, 4 L.R.A. 462, 14 Am. St. Rep. 73, 11 S. W. 878; Bank of Newport v. Cook, 60 Ark. 288, 29 L.R.A. 761, 46 Am. St. Rep. 171, 30 S. W. 35; McGill v. Ware, 5 Ill. 29; Willett v. Maxwell, 169 Ill. 540, 48 N. E. 473; Marvine v. Hymers, 12 N. Y. 223. And as to this it cannot be usurious, because of prior loans carried forward and entered into it as a part of the consideration, because none of the prior loans are usurious, all being under identical computations to that of the $340.90 loan. The court should have instructed the jury that all the loans pleaded, except the one for $701.35, were not usurious. Failure to do so was unquestionably reversible error.

As to the note for $701.35, the only basis upon which usury could be found or predicated must be upon the disputed question of fact of whether items to the amount of $48.65 were properly included in, and were a part of the consideration for, said note as advancements for interest charges paid by the bank for the plaintiff, or whether, on the contrary, as plaintiff claims, they had no place as a part of the consideration of the note, because he had paid the coupon interest notes himself in cash not borrowed of the bank. The only issue of fact, preliminary to any question of usury, was whether plaintiff paid these two interest coupon notes to other parties, for $30 and $12 respectively, admittedly overdue, with cash furnished by himself, or, instead, whether the bank advanced him the cash to take them up. Plaintiff admits the notes were paid by defendant bank's draft. But he says he bought the draft. The bank says he did not; that it was an advancement, a loan. Thus this entire usury suit resolves into this simple dispute. If it be merely a good-faith dispute, no usury is in the case. If the bank honestly believed it made the advancement it should prevail, whether it made it or not. Of course, should the jury find with plaintiff that he bought this draft with money produced by him, and not borrowed of defendant, and that the bank, acting in bad faith, had knowingly and intentionally in fact included this amount as a bonus or interest overcharge in the note

taken, the bank would be guilty of taking usurious interest. The question of intent would then be controlling. Waldner v. Bowden State Bank, 13 N. D. 604, 102 N. W. 169, 3 Ann. Cas. 847 and Miller v. Bank of Harvey, 22 N. D. 538, 134 N. W. 745. Note in 23 L.R.A. (N.S.) 391. And the jury should be fully instructed thereon. The scope of the proof should be enlarged over what was allowed on this trial, objections having been sustained to inquiries touching the intent of the defendant in these transactions.

The court properly excluded the proof offered by the defendant to show that the custom of other banks was to exact 12 per cent interest so computed and taken in advance upon loans, and offered probably because of the phraseology of § 5166, Comp. Laws 1913. But its reasoning was fallacious. The court should have taken judicial notice of the fact that the defendant bank was a "banking association" within that statute, and as such entitled "to receive such interest, . . . and for not more than one year in advance."

Respondent argues that these loans are not "loans on personal security," and not within said statute, § 5166, permitting deduction of one year's interest in advance, and hence the case is determined by § 6075, Comp. Laws 1913, forbidding taking of more than ninety days' advance interest. Section 5166 reads: "Such association may demand and receive for loans on personal security, or for notes, bills, or other evidences of debt discounted, such rate of interest as may be agreed upon, not exceeding the amount authorized by law to be contracted for, and it shall be lawful to receive such interest according to the ordinary usage of banking associations, and for not more than one year in advance." This statute applies to all notes, bills, or other evidences of debt, as well as to loans made upon strictly personal security. The term "discounted," in banking circles, has a more comprehensive meaning than the mere purchase of negotiable paper at a discount, and covers loan transactions as well. Fleckner v. Bank of United States, 8 Wheat. 338, 5 L. ed. 631. The transaction is one within the statute quoted.

In view of a new trial it should be stated that the exclusion of the bank books showing the items in notes, interest, exchange, and expenses, that entered into the consideration for the $701.35 note, was error. The defendant was entitled to have the testimony of its cashier as to such

items corroborated by the bank books showing them. And the fact that the total of the various items shown upon the books and connected with the note by number as to bills receivable when computed correctly, with interest at 12 per cent for five months, the term of the note taken, in advance, was the exact amount for which the note was taken, is in itself a strong corroborative circumstance in defendant's favor. It was entitled, upon the foundation laid, to have the bank books concerning the transactions, admittedly in the bank cashier's handwriting, he negotiating the loan, received in evidence.

The complaint as filed asked judgment for $661.74. The jury returned a verdict awarding plaintiff damages for $661.70. Both the jury and the court overlooked the fact that before any evidence was offered at the opening of the trial, plaintiff's counsel admitted an error of $100 in the computation made in the complaint, and reduced his demand in that amount. Immediately upon the return of the verdict, in open court, counsel for plaintiff called attention to the error in the original complaint, and asked there and then to remit $100 of the verdict. He subsequently voluntarily remitted $275.40 of the recovery, and entered judgment for only $386.30, damages. In view of a retrial it may be stated that the verdict cannot exceed $167.40 (double the difference between $617.65 and $701.35), together with double the amount of interest paid that accrued subsequent to maturity of said note, if any additional interest was paid, so that the judgment appealed from, assuming the truth of plaintiff's testimony on the issue of fact involved, is approximately $200 excessive.

Respondent has, after oral argument in this court, tendered a supplemental brief in which for the first time he attempts to raise the constitutionality of § 5166, Comp. Laws 1913, claiming it to be special legislation and a violation of § 20 of the state Constitution so far as it authorizes banking associations to exact advance interest for one year on loans, while the general statutes applicable to all others allow but ninety days' advance interest to be so taken. The question was not raised below, is not briefed, is raised too late, and will not be passed upon.

The judgment appealed from is ordered vacated, and a new trial granted as to the cause of action concerning usury in the $701.35 note. Appellant will recover costs on this appeal.

CITIZENS STATE BANK of Rugby, North Dakota, a Corporation and Harold Thorson, v. J. H. LOCKWOOD and A. M. Iverson.

(156 N. W. 47.)

In a contract for the purchase of plaintiff bank by Thorson from defendants, it was stipulated that defendants "agree to have all bills receivable now in said bank which are past due or payable on demand, either renewed and secured or paid."

Suit is brought as upon a guaranty of payment by defendants for a $6,000 balance remaining of unsecured and unpaid commercial paper.

Held:

Contract — bank — sale — bills receivable — guaranty of payment — suit on — guaranty of collection.

1. That the paragraph in question is not a guaranty of payment, but constitutes in effect a guaranty of collection.

Damages recoverable — contract — breach of — notes and bills.

2. Defendants are responsible only to the amount of the actual damage occasioned by their breach of contract in failing to procure any remaining portion of said notes to be renewed and secured or paid.

Measure of damages — value of notes and bill — amount due on them — the difference — expense of collection.

3. Such damages would be measured by the difference between the actual value of the notes and the amount due upon them, together with the necessary expense of endeavoring to enforce their payment.

Opinion filed December 4, 1915. On rehearing January 7, 1916.

Appeal from the District Court of Pierce County; *Buttz,* Special Judge.

Affirmed.

Albert E. Coger, for appellants.

Where there is no ambiguity in the language of the contract, the language itself must be alone consulted in ascertaining the intention. 20 Cyc. 1423, 1424; Manhattan Rolling Mill v. Dellon, 113 N. Y. Supp. 571.

But where the court and the lawyers on both sides of the case fail to agree on what the contract means, under such circumstances oral testimony was admissible to throw light upon its meaning. Hazelton

Boiler Co. v. Fargo Gas & Electric Co. 4 N. D. 376, 61 N. W. 151; Code, § 5351; Heidenheimer v. Cleveland, — Tex. —, 17 S. W. 524; Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; Topliff v. Topliff, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057; District of Columbia v. Gallaher, 124 U. S. 505, 31 L. ed. 526, 5 Sup. Ct. Rep. 585, 19 Ct. Cl. 564; 9 Cyc. 591.

The only result of introducing extraneous matters would be confusion; the answer here discloses that such extraneous matters are pleaded with the design to contradict the written contract. 21 Am. & Eng. Enc. Law, 1109, 1110; 17 Cyc. 668; 11 Enc. Pl. & Pr. 686; 9 Enc. Pl. & Pr. 686, 687.

Before parol evidence to prove fraud can be introduced, it must be pleaded. 17 Cyc. 699; Western Mfg. Co. v. Rogers, 54 Neb. 456, 74 N. W. 849; Ellison v. Gray, 55 N. J. Eq. 581, 37 Atl. 1018; Caudrey's Case, 5 Coke, 25.

Where a contract is in writing, and is susceptible of proper construction and interpretation according to the well-established rules, excepting in the case of fraud pleaded and proved, it cannot be contradicted by parol. Towner v. Lucas, 13 Gratt. 705; Thorne v. Warfflein, 100 Pa. 527; Branan v. Warfield, 3 Ga. App. 586, 60 S. E. 325; Wigmore, Ev. § 2435.

In such cases the intention of the parties is to be gathered and determined from the contract itself. Code, §§ 5381–5383, 7316; Hennessy v. Griggs, 1 N. D. 52, 44 N. W. 1010; Northwestern Fuel Co. v. Bruns, 1 N. D. 137, 45 N. W. 699; National German American Bank v. Lang, 2 N. D. 66, 49 N. W. 414; Edwards & M. Lumber Co. v. Baker, 2 N. D. 292, 50 N. W. 718; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924; Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 729; William Deering & Co. v. Russell, 5 N. D. 319, 65 N. W. 691; Fletcher Bros. v. Nelson, 6 N. D. 94, 69 N. W. 53; Foster v. Burlong, 8 N. D. 282, 78 N. W. 986; Reeves v. Bruening, 13 N. D. 157, 100 N. W. 241; Alsterberg v. Bennett, 14 N. D. 596, 106 N. W. 49; Rieck v. Daigle, 17 N. D. 365, 117 N. W. 346; American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99; McCulloch v. Bauer, 24 N. D. 109, 139 N. W. 318; Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088; Gilbert v. Moline Plough Co. 119 U. S. 492, 30 L. ed. 476, 7 Sup. Ct. Rep. 305.

If I agree to have a thing done, I agree to get it done by taking the proper steps or methods. I agree to accomplish it. I assume the obligation to do it or to have it done. I agree to bring about the result contemplated by the contract. Huck v. Gaylord, 50 Tex. 582; Com. v. Delamater, 13 Pa. Co. Ct. 155; True v. Harding, 12 Me. 193; Morris v. Bradley, 20 N. D. 646, 128 N. W. 118.

The agreement here was to have the notes renewed and secured, or paid. It is in the alternative. The party obligating himself so to act and do has the right of selection as to which course he will pursue. But he must give notice of his selection before the time of performance arrives, or such right passes to the other party. Code, §§ 5222, 5223, 5361, 6075; Acme Harvester Co. v. Axtell, 5 N. D. 315, 65 N. W. 680; 20 Cyc. 1397, 1398; Nading v. McGregor, 121 Ind. 465, 6 L.R.A. 686, 23 N. E. 283; Kent v. Silver, 47 C. C. A. 404, 108 Fed. 365; Merritt v. Haas, 106 Minn. 275, 21 L.R.A.(N.S.) 153, 118 N. W. 1023, 119 N. W. 247.

A stipulation in a contract will be held to be a condition precedent only when the contract clearly requires such construction. The contract in question was not such. Walker v. Stimmel, 15 N. D. 484, 107 N. W. 1081; Roberts, T. & Co. v. Laughlin, 4 N. D. 167, 59 N. W. 967; Foster County State Bank v. Kester, 18 N. D. 135, 119 N. W. 1044; Smith v. Snow, 16 N. D. 306, 112 N. W. 1062; Woody v. Haworth, 24 Ind. App. 634, 57 N. E. 272; McCague Bros. v. Irey, 73 Neb. 602, 103 N. W. 281; Swindells v. Dupont, 88 Minn. 9, 92 N. W. 468; Oneida Steel Pulley Co. v. New York Leather Belting Co. 120 App. Div. 625, 105 N. Y. Supp. 534; Winchell v. Doty, 15 Hun, 1; Tuton v. Thayer, 47 How. Pr. 187; Kahn v. Eisenberg, 97 N. Y. Supp. 959; Bossert v. Striker, 142 App. Div. 5, 126 N. Y. Supp. 726; Pierce v. Merrill, 128 Cal. 464, 79 Am. St. Rep. 56, 61 Pac. 64; Klien v. Kern, 94 Tenn. 34, 28 S. W. 295; Avery v. Moore, 87 Kan. 337, 124 Pac. 173; Ralph v. Eldridge, 137 N. Y. 525, 33 N. E. 559; Jackson v. Swart, 182 N. Y. 373, 75 N. E. 226.

The guarantee was not required to bring action or take any steps, before looking to his guarantor to meet the contract. 20 Cyc. 1449, 1450, note 91; Donley v. Bush, 44 Tex. 1; Grannis v. Miller, 1 Ala. 471; Douthitt v. Hudson, 4 Ala. 110.

The liability of the guarantor of a note, if the guaranty is made

before maturity, accrues at maturity, if made after maturity, within a reasonable time thereafter. Yeates v. Walker, 1 Duv. 84; Crocker v. Gilbert, 9 Cush. 131; Read v. Cutts, 7 Me. 186, 22 Am. Dec. 184; Lane v. Levillian, 4 Ark. 76, 37 Am. Dec. 769; Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Foster v. Tolleson, 13 Rich. L. 31; Munro v. Hill, 25 S. C. 476; 1 Brandt, Suretyship, 3d ed. § 222.

A demand for anything is never necessary, when it conclusively appears that it would have been unavailing for any purpose, that it would be futile. 1 Cyc. 699; Myrick v. Bill, 3 Dak. 284, 17 N. W. 268; Thompson v. Thompson, 11 N. D. 211, 91 N. W. 44; More v. Burger, 15 N. D. 345, 107 N. W. 200.

The measure of damages is prima facie the par value of the notes. Page, Contr. § 1594; Barron v. Mullin, 21 Minn. 374; Browne v. St. Paul Plow Works, 62 Minn. 90, 64 N. W. 66; Lathrop v. Atwood, 21 Conn. 117; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; Thompson v. Richards, 14 Mich. 172; Sturgess v. Crum, 29 Mo. App. 644; Richards v. Whittle, 16 N. H. 259; Sedgw. Damages, 9th ed. §§ 618, 622a, 622b.

Under a contract to procure the notes to be paid, the rule of damages can only be the amount due on the notes for principal and interest. Robinson v. Gilman, 43 N. H. 485.

L. N. Torson and, *Torson & Wenzel* and, *Engerud, Holt, & Frame,* for respondents.

The essence of a contract of guaranty is that the guarantor shall do the very act which another person has promised to do. Comp. Laws 1913, § 6651; Gridley v. Capen, 72 Ill. 11.

"A collateral undertaking to pay a debt owing by a third person, in case the latter does not pay." Dole v. Young, 24 Pick. 250; Buckingham v. Murray, 7 Houst. (Del.) 176, 30 Atl. 779; Northern State Bank v. Bellamy, 19 N. D. 509, 31 L.R.A.(N.S.) 149, 125 N. W. 888; Starr v. Millikin, 180 Ill. 458, 54 N. E. 328.

The contract here before the court is analogous to a guaranty of collection. Foster County State Bank v. Hester, 18 N. D. 135, 119 N. W. 1044; Hazelton Boiler Co. v. Fargo Gas & Electric Co. 4 N. D. 365, 61 N. W. 151; Young v. Metcalf Land Co. 18 N. D. 441, 122 N. W. 1101; Locke v. McVean, 33 Mich. 473; Curtis v. Hubbard, 6 Met. 186; Home Sav. Bank v. Hosie, 119 Mich. 116, 77 N. W. 625;

Belloni v. Freeborn, 63 N. Y. 383; Stewart v. Marvel, 101 N. Y. 357, 4 N. E. 743.

The appellant drew the contract himself, and he is therefore in no position to ask the court to give it a meaning and effect which its words and provisions do not warrant. Comp. Laws 1913, § 5914.

The contract was and is in substance and effect an assurance, a warranty, that the makers of the notes have the cash or resources with which to pay them; in short that they are solvent it is therefore a mere guaranty of collection. Carter v. McGehee, 61 N. C. (Phill. L.) 431; Curtis v. Smallman, 14 Wend. 231; Cowles v. Pick, 55 Conn. 251, 3 Am. St. Rep. 44, 10 Atl. 569; Walker v. Forbes, 25 Ala. 139, 60 Am. Dec. 498; Dewey v. W. B. Clark Invest. Co. 48 Minn. 130, 31 Am. St. Rep. 623, 50 N. W. 1032; Burton v. Dewey, 4 Kan. App. 589, 46 Pac. 325; Crane v. Wheeler, 48 Minn. 207, 50 N. W. 1033; Union Nat. Bank v. First Nat. Bank, 45 Ohio St. 236, 13 N. E. 884; Comp. Laws 1913, § 6658; Roberts, T. & Co. v. Laughlin, 4 N. D. 167, 59 N. W. 967.

It is a mere promise to make good to the holder of the notes what he himself cannot collect from the makers. Mosher v. Hotchkiss, 2 Keyes, 589; 1 Brandt, Suretyship, § 111; Tuton v. Thayer, 47 How. Pr. 187; Coolidge v. Brigham, 5 Met. 68; Burton v. Dewey, 4 Kan. App. 589, 46 Pac. 325.

It is well settled that before the promisee in a guaranty of collection can sue the promisor, he must exhaust his legal remedies against the makers of the notes, and thereby established the measure and extent of his loss. Smith v. Snow, 16 N. D. 306, 112 N. W. 1062; Roberts, T. & Co. v. Laughlin, 4 N. D. 167, 59 N. W. 967; Bosman v. Akeley, 39 Mich. 710, 33 Am. Rep. 447; Cowles v. Pick, 55 Conn. 251, 3 Am. St. Rep. 44, 10 Atl. 569; Burton v. Dewey, 4 Kan. App. 589, 46 Pac. 325; Central Invest. Co. v. Miles, 56 Neb. 272, 71 Am. St. Rep. 681, 76 N. W. 566; McMurray v. Noyes, 72 N. Y. 523, 28 Am. Rep. 180; Peck v. Frink, 10 Iowa, 193, 74 Am. Dec. 384; Comp. Laws 1913, § 7146; Mosher v. Hotchkiss, 2 Keyes, 589; Coolidge v. Brigham, 5 Met. 68; Lehneis v. Egg Harbor Commercial Bank, — N. J. Eq. —, 26 Atl. 797; Anderson v. First Nat. Bank, 6 N. D. 497, 72 N. W. 916; Roberts, T. & Co. v. Laughlin, 4 N. D. 176, 59 N. W. 967; Cosand v. Bunker, 2 S. D. 294, 50 N. W. 84; Booth v. Powers, 56 N. Y. 22;

Thayer v. Manley, 73 N. Y. 305; Young v. Metcalf Land Co. 18 N. D. 441, 122 N. W. 1101.

Appellant has mistaken his remedy, and has not stated a cause of action. He does not plead and prove that his legal remedies have been exhausted, and thus fix his loss, if any. Smith v. Snow, 16 N. D. 306, 112 N. W. 1062; Roberts, T. & Co. v. Laughlin, 4 N. D. 167, 59 N. W. 967; Cowles v. Pick, 55 Conn. 251, 3 Am. St. Rep. 44, 10 Atl. 569; Crane v. Wheeler, 48 Minn. 207, 50 N. W. 1033; Central Invest. Co. v. Miles, 56 Neb. 272, 71 Am. St. Rep. 681, 76 N. W. 566; McMurray v. Noyes, 72 N. Y. 523, 28 Am. Rep. 180; Mosher v. Hotchkiss, 2 Keyes, 589; Day v. Elmore, 4 Wis. 190; Peck v. Frink, 10 Iowa, 193, 74 Am. Dec. 384; Grannis v. Miller, 1 Ala. 471; Nesbit v. Bradford, 6 Ala. 748; Curtis v. Smallman, 14 Wend. 231; Union Nat. Bank v. First Nat. Bank, 45 Ohio St. 236, 13 N. E. 884; Clay v. Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422; Burton v. Dewey, 4 Kan. App. 589, 46 Pac. 325.

In this case there is neither allegation nor proof that appellant has tried, by action or otherwise, to collect from the makers. Roberts, T. & Co. v. Laughlin, 4 N. D. 167, 59 N. W. 967; Anderson v. First Nat. Bank, 6 N. D. 497, 72 N. W. 916; Cosand v. Bunker, 2 S. D. 294, 50 N. W. 84; Booth v. Powers, 56 N. Y. 22; Thayer v. Manley, 73 N. Y. 305.

From his pleading and showing he has sustained no legal loss. Smith v. Snow, 16 N. D. 306, 112 N. W. 1062.

A contract of guaranty is a collateral undertaking. It is a promise to pay if the person whose obligation is guaranteed does not pay. There is a vast distinction between such a contract and the one before us. Northern Sav. Bank v. Bellamy, 19 N. D. 509, 31 L.R.A.(N.S.) 149, 125 N. W. 888.

Goss, J. This action is brought upon contract upon an alleged written guaranty. It reads as follows:

This agreement made and entered into this 29th day of September, A. D. 1911, by and between A. M. Iverson and J. H. Lockwood, of Rugby, North Dakota, now owners of the Citizens State Bank of Rugby,

parties of the first part, and Harold Thorson, of Drake, North Dakota, party of the second part,

Witnesseth, That the said parties of the first part for and in consideration of the sum of Eight Thousand Dollars to them in hand paid in Bills Receivable of the said Bank, such as the party of the second part may select, have bargained and sold unto the said party Eighty (80) shares of capital stock of the said Citizens State Bank of Rugby, North Dakota, hereby agree to deliver to the said party of the second part commission notes and mortgages securing the same to the amount of $10,145.

The said parties of the first part further agree to transfer their good will to the said bank, and not to engage in any banking business in the city of Rugby, North Dakota, for a period of five years, nor to make any real estate loans for sale or on commission.

The said parties of the first part further agree to have all bills receivable now in said bank, which are past due or payable on demand, either renewed and secured or paid.

This decision must depend upon the construction to be given to the last paragraph. Plaintiffs contend that by the words "parties of the first part further agree to have all bills receivable now in said bank, which are past due or payable on demand, either renewed and secured or paid,"—defendants have agreed that they will pay all said paper not renewed and secured. Defendants insist that the construction should be that they will have said paper renewed and secured, or paid by the makers. If the plaintiffs are right, this suit is maintainable upon the written contract. If defendants be correct, they can be responsible only to the amount of the actual damage any breach of their contract in failing to procure the makers to pay the notes may have caused plaintiffs, and which damages would be measured by the difference between the actual value of the notes and the amount due upon them, together with the necessary expense of endeavoring to enforce payment.

This portion of the contract does not purport to be one for absolute indemnity. Defendants are not guarantors of payment, but only of collection. Their agreement is none other than to have the makers of all past-due or demand bills receivable, either renew and secure or pay. Such is clearly the construction to be given. Had the agreement ended

with the words "renewed and secured," omitting the words "or paid," it could not be contended that a guaranty of payment could be implied. The only obligation upon defendants would have been to have, procure, cause, or bring about the renewing and securing of the paper by the makers. Did the parties intend, therefore, to obligate themselves to pay absolutely these debts of others by the addition of the words "or paid?" To hold that such was their intent necessitates a construction that the words "or paid" was intended as the penalty of what must be declared their guaranty of payment. Suppose the contract had omitted the words "or paid," and this suit, instead of being brought upon the grounds urged, was instead for damages because the notes had been allowed by defendant to be paid, instead of renewals with security procured or exacted? In other words, with these two words omitted, had plaintiffs sued for damages because their money was not kept at interest, what would have been the answer? Simply that the agreement necessarily implied the alternative of payment by the makers, in case they preferred to pay rather than renew and secure. The words "or paid" add nothing to the legal import of the contract. The omitted words were nevertheless understood as necessarily an implied part of the contract. How, then, can the situation be changed when the parties have but mentioned such alternative, instead of leaving it to implication? This fairly tests the question, and concludes it against the plaintiff. Appellants concede the alternatives "secure or pay" was both given and intended, but argue that, because the alternative of procuring security was not performed by procuring within a reasonable time renewals and security, said alternative under § 4779, Comp. Laws 1913, ceased, and defendants became liable absolutely to pay as upon a guaranty of payment. The fallacy in this position is that it necessitates an entire change of the nature and legal effect of the contract, which is to be construed and determined as of the time of contracting, and not retrospectively, dependent on how it was performed or violated, no reference to practical construction being here had. Whether it be a contract guarantying payment, or merely guarantying collection, it is the same now as when executed, and if then it only guaranteed collection, it can never be held to guarantee payment simply because in terms it granted an alternative. That an alternative was given does not authorize the addition, by construction, of a penalty not contracted for. To do so

would be nothing short of making a contract for the parties which they have not seen fit to make for themselves.

There are various rules for construction and interpretation of guaranties. In Bell v. Bruen, 1 How. 169, 11 L. ed. 89, it is said that construction of a guaranty should be adopted "which, under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct to the parties." Ibid.; Lawrence v. McCalmont, 2 How. 450, 11 L. ed. 335; London & S. F. Bank v. Parrott, 125 Cal. 482, 73 Am. St. Rep. 64, 58 Pac. 164; Crane Co. v. Specht, 39 Neb. 132, 42 Am. St. Rep. 562, 57 N. W. 1015; Swift & Co. v. Jones, 135 Fed. 438. This is at least a safe and sane general proposition. Also it should be remembered that a guaranty is an engagement to pay the debt of another, and "there is certainly no reason for giving it an expanded signification or liberal construction beyond the fair import of the terms. . . . It is to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety. The presumption is, of course, to be ascertained from the facts and circumstances accompanying the entire transaction." 6 Enc. U. S. Sup. Ct. Rep. 584 E.

Search has been made in vain for a guaranty identical or closely analogous in terms. An exhaustive reading of authority convinces that each case must be decided under its peculiar facts, and largely upon general principles. It was well said in White's Bank v. Miles, 73 N. Y. 335, 29 Am. Rep. 157, at page 161: "Precedents do not help much in the construction of such instruments. The dividing line between those which are limited [guaranties] and those which are continuous is not always plainly seen, and cases apparently quite similar are sometimes found upon one side of it and sometimes upon the other. Where there is uncertainty upon the face of the instrument, its construction must necessarily depend upon the circumstances which throw light upon it, and hence the diversity." Exactly our conclusions. A few of the many adjudicated guaranties may be briefly set out to illustrate the difficulty of applying precedent. For instance, in Hotchkiss v. Barnes, 34 Conn. 28, 91 Am. Dec. 713, the guaranty reads: "You can let Day have what goods he calls for, and I will see that the same are settled for. Yours truly, H. S. Barnes." Held, under the explanatory circumstances, to be a continuing guaranty. On the contrary, in the

guaranty in S. Hamill Co. v. Woods, 94 Iowa, 246, 62 N. W. 735, the following is held not to be a continuing guaranty: "Messrs. Hamill & Co. Keokuk, Iowa: I agree to be responsible personally for any goods you may let Robert Breed have, and I will see the same is paid the same as if it was my own debt. [Signed] Annie Woods." This language was held "not so clear as to indicate its meaning conclusively," and parol evidence was allowed to show the circumstances under which it was executed. Likewise in the recent case of Merchants' Nat. Bank v. Cole, 83 Ohio St. 50, 93 N. E. 465, Ann. Cas. 1912A, 779, the following was held to be not necessarily a continuing guaranty, and explainable by parol as to the circumstances and the subject-matter. It would seem to be equally, if not more, clear, certain, explicit, and definite than the one in this contract. The guaranty referred to reads: "I hereby guarantee the payment of all notes of F. E. & G. H. Cole held by the Merchants National Bank; also all renewals of same, or any new loans made to either F. E. or G. H. Cole by the said bank. [Signed] Lucy A. Cole." It was held to not necessarily include certain new loans made by said bank to said parties. The annotator to Ann. Cas. 1912A, 779, has collected and reviewed scores of cases. And under our own decisions in case of any doubt as to the construction to be adopted, proof of explanatory circumstances is permitted. Foster County State Bank v. Hester, 18 N. D. 135, 119 N. W. 1044, Hazelton Boiler Co. v. Fargo Gas & Electric Co. 4 N. D. 365, 61 N. W. 151. In the latter case the court explicitly held the contract to be so clear and unambiguous as to obviate the necessary for extrinsic evidence to understand it, but nevertheless it was held to be explainable by the surrounding facts and circumstances. This is perhaps an extreme holding, but it illustrates the reluctance to construe a contract from its terms alone, where any ambiguity arises, or where it is "in any respect ambiguous or uncertain." Comp. Laws 1913, § 5909. See also §§ 5896–5907, Comp. Laws 1913.

But if there be ambiguity in this contract, it is as to whether the paragraph in question amounts to any guaranty whatever. If judicial notice be taken of banking usages, and rules of the state banking department relative to bad debts. (Comp. Laws 1913, §§ 4146–5191), in connection with the time of the year and that the bank was necessarily to be kept a solvent and going institution, grave doubt might arise as to whether any guaranty whatever was understood to be taken or

given by the agreement "to have all bills receivable, past due or payable on demand, either renewed and secured or paid." But counsel for respondent have simplified the question by conceding that so far as this case is concerned it may be taken as a guaranty of collection, and have briefed upon that basis. The guaranty is certainly not one of payment.

In the brief of appellants, it is urged that "no sane business man would either buy the $8,000 worth of capital stock of this bank, or take it as a gift, unless such an assurance as a guaranty of payment of past-due paper was made." It is unnecessary to speculate as to what should have been contracted for, to determine what has actually been agreed to. It may be remarked, however, that the written contract provides considerable security to the purchasers by its stipulation that they may pay the purchase price of these eighty shares of capital stock by delivering defendants $8,000 face value of such bills receivable of the bank as the purchasers should select and turn over to the sellers as the purchase price. Needless to say, no gilt-edged securities would be delivered to the sellers as said purchase price, if there be worthless paper to turn back. But this was not all. The contract further provides that $10,450 in commission notes and mortgages securing the same should be delivered with the bank on the purchase; $18,450 of indemnity is thus taken. Had more been sought, it should have been plainly stipulated for. That the purchasers knew how to prepare a contract and express themselves therein is evident by these very provisions. It is but reasonable to conclude that had there been any intent either to exact or to give any such broad guaranty as one of payment of all past-due and demand paper remaining unsecured, usual banking custom would have been followed, and plain and unequivocal guaranties of payment taken and given, either by contract or by indorsement upon said commercial paper.

The contract amounts in legal effect to but a guaranty of collection. It affords no basis for a recovery as upon a guaranty of payment. Dismissal of this action is affirmed.

COOLEY, District Judge, dissenting. It is naturally with some hesitation that I dissent from the majority opinion of the court; but a careful consideration of the facts and the law applicable thereto has convinced me that the plaintiffs should prevail, and this conviction has not

been shaken by the majority opinion. It is therefore with all due deference to the majority that I presume to set out, somewhat in detail, my views of the law and the facts in this case, with some reference to the reasons assigned by the majority for their adverse conclusion.

The material facts in this case are not disputed. At the time of the commencement and trial of this action, the Citizens State Bank of Rugby, North Dakota, was a banking corporation organized under the laws of this state, and having a capital stock of $10,000. At and prior to the execution of the contract hereinafter mentioned, the defendant J. H. Lockwood was the president, and the defendant A. M. Iverson was the vice president of the said bank. Together they owned and controlled $8,000 of the capital stock. Being desirous of procuring for himself and his associates a controlling interest in said bank, the plaintiff Harold Thorson entered into negotiations therefor with the defendants, which negotiations culminated in the following written agreement:

'This agreement, made and entered into this 29th day of September, A. D. 1911, by and between A. M. Iverson and J. H. Lockwood, of Rugby, North Dakota, now owners of the Citizens State Bank of Rugby, parties of the first part, and Harold Thorson, of Drake, North Dakota, party of the second part,

Witnesseth, That the said parties of the first part, for and in consideration of the sum of eight thousand dollars, to them in hand paid in Bills Receivable of the said bank, such as the party of the second part may select, have bargained and sold unto the said party [of the second part] Eighty (80) shares of capital stock of the said Citizens State Bank of Rugby, North Dakota, hereby agree to deliver to the said party of the second part commission notes and mortgages securing the same to the amount of $10,145.

The said parties of the first part further agree to transfer their good will to the said bank and not to engage in any banking business in the city of Rugby, North Dakota, for a period of five years, nor to make any real estate loans for sale or on commission.

The said parties of the first part further agree to have all Bills Receivable now in said bank, which are past due or payable on demand, either renewed and secured or paid.

In Testimony Whereof, etc., etc.

At the time of the execution of the contract there were in said bank bills receivable that were past due and payable on demand amounting to approximately $25,000. Of these bills receivable, there remained at the time of the trial about $6,600 that had not been renewed and secured or paid.

Basing their cause of action upon the following provision of the contract: "The said parties of the first part further agree to have all bills receivable now in said bank, which are past due or payable on demand, either renewed and secured or paid," the plaintiff, in April, 1913, instituted this action against the defendants to recover as damages, for defendants' failure to comply with this agreement, the amount due on the notes that were past due and payable on demand, held by said bank at the time of the sale, and which, at the commencement of the action, had not been renewed and secured or paid. In their complaint the plaintiffs offered to indorse and deliver all of said notes to the defendants, and to assign and deliver to them any security held in connection with any of said notes upon payment to plaintiffs by defendants of the amount due. The issues were tried to a jury, and at the conclusion of the testimony both sides moved for a directed verdict, whereupon the lower court discharged the jury, and upon findings of fact and conclusions of law subsequently made, judgment was duly entered for defendants.

This appeal involves the interpretation of the following clause of said contract: "The said parties of the first part further agree to have all bills receivable now in said bank, which are past due or payable on demand, either renewed and secured or paid."

It would seem that the majority of the court have entirely misconceived the nature of the agreement contained in the paragraph under consideration. Now, an alternative obligation is defined as "an obligation stipulating for the doing of one or the other of two things, and discharged by the performance of either." By the terms of this agreement the defendants agreed to have certain bills receivable either renewed and secured or paid. The obligation of the defendants was therefore an alternative obligation,—to effect the performance of either one of two separate and distinct acts, the performance of either one of which would satisfy the terms of the agreement. The situation is not different from what it would be had the defendants, in one part of the contract,

agreed to have the notes renewed and secured, and in another and subsequent part of the contract, agreed that in the event they did not have the notes renewed and secured, they would have them paid. Nor is it different from what it would be had the agreement been framed so as to read: "The said parties of the first part further agree to have all bills receivable . . . either paid or renewed and secured." The paragraph in question contains two separate and distinct agreements. They are both principal agreements. Neither is secondary or subordinate to the other. It is therefore by no means a fair test of this question to eliminate from the clause under consideration the words, "or paid." As before stated, the obligation assumed by the defendants is in the alternative.

Comp. Laws 1913, § 5778 (Rev. Codes 1905, § 5222) provides: "If an obligation requires the performance of one of two acts in the alternative, the party required to perform has the right of selection, unless it is otherwise provided by the terms of the obligation."

Comp. Laws 1913, § 5779 (Rev. Codes 1905, § 5223) provides: "If the party having the right of selection between alternative acts does not give notice of his selection to the other party, within the time, if any, fixed by the obligation, . . . or if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party."

Comp. Laws 1913, § 5917 (Rev. Codes 1905, § 5361) provides: "If no time is specified for the performance of any act required to be performed, a reasonable time is allowed."

A reasonable time had elapsed between the 29th day of September, 1911, and April, 1913, for the performance by the defendants of any obligation assumed by them under the terms of the agreement, and no selection having been made by the defendants during that time, the right of selection passed to the plaintiffs. It was therefore optional with the plaintiffs to bring an action for damages for failure to have the notes renewed and secured, or for failure to have the notes paid. The plaintiffs have chosen the latter alternative.

The contract, therefore, which plaintiffs are seeking to enforce in this action, pursuant to such alternative, is, when reduced to its lowest terms, "We agree to have the designated notes paid within a reasonable time." It is the agreement to have the notes paid that is the basis of

this action, and it would seem that in determining the proper interpretation to be given to this agreement, it would be a strange process of reasoning that would permit of an elimination of the agreement itself from any consideration whatsoever.

What the legal liability of defendants would be under an agreement to have the notes renewed and secured only, is entirely beside the question in this case, and the solution of that question, whatever it may be, is by no means conclusive of plaintiffs' rights under the agreement to have the notes paid.

The majority of the court have assumed that the only undertaking by the defendants was to have the notes renewed and secured. They say: "The words 'or paid' adds nothing to the legal import of the contract. The omitted words were nevertheless understood as necessarily an implied part of the contract. How, then, can the situation be changed when the parties have but mentioned such alternative, instead of leaving it to implication? This fairly tests the question, and concludes it against the plaintiff." In other words, the court, in effect, says that this contract is to be construed as though it read: "We agree to have the designated notes renewed and secured, *unless they are paid.*" Such is not the agreement. The defendants have made two specific agreements. One agreement is to have the notes renewed and secured, and the other is to have the notes paid. These two agreements are united by the disjunctive "or," thus indicating an alternative obligation.

The majority of the court have not only misconceived the nature of the agreement, but they seem to have misunderstood the contentions of the parties. Counsel for both parties have disclaimed that this contract is strictly one of guaranty, but plaintiffs claim that the paragraph under consideration constitutes simply a contract on the part of the defendants to procure, or cause one of either two things to be done, one of such things being the payment of money; that by virtue of their selection to sue for a breach of the agreement to have, procure, or cause money to be paid, they are entitled to recover the full amount of the indebtedness which the defendants agreed to have, procure, or cause to be paid. At no time have plaintiffs claimed that the agreement to have the notes paid was strictly a guaranty of payment. The contention of the defendants is that the contract is "intended to be in the nature of an

indemnity against loss," or a "warranty that the makers of the notes have the cash or resources with which to pay them; in short, that they are solvent;" and that respondents are liable only as upon a guaranty of collection; that appellants' right of action for any breach of this agreement, is one for damages only, after exhausting all legal remedies against the makers, or upon alleging and proving that the makers are insolvent and the notes uncollectible; and the lower court so held.

In the majority opinion it is stated that "defendants insist that the construction should be that they will have said paper renewed and secured or paid by the makers." This is not, in any sense, a construction of the contract. It is simply a repetition of the words of the agreement, with the addition of the words, "by the makers," which words would naturally be implied from the context. It may be conceded that this was the agreement that was made, but it does not follow that the legal effect of the words so used and implied is not as contended for by plaintiffs. The majority of the court concede that if this is the agreement, the defendants would be responsible "to the amount of the actual damage any breach of their contract in failing to procure the makers to pay the notes may have caused plaintiffs." This is a correct statement of the rule of damages, but I cannot agree that the damages are to "be measured by the difference between the actual value of the notes and the amount due upon them, together with the necessary expense of endeavoring to enforce payment." If the agreement is strictly, or in effect, a guaranty of collection, the measure of damages would be as stated in the majority opinion. But I am unable to perceive upon what theory this agreement can be construed as a guaranty of collection.

No particular form of expression is a necessary prerequisite to the creation of a contract of guaranty. If the words used evidence an intent on the part of the promisor to answer for the debt of another, the promise constitutes a guaranty, and it may be conditional, or it may be absolute. A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor. A promise to answer for the debt of another may constitute a guaranty of its collection, or it may constitute a guaranty of its payment. A guaranty of collection imposes upon the guarantee the duty of exhausting his legal remedies against the debtor, or of showing that such legal proceedings would be unavailing, and is therefore termed a conditional

guaranty. We look in vain for any expression in the contract itself, or any facts or circumstances surrounding the transaction, tending in the slightest degree to show that the parties to this agreement intended the particular clause under consideration to constitute a guaranty of collection, or any form of indemnity against loss importing the performance by plaintiffs of any condition precedent to the liability of the defendants. The defendants, Lockwood and Iverson, in agreeing to have the notes renewed and secured or paid, themselves assumed an unconditional obligation to effect through their own efforts, unaided by the plaintiffs, either the renewal or the payment of the notes by the makers. Under the terms of this agreement, no obligation was assumed by, or imposed upon, the plaintiffs to exert any effort to have the notes either renewed and secured or paid; but the obligation to have one or the other of these two things done was assumed by, and imposed upon, the defendants alone. It is easy to conceive of conditions under which an attempt by the plaintiffs to collect the notes by legal process or otherwise might be such an interference with the performance of the obligation assumed by the defendants as to constitute a complete defense to any attempt on the part of the plaintiffs to recover for any breach of the contract by the defendants. In the majority opinion it is stated that "it is unnecessary to speculate as to what should have been contracted for, to determine what has actually been done." I will go a step further, and say that it is not only unnecessary, but it is highly improper. For this reason it is not only unnecessary, but it is improper, to consider whether, in the making of this agreement, usual banking custom had or had not been followed, or what should have been the form of the contract had there been an intent to exact or give as broad a guaranty as one of payment.

Nor is the consideration agreed to be paid by plaintiffs for the eighty shares of stock a proper matter to be considered in determining the meaning of this unambiguous agreement. There is no evidence to show that the contract was an improvident one from the point of view of either party, or that either attempted to, or did, overreach the other. The defendants knew the character of the paper they were selling to the plaintiffs as well as, if not better than, the plaintiffs, and that the extent of the liability assumed by defendants was not as great as it would appear to be from the amount of past-due and demand paper

that was on hand at the date of the contract is evidenced by the fact that at the commencement of this action only about one fourth of the paper had not been renewed or paid. Moreover, from all that appears, the defendants, by guarantying the past-due and demand paper, assumed no greater hazard than that which they escaped by unloading the bank upon the plaintiffs. In other words, the language of the contract itself is to govern its interpretation, and we have no right to indulge in speculation, conjectures, or inferences not supported by any record in the case.

The interpretation to be given to the contract under consideration is important only in determining the measure of damages, and it is immaterial whether this agreement is termed a guaranty of payment, or, as urged by the majority opinion, simply a contract by the defendants to have the notes paid by the makers. In either case the damages recoverable must be the same in amount. My one personal opinion is that the agreement constitutes substantially a guaranty of payment.

The words, "I hereby guarantee the payment of the within note," constitute a guaranty of payment. Northern State Bank v. Bellamy, 19 N. D. 509, 31 L.R.A.(N.S.) 149, 125 N. W. 188. It is difficult to perceive any difference, in legal effect, between these words, and "I hereby agree to have the within note paid." In either case, the legal effect of the agreement is that the note shall be paid, either voluntarily, or through the procurement of the promisor, by the maker or by some other person in his behalf. "Guaranty is an undertaking by one person that another shall perform his contract or fulfil his obligation, and that in case he does not do so, the guarantor will do it for him. A guarantor of a bill or note is one who engages that the note shall be paid." Ibid. When defendants agreed to have the notes paid, they engaged that the notes "shall be paid." The obligation is even stronger than the ordinary guaranty of payment; for defendants have not only engaged that the makers shall pay the notes voluntarily, but they have promised that they will themselves cause the makers to pay.

In the case of Robinson v. Gilman, 43 N. H. 485, the court say: "A brief statement of set-off was, in substance, that in consideration that said Gilman would not bring a suit on two promissory notes due to him from one Rollins, and summon said Robinson as trustee of said Rollins, he would procure said notes to be settled and paid to said

Gilman. . . . Though not in terms a guaranty of the two promissory notes described in the set-off, it was in substance such guaranty,—a contract to procure the notes to be paid. The rule of damages in such a case can only be the amount due on the notes for principal and interest, —an amount to be ascertained by simple computation."

In Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279, it was held that "Give John a little more time, and I will see you get your money,"— was a guaranty of payment.

In Meldrum v. Kenefick, 15 S. D. 370, 89 N. W. 863, it was held that the statement, "I will see that you get your money," was an original undertaking for the payment of the debt.

In McGowan Commercial Co. v. Midland Coal & Lumber Co. 41 Mont. 211, 108 Pac. 655, it was held that the oral statement, "You let G. have what he requires,—what he needs,—and I will see that it is paid,"—was an original undertaking for the payment of the debt.

Also in Taylor v. Ross, 3 Yerg. 330, the court held the written promise, "We bind ourselves to see the within note paid," to be a guaranty of payment.

Eliminating the provision for the renewal and securing of the notes, the agreement of the respondents is not materially different from those construed in the foregoing cases.

In the writer's opinion, the defendants, upon their failure to effect the renewal or payment of the past-due and demand notes within a reasonable time, became absolutely liable, upon a guaranty of payment, for the full amount due on said notes.

BRUCE, J. I concur in the above dissenting opinion.

On Petition for Rehearing (Filed January 7, 1916).

FISK, Ch. J. In voting to deny appellants' petition I desire to add the following statement of my views: As I construe the contract, it is not a guaranty either of collection or of payment, and in this I fully agree with counsel on both sides. It is rather in the nature of an indemnity to Thorson, who was purchasing stock in the bank, against loss on account of this large amount of past-due or demand bills receivable in the bank, and to this end Iverson and Lockwood agreed with

Thorson to have such bills receivable either renewed and secured, or paid. It amounts, in effect, therefore, to a promise to collect such of these bills receivable as they should fail to get renewed and secured, and, as above stated, the intention was to protect Thorson against loss; and while, perhaps, not strictly an indemnity, it is such in legal effect, and was, I believe, thus intended. I disagree with appellants' counsel only as to the correct measure of damages for the breach of such promise. He contends for the same measure of damages as would obtain if it were an absolute guaranty of payment. This, I think, is unsound. Concededly, the parties did not intend a guaranty of payment, and why should they be held to a liability to be measured the same as under such a guaranty? They did not agree to pay these bills receivable, but merely in effect to collect them from the makers, and, as I view it, their liability is no greater than it would have been if they had guaranteed their collection. I fully agree with respondent's counsel that the true measure of damages for the breach is the same as for a breach of a guaranty of collection.

WALTER A. McDONALD v. M. B. FINSETH, and C. H. Langley, E. G. Langley, and Ernest Engel.

(155 N. W. 863.)

Third person — promise for benefit of — action by — to enforce — consideration — knowledge of such promise — not necessary.

1. When one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, even though the consideration does not run directly from him, and even though at the time he knew nothing of the promise to pay him.

Note.—The remark of Judge Marshall in Tweeddale v. Tweeddale, 116 Wis. 517, 61 L.R.A. 509, 96 Am. St. Rep. 1003, 93 N. W. 440, that there is probably as much confusion in the judicial holdings as to the right of a third person to sue on a contract made for his benefit as on any question of law that can be mentioned, is borne out by the variety of views and decisions to be found in the reported cases, which are exhaustively reviewed in notes in 25 L.R.A. 257, and 2 L.R.A.(N.S.) 783.

Grantee — mortgaged premises — purchase subject to mortgage — payment assumed — liable for deficiency on foreclosure — grantor personally liable.

2. The grantee of mortgaged premises who purchases subject to a mortgage which he assumes and agrees to pay will be held liable for a deficiency arising on a foreclosure and sale, even though his grantor is not personally liable for the payment of the mortgage.

Mortgage — mortgagor selling property — subject to mortgage — subsequent grantees — assuming payment of mortgage — liable for full amount of mortgage.

3. Where A agrees to loan B $2,000, and takes a note and mortgage therefor, and at the time fails to pay to B the full sum of $2,000 on account of a shortage of funds, and before he can pay the same the mortgagor sells the property to C, subject to said mortgage, though no agreement to pay or assume the same is given in such deed, and A and B then agree that A shall collect the full sum of $2,000 on the mortgage when it falls due, and shall pay the balance over what he had actually paid to B, and which is $600, when the money is so collected, and gives to B a written obligation binding himself to pay the said sum of $600 and to collect the same, and the land is afterwards sold by C to subsequent grantees who specifically agree to assume and pay the said mortgage, A may, on a foreclosure of the mortgage against the last grantee, collect the full sum of the said mortgage note, namely, $2,000.

Cotenant — not allowed to assert ignorance of terms of deed — assuming payment of mortgage — delivery of deed — possession of premises — without questioning terms of deed — interest — payment on.

4. A cotenant will not be allowed to assert ignorance of the terms of a deed by which he, together with his cotenant, assumes and agrees to pay a mortgage debt on the land, on the ground that the deed was not delivered to him, but to his cotenant, and he has had no knowledge of its terms, and his cotenant had no authority to agree to such assumption, when, with full knowledge of the fact that the same had been received and had been recorded, he remains in the possession of the premises, together with his cotenant, for nearly three years, without questioning the terms of the deed or the authority of his cotenant to receive the same, and himself pays interest on the indebtedness secured by the mortgage, which was so assumed during such time.

Opinion filed December 14, 1915. Rehearing denied January 8, 1916.

Appeal from the District Court of Burleigh County, *Nuessle*, J. Action to foreclose a mortgage and for a deficiency decree. Judgment for plaintiff. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an action for the foreclosure of a mortgage and for a deficiency decree, and comes before us for a trial *de novo* after judgment being rendered in the trial court in favor of the plaintiff. The question at issue is whether the defendant M. B. Finseth assumed the mortgage, and, even if he did, whether the present plaintiff, Walter A. McDonald, can hold him personally liable for the deficiency decreed against him. The mortgage which the plaintiff seeks to foreclose was executed on January 31, 1910, by one Charles H. Woodbury and wife and was given to secure a note of the face value of $2,000. It appears, however, that the amount which was actually paid to the Woodburys was only $1,400, the explanation for this transaction being that at the time of the loan McDonald did not have the full $2,000, and paid the Woodburys only $1,400; that shortly thereafter and on March 4, 1911, and before the payment of the balance, the Woodburys transferred the property to one Ernest Engel and that it was therefore agreed that McDonald should collect the whole $2,000, and after he had collected the same should pay the $600 to them, the plaintiff testifying that he had executed an obligation which bound him to pay this balance and to collect the amount. This deed from the Woodburys to Ernest Engel was for a recited consideration of $10,525. There was in it no mention of the plaintiff's mortgage except a covenant that "the premises are free from all encumbrances excepting a mortgage of $2,000 to Walter A. McDonald." There was no specific agreement to pay the mortgage on the part of the grantee, and there were the usual covenants of title and of quiet possession. No parol evidence was introduced on the trial to show any oral or collateral agreement to pay this mortgage, or to show that its payment constituted part of the purchase price. Later, and on March 27, 1911, Engel and his wife executed a deed of the premises for the alleged consideration of $10,500 to C. H. Langley and E. J. Langley. This deed contained the provision that "the premises are free from all encumbrances except a mortgage for $2,000 *which second parties (the Langleys) assume and agree to pay with accrued interest from February 1, 1911.*" Later and on June 1, 1911, the Langleys executed a warranty deed of the premises for the recited consideration of $10,500 to the defendant and appellant, M. B. Finseth, and to H. A. Hallum. This deed contained in the covenant against encumbrances

the following clause: "that the premises are free from all encumbrances except a mortgage for *$2,000 which second parties (Finseth and Hallum) agree to pay with accrued interest from February 1, 1911.*" It appears that this deed was delivered only to the grantee Hallum, and that appellant, Finseth, did not actually know of the assumption clause contained therein until later, when he found it upon the records of Burleigh county. The trial court found the amount due upon the indebtedness to the plaintiff, McDonald, to be the sum of $2,350, with interest at 10 per cent from January 31, 1913, and, the mortgage containing the usual deficiency clause, adjudged and decree that "in case the property shall not bring a sum sufficient on the sale thereof to pay the entire debt, interest, and taxes, that the plaintiff shall have and recover a deficiency judgment against the defendant, M. B. Finseth, if any there be." From this judgment plaintiff has appealed, and asks for a trial *de novo*. This contention is: (1st) That there was no privity of contract between himself and the mortgagee, McDonald, and therefore no assumption of the mortgage by him; (2d) that the mortgagee, McDonald, only paid to the Woodburys, the original mortgagors, the sum of $1,400, and that in no case can he be held liable for the difference between the sum of $1,400 and $2,000, which the mortgage ostensibly secured. He argues that his liability can only be founded on the assumption clause in the deed to him from the Langleys; that the covenants of the Woodburys, the original mortgagors and grantors, to Ernest Engel, only stated that the land was free from all encumbrances excepting a mortgage of $2,000, to W. A. McDonald; that this was merely a limitation upon the covenant of title and quiet possession made by the grantor, and in no way constituted an assumption of the mortgage or an agreement to pay the same by the grantee, Engle; and that there is in the record even, no evidence that the amount of the mortgage was deducted from the purchase price and entered into the consideration for the transfer.

S. E. Ellsworth and *F. H. Register,* for appellant.

"An express exception contained only in the covenant against encumbrances, in a deed to real property, of a mortgage upon the land, in the absence of qualifying words making the grant of the deed subject to such encumbrance, or making the restriction upon the covenant

against encumbrance apply also to the covenant of warranty, or generally to all the covenants of the deed, does not except such mortgage from the covenant of warranty." Smith v. Gaub, 19 N. D. 337, 123 N. W. 827; Fry v. Ausman, 29 S. D. 30, 39 L.R.A.(N.S.) 150, 135 N. W. 708, Ann. Cas. 1914C, 842.

"A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." Comp. Laws 1913, § 5841; King v. Whitely, 10 Paige, 465; Cashman v. Henry, 55 How. Pr. 234; Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440; Wilbur v. Warren, 104 N. Y. 192, 10 N. E. 263; Lorillard v. Clyde, 122 N. Y. 498, 10 L.R.A. 113, 25 N. E. 917; Wager v. Link, 134 N. Y. 122, 31 N. E. 213; Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49; King v. Sullivan, 31 App. Div. 549, 52 N. Y. Supp. 130; Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Pardee v. Treat, 82 N. Y. 385; Wager v. Link, 150 N. Y. 549, 44 N. E. 1103; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195.

"A party suing must show that a contract to which he is not a party has been made for his benefit, in order to maintain his action." Parlin v. Hall, 2 N. D. 473, 52 N. W. 405; Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100; Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609; Fry v. Ausman, 29 S. D. 30, 39 L.R.A.(N.S.) 150, 135 N. W. 710, Ann. Cas. 1914C, 842; Vrooman v. Turner, 69 N. Y. 284, 25 Am. Rep. 195; King v. Whitely, 10 Paige, 465; Brown v. Stillman, 43 Minn. 126, 45 N. W. 2; Nelson v. Rogers, 47 Minn. 103, 49 N. W. 526; Jefferson v. Asch, 53 Minn. 446, 25 L.R.A. 257, 39 Am. St. Rep. 618, 55 N. W. 605; Clement v. Willett, 105 Minn. 267, 17 L.R.A. (N.S.) 1094, 127 Am. St. Rep. 562, 117 N. W. 491, 15 Ann. Cas. 1053; Kramer v. Gardner, 104 Minn. 370, 22 L.R.A.(N.S.) 492, 116 N. W. 925; Wood v. Johnson, 117 Minn. 267, 135 N. W. 747.

The liability of a grantee who assumes the payment of a mortgage depends upon the personal liability of his immediate grantor. If the grantor is not liable, the mortgagee cannot claim any deficiency from such grantee. Morris v. Mix, 4 Kan. App. 654, 46 Pac. 58; New England Trust Co. v. Nash, 5 Kan. App. 739, 46 Pac. 987; Skinner v. Mitchell, 5 Kan. App. 366, 48 Pac. 450; Ward v. De Oca, 120 Cal. 102, 52 Pac. 130; Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609; Y. M. C. A. v. Croft, 34 Or. 106, 75 Am. St. Rep. 568, 55 Pac. 439;

Eakin v. Schultz, 61 N. J. Eq. 156, 47 Atl. 274; Norwood v. De Hart, 30 N. J. Eq. 412; Wise v. Fuller, 29 N. J. Eq. 257; Crone v. Stinde, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907; Goodenough v. Labrie, 206 Mass. 599, 138 Am. St. Rep. 411, 92 N. E. 807; Willard v. Wood, 135 U. S. 309, 34 L. ed. 210, 10 Sup. Ct. Rep. 831; 27 Cyc. 1355, 1356; Wiltsie, Mortg. Foreclosure, § 227; 9 Enc. Pl. & Pr. 469.

M. C. Freerks, for respondent.

"The contract by which a grantee assumes the payment of existing encumbrances is separate from the conveyance. It may be, and often is, embodied in the deed; but it may be by separate writing, or may rest entirely in parol." Moore v. Booker, 4 N. D. 549, 62 N. W. 607; Wright v. Briggs, 99 Ind. 563; Merrman v. Moore, 90 Pa. 78; Lamb v. Tucker, 42 Iowa, 118; Winans v. Wilkie, 41 Mich. 264, 1 N. W. 1049; Wilson v. King, 23 N. J. Eq. 150; Johnson v. Harder, 45 Iowa, 677; Ross v. Kennison, 38 Iowa, 396; Thompson v. Bertram, 14 Iowa, 476; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Douglass v. Wells, 18 Hun, 88; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650; Conover v. Brown, 29 N. J. Eq. 510; Jones, Mortg. 758, cases cited in notes; McArthur v. Dryden, 6 N. D. 438, 71 N. W. 125; Williams v. Naftzger, 103 Cal. 438, 37 Pac. 411; Alvord v. Spring Valley Gold Co. 106 Cal. 547, 40 Pac. 27; Laderoute v. Chale, 9 N. D. 336, 83 N. W. 218; Watts v. Welman, 2 N. H. 458; Allen v. Lee, 1 Ind. 58, 48 Am. Dec. 352; Medler v. Hiatt, 8 Ind. 171; Pitman v. Conner, 27 Ind. 337; Fitzer v. Fitzer, 29 Ind. 468; Blood v. Wilkins, 43 Iowa, 567; Wachendorf v. Lancaster, 66 Iowa, 458, 23 N. W. 922; Becker v. Knudson, 86 Wis. 14, 56 N. W. 192; Burbank v. Gould, 15 Me. 118; Laudman v. Ingram, 49 Mo. 212; Preble v. Baldwin, 6 Cush. 549; Brackett v. Evans, 1 Cush. 79; Sidders v. Riley, 22 Ill. 110; Corbett v. Wrenn, 25 Or. 305, 35 Pac. 658.

The liability of a grantee who assumes prior encumbrances depends upon his contract, rather than upon the liability of his grantor. Harberg v. Arnold, 78 Mo. App. 237; Heim v. Vogel, 69 Mo. 529; Birke v. Abbott, 103 Ind. 1, 53 Am. Rep. 474, 1 N. E. 485; Hare v. Murphy, 45 Neb. 809, 29 L.R.A. 851, 64 N. W. 211; Little v. Thoman, 4 Ohio Dec. Reprint, 513; McKay v. Ward, 20 Utah, 149, 46 L.R.A. 623, 57 Pac. 1024; Cobb v. Fishel, 15 Colo. App. 384, 62 Pac. 625; Merriman v. Moore, 90 Pa. 78; Enos v. Sanger, 96 Wis. 150, 37 L.R.A. 862, 65

Am. St. Rep. 38, 70 N. W. 1069; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Bay v. Williams, 112 Ill. 91, 54 Am. Rep. 209, 1 N. E. 340; Hare v. Murphy, 45 Neb. 809, 29 L.R.A. 851, 64 N. W. 211; Shuler v. Hardin, 25 Ind. 386; Atherton v. Toney, 43 Ind. 211; Maher v. Lanfrom, 86 Ill. 513; Freeman v. Auld, 44 N. Y. 50; Hardin v. Hyde, 40 Barb. 435; Green v. Turner, 38 Iowa, 112; Greither v. Alexander, 15 Iowa, 470.

Such grantee so assuming or taking subject to a mortgage cannot be heard to dispute the amount and validity of the mortgage; nor can he set up duress, illegality of consideration, or coverture of one of the mortgagees. Foy v. Armstrong, 113 Iowa, 629, 85 N. W. 753; Willis v. Terry, 15 Ky. L. Rep. 753, 24 S. W. 621; Johnson v. Thompson, 129 Mass. 398; McNaughton v. Burke, 63 Neb. 704, 89 N. W. 274; Arlington Mill & Elevator Co. v. Yates, 57 Neb. 286, 77 N. W. 677; Pass v. Lynch, 117 N. C. 453, 23 S. E. 357; Mott v. Maris, — Tex. Civ. App. —, 29 S. W. 825; Washington, O. & W. R. Co. v. Cazenove, 83 Va. 744, 3 S. E. 433; First Nat. Bank v. Honeyman, 6 Dak. 275, 42 N. W. 771; Gage v. Cameron, 212 Ill. 146, 72 N. E. 204; Jehle v. Brooks, 112 Mich. 131, 70 N. W. 440; Strong v. Converse, 8 Allen, 557, 85 Am. Dec. 732; Drury v. Tremont Improv. Co. 13 Allen, 168; Weed Sewing Mach. Co. v. Emerson, 115 Mass. 554; Schley v. Fryer, 110 N. Y. 71, 2 N. E. 280; Corning v. Burton, 102 Mich. 86, 62 N. W. 1040; Hendricks v. Brooks, 80 Kan. 1, 133 Am. St. Rep. 186, 101 Pac. 622; Frick Co. v. Hoff, 26 S. D. 360, 128 N. W. 495; Kimm v. Wolters, 28 S. D. 255, 133 N. W. 277; Peasley v. McFadden, 68 Cal. 611, 10 Pac. 179.

Bruce, J., (after stating the facts as above). There is a decided conflict in the authorities upon the question which is before us, and some courts hold to the rule that the grantee of mortgaged premises who purchases subject to a mortgage which he assumes and agrees to pay will not be liable for a deficiency arising on a foreclosure and sale, unless his grantor is also liable, legally and equitably, for the payment of the mortgage, and that if there is a break anywhere in the chain of liability, all of the subsequent purchasers are without obligation in so far as the mortgagee is concerned, and that the promise of the last grantee only operates as an indemnity to his immediate grantor. See dissenting

opinion in McKay v. Ward, 20 Utah, 149, 46 L.R.A. 623, 57 Pac. 1024; Fry v. Ausman, 29 S. D. 30, 30 L.R.A.(N.S.) 150, 135 N. W. 710, Ann. Cas. 1914C, 842; Brown v. Stillman, 43 Minn. 126, 45 N. W. 2; Nelson v. Rogers, 47 Minn. 103, 49 N. W. 526; Vrooman v. Turner, 69 N. Y. 284, 25 Am. Rep. 195; King v. Whitely, 10 Paige, 465; Morris v. Mix, 4 Kan. App. 654, 46 Pac. 58; New England Trust Co. v. Nash, 5 Kan. App. 739, 46 Pac. 987; Skinner v. Mitchell, 5 Kan. App. 366, 48 Pac. 450; Ward v. De Oca, 120 Cal. 102, 52 Pac. 130; Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609; Y. M. C. A. v. Croft, 34 Or. 106, 75 Am. St. Rep. 568, 55 Pac. 439; Eakin v. Shultz, 61 N. J. Eq. 156, 47 Atl. 274; Norwood v. De Hart, 30 N. J. Eq. 412; Wise v. Fuller, 29 N. J. Eq. 257; Crone v. Stinde, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907; Goodenough v. Labrie, 206 Mass. 599, 138 Am. St. Rep. 411, 92 N. E. 807; Hicks v. Hamilton, 144 Mo. 495, 66 Am. St. Rep. 431, 46 S. W. 432; Willard v. Wood, 135 U. S. 309, 34 L. ed. 210, 10 Sup. Ct. Rep. 831; Wiltsie, Mortg. Foreclosure, § 227; 9 Enc. Pl. & Pr. 469.

If we adopt this rule, it is perfectly clear that the trial court erred in rendering judgment for the plaintiff and respondent, and that such judgment should be reversed, for, although it is perfectly clear from the record that in the deed from the Langleys to Finseth, Finseth assumed and agreed to pay the mortgage, and that in the deed from Engel to the Langleys, the Langleys also agreed to pay the mortgage, it is not clear that in the deed from the Woodburys to Engel, made any such agreement or assumption; that the chain was therefore broken, and according to the authorities cited there would be no privity of contract between the mortgagee, McDonald, and the defendant M. B. Finseth. We believe, however, that the cases mentioned are unsound in principle, and prefer to follow the other line of authorities, which appear to us to express the better rule. The cases cited by counsel for appellant, indeed, seem to totally ignore, in their conclusions at any rate, even if not in their reasoning, the well-established rule of law that when one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, even though the consideration does not run directly from him, and even though at the time he knew nothing of the promise to pay him. Hare v. Murphy, 45 Neb. 809, 29 L.R.A. 851, 64 N. W. 211; McKay v. Ward, 20 Utah,

149, 46 L.R.A. 623, 57 Pac. 1024; Rev. Codes 1895, § 3840; Crone v. Stinde, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907, overruling Hicks v. Hamilton, 144 Mo. 495, 66 Am. St. Rep. 431, 46 S. W. 432.

This is certainly the rule which has been announced by this court in construing § 3840, Rev. Codes 1895, which provides that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." In the case of McArthur v. Dryden, 6 N. D. 438, 71 N. W. 125, we said: "Section 3840, above quoted, contemplates a contract resting upon a present consideration passing between the two contracting parties, and with which the third party has no connection. One of the most common instances of such a contract arises when a mortgagor of real property sells the same, and the grantee, as a part of the consideration, promises and agrees with the mortgagor that he will pay the mortgage debt. Here the conveyance of the property furnishes the consideration for the grantee's promise, and the mortgagee may maintain an action against him. He becomes the principal debtor, and, while the mortgagor is not released, yet, as to the grantee, he stands in the position of a surety. Moore v. Booker, 4 N. D. 543, 62 N. W. 607."

And we are not unaware of the holding in Parlin v. Hall, 2 N. D. 473, 52 N. W. 405, and come to our conclusion in spite of that decision. In our minds, indeed, that case is in no way parallel with the one at bar, as in it the defendant did not agree to pay any debt, or to pay anyone, or to be directly responsible to any third party, but merely "to pay to said first party all the sums which he pays on said guaranty, or advances in pursuance of this agreement." This is clearly not a promise to pay any third party. In the case at bar the defendant Finseth expressly agreed in his deed from the Langleys to pay a mortgage of $2,000, and we must assume that this amount was deducted from the purchase price of the land. 3 Pom. Eq. Jur. 3d ed. § 1205; Maher v. Lanfrom, 86 Ill. 513; Freeman v. Auld, 44 N. Y. 50; Hardin v. Hyde, 40 Barb. 435; Fuller v. Hunt, 48 Iowa, 163; Green v. Turner, 38 Iowa, 112; Greither v. Alexander, 15 Iowa, 470; Gage v. Cameron, 212 Ill. 146, 72 N. E. 204; Jehle v. Brooks, 112 Mich. 131, 70 N. W. 440; Strong v. Converse, 8 Allen, 557, 85 Am. Dec. 732; Drury v. Tremont Improv. Co. 13 Allen, 168; Weed Sewing Mach. Co. v. Emerson, 115 Mass. 554; Schley v. Fryer, 100 N. Y. 71, 2 N. E. 280;

Corning v. Burton, 102 Mich. 86, 62 N. W. 1040. The case, indeed, is no different from one in which A, who is anxious to sell his land, and also to give his son a present, agrees to sell it to B for $4,000 on the consideration that $3,000 shall be paid to him in cash, and the $1,000 balance of the purchase price shall be paid to his son. The last assumption, indeed, is an original promise on the part of the grantee, Finseth, to pay the plaintiff, McDonald, a certain sum of money, and, under what we believe to be the better line of authorities, can be and is properly supported by the consideration afforded by the transfer of land to him, and by the fact that the amount of the mortgage was deducted from the purchase price, and this, even though there was no direct dealing between him and the plaintiff mortgagee. Crone v. Stinde, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907 (overruling Hicks v. Hamilton, 144 Mo. 495, 66 Am. St. Rep. 431, 46 S. W. 432, and Harberg v. Arnold, 78 Mo. App. 237, and Heim v. Vogel, 69 Mo. 529); Birke v. Abbott, 103 Ind. 1, 53 Am. Rep. 474, 1 N. E. 485; Hare v. Murphy, 45 Neb. 809, 29 L.R.A. 851, 64 N. W. 211; Little v. Thoman, 4 Ohio Dec. Reprint, 513; McKay v. Ward, 20 Utah, 149, 46 L.R.A. 623, 57 Pac. 1024; Cobb v. Fishel, 15 Colo. App. 384, 62 Pac. 625; Marble Sav. Bank v. Mesarvey, 101 Iowa, 285, 70 N. W. 198; Merriman v. Moore, 90 Pa. 78; Brewer v. Dyer, 7 Cush. 337; Enos v. Sanger, 96 Wis. 150, 37 L.R.A. 862, 65 Am. St. Rep. 38, 70 N. W. 1069; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Bay v. Williams, 112 Ill. 91, 54 Am. Rep. 209, 1 N. E. 340.

So, too, it is immaterial whether the original mortgagor in fact received from the plaintiff the full sum of $2,000 or not, or whether, as claimed by the defendant, $600 of the $2,000 has never been paid to the original mortgagor. The evidence shows that this $600 was not paid, but was kept back for a short time, with the consent of both parties, on account of the immediate lack of funds of the mortgagee, and that in the interim the original mortgagors, the Woodburys, deeded the property to Ernest Engel, such deed containing the provision that the premises were "free from all encumbrances except a mortgage of $2,000 to Walter A. McDonald." It is true that under the holding of this court in the cases of Smith v. Gaub, 19 N. D. 337, 123 N. W. 827, and Sommers v. Wagner, 21 N. D. 531, 131 N. W. 797, Ernest Engel, the grantee of the Woodburys, was not himself bound to pay the mortgage

debt, and that "an express exception contained only in the covenant against encumbrances in a deed to real property of a mortgage upon the land, in the absence of qualifying words making the granting of the deed subject to such encumbrance, and making the restriction upon the covenant against encumbrances apply also to the covenant of warranty, and generally to all the covenants in the deed, does not except such mortgage from the covenant of warranty." The deed from the Woodburys to Engel, indeed, contained the provision that the "parties of the first part (the Woodburys) for themselves, their heirs, executors and administrators, do covenant with the party of the second part, his heirs and assigns, that they are well seised of the land and premises aforesaid, and have good right to sell and convey the same in the manner and form aforesaid; that the same are free from all encumbrances except a mortgage of $2,000 to Walter A. McDonald; and the above bargained and granted land and premises in the quiet and peaceable possession of said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said parties of the first part will warrant and defend." It is also true that though it might have been shown by parol evidence that the amount of the $2,000 mortgage was deducted from the purchase price, there is no such proof in the record.

The fact remains, however, that the last grantee, the defendant Finseth, specifically agreed to pay the $2,000 mortgage, and the question before us is merely whether the plaintiff, McDonald, can, in a court of equity, take advantage of the promise and assert his claim. It is perfectly clear that he could have asserted it against the original mortgagors, the Woodburys; for the testimony shows that McDonald had agreed with these parties to collect the full amount of the mortgage note, and had given back to them an obligation by which he had agreed to pay them this amount of money when so collected. His testimony is as follows: "I do not believe I ever met the defendant Finseth,—may have seen him. The full amount, $2,000, was not paid by me, only $1,400, plus interest and an acknowledgment for $600. Instead of giving these people $600 in cash, to save making up a new set of papers, I gave them an acknowledgment that when the note would be paid I would give them $600, and that acknowledgment has never been taken up. I was not to pay it until this note of $2,000 was paid. That was

the understanding on this $600, which they have never received as a part of the $2,000, and has been drawing interest. If the note is not paid by the makers, I would say that the only consideration that secures this mortgage is $1,400. I gave them $1,400. I never gave them any other money. I have not paid anything on the $600 acknowledgment. I was not planning on paying it until the note here in question, of $2,000, was paid. All that I am out at the present time is $1,400 and interest and some costs. I have collected the interest on the $2,000 note up to January 31, 1913, I think. My agreement to pay the $600 has never been surrendered, and is still an outstanding obligation against me. I have collected $600 interest up to January 31, 1913—10 per cent."

Even though the deed from the Woodburys to Engel would preclude the idea that Engel agreed to assume and pay the mortgage debt, still the fact remains that the sum would be a lien upon the premises, and the title of the grantee would be subject thereto, and the presumption would be, even without proof, that that amount of money was deducted from the purchase price. Although, indeed, to quote the language in the opinion of Smith v. Gaub, supra, and in relation to the modification of the covenant of warranty by the statement that the premises were free from all encumbrances except the mortgage specified, "if plaintiff had wished or intended to except the mortgage from the covenant of warranty, he could easily have done so by making the restriction upon the covenant against encumbrances apply to all the covenants of the deed. In view of the ease with which it may be accomplished, it is inconceivable that a careful conveyancer in a document so formal and important as a deed should fail to make the exception in some such manner." This court must, nevertheless, take judicial notice of the well-established customs of business and trade, and it will not be presumed, in the absence of proof, that any person would take a deed to land which was subject to a mortgage without deducting such amount from the purchase price, nor that he would rely entirely on the covenants of warranty of his grantor to protect his purchase. The fact, indeed, that the interest on the full $2,000 was paid up to the 31st day of January, 1913, and partly by the defendant himself, adds emphasis to this presumption. Whether or not the plaintiff had paid to his original mortgagor the full amount of the mortgage note, indeed, is a matter

which lies between such original mortgagor and the plaintiff. So far as the defendant in this action is concerned, and his immediate grantor, none of such parties can be held to have paid their debts or complied with the provisions of their agreements of purchase until they have paid the $2,000; and since in their deeds they expressly agreed to assume and pay the mortgage, under all of the authorities the presumption would be that the full amount was deducted from the purchase price, and that the same was retained by them for the very purpose of paying the same.

They had, in short, agreed to pay this debt to the grantors in a certain manner, and this included the paying of $2,000 and interest to the owner of the mortgage; and we can see no reason why these contracts were not valid and could not be enforced.

Nor is there any merit in the contention that the deed was not delivered to the defendant Finseth, but to his cotenant, H. A. Hallum, and that said cotenant had no authority to obligate the defendant Finseth to pay such mortgage, or to accept a deed containing such clause. This point was mentioned in the oral argument, but is not suggested in the brief. If it had been, the answer to it is that the defendant Finseth himself testified that he knew the property had been deeded to himself and his cotenant; that he knew there was a mortgage on the property, and paid interest on it; that his cotenant told him that he had received the deed; that he knew that he had placed it of record; that he told him he had; that the property now stands in his name; that he paid half of the interest for two years on the full $2,000, and that Mr. Hallum paid the other half, and that he understood it was to be sent up to Mr. McDonald. The deed was recorded on the 7th day of August, 1911. This action was not begun until June, 1914. It would hardly seem that the grantee of a recorded deed can sit quietly for three years, remain in possession of the premises, and pay the interest on a mortgage which is assumed thereon, and then claim that he did not know of or consent to the terms of the instrument.

The judgment of the District Court is affirmed.

EDWARD T. BURKE. I concur in the affirmance, but express no opinion upon paragraphs three and four of the opinion.

CHARLES H. ANDERSON, Relator, v. INTERNATIONAL SCHOOL DISTRICT NO. 5, Portal Township, Burke County, North Dakota, a Municipal Corporation, et al.

(156 N. W. 54.)

State Constitution — corporation debts — school districts — assessed valuation — property — executory contracts — public improvements.

1. The purpose of § 183 of our state Constitution in limiting the debt of certain municipalities, including school districts, to 5 per cent upon the assessed valuation of the taxable property therein, is to prevent such municipalities from improvidently contracting debts for other than ordinary current expenses of administration, and to restrict their borrowing capacity; and the word "debt," as therein employed, should receive a broad meaning so as to cover liabilities created under executory contracts for public improvements, although nothing is due thereunder until the same are executed in part or in whole.

Contract — schoolhouse — architect — heating — ventilation.

2. Defendant school district, whose debt limit was about $16,000, entered into a contract on May 27, 1913, with defendant Bartelson for the erection of a schoolhouse at the agreed price of $24,000. Eighty-five per cent of the labor and materials furnished was payable monthly upon estimates of the architect, and the balance within a short time after the completion of the building, which was to be completed on or before October 15, 1913. It also in July and August, 1913, entered into two other contracts, one for heating and ventilating the building, and the other for lighting the same, which contracts called for the payment of $3,679 and $599.95, respectively, at the completion thereof.

Held, that these contracts created a present debt against the district at the date they were entered into, which debt, after deducting available funds in the treasury applicable to the payment thereof, greatly exceeded the constitutional debt limit; and to the extent of such excess the contracts are void, and further payments thereon are enjoined.

Debt limit — constitutional — funds — school district liability — taxes — anticipated revenues — future years.

3. In ascertaining whether the constitutional limit has been exceeded, funds in the treasury available for meeting the district's liabilities may be considered, also taxes levied and uncollected; but the district officers have no right to anticipate revenues to be derived from tax levies to be made in future years.

Contracts — public officers — liability — incurring — constitutional debt limit.

4. Section 2218, Compiled Laws 1913, construed, and held not to authorize the making of the contracts in question. The evident purpose of that statute

was to limit public officers from incurring liabilities (within the constitutional debt limit) to such sum as may be liquidated during the current or subsequent years out of the revenues which may be raised within the maximum tax rate permitted by law. It does not purport to, nor could it legally, authorize the incurring of liabilities exceeding the constitutional debt limit.

Opinion filed November 24, 1915. Rehearing denied January 15, 1916.

Appeal from the District Court, Burke County; *Leighton,* J. From a judgment in defendants' favor, plaintiff appeals.

Reversed.

Charles D. Kelso and *Francis J. Murphy,* for appellant.

As soon as an indebtedness is greater than the constitutional limit of 5 per cent, the law is violated, even though it may be but for the moment. Birkholz v. Dinnie, 6 N. D. 511, 72 N. W. 931.

At the time the contract was signed it became obligatory on both parties, and the indebtedness was incurred. Crogster v. Bayfield County, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167; Kiichli v. Minnesota Brush Electric Co. 58 Minn. 418, 49 Am. St. Rep. 523, 59 N. W. 1088; Levy v. McClellan, 196 N. Y. 178, 89 N. E. 569.

It is the policy of the law to restrict the expenditures, by fixing a limit to the amount which can be lawfully collected from the taxpayers of the district, for school purposes in any one year. Farmers' & M. Nat. Bank v. School Dist. 6 Dak. 255, 42 N. W. 767; Stern v. Fargo, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403; Kane v. School Dist. 52 Wis. 502, 9 N. W. 459.

Such limit cannot be exceeded in any one year. Birkholz v. Dinnie; Crogster v. Bayfield County; Kiichli v. Minnesota Brush Electric Co.; Levy v. McClellan; Farmers' & M. Nat. Bank v. School Dist. and Stern v. Fargo, supra.

The appropriation should be made prior to the incurring of the expense. Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; Roberts v. Fargo, 10 N. D. 230, 86 N. W. 726; Pryor v. Kansas City, 153 Mo. 135, 54 S. W. 499.

Anticipated levies or taxes cannot be considered. Zimmerman v. State, 60 Neb. 633, 83 N. W. 919; Scott v. Armstrong School Directors, 103 Wis. 280, 79 N. W. 239.

Funds appropriated or levied for any specific purpose cannot be diverted for other purposes. N. D. Const. § 130; State ex rel. Ahern v. Walsh, 31 Neb. 469, 48 N. W. 263; Drew v. School Twp. 146 Iowa,

721, 125 N. W. 815; Schouweiler v. Allen, 17 N. D. 510, 117 N. W. 866.

It is no defense that the building is accepted and the municipality is using it, if the debt limit has been exceeded. Superior Mfg. Co. v. School Dist. 28 Okla. 293, 37 L.R.A.(N.S.) 1054, 114 Pac. 328; McGillivray v. Joint School Dist. 112 Wis. 354, 58 L.R.A. 100, 88 Am. St. Rep. 969, 88 N. W. 310.

Palda, Aaker, & Greene, Chas. H. Marshall, and *M. R. Keith,* for respondents.

The mere vote to issue bonds does not impliedly limit the school board to the expenditure of only that sum. McCavick v. Independent School Dist. 25 S. D. 449, 127 N. W. 476.

If the school board were assured that the maximum tax levy for the ensuing year would enable them to pay the ordinary expenses of the school district, as well as the remainder of the contract price over the funds then available, it was within their power to make the contract. Territory ex rel. Woods v. Oklahoma, 2 Okla. 158, 37 Pac. 1094; McBean v. Fresno, 112 Cal. 159, 31 L.R.A. 794, 53 Am. St. Rep. 191, 44 Pac. 358; Smilie v. Fresno County, 112 Cal. 311, 44 Pac. 556; Weston v. Syracuse, 17 N. Y. 110; State v. McCauley, 15 Cal. 429; People v. Arguello, 37 Cal. 524; East St. Louis v. East St. Louis Gaslight & Coke Co. 98 Ill. 415, 38 Am. Rep. 97; Erie's Appeal, 91 Pa. 398; Smith v. Dedham, 144 Mass. 177, 10 N. E. 782; Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416; Indianapolis v. Indianapolis Gaslight & Coke Co. 66 Ind. 396.

The schoolhouse itself, for the purpose of valuation, is an asset of the district. School Dist. v. Western Tube Co. 13 Wyo. 304, 80 Pac. 155; 35 Cyc. 975.

Although the powers of a school district are few and limited, a reasonable construction must be given to the powers which are actually granted. Conklin v. School Dist. 22 Kan. 521; Code, §§ 1208, 1209, 1224, 1433.

Fisk, Ch. J. The relator, a citizen and taxpayer in the defendant school district, seeks to enjoin certain of the defendants who are officers of such school district from issuing and delivering, and certain other defendants who are contractors and who erected and furnished a school building in such district pursuant to contract with the school

board, from receiving any warrant or warrants in payment thereof, and for other equitable relief.

At the conclusion of the trial in the district court, findings of fact and conclusions of law were made adverse to the relator's contention, and judgment entered pursuant thereto, dismissing the action. Plaintiff has appealed and demands a trial *de novo* in the supreme court.

The facts as briefly stated in appellant's brief, and which we deem correct, are as follows: "The defendant, school district, is International School District No. 5, and comprises territorially the whole of Portal township, Burke county, North Dakota. That within this territory are four country schoolhouses and a graded school in the village of Portal, all under one school board and the common school district.

"In the spring of 1913 a vote was held to bond the district to build a new schoolhouse, which carried. Also a vote to bond the district in the sum of $13,000, which carried, and the bonds were issued, sold, and the funds paid into the district treasury.

"May 27, 1913, a contract was entered into with one Carl Bartelson in the sum of $24,000 to erect a schoolhouse in the village of Portal.

"July 22, 1913, another contract for heating and ventilating, in the sum of $3,679, and on August 12, 1913, a third contract for wiring was entered into, in the sum of $599.95.

"The matter was rushed to a completion, and the schoolhouse erected and moved into, the forepart of January, 1914, and at the time suit was instituted had been used since its completion.

"March 20, 1914, papers were served upon the defendants, starting an action by the appellant and plaintiff to enjoin further issuance of warrants in payment of outstanding warrants upon these contracts, on the theory that the school district was in debt beyond the 5 per cent limit. The plaintiff started action as a resident and taxpayer on behalf of all taxpayers in the district. A temporary injunctional order was issued at the start of the action, and the case was tried November 9, 1914, resulting in an order dissolving the temporary injunction, and judgment for the defendants dismissing the action."

We deem it advisable to here set out the findings of fact of the trial court, which constitute a more detailed statement of the facts. With the exception of the first three, which relate to formal matters, respecting the parties, their official positions, etc., such findings are as follows:

"4. That heretofore and prior to the 24th day of May, A. D. 1914, pursuant to the authority given by the electors of said school district, at an election held for that purpose, the bonds of said school district in the amount of $13,000 were issued for the purpose of raising moneys with which to aid in the building of a high-school building at Portal, in said school district; and that on the 24th day of May, 1912, there was paid into the treasury of said school district as the proceeds of the sale of such bonds the sum of $13,000.

"5. That on the 27th day of May, 1913, the said school board of said district entered into a contract with the defendant Carl Bartelson, to furnish the materials and labor for the erection of a high-school building in said district, and by the terms of said contract, agreed to pay to the defendant Bartelson, on the completion of such building, the sum of $24,000, and by the terms of said contract the said building was to be completed on or before the 1st day of January, 1914; that pursuant to such contract the defendant Bartelson did furnish the material and labor for, and did construct for said school district, at the city of Portal, therein, the said high-school building, and delivered the same to the said district on or about the 1st day of January, 1914.

"6. That between the 11th day of July, 1913, and the 23d day of December, 1913, the defendant school district, through its said officers, paid to said defendant Bartelson on the contract price for said school district, in the warrants of said district, the sum of $21,352.92, and that there remains on the principal contract price for said schoolhouse, and is due and owing to said Bartelson thereon, the sum of $2,647.08.

"7. That the assessed valuation of the taxable property in the defendant school district for the year 1912 was $291,000, and the assessed valuation of the taxable property in said district for the year 1913 was $337,980, and that the assessed valuation of the taxable property in said district for the year 1914 was $289,644.

"8. That at the time of the signing and execution of said contract by the officers of said school district with said defendant Bartelson, to wit, on the 27th day of May, 1913, the said school board, for the purpose of ascertaining whether or not the expense of building said schoolhouse could be paid out of the funds then in the treasury, and out of the proceeds of the tax levy for the ensuing school year, and other funds to be received from the state, county, and other sources during the

ensuing year, ascertained the amount of available cash in the treasury of said district or due to it at that time, and made an estimate of the other school funds to be received, and a computation of the amount of the tax levy at the maximum rate of 30 mills for the ensuing year, together with the uncollected taxes theretofore levied upon the property n said school district, and therefrom such board decided that the cost of the construction of such schoolhouse under said contract with the defendant Bartelson should be fully paid out of the available cash then on hand, and the estimated income of said district for the ensuing school year, such estimates showing that the total amount of funds available and the income from the various sources during the ensuing year would aggregate upwards of $35,000, and that the expense of maintenance of the schools of said district for the ensuing school year of 1913 and 1914 would be approximately $9,000, including the salaries of teachers and all other expenses; that the amount of cash on hand at the time of the execution of said contract, together with the funds received from all sources during the school year of 1913 and 1914, and the amount of uncollected taxes outstanding on the date of such contract, and the tax levy for the school year of 1913 and 1914, was as follows:

Cash in the treasury from the sale of bonds	$13,000.00
Cash in the general fund of the district	3,618.55
Cash in the hands of the county treasurer due to said district on the 1st day of June, 1913	3,840.42
Cash received as interest paid by the district depositary	198.67
Cash received from the state tuition fund	1,365.10
Cash received from the county tuition fund	912.17
Cash received from the tuition paid by pupils from outside the district	209.25
Cash received from the school poll tax	199.37
Cash received from the state of North Dakota for high-school aid	270.00
Tax levy of 30 mills on $337,980, being the assessed valuation of the taxable property within said district for 1913	10,139.40
Amount of uncollected taxes due said district on May 27, 1913	1,750.65
	$35,503.58

"9. That at the time of the making of said contract with the said defendant Bartelson, there were no outstanding warrants of said district unpaid, except one warrant for the sum of $1,155; that the actual amount of the expense of maintaining and operating the schools in said district for the school year ending June 30th, 1914, including the salaries of all teachers, and incidental expenses, was the sum of $9,324.-68.

"10. That at the time of the making of said contract with said defendant Bartelson, there were outstanding bonds of said school district to the amount of $15,000, and that there was at the same time in the treasury of said school district, in cash, the full proceeds of the bond issue of $13,000, and that on the 1st day of July, the beginning of the school year of 1913 and 1914, there was cash in the treasury of said district, including the proceeds of such bonds, the sum of more than $17,000.

"11. That the new school building constructed under the contract with the defendant Bartelson was intended to, and did, take the place of another school building belonging to said district and situated in the city of Portal, which had theretofore been used by said district as its high-school building, and that the said school building, together with the half block of land in said city of Portal on which it was situated, was, at the time of the making of the said contract with said Bartelson, of the value of $4,500 to $5,000, and it was estimated and considered by said defendant board that, upon the completion of the new school building, the old school building, together with the lots upon which it stood, should be sold, and would be sold, for the sum of at least $4,000, and that thereafter, in the month of May, 1914, at a duly called election within said school district for the purpose of deciding whether such old school building should be sold, it was determined by the vote of said district that such building and property should be sold, and the board of directors were authorized to sell same, and the proceeds to be turned into the general fund of the district; that at such election there were but two votes cast opposed to said sale.

"12. That the first payment by the defendant school district to the defendant Bartelson on said contract was not made until the 11th day of July, 1913.

"13. That the aggregate sum of the cash in the treasury of said

school district at the date of the execution of said contract with said defendant Bartelson, and the cash received from the various sources into the treasury of said school district during the school year of 1913 and 1914, together with the amount of the tax levy for said year, and the amount of the uncollected taxes outstanding at the date of the making of such contract, exclusive of the value of the school building so to be sold, amounted to the sum of $1,023.90, more than the amount of said Bartelson's contract, namely $24.000, and the entire expense of the maintenance of said schools and the incidental expenses of said district, the aggregate amount of such moneys and revenues being the sum of $35,503.58, and the amount of the outstanding warrants, the Bartelson contract, and the expenses of the school year being the sum of $34,479.68; and that at the beginning of the school year of 1914 and 1915, namely on July 1st, 1914, there was available funds and revenues to the credit of said school district, after the discharge of all of said contract and other liability sustained during the school year of 1913 and 1914 the said sum of $1,023.90.

"14. That on the 22d day of July, 1913, the defendant school board, in order to complete the equipment of said schoolhouse so being constructed by the defendant Bartelson, entered into a contract with the defendants Davidson & Olson to provide a heating and ventilating system for said schoolhouse, and for which heating and ventilating system, by the terms of said contract, the said school district agreed to pay the said Davidson & Olson, the sum of $3,769 within twenty days after the final completion of their contract; that said Davidson & Olson furnished and placed in said building the said heating and ventilating system, and completed their work thereon on or about the 1st day of January, 1914.

"15. That on or about the 12th day of August, 1913, the said school district, through its said school board, for the purpose of further equipping said schoolhouse with proper facilities for lighting the same, entered into a contract with the defendants Everett & Leary, whereby said school district agreed to pay to said Everett & Leary for the wiring of said schoolhouse for the purposes of lighting the same, the sum of $599.95, the same to be paid upon the full completion of their said contract; that the said defendants Everett & Leary fully performed their contract by completing the work on or before the 1st day of January, 1914.

"16. That prior to entering into said contracts with the defendants Davidson & Olson and Everett & Leary, the said board made an estimate and computation of the sources of revenue for the then current year and the next succeeding school year of said district, for the purpose of ascertaining whether or not they would be able to provide funds for the payment of said last-mentioned contractors out of the revenues of the current year and the maximum tax levy of the next succeeding school year; and said school board thereupon estimated that the state and county school funds and other sources of revenue, together with the taxes for the year 1914, plus the surplus that should remain over the expenditures and liabilities for the year 1913 and 1914, and including the amount which it was estimated would be realized from the sale of the old schoolhouse during the then current year or the subsequent school year, and from such estimate determined that there would be available for the payment of the salaries of teachers and general expenses of the school district, and of the Davidson & Olson and the Everett & Leary contracts, during the current school year and the succeeding school year of 1914 and 1915, more than $15,000, and that the schools and the defraying of incidental expenses for the school year of 1914 and 1915 would be the sum of $8,924, adding to which the amount of the last-mentioned contracts, the total necessary expenditures for the next succeeding school year would be the sum of $13,292.95.

"17. That the tax levy within the legal limit for the year 1914 for said district amounts to the sum of $8,689.32; the estimated return from state and county tuition funds, school poll and high-school sources of revenue, would be the sum of $3,000, and that there would be available from the sale of the old school house the sum of $4,000; that taking into consideration the amount of such tax levy, the estimated returns from the various funds and the return from the sale of the old schoolhouse, and the excess over the expenditures of the school year ending June 30, 1914, there would be and will be available for payment of said contracts and operating expenses of the current year the sum of $16,713.22 leaving a surplus, after the discharge of the obligations of all three of the contracts herein referred to, and the payment of all the expenses of the maintenance of said school district during the two years of $3,420.20.

"18. That during the school year of 1913 and 1914 and the current

school year, no warrants have been drawn upon the treasury of said defendant school district in excess of the revenues and funds available for the ultimate payment thereof, without taking into consideration the anticipated proceeds of the sale of the old school building.

"19. That there has been paid by said school district, in warrants, the sum of $2,512 on the contract of the said Davidson & Olson, and that there remains unpaid by warrants or otherwise on said contract the sum of $1,257, and the amount of said contract with the defendants Everett & Leary has been fully paid by the warrants of said district."

Appellant contends that the evidence is insufficient to support findings Nos. 8, 11, and 14 to 19, both inclusive; he also contends that the evidence is wholly insufficient to justify the court in finding that the defendant school district could legally enter into the contracts described in the pleadings, and that the same conclusively establishes that on May 27, 1913, the defendant school district in entering into the contract with the defendant Bartelson for the construction of such school building exceeded the constitutional debt limit of 5 per cent of all taxable property within such district.

In view of appellant's concession at the argument, to the effect that the whole question for consideration is whether the contracts for the erection and equipment of the new school building created an indebtedness in excess of the constitutional limit of 5 per cent on the assessed valuation of the district as fixed by § 183 of the Constitution, we deem it useless to here narrate the testimony in support of the various findings challenged in appellant's brief. Suffice it to say that after duly considering such testimony we deem such findings sustained by the proof. Indeed, there seems to be no serious dispute in the evidentiary facts, upon any material point, but the controversy appears in the main to involve legal questions and conclusions merely. As stated in appellant's printed brief: "The issue is whether the respondent school district has an indebtedness beyond the 5 per cent limit." In support of the affirmative of this issue, counsel for appellant call attention to the conceded fact that the assessed valuation for the years 1913 and 1912 were $337,980 and $291,519, respectively, and that consequently the limit of indebtedness under the 1912 assessment would be $14,575.95, and under the 1913 assessment $16,899. They then call attention to the fact that on May 27th, 1913, the date of the Bartelson contract, the district

was already indebted for bonds outstanding in the sum of $15,000, and they assert that the Bartelson contract created a present additional indebtedness of $24,000, the Davidson & Olson contract $3,769 and the Everett & Leary contract $599.95, making a total additional indebtedness of $28,728.95. Of course, if counsel are correct in their assumption that these contracts created such a present indebtedness, it is clear that the constitutional limit has been greatly exceeded. In support of their assumption they cite: Crogster v. Bayfield County, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167; Küchli v. Minnesota Brush Electric Co. 58 Minn. 418, 49 Am. St. Rep. 523, 59 N. W. 1088; Levy v. McClellan, 196 N. Y. 178, 89 N. E. 569. To the above may be added numerous authorities collected in the note to the case of Superior Mfg. Co. v. School Dist. as reported in 37 L.R.A.(N.S.) 1054. These cases fully support appellant in his contention that the entering into these contracts operated in law to create a present indebtedness or obligation against the school district, and counsel for respondents very frankly concede that there are authorities holding that the making of such contracts creates a present indebtedness to the full amount of the contract, but they assert that they have found no decision of this court so holding, and that a considerable number of courts of high authority take a contrary view, citing: Territory ex rel. Woods v. Oklahoma, 2 Okla. 158, 37 Pac. 1094; Mc Bean v. Fresno, 112 Cal. 159, 31 L.R.A. 794, 53 Am. St. Rep. 191, 44 Pac. 358; Smilie v. Frisno County, 112 Cal. 311, 44 Pac. 556; Weston v. Syracuse, 17 N. Y. 110; State v. McCauley, 15 Cal. 429; People v. Arguello, 37 Cal. 524; East St. Louis v. East St. Louis Gaslight & Coke Co. 98 Ill. 415, 38 Am. Rep. 97; Erie's Appeal, 91 Pa. 398; Smith v. Dedham, 144 Mass. 177, 10 N. E. 782; Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416; Indianapolis v. Gaslight & Coke Co. 66 Ind. 396. These cases involve contracts calling for payment in installments, and most, if not all, of them relate to contracts for necessary current expenses, such as a supply of water or lights, covering a term of years and payable monthly, quarterly, or annually. While there is some diversity of opinion among the courts upon the question, the weight of authority seems to favor the view that obligations under contracts of this nature, providing for payments in installments as the service is rendered, do not create a present indebtedness against the municipality and that such indebtedness is not created

until the service is performed. South Bend v. Reynolds, 155 Ind. 70, 49 L.R.A. 795, 57 N. E. 706; Wade v. Oakmont, 165 Pa. 479, 30 Atl. 959; New Orleans Gaslight Co. v. New Orleans, 42 La. Ann. 188, 7 S. W. 559; Mercantile Trust & Deposit Co. v. Columbus, 161 Fed. 135; Connor v. Marshfield, 128 Wis. 280, 107 N. W. 639; Anoka Waterworks E. L. & P. Co. v. Anoka, 109 Fed. 580; Joseph v. Joseph Waterworks Co. 57 Or. 586, 111 Pac. 864, see also, 57 Or. 592, 112 Pac. 1083, denying petition for rehearing. For a very good statement of the rule, see Allison v. Chester, (W. Va.) Ann. Cas. 1913B, 1174, and Logansport v. Jordan, (Ind.) 17 Ann. Cas. 415, and valuable notes to these cases wherein many authorities are reviewed. After a careful consideration of the question, we deem the sound rule relating to contracts of the nature of those before us to be that an indebtedness within the meaning of § 183 of our Constitution was created against the district at the time these contracts were entered into.

Applying this rule to the facts before us we are forced to the conclusion that the constitutional debt limit was exceeded. These contracts cannot be said to create merely a future contingent liability, as did the contracts involved in Bismarck Water Supply Co. v. Bismarck, 23 N. D. 352, 137 N. W. 34. We there held that the city, by obligating itself to pay a mere future contingent liability in excess of the debt limit did not thereby violate the constitutional debt limit provision. It will be observed that the language of the Constitution, § 183, is positive and unequivocal. It reads: "The debt of any . . . school district . . . shall never exceed 5 per cent upon the assessed value of the taxable property therein. . . . All bonds or obligations in excess of the amount of indebtedness permitted by this Constitution . . . shall be void." Construing the above section, this court in Darling v. Taylor, 7 N. D. 538, 75 N. W. 766, quotes with approval from the decisions of Iowa, West Virginia, and South Dakota, and reached the conclusion that no added indebtedness arises within such constitutional restriction by the issuance of a county warrant for current expenses in anticipation of the collection of taxes already levied. The obvious purpose of the constitutional debt limit provision was to prevent the municipalities therein mentioned from improvidently contracting debts for other than ordinary current expenses of administration. As said by the court of appeals of New York in Levy v. Mc-

Clellan, 196 N. Y. 178, 89 N. E. 569: "It was to restrict their borrowing capacity and thus to minimize the mischievous consequences to the taxpayers of extravagance in city expenditures. . . . That is a mandate directed to all municipal officers, which, in effect forbids them to obligate the municipality in any manner which may result in an indebtedness in excess of 10 per cent of the assessed valuation." And that court squarely held that in determining the extent of existing indebtedness of the municipality in order to ascertain the margin of its constitutional debt limit, its liability upon contracts for public improvements should be included where they are to be met from an issue of bonds, and not from current revenues or annual tax collections, even though but a small portion of such contracts have been executed by the contractors. We quote from the opinion as follows: "Why should these contracts not be regarded as constituting an indebtedness of the city? The law presumes that the parties to a contract will perform their agreements. If the incurring of contractual obligations to pay for public improvements does not represent an indebtedness which is to be taken into account in ascertaining the margin of the debt limit, the force of the constitutional prohibition becomes doubtful. If the provision applies, not to the time of the execution of the contract, but only to the time when payments become due, very remarkable results may follow. To illustrate: If, prior to the time of the completion of a contract for an extensive public improvement, made when the margin of the city's debt limit, as measured by an indebtedness consisting in direct, or absolute obligations, seemed to warrant it, the debt limit is reached through the issuance of bonds to meet payments upon other contracts subsequently made, but completed at an earlier date, is the obligation of payment upon the first contract avoided? The constitutional provision is that 'all indebtedness in excess of such limitation, . . . shall be absolutely void;' with an exception which does not apply to the case supposed. Can that provision be invoked by a taxpayer to defeat an obligation of the city, valid and binding when incurred? I do not think we should agree to that. Then, may the validity of a contract obligation depend upon conditions, as determined by subsequent facts? If contracts are binding when made, are they to be invalidated by after-occurring events in the city's financial career? If the answer is obvious, it is at once suggested to the mind that

the constitutional debt limitation does include within its provision the actual, or estimated, indebtedness upon such contracts. Again, to illustrate what I conceive to be the fallacy of the argument in favor of the exclusion of such contract obligations from the computation of indebtedness, if the assessed valuation of taxable real estate should be less in a subsequent year, and the margin of the debt limit is, in consequence, reached or narrowed, is the indebtedness to be met upon a contract made upon the basis of the assessment rolls in a prior year, showing an ample debt margin, avoided, because the payment will put the city in debt beyond the constitutional limit? . . . If the provision as to the debt limit is not applicable to binding contract obligations when incurred, then how is it safely applicable when the obligations mature? If it is not heeded when obligations exist upon contracts for public improvements, of what avail will it be if the obligation to meet payments maturing in subsequent years shall result in a burdensome taxation?

"It seems to me that the better conclusion to be reached upon this question, and the one in better accord with the policy of the constitutional provision, is that, in ascertaining the margin of the city's constitutional debt limit, 'existing indebtedness' must be regarded as including the city's liability upon contracts for public improvements, which is intended to be met from an issue of bonds.

"Decisions by the courts of other states are cited by counsel on either side of the question. Many are inapplicable, by reason of the differing provisions of the state Constitutions. In Illinois the decisions of the supreme court support the views which I have expressed upon the subject of what constitutes an indebtedness. The Constitution of that state prohibits allowing a city 'to become indebted . . . to and amount, including existing indebtedness, in the aggregate exceeding 5 per cent on the value of taxable property therein, to be ascertained by the last assessment for state or county taxes,' etc. In Culbertson v. Fulton, 127 Ill. 30, 18 N. E. 781, it was sought to restrain the city from accepting water works, constructed for it under a contract, on the ground that the constitutional provision would be violated. The court held that 'by entering into the contract the city became indebted. The obligations entered into by the terms of the contract constitute such an indebtedness as is contemplated by the language of the Constitution. It

cannot be said that the indebtedness did not come into being until the work was completed and accepted by the city.' In Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77, to which the referee refers, the question arose as to whether a contract, by which the city agreed to pay a rental of $1,500 a year for twenty-five years for a water supply, created an indebtedness of the aggregate amount of the rentals in all the years. In holding that it did not, the United States Supreme Court considered that a distinction exists between contracts for the supply of water or gas for a stipulated rental, and contracts for the erection of a public improvement; observing that in the latter case 'the debt is created at once, the time of payment being only postponed.' . . .

"Without an ampler discussion, I am of the opinion that the amounts which on June 30th, 1908, were involved in the contracts of the city for public improvements, and which the referee states as being upwards of $54,000,000, should have been included in ascertaining the city's 'existing indebtedness.' That would result in a reduction, *pro tanto,* of the 'margin of constitutional limit of indebtedness,' as stated by the referee; less, of course, by the amount already charged against the city, as earned upon the contracts, *viz.,* $2,553,933.92."

The reasoning and conclusion of the New York court impresses us as sound, and appears to have the support of the great weight of authority, and we have no hesitancy in adopting the rule thus announced for this jurisdiction. To the same effect see Crogster v. Bayfield County, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167; Küchli v. Minnesota Brush Electric Co. 58 Minn. 418, 49 Am. St. Rep. 523, 59 N. W. 1088, and the cases cited in the note to Superior Mfg. Co. v. School Dist. in 37 L.R.A.(N.S.) 1054. Also the very able and exhaustive opinion of Judge Deemer in Windsor v. Des Moines, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476. Judge Deemer very clearly distinguishes contracts of the nature before us from those for the ordinary current expenses. We quote: "Again, it is argued that the contract does not create a debt, but merely a contractual obligation, which may only become a debt as the light was furnished and the compensation earned. It seems to be conceded that, if the contract related to the ordinary expenses of the city, as the furnishing of light or water, or of fire protection, this argument would be sound. Indeed, it is express-

ly so held in many of the cases heretofore cited. But does this rule apply to a contract for the construction of a plant for the purpose? Expressions may be found in some of the cases cited that give color to this argument (see Dively v. Cedar Falls, 27 Iowa, 227; Anderson v. Orient F. Ins. Co. 88 Iowa, 579, 55 N. W. 348; Allen v. Davenport, 107 Iowa, 90, 77 N. W. 532; Burlington Water Co. v. Woodward, 49 Iowa, 58); and in some cases this is no doubt the rule. See East St. Louis v. East St. Louis Gaslight & Coke Co. 98 Ill. 415, 38 Am. Rep. 97; Crowder v. Sullivan, 128 Ind. 486, 13 L.R.A. 647, 28 N. E. 94; Smith v. Dedham, 144 Mass. 177, 10 N. E. 782; Merrill R. & Lighting Co. v. Merrill, 80 Wis. 358, 49 N. W. 965; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77. But where the contract is for the erection of electric light plants, or for any other improvement, and the time of payment is postponed to a later date, and no special levy for the purpose of erecting such works is authorized, the rule seems to be well settled that the sums to become due in the future must all be taken into account in estimating the amount of the existing indebtedness of the municipality. Culbertson v. Fulton, 127 Ill. 30, 18 N. E. 781; Council Bluffs v. Stewart, 51 Iowa, 385, 1 N. W. 628; French v. Burlington, 42 Iowa, 614.

"This must be the true rule, for if appellants' contention be correct, the city might, by contracts such as the one in suit, absorb all the general revenues in advance, and leave nothing for the payment of current expenses. Suppose a city should anticipate all its general revenues, and thus leave nothing for the payment of current expenses; and suppose, further, that it should issue warrants for the payment of these expenses, which were not paid for want of funds; could not the holder of these warrants enforce them against the city, and if enforced, and the city is compelled to pay (as no doubt, it would be obliged to do) the amount thereof, in addition to the amounts previously appropriated for improvements, would not the very object of the constitutional provision be thwarted, and a wise provision of our fundamental law render nugatory? The answer to these propositions is so obvious that no amount of refinement can add anything to the conclusion. We are cited to no case that establishes a contrary doctrine. Language is no doubt used in some of them which is broad enough to sustain appellants' contention, but that language must be interpreted in the light of the facts dis-

closed in the opinions. So interpreted, there is no real conflict in the cases on this proposition. As a general rule, a city may not anticipate its general revenues to be created by a scheme of general taxation. Special taxes and assessments may, however, be anticipated in a proper case. Davis v. Des Moines, 71 Iowa, 500, 32 N. W. 470; Clinton v. Walliker, 98 Iowa, 655, 68 N. W. 431; Anderson v. Orient F. Ins. Co. 88 Iowa, 579, 55 N. W. 348; Tuttle v. Polk, 92 Iowa, 433, 60 N. W. 733; Allen v. Davenport, 107 Iowa, 90, 77 N. W. 532. As supporting the general rule announced, see also State, Read, Prosecutor, v. Atlantic City, 49 N. J. L. 558, 9 Atl. 759; Beard v. Hopkinsville, 95 Ky. 239, 23 L.R.A. 402, 44 Am. St. Rep. 222, 24 S. W. 872; Spilman v. Parkersburg, 35 W. Va. 605, 14 S. E. 279; Prince v. Quincy, 128 Ill. 443, 21 N. E. 768; State v. Fayette County, 37 Ohio St. 526. That such is the legislative intent is clearly indicated by § 1 of chapter 4 of the Acts of the 22d General Assembly, which reads as follows: 'All cities of the first class shall make their appropriation for all the different expenditures of the city government for each fiscal year at or before the beginning thereof, and it shall be unlawful for the city council or any officer, agent, or employee of the city, to issue any warrant, enter into any contract, or appropriate any money in excess of the amounts thus appropriated for the different expenses of the city, during the year for which said appropriation shall be made, and any such city shall not appropriate in the aggregate an amount in excess of its annual legally authorized revenue, but nothing herein shall prevent such cities from anticipating their revenues for the year for which such appropriation was made, or from bonding or refunding their outstanding indebtedness, provided that this section shall not apply to cities of the first class organized since 1881.' In construing this section we said, in Phillips v. Reed, 107 Iowa, 331, 76 N. W. 850, 77 N. W. 1031, that the object of the law was to place municipal corporations on a cash basis, and prevent the accumulation of such a floating indebtedness as appears in that case." See also Culbertson v. Fulton, 127 Ill. 30, 18 N. E. 781.

Concededly, at the date the Bartelson contract was made the school district was indebted in the sum of $15,000 in bonds and $1,155 in an outstanding warrant, and it had but $16,618.35 in its treasury. The limit of indebtedness under § 183 of the Constitution, if based on the

1913 assessment, was but $16,899. It is entirely clear, and we think practically conceded, that at such date the district did not have funds on hand over and above those necessary to discharge the ordinary current expenses, sufficient to discharge the liabilities incurred under such contracts. The 1913 tax levy was not then made, and the revenues to be derived therefrom could not be anticipated in order to augment the funds available for meeting the new liabilities thus incurred. But even if this could properly be done, it would not change the result. It is needless to say that all persons dealing with public corporations or their officers are in law chargeable with notice of their powers and the limitations thereof. Roberts v. Fargo, 10 N. D. 230, 86 N. W. 726.

We think our holding as above stated sufficiently disposes of respondent's contention that these contracts were authorized by § 2218, Compiled Laws. Certainly this section could not authorize the incurring of indebtedness in excess of the constitutional debt limit. This section does not purport to do this, but its evident purpose was, as its language clearly shows, to limit public officers in the contracting of indebtedness or incurring of liability (within the debt limit) to such sum as may be liquidated during the current or subsequent years out of the revenues which may be raised within the maximum rate of taxes which may be levied as prescribed by law. It has, as we view it, nothing to do with the question of the power to anticipate revenues to be derived from future levies in determining whether the constitutional debt limit has been exceeded. The judgment appealed from is reversed, and the district court is directed to enter a decree adjudging the warrants which have been issued and are outstanding in payment of the balance due on such contracts to be null and void, and directing that the same be canceled; also adjudging that the defendant officers be perpetually restrained and enjoined from paying such warrants or any further sums on any of the contracts mentioned in the complaint, and that the warrants which have been issued in payment of such contracts in excess of the debt limit, and which are now outstanding and in the possession and owned by any of the defendants be ordered to be delivered to the court for cancelation. Appellant to recover his costs on this appeal.

FISK, Ch. J. Filed January 15, 1916. Since the above opinion was filed we have been requested by counsel to determine what portion of

the contract indebtedness, if any, is within the debt limit. The concluding portion of such opinion was written upon the assumption that the payments made under the Bartelson contract more than exceeded the debt limit, but our attention is now called to the fact that no payments thereon have been made except as stated in finding number 6, by the issuance of warrants, and that such warrants are still outstanding and unpaid.

In compliance with such request we have reconsidered this phase of the case, and for the information of the trial court in entering its judgment, as well as the parties, we will briefly state our conclusions.

At the date the Bartelson contract was entered into (May 27, 1913) the debt limit of the district was $14,550, being 5 per cent of the assessed valuation of the taxable property of such district for the preceding year. At that date the district was indebted in the sum of $16,155. But it had available resources to off-set such indebtedness in the sum of $21,374.10, or a net credit balance of $5,219.10. The district could therefore create a valid indebtedness in the sum of $14,550 plus $5,219.10, or a total of $19,769.10. The Bartelson contract therefore exceeded the debt limit in the sum of $4,230.90. Or in other words such contract was valid to the extent only of $19,769.10. The other contracts were both void because in excess of the debt limit.

The judgment of the district court is reversed, and that court is directed to enter a decree adjudging that all warrants issued in payment of the Bartelson contract in excess of the sum of $19,769.10 are void, and directing the cancelation thereof, and that all warrants issued on the Davidson & Olson and the Everett & Leary contracts be adjudged null and void and be canceled; also adjudging that the school district officers be perpetually restrained and enjoined from paying such warrants or any of them, and from paying or issuing warrants for any further sums on said contracts except to the said Bartelson, and as to him only to the extent and amount above indicated as within said debt limit; also adjudging that all warrants heretofore issued on said contracts, except as above indicated, which are now outstanding and in the possession and owned by any of the defendant contractors, be ordered to be delivered to the court for cancelation.

L. T. GUILD v. A. Y. MORE.

(155 N. W. 44.)

Complaint — cause of action — insufficient facts stated — assailed on trial — objection to evidence — liberal construction.

1. A complaint assailed for the first time at the trial by an objection to the introduction of evidence on the ground that it fails to state facts sufficient to constitute a cause of action will be liberally construed.

Fraud and deceit — damages — action for — measure of — allegations.

2. In an action to recover general damages for fraud and deceit, it is not necessary to allege the measure of damages.

Deception — wilful — injury — position — change of — damages.

3. One who wilfully deceives another with intent to induce him to alter his position to his injury is liable, in an action of deceit, for any damage which the injured party suffers thereby.

Deceit — action for — false representations — inducement to contract — actionable fraud — legal right — surrender of.

4. To maintain an action for deceit it is not necessary that the false representations should have been an inducement to a contract afterwards consummated; but, if the essential elements of actionable fraud are present, such action will lie for any false representation relied on by the plaintiff, whereby he was induced, to his injury, to part with property or surrender some legal right.

Contract — repudiation of — fraud — damages — action — tender back — property — value.

5. The defrauded party, on discovery of the fraud, may affirm the transaction keep whatever property or advantage he has derived under it, and recover in an action of deceit the damages caused by the fraud; or he may, within a reasonable time after discovery of the fraud, repudiate the contract, and, tendering back what he has received under it, recover what he has parted with, or its value.

Deceit — action for — damages — retention of property — transaction — affirmance.

6. The defrauded party, by retaining the property, and bringing an action of deceit for the damages sustained by reason of the fraud practised upon him, thereby affirms the transaction.

Note.—On the question of necessity of proving fraud in civil action, see note in 33 L.R.A.(N.S.) 837.

And on the general question on whom rests the burden of proof, see notes in 23 Am. Rep. 308; 33 Am. Rep. 736; and 37 Am. Rep. 148.

Contract — affirmed — rescinded — fraud — misrepresentations — knowledge of facts — payment — proof — limit of.

7. The transaction must be affirmed or rescinded as a whole. And in an action wherein plaintiff by fraudulent representations was first induced to sign an executory contract for the purchase of certain property, and subsequently, by further fraudulent representations without knowledge of the fraud, induced to make further and final payment, he will not be restricted to proof of false representations preceding the date of the executory contract, but will be permitted to show representations made up to the time he made final payment and received the property purchased.

Written instrument — valid existence — delivery — parties — intention of.

8. A written instrument has no valid existence until delivered in accordance with the intention of the parties.

Intent — guilty knowledge — material ingredient — facts — evidence.

9. Wherever the intent or guilty knowledge of a party is a material ingredient in the case, any facts logically tending to establish such intent or knowledge are proper evidence.

Evidence — letters — series of — introduction — whole correspondence — offered — relating to same transaction.

10. Where one party introduces in evidence one or more of a series of letters written by the party sought to be charged, the latter may offer the remainder of the correspondence relating to the transaction in question.

Letter — offered — reference to other letter — inclosure — evidence — admissibility.

11. When a letter so offered refers to another letter inclosed therewith, the letter so inclosed and referred to is also admissible, provided the reference is such as to make it apparent that the latter is necessary to a full understanding of the former.

Error — evidence — pleadings — issues — facts.

12. No error can be predicated upon the admission of competent evidence bearing directly on an issue of fact presented by the pleadings.

Instructions — request for — judgment roll — no part of review — supreme court — statement of case.

13. Requests for instructions do not constitute part of the judgment roll, and hence, cannot be reviewed on appeal unless incorporated in the statement of the case.

Evidence — preponderance of — honesty — good faith — presumption — instructions — theory.

14. A preponderance of the evidence, after making due allowance for the presumption in favor of honesty and good faith, is sufficient in ordinary cases to establish a charge of fraud. And instructions to the jury based upon this theory are held to be not erroneous in the case at bar.

Burden of proof — evidence — weight of — determined — pleadings — shifting.

15. The term "burden of proof" means the obligation imposed upon a party who alleges a fact or set of facts, to establish the existence thereof by a weight of evidence legally sufficient, first to destroy the equilibrium, and, second, to overbalance any weight of evidence produced by the other party. The burden of proof is determined by the pleadings, and never shifts, but must be carried by the responsible party throughout the case.

Burden of proof — prima facie case — trial — evidence — shifts when.

16. The phrase "burden of evidence" means that logical necessity which rests on a party at any particular time during a trial to create a prima facie case in his own favor, or to overthrow one when created against him. The burden of evidence has no necessary connection with the pleadings, but is determined by the progress of the trial, and shifts to one party when the other party has produced sufficient evidence to be entitled as a matter of law to a ruling in his favor.

Deceit — action for — affirmative — defense — fraud — books — examination of — burden of proof — preponderance of proof — complaint — allegations of.

17. In an action of deceit, wherein it is asserted as an affirmative defense that plaintiff, before the consummation of the fraud, made an examination of the books of the concern, and hence know or should have known the real state of affairs; and that therefore, even though it be true that plaintiff was first induced by material misrepresentations to contract, still plaintiff did not rely thereon, but relied on his own investigation; an instruction upon such defense that the burden of proving that the representations were not relied on is on the person who has been proved guilty of material misrepresentation, is not erroneous as placing the burden of proof upon the defendant to disprove plaintiff's reliance upon the false representations; the court having, also, charged that plaintiff was required to establish, by a preponderance of the evidence, all the material allegations in his complaint, including his reliance upon the false representations.

False representations — materiality — question of fact — for jury.

18. Ordinarily the question of materiality of a false representation is one of fact to be determined by the jury.

Deceit — action for — allegations — proof of part.

19. In an action of deceit it is not necessary for plaintiff to prove all the fraudulent misrepresentations alleged; it is sufficient if he proves one or more of them, and that those so proved were relied upon to his damage.

Action — merits — questions — answers — verdict — issues — judgment.

20. When the merits of an action have been determined by special answers to questions submitted, the verdict will not be held defective by reason of the

fact that the jury made findings on immaterial issues framed by the pleadings, where such immaterial findings cannot in any way qualify, limit, or affect the answers upon which the right of either of the parties to a judgment in his favor is made clear.

Complaint — contents — immaterial allegations — objections to — raised after trial and verdict.

21. An objection that a complaint contains irrelevant and immaterial allegations cannot be raised for the first time after trial and verdict.

Findings — evidence — insufficiency of — to sustain — appeal — first raised on.

22. Insufficiency of the evidence to sustain the findings of a jury cannot be raised for the first time on the argument in the appellate court.

Argument — error on — jury — facts constituting — burden of showing.

23. A party predicating error upon improper argument to the jury has the burden of showing affirmatively, by the record presented to the appellate court, the facts constituting such error.

Damages — amount of — computation.

24. Amount of damages as computed by trial court *held* correct.

Opinion filed October 9, 1915. Rehearing denied November 29, 1915.

Appeal from a judgment of the District Court of Cass County, *Pollock,* J. Defendant appeals.

Affirmed.

A. W. Fowler and *Pollock & Pollock,* for appellant.

"A party cannot be defrauded in being induced to do what good faith and a proper observance of his promises make it his duty to do." Marsh v. Cook, 32 N. J. Eq. 262; Herring v. Draper, 2 Houst. (Del.) 158; Farmers' Stock Breeding Asso. v. Scott, 53 Kan. 534, 36 Pac. 978; Faribault v. Sater, 13 Minn. 223, Gil. 210; Miller v. Layne & B. Co. — Tex. Civ. App. —, 151 S. W. 341; Randall v. Hazelton, 12 Allen, 412; Smith v. Chadwick, L. R. 9 App. Cas. 187, 53 L. J. Ch. N. S. 873, 50 L. T. N. S. 697, 32 Week. Rep. 687, 48 J. P. 644.

"Novation is the substitution of a new obligation for an existing one." Comp. Laws 1913, §§ 5829–5831; Re Ransford, 115 C. C. A. 560, 194 Fed. 658, 29 Cyc. 1130.

The burden of proof of novation rests upon the party asserting it. 29 Cyc. 1139; Schafer v. Olson, 24 N. D. 542, 43 L.R.A.(N.S.) 762, 139 N. W. 983, Ann. Cas. 1915C, 653.

It is never presumed, and the intention to create must be clear. 29

Cyc. 1138, and cases in note 68; J. I. Case Threshing Mach. Co. v. Olson, 10 N. D. 170, 86 N. W. 718.

A special verdict must contain all the ultimate facts upon which the law is to arise and the judgment of the court to rest. Failing in this, it will not support any judgment. Sherman v. Menominee River Lumber Co. 77 Wis. 14, 45 N. W. 1079; Beare v. Wright, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057; Hart v. West Side R. Co. 86 Wis. 483, 57 N. W. 91, 7 Am. Neg. Cas. 277; Wilson v. Commercial Union Ins. Co. 15 S. D. 322, 89 N. W. 649; J. H. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231, 7 Ann. Cas. 505; State v. Hanner, 24 L.R.A.(N.S.) 6, and cases cited; Moore v. Moore, 67 Tex. 293, 3 S. W. 284; Bartow v. Northern Assur. Co. 10 S. D. 132, 72 N. W. 86; Bibb v. Hall, 101 Ala. 79, 14 So. 98; Carter v. Dublin Bkg. Co. 104 Ga. 569, 31 S. E. 407; Chicago & N. W. R. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15; Rarey v. Lee, 16 Ind. App. 121, 44 N. E. 318; Ward v. Cochran, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. Rep. 230; Morrison v. Lee, 13 N. D. 591, 102 N. W. 223.

Nothing can be taken by implication or intendment to support the special verdict; it must show in and of itself a legal conclusion of liability. Garfield v. Knights Ferry & T. M. Water Co. 17 Cal. 510, cases cited in note to State v. Hanner, 24 L.R.A.(N.S.) 8.

The duty of preparing the verdict and of framing the issues made by the pleadings rests solely with the court. Schumaker v. Heinemann, 99 Wis. 251, 74 N. W. 785; Wilson v. Commercial Union Ins. Co. 15 S. D. 322, 89 N. W. 649; Cullen v. Hanisek, 114 Wis. 24, 89 N. W. 900; Bartow v. Northern Assur. Co. 10 S. D. 132, 72 N. W. 86; Moore v. Moore, 67 Tex. 293, 3 S. W. 284.

Where the court fails to submit all the issues, such omission is not waived by failure of counsel to request the submission of additional questions. Hildman v. Phillips, 106 Wis. 611, 82 N. W. 566, 7 Am. Neg. Rep. 705; Sherman v. Menominee River Lumber Co. 77 Wis. 14, 45 N. W. 1079; Orttel v. Chicago, M. & St. P. R. Co. 89 Wis. 127, 61 N. W. 289; McFetridge v. American F. Ins. Co. 90 Wis. 138, 62 N. W. 938; Dugal v. Chippewa Falls, 101 Wis. 533, 77 N. W. 878.

The submission of mere representations of opinion is immaterial and improper. Deming v. Darling, 148 Mass. 504, 2 L.R.A. 743, 20 N. E. 107; Sawyer v. Prickett, 19 Wall. 146, 22 L. ed. 105; Mooney v.

Miller, 102 Mass. 217; Manning v. Albee, 11 Allen, 520; Wise v. Fuller, 29 N. J. Eq. 257; Wilkinson v. Clauson, 29 Minn. 91, 12 N. W. 147; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; James Music Co. v. Bridge, 134 Wis. 510, 114 N. W. 1108; Gordon v. Butler, 105 U. S. 553, 26 L. ed. 1166; Homer v. Perkins, 124 Mass. 431, 26 Am. Rep. 677; Kimball v. Bangs, 144 Mass. 321, 11 N. E. 113; Baldwin v. Moser, — Iowa, —, 123 N. W. 989; Western Townsite Co. v. Novotny, 32 S. D. 565, 143 N. W. 895.

"An action for false and fraudulent representations can never be maintained upon a promise or a prophecy." Union P. R. Co. v. Barnes, 12 C. C. A. 48, 27 U. S. App. 421, 64 Fed. 80.

Nor a mere expression of opinion, though it be false. Johansson v. Stephanson, 154 U. S. 625, 23 L. ed. 1009, 14 Sup. Ct. Rep. 1180; Belcher v. Costello, 122 Mass. 189; Warner v. Benjamin, 89 Wis. 290, 62 N. W. 179; Kimber v. Young, 70 C. C. A. 178, 137 Fed. 744; Heyrock v. Surerus, 9 N. D. 28, 81 N. W. 36; Hartsville University v. Hamilton, 34 Ind. 506; J. H. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231, 7 Ann. Cas. 505; Welshbillig v. Dienhart, 65 Ind. 94; State Bank v. Gates, 114 Iowa, 323, 86 N. W. 311; Hubbard v. Long, 105 Mich. 442, 63 N. W. 644; Milwaukee Brick & Cement Co. v. Schoknecht, 108 Wis. 457, 84 N. W. 838; Sheldon v. Davidson, 85 Wis. 138, 55 N. W. 161; First Nat. Bank v. Swan, 3 Wyo. 356, 23 Pac. 743; Joseph v. Decatur Land Improv. & Furnace Co. 102 Ala. 346, 14 So. 739; Knowlton v. Keenan, 146 Mass. 86, 4 Am. St. Rep. 282, 15 N. E. 127; Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Nelson v. Grondahl, 12 N. D. 130, 96 N. W. 299.

"Positive statements as to value are generally mere expressions of opinion and as such cannot support an action for deceit." Gordon v. Butler, 105 U. S. 553, 26 L. ed. 1166; Blease v. Garlington, 92 U. S. 1, 23 L. ed. 521; Heald v. Yumisko, 7 N. D. 423, 75 N. W. 806; Morgan v. Hodge, 145 Wis. 143, 129 N. W. 1083.

In order to rescind a contract for fraud, the proof must be clear, satisfactory, and convincing. Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856, and cases cited.

In an action for deceit, the plaintiff must not only prove that the representations were false, but also that the defendant knew they were false. Hindman v. First Nat. Bank, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 931; Kimber v. Young, 70 C. C. A. 178, 137 Fed. 748.

Fraud will never be presumed. Heyrock v. Surerus, 9 N. D. 28, 81 N. W. 36; Klipstein v. Raschein, 117 Wis. 248, 94 N. W. 63.

That plaintiff relied upon the false representations is an essential element in a cause of action for deceit. Such element must be alleged and proved, and the burden is upon the plaintiff. It is not for the defendant to prove the negative of this. Taylor v. Guest, 58 N. Y. 262; Holt v. Sims, 94 Minn. 157, 102 N. W. 386; Anderson v. McPike, 86 Mo. 293; McCready v. Phillips, 44 Neb. 790, 63 N. W. 7; Ackman v. Jaster, 179 Pa. 463, 36 Atl. 324; Provident Loan Trust Co. v. McIntosh, 68 Kan. 452, 75 Pac. 498, 1 Ann. Cas. 906; White v. Smith, 39 Kan. 752, 18 Pac. 931; Curtis v. Hoxie, 88 Wis. 41, 59 N. W. 581; Montgomery v. Fritz, 7 N. D. 348, 75 N. W. 266; Nelson v. Grondahl, 12 N. D. 130, 96 N. W. 299; Bartlett v. Blaine, 83 Ill. 25, 25 Am. Rep. 346; First Nat. Bank v. Maxfield, 83 Me. 576, 22 Atl. 479; Cole v. Miller, 60 Ind. 463; Holton v. Noble, 83 Cal. 7, 23 Pac. 58; 2 Jones, Ev. § 192, and cases.

By the practice adopted in the case and by the charge of the court, appellant was, in effect, deprived of his statutory right to a finding by the jury of the facts, without passion or prejudice. Ward v. Chicago, M. & St. P. R. Co. 102 Wis. 215, 78 N. W. 442; Schrunk v. St. Joseph, 120 Wis. 223, 97 N. W. 946, 15 Am. Neg. Cas. 468.

When a special verdict is taken, general instructions on any subject involved should not be given. Mauch v. Hartford, 112 Wis. 40, 87 N. W. 816, 11 Am. Neg. Rep. 63; Kohler v. West Side R. Co. 99 Wis. 33, 74 N. W. 568; Louisville, N. A. & C. R. Co. v. Hart, 119 Ind. 273, 4 L.R.A. 549, 21 N. E. 753; Morrison v. Lee, 13 N. D. 592, 102 N. W. 223; Patnode v. Westenhaver, 114 Wis. 460, 90 N. W. 467.

The special verdict should be so framed and the charge so given, that both will cover the issues for which claim is made by both parties, and *not* upon the sole theory of one party. Southern Development Co. v. Silva, 125 U. S. 257, 31 L. ed. 682, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435; Farrar v. Churchill, 135 U. S. 618, 34 L. ed. 250, 10 Sup. Ct. Rep. 771; Colton v. Stanford, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 26; Farnsworth v. Duffner, 142 U. S. 43, 35 L. ed. 931, 12 Sup. Ct. Rep. 164; Curran v. Smith, 81 C. C. A. 537, 149 Fed. 951; Pittsburg Life & T. Co. v. Northern Cent. L. Ins. Co. 140 Fed. 888.

Proof that the complaining party inquired of others as to the subject-matter and value should be admitted as negativing the claim that he relied upon the representations. Anderson v. McPike, 86 Mo. 293; Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Farrar v. Churchill, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771; Fauntleroy v. Wilcox, 80 Ill. 477; Craig v. Hamilton, 118 Ind. 565, 21 N. E. 315.

Evidence of character should be founded on reputation previously existing, and a stranger sent to the neighborhood of a witness to learn his character will not be permitted to testify as to the result of his inquiries. Reid v. Reid, 17 N. J. Eq. 101; 1 Greenl. Ev. § 461; Douglass v. Tousey, 2 Wend. 352, 20 Am. Dec. 616.

A witness cannot testify as to outside statements made to him by others. It is hearsay and highly prejudicial in this case. 16 Cyc. 1195, 1196; Thomas v. Placerville, Gold Quartz Min. Co. 65 Cal. 600, 4 Pac. 641; See Russell v. Brosseau, 65 Cal. 605, 4 Pac. 644; Bailey v. Kreutzmann, 141 Cal. 519, 75 Pac. 104; Ellis v. Whitehead, 95 Mich. 105, 54 N. W. 752; Wigmore, Ev. §§ 1918–1924; Cook v. United States, 138 U. S. 157, 185, 34 L. ed. 906, 914, 11 Sup. Ct. Rep. 268.

Evidence which the jury are not at liberty to believe should not be submitted to them. Robb v. Hackley, 23 Wend. 52; Johnston v. Spoonheim, 19 N. D. 191, 41 L.R.A.(N.S.) 1, 123 N. W. 830; 16 Cyc. 1202–1204; Wigmore, Ev. §§ 1765 and 1788; Jones, Ev. §§ 235a, 236 and 237; Rice, Ev. 1892 ed. p. 434; Citizens' State Bank v. Christianson, 30 N. D. 182, 152 N. W. 346.

The testimony of witnesses should be confined within the limits and issues of the pleadings. Jones, Ev. §§ 139, 140; Bailey v. Walton, 24 S. D. 119, 123 N. W. 701; Galveston, H. & S. A. R. Co. v. Smith, — Tex. Civ. App. —, 24 S. W. 668; Broomfield v. State, — Tex. Crim. Rep. —, 74 S. W. 915.

Watson & Young, E. T. Conmy, and *Horace C. Young,* for respondent.

The presumption on appeal is that the rulings of the trial court were correct, and the burden is upon him who challenges them, to show their incorrectness. Garr, S. & Co. v. Spaulding, 2 N. D. 414, 51 N. W. 867; Gould v. Duluth & D. Elevator Co. 3 N. D. 104, 54 N. W. 316; State

v. Campbell, 7 N. D. 58, 72 N. W. 935; Myers v. Mitchell, 1 S. D. 249, 46 N. W. 245.

"One who wilfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damages which he thereby suffers." Comp. Laws 1913, § 5943. "For every wrong there is a remedy." Comp. Laws 1913, § 7257.

Errors of which complaint is made, must be specifically assigned: The evidence erroneously admitted must be pointed out. Franz Falk Brewing Co. v. Mielenz Bros. 5 Dak. 142, 37 N. W. 728; McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39; Caulfield v. Bogle, 2 Dak. 464, 11 N. W. 511; Bush v. Northern P. R. Co. 3 Dak. 445, 22 N. W. 508; Hudlum v. Holy Terror Min. Co. 16 S. D. 261, 92 N. W. 31; Bettys v. Denver Twp. 115 Mich. 228, 73 N. W. 138; Bryson v. Boyce, 41 Tex. Civ. App. 415, 92 S. W. 820; Sanders v. Central of Georgia R. Co. 123 Ga. 763, 51 S. E. 728; Leverett v. Bullard, 121 Ga. 536, 49 S. E. 591; Sheridan v. Gray's Ferry Abattoir Co. 214 Pa. 115, 63 Atl. 418; Lane v. Williams, 118 Ga. 167, 44 S. E. 993; Reinhart v. Blackshear, 105 Ga. 799, 31 S. E. 748.

Unless so clearly stated, assignments of errors will not be considered. Western U. Teleg. Co. v. Michelson, 94 Ga. 436, 5 Inters. Com. Rep. 236, 21 S. E. 169; Pearson v. Brown, 105 Ga. 802, 31 S. E. 746; Georgia R. & Bkg. Co. v. Hurt, 112 Ga. 817, 38 S. E. 40; Reilly v. Atchison, 4 Ariz. 72, 32 Pac. 262; Feister v. Kent, 92 Iowa, 1, 60 N. W. 493; Fagerberg v. Johnson, 48 Kan. 434, 29 Pac. 684; Cheatham v. Pearce, 89 Tenn. 668, 15 S. W. 1080; Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559; Pearson v. Flanagan, 52 Tex. 266; Gallagher v. Goldfrank, 75 Tex. 562, 12 S. W. 964; Parker County v. Jackson, 5 Tex. Civ. App. 36, 23 S. W. 924; Galveston, H. & S. A. R. Co. v. Bowman, — Tex. Civ. App. —, 25 S. W. 140; Johnson v. White, — Tex. Civ. App. —, 27 S. W. 174; Kempner v. Ivory, — Tex. Civ. App. —, 29 S. W. 538; Salvador v. Feeley, 105 Iowa, 478, 75 N. W. 476; Reinhart v. Blackshear, 105 Ga. 799, 31 S. E. 748; Lane v. Williams, 118 Ga. 167, 44 S. E. 993; Sanders v. Central of Georgia R. Co. 123 Ga. 763, 51 S. E. 728; Altgelt v. Elmendorf, — Tex. Civ. App. —, 86 S. W. 41.

"A case will not be reversed on account of errors in rulings on evidence unless such errors are particularly specified." Clifford v. L. Wolff

Mfg. Co. 8 Colo. App. 334, 46 Pac. 214; Skinner v. Mitchell, 5 Kan. App. 366, 48 Pac. 450; Graham v. Frazier, 49 Neb. 90, 68 N. W. 367; Woodbridge Bros. v. DeWitt, 51 Neb. 98, 90 N. W. 506; Parkins v. Missouri P. R. Co. 4 Neb. (Unof.) 1, 93 N. W. 197; Louisville & N. R. Co. v. Morgan, 114 Ala. 449, 22 So. 20, 2 Am. Neg. Rep. 294; Las Animas County v. Stone, 11 Colo. App. 476, 53 Pac. 616; Quaker City Nat. Bank v. Hepworth, 21 Pa. Super. Ct. 566.

"An assignment of error to evidence, which does not set out the testimony admitted, is insufficient." Burt v. Florida Southern R. Co. 43 Fla. 339, 31 So. 265; Reinhart v. Blackshear, 105 Ga. 799, 31 S. E. 748; Willingham v. Sterling Cycle Works, 113 Ga. 953, 39 S. E. 314; Acklin v. McCalmont Oil Co. 201 Pa. 257, 50 Atl. 955; Bachert v. Lehigh Coal & Nav. Co. 208 Pa. 362, 57 Atl. 765; DeRoy v. Richards, 8 Pa. Super. Ct. 119; H. B. Claflin Co. v. Querns, 15 Pa. Super. Ct. 464; Pizzi v. Nardello, 23 Pa. Super. Ct. 535; Perry v. Lynch, 10 Colo. App. 549, 52 Pac. 219; Parsons v. Parsons, 17 Colo. App. 154, 67 Pac. 345; Rudolph v. Smith, 18 Colo. App. 496, 72 Pac. 817; Morris v. Levering, 98 Ga. 33, 25 S. E. 905; McCullough v. Seitz, 28 Pa. Super. Ct. 458; Brady v. Georgia Home Ins. Co. 24 Tex. Civ. App. 464, 59 S. W. 914; Cases cited in 3 Century Dig. § 29997, "Appeal & Error."

Novation belongs to the law of contracts, and not to the law of torts. We are seeking redress for a wrong—a deception—a fraud. We are not suing upon contract. True, a contract was made, but an essential element therein, namely, "consent," was obtained by fraud, and therefore not real. Comp. Laws 1913, § 5837; Jones, Ev. §§ 431, 435; 1 Rice, Ev. pp. 393, 394; 2 Rice, Ev. p. 953; Zerbe v. Miller, 16 Pa. 488; Hopkins v. Sievert, 58 Mo. 201; Stauffer v. Young, 39 Pa. 455; Smalley v. Hale, 37 Mo. 102; 2 Parsons, Contr. 6th ed. 786; Best, Ev. 230, 235, 236; Cushing v. Rice, 46 Me. 303, 71 Am. Dec. 579; Thompson v. Bell, 37 Ala. 438; Selden v. Myers, 20 How. 506, 15 L. ed. 976; Lull v. Cass, 43 N. H. 62; Montgomery v. Pickering, 116 Mass. 227; Meyer v. Huneke, 55 N. Y. 412; Wharton v. Douglass, 76 Pa. 273; Burtner v. Keran, 24 Gratt. 42; Gage v. Lewis, 68 Ill. 604; Hines v. Driver, 72 Ind. 125; McLean v. Clark, 47 Ga. 24; Turner v. Turner, 44 Mo. 535; Thomas v. Kennedy, 24 La. Ann. 209; Grider v. Clopton, 27 Ark. 244; Cook v. Moore, 39 Tex. 255; Fuller v. Lamar, 53 Iowa,

477, 5 N. W. 606; Wade v. Saunders, 70 N. C. 270; Abbott, Trial Ev. pp. 614, 615; Wood, Pr. Ev. 63; Cozzins v. Whitaker, 3 Stew. & P. (Ala.) 329; Beecker v. Vrooman, 13 Johns. 302; Johnson v. Miln, 14 Wend. 195; Tayloe v. Riggs, 1 Pet. 591, 7 L. ed. 275; Mumford v. M'Pherson, 1 Johns. 414, 3 Am. Dec. 339.

Subsequent conduct is admissible to show fraudulent intent. 2 Thomp. Trials, §§ 1977, 1978; Kephart v. Continental Casualty Co. 17 N. D. 380, 116 N. W. 349; 1 Hayne, New Tr. & App. § 1149; Spencer v. Long, 39 Cal. 700; Ackley v. Fishbeck, 124 Cal. 409, 57 Pac. 207.

Even though an issue be raised by the evidence, it should not be submitted as such to the jury unless raised by and supported in the pleadings. Miller v. Layne & B. Co. — Tex. Civ. App. —, 151 S. W. 341; 6 Century Dig. "Trial," § 832, and cases cited.

An appellant, to have the action of the trial judge reviewed, must bring into the record and before the appellate court the same record that was presented to the trial court; otherwise alleged errors are not reviewable. Schomberg v. Long, 15 N. D. 506, 108 N. W. 332; State v. Gerhart, 13 N. D. 663, 102 N. W. 880; State v. Scholfield, 13 N. D. 664, 102 N. W. 878; Aultman v. Jones, 15 N. D. 130, 106 N. W. 688; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132; Sockman v. Keim, 19 N. D. 317, 124 N. W. 64; Lockensmith v. Winton, 11 Ala. App. 670, 66 So. 954; American Nat. Bank v. Hammond, 25 Colo. 367, 55 Pac. 1090; Andrews v. Jackson, 168 Mass. 266, 37 L.R.A. 402, 60 Am. St. Rep. 390, 47 N. E. 412; Smith v. Anderson, 74 Or. 1158, 144 Pac. 1158; Collins v. Jackson, 54 Mich. 186, 19 N. W. 947; Stubbs v. Johnson, 127 Mass. 219; Tillis v. Smith Sons Lumber Co. 188 Ala. 122, 65 So. 1015; New v. Jackson, 50 Ind. App. 120, 95 N. E. 328; Moon v. McKinstry, 107 Mich. 668, 65 N. W. 546; Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Warner v. Benjamin, 89 Wis. 290, 62 N. W. 179; Hetland v. Bilstad, 140 Iowa, 411, 118 N. W. 422; Whitehurst v. Life Ins. Co. 149 N. C. 273, 62 S. E. 1067.

Representations as to the value of property very often are those of fact, and, when false, are actionable. Their materiality is for the jury. Mattauch v. Walsh Bros. 136 Iowa, 225, 113 N. W. 818; Hetland v. Bilstad, 140 Iowa, 411, 118 N. W. 422; Fottler v. Moseley, 179 Mass. 295, 60 N. E. 788; Kehl v. Abram, 210 Ill. 218, 102 Am. St. Rep. 158, 71 N. E. 347.

Evidence that satisfied the common mind of fraud is sufficient. The court so charged the jury. 1 Brickwood's Sackett, Instructions to Juries, § 1054; Jones, Ev. 2d ed. § 192; 1 Moore, Facts, § 50, and cases cited; Fargo Gas & Coke Co. v. Fargo Gas & Electric Co. 4 N. D. 219, 37 L.R.A. 593, 59 N. W. 1066; 16 Cyc. 927.

The burden of proof and knowledge of the facts giving rise to the right to rescind and of the time of acquiring such knowledge, rests on the defendant. Sprague v. Taylor, 58 Conn. 542, 20 Atl. 612; Kerr, Fr. & Mistake, 75; Nicol's Case, 3 De G. & J. 439, 28 L. J. Ch. N. S. 257, 5 Jur. N. S. 205, 7 Week. Rep. 217; Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032; 24 Am. & Eng. Enc. Law, 626; Hiner v. Richter, 51 Ill. 299.

Counsel have the right to argue to the jury the questions which concern the case. The fact that a special verdict is demanded does not change or abridge the rule. The right of argument is one of the essentials of "due process." 1 Thomp. Trials, § 920.

The subject of investigation and reliance was fully and properly submitted to the jury. Barron v. Myers, 146 Mich. 510, 109 N. W. 862, and cases cited.

Objections to questions must be specific. Hayne, New Tr. & App. rev. ed. § 105.

In actions for deceit, it is not necessary to prove each false or fraudulent representation. The finding of a single false representation inducing a sale is sufficient. Long v. Davis, 136 Iowa, 734, 114 N. W. 197; Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1, 40 Atl. 1046; Kehl v. Abram, 210 Ill. 218, 102 Am. St. Rep. 158, 71 N. E. 347; Somers v. Richards, 46 Vt. 170.

Questions as to the materiality or relevancy of testimony are largely, if not wholly, discretionary with the trial judge, and his rulings will not be interfered with in the absence of manifest abuse. Moody v. Pierano, 4 Cal. App. 411, 88 Pac. 380; Humphrey v. Monida & Y. Stage Co. 131 Minn. 18, 131 N. W. 498; Chesterfield Mfg. Co. v. Leota Cotton Mills, 114 C. C. A. 318, 194 Fed. 358; McDonald v. Smith, 139 Mich. 211, 102 N. W. 668.

The charge of the trial court must be considered as a whole,—not by excerpts. Stoll v. Davis, 26 N. D. 379, 144 N. W. 443; First Nat. Bank v. Minneapolis & N. Elevator Co. 11 N. D. 280, 91 N. W. 436;

Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335; National Bank v. Lemke, 3 N. D. 154, 54 N. W. 919; Gagnier v. Fargo, 12 N. D. 224, 96 N. W. 841.

A judgment will not be reversed because of an erroneous instruction, when it affirmatively appears from answers to interrogatories, that such instruction did not influence the jury in reaching its verdict. Acton v. Fargo & M. Street R. Co. 20 N. D. 458, 129 N. W. 225; McDonald v. Smith, 139 Mich. 211, 102 N. W. 668; Hutchinson Furnace & Smoke Consuming Co. v. Lyford, 123 Ill. 300, 13 N. E. 844; Eames v. Morgan, 37 Ill. 260.

The rule of *caveat emptor* does not apply under the facts here. "Where parties deal at arms' length the doctrine applies; but the moment the vendor makes a false statement of fact, and its falsity is not palpable to the purchaser, he has an undoubted right implicitly to rely upon it." Fargo Gas & Coke Co. v. Fargo Gas & E. Co. 4 N. D. 223, 37 L.R.A. 593, 59 N. W. 1066.

Many material facts, not known to or ascertainable by plaintiff, were purposely withheld by defendant, who possessed full knowledge of them. Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032; Graham v. Moffett, 119 Mich. 303, 75 Am. St. Rep. 393, 78 N. W. 132; Barron v. Myers, 146 Mich. 510, 109 N. W. 862; Miller v. Curtiss, 27 Jones & S. 127, 13 N. Y. Supp. 604; Webber v. Jackson, 79 Mich. 175, 19 Am. St. Rep. 165, 44 N. W. 591; Berge v. Eager, 85 Neb. 425, 123 N. W. 454; Smith v. Werkheiser, 152 Mich. 177, 15 L.R.A.(N.S.) 1092, 125 Am. St. Rep. 406, 115 N. W. 964; Harvey v. Smith, 17 Ind. 272.

Where evidence is circumstantial in its nature and offered to prove motive or intent, considerable latitude must be allowed. Jones, Ev. § 142; Coggey v. Bird, 126 C. C. A. 527, 209 Fed. 803; Mudsill Min. Co. v. Watrous, 9 C. C. A. 415, 22 U. S. App. 12, 61 Fed. 163, 18 Mor. Min. Rep. 1; Butler v. Watkins, 13 Wall. 456, 457, 20 L. ed. 629; Swinney v. Patterson, 25 Nev. 411, 62 Pac. 1; Bancroft v. Heringhi, 54 Cal. 120; Porter v. Stone, 62 Iowa, 442, 17 N. W. 654; United States v. Kenney, 90 Fed. 257; Darling v. Klock, 33 App. Div. 270, 53 N. Y. Supp. 593; Piedmont Bank v. Hatcher, 94 Va. 229, 26 S. E. 505.

Where part of correspondence by letters is offered and received, other

parts thereof may also be offered. 17 Cyc. 365, 408, "evidence;" Anderson v. First Nat. Bank, 4 N. D. 182, 59 N. W. 1029; Thayer v. Hoffman, 53 Kan. 723, 37 Pac. 125; Harris v. Pryor, 44 N. Y. S. R. 495, 18 N. Y. Supp. 128; Stringer v. Breen, 7 Ind. App. 557, 34 N. E. 1015; Pinkham v. Cockell, 77 Mich. 265, 43 N. E. 921.

It is not the province of a complaint to allege a rule of damages. Its business is to state the facts. St. Louis Trust Co. v. Bambrick, 149 Mo. 560, 51 S. W. 706; San Antonio v. Pizzini, — Tex. Civ. App. —, 58 S. W. 635.

CHRISTIANSON, J. This is an action to recover damages for the fraud and deceit of the defendant, whereby it is alleged that plaintiff was induced to purchase from the defendant an interest in a certain newspaper plant located in the city of Fargo in this state, known as the "Courier-News." Upon demand of defendant's counsel, the case was submitted to the jury for a special verdict. Judgment was ordered and entered against defendant upon such special verdict, and this appeal is from the judgment so entered.

The complaint at length and with great particularity sets forth the facts upon which plaintiff relies for a recovery, and charges "that the defendant, More, for the purpose of inducing the plaintiff to purchase an interest in said newspaper plant, and to pay over to him the cash or securities hereinbefore referred to, or pay to him their equivalent in money, to wit, the sum of twenty-thousand dollars ($20,000), and to induce plaintiff to resign his pastorate and sever his connection with his church and to remove his family from Toledo, Ohio, and establish himself in the city of Fargo permanently, and to induce the plaintiff to take upon himself the editorial management and the operation of said newspaper plant during the months of July, August, and September, 1913, falsely and fraudulently represented and stated to the plaintiff: (1) That the Courier-News was the leading newspaper in the state; (2) that the people of the state in their politics were almost solidly Progressive; (3) that the new Progressive party in its membership stood second in the state and ran second in the 1912 elections; (4) that the new Progressive party was organized, and was solidly behind the paper, and would get behind the plaintiff, and would give him united support; (5) that the paper was popular throughout the state; (6) was in good

repute and was of wide influence; (7) that it paid its bills and had a good financial standing; (8) that it was sound financially and was upon a paying basis, and was returning a profit month by month; (9) that it had a subscription list of at least 10,000; (10) that the newspaper and plant, including franchise, subscription lists, and accounts, were of the value of seventy-three thousand dollars ($73,000), to wit:

For the press, linotypes, type, stereotyping outfit, and entire mechanical equipment	$30,000
For the office equipment, furniture, etc., used in business and editorial departments	3,000
For Associated Press franchise	15,000
For subscription list	10,000
Uncollected accounts	15,000
	$73,000

The complaint also alleges a large number of fraudulent concealments, among others that the Courier-News, instead of being the leading newspaper in the state, was in fact in general disrepute as a newspaper, and had been for a number of years past, and was generally a discredited organ; that it had an unbroken record for financial bad faith with those who had interested themselves in it; that under its ownership just prior to that of the defendant, two persons active in its management were indicted by the Federal grand jury for fraudulent use of the mails in conducting a voting contest; that a large number of respectable citizens had at various times invested money in it to help sustain it, and that without exception these men had been the losers; that during its entire history and up to the time of the negotiations between the plaintiff and the defendant it had never returned a profit, and was a constantly losing venture during the ownership of the defendant, More.

The complaint further alleges that plaintiff relied upon said representations, and, because of such representations and concealments, was induced to pay over to defendant $20,000, resign his position as pastor, come to Fargo, and join with the defendant and his bookkeeper in organizing the Courier-News Corporation; and that the only thing he has received for his money is a stock certificate in said corporation of

the face value of $26,000, which it is alleged is worthless. And that by reason of such false representations and concealments, plaintiff has been damaged in the sum of $35,000. The answer, aside from certain admissions and explanations with reference to the fraudulent concealments charged, is a general denial.

The evidence shows that the plaintiff, at the time of the commencement of the transaction in question, was, and for twenty-five years prior thereto had been, a Methodist minister. Before entering the ministry he was a printer or newspaper man. During July, 1913, through a mutual acquaintance of plaintiff and defendant, plaintiff's attention was called to the fact that the defendant, More, owned and desired to sell the Courier-News. Negotiations were opened between plaintiff and defendant with the result that on August 4, 1913, they executed a written agreement as follows:

Memorandum of Agreement, made this 4th day of August, A. D., 1913, by and between A. Y. More, of Fargo, North Dakota, party of the first part, and Lewis T. Guild, of Toledo, Ohio, party of the second part.

Witnesseth:—That for and in consideration of the sum of forty-five thousand dollars ($45,000), to be paid by the party of the second part, to the party of the first part as hereinafter provided, said party of the first part hereby agrees to sell and does hereby sell to the party of the second part, the following described property, to wit:

The newspaper and printing business known as the Fargo Courier-News, etc. . . .

The sum of forty-five thousand dollars ($45,000) is to be paid as follows:

Five hundred ($500) in cash at the execution of this contract, which, in case the contract is canceled, is to be returned to Lewis T. Guild. . . . [Here follow provisions for the remainder of the payments].

It is mutually agreed by and between the parties hereto, that this contract, together with the notes for $25,000 and the chattel mortgage securing same, shall be left with the Northern Savings Bank, with an agreement that upon the party of the second part delivering to the party of the first part the $20,000 payment, and the said A. Y. More putting in the savings bank for the use and benefit of the said second party a

bill of sale conveying all of the above-described property, then, and in that event, one copy of this contract shall be delivered to each of the parties hereto, and the said notes for $25,000 and mortgage securing same shall be delivered to the party of the first part.

It is further agreed that said exchange shall be made on or before the 11th day of August, 1913. . . .

[Here follow provisions relative to the organizing of a corporation and the distribution of its stock, and an agreement that the defendant shall continue to operate the paper until September 1st, and also an agreement on his part to accept the obligations of corporation on the same terms as the notes of the plaintiff theretofore described.] . . .

This contract, together with a bill of sale of the newspaper plant from More to Guild, and three promissory notes and chattel mortgage on the same property from Guild to More, together with a letter of instructions signed by Guild and More, was delivered to Attorney Turner with instructions to deposit the same with the Northern Savings Bank of Fargo, to be held in escrow.

On August 5, 1913, an agreement was signed by More providing for certain changes in the contract. On August 11, 1913, a modification or extension of the contract was prepared and signed by the plaintiff, which provided for certain changes in the payments, and also provided that the time for the exchange of the bill of sale for the notes and chattel mortgage, and the delivery thereof to the plaintiff and defendant respectively, should be extended to September 15, 1913. This modification, together with a check for $5,000, was mailed by Guild to the Northern Savings Bank (the depository); and on August 16, 1913, that agreement was signed by More. The correspondence between the parties shows that Guild at one time, on account of the sickness of his wife and the difficulty which he experienced in closing his affairs at Toledo, suggested a cancelation of the contract, which, however, More would not permit.

The matter of the organization of the corporation was left in the hands of Attorney Turner, and a charter was obtained from the secretary of state on August 25, 1913. Thereafter on August 27, 1913, the plaintiff, Guild, arrived in North Dakota, and on the same day the first meeting of the incorporators was held and the organization perfected;

More subscribing for 358 shares in the proposed croporation, the plaintiff, Guild, for one share, and Williams (More's bookkeeper), the third incorporator, for one share. Some objection was raised to the regularity of the proceedings by an attorney who examined the same for the purpose of passing on the validity of the notes and chattel mortgage to be executed by the corporation to More. The plaintiff and defendant thereupon consulted Attorney Holt, of Fargo, with the result that another meeting of the stockholders of the corporation was held on August 29, 1913, and certain resolutions were passed canceling all proceedings had at the meeting of the stockholders held on August 27, 1913.

For certain reasons, it was agreed that the property should be sold to the corporation for the sum of $52,250. More, also, agreed to loan the corporation $3,000, to be used as a working capital. These matters were acted on by the directors of the corporation at the meeting held on August 29, 1913, and resolutions duly adopted authorizing the corporation to purchase from More the Courier-News newspaper plant for the sum of $52,250 for the following consideration: 360 shares of the capital stock of said corporation to be issued as follows: 358 shares to More; 1 share to Guild, and 1 share to Williams; the corporation to execute and deliver to More its promissory notes aggregating $19,250, secured by chattel mortgage on all its property, for the $16,250 balance of the purchase price, and the $3,000 loaned by More to the corporation. The certificates of stock were issued forthwith, and the notes and chattel mortgage were executed and delivered to More, and on that same day a bill of sale for the newspaper plant to the corporation was also executed. The chattel mortgage and bill of sale were filed for record shortly after their execution. On August 30, 1913, the plaintiff executed and delivered to the defendant, More, two checks aggregating $14,500, which defendant thereafter cashed. And on the same day, More assigned and delivered to Guild 258 shares of the capital stock of the corporation, and Williams (More's bookkeeper), shortly thereafter assigned his one share of stock to Guild, and also tendered his resignation as an officer of the corporation.

The agreement, as consummated between Guild and More, was that Guild, in consideration of the $20,000 paid to More, received 260 shares of the capital stock, and More received the $20,000 paid by

Guild, 100 shares of capital stock in the corporation, and the notes of the corporation for $16,250. The result of the transaction as consummated was that the Courier-News Corporation, became the owner of the newspaper plant formerly owned by More, subject to a first mortgage to More for $19,250, securing part of the purchase price and the $3,000 loan made by More to the corporation. There were issued in all 360 shares of the corporate stock of this corporation, of which More held 100 shares, and Guild 260 shares, for which Guild had paid in all $20,000 in the following manner: $500 on August 4, 1913; $5,000 about August 11, 1913, and $14,500 on August 30, 1913. The plaintiff took possession of the newspaper property on September 1, 1913, later returned to Ohio and removed his family to Fargo. Guild had no knowledge of the fraud practised upon him until after his return from Ohio. But after being in possession of the property he discovered certain things which led him to believe that misrepresentations had been made to him, and he reported these matters to the defendant from time to time. Receiving no satisfactory explanation or adjustment, he, on October 7 and 9, 1913, respectively, wrote letters or notices to More, stating that on account of the misrepresentations he (plaintiff) repudiated the contract, and tendered a return of the stock certificates, and demanded from defendant a return of the $20,000 which plaintiff had paid. This demand was ignored by defendant, and plaintiff thereafter brought this action.

We have not set out the evidence with reference to the false representations, and fraudulent concealments, as it is unnecessary to a consideration of the questions raised. It is sufficient to say that the evidence showed that such misrepresentations and concealments were made from the commencement of the negotiations in the latter part of July, 1913, until the consummation of the transaction on August 30, 1913. The jury, in their answers to the special findings, found that: (1) The representations and suppressions were made as alleged. (2) That they were material. (3) That they were false. (4) That they were wilfully made, with intent to deceive the plaintiff, and to induce him to resign his position, come to Fargo, take up the management of the Courier-News, and buy an interest in it. (5) That plaintiff relied in and upon such representations in purchasing from the defendant an interest in the Courier-News. (6) That each of the various suppres-

sions of fact constituted one of the inducements which led plaintiff to purchase an interest in the Courier-News. The findings of the jury are amply sustained by the evidence.

After the jury had been impaneled and sworn to try the case, defendant's counsel objected to the introduction of evidence, and moved for a dismissal of the action "upon the ground and for the reason that the complaint does not state facts sufficient to constitute a cause of action; particularly in this that it does not allege facts from which damages can be measured or determined, and does not allege the value of the property sold and delivered by the defendant to the plaintiff, nor the value such property would have had if it had been as represented by the defendant."

1. It is too well settled to require the citation of authority that an objection to the admission of evidence at the trial, on the ground that the facts stated in the complaint are not sufficient to constitute a cause of action, is not favored by the courts. The presumption is in favor of the pleading so attacked, and if it states facts showing that the plaintiff is entitled to recover, though the same may be informally stated, it will be sustained.

2. The complaint in the case at bar, however, was clearly sufficient. It set forth with a great deal of particularity the facts constituting plaintiff's cause of action, and alleged, and prayed for, damages in the sum of $35,000. The objection was based upon the theory that the complaint must state the measure of damages. We are not aware of any such rule of pleading. The damages asked by plaintiff were general damages, *i. e.,* such damages as the law holds to be the necessary result of the cause of action set forth in the complaint. In such cases the measure of damages is purely a question of law. Sedgw. Damages, 9th ed. § 606. And this court has repeatedly considered and determined the same as a legal question. Fargo Gas & Coke Co. v. Fargo Gas & Electric Co. 4 N. D. 219, 37 L.R.A. 593, 59 N. W. 1066; Beare v. Wright, 14 N. D. 31, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057. Hence, an allegation stating the measure of damages is not essential, as this would be merely a statement of a legal conclusion. St. Louis Trust Co. v. Bambrick, 149 Mo. 560, 51 S. W. 706; San Antonio v. Pizzini, — Tex. Civ. App. —, 58 S. W. 635. See also 31 Cyc. 49; 12 Enc. Pl. & Pr. 1024.

The proposition on which appellant apparently places his greatest reliance is that plaintiff, by bringing this action for deceit, affirmed the contract entered into August 4, 1913, and that therefore the only representations which would be material are those made prior to August 4, 1913, and that therefore it was error to admit evidence showing representations made by defendant to plaintiff between August 4, 1913, and August 29, 1913. Appellant's counsel states the proposition in their brief as follows:

"Exhibit 17 was the contract which Guild was fraudulently induced to enter into (assuming fraudulent representations or concealments as we are bound to do). The only fraudulent representations and concealments which are material are those made prior to August 4th. They are the only ones which could have induced Guild to make the contract. After he had signed this contract he became obligated by its terms, and legally bound to carry out all his covenants thereunder until he repudiated the contract. Even though induced by fraudulent representations the contract was not void, but only voidable. Any fraudulent representations or concealments which may have been made after August 4th were palpably immaterial. They could not have induced Guild to execute Ex. 17. They, of course, may have induced Guild to carry out the contract, but, if so, they only induced him to do what he was already legally bound to do under the terms of his contract. What he did in performance of his contract is, as a matter of law, only attributable to his obligation to perform the contract, and cannot be attributed to any false representations or concealments made after the contract was executed. A party cannot be defrauded in being induced to do what good faith and a proper observance of his promises made it his duty to do."

Plaintiff does not bring a suit on contract, but asks to be compensated for the damages he has sustained on account of the deceit practised upon him by the defendant. The plaintiff in his complaint averred, and by his evidence established, that by reason of, and in reliance upon, certain false representations on the part of defendant, he (plaintiff) paid over to defendant in all $20,000 in cash, in return for which he (plaintiff) received only 260 shares of stock in a certain corporation.

3. Plaintiff's right of recovery exists not by reason of contract, but

by reason of the obligation imposed by our statute, under our law, "every person is bound without contract to abstain from injuring the person or property of another or infringing upon any of his rights." Comp. Laws, § 5942. And, "one who wilfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers." Comp. Laws 1913, § 5943.

4. Actionable fraud does not necessarily consist of false representations which constituted an inducement to the making or consummation of a contract. But, if the essential elements of actionable fraud are present, a plaintiff can recover such damages as he has sustained through relying on the misrepresentations of a defendant in any transaction, whereby plaintiff has been induced to part with property or surrender some legal right, and thereby suffered loss and injury. As, when such misrepresentation induced plaintiff, to his loss, to refrain from making sales or entering into contracts (Snow v. Judson, 38 Barb. 210; Butler v. Watkins, 13 Wall. 456, 20 L. ed. 629); or from performing a contract (Benton v. Pratt, 2 Wend. 385, 20 Am. Dec. 623; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30); or from exercising his right to rescind a contract (New York Land Improv. Co. v. Chapman, 118 N. Y. 288, 23 N. E. 187; Bowen v. Carter, 124 Mass. 426); or where plaintiff by false and fraudulent representations, or by fraudulent concealment of facts, is induced to compromise a claim (Wessels v. Carr, 15 App. Div. 360, 44 N. Y. Supp. 114; Howard v. McMillen, 101 Iowa, 453, 70 N. W. 623; Buck v. Leach, 69 Me. 484); or to extend credit, and suffers loss through the insolvency of the person to whom credit is extended (20 Cyc. 68).

Cooley (Cooley, Torts, 3d ed. p. 905) says: "Actual or positive fraud consists in deception practised in order to induce another to part with property or to surrender some legal right, and which accomplishes the end designed."

20 Cyc. 80, states the law to be as follows: "An action of deceit may be maintained upon fraudulent misrepresentations whereby plaintiff has been induced to forbear the enforcement of some legal right and has thereby suffered loss, as well as where he has been induced to do some positive act."

"To maintain an action of deceit it is not necessary that the false representations should have been an inducement to a contract after-

ward consummated; but, if the essential elements of actionable fraud are present, plaintiff can recover damages he has sustained through relying on the misrepresentations of defendant." 20 Cyc. 79.

A cause of action in deceit accrues immediately upon the successful consummation of the fraud, provided the fraud results in injury to the plaintiff. 20 Cyc. 90. He is not required either to complete or perform the contract (20 Cyc. 92), or tender a return of the property received under the contract, but is entitled to retain what he received, and sue for the damages caused by the fraud. 20 Cyc. 91.

5–7. A contract thus entered into is voidable and does not become binding on the defrauded party until his free consent thereto is given. In other words, it does not become a valid contract or binding upon the defrauded party unless, with knowledge of the fraud, he ratifies or affirms it. Sell v. Mississippi River Logging Co. 88 Wis. 581, 60 N. W. 1065, 1067. The law naturally does not protect the wrongdoer, or give him any benefit or advantage by reason of the fraud he has perpetrated. And, therefore, on discovery of the fraud, the defrauded party is given the option of rescinding or affirming the transaction. In case of rescission, he is required to act promptly on discovery of the fraud. In such case, the contract ceases to exist for any purpose, and the parties stand in the same position as though it had never been made, and hence, it is necessary that they be placed in the same position in which they were before the transaction took place. Therefore the party defrauded, in such case, is entitled to recover back whatever consideration he parted with, but he must, also, return or offer to return to the other party whatever he received. In case of affirmance, he retains what he received, and is entitled to be compensated for the damages he sustained by reason of the false representation. That is, the wrongdoer will be compelled to pay damages equal to the difference in value between what he gave and what he represented he would give. Fargo Gas & Coke Co. v. Fargo Gas & Electric Co. 4 N. D. 219, 37 L.R.A. 593, 59 N. W. 1066; Beare v. Wright, 14 N. D. 31, 69 L.R.A. 409, 103 N. W. 632, 8 Am. Cas. 1057.

The transaction may be affirmed either expressly or by implication. And a person who retains as his own the property which he received in the transaction will necessarily be deemed the owner thereof. And, having elected to assume the position of owner, will be compelled to

abide by the selection made, and to be not only invested with the rights and prerogatives, but also burdened with the duties and liabilities, incident to such ownership. Hence, in such case the measure of damages for the fraud and deceit practised upon him is very properly predicated upon the basis that the defrauded party is the owner of the property, and therefore his damage is equal to the difference in value between the property he received and what he would have received if the representations had been true. Such affirmation, however, does not remove all effect of the fraud, or render the contract in every essential equivalent to a contract originally made in good faith and free from fraud. The party guilty of fraud is not relieved from liability for his wrongful conduct, nor does the injured party waive his claim for damages. 20 Cyc. 87, 90. Neither is the defrauded party bound by the recitals of the contract. The rule that prior negotiations are merged in the written agreement does not apply. But the party defrauded may show by parol that he was induced by false and fraudulent representations to become a party to the contract. Jones, Ev. §§ 431, 435.

It is true, plaintiff affirmed the transaction; but which transaction did he affirm? He had the option of either affirming or rescinding; he elected to affirm. But he must affirm or rescind the entire transaction. He could not affirm in part, and rescind the remainder. The transaction here involved was the sale by More to Guild of an interest in the Courier-News, and the payment therefor by Guild to More of $20,000. The executory contract of August 4, 1913, constituted merely a part of the transaction. This contract was voidable. It was tainted with fraud. No legal duty rested on Guild to comply with its terms. If Guild was induced by false representations to carry out the scheme outlined in such contract, then such latter representations were equally actionable. Plaintiff received no property on August 4th, but merely the promise of defendant to deliver certain property to him at a future time, upon certain conditions. The only thing plaintiff ever received for his money was the stock certificates delivered to him on August 30th. On that day the transaction was terminated, and the purpose sought by the false representations accomplished. On that day, plaintiff received the stock certificates for which he paid his money. It seems obvious that by retaining these certificates he affirmed the transaction by which he became possessor thereof, and not merely the executory negotiations and agreements in the transaction.

It is true that an action for deceit will not lie where a party is merely induced to do that which good conscience and legal duty requires him to do,—such as, to pay a just and legal debt, or comply with the conditions of a valid, legal contract. But that is not the condition here. The contract signed August 4, 1913, was wholly executory. (Comp. Laws § 5921.) It even contemplated a possible cancelation, and provided that, in event of such cancelation, the $500 paid by Guild should be returned to him. Its execution was merely one of the numerous acts in the transaction which was consummated on August 30, 1913, by the delivery to Guild by More of the stock certificates, and the payment by Guild to More of the sum of $14,500. One of the essentials to the existence of a valid contract is the consent of the contracting parties thereto. (Comp. Laws, § 5837.) This consent must be free and mutual. (Comp. Laws, § 5842.) The apparent consent is not real or free when obtained through fraud. (Comp. Laws, § 5844.) Even the executed contract consummated on August 30, 1913, was voidable, and subject to rescission. The free consent of Guild thereto was lacking. It did not become binding upon Guild until he, with knowledge of the fraud, ratified or affirmed it. Sell v. Mississippi River Logging Co. 88 Wis. 581, 60 N. W. 1065, 1067. The trial court properly admitted the evidence in question.

8. The evidence was admissible for another reason. The undisputed evidence shows that the contract signed August 4, 1913, was, together with the other papers accompanying the same, delivered in escrow. By the modification subsequently executed and transmitted to the depository, the date for the delivery of the papers deposited with this contract was extended to September 1, 1913. It is undisputed that the bill of sale from More to Guild, and the promissory notes and chattel mortgage from Guild to More, deposited in escrow with this contract, were never used. But on August 29, 1913, another bill of sale for the newspaper property was executed and delivered to the corporation, and the corporation thereupon executed and delivered its notes and chattel mortgage to More. This entire deal was fully consummated on August 30, 1913, by the delivery to the respective parties of the various papers, and the payment by Guild to More of the sum of $14,500, the balance of the $20,000. It appears, therefore, that the contract signed August 4, 1913, and the bill of sale and notes and chattel mortgage accompany-

ing the same, were as a matter of fact never delivered by the depository to the parties for whom they were intended, but before the time fixed for such delivery other papers executed by, and to, different parties were delivered in place thereof. Hence, as neither the contract signed August 4, 1913, nor any of the papers accompanying it were ever delivered, it is self-evident that these instruments never had any legal effect nor became binding upon the parties thereto. Because it is a general rule (in this state prescribed by statute), that "a written instrument has no legal inception or valid existence until it has been delivered in accordance with the intention of the parties." See §§ 5891 and 6901, Compiled Laws, and Stockton v. Turner, 30 N. D. 641, 153 N. W. 275. The plaintiff, Guild, testifies that these instruments were afterwards destroyed, and this is not denied by any other witness. Hence, it seems quite clear that the parties intentionally abandoned the escrow arrangement and consummated a deal along other lines.

One Metcalf was called as a witness for plaintiff and permitted to testify in regard to certain negotiations which he had with the defendant, More, in the spring of 1913, for the purchase of the Courier-News plant. Appellant asserts that this transaction was too remote in point of time, and in no manner relevant to the issues involved in this action, and that therefore the admission of evidence relative thereto constituted prejudicial error. Metcalf's testimony showed that he was a newspaper man of considerable experience. That in the spring of 1913 he entered into negotiations with More for the purchase of the Courier-News, and, together with one Baker, obtained an option contract therefore from More, and paid More $250, as earnest money. That, thereafter, he (Metcalf) worked on the paper for about ten weeks, and, while so engaged, examined the various books and records of the concern and found that at least $5,000 of the subscription accounts had prior thereto been in the hands of a collection agency for collection, and returned by such agency as uncollectable. That a large number of the subscription accounts were from four to six years old. That the books showed that during the eight months of More's ownership prior to Metcalf's investigation, the paper had been operated at a loss of about $11,000, which deficit had been made good by More. Metcalf further testified that, after discovering this condition of affairs, he had an interview with the defendant, More, about the middle of June, 1913, and informed

him fully of the result of his investigation, and refused to proceed with the purchase, and that thereupon the defendant, More, returned the money paid by Metcalf.

We are unable to see how it can be seriously contended that this testimony was inadmissible. Among the vital questions at issue in this lawsuit was the following: "Did More *knowingly* misrepresent or conceal certain material facts for the purpose and with the intent of inducing Guild to purchase an interest in the Courier-News, and pay over to More, $20,000?" The testimony in question had a direct bearing on More's knowledge of the financial condition of the paper. It tended to show that he was fully informed of the fact that it was losing money, and that a large portion of the subscription accounts were worthless. The fact that Metcalf informed him of these matters in June, 1913, would obviously be competent evidence to show that More was possessed of this knowledge during his negotiations with Guild in August, 1913.

In speaking on this subject, in Bottomley v. United States, 1 Story, 135, Fed. Cas. No. 1689, the distinguished jurist, Judge Story, said: "Wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, these collateral facts, tending to establish such intent or knowledge, are proper evidence. In many cases of fraud it would be otherwise impossible satisfactorily to establish the true nature and character of the act."

The evidence in question was clearly competent for the purpose of showing knowledge on the part of More. Elliott, Ev. § 2141; Jones, Ev. § 142; 6 Enc. Ev. 26; 20 Cyc. 119; See also Mutual L. Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; Penn Mut. L. Ins. Co. v. Mechanics Sav. Bank & T. Co. 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413.

10. During October and November, 1913, the plaintiff sought to make a sale of his interest in the Courier-News through the agency of a newspaper broker named Heinrichs. Defendant's counsel demanded and received from plaintiff the entire correspondence between plaintiff and Heinrichs regarding this matter. They then selected five letters and a telegram from plaintiff to Heinrichs, and offered the same in evidence as a part of their cross-examination of the plaintiff, Guild, for the purpose of impeaching his testimony. Plaintiff's counsel thereupon offered the remainder of the correspondence. The correspondence all

related to the same proposed transaction, and referred to a prospective purchaser. In one of the letters from Heinrichs to Guild, he refers to a letter from the prospective purchaser, saying among other things: "I am inclosing a letter. . . . The inclosed letter from C. A. Stedman will explain itself." The Stedman letter so inclosed was among the correspondence so offered by plaintiff's counsel. It is now asserted that the admission of this letter constituted prejudicial error. We are unable to find any merit in appellant's contention. The Stedman letter was part of the correspondence. The letter from Heinrichs to Guild, with which it was inclosed, clearly shows that it cannot be fully understood unless the letter inclosed is read in connection therewith. Defendant's counsel had the entire correspondence in their possession. They knew its contents. They selected and offered in evidence a few selected, isolated letters out of a series of letters relating to the same transaction. The letters were offered for the purpose of impeaching Guild's testimony, by showing that certain statements in the letters offered were contrary to statements made by Guild during the trial. It seems obvious that the most elemental rules of justice and fair play would permit him to introduce the whole of the correspondence so that the jury would have, not a few isolated statements, but all the statements made, and thus be enabled to say whether, taking the correspondence as a whole, Guild did make any statements therein contrary to those made at the trial.

Rules of evidence were formulated to aid the court and jury in ascertaining the truth in disputed transactions. If a part of a conversation, or portions of a letter, or a few selected letters from an entire correspondence, could be selected and offered in evidence, and the remainder excluded, it would seldom establish the truth, but would give an imperfect and frequently a distorted and erroneous idea of the conversation, letter, or correspondence under consideration. Isolated words do not convey the meaning of a sentence; and it is no more likely that part of a conversation, portions of a writing, or a few letters out of a correspondence, will disclose the meaning and intention of the parties as expressed by them in such conversation, writing, or correspondence. Hence, it is one of the fundamental rules of evidence, that where one party uses as evidence statements made during a conversation, or a number of a series of letters written, by the party sought to be charged

or affected thereby, then the latter may offer the remainder of the conversation or correspondence relating to the transaction or question in issue. Jones, Ev. § 294; 17 Cyc. 408; Anderson v. First Nat. Bank, 4 N. D. 182, 59 N. W. 1029; Thayer v. Hoffman, 53 Kan. 723, 37 Pac. 125; and Stringer v. Breen, 7 Ind. App. 557, 34 N. E. 1015. See also Abbott, Civil Trial Brief, 3d ed. pp. 309, 310, and authorities cited.

The Stedman letter was part of this correspondence. It was directly referred to in other letters. Much of the correspondence would be misleading and confusing without it. It was necessary that the jury should know the contents of this letter in order to fully understand the remainder of the correspondence, and to determine whether plaintiff did as a matter of fact in this correspondence make any statements contrary to his testimony at the trial. "Where a writing offered refers to another writing, the latter should also be put in at the same time, provided the reference is such as to make it probable that the latter is requisite to a full understanding of the effect of the former." Wigmore, Ev. § 2104. See also Wigmore, Ev. § 2120; 17 Cyc. 365; United Iron Works v. Outer Harbor Dock & Wharf Co. 168 Cal. 81, 141 Pac. 917; McDonnell v. Huffine, 44 Mont. 411, 120 Pac. 792. Defendant's counsel, by offering a portion of the correspondence between Guild and Heinrichs, opened the door for their adversary to introduce the remainder of the correspondence, relative to the same transaction. No error was committed in the admission of this testimony.

Error is also assigned upon the admission in evidence of two letters or written notices, dated October 7 and 9, 1913, respectively, delivered by Guild to More, tendering a return to More of the stock, and demanding a return to Guild of the money paid. Plaintiff alleged in his complaint that "he notified the defendant that he had been defrauded, and that the facts had been misrepresented, and that he repudiated the transaction; that at defendant's request he, the plaintiff, continued to edit and manage the paper and to avoid sacrifice and injury to the paper, as well as embarrassment to the defendant, he waived his proposed rescission and is still continuing to edit and manage the paper; that he has elected to hold said defendant for such damage as this defendant has caused him through the fraud and deceit."

The defendant by his answer put this allegation in issue. Hence, it was proper for the plaintiff to offer evidence bearing on this contro-

verted issue of fact. Just before the written notices were offered, plaintiff had been stating when he discovered the fraud, and what he discovered, and that he thereupon called these matters to More's attention. And while testifying to such conversations, he stated that he served notice upon More that he (plaintiff) would demand a rescission. Defendant's counsel thereupon moved that this testimony be stricken out.

The motion and the court's ruling thereon as shown by the record are as follows:

By Mr. Pollock: Just a moment. We ask that this be stricken out as not *the best evidence;* not responsive.

By the Court: Well that is sustained. You have the written notice there?

By Judge Young: Yes.

By the Court: Then it is sustained.

Whereupon plaintiff's counsel, conforming to the court's ruling, offered the written notices wherein plaintiff demanded a return of the money paid to defendant, and tendered to defendant the 260 shares of stock, which plaintiff had received from More. No error was committed in admitting this evidence.

Error is assigned on the refusal of the court to give a certain instruction, and submit a proposed question to the jury. Neither the requested instruction nor the proposed question were incorporated in the statement of case. Respondent insists that these matters are not part of the record in a civil action, unless incorporated in the statement of case. Appellant, however, contends that under the provisions of the 1913 practice act all requested instructions, whether given or refused, become part of the judgment roll and therefore need not be incorporated in the statement of case.

Under the laws of this state, prior to the enactment of the new practice act in 1913, neither the instructions nor the requests for instructions constituted part of the judgment roll, and, hence, could not be reviewed on appeal unless incorporated in the statement of case. See Kinney v. Brotherhood of American Yeoman, 15 N. D. 21, 31, 106 N. W. 44. The former law was amended in 1913 and the following provision incorporated: "All instructions of the court to the jury, when

filed in the office of the clerk of said court, shall be deemed a part of the judgment roll." Comp. Laws, 1913, § 7689. It is conceded that requests for instructions do not become part of the judgment roll unless they are made so by virtue of the section quoted. The language of this section is plain. There seems indeed to be little, if any, need of judicial construction. It provides that *"all the court's instructions to the jury"* shall be deemed a part of the judgment roll. This obviously refers to the instructions actually given and which guided the jury in its deliberations. These instructions, it is true, may consist partly of matter requested by either or both sides, but such requested instructions do not become a part of the court's instructions to the jury unless the request is granted and the proposed instructions actually given to the jury.

Appellant's counsel has requested that in the event this court shall hold that the request to instruct and to submit the proposed question to the jury are not subject to review on appeal unless incorporated in the statement of case, that then this court in the exercise of its discretion permit the record to be remanded to the district court in order that such matters may be incorporated in the statement of case. This request must be denied, as we are entirely satisfied from an examination of the proposed instruction and questions as printed in appellant's brief that the trial court committed no error in denying these requests.

14. Appellant asserts that the trial court erred in giving the following instruction: "I will now take up the question of fraud and deceit. Here again the burden of proof falls upon the plaintiff to show by a fair preponderance of the evidence the fraud and deceit which he has alleged in his complaint [here the court refers to the various representations and suppressions charged]. Has the plaintiff by a fair preponderance of the evidence shown the intentional and wilful falsity of such statements, their fraudulent and deceitful character, and his, plaintiff's, reliance thereon, and the same with reference to the alleged suppressions."

Appellant's position is stated in his brief as follows: "The gist of the error we complain of is embodied in the following sentence from the above charge." Here again the burden of proof falls upon the plaintiff to show by a *fair preponderance* of the evidence the fraud and deceit which he has alleged in his complaint. We contend that this does not correctly state the law as to the burden of proof which rests upon plaintiff.

The court's instructions should be considered as a whole. The instruction complained of was only a part of the court's instructions to the jury on the subject under consideration. The court, after calling the jury's attention to the various representations and suppressions charged in the complaint, instructed the jury as follows: "Has the plaintiff by a fair preponderance of the evidence shown *the intentional and wilful falsity of such statements, their fraudulent and deceitful character, and his, plaintiff's, reliance thereon and the same with reference to the alleged suppression?*

"At the threshold of this inquiry I charge you, gentlemen of the jury, that fraud and deceit are never to be presumed, but must be affirmatively proven by the party alleging the same. *The law presumes that all men are fair and honest; that their dealings are in good faith and without intention to cheat or defraud others.* Where a transaction called in question is equally capable of two constructions,—one that is fair and honest, and one that is dishonest,—then the law is that the fair and honest construction must prevail, and the transaction called in question must be presumed to be fair and honest." The trial court carefully explained what was meant by the burden of proof, and with reference to the application thereof in this particular case instructed the jury as follows: "In a word, the rule that the law imposes upon a party charging fraud being *that he shall produce sufficient evidence to satisfy the judgment and conscience of the jury of the truth of the charge.* Fraud is fully proved by evidence that satisfies the conscience of a common man so that he would act upon his conviction in matters of the highest importance to his one interest."

In connection with the preponderance of evidence the trial court, after carefully defining the term "preponderance," instructed the jury as follows: "The law says that unless, upon the various matters where I have stated that the plaintiff has the burden of proof, he satisfies you of the correctness of the facts as alleged by him to such an extent that his proof outweighs the proof of the defendant, he cannot prevail in the instances where he has not so satisfied you. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the defendant weighs just the same as that of the plaintiff, you must find for the defendant upon that question."

The court's instructions gave the defendant the benefit of the presumption of honesty and fair dealing, and placed upon the plaintiff the burden of proving by a preponderance of the evidence, every material element of the cause of action. These instructions were not prejudicial to defendant, and he has no just cause of complaint. 17 Cyc. 760; 20 Cyc. 109.

15–17. Appellant, also, asserts that the following instructions were erroneous: "The ground of this kind of redress is not the merit of the plaintiff, but the demerit of defendant; it being the law that one who chooses to make positive assertions without warrant shall not excuse himself by saying that the other party need not have relied upon them. The defendant must show that his representations were not in fact relied upon, if such representations and their falsity have been proved by the plaintiff.

"In short, nothing will excuse culpable misrepresentations, if you find any were made, short of proof that they were not relied on, either because the other party knew the truth, or because he relied wholly on his own investigation, or because the alleged fact did not influence his action at all; and the burden of proving that false statements were not relied on is on the person who has been proved guilty of material misrepresentations." The specific objections made to these instructions in the court below were that they did not properly state the law, were inapplicable to the facts in the case, in conflict with other portions of the charge, and in effect placed the burden of proof upon the defendant. The latter objection is the only one urged in this court, and hence is the only one which we will consider.

The plaintiff testified that he relied solely and absolutely upon the representations made by the defendant. Defendant, as part of his defense, offered evidence tending to show that plaintiff was given an opportunity to investigate, and did investigate, the books and property of the Courier-News, and had an opportunity to inform himself of the facts, and hence either know or should have known the falsity of the alleged representations. This testimony was offered by defendant for the purpose of rebutting the contention that the misrepresentations alleged provided the inducement which caused plaintiff to make the purchase. As stated by appellant in his brief: "The theory of defendant was that, even admitting that there had been fraudulent representations

or concealments which induced the making of the contract, Ex. 17, that nevertheless plaintiff undertook to make and in fact made a thorough investigation before signing the contract, and relied solely upon such investigation, and not upon false representations, if any were made." This is denominated by appellant throughout his brief, and also upon oral argument as "defendant's affirmative defense."

The instructions assailed are merely two short excerpts selected from the charge. We have already set out the court's instructions as to the burden of proof. The jury was therein specifically informed that the plaintiff had the burden of proving by a preponderance of the evidence, the facts alleged in his complaint, including his reliance on the alleged misrepresentations. In dealing with defendant's "affirmative defense," the court, after stating the contentions of the parties in respect thereto, immediately preceding the instructions assailed, instructed the jury as follows: "The question then naturally arises, first, Would the plaintiff be estopped from claiming that he was deceived and defrauded if, by a diligent, faithful, and searching examination of the plant, the books, and the records of the Courier-News, he could have discovered the falsity of the statements he claims defendant made? In that behalf, I charge you, gentlemen, that if you find false statements were made to plaintiff by defendant or his agent, and the falsity of the same was discovered by Mr. Guild by an examination of the books or plant of the company, then it would follow he could not claim to have been deceived and defrauded by such false statements, if any you find were made."

The court, in the parts of the charge here assailed, was dealing solely with "defendant's affirmative defense." For the purpose of submitting the same, it adopted the theory of the defense, as quoted from appellant's brief. The trial court was dealing with a case wherein it was conceded, or proved, that actionable false representations had been made,—a case wherein the defendant "had been proved guilty of material misrepresentations." The instructions complained of are expressly limited to a case of that nature. The court nowhere instructed the jury that the burden of proof rested on the defendant. On the contrary, the jury was expressly instructed that the burden of proof was upon the plaintiff to prove the facts alleged in the complaint by a preponderance of the evidence.

While it is true that plaintiff in this, as in every case, had the burden of proof throughout the case—so far as the material allegations in his complaint denied by the answer were concerned—still, it did not necessarily follow that he also had the "burden of evidence" throughout the case. Much confusion has arisen among the decisions of the various courts out of the fact that the term "burden of proof" is generally used by the courts in two senses. (1) In the first sense, when it is said that the burden of proof is on "A" that means that he will lose unless he shall at the close of the trial have brought down his end of the scale, by placing thereon a weight of evidence sufficient, first, to destroy the equilibrium; and, second, to overbalance any weight of evidence placed on the other end. (2) In the second sense, the necessity which rests on a party at any particular time during a trial to create a prima facie case in his own favor or to overthrow one when created against him. This necessity or burden devolves upon one party whenever under the evidence, or applicable presumptions, or a combination of these, the other party is entitled as a matter of law to a ruling in his favor. § 16 Cyc. 926; 2 Enc. Ev. 777, 808. In order to avoid this confusion, a number of courts have substituted some other phrase for the term "burden of proof" when used to express the second meaning. The terms most frequently used to express such second meaning are, "burden of evidence" and "weight of evidence." See Words & Phrases, 1st Series, and Words & Phrases, 2d Series, Cyc. uses the term "burden of proof" to express the first meaning, and the term "burden of evidence" to express the second meaning. And in showing the distinction between the two terms thus used it is said: "As the burden of proof is invariably determined by the rules of pleading, so the position of the burden of evidence is controlled by the logical necessities of making proof which a party is under at the time the question of its position becomes important; the burden of evidence being always upon that party against whom the decision of the tribunal would be given if no further evidence were introduced, or, to speak more accurately, if no evidence were introduced which the judge would permit the jury to consider as the basis of their verdict. It results from this that at the beginning of every trial the burden of proof and the burden of evidence are on the same party as to the existence of every fact essential to the affirmative case, including the credibility of the witnesses and the legal validity

and genuineness of documents adduced to support it. This burden of evidence so continues until the party with the burden of proof establishes a prima facie case, for nothing less than the latter will shift the burden of evidence. The party having the burden of proof may establish a prima facie case in several ways: (1) He may prove facts which give rise to an inference of that probative weight; or (2) he may establish the existence of some legal substitute for such an inference of fact; or (3) he may proceed by a combination of these methods as to the whole or different parts of his case. When such a prima facie case is established, the burden of evidence is then shifted upon the party who does not have the affirmative of the issue, the position of the burden of proof being in no way affected. Since affirmative action of the tribunal demands that the party who has the burden of proof shall at the end of the trial stand possessed of a prima facie case in his favor, the party who has not the affirmative of the issue succeeds, for the time being, if he can impair the prima facie quality of the case against him, and the burden of evidence thereupon returns to the party having the burden of proof; and this process continues until the stock of relevant facts is exhausted." 16 Cyc. 932.

So, in an action by a passenger against a company for personal injuries, the passenger has the burden of proof, but when he establishes that the injury was caused by the carrier's act in the operation of the train, he raises a presumption of negligence, and the burden of evidence is thereupon shifted upon the railway company, and it has the burden to rebut that presumption by showing that it was not negligent, or that the plaintiff, by the exercise of ordinary care on his part, could have avoided the consequences to himself of the negligence of the carrier. See Cody v. Market Street R. Co. 148 Cal. 90, 82 Pac. 666, 667.

And in an action for slander, the falsity of the words spoken is one of the vital questions, and the plaintiff must both allege and prove not only that the slanderous words were spoken, but also that they were false. 25 Cyc. 453. (Although as a general rule the words are presumed to be false, and such presumption is sufficient prima facie evidence of the falsity of the defamatory words. 25 Cyc. 491.) But, if defendant desires to defend on the ground that the defamatory words were true, he is required to plead and prove such fact. 25 Cyc. 459, 491.

By analogous reasoning it has been held that where a person makes material false representations concerning matters, and under circumstances, which from their nature or situation may be assumed to be within the peculiar knowledge, or under the power, of the party making the representations, the party to whom it is made has a right to rely on them; and it will be presumed that the party to whom such material, false representations were made, relied and acted thereon; "and, in the absence of any knowledge of his own, or of any facts which should arouse suspicion and cast doubt upon the truth of the representations, he is not bound to make inquiries and examination for himself." And as stated in Pomeroy's Equity Jurisprudence, § 891; "It does not, under such circumstances, lie in the mouth of the person asserting the fact to object or complain because the other took him at his word. If he claims that the other party was not misled, he is bound to show clearly that such party did know the real facts; the burden is on him of removing the presumption that such party relied and acted upon his statements." And in § 895 the same author says: "Where a representation is made of facts which are, or may be assumed to be, within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence."

In Sprague v. Taylor, 58 Conn. 542, 20 Atl. 612, the court said: "It is conceded, and is unquestionable, that the defendant's false representations need not have been the sole inducement which influenced Mrs. Sprague. Bigelow, Fraud, p. 544, and cases there cited. The plaintiff testified that she relied upon the defendant's representations. In such a case it is incumbent upon the defendant to prove that the false representations were not relied on. It is not enough for him to say that there were other representations or other circumstances which might have been the operative inducement. Kerr, Fraud & Mistake, 75; Opinion of Lord Justice Turner in Nicol's Case, 3 De G. & J. 439, 28 L. J. Ch. N. S. 257, 5 Jur. N. S. 205, 7 Week. Rep. 217;" See also: 20 Cyc. 109, 110; Charbonnel v. Seabury, 23 R. I. 543, 51 Atl. 208; Anderson v. Donahue, 116 Minn. 380, 133 N. W. 975; Hiner v. Richter, 51 Ill. 299; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241; Winans v. Winans, 19 N. J. Eq. 220.

This is in harmony with the decision of this court in Fargo Gas & Coke Co. v. Fargo Gas & E. Co. 4 N. D. 219, 37 L.R.A. 593, 59 N. W. 1066, holding that "ordinarily, one who buys property has a right implicitly to rely upon representations of the seller; and, if they were false and made with intent to deceive the purchaser, the seller will not be allowed to urge that the buyer, by investigation, could have discovered their falsity." And, also, in harmony with the decision of this court in Liland v. Tweto, 19 N. D. 551, 573, 125 N. W. 1032, in which this court held that "the burden of proof and knowledge of the facts giving rise to the right to rescind and of the time of acquiring such knowledge rests on the defendant." See also 6 Enc. Ev. 70, 72; 8 Enc. Pl. & Pr. 908; 16 Cyc. 929.

Under the express language of the instructions assailed, they became applicable only in case defendant "had been proved guilty of material misrepresentation." In which case alone "defendant's affirmative defense" became material. Taking the instructions as a whole, they were not incorrect as misplacing the burden of proof. In this case we are dealing with a special verdict. The jury was required to find specifically on certain disputed questions. In connection with each representation the jury was required to answer this question: "Did plaintiff believe in and rely upon such statement, so made, in making the purchase of an interest in the Courier-News, or in purchasing from the defendant an interest in the Courier-News?"

The court elsewhere in its instructions informed the jury that the plaintiff had the burden of proving the fact that he relied on the representations. And in that part of the instructions, referring to the different questions on which findings were required, the court said: "It is highly essential and an important matter to determine whether in each instance the plaintiff believed in and relied upon statements made to him, if any, in the transactions referred to, and a distinct answer will have to be made to that sub-question marked (e) in the several questions."

We are agreed that, taking the court's instructions as a whole, the objection urged by appellant to the instructions in consideration is not well taken. This disposes of the errors assigned upon the instructions, fairly arising upon the record and presented for our determination on this appeal. The remainder of the errors assigned upon the instructions

are so devoid of merit as to require no extended discussion in this opinion. All have been considered, and we are all agreed, that the instructions in this case, when considered as a whole, are not subject to attack upon any of the grounds assigned by appellant.

In the specifications served with the notice of appeal, only one finding is attacked as unsupported by the evidence; namely, the finding that the defendant represented the different items of property as having certain values aggregating in all a total value of $73,000. We believe there is sufficient competent testimony to sustain this finding.

A number of assignments of error are predicated upon the court's rulings on the admission of evidence, the overruling of defendant's objections to the special verdict, and the denial of defendant's motion to change the answers to certain findings. These various assignments, however, are all based upon the contention that some of the representations set forth in the complaint were not material, and, if material, were not established by sufficient competent testimony. In order to properly consider these assignments, it is necessary to refer at some length to the proceedings had in the court below.

The record shows that copies of the instructions, and the special verdict, were delivered to counsel for the respective parties on May 19, 1914. On May 21, 1914, the trial court required counsel to make their objections, if any, to the charge and special verdict. Defendant's counsel dictated to the court stenographer certain objections to certain portions of the instructions, stating that written objections would be subsequently filed. Thereafter the court asked counsel if they had any objections to make to the special verdict. Plaintiff's counsel stated that they had none to offer. Defendant's counsel stated that they had not examined the questions, and did not suppose that they would be required to make any objections. The court thereupon announced that it would take a recess for three hours to enable counsel to make any desired objections to the questions. Defendant's counsel thereupon made the following statement: "For the purpose of the record the defendant states that, under the statute as he understands it, the court has no power or authority to require the defendant to make objections to the form of the questions or to the special verdict in any particular; that the statute casts that burden upon the court to prepare the special verdict, and nowhere gives the court authority to delegate that burden

to counsel for either of the parties, nor should the counsel be required to make objections to the special verdict and thus be placed in the position of determining the character and nature and sufficiency of the special verdict, in determining a matter which is placed by statute expressly upon the court; and in this case counsel for the defendant state that they have endeavored to be of all the assistance they could to the court in framing the special verdict, and have offered one question to be embodied in the special verdict, which has been presented to the court and which counsel suggested to the court should be embodied in the special verdict, but counsel do not believe that under the statute, in the protection of their client's rights, that they should be required or held to take or make any objections or exceptions at this time as to the special verdict."

To which the trial judge replied as follows: "In response to the suggestion of counsel the court will say that up to the present time counsel, as stated by him, has only made one request for or submitted but one question, and that was submitted some two weeks ago when we took the adjournment and before the testimony was all introduced. The court further states that he has requested counsel for both parties to make any suggestions with reference to questions that they desire, and will still keep this question open until 3 o'clock this afternoon, and if counsel desires to make any requests or any objection he will hear him at that time. Otherwise the questions will be as already prepared, with the addition of one further with reference to the verdict." The case was submitted to the jury on May 25, 1914, and the verdict returned May 26, 1914. No motion was ever made to strike out any of the allegations of the complaint now under consideration. No request was made to eliminate from the jury's consideration any of the questions of fact, or to instruct the jury to answer any question in favor of the defendant; but defendant's counsel permitted all the questions proposed by the trial court to be submitted to the jury without objection. The objections under consideration were raised for the first time after the verdict had been recorded and the jury discharged. At that time defendant's counsel filed certain written objections to the verdict and moved that the answers to some of the questions be changed. The trial court refused to change the answers, and overruled the objections to the verdict, and entered judgment in favor of plaintiff.

As stated, appellant contends that some of the false representations charged in the complaint were not actionable. Under the laws of this state actionable deceit consists in any of the following acts committed by one who thereby wilfully deceives another with intent to induce him to alter his position to his injury or risk:

1. The suggestion as a fact of that which is not true by one who does not believe it to be true.

2. The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;

3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,

4. A promise made without any intention of performing. See §§ 5943, 5944, Comp. Laws 1913.

18–20. "The representations and suppressions in question were alleged in the complaint and denied by the answer. Defendant's counsel permitted the trial court to submit these questions to the jury without objection, although counsel were given a specific opportunity to object to every question submitted. The special verdict is not attacked, either on the ground that the court failed to submit, or that the jury failed to pass on, all material and controverted questions. Nor is there any contention that the findings of the jury are in any manner inconsistent. Nor is it contended that some of the representations found to have been made are not material, but defendant's sole contention is, that some of the representations and suppressions which the jury found to have been made were not in themselves actionable and that for that reason the verdict must fall. It is true that a special verdict must contain findings on all the material disputed facts, upon which the law is to arise and the judgment of the court to rest. But the application of that principle does not defeat the verdict or warrant a reversal of the judgment in this case, because in this case, there are sufficient findings, unchallenged, and concededly sustained by the evidence, to entitle plaintiff to judgment. The only complaint made by the defendant in this case is that the jury, in addition to finding that defendant made false representations, which were actionable, also found that he made other false representations, which were not actionable. Is plaintiff's right of recovery to be lessened or impaired because the

jury, at defendant's request and with his permission, were permitted to consider the issues framed by the pleadings? Is plaintiff's right of recovery impaired because the jury, under these circumstances, found that the defendant, in addition to making actionable representations, also, made others which were not actionable? We think not. Such doctrine would hardly promote the ends of justice.

The court submitted to the jury for determination all questions relative to the misrepresentations charged. Among the questions so submitted was whether the various representations made by More to Guild were in fact material. In this connection the court instructed the jury that "the evidence must show that the alleged false or fraudulent representations were willfully and intentionally made regarding something which had already transpired, or was then alleged to exist. No statement of one's opinion as to what will or will not happen or exist in the future can be considered by you in making up your judgment in this case whether fraudulent representations have in fact been made. Every person in making a contract is at liberty to speculate or express opinions as to future events, and he cannot be held to answer for their truth or falsity." Ordinarily the question of materiality is one of fact for the jury. 14 Am. & Eng. Enc. Law, 207; 20 Cyc. 124. In this case this question was so submitted under instructions, the correctness of which have not been challenged. The jury found that the representations made were all material.

The view which we are compelled to take of this matter, however, renders it unnecessary for us to determine whether all of the various misrepresentations and suppressions charged are actionable. It is sufficient to say that some of the false representations found to have been made are concededly actionable. If it be assumed that some of these representations were not material, or not established by the evidence, then the effect would be the same as if the jury had returned its findings that these particular charges were not proven. The failure to prove such allegations of plaintiff's complaint would not defeat his right of recovery. "It is not necessary, however for plaintiff to prove all the fraudulent misrepresentations alleged, but only such allegations as to the means used to deceive him as are necessary and sufficient to support his cause of action." 20 Cyc. 107. See also Long v. Davis, 136 Iowa, 734, 114 N. W. 197.

But even if the jury had gone farther than that, and answered all the questions under consideration in favor of the defendant, still such answers would not be inconsistent with the answers contained in the remainder of the findings, and would in no manner affect or defeat plaintiff's right of recovery; but plaintiff would still be entitled to judgment upon all the facts as found by the jury. This being so, appellant's assignments of error predicated upon these propositions are not well taken.

In the case of Robinson v. Washburn, 81 Wis. 404, 407, 51 N. W. 578, the court said: "When the merits of an action have been determined by special answers to questions submitted, the verdict should not be held defective and rejected by reason of the failure to answer other questions, or any inconsistency in the answers given which do not and cannot in any way qualify or limit the answers upon which the right of either of the parties to a judgment in his favor is made clear."

And in Bush v. Maxwell, 79 Wis. 114, 125, 48 N. W. 250: "It is urged by the learned counsel for the appellant that the failure of the jury to answer some of the questions submitted to them is fatal to the judgment. We think a failure of the jury to answer questions submitted to them does not render the verdict insufficient to sustain the judgment, unless the answer to such questions favorably to the party against whom the judgment is rendered would necessarily make such judgment erroneous." See also Coggswell v. Davis, 65 Wis. 191, 206, 26 N. W. 557; Nelson v. Chicago, M. & St. P. R. Co. 60 Wis. 321, 328, 19 N. W. 52; Farwell v. Warren, 76 Wis. 527, 540, 45 N. W. 217; Schrubbe v. Connell, 69 Wis. 476, 34 N. W. 503; Geisinger v. Beyl, 80 Wis. 443, 50 N. W. 501; McDermott v. Chicago, M. & St. P. R. Co. 91 Wis. 39, 64 N. W. 430; Knowlton v. Milwaukee City R. Co. 59 Wis. 278, 18 N. W. 17; Singer Mfg. Co. v. Sammons, 49 Wis. 316, 5 N. W. 788; Mills & L. C. Lumber Co. v. Chicago, St. P. M. & O. R. Co. 94 Wis. 336, 68 N. W. 996; 38 Cyc. 1924.

Appellant contends, however, that these representations were considered by the jury in fixing the represented value of the property, and that therefore "if any one representation is immaterial" that then the entire verdict must fall. Appellant's contention is without merit, under the evidence and the findings of the jury in this case. The jury found that if the representations of the defendant had been true, the

property on August 29, 1913, would have had an actual value of $45,000. This is the most favorable finding to defendant that could possibly be made. No smaller represented value could have been fixed, under the evidence in this case. No one contended that the property was represented as having a lesser value. While the testimony offered by plaintiff tended to show that, if the representations had been true, the property would have had a much greater value,—even as much as $73,000. And defendant offered testimony tending to show that the property at the time of the sale had an actual value of $45,000 and over. The jury in its findings gave the defendant the benefit of all doubt, and fixed the value of the property as represented, at the actual price fixed by the parties in their dealings. The jury said that, if the property had been as represented, Guild's interest therein would have been worth what he paid for it, and no more.

21. It also seems self-evident that if the objections urged ever had any merit, they could not be raised for the first time after trial and verdict. If certain allegations of the complaint were irrelevant, defendant should have moved to strike them. Comp. Laws 1913, § 7459; 31 Cyc. 637. And having failed to urge the objection to such allegations at the proper time, he cannot be heard to object after the return of the verdict and the discharge of the jury. 31 Cyc. 717, 718, 763 et seq.; 38 Cyc. 1932. See also Hart v. Wyndmere, 21 N. D. 383, 409, 131 N. W. 271, Ann. Cas. 1913D, 169; Hrouska v. Janke, 66 Wis. 252, 28 N. W. 166.

22. If the evidence was insufficient, defendant's counsel should have requested the court either to eliminate these questions from the jury's consideration, or to instruct the jury to make certain answers thereto (see Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558; Nokken v. Avery Mfg. Co. 11 N. D. 399, 403, 92 N. W. 487); or served with his notice of appeal specifications of the insufficiency of the evidence (Comp. Laws § 7656). Having failed to challenge the sufficiency of the evidence to sustain these answers in any proper manner, they are binding upon the parties. 38 Cyc. 1931.

23. Appellant also asserts that the trial court erred in permitting counsel to use copies of the special verdict during their arguments to the jury. Arguments of counsel are intended to aid the jury in determining the truth in disputed transactions. In this case, the jury was

required to determine specific questions of fact. In order that counsel might argue the case intelligently, it was desirable that they should know what specific questions would be submitted to the jury. Clearly there was no error in permitting counsel to know what questions would be so submitted in order that counsel might confine their arguments to the specific matters to be determined by the jury. In fact it is required by statute that a special verdict must be demanded before argument. See § 7633, Comp. Laws. Hence the framers of this law contemplated that both the court and the parties should know before argument whether the jury would be required to return a general or special verdict.

Appellant's counsel, however, contends that in this manner counsel would be enabled to inform the jury of the legal effect of their answers. An argument whereby the jury is informed of the effect any particular answer or answers would have upon the ultimate rights of the parties would doubtless be improper. But there is no showing that such argument was made by any counsel in this case. This assignment of error is predicated solely upon a statement appearing in the record, made by the trial judge some time prior to argument, to the effect that he would permit counsel to have and use copies of the proposed special verdict during the argument to the jury. There is nothing in the record to show either that counsel availed themselves of this privilege, or abused it. A party predicating error upon improper argument to the jury has the burden of proving affirmatively, by the record presented to the appellate court, facts constituting such error. In this case the record fails to disclose any error whatsoever, but we are asked to presume that counsel was permitted by the trial court to make an improper argument. The presumption, however, is to the contrary.

24. Appellant, also, contends that the trial court adopted an erroneous method of computation in assessing damages against the defendant. Only 360 shares of the corporate stock of the corporation had been issued. The holders of these 360 shares owned the entire property of the Courier-News Corporation. Guild owned 260 shares, and More 100 shares of stock. The jury found that the actual cash value of the assets of the Courier-News Corporation, on August 29, 1913, including all property transferred to it by the defendant, More, and exclusive of the $3,000 loaned to the corporation by More on that day, was $30,500.

It also found that, if the representations had been true, the property in question would have been worth $45,000. The difference between the represented and actual value as found by the jury was $14,500. This difference in value or damage affected all the stock issued. The loss of $14,500 divided among 360 shares, the number issued, gave a loss of $40.27 plus per share. This loss of $14,500 was apportioned between Guild and More, the owners of the stock, as follows: More, 100 shares, $4,028; Guild, 260 shares, $10,472. Guild was only interested in the damage he sustained through the difference in value of his 260 shares, and this is exactly what the court allowed him. We believe that the trial court's method of computing damages was correct.

Certain objections were urged by respondent's counsel against the consideration of the merits of the appeal. Some of such objections were not without apparent merit, but the different defects were such that they could have been cured by amendment. And so, in view of the importance of the litigation, we deem it our duty, in the interests of justice, to consider the merits of the different questions presented, and having done so, it is unnecessary to discuss or decide the questions raised by respondent.

The issues of fact in this case were fully and fairly submitted to a jury. The jury, at defendant's request, was required to find, and did find, specifically upon every question of fact presented by the pleadings. The answers of the jury, to the different questions propounded, were clear and unequivocal, and indicated a thorough understanding and consideration of the questions submitted. Where the evidence was in conflict, the jury said that the plaintiff was right and the defendant wrong. The findings of the jury, based upon testimony, the sufficiency of which is not challenged, entitled plaintiff to the judgment which he received in the court below. The judgment appealed from must be affirmed. It is so ordered.

BURKE, J., dissenting. I cannot agree with the majority opinion, nor with the result therein announced. In particular I believe it was prejudicial error in the trial court to give the instruction treated in ¶ 17 of the syllabus of the majority opinion. Plaintiff had the burden of showing, first, that the misrepresentations were made to him by defendant; second, that he relied thereon. Notwithstanding this fact,

the jury was, in effect, told that if the defendant had been proved guilty of material misrepresentations, the burden shifted to him to show that plaintiff did not rely thereon. This is the last instruction given, and was intended to, and did, modify the general instruction that the burden of proof was in all things upon the plaintiff. Thus the court, in effect, told the jury that the defendant must disprove one of the things that it is conceded plaintiff should have proved. This clearly misplaces the burden of proof and was very prejudicial to the defendant. For this reason alone I think a new trial should be granted.

NORTHERN TRUST COMPANY, a Corporation, v. LAVIS F. FOLSOM and Stella F. Steele, as Sole Heirs at Law of John B. Folsom, Deceased, Substituted for Matthew F. Steele, Administrator.

(156 N. W. 216.)

Opinion filed December 28, 1915.

PER CURIAM. The facts in this case are so similar to those of Northern Trust Co. v. First Nat. Bank, 33 N. D. 1, 156 N. W. 212, just decided by this court, that the decision in said case governs herein. Judgment of the lower court is accordingly affirmed.

Appeal from the District court of Cass County, *Pollock*, J.

Lawrence & Murphy and *Pollick & Pollick*, all of Fargo, North Dakota, for defendants and appellants.

Pierce, Tenneson, & Cupler, and *Watson & Young*, of Fargo, North Dakota, for plaintiff and respondent.

WALTER NELSON v. JULIA A. SQUIRE and Homer H. Squire.

(155 N. W.1090.)

Trial court — discretion — abuse of — new trial — motion for — newly discovered evidence — affidavits — promissory notes — payment — defense of.

Evidence examined and held that the trial court did not abuse its discretion in ordering a new trial upon affidavits. It was shown that one of the notes in suit had been paid in cash and another paid by renewal, in the hands of other parties. This defense had been interposed by the answer, but, upon the trial, plaintiff's witnesses testified that there were two sets of notes exactly alike, and that the payments and renewals had been of two other notes not involved in the litigation. The affidavits for a new trial, however, denied the existence of any such notes.

Opinion filed January 3, 1916.

Appeal from District Court of Divide County, *Leighton,* J.
Affirmed.

C. E. Brace, for appellant.

A new trial will not be granted on the ground of surprise, where the party went to trial without material evidence which he could have procured by the exercise of ordinary diligence. Linard v. Crossland, 10 Tex. 462, 60 Am. Dec. 213; Tooney v. State, 5 Tex. App. 185.

The situation presented by such a motion must not be attributable to the negligence of the party asking for a new trial on the ground of surprise. He must show good diligence, and free himself from negligence. Josephson v. Sigfusson, 13 N. D. 312, 100 N. W. 703; Gains v. White, 1 S. D. 434, 47 N. W. 524.

A new trial will not be granted because the movant was surprised by the testimony of the adverse party. Travis v. Barkhurst, 4 Ind. 171; Helm v. First Nat. Bank, 91 Ind. 44; Delaney v. Brunette, 62 Wis. 615, 23 N. W. 22; Beal v. Codding, 32 Kan. 112, 4 Pac. 180; Dimmey v. Wheeling & E. G. R. Co. 27 W. Va. 32, 55 Am. Rep. 292, 7 Am. Neg. Cas. 111; Blake v. Madigan, 65 Me. 522; Beckford v. Chipman, 44 Ga. 543; Whiteman v. Leslie, 54 How. Pr. 494.

Where actual surprise is occasioned on a trial, the party should at once acquaint the court with the fact, and request a continuance. Gaines v. White, 1 S. D. 434, 47 N. W. 524.

Even where the testimony of one's own witnesses is different from that expected, a new trial will not be granted on the ground of surprise. Guard v. Risk, 11 Ind. 156; Greater v. Fowler, 7 Blackf. 554; Cartery's Estate, 56 Cal. 470; Ex parte Walls, 64 Ind. 461; Rockford, R. I. & St. L. R. Co. v. Rose, 72 Ill. 183.

One who holds title to commercial paper derived, in good faith and without notice, through a holder in due course, takes the same free from all defenses. Comp. Laws 1913, §§ 6937, 6943.

George P. Homnes, for respondents.

Where a party has used due diligence to discover the facts material to the case, is surprised by evidence which he had no reason to believe existed, a new trial may be granted on the ground of surprise. 29 Cyc. 863; Barnes v. Milne, Rich. Eq. Cas. 459, 24 Am. Dec. 422.

Where it appears that the new evidence could not have been obtained for the trial, a new trial will be granted. Clark v. Carter, 12 Ga. 500, 58 Am. Dec. 485; Delmas v. Margo, 25 Tex. 1, 78 Am. Dec. 516; 1 Hayne, New Tr. & App. § 79, pp. 386–389; Eagan v. Delaney, 16 Cal. 85, 5 Mor. Min. Rep. 223; Coghill v. Marks, 29 Cal. 673; Delmas v. Martin, 39 Cal. 555; Moore v. Los Angeles Infirmary, 49 Cal. 669; Kenezleber v. Wahl, 92 Cal. 202, 28 Pac. 225.

Where evidence is introduced the existence of which was unknown to the movent, a new trial may be allowed, although the movent did not ask for a continuance, and where he then knew of no evidence to rebut the offered evidence. 29 Cyc. 878.

In such cases the trial court is invested with a wide discretion. Josephson v. Sigfusson, 13 N. D. 312, 100 N. W. 703.

BURKE, J. The facts as they appear to us are as follows: In May, 1909, Homer Squire lived upon a government homestead to which he had not yet received a patent. He had just bought a threshing machine from Johnson Brothers Hardware Company, local agents, for the sum of $1,623. Of this amount he had paid $600 cash; had given his notes for $423, $300, and $300. To secure those three notes he gave a mortgage back upon the rig and also a mortgage upon his homestead. Johnson Brothers, learning that no patent had been issued to Squires for his land, insisted that he procure a mortgage upon his mothers' homestead to which patent had been issued. His mother complied with this re-

quest, giving a mortgage upon her land to secure the same notes. It is not clear to this court whether the mother signed other notes for the same amounts. Thereafter, the Johnson Brothers assigned the notes and mortgage to the First National Bank of Ambrose, who collected and surrendered the $423 note. Later the bank assigned the two notes of $300 each and the two mortgages upon the real estate to a hardware company of St. Paul. The hardware company attempted collection of the $600, and sent the notes to North Dakota attorneys for that purpose. Squires then attempted to borrow the necessary $600 upon his farm, and, in cleaning up the total, ran across the $300 mortgage which he had given before his patent had issued. This mortgage was held by the St. Paul hardware company, who agreed to satisfy it upon the payment of one of the notes upon which there was due $385: There then remained due the sum of $341 upon the other note. Squires did not pay this note, but gave a renewal note, and secured it by a second mortgage upon his land. The hardware company did not surrender the two old $300 notes to renew which the $341 note was executed and the $385 payment made, but fraudulently sold them to the plaintiff in this action. Plaintiff began an action to foreclose against the mother's land, claiming the full amount of the two notes, with interest. To the foreclosure proceedings the defense was interposed that said notes had been superseded as above,—practically paid by the issuance of the $341 note given to the hardware company. Trial was had to the court, where the evidence of the plaintiff seemed to show that there were, in fact, four $300 notes, possibly duplicates given at the time the mortgage was taken upon the mother's homestead, and that the two notes paid and renewed were other and different notes than the ones sold to plaintiff. The notes were not offered in evidence, however, and as the testimony taken in the trial below is not before us, we are not positive as to the facts. On the strength of this testimony the trial court entered judgment in favor of the plaintiff, ordering the foreclosure as prayed. Shortly after the decision a motion for a new trial was made, based upon affidavits by Homer Squire, John G. Odden, an attorney George P. Homnes, and especially the affidavit of one of the Johnson Brothers. Those affidavits state the facts as we have given them, and Johnson states positively that Squires owed but two $300 notes, and never was indebted to Johnson Brothers upon any other indebtedness. Defendant excuses his failure

to produce the affiants as witnesses upon the grounds that he had never heard of any additional $300 note until the trial itself, and that it was then too late to produce the rebutting testimony.

Upon this showing the trial court ordered a new trial and from such order this appeal is taken. It is conceded, we believe, that this order should not be disturbed except for abuse of discretion, and the only point for decision is whether such exists in this case.

1. In our opinion, the trial court did not abuse its discretion. That a meritorious defense was presented is too plain for argument. The affidavit by one of the original Johnson Brothers is convincing as to the merits. In all events, they present enough merit to justify the action of the trial court. Appellant in his brief lays most stress upon the proposition that no surprise was shown. This is also without merit. Defendant could not have anticipated from the pleadings that the payments made by him had been credited upon some paper which never existed, or of the existence of which he was in total ignorance. In his answer he had set forth specifically the payments that he had made and no reply or other pleading notified him of the plaintiff's contention that such payments were applied upon other notes. Being apprised of this contention for the first time at the trial itself, it is not likely that he could get the rebutting witnesses in time to be of effect. We believe the showing of diligence sufficient. See 29 Cyc. 863, and cases cited; Clark v. Carter, 12 Ga. 500, 58 Am. Dec. 485; 1 Hayne, New Tr. & App. § 79, p. 386; Kenezleber v. Whal, 92 Cal. 202, 28 Pac. 225. In motions for a new trial on such grounds as are here presented the trial court is vested with a wide discretion, and its action will not be disturbed except in case of manifest abuse. Josephson v. Sigfusson, 13 N. D. 312, 100 N. W. 703; McGregor v. Great Northern R. Co. 31 N. D. 471, 154 N. W. 261; State v. Cray, 31 N. D. 67, 153 N. W. 425; Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419. We do not believe it is material to this decision whether plaintiff was or was not a holder in due course. The order of the trial court is affirmed.

STATE OF NORTH DAKOTA v. ANDY UHLER.

(156 N. W. 220.)

Continuance — motion for — absence of witness — stipulation as to substance of testimony — if witness present and testifying — impeachment evidence offered — court's ruling on — discretion — diligence — trial court — discretion on — action of — disturbed when — continuance — application for — avoided — stipulation as to evidence — truth of — not necessary — defendant — constitutional rights — accused — witnesses — process to compel attendance.

1. To avoid a continuance on defendant's application, the state stipulated to what the absent witness if present would testify, and on trial offered impeaching evidence: On the contentions of defendant it is *held:*

(a) Denial of the continuance was an exercise of discretion based upon all the record facts, the showing made, including that of diligence, and the likelihood of defendant ever being able to produce said witness.

(b) Decision thereon will be disturbed only for a clear abuse of the discretion vested in the trial court.

(c) Upon such an application it is not necessary to avoid a continuance that the state admit the truth of what it is asserted the absent witness, if present, would testify to.

(d) Reasonably administered, the denial of a continuance upon a concession as here made is not a denial of the constitutional right to process to compel attendance of witnesses in behalf of an accused. An unreasonable denial, however, may be an invasion of such constitutional right.

Juror — challenge — for cause — peremptory — not exhausted — challenge denied — not error.

2. On an appeal no error can be predicated upon the overruling of a challenge to a juror for cause, where the appellant had not exhausted all his peremptory challenges.

Information — names of witnesses indorsed — other witnesses — objection to.

3. There was no error in overruling certain objections to use of a witness whose name was not indorsed upon the information.

Cross-examination — defendant.

4. Error is not shown in the cross-examination of defendant.

Absent witness — testimony conceded — state can impeach.

5. The state could impeach what it was conceded the absent witness, if present, would testify to.

Trial — delay — to secure absent witness — denial of application.

6. There was no error in refusing to delay the trial that defendant might procure Mrs. H. to be present and testify.

Information — arrest of judgment — motion for — assailed for first time — judgment — sufficient to support.

7. The information, for the first time assailed by a motion in arrest of judgment, is held sufficient to support the judgment.

Instructions — erroneous — prejudicial — proof offered on trial — failure of record to show.

8. Instructions, not abstractly wrong, will not be held erroneous or prejudicial when the proof offered on the trial is not brought up on the appeal.

Opinion filed January 5, 1916.

An appeal from the District Court of Grand Forks County, *Cooley*, J., adjudging defendant guilty of robbery.

Affirmed.

J. B. Wineman, for appellant.

A defendant on trial for crime has the right to have his witnesses present in court, and to the process of the court to procure them. Comp. Laws 1913, § 10787; N. D. Const. § 13, art. 1.

A defendant is deprived of this right in its fullness and completeness if the testimony of a witness is brought before the court and jury in any other form, to which he does not give assent. And, where a witness is absent, and continuance is requested upon proper showing, a stipulation by the state as to the testimony of such absent witness is insufficient to bring to defendant the full benefits of his constitutional and statutory rights. State v. Berkley, 92 Mo. 41, 4 S. W. 24; Pace v. Com. 89 Ky. 207, 12 S. W. 271; State v. Wilcox, 21 S. D. 532, 114 N. W. 688; 4 Enc. Pl. & Pr. 865.

If the state, in such case, is willing to admit the truth of the statements set out in the affidavit for continuance, then the application may be denied. Madison v. State, 6 Okla. Crim. Rep. 356, 118 Pac. 617, Ann. Cas. 1913C, 484.

If the state does not concede the truth of the testimony which an absent witness would give, the trial court has no power to refuse the defendant's motion for a continuance, when the witness is within the jurisdiction of the court. State v. Twiggs, 60 N. C. (1 Winst. L.)

142; Hyde v. State, 16 Tex. 445, 67 Am. Dec. 630; De Warren v. State, 29 Tex. 464; Skaro v. State, 43 Tex. 88; Hackett v. State, 13 Tex. App. 406; McGrew v. State, 31 Tex. Crim. Rep. 339, 20 S. W. 740; Phipps v. State, 36 Tex. Crim. Rep. 216, 36 S. W. 753; Jackson v. State, 48 Tex. Crim. Rep. 648, 90 S. W. 34; Jenkins v. State, 49 Tex. Crim. Rep. 457, 122 Am. St. Rep. 812, 93 S. W. 726; Purvis v. State, 52 Tex. Crim. Rep. 316, 106 S. W. 355; Davis v. State, 52 Tex. Crim. Rep. 332, 107 S. W. 855; Westerman v. State, 53 Tex. Crim. Rep. 109, 111 S. W. 655; Wheeler v. State, 61 Tex. Crim. Rep. 527, 136 S. W. 68; Francis v. State, — Tex. Crim. Rep. —, 55 S. W. 489, 13 Am. Crim. Rep. 425; Gardner v. State, — Tex. Crim. Rep. —, 59 S. W. 1115; Roberst v. State, 65 Tex. Crim. Rep. 62, 143 S. W. 614; McMillan v. State, 65 Tex. Crim. Rep. 319, 143 S. W. 1174; Burford v. State, — Tex. Crim. Rep. —, 151 S. W. 538; People v. Vermilyea, 7 Cow. 369; People v. Diaz, 6 Cal. 248; People v. Fong Chung, 5 Cal. App. 587, 91 Pac. 105; State v. Wilcox, 21 S. D. 532, 114 N. W. 687; Watson v. State, 118 Ga. 66, 44 S. E. 803; Pannell v. State, 29 Ga. 681; Hood v. State, 93 Ga. 168, 18 S. E. 553; Wheeler v. State, 8 Ind. 117; McLaughlin v. State, 8 Ind. 281; Carmon v. State, 18 Ind. 450; Burchfield v. State, 82 Ind. 580; Madison v. State, Ann. Cas. 1913C, 493 note.

Where defendant is deprived of the presence of his witnesses in court and testifying, the evidence which they would give, as conceded by the state to avoid continuance, must be received free from impeachment. Conley v. People, 80 Ill. 236, 2 Am. Crim. Rep. 445.

Where there is error in overruling a motion for continuance, all proceedings in connection with the trial following are nugatory. Johnson v. State, — Ga. App. —, 85 S. E. 205; Morgan v. State, 13 Ga. App. 434, 79 S. E. 247; Britt v. State, 13 Ga. App. 698, 79 S. E. 859; Hamilton v. State, 3 Ind. 553; McLaughlin v. State, 8 Ind. 281; Miller v. State, 9 Ind. 340; Wassels v. State, 26 Ind. 30; State v. Dawson, 90 Mo. 149, 1 S. W. 827; State v. Neiderer, 94 Mo. 79, 6 S. W. 708; State v. Warden, 94 Mo. 648, 8 S. W. 233; State v. Dyke, 96 Mo. 298, 9 S. W. 925; State v. Loe, 98 Mo. 609, 12 S. W. 254; State v. Abshire, 47 La. Ann. 542, 17 So. 141, 10 Am. Crim. Rep. 461.

Where a juror has formed an unqualified opinion, and has expressed it freely, and where his attitude in answering questions indicates that he

believes it is necessary for the defendant to prove his innocence, or that he would be unwilling to be governed by the evidence and instructions, he is disqualified to act as a juror. People v. Cottle, 6 Cal. 227; People v. Williams, 6 Cal. 206; State v. Roberts, 27 Nev. 449, 77 Pac. 598; State v. Fujita, 20 N. D. 555, 129 N. W. 360, Ann. Cas. 1913A, 159; State v. Barker, 46 La. Ann. 798, 15 So. 98; People v. Mahoney, 73 Hun, 601, 26 N. Y. Supp. 257; State v. Flint, 60 Vt. 304, 14 Atl. 178; 24 Cyc. 309.

It is the duty of the state's attorney to indorse, on the information, the names of all the witnesses known to him at the time of filing the information, and if other witnesses are called, and objection is made, it should clearly appear that the state's attorney did not know of them, before they should be permitted to give their testimony. State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052.

Questions which are asked of a defendant on trial for crime, which have for their apparent sole purpose the degradation of defendant and his relatives, before the jury, are irrelevant, and highly improper. State v. Apley, 25 N. D. 298, 48 L.R.A.(N.S.) 273, 141 N. W. 740; State v. Gleim, 17 Mont. 17, 31 L.R.A. 294, 52 Am. St. Rep. 655, 41 Pac. 998, 10 Am. Crim. Rep. 46; People v. Un Dong, 106 Cal. 83, 39 Pac. 12; State v. Carson, 66 Me. 116, 2 Am. Crim. Rep. 58.

The state has no right, in rebuttal or otherwise, to offer testimony to impeach the conceded testimony of defendant's absent witness. Brown v. State, 142 Ala. 287, 38 So. 268; State v. Shannehan, 22 Iowa, 435; Davis v. State, — Tex. Crim. Rep. —, 152 S. W. 1094; Rhodes v. Com. 151 Ky. 534, 152 S. W. 549; State v. Abshire, 47 La. Ann. 542, 17 So. 141, 10 Am. Crim. Rep. 456.

It was error for the court to refuse the request of defendant that a witness within its jurisdiction, who had been served with subpœna as a witness for defendant, be brought to court. 40 Cyc. 2157.

To constitute the crime of robbery it is essential that the taking be wrongful, unlawful, or felonious. A taking of property accompanied by an assault, which assault is described by use of the above terms, is not necessarily robbery. State v. Fordham, 13 N. D. 494, 101 N. W. 888; State v. Rechnitz, 20 Mont. 488, 52 Pac. 264; State v. Fulford, 124 N. C. 798, 32 S. E. 377; State v. McCaskey, 104 Mo. 644, 16 S. W. 511; Sledge v. State, 99 Ga. 684, 26 S. E. 756; McDow v. State, 113 Ga. 699, 39 S. E. 295; State v. Oliver, 20 Mont. 318, 50 Pac. 1018.

The court failed to specifically instruct as to all the elements of robbery; neither does the information sufficiently charge the crime of robbery. State v. Johnson, 26 Mont. 9, 66 Pac. 290, 14 Am. Crim. Rep. 619; State v. Smith, 174 Mo. 586, 74 S. W. 624, 14 Am. Crim. Rep. 616; State v. Magill, 19 N. D. 131, 22 L.R.A.(N.S.) 666, 122 N. W. 330; Alston v. State, 109 Ala. 51, 20 So. 81; 12 Cyc. 612; Goldsberry v. State, 66 Neb. 312, 92 N. W. 906; Lindley v. State, 8 Tex. App. 445; State v. Hakon, 21 N. D. 133, 129 N. W. 234.

Where court officers, sheriffs, and policemen testify for the state, the defendant is entitled to an instruction from the court to the jury, that greater care should be exercised in weighing the testimony of such witnesses than in case of witnesses who are wholly disinterested. Blashfield, Instructions to Juries, p. 225; 2 Sackett, Instructions to Juries, § 2768; 40 Cyc. 2655; Kastner v. State, 58 Neb. 767, 79 N. W. 713; Sandage v. State, 61 Neb. 240, 87 Am. St. Rep. 457, 85 N. W. 35; State v. Miller, 9 Houst. (Del.) 564, 32 Atl. 137.

"An indictment for robbery under the statute should charge the offense in the language of the statute, or, in words equivalent, provided all the necessary elements of the crime are expressed in the statute." Clark, Crim. Law, § 379; State v. Fulford, 124 N. C. 798, 32 S. E. 377; State v. McCaskey, 104 Mo. 644, 16 S. W. 511; Sledge v. State, 99 Ga. 684, 26 S. E. 756; McDow v. State, 113 Ga. 699, 39 S. E. 295; State v. Oliver, 20 Mont. 318, 50 Pac. 1018; 18 Enc. Pl. & Pr. 1217; 22 Cyc. 332; People v. Colburn, 105 Cal. 648, 38 Pac. 1105; People v. Ah Sing, 95 Cal. 654, 30 Pac. 796; Anderson v. State, 28 Ind. 22; State v. Ready, 44 Kan. 697, 26 Pac. 58; State v. Barnett, 3 Kan. 250, 87 Am. Dec. 471; Com. v. Tanner, 5 Bush, 316; State v. Devine, 51 La. Ann. 1296, 26 So. 105; State v. Henry, 47 La. Ann. 1587, 18 So. 638; State v. Perley, 86 Me. 427, 41 Am. St. Rep. 564, 30 Atl. 74, 9 Am. Crim. Rep. 504; State v. O'Neil, 71 Minn. 399, 73 N. W. 1091; State v. Davidson, 38 Mo. 374; Acker v. Com. 94 Pa. 284; State v. Swafford, 3 Lea, 162; Clemons v. State, 92 Tenn. 282, 21 S. W. 525; Williams v. State, 10 Tex. App. 8; State v. Bohn, 19 Wash. 36, 52 Pac. 325; State v. Scott, 72 N. C. 461.

In the case at bar the words denoting the elements of the crime of robbery were used in the information in describing the assault, but nowhere used in describing the charge, the robbery, nor were they

differently used by the court in his instructions. State v. Siegel, 265 Mo. 239, 177 S. W. 354; 22 Cyc. 33, cases cited under note 37; Jane v. State, 3 Mo. 61; State v. Dixon, 247 Mo. 668, 153 S. W. 1022; State v. Underwood, 254 Mo. 470, 162 S. W. 184; State v. Woodson, 248 Mo. 706, 154 S. W. 705; State v. McGrath, 228 Mo. 422, 128 S. W. 966; State v. Melton, 117 Mo. 618, 23 S. W. 889; State v. Nicholson, 116 Mo. 522, 22 S. W. 804; Nathan v. State, 8 Mo. 631.

The information was only sufficient to sustain a verdict of simple assault. 5 Enc. Pl. & Pr. 792; Territory v. Gonzales, 14 N. M. 31, 89 Pac. 250; Smith v. State, — Tex. Crim. Rep. —, 57 S. W. 949; Mc Namara v. People, 24 Colo. 61, 48 Pac. 541; State v. Clayton, 100 Mo. 516, 18 Am. St. Rep. 565, 13 S. W. 819; State v. Veverlin, 30 Kan. 611, 2 Pac. 630.

O. B. Burtness, State's Attorney, and *T. B. Elton,* Assistant State's Attorney, for respondent.

A continuance is not always a matter of right, but it lies in the sound discretion of the trial court to grant or refuse it, and in its judgment the facts and circumstances in each case may warrant, and its action will not be disturbed unless there is clear abuse of discretion. Underhill, Crim. Ev. 2d ed. § 268, and cases cited.

Further, the person requesting continuance on the ground of absence of a witness must show that reasonable diligence was used to have him present, the competency and materiality of the testimony of such witness, and reasonable certainty that the witness will be present and testify at the next term. Underhill, Crim. Ev. 2d ed. §§ 269, 270; People v. Leyshon, 108 Cal. 440, 41 Pac. 480; People v. Ashnauer, 47 Cal. 98; People v. Francis, 38 Cal. 188; People v. AhYute, 53 Cal. 613; 9 Cyc. 181, and cases cited.

An allegation in the affidavit that proper diligence has been used, is not enough. Underhill, Crim. Ev. 2d ed. §§ 269, 270, and cases cited; State v. Phillips, 18 S. D. 1, 98 N. W. 171, 5 Ann. Cas. 760; State v. Stevens, 19 N. D. 249, 123 N. W. 888; Chapman v. State, — Tex. Crim. Rep. —, 30 S. W. 225.

An affidavit for continuance should contain a statement of facts, as to its material elements, and not mere conclusions. There is no showing that the absent witness was a resident of the state. State v. Kindred, 148 Mo. 270, 49 S. W. 845; State v. Wilcox, 21 S. D. 532, 114 N. W. 687.

Where the state consents that the affidavit purporting to state the testimony which the absent witness would give, if present in court, may be read as his testimony, the continuance should not be granted. Keating v. People, 160 Ill. 480, 43 N. E. 724; Adkins v. Com. 98 Ky. 539, 32 L.R.A. 108, 33 S. W. 948; People v. Leyshon, 108 Cal. 440, 41 Pac. 480; Fanton v. State, 50 Neb. 351, 36 L.R.A. 158, 69 N. W. 953; Territory v. Perkins, 2 Mont. 470; Territory v. Harding, 6 Mont. 332, 12 Pac. 750; Territory v. Guthrie, 2 Idaho, 432, 17 Pac. 39; Hoyt v. People, 16 L.R.A. 239, note; Hickman v. People, 137 Ill. 79, 27 N. E. 88; State v. Bartley, 48 Kan. 425, 29 Pac. 701; State v. Shannehan, 22 Iowa, 437; State v. McComb, 18 Iowa, 43; Pace v. Com. 89 Ky. 204, 12 S. W. 271; State v. Lund, 49 Kan. 580, 31 Pac. 146; State v. Daniels, 49 La. Ann. 954, 22 So. 415; State v. Hutto, 66 S. C. 449, 45 S. E. 13; People v. Nylin, 139 Ill. App. 500, affirmed in 236 Ill. 19, 86 N. E. 156.

A wide discretion is vested in the trial court in respect to the allowing or refusing of challenges to jurors. State v. Ekanger, 8 N. D. 559, 80 N. W. 482; State v. Werner, 16 N. D. 83, 112 N. W. 60; State v. Fujita, 20 N. D. 555, 129 N. W. 360, Ann. Cas. 1913A, 159.

Further than this, if defendant has not exhausted his peremptory challenges, he cannot complain because the court denies his challenge for cause. 24 Cyc. 328; People v. Decker, 157 N. Y. 186, 51 N. E. 1018; Herbert v. Northern P. R. Co. 3 Dak. 38, 13 N. W. 349, affirmed in 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590.

Witnesses, other than those whose names are indorsed on the information, may be called and used by the state, where it is made clearly to appear that such witnesses were unknown to defendant, when filing the information. State v. Albertson, 20 N. D. 512, 128 N. W. 1122; State v. Pierce, 22 N. D. 358, 133 N. W. 991; State v. Matejousky, 22 S. D. 30, 115 N. W. 96; State v. King, 9 S. D. 628, 70 N. W. 1046; State v. Frazer, 23 S. D. 304, 121 N. W. 790.

Where competent testimony is given by a witness, a motion to strike out all his testimony is properly overruled. It is the duty of the party objecting to separate the competent from the incompetent testimony, by proper indication to the court, and to confine his motion to the latter. Thomp. Trials, 2d ed. § 719.

In a charge of robbery, instructions to the jury that if they found

that defendant did "take, steal, and carry away" the money, sufficiently embrace the term "feloniously." Any words which mean a "wrongful and unlawful taking with intent to deprive the owner" are sufficient. The court further charged that the jury must find that defendant did "steal" the money.

The word "steal" has a uniform and accepted meaning, and implies a felonious taking. Baldwin v. State, 46 Fla. 115, 35 So. 220; State v. Minnick, 54 Or. 86, 102 Pac. 605; Com. v. King, 202 Mass. 379, 88 N. E. 454; Gardner v. State, 55 N. J. L. 17, 26 Atl. 30; State v. Perry, 94 Ark. 215, 126 S. W. 717; State v. Richmond, 228 Mo. 362, 128 S. W. 744; United States v. Trosper, 127 Fed. 476; State v. Griffin, 79 Iowa, 568, 44 N. W. 813; 12 Cyc. 613, and cases cited.

The question of the degree of credit to be given to the testimony of a witness, or whether his testimony shall be wholly rejected, is for the jury. 12 Cyc. 604; Underhill, Crim. Ev. 2d ed. § 280a; Thomp. Trials, §§ 2285, 2418; Hronek v. People, 134 Ill. 139, 8 L.R.A. 837, 23 Am. St. Rep. 652, 24 N. E. 861; Copeland v. State, 36 Tex. Crim. Rep. 575, 38 S. W. 210; Jaynes v. People, 44 Colo. 535, 99 Pac. 325, 16 Ann. Cas. 787; People v. Shoemaker, 131 Mich. 107, 90 N. W. 1035; State v. Hoxsie, 15 R. I. 1, 2 Am. St. Rep. 838, 22 Atl. 1059.

An information on the crime of robbery, accompanied by an assault, which characterizes the assault as having been committed "wilfully, wrongfully, unlawfully, and feloniously," is entirely sufficient to charge that the robbery committed in connection with such assault was also so committed. Smith v. State, 72 Neb. 345, 100 N. W. 807; Comp. Laws 1913, §§ 9521, 10683, 10693; 22 Cyc. 332, note 41; Richards v. State, 65 Neb. 808, 91 N. W. 878; 1 Bishop, Crim. Proc. 535; People v. Lopez, 90 Cal. 569, 27 Pac. 427; State v. Longstreth, 19 N. D. 268, 121 N. W. 1114, Ann. Cas. 1912D, 1317; State v. Holong, 38 Minn. 368, 37 N. W. 587.

Goss, J. This is an appeal from an order denying a motion for new trial after sentence upon a conviction of robbery. The first alleged ground for reversal is based upon denial of defendant's motion for a continuance over the term at which he was tried. The motion was based upon affidavits of defendant and counsel and upon the files, including a subpœna issued June 22, 1915, returnable four days later, with the

sheriff's return of inability to find Johnson, the witness therein named. The case was called for trial July 1, 1915, whereupon the motion was presented and denied. The court stated: "The motion is overruled upon the statement of the state's attorney in open court that he stipulates that Ole Johnson, if present, would testify" to a state of facts set forth in the record, tending to show the robbery to have taken place, if at all, on the Minnesota side of the Red river and beyond the trial court's jurisdiction. And "that this statement may be read to the jury as evidence in the case and considered by them as evidence." The affidavits for continuance were read to the jury by defendant during the trial. The jury was instructed that, "in considering the testimony of Ole Johnson, admitted in this trial by the state as facts which Ole Johnson would testify to if present, the jury must give the same weight to such testimony as they would give to it had Ole Johnson been upon the stand testifying under oath; and if from all the testimony in the case, the testimony of Ole Johnson included, there is a reasonable doubt of the guilt of the defendant as charged in the information, then the jury must acquit." This fairly reflects the record upon this question. However, in the absence of any concession from the state concerning what Johnson would have testified to, the court would have been justified in denying a continuance, because of defendant's failure to show diligence in preparation for trial and because of the further fact that, under the showing made, the absent witness may never return within the jurisdiction of the court, and a continuance would be useless and unavailing. But the state was tendered, and it accepted, the statement as to what Johnson would testify as in lieu of his deposition thereto. And the state, being ready for trial, opposed the continuance, and it was denied.

Defendant contends that the court treated his application as sufficient by the acceptance of the stipulation in lieu of the testimony of Johnson, and allowed the case to be tried upon that theory, and thence the state is now precluded from questioning on appeal the sufficiency of the showing made for the continuance; and that the case must be treated as a denial of a motion for continuance made upon a sufficient basis upon condition of a concession by the state of the facts to which the absent witness would testify. Upon this assumption defendant contends that the denial of the continuance was both an abuse of discretion

and a violation of his constitutional right to process of the court to compel the attendance of witnesses in his behalf, as guaranteed by § 13 of art. 1 of our state Constitution. Defendant claims that, in ruling upon constitutional rights, no compulsory concession can be considered as the equivalent of the testimony of a witness given upon trial; that the only equivalent of the testimony of such absent witness is an unequivocal admission by the state of the truth of the facts to which it is claimed such absent witness would have testified, which admission would have dismissed this prosecution.

Brief reference may be made to the various holdings. It should be noted that about half the states have statutes governing practice under these conditions. We have not. Section 10,787, Comp. Laws 1913, but provides that a continuance may be granted upon sufficient cause, and that a cause which would be considered as sufficient for postponement in a civil action is sufficient in a criminal action. Some states have statutes that a continuance may be denied upon a concession by the state that the witness, if present, would testify as stated in the affidavits for continuance, making the affidavits for continuance virtually depositions which the defense may thus use, but subject to contradiction by the state. Statutes upon the question are to be found in Arkansas, Illinois, Idaho, Iowa, Kansas, Kentucky, Missouri, Montana, Mississippi, New Mexico, and Wyoming. See note in 4 Enc. Pl. & Pr. 867, and note in 28 Ann. Cas. 1913C. In some of these states, as in Missouri, it has been held that a statute providing that a continuance may be avoided by concession, but without admitting therein the truth of the matters specified for a continuance, is an unconstitutional deprivation of the right to compel the testimony of the absent witness, and hold accordingly that the facts stated for a continuance must be admitted as true by the state for it to thus avoid a continuance. Likewise cases from Louisiana, Texas, California, and other states hold that nothing less than an admission of the truth of said statements will justify denial of a continuance to which the defendant is otherwise entitled. California authorities also hold, supporting the contention of the defendant, that a denial of a continuance, but upon condition of the state's admitting the facts in the affidavit for continuance, places the sufficiency of the basis for the continuance beyond dispute by the state. People v. Fong Chung, 5 Cal. App. 587, 91 Pac. 105. The leading

California case upon the denial of continuance by concession is People v. Diaz, 6 Cal. 248, and for a recent holding to the same effect see People v. Bossert, 14 Cal. App. 111, 111 Pac. 15. These cases, like People v. Fong Chung, supra, hold that a defendant "had a constitutional right to have his witnesses orally examined in court, and in the absence of a showing that the motion was made in bad faith that he was entitled to a reasonable time to secure their attendance." Tennessee and Nevada, Oklahoma, South Dakota, and Texas are to the same effect. State v. Baker, 13 Lea, 326; State v. Salge, 2 Nev. 321; Madison v. State, 6 Okla. Crim. Rep. 356, 118 Pac. 617, Ann. Cas. 1913C, 484; State v. Wilcox, 21 S. D. 532, 114 N. W. 687; Jenkins v. State, 49 Tex. Crim. Rep. 457, 122 Am. St. Rep. 812, 93 S. W. 726. Most of the other states qualify the rule or treat the entire matter of the continuance, including the affidavits and concessions and all facts known to the court from the files and proceedings had in the case, as a discretionary matter, reviewable for abuse of discretion, and as involving, when reasonably exercised, no violation of any constitutional right of process to compel attendance of witnesses. In the recent Wisconsin case of Miller v. State, 139 Wis. 57, 119 N. W. 850, many decisions are cited and discussed, in all phases here involved, including constitutional right to process. Mr. Justice Marshall in the course of the opinion states: "My personal view is that upon a full concession being made, as in this case, even in the event of a good case made for a continuance, it not only is within the discretion, but the discretion ought to be exercised to proceed with the trial under some circumstances. That the constitutional right to have one's witnesses in case of a criminal prosecution against him testify upon the trial does not mean under all circumstances. Otherwise, the wheels of justice might be impeded to great public detriment without really subserving any private right, except in a technical sense. In case of great prejudice to public interests by delay, and the accused having had, without success, the amplest use of all legal instrumentalities to compel attendance of his witness, and it appearing that further postponement will furnish only a bare possibility or a remote probability of better success, the court should not only have the power to proceed with the trial upon a concession being made, as here [of what the witness would state if present, but not admitting its truth], but it might be its duty to the public to do so, and a favor, in-

stead of a prejudice, to the accused; certainly not a violation of any constitutional right reasonably administered. It is the opinion of the court that in case of the presentation for a continuance being so weak that the trial court might decide either way, then in its discretion it may grant or deny the application, according to whether the adverse party will make a concession such as was exacted here." All this is especially pertinent under the defective showing made, as heretofore indicated. Nebraska and Massachusetts follow a similar rule. Fanton v. State, 50 Neb. 351, 36 L.R.A. 158, 69 N. W. 953. In Com. v. Donovan, 99 Mass. 426, 96 Am. Dec. 765, it is said: "The practice of allowing such motions, when made on account of the absence of a witness, to be met by a concession that the witness would testify as stated in the affidavit accompanying the motion, giving to it the force and effect of a deposition of the witness, is generally adopted in our courts in civil cases. It has also been allowed in criminal proceedings with the sanction of this court. Com. v. Knapp, 9 Pick. 496–515, 20 Am. Dec. 491. It is true that in some cases such a concession would be a very inadequate substitute for the testimony of the absent witness. In such cases it might be proper for the court to require the facts themselves to be admitted, or to grant the postponement. But it would be impossible to lay down any rule of law as a guide by which to determine the question. All the circumstances which bear upon the propriety of one course or the other, the evidence of diligence, the indications of good faith, or the contrary, the importance of the testimony, and the means of supplying the deficiency from other sources, are before the judge at the trial, as they cannot be presented to any revisory tribunal. These considerations show the propriety of holding the whole matter of continuance or postponement to be entirely within the discretion of the judge at the trial. They apply to criminal as well as to civil causes." Of course such discretion is reviewable and subject to correction for plain or gross abuse. Each case must, to a great extent, rest for decision upon its own peculiar facts. As remarked in some of the cases, any other rule opens the door, partially at least, to an easy abuse of the right to a continuance. It is not difficult to procure *ex parte* affidavits. As remarked in Territory v. Harding, 6 Mont. 323, 332, 12 Pac. 750, at 755: "It is easy enough for a defendant to set forth in an affidavit the names of witnesses who are absent from the

territory and in a foreign country, as in this case,—and the higher the crime the farther away the witnesses are generally declared to be. . . . No guilty man is ever ready for trial. Every continuance of his cause brings him so much nearer to an acquittal. The trial court must judge whether his application for continuance is made merely for delay or in good faith, to the end that justice may be done."

Kentucky, after having held for years in favor of all that the defendant can contend for in this case, has the following to say upon a statute permitting a concession as made in this case to be taken to avoid a continuance: "During all these years it became manifest that the rule requiring the state to admit as absolutely true whatever the accused might, by his *ex parte* affidavit, say he could prove by an absent witness, materially impaired the execution of the criminal law; that by its operation it was placed in the power of an unscrupulous criminal, aided by expert and ingenious counsel, to long and indefinitely delay the trial of his cause or else to compel the state to admit facts for the purpose of a trial which often in effect were equivalent to a verdict of acquittal. In this way and by the operation of this provision, the criminal law was brought into disrepute and by many held in contempt, and the court and officers of the law censured for the long delay and final failure of justice. To remedy this crying evil the legislature in 1886 amended the provisions of the Code of 1854 in reference to the terms on which the state might procure a trial of criminal causes." Of course by this quotation no inference is made against defendant's counsel in this case, his good faith being apparent. But this is the experience, however, under the rule contended for, as set forth in Atkins v. Com. reported in 32 L.R.A. 108–111. And cases are to be found similar to Edmonds v. State, 34 Ark. 720, where the affidavit of the defendant for continuance has recited the names and substance of the purported testimony of absent witnesses, and after, by an admission by the state that they would so testify, they have been produced by the state and given testimony to exactly the contrary, thereby raising interesting questions of the extent to which the state is bound by its admission. In those states following the practice adopted in the case at bar, in spite of the admission the witnesses may testify to the contrary. But if the state was obliged to concede as true to fact the purported testimony of the absent witnesses, it might be powerless to contradict its truth during the

trial, even though it could produce the witnesses for examination. See cases cited in note in 16 L.R.A. 239.

Then again, the denial of a continuance upon a prima facie showing is not necessarily prejudicial error, inasmuch as not only the facts upon which the applications are made, together with the discretion exercised in ruling upon the continuance, are to be considered on the appeal, but the further and important question of how under the record the ruling of the court operated to the defendant's prejudice, and where it does not appear that the defendant was prejudiced, none will be presumed. Cremeans v. Com. 104 Va. 860, 2 L.R.A.(N.S.) 721, 52 S. E. 362. In that case the court concluded, from the testimony on the trial and the whole record, that, notwithstanding the affidavit of the defendant regarding four purported witnesses to the homicide, whose testimony was claimed to be all important, said witnesses being absent, that they could not have witnessed the homicide; and that although the showing for a continuance upon the moving papers was prima facie sufficient and its denial at the time of the ruling was error upon the moving papers, yet the record on the trial disclosed the same to be without prejudice. And the same in principle has been held in Roberts v. Com. 94 Ky. 499, 22 S. W. 845, holding that evidence but cumulative to that of other witnesses was insufficient to entitle a defendant to a continuance where the state conceded the absent witness would testify as stated in the application. Also that the presence of the alleged absent witnesses at the trial, when known to the defendant, cures any error in the denial of a motion for continuance at the commencement of the trial. And this is so whether the absent witness is called or not. Vaughn v. Com. 15 Ky. L. Rep. 256, 23 S. W. 371; McGrath v. State, 35 Tex. Crim. Rep. 413, 34 S. W. 127, 941; Black v. State, 47 Ga. 589. And this is true, even where the absent witness was produced in court just before the argument to the jury was closed and the witness was not called. Mitchell v. State, 36 Tex. Crim. Rep. 278, 33 S. W. 367, 36 S. W. 456; State v. Banks, 118 Mo. 117, 23 S. W. 1079. And it may be noticed that Texas and Missouri hold with California to the extreme contended for by the defendant as to the right to a continuance and to its denial constituting an invasion of constitutional rights. And this is very important because the defendant has not brought the evidence, or any substantial part of it, upon this appeal. So far

as the record is concerned, defendant may have produced a dozen witnesses testifying that this occurrence took place in Minnesota, and all might have been impeached by some physical fact or other conclusive testimony that would have rendered the testimony offered by the said Johnson cumulative and incredible as well. Or the record might disclose a waiver by act of any right to a claim of prejudice. This is but illustrative of the fact that the denial of the continuance might not have been prejudicial in fact. No presumption of prejudice should be indulged in where the evidence in the case is not before the appellate court.

The denial of the continuance was the exercise of a discretion upon all the record facts, the showing made for the continuance, the state's concession as to what the absent witness would testify, if present, sufficiency of the showing as to diligence and likelihood of the defendant's ever being able to produce said witness. Upon all of these, collectively, the trial court ruled in denying the continuance. Its decision thereon will be disturbed only for a clear abuse of legal discretion. Upon such an application the state may concede what the absent witness, if present, would testify to, reserving the right to impeach what is in effect, if offered on the trial, the deposition of said absent witness. It is unnecessary in such concession that, to avoid a continuance the state admit the purported facts to which the absent witness would testify are true. Reasonably administered the denial of a continuance upon such a concession by the state does not amount to a denial of the constitutional right to process to compel attendance of witnesses in behalf of an accused. While every case must be ruled by the facts thereof, under ordinary circumstances and conditions the foregoing rules are applicable. And without the testimony here it will not be presumed that its denial was prejudicial error.

Error is assigned upon denial of a challenge for cause. The *voir dire* examination is set forth at length. But defendant states in his brief: "It is true that defendant exercised only nine of his ten peremptory challenges, but it appears to us that ought not to make any difference." This admission disposes of this assignment. His failure to use a peremptory challenge waived all objection to the juror. State v. Goetz, 21 N. D. 569, 131 N. W. 514. The syllabus reads: "Failure to exer-

cise a peremptory challenge is a waiver of previous objection to a juror to whom a challenge for cause had been taken and disallowed."

Error is claimed in the admission of the testimony of Martin Olson. The objection is made that his name was not indorsed upon the information. Instead the name of another, one Elliott, appeared thereon. Olson was the sheriff of Ramsey county and the officer who arrested the defendant. From the statement of the state's attorney, explanatory of why Olson, and not Elliott, was called as a witness, it appears that at the time of the filing of the information and for some time thereafter he thought Elliott had made the arrest; and only upon his telephoning for Elliott at Devils Lake to attend at Grand Forks upon the trial, did he learn from sheriff Olson that he, and not Elliott, made the arrest. It is apparent that Elliott's name, instead of Olson's, was indorsed upon the information through mistake. One reason for the law is to compel public prosecutors to "treat those who they accuse of crime with perfect fairness." Good faith is exacted on the part of the state toward defendants to prevent any overreaching of defendant's rights or prejudicing of them by any intentional omission of names of the witnesses from the information. State v. Kent (State v. Pancoast) 5 N. D. 516–536, 35 L.R.A. 518, 67 N. W. 1052. "The question is largely one of discretion, and it is not reversible error unless the discretion reposed in the trial court is abused," quoting from the opinion in State v. Pierce, 22 N. D. 358–361, 133 N. W. 991; State v. Albertson, 20 N. D. 512, 128 N. W. 1122. In any event, the state has sufficiently excused its failure to indorse the name of Olson upon the information. State v. Kilmer, 31 N. D. 442, 153 N. W. 1089.

The fourth assignment of error is based upon a question asked in cross-examination of the defendant. From the small portion of the evidence in the record, it will be assumed that the defendant and his wife were arrested in Devils Lake, and that a money order was an important circumstance in the case. The direct examination is not set out in the record, nor is but a small portion of the cross-examination. The objectional testimony is the following:

Q. When you were out there at Petersburg and got the money order, I suppose you took the money order with you?

A. I did.

Q. What did you do with it?

A. Turned it over to my wife.

Q. Do you know what she did with it?

A. Yes, I know what she did with it.

Q. What?

A. After we were arrested she turned it over to the Missus of the jail there.

Q. Were you there at the time?

A. I was there, yes.

Q. It is a fact, is it not, that when she was arrested and you were arrested, as you have testified, and your wife was searched, that she made an attempt to take the money order and put it into her vagina?

This question was objected to as improper cross-examination, a highly prejudicial question, immaterial, not relevant to the issues, and simply made for the purpose of prejudicing the jury.

The Court: Well, he was present at the time, as he testifies. Overrule the objection.

It was then developed by defendant's answer that he was not present when his wife was searched, and could not have known what she did with the money order, and the question was not answered further than that. Without knowing what the scope of the direct-examination was, the evidence in the case not being presented on this appeal, this court has no means of knowing whether the cross-examination as such was improper or whether this testimony sought was material or relevant, and cannot determine whether, as stated by counsel, it was made for the sole purpose of prejudicing the jury. The trial court was familiar with all the proof, and it will be assumed that his ruling was correct.

The fifth assignment of error is taken to the impeachment by the state by the witness Duret of the testimony of defendant's absent witness, Ole Johnson, as set forth in defendant's application for continuance, evidently read to the jury as a deposition. Appellant's argument is based upon the objection that the state should have been compelled to unqualifiedly admit the truth of the purported facts set out in said application for continuance, and should not be allowed to deny them.

The contention might be interesting in those states sustaining the right of the defendant to a continuance as an absolute right, upon the showing made. But as the state did not admit the truth of the facts stated in the application for a continuance and reserved the right to impeach the same, and as it was not obliged to admit the truth of said facts, it is difficult to understand why the impeachment of the facts so stated should constitute error. It may here be remarked that, had the state admitted the truth of said facts, it would have been stipulating that the crime took place in Minnesota, and would have been the equivalent of dismissing the prosecution. This but illustrates one reason why the state should not be compelled to admit the truth of *ex parte* affidavits to avoid a continuance.

The sixth assignment of error is taken upon the following record concerning one Mrs. Carl Hanson, subpœnaed in defendant's behalf and who failed to appear.

After the state had rested its case on rebuttal, defendant's counsel made the following statement:

We have subpœnaed Mrs. Hanson, who has been very unfortunate in that she lives on the river bank and her house has been flooded and she hasn't any shoes or any proper clothes. . . . I would like to take that witness's testimony. We subpœnaed her yesterday morning, and the sheriff informed me of the circumstances, and I thought if it was possible to get along without forcing the woman up here, when she was not properly clothed, I would try to do it.

The Court: There is a request made to offer testimony on the part of the defense, but there has not been any showing made as to whether this testimony is material or what she would testify to. It might be purely cumulative on some immaterial matter, and I don't feel disposed to continue the case for any length of time in order to allow you to get this witness here. You have known since last night at any rate that you wanted . r.

Mr. Wineman: I knew yesterday morning. I subpœnaed her yesterday morning, and was informed by the sheriff, or his deputy, of the facts, so I was aware she didn't have clothes to come, and it was my intention, if possible, to excuse her, but, as I find, I think it is material.

The Court: Proceed with your arguments if you are through.

Mr. Wineman: Defendant rests. There is no sur-rebuttal; simply desire this additional witness.

Upon this record it is apparent that there is no sufficient showing for a continuance. Had the defendant really desired, he could have obtained her presence at the trial by use of a bench warrant. Had he done so, no doubt a continuance would have been allowed and probably the sheriff would have produced her.

The remaining assignments are taken upon the instructions and the ruling of the court upon defendant's motion in arrest of judgment. These challenge the sufficiency of the information to charge the crime of robbery. Defendant contends that it charges but a felonious assault, and is vulnerable to his motion in arrest of judgment and to the exceptions taken to the instructions, wherein the court assumed the information contained the basic material allegations for instructions fully covering the crime of robbery. The information reads: "One Andy Uhler, the defendant herein, did commit the crime of robbery, committed as follows, to wit: That at the said time and place the said Andy Uhler did wilfully, wrongly, unlawfully, and feloniously make an assault upon the person of one Gustave Ronse, and did then and there by means of force and by putting in fear, steal, and take, and carry away from the person and possession of said Gustave Ronse and against his will, certain personal property of the said Gustave Ronse, to wit: Two hundred fifty dollars lawful money of the United States."

Defendant failed to demur, evidently preferring to take advantage of any defects therein by motion in arrest of judgment. In State v. Wright, 20 N. D. 216, 126 N. W. 1023, Ann. Cas. 1912C, 795, quoting from the syllabus, it is said: "Following the rule announced in State v. Johnson, 17 N. D. 554, 118 N. W. 230, held, that when the sufficiency of the allegations in an information is first challenged by motion in arrest of judgment the same will be construed with less strictness than when the sufficiency thereof is raised by demurrer; and where the information states facts constituting an offense, in general words and substantially in the language of the statute defining the offense,—the information will be held sufficient as against attack by motion in arrest of judgment." In State v. Johnson, supra, it is said: "If the information states an offense, though imperfectly, by reason of general state-

ments, or it is defective as to some matter not of the substance of the offense, then a motion in arrest of judgment will not lie." Such being the settled law of this jurisdiction, this information is not vulnerable to the objection as taken. Any question of duplicity was also waived by failure to demur. State v. Climie, 12 N. D. 33, 94 N. W. 574, 13 Am. Crim. Rep. 211. This information sufficiently charges the felonious intent to steal with which the property was alleged to have been taken by defendant from the possession of Ronse, and it sufficiently characterizes the taking to have been wilful, unlawful, and felonious and with intent to deprive the owner thereof. Appellant contends that these terms descriptive of the intent with which the act was done apply only to the assault charged to have been made upon Ronse, and does not charge that the taking by means of force and putting in fear was with unlawful or felonious intent to deprive him of his property. Appellant has overlooked the significance of "steal," a word of art, in the clause "steal, take, and carry away from the person and possession of Gustave Ronse and against his will, certain personal property." "It is usually held that the necessary intent is sufficiently implied by the allegation that defendant feloniously stole, or even that he stole, this being sufficient to show the animus with which the act was done." 25 Cyc. 74, citing, among other cases, Gardner v. State, 55 N. J. L. 17, 26 Atl. 30, in the syllabus of which is found "the word 'steal' or 'stealing' in a criminal statute, when unqualified by the context, signifies a taking which at common law would have been denominated felonious, and imports the common-law offense of larceny." The opinion quotes with approval Dunnell v. Fiske, 11 Met. 551–554, to the same effect. Also Com. v. Kelley, 184 Mass. 320, 68 N. E. 346; People v. Lopez, 90 Cal. 569, 27 Pac. 427, holding that the omission of the word "feloniously" was cured by the use of the word "steal." "Employed in the charging part of an information for grand larceny, it would be understood as charging the criminal intent with which the act was committed." And in State v. Minnick, 54 Or. 86, 102 Pac. 605. In the absence of a demurrer or motion to set aside the indictment, the following indictment for larceny was held sufficient: "The said John Minnick on the 25th day of March, 1908, in the county of Union and state of Oregon, did then and there take, steal, and carry away, and then and there take, steal, and drive and lead away, two heifers, then and there the personal

property of one W. A. Ogden, and said personal property then and there of the value of $30." It will be noticed that the intent is not charged or characterized, except by the use of the words "take, steal, and carry away." Concerning the omission of the word "feloniously" it is said: "We think the words 'take, steal and drive away' are sufficient to describe larceny. Webster gives the primary meaning of the word 'steal' as follows: 'To take and carry away feloniously; to take without right or leave and with intent to keep wrongfully.' When we say of a person, 'he stole a horse,' we are not merely uttering a conclusion of law, but stating a fact in language that everybody, from the college professor to the common laborer, can understand. An indictment is definite enough if the facts are so stated as 'to enable a person of common understanding to know what is intended.' " Our statute, Comp. Laws 1913, § 10685. Baldwin v. State, 46 Fla. 115, 35 So. 220; State v. Griffin, 79 Iowa, 568, 44 N. W. 813; Turnipseed v. State, 45 Fla. 110, 33 So. 851; Gillotti v. State, 135 Wis. 634, 116 N. W. 252. In State v. Fordham, 13 N. D. 494–500, 101 N. W. 888, it is stated: "In this connection it [the word wrongful] is synonymous with 'felonious;' and it is well settled that the word 'felonious' when used in defining the crime of robbery or larceny implies an intent to steal." The allegation then that the defendant "by means of force and by putting him in fear did steal, take, and carry away" charges a felonious taking of property from the person. As against the attack made, the information is sufficient to sustain the judgment.

Certain exceptions are taken to the giving and the refusal to give certain instructions. None of the instructions given are abstractly wrong, and, depending upon the scope of the proof, might have been proper and within the issues. Likewise, under the record, the refusal to instruct as requested might have been entirely proper. These assignments may be disposed of by the following from the syllabus of State v. La Flame, 30 N. D. 489, 152 N. W. 810, following the rule announced in State v. Woods, 24 N. D. 156, 139 N. W. 321: "Where the evidence is not before the supreme court, and instructions may or may not be erroneous, dependent upon whether within or without the scope of the proof, they will be deemed sufficient." This is but another way of stating the rule that, unless abstractly wrong, presumptions will not be drawn that instructions are erroneous. And as stated in State

v. La Flame, the practice in criminal appeals, of omitting from the record on appeal the evidence upon which the verdict was found, is to be condemned rather than encouraged by presumptions of error, necessarily taken in ignorance of the proof. This passes upon all assignments presented. Finding no reversible error, the judgment appealed from is affirmed.

JAY J. SEYMOUR v. F. C. DAVIES, as Sheriff.

(156 N. W. 112.)

Upon the affidavits in support of and controverting the granting of a new trial after a verdict for plaintiff, it is *held:*

Issue of fact — record — sufficient for submission to jury — merits — new trial — motion for — affidavits.

1. Upon the record on trial an issue of fact was presented sufficient to require submission of the merits of the case to the jury.

Former trial — issues — new trial — newly discovered evidence — result.

2. Under the issues presented on the former trial the purported newly discovered facts might have materially affected the result.

Newly discovered evidence — trial court's findings on — conflicting evidence — facts presented by affidavits — not disturbed.

3. The trial court's holding that the purported facts amounted to newly discovered evidence will not be disturbed under the conflict of fact presented by the affidavits.

Newly discovered evidence — diligence — showing on — undiscovered before — reasons for.

4. The defendant has shown sufficient reason for not earlier discovering the facts urged as the grounds for new trial.

Opinion filed January 7, 1916.

An appeal from an order of the District Court of Eddy County, *Buttz,* J., granting a new trial.

Affirmed.

James A. Manley, for appellant.

A person in actual possession of, and having actual control over, personal property is prima facie the owner thereof. Mariner v. Wasser, 17 N. D. 361, 138 Am. St. Rep. 714, 117 N. W. 343; Jones, Ev. § 74c; Bean v. Loftus, 48 Wis. 371, 4 N. W. 334.

A final judgment does not become such until entered in the judgment book, and has no force or effect until entered by the clerk in the judgment book. Re Weber, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523.

It is settled that, where property is in the possession of a third person claiming title, the officer must show something more than process fair on its face. 3 Elliott, Ev. § 2603; Carson v. Fuller, 11 S. D. 502, 74 Am. St. Rep. 823, 78 N. W. 960.

Where the officer claims to have acted under process of execution, and the judgment on which it issued, such judgment must be valid to afford protection to the officer. Bugbee v. Lombard, 88 Wis. 271, 60 N. W. 414; Bean v. Loftus, 48 Wis. 371, 4 N. W. 334; Bogert v. Phelps, 14 Wis. 89.

No one but a creditor can question the title of the fraudulent vendee of property, and hence the officer must show that the relation of debtor and creditor exists between the party against whom the attachment or execution runs, and the person in whose behalf it issued. 35 Cyc. 1, 747, 748; Howard v. Manderfield, 31 Minn. 337, 17 N. W. 946; Homberger v. Brandenberg, 35 Minn. 401, 29 N. W. 123; 20 Enc. Pl. & Pr. 153; Hakanson v. Brodke, 36 Neb. 42, 53 N. W. 1033; 25 Am. & Eng. Enc. Law, 702; Pitkin v. Burnham, 55 L.R.A. 280, and note, 62 Neb. 385, 89 Am. St. Rep. 763, 87 N. W. 160; Trowbridge v. Bullard, 81 Mich. 451, 45 N. W. 1012; Mathews v. Densmore, 43 Mich. 461, 5 N. W. 669; Oberfelder v. Kavanaugh, 21 Neb. 483, 32 N. W. 295; 2 Cooley, Torts, 3d ed. p. 889; Smith v. Healey, 121 N. Y. Supp. 230; McCune v. Peters, 54 Misc. 165, 105 N. Y. Supp. 896; Albie v. Jones, 82 Ark. 414, 102 S. W. 222, 12 Ann. Cas. 433; Black, Judgm. § 170.

The application for a new trial on newly discovered evidence is regarded with suspicion and examined with caution. 14 Enc. Pl. & Pr. 790; Moore v. Philadelphia Bank, 5 Serg. & R. 41; Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; Gaines v. White, 1 S. D. 434, 47 N. W. 524; Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Mackin

v. People's Street R. & Electric Light & P. Co. 45 Mo. App. 82; Baker v. Joseph, 16 Cal. 173.

The rule is settled that a new trial will not be granted upon the ground of newly discovered evidence unless the same is of such a character as will probably change the result. Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; Libby v. Barry, 15 N. D. 286, 107 N. W. 972.

Such evidence must be material. Libby v. Barry, 15 N. D. 287, 107 N. W. 972; Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762.

Evidence which was known to a party or his attorney is not newly discovered evidence. 14 Enc. Pl. & Pr. 792.

A party is chargeable with knowledge of all facts known to his attorney which are connected with the cause or matter in reference to which the relation exists. 3 Am. & Eng. Enc. Law, 320; 4 Cyc. 933; Bates v. A. E. Johnson Co. 79 Minn. 354, 82 N. W. 649; Smith v. Ayer, 101 U. S. 320, 20 L. ed. 955; Camas Prairie State Bank v. Newman, 15 Idaho, 719, 21 L.R.A.(N.S.) 703, 128 Am. St. Rep. 81, 99 Pac. 833; Greenlee v. McDowell, 39 N. C. (4 Ired. Eq.) 481.

Due diligence must have been used to discover the evidence before the trial. If his diligence is even doubtful, he will not succeed. 14 Enc. Pl. & Pr. 798, 799, and cases cited; Comp. Laws 1913, § 7660; Longley v. Daly, 1 S. D. 257, 46 N. W. 250; 29 Cyc. 889, and cases cited; Demmon v. Mullen, 6 S. D. 554, 62 N. W. 380; Goose River Bank v. Gilmore, 3 N. D. 188, 54 N. W. 1032; Arnd v. Aylesworth, 136 Iowa, 297, 111 N. W. 407; Robins v. Modern Woodmen, 127 Iowa, 444, 103 N. W. 375.

Negligence of counsel is negligence of party. 14 Enc. Pl. & Pr. 799; Thompson v. Welde, 27 App. Div. 186, 50 N. Y. Supp. 618; Yates v. Monroe, 13 Ill. 212.

And the employment of another attorney does not excuse the lack of diligence. McBride v. McClintock, 108 Iowa, 326, 79 N. W. 83; 29 Cyc. 891.

Party knowing the facts, but not disclosing them to counsel, is not excused. Blair v. Paterson, 131 Mo. App. 122, 110 S. W. 615; Kraus v. Clark, 81 Neb. 575, 116 N. W. 164.

Forgotten evidence is not new evidence. Gregory v. Gregory, 129 Ill. App. 96; Brown v. Newell, 132 App. Div. 548, 116 N. Y. Supp.

965; Grigsby v. Wolven, 20 S. D. 623, 108 N. W. 250; Robins v. Modern Woodmen, 127 Iowa, 444, 103 N. W. 375.

Where counsel did not know of the facts before the former trial, but they should have been known to the client, affords no excuse. Haner v. Furuya, 39 Wash. 122, 81 Pac. 98.

Nor where any sort of diligence would have produced the evidence before. Renshaw v. Dignan, 128 Iowa, 722, 105 N. W. 209; Grand Rapids Electric Co. v. Walsh Mfg. Co. 142 Mich. 4, 105 N. W. 1; King v. Hill, — Tex. Civ. App. —, 75 S. W. 550; Bushwell v. Bushwell, 146 Iowa, 52, 124 N. W. 770.

Letter which had been in party's possession all the time not ground for new trial. Coker v. Oliver, 4 Ga. App. 728, 62 S. E. 483; Newbury v. Great Northern R. Co. 109 Minn. 113, 122 N. W. 1117.

Failure to make proper inquiry is want of diligence. Benjamin v. Flitton, 106 Iowa, 417, 76 N. W. 737.

That evidence was discovered by the use of systematic inquiry after the trial indicates that proper diligence was not exercised before. 29 Cyc. 892, and cases cited; Scott v. Hobe, 108 Wis. 239, 84 N. W. 181; Burlington & M. River R. Co. v. Kittredge, 52 Neb. 16, 71 N. W. 986.

Affidavit of applicant must show of whom inquiry was made. Smith v. Wagaman, 58 Iowa, 11, 11 N. W. 713.

Failure to examine witness at trial is want of diligence. 29 Cyc. 896, and cases cited.

And where the same witness was used upon the trial, the showing must, indeed, be strong, to warrant a new trial. Marengo Sav. Bank v. Kent, 135 Iowa, 386, 112 N. W. 767; Buswell v. Buswell, 146 Iowa, 52, 124 N. W. 770; Houston & T. C. R. Co. v. Davenport, — Tex. Civ. App. —, 110 S. W. 150.

Legal diligence requires that a witness be examined fully and specifically as to his knowledge of all matters in controversy. 29 Cyc. 897, and cases cited; George v. Emery, 18 Wyo. 352, 107 Pac. 1; Brennan v. Goodfellow, — Iowa, —, 96 N. W. 962.

If the affidavits offered in support of the motion are rebutted by counter affidavits, a new trial will be refused. Deindorfer v. Bachmor, 12 S. D. 285, 81 N. W. 297; Barber v. Maden, 126 Iowa, 402, 102 N. W. 120.

While the granting of a motion for new trial is largely in the discretion of the trial court, yet where the movent shows no diligence, and the contrary appears by affidavits, it is an abuse of discretion to grant the motion. 29 Cyc. 892; Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157.

And on the question of diligence the affidavits of both client and attorney are necessary. 14 Enc. Pl. & Pr. 823–825.

And the particular acts and facts must be set forth, so that the court may decide properly upon the question of diligence. 14 Enc. Pl. & Pr. 824; Gaines v. White, 1 S. D. 434, 47 N. W. 524; Margolius v. Muldberg, 88 N. Y. Supp. 1048; Nicholson v. Metcalf, 31 Mont. 276, 78 Pac. 483; B. S. Flersheim Mercantile Co. v. Gillespie, 14 Okla. 143, 77 Pac. 183; Levy v. Hatch, 92 N. Y. Supp. 287; Chicago & A. R. Co. v. Raidy, 203 Ill. 310, 67 N. E. 783, 14 Am. Neg. Rep. 269; Bertram v. State, 32 Ind. App. 199, 69 N. E. 479.

Maddux & Rinker, for respondent.

Irregularity of the prevailing party, which ordinary prudence could not have guarded against, preventing a fair trial, will support the order for a new trial. Their regularity of which complaint is here made, and as practised by appellant, consists in the addition of very material matter to the indorsement of the notes. This amounts to surprise and fraud on the defendant. Peers v. Davis, 29 Mo. 184; Fretwell v. Laffoon, 77 Mo. 26.

Where the prevailing party introduces false testimony and thus succeeds, it is ground for a new trial. First Nat. Bank v. Wabash, St. L. & P. R. Co. 61 Iowa, 700, 17 N. W. 48; Cleslie v. Frerichs, 95 Iowa, 83, 63 N. W. 581; Freeman, Judgm. 100; McGuire v. Drew, 83 Cal. 225, 23 Pac. 312; Schellhous v. Ball, 29 Cal. 605; Doyle v. Sturla, 38 Cal. 456; Butler v. Vassault, 40 Cal. 74; Green v. Bulkley, 23 Kan. 130; Freeman v. Wood, 14 N. D. 95, 103 N. W. 392; Gilbraith v. Teufel, 15 N. D. 152, 107 N. W. 49; Slater v. Drescher, 72 Hun, 425, 25 N. Y. Supp. 153; Hinton v. McNeil, 5 Ohio, 509, 24 Am. Dec. 315.

"If the new evidence tends to establish a new fact, not in dispute at the trial, such evidence is not cumulative, merely because it tends to establish the same defense." 14 Enc. Pl. & Pr. 819, and citations; 15 Enc. Pl. & Pr. 821, and citations.

Granting new trial on ground of newly discovered evidence is within the discretion of the trial court, and its order will not be disturbed unless abuse clearly appears. Longley v. Daly, 1 S. D. 257, 46 N. W. 247; Alderson v. Larson, 28 S. D. 369, 133 N. W. 809; Libby v. Barry, 15 N. D. 286, 107 N. W. 972; Citizens' Bank v. Schultz, 21 N. D. 551, 132 N. W. 134.

Goss, J. Plaintiff appeals from an order granting defendant a new trial, after a verdict for plaintiff on the merits. The defendant, as sheriff, levied upon $500 paid by one Hewes, mortgage or, in satisfaction of a real estate mortgage given in 1902 to Oscar O. Irwin, mortgagee, and securing five promissory notes of $1,000 each. In August, 1912, these notes were sent to the Bank of New Rockford for collection. The total amount due, $2,293, was paid by Hewes. But before the money was remitted by the collecting bank it was levied upon as the property of Irwin, mortgagee, under a purported judgment in favor of one Nash, judgment creditor, against Irwin as judgment debtor. Seymour claims to own the notes and to have owned them since 1903, and denies that Irwin has any interest in them. Irwin also disclaims any interest or ownership in the notes or in their proceeds. Upon the back of each of the four notes in evidence appears the indorsement: "Pay to the order of Oscar O. Irwin and J. J. Seymour, Oscar O. Irwin;" and thereunder an indorsement: "Oscar O. Irwin without recourse." Upon the payment of the notes to the bank a satisfaction signed by Irwin was by it delivered to Hewes, no assignment of record of the mortgage ever having been made. The question of fact passed upon by the jury was whether Seymour was sole owner of these notes; or instead whether they were owned jointly by Seymour and Irwin, as would be inferred from only the first indorsement on said note. This action is brought by Seymour, who claims their entire and absolute ownership and consequently the $500 levied upon and a portion of the proceeds of the notes. The jury found for Seymour. A motion for new trial was then made upon affidavits of Hewes, E. R. Davidson, and H. C. Sexton, cashier and vice president respectively of the Bank of New Rockford, and the affidavits of defendant's attorneys, Maddux & Rinker,—all alleging facts concerning and tending to establish that the general indorsement, "Oscar O. Irwin without recourse," upon said

notes at and before the trial, had been placed thereon unknown to defendant or his attorneys, after the levy had been made on the money in the Bank of New Rockford; and that some time after said levy the attorney for Seymour had procured these canceled notes from Hewes, to whom they had been delivered by the bank upon their payment; that the four notes had been transmitted to the state of new York during said interval and while the deposition of Seymour had been there taken, and were returned with and attached to his deposition about February 4, 1914. That upon return, the deposition together with the notes and other papers attached, had been delivered to attorney Maddux by the clerk of court of Eddy county. That the indorsement in dispute was then upon said notes. That trial was had beginning February 12, 1914. That one set of depositions of both Seymour and Irwin had been taken May 16, 1913, at which time the notes were not used or present, they being at that time in the possession of Hewes. Both of said depositions were returned in May, 1913, preceding the trial in February, 1914, and during which interval they were on file in the clerk's office. In said depositions is a question asked by defendant's nonresident examining counsel of Seymour, "And he (Irwin) indorsed them to you without recourse?" Plaintiff asserts this shows knowledge in defendant in May, 1913, that the notes had been so indorsed. All of the depositions were offered in evidence on the trial. Under the first depositions, however, taken at considerable length, and at the taking of which opposing counsel appeared in defendant's behalf and cross-examined, certain admissions were made by plaintiff and Irwin touching the ownership of the notes and of the real estate for which they were given, disclosing that the notes were taken in Irwin's name in part payment of the purchase price of a farm and personal property in North Dakota, previously acquired and owned jointly by Seymour and Irwin. And it may be here remarked that the testimony taken before a referee of both these parties establishes a desire to conceal rather than to frankly state the facts of ownership and the consideration for the alleged sale of these notes or Irwin's interest therein to Seymour. They do not know what was paid, except both testify they got "satisfaction." They refuse to impart any knowledge on cross-examination, as to what was paid or received for the transfer and possession. Both persisted in being evasive, headstrong and foolish, assuming that there is merit in

plaintiff's case. Plaintiff himself was the worse offender, evidently either forgetting or disregarding the fact that he was under oath and giving sworn testimony, even though several times admonished by the referee. This is touched upon to show that there was a sufficient issue of fact to carry the case to the jury upon the question of whether Irwin still retained his joint interest in the notes and their proceeds. But returning to the affidavits used on motion for a new trial, they further disclose that Rinker examined the indorsements at or just before the notes were collected, and that the general indorsement of "Oscar O. Irwin without recourse" was not on them; that, though causing the levy upon the money as the property of Irwin, Rinker was not present at and took no part on the trial, and had no information concerning it, being elsewhere engaged; that he had not assisted in preparing the case for trial, and did not see the last deposition or the notes accompanying it until some days after the verdict, when he discovered for the first time the additional indorsement, "Oscar O. Irwin without recourse," was upon the notes. He also embodies in his affidavit a letter sent a few days after the levy to the bank in the state of New York which had transmitted the notes for collection to the Bank of New Rockford. In said letter is found the following: "We understand from the Bank of New Rockford that you claim that this is not the property of Irwin, but of another customer of yourself. Since levying upon this money, we have inspected the notes, and find that there is an assignment on the back thereof by Irwin, assigning them to himself and another party, but we find further that he gave a discharge of the mortgage, and that the mortgage had never been assigned to anyone in the records of the courthouse, and it is indeed a very unusual thing for any person to buy as large an amount of notes as this, secured by real estate mortgage, without getting an assignment of the mortgage, and on the face of the thing it appears to use that this money is still the property of Irwin, and we intend that if any person is claiming it that he shall establish his right thereto. . . . We are going to hold this money levied upon as the property of Irwin until it is decided by court that it is not his property." Rinker asserts that had the disputed indorsement been upon the notes when he wrote this letter he would have known and noticed it. The affidavit of attorney Maddux is that he was the attorney for defendant on trial; that he had no knowledge that the indorsement in

question had been affixed to the note after the levy and before he procured the notes a week before the trial, in preparation therfor, and that without such knowldge of these facts defendant was "concluded from securing and offering the proof of the facts herein stated," concerning the affixing of indorsement pending trial. "That plaintiff, through his fraudulent acts, as stated, misled and practised a fraud upon the court and upon defendant, and thereby knowingly gained and secured an advantage unfairly and fraudulently and knowingly, and premeditatedly prevented a fair trial of said action, and by reason of such fraudulent practice and conduct was enabled to recover the verdict and judgment herein stated, and not otherwise." The court in its instructions made reference to all the indorsements, and permitted the notes to be taken by the jury when deliberating upon their verdict. These affidavits in support of a new trial were met by those of Seymour and Irwin and plaintiff's counsel and his stenographer and the clerk of the district court, all denying that the notes had been altered after they had been paid, and after the levy had been made, and before trial by said indorsement in question. Upon these issues and facts, was it clearly an abuse of the discretion vested in the trial court to order a retrial is the question for determination. Appellant asserts that inasmuch as the indorsement was upon the note prior to the trial, and as counsel for the defendant had the notes and depositions in his possession for a week before and in preparation for trial, with one of defendant's counsel having personal knowledge as asserted by him, that at the time of the levy said indorsement was not upon the notes, that, therefore, the evidence cannot be held to be newly discovered evidence; and, further, that it is affirmatively shown that failure to notice and present this issue is because of a failure to use diligence to ascertain the facts or properly prepare the case for trial. That, with an absence of either proof of diligence or of newly discovered evidence, it was an abuse of discretion to grant a new trial.

"The statute provides that a new trial may be granted, among others, on the ground of 'newly discovered evidence material to the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.' It is conceded that a motion based upon this ground is addressed to the sound judicial discretion of the trial court. The discretion vested in a trial court in the determina-

tion of such motions is based on the theory 'that the judge who tries a case, having the parties, their witnesses, and counsel, before him, with opportunity to observe their demeanor and conduct during the trial, and note all incidents occurring during its progress likely to affect the result thereof, is better qualified to judge whether a fair trial has been had and substantial justice done than the appellate tribunal.'" Aylmer v. Adams, 30 N. D. 514, at 522, 153 N. W. 419. Again at page 531, it is said: "Diligence is a relative term, incapable of exact definition, and depends essentially upon the peculiar circumstances of each case. . . . And, in determining the question of whether or not the moving party used due diligence, all the circumstances, including the situation of the parties and the witness who will give the newly discovered evidence, will be considered." McGregor v. Great Northern R. Co. 31 N. D. 471, 154 N. W. 261, 268; Malmsted v. McHenry Teleph. Co. 29 N. D. 21, 149 N. W. 690.

The trial court has held the evidence to be newly discovered, and excused defendant and his counsel from failure to discover the same before trial. The evidence is newly discovered, if it be assumed, as it must be, that there is reasonable probability of the fact of the indorsement having been added to the notes after the levy and before they were delivered to Maddux a week before the trial. That one of defendant's attorneys knew that at the time of the levy said indorsement was not upon the notes, and the other one of his attorneys had knowledge that, shortly before the trial, the indorsement was on said notes, does not necessarily, under the proof that neither one knew all of said facts from which the conclusion could be drawn that the indorsement had been placed on the note during said period, prevent the testimony from being newly discovered in fact subsequent to the trial. Had the same attorney had occasion to know the indorsements upon the notes at the time of the levy, and of the indorsements thereon at the time of the trial, it is doubtful if the testimony could be claimed to be newly discovered, because the fact would be otherwise. Such is not the case at bar, where the trial court has found that the evidence was newly discovered.

As for diligence in preparation for trial, courts should be slow to relieve from a want of it by granting new trials upon facts which should have been discovered before trial had due diligence been used. The discovery after verdict that these indorsments had been placd upon the

notes after levy might have an important bearing upon the fact of ownership. But defendant's counsel at the time might have observed said indorsement, but been wholly ignorant of when it was placed thereon, and have no particular reason to investigate as to whether it was thus tampered with or manufactured evidence. In fact, knowing the notes to be paid by the maker and produced as proof in this collateral action, he would have been justified ordinarily in assuming that all these indorsements were upon the notes before they were paid; and especially is this so under the testimony of both Seymour and Irwin that the notes were transferred years before to the former. Perhaps due diligence might have discovered when the indorsement was made, and perhaps not. There is sufficient doubt upon that question to leave undisturbed the finding of the trial court that due diligence was used.

There is much bitterness manifested between counsel, who have evidently taken the trial of this case as a matter personal to them. The briefs are full of charges and innuendoes, all of which is as unnecessary as it is unjustifiable. It should be said that, if any alteration of indorsements is shown, and it is very doubtful if the proof by inference largely is sufficient to establish alteration of indorsements over the positive proof to the contrary, no inference is made in this opinion that it was done by or with the knowledge of plaintiff's counsel. But as the trial court, familiar with all the proof, has found the same sufficient to warrant its submission to the jury with all the other facts in the case, we hesitate to declare it was an abuse of discretion so to do. Nevertheless the action of the trial court in granting new trial was the exercise of its discretion in defendant's favor to an extreme, and borders closely on the dividing line between sound exercise of discretion and an abuse thereof. Yet the issue is not altogether so clear as to warrant an appellate court in declaring it an abuse of discretion to grant a new trial. Had the discretion been exercised the other way, its order would likewise have been affirmed. The order appealed from is affirmed.

JOHN MESSER v. HENRY BRUENING.

(156 N. W. 241.)

Verdict — sufficiency of evidence — challenged — by motion for new trial — directed verdict — motion for — not made — appeal — insufficiency of evidence — cannot be raised — error — specifications.

1. Where a motion is not made for a directed verdict and the sufficiency of the evidence to support the verdict challenged by a motion for a new trial, the insufficiency of the evidence to support the verdict cannot be raised the first time on appeal and by an alleged specification of error to that effect served with the notice of appeal.

Verdict — evidence — sufficient to support.

2. Evidence examined and *held* to be sufficient to justify the verdict.

Negligence — contributory negligence — primarily for jury — court.

3. Questions of negligence and of contributory negligence are primarily for the jury, and not for the court, to pass upon.

Discretion — abuse of — examination of party — by court — right of court.

4. No error or abuse of discretion is held to have been committed by the trial court in his examination of the defendant when a witness in his own behalf.

Trial — judge — not mere moderator — has active duties — right to ascertain truth — material points — sound discretion.

5. A judge presiding on a trial is not a mere moderator, but has active duties to perform without partiality in seeing that the truth is developed; and it is his duty, in the exercise of sound discretion, to elicit the evidence upon relevant and material points involved in the case.

Opinion filed January 7, 1916.

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

Action to recover damages for personal injuries. Judgment for plaintiff. Defendant appeals.

Affirmed.

C. B. Craven, for appellant.

The right of the trial court to participate in the examination of witnesses is conceded; but it is urged as the settled rule, that such right should be exercised with great caution and impartiality, to the end that the jury may not be mislead or influenced. State v. Hazlett, 14 N. D. 490, 105 N. W. 617; Comp. Laws 1913, § 7620; Territory v. O'Hare,

1 N. D. 30, 44 N. W. 1003; State v. Barry, 11 N. D. 428, 92 N. W. 809; 40 Cyc. 2441, notes 23–26; Flinn v. Ferry, 127 Cal. 648, 60 Pac. 434.

No hint or intimation from the judge in asking questions of a witness, that the testimony or answers show improbability, or are of doubtful character, should be given either by word or action. Barlow Bros. Co. v. Parsons, 73 Conn. 696, 49 Atl. 205; Gordon v. Irvine, 105 Ga. 144, 31 S. E. 151; Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318; Grant v. State, 122 Ga. 740, 50 S. E. 946; Caswell v. State, 5 Ga. App. 483, 63 S. E. 566; Ford v. State, 2 Ga. App. 834, 59 S. E. 88; Pardridge v. Cutler, 104 Ill. App. 89; Leo v. State, 63 Neb. 723, 89 N. W. 303, 12 Am. Crim. Rep. 589; Maynard v. State, 81 Neb. 301, 116 N. W. 53.

"Where prolonged examination of a witness by the court is such as to convey to the jury the impression that, in the opinion of the court, the witness is unworthy of belief, counsel may make objection, so that on appeal his acquiescence may not appear. Bennett v. Harris, 68 Misc. 503, 124 N. Y. Supp. 797; First State Bank v. Hare, — Tex. Civ. App. —, 152 S. W. 501; Dreyfus v. St. Louis & Suburban R. Co. 124 Mo. App. 585, 102 S. W. 53; Berwind White Coal Min. Co. v. Firment, 95 C. C. A. 1, 170 Fed. 151; 40 Cyc. 2442.

Where a person, by the exercise of ordinary care, can avoid injury to himself, or can avoid the consequences of the negligence of another, it is his duty to do so, and, failing so to do and act, he cannot recover. Barber v. East & West R. Co. 111 Ga. 838, 36 S. E. 50; Chicago & N. W. R. Co. v. Weeks, 99 Ill. App. 518, 198 Ill. 551, 64 N. E. 1039; Stewart v. Pennsylvania Co. 130 Ind. 242, 29 N. E. 916, 3 Am. Neg. Cas. 269; Hutchins v. Priestly Exp. Wagon & Sleigh Co. 61 Mich. 262, 28 N. W. 85.

The law imposes on a person the obligation to use ordinary care and prudence for his own protection against loss or injury, and that means such care and caution as is commensurate with the danger to be avoided. Carroll v. Grande Ronde Electric Co. 47 Or. 424, 6 L.R.A.(N.S.) 290, 84 Pac. 389.

Edward P. Kelly, for respondent.

The matters brought out by the trial court in his examination of witnesses were material, and were elicited without any suggestion of opinion on the part of the court, either by words or attitude. "A pre-

siding judge on a trial is not a mere moderator, but has active duties to perform, without partiality, in seeing that the truth is developed." 21 Enc. Pl. & Pr. p. 990; Long v. Ate, 95 Ind. 481; Sparks v. State, 59 Ala. 82.

And this is not a mere privilege, but a duty of the court. Lycan v. People, 107 Ill. 423; State v. Lee, 80 N. C. 483; De Ford v. Painter, 3 Okla. 80, 30 L.R.A. 722, 41 Pac. 96; Ferguson v. Hirsch, 54 Ind. 337; Blizzard v. Applegate, 77 Ind. 516; Huffman v. Cauble, 86 Ind. 591; Lefever v. Johnson, 79 Ind. 554.

"The driver of an automobile should use reasonable care in its operation according to place and presence of others." Indiana Springs Co. v. Brown, 165 Ind. 465, 1 L.R.A.(N.S.) 238, 74 N. E. 615, 6 Ann. Cas. 656, 18 Am. Neg. Rep. 392.

BRUCE, J. This is an action to recover damages for personal injuries alleged to have been occasioned by the negligence of the defendant and appellant while driving an automobile. The case has been before us on a former appeal and on which a new trial was ordered. See Messer v. Bruening, 25 N. D. 599, 48 L.R.A.(N.S.) 945, 142 N. W. 158. The testimony on the two trials being substantially the same, a reiteration here is not necessary.

But two grounds for a reversal are urged: (1) That the evidence is not sufficient to support the verdict; (2) that the trial court erred in his examination of the defendant who was a witness on the trial in his own behalf. The first ground of alleged error could be totally disregarded by us under our recent holding in the case of Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. ante, 366, 155 N. W. 861, as no motion for a directed verdict was made upon the trial, nor was the sufficiency of the evidence challenged in any way until the case came before us on the appeal.

Even if we considered the point, however, we would hold that there was no merit in it, as, in our opinion, there was evidence of both negligence and contributory negligence that should have been and was properly submitted to the jury. Although we held in our prior decision that there was no proof of a violation of the penal statute, which merely provides that the driver of an automobile must come to a stop when the *driver* of a horse signals him to do so (see Messer v. Bruening, supra),

we also held that it was nevertheless for the jury to decide whether, under the facts of the case, the defendant was not guilty of negligence under the common law for refusing to stop when signaled to do so by some other occupant of a wagon or carriage than the driver, and when the occupants of the carriage or wagon were in a known or apparent condition of danger. There is evidence in the case that, after the horse began to become restless, the plaintiff's wife not only signaled, but called upon, the defendant to stop, and that, instead of doing so, and while the horse was jumping and rearing and backing up, the defendant not merely failed to stop, but turned his machine to the right side of the road and in close proximity to the horse, and at the same time tooted his horn, while the other occupants of his machine laughed loudly at the consternation this had occasioned. If this was so, the defendant was clearly negligent, and whether it was so or not was for the jury to decide.

The question, too, of contributory negligence was for the jury, and not for the court, to pass upon. There was evidence pro and con on the question of the restless character of the horse, and there was evidence pro and con on the question as to whether the plaintiff himself turned his horse in front of the approaching machine, and that the accident was due to his stubbornly refusing to give the defendant his share of the road, or whether the horse became unmanageable before the machine and the carriage met, so that it was impossible to do so. Such being the case the question of contributory negligence was for the jury, and not for the court, to pass upon.

Nor do we discover any ground for a reversal in the action of the trial judge in examining the defendant, Bruening, and in the following colloquy complained of:

Q. Like to ask one question: How wide was the road there at this place?

A. I don't remember, a couple of rods on each side of the main traveled road.

Q. You say you stopped the automobile on the east side of the road?

A. Yes, sir, I did.

Q. How far were you east from the traveled portion of the road?

A. About 2 rods. I should think, about a rod and a half. I don't remember just how far it was.

Q. The traveled portion of the road was to the west of you?

A. Yes.

Q. How far?

A. About a rod and a half or two rods.

Q. Was the road level there?

A. Yes, level, little ruts there.

Q. Graded?

A. No, it was not.

Q. And how close did the horse and buggy pass to your automobile when it went as you say—straight east in front of you?

A. I do not know, maybe 2 or 3 yards, something like that.

Q. In 2 or 3 yards of the automobile?

A. Yes, it came pretty close.

Q. Came down off the traveled portion of the road to where it sheered off of the traveled portion of the road here east?

A. Yes, into the plowing.

Q. Was the road, west of the traveled road, rough or smooth?

A. It seems it was in repair.

Q. Was the horse running or walking?

A. It was trotting a fairly good trot, when it got close to the car it appeared to be.

Q. Frightened?

A. Frightened a little when it got close to the car.

Q. And you claim that it came right over to the automobile?

A. Went right square in front of the automobile.

Q. While you were standing?

A. Yes.

Q. And it was frightened at the car?

A. Yes.

We cannot agree with counsel for appellant that this examination was unfair or calculated to lead the jury to infer that the court doubted the credibility of the witness. There is nothing in the examination itself that would lead us to that belief, and if there was anything hostile in the voice or manner of the judge, we have no evidence thereof in the

record which is before us. There can be no question that the matter examined upon was material to the lawsuit. "A judge presiding on a trial is not a mere moderator, but has active duties to perform without partiality in seeing that the truth is developed." 21 Enc. Pl. & Pr. 990; Long v. State, 95 Ind. 481; Sparks v. State, 59 Ala. 82. It is his duty, in the exercise of his "sound discretion, to elicit the evidence upon relevant and material points involved in the case." De Ford v. Painter, 3 Okla. 80, 30 L.R.A. 722, 41 Pac. 96; Ferguson v. Hirsch, 54 Ind. 337; Huffman v. Cauble, 86 Ind. 591; Lefever v. Johnson, 79 Ind. 554. We can find no abuse of discretion in the case which is before us, or any evidence of an improper use of a prerogative which must necessarily be vested in all trial courts.

Counsel also urges that the verdict is so small that it must have been the result of sympathy on the part of the jury for the plaintiff, rather than upon a belief in the defendant's guilt. The verdict, it is true, was only for $550, while the plaintiff, while incapacitated, could have earned $750, and no allowance seems to have been made for pain and suffering. The plaintiff, however, does not complain, and although a former jury awarded a verdict for $800, it also, if plaintiff's estimate of the value of his time is correct, ignored this element of pain. Verdicts, however, cannot be set aside on this ground on motion of the defendant without some other clear proof of passion or prejudice, and we find none in the record which is before us.

The judgment of the District Court is affirmed.

MARIE HERZOG HENDERSON v. FRANK W. HENDERSON.

(156 N. W. 245.)

Husband and wife — agreement between for wife to obtain divorce — criminal action pending against husband — wife enabled to testify — agreement to remarry — agreement breached by husband — marries another woman — collusive divorce — order to show cause why divorce should not be set aside — motion to quash order — relief — divorce — consent to — validity — failure of husband to keep agreement — showing of — insufficient.

Plaintiff, the wife, agreed with her husband that she should obtain a divorce in the mistaken belief that this was necessary to enable her to testify for

her husband in a criminal action wherein he was charged with embezzlement. It was further agreed that, after the termination of this action and other criminal proceedings, that the husband should remarry her. In accordance with this agreement the wife deceived her attorneys and the trial judge, and obtained a divorce. The husband, however, married another woman, and the wife secured from the same trial judge an order to show cause why the decree of divorce should not be set aside as collusive. The said order was served personally upon defendant outside of the state of North Dakota. Whether such service is sufficient to confer jurisdiction is not decided.

A motion to quash the proceedings should have been allowed. Plaintiff's own testimony shows that she was not entitled to any relief. Having consented to the decree in order to aid her husband, she cannot question its validity by merely showing that the husband has failed to keep his agreement to remarry her, especially after the husband has married another woman.

Opinion filed January 10, 1916.

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

Reversed.

Wolfe & Schneller, for appellant.

"Objection to the illegality of the service is considered as abandoned only when the party pleads to the merits in the first instance, without insisting upon the illegality." Motion to quash the order of the court to show cause, specifying and preserving all objections, was the proper practice. Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237.

On such a motion the court is bound to assume the truth of each fact established by the evidence upon which the decree of divorce was granted, where no fact is challenged. Graves v. Graves, 10 L.R.A. (N.S.) 216, and notes, 132 Iowa, 199, 109 N. W. 707, 10 Ann. Cas. 1104; Greene v. Greene, 2 Gray, 361, 61 Am. Dec. 454; Pico v. Cohn, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537; United States v. Throckmorton, 98 U. S. 63, 25 L. ed. 94; Steele v. Culver (South Haven & E. R. Co. v. Culver) 157 Mich. 344, 23 L.R.A.(N.S.) 564, 122 N. W. 95.

The representation which may form the basis of statutory collusion must be a misrepresentation. There was no collusion in this case because both charges laid against defendant were true, so far as the record shows, and this record is binding on both parties. Wiemer v. Wiemer,

21 N. D. 372, 130 N. W. 1015; Rev. Codes 1905, § 4058, Comp. Laws 1913, § 4389.

There being no legal collusion, there could be no fraud prepetrated on the court, as every representation made to and in the court was a true one. "Where there is a failure to state a material fact, there is a presumption against the pleader that it does not exist." Maxwell, Code Pl. p. 16 and cases cited; Nation v. Cameron, 2 Dak. 347, 11 N. W. 525; State v. Stewart, 9 N. D. 409, 83 N. W. 869.

Where a wife consents to a divorce against her, in reliance on the promise of the husband to remarry her and to enable him to procure a deed of their homestead, from her father, who refused to convey it so long as she was his wife. After her husband has married another woman she cannot have the decree annulled. Karren v. Karren, 25 Utah, 87, 60 L.R.A. 294, 95 Am. St. Rep. 815, 69 Pac. 465.

Where a party has invoked the jurisdiction of the court, in all equity and good conscience, he should not be permitted to attack a decree which his own acts induced the court to grant. Lacey v. Lacey, 38 Misc. 196, 77 N. Y. Supp. 235.

Where a party depends upon a transaction which is evil in itself or prohibited by law, and which he must prove in order to make out his own case, he cannot recover. Short v. Bullion-Beck & C. Min. Co. 20 Utah, 20, 45 L.R.A. 603, 57 Pac. 720; Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Simons v. Simons, 47 Mich. 253, 10 N. W. 360.

Where a party is entitled to a decree of divorce, the fact that it was brought about by fraud and collusion is no ground for setting it aside. Harft v. Harft, 16 N. Y. Week. Dig. 461.

A certified copy of a court record of a foreign court, by one who claims to be clerk of said court, without further authentication, is wholly incompetent. U. S. Rev. Stat. § 905, Comp. Stat. 1913, § 1519; Rev. Codes 1913, § 7911; Goss v. Herman, 20 N. D. 295, 127 N. W. 78.

M. A. Hildreth, for respondent.

The judgment and decree of divorce is subject to attack by either party, either by motion, by action, or by appeal. Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095; Nichells v. Nichells, 5 N. D. 125, 33 L.R.A. 515, 57 Am. St. Rep. 540, 64 N. W. 73; Garr, S. & Co. v. Spaulding, 2 N. D. 414, 51 N. W. 867; Simpkins v. Simpkins, 14 Mont. 386,

43 Am. St. Rep. 641, 36 Pac. 759; Cottrell v. Cottrell, 83 Cal. 457, 23 Pac. 531; Bell v. Peck, 104 Cal. 135, 37 Pac. 766; McBlain v. McBlain, 77 Cal. 507, 20 Pac. 61.

A motion to vacate a judgment is the settled procedure in this state. Freeman v. Wood, 11 N. D. 2, 88 N. W. 721; Kitzman v. Minnesota Thresher Mfg. Co. 10 N. D. 26, 84 N. W. 585; Kenney v. Fargo, 14 N. D. 419, 105 N. W. 92; Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581; Cline v. Duffy, 20 N. D. 526, 129 N. W. 75; Williams v. Fairmount School Dist. 21 N. D. 120, 129 N. W. 1027.

Courts possess the inherent power to vacate and set aside collusive and fraudulent judgments, notwithstanding more than one year has elapsed after entry. 23 Cyc. 907; Whittaker v. Warren, 14 S. D. 611, 86 N. W. 638; Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095; Balch v. Beach, 119 Wis. 77, 95 N. W. 132.

The defendant was a nonresident, and he was only entitled to notice through the office of the clerk of court. That he had actual notice appears from the record. Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193; Weatherbee v. Weatherbee, 20 Wis. 499; Crouch v. Crouch, 30 Wis. 667; Boyd's Appeal, 38 Pa. 241; Singer v. Singer, 41 Barb. 139; True v. True, 6 Minn. 458, Gil. 315; State v. Whitcomb, 52 Iowa, 85, 35 Am. Rep. 258, 2 N. W. 970; Holmes v. Holmes, 63 Me. 420; Binsse v. Barker, 13 N. J. L. 263, 23 Am. Dec. 720; Adams v. Adams, 51 N. H. 388, 12 Am. Rep. 134; Earle v. Earle, 91 Ind. 27; Brown v. Grove, 116 Ind. 84, 9 Am. St. Rep. 823, 18 N. E. 387; Wisdom v. Wisdom, 24 Neb. 551, 8 Am. St. Rep. 215, 39 N. W. 594; Olmstead v. Olmstead, 41 Minn. 297, 43 N. W. 67; Stephens v. Stephens, 62 Tex. 337; Britton v. Britton, 45 N. J. Eq. 88, 15 Atl. 266; Bryant v. Austin, 36 La. Ann. 808; McMurray v. McMurray, 67 Tex. 665, 4 S. W. 357; Everett v. Everett, 60 Wis. 200, 18 N. W. 637; Firmin v. Firmin, 16 Phila. 75; Bomsta v. Johnson, 38 Minn. 230, 36 N. W. 341; Caswell v. Caswell, 120 Ill. 377, 11 N. E. 342, 24 Ill. App. 548; Gechter v. Gechter, 51 Md. 187; Fidelity Ins. Co.'s Appeal, 93 Pa. 242; Edson v. Edson, 108 Mass. 590, 11 Am. Rep. 393.

It is settled law that courts have inherent power to set aside or revise their judgments and decrees, where they have been obtained by fraud upon one party and imposition upon the court. Parker v. Dee,

3 Swanst. 529; Kemp v. Squire, 1 Ves. Sr. 205; Roach v. Garvan, 1 Ves. Sr. 157; Stevens v. Guppy, Turn & R. 178; Richmond v. Tayleur, 1 P. Wms. 736; Lloyd v. Mansell, 2 P. Wms. 73; Shelford, Marr. & Div. 475; Conway v. Beazley, 3 Hagg. Eccl. Rep. 639, 642; Prudham v. Phillips, 2 Ambl. 763, 20 How. St. Tr. 479, note; Jackson v. Jackson, 1 Johns. 424; Dunn v. Dunn, 4 Paige, 425; Story, Confl. L. § 547; 2 Kent, Com. 11th ed. 109; Re Henderson, 27 N. D. 160, 51 L.R.A. (N.S.) 328, 145 N. W. 574.

And marriage with an innocent party will not defeat this proceeding. Caswell v. Caswell, 24 Ill. App. 548; Everett v. Everett, 60 Wis. 200, 18 N. W. 637; Stephens v. Stephens, 62 Tex. 337.

Where the petitioner is not free from blame, the court may refuse a divorce even though the evidence discloses statutory grounds for divorce, since public policy favors the continuity of the marriage relation. Lyon v. Lyon, 39 Okla. 111, 134 Pac. 650.

A promise to marry conditioned on obtaining a divorce is void as against public policy. Halls v. Cartwright, 18 La. Ann. 414; Wass v. Wass, 41 W. Va. 126, 23 S. E. 537; 1 Bishop, Marr. & Div. 193; Noice v. Brown, 38 N. J. L. 228, 20 Am. Rep. 388.

"The state is interested in divorce proceedings, being concerned with the preservation of the marriage." Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020.

In some jurisdictions the statute provides that if no defense is interposed in a divorce suit, the state shall, by some officer intervene and defend. This rule rests on the inconvenience which would result to the collateral rights of third parties. Parish v. Parish, 9 Ohio St. 534, 75 Am. Dec. 482; Holmes v. Holmes, 63 Me. 420; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193; Drexel's Appeal, 6 Pa. 272; Shallcross v. Deats, 43 N. J. L. 177; Tyler v. Aspinwall, 73 Conn. 493, 54 L.R.A. 758, 47 Atl. 755.

Upon proof of fraud in the procurement of a judgment, the party defrauded may have it vacated at any time. Cannan v. Reynolds, 5 El. & Bl. 301, 26 L. J. Q. B. N. S. 62, 1 Jur. N. S. 873; Allen v. Macellan, 12 Pa. 328, 51 Am. Dec. 608.

The test is not whether the plaintiff had a just cause for divorce, but was the divorce procured under circumstances which were a fraud on the court and upon the other party. Senter v. Senter, 70 Cal. 624, 11

Pac. 782; Beard v. Beard, 65 Cal. 354, 4 Pac. 229; McBlain v. McBlain, 77 Cal. 509, 20 Pac. 61; Cottrell v. Cottrell, 83 Cal. 459, 23 Pac. 531; Hopkins v. Hopkins, 39 Wis. 170.

Only reasonable diligence under all the circumstances, as to the time of acting in such cases, is required. Plaintiff acted with such care and diligence in this case. Daniels v. Benedict, 50 Fed. 347; Yorke v. Yorke, 3 N. D. 351, 55 N. W. 1095.

BURKE, J. Plaintiff and defendant intermarried at St. Paul, Minnesota, in 1909. In January, 1914, plaintiff, the wife, applied to attorneys at Jamestown, North Dakota, to prosecute proceedings against her husband for divorce. The defendant was personally served with the summons and complaint at Wahpeton, North Dakota, on January 16, 1914, although he was at that time a resident of Minnesota. He made no further appearance in the action, and upon March 4, 1914, the wife appeared before the district court with due proof and obtained a decree of divorce upon the grounds of cruel and inhuman treatment and adultery with various and divers persons, unknown. The divorce allowed the wife alimony, suit money, and counsel fees, and also provided that either party might marry again after the expiration of three months. During the fourth month after the decree, defendant, the husband, married again, whereupon the wife made application to the trial court for an order to show cause why the decree of divorce should not be set aside. As a basis for this order she filed her affidavit to the effect that prior to the institution of the divorce proceedings her husband had represented to her that he had been married before and had not secured a divorce; that the former wife was making him trouble, and further represented to her that he had been arrested at Wahpeton, North Dakota, upon the charge of embezzlement; and that she, his wife, would not be allowed to testify upon his behalf. That for those two reasons he had requested her to obtain a divorce from him, so that he might avoid a possible charge of bigamy preferred by his first wife, and in order that she, plaintiff, might testify as a witness upon the trial wherein he was charged with embezzlement. She further alleged that he, her husband, represented to her that if she would secure the divorce and aid him in meeting the criminal charges aforesaid successfully, he would then remarry her. That it was in reliance upon said promises, and not

through any desire for a divorce, that the proceedings had been instituted wherein she had obtained the said divorce. She further alleged that pursuant to this agreement she had deceived her attorneys in Jamestown, North Dakota, as well as the trial court, and had represented to him that she desired such decree, when in truth and in fact she wished only to aid her husband in his trouble. That, notwithstanding the husband's promises to remarry her, he had married another woman, whom she has since learned and believes was an important witness for the state against her husband in the embezzlement case, and that the said marriage was undoubtedly brought about by her once-husband in order to prevent the said witness from testifying against him upon such trial.

Upon the strength of this showing the trial court issued an order to show cause why the divorce should not be annulled, and the same was personally served upon the defendant within the state of Minnesota, of which he was a resident. Upon the return day, defendant was represented by counsel, who, appearing especially, objected to the jurisdiction of the trial court over defendant's person and moved to vacate and set aside the service of the citation and order to show cause, upon the grounds that no legal service had been made upon the defendant, who was a resident of the state of Minnesota and served therein. Upon this being overruled, the defendant, reserving all of the defendant's rights, objections, and exceptions to the jurisdiction of the court as aforesaid, moved the court to quash the order upon the grounds that the same was improvidently issued, and that the facts shown therein were insufficient to warrant the court in granting the same. This was also denied, whereupon plaintiff offered herself as a witness, and the defendant objected to the taking of any proof upon all the grounds hereinbefore mentioned. This objection was overruled, and the plaintiff testified along the lines indicated by her affidavit. She was cross-examined by the defendant, who also introduced nine exhibits as evidence upon his own behalf. At the end of the testimony, defendant moved to strike out all the testimony offered, and renewed his motion to quash. These motions were denied, and the trial court entered an order setting aside, vacating, and canceling the decree of divorce. Defendant has appealed, urging the same objections made to the trial court. There seems to be no statutory authorization for such a service;

but in order to end this litigation we will base our decision upon the merits, and assume for the purposes of this opinion that it was before the court.

(1) The motion to quash should have been allowed. Taking the affidavit of the plaintiff as true, we find that at the time of the commencement of this action, she had good grounds for a divorce against her husband upon the grounds of adultery and probable desertion. She did not desire the divorce, however, for her own sake, but did desire it in order that she (as she supposed) might become a witness and testify in her husband's behalf in an action wherein he was charged with a crime. Whatever was her motive, she did really desire a divorce and obtained it. To be sure, she relied upon the promises of the husband to remarry her after his difficulties had been met, and it was not until she learned that the husband did not intend to keep his promises that she found any fault with the decree that had been entered against her. It is evident that she cannot, after the remarriage of her husband, reopen the judgment which she herself obtained. Two L.R.A. notes cover the grounds so thoroughly that we will do little more than refer to them. In Karren v. Karren, 25 Utah, 87, 95 Am. St. Rep. 815, 69 Pac. 465, 60 L.R.A. 294, it was held as follows: "A woman who consented to a decree of divorce against her to enable her husband to obtain a grant of property cannot, after her husband had married another woman, have the decree annulled, although in consideration of her consent he promised to remarry her after the grant was procured and the decree was obtained by suppression of facts and false testimony. (Paragraph 1 of syllabus.)"

Following this case in the L.R.A. citation is a fourteen-page note summarizing all of the cases up to the year 1902. We quote briefly from the note at page 307: "As a general rule the party obtaining a divorce decree will not be relieved therefrom upon his application to set it aside, upon the broad principle that, having induced the court to render the judgment, he is estopped from afterwards attacking it, except of course for fraud upon himself, mistake or surprise." In the case at bar, of course, plaintiff can claim neither surprise nor mistake, and the fraud practised upon her was not of the kind of which she could take advantage. Among the cases mentioned is Ficener v. Ficener, 8 Ky. L. Rep. 867, 3 S. W. 597, the court stating that the grounds

for setting aside ordinary judgments at law or in equity do not apply to judgments for divorce where the parties have remarried or otherwise changed their status. In Champion v. Woods, 79 Cal. 17, 12 Am. St. Rep. 126, 21 Pac. 534, relief was denied to a wife who had obtained a decree of divorce and had carelessly stated that there was no property when in fact there was such property in existence. In the case of Olmstead v. Olmstead, 41 Minn. 297, 43 N. W. 67, the rule is stated that the fraud practised upon the wife must be something substantial. In that case the husband secured her signature to a paper by fraud. The wife did not know the nature of the signature until months later, when she found that she had in truth signed and verified a complaint for divorce which the husband had taken before a lawyer and had a suit carried on in her name without her knowledge. The Minnesota court set aside the judgment. Of course, the facts in the case at bar are altogether different, and we cite this case merely to show an instance of when release will be granted. In 51 L.R.A.(N.S.) 534, is a note continuing the subject down to the year 1914. It is sufficient to say that of all the cases cited there is no dissent from the rule announced, unless possibly the case of Ficener v. Ficener, which we have already mentioned. At 14 Cyc. page 271, the text says: "The party in whose favor a divorce has been granted cannot ordinarily have it set aside, unless the divorce suit was instituted without the knowledge or consent of the applicant." Cases supporting this doctrine are found in the text and in the annotations.

That this is the law must have suggested itself to plaintiff's counsel, because he says in his brief: "While there are some authorities on the brief of the appellant to the effect that where there is collusion and fraud, the court will allow the parties to remain where they have each placed themselves, yet there are well-defined exceptions to this rule. When the court can say that one of the parties is more innocent than the other, or has been the vicitm of a cruel wrong, and that party has acted with reasonable diligence in undoing the wrong, then the question as to how far they may have misled the court becomes wholly immaterial, and the court is confronted with these two questions, *viz.*, (1) Was the divorce procured in bad faith; or (2) Was it done for an ulterior purpose? And, if the latter, was that purpose to defeat the ends of pubiic justice? In the case at bar we have tried to make it plain that Hender-

son was confronted with a charge that involved his entire future. Mrs. Henderson and the girl that subsequently became his wife were to be silenced. That silence became the basis of these proceedings. That the defendant lulled his wife into apparent security is evidenced by the fact that they left North Dakota together, went to a public hotel, and lived together as man and wife after the alleged divorce. That subsequently the defendant, in his correspondence, indicated clearly that he was holding out for the time being a false signal or hope to Mrs. Henderson. . . . Looking at the conduct of the defendant, in the first instance, we find that it is bad. His methods are dangerous to the administration of public justice. He was willing to commit a crime to save himself from conviction for a crime. He was willing to lie whenever lies would best serve his purpose. He was willing to enter into a scheme wherever a scheme would carry out a scheme. He was willing to contract a marriage in South Dakota, knowing at the time that the promise he had made to Mrs. Henderson false—lies that came from his lips. . . . ."

There is nothing in the record that reflects any credit upon the husband, but that is not the issue. The wife concedes that she was willing to aid him in those unlawful purposes. That she was willing to obtain a divorce in her belief that that was necessary so that she might testify upon his behalf. She was willing to have this divorce entered and run her chances of a remarriage. Her testimony shows that she still believes the defendant was guilty of adultery at the time the decree says he was. She was aware of the nature of the step that she was taking. The divorce was not obtained by any fraud practised upon her. She went into the suit with her eyes open, relying upon the promise of defendant that he would remarry her. After he had broken his promise and had contracted another marriage, she, for the first time, attacks the decree which she herself had obtained. Under those circumstances she has no standing in a court of equity. As all of those things appeared upon her original application for relief, her application should have been denied. Certainly the motion to quash should have been allowed. The order of the trial court is reversed and the decree of divorce is ordered reinstated.

JULIANE THOMPSON v. LOUIS THOMPSON.

(156 N. W. 492.)

Divorce — evidence — uncorroborated statement, admission or testimony of parties — collusive divorces — object of statute — strength of corroboration.

1. Section 4400, Compiled Laws 1913, which provides that "no divorce can be granted . . . upon the uncorroborated statement, admission, or testimony of the parties," was intended to guard against collusive divorces, and in any action, where the record and evidence considered as a whole precludes any reasonable probability of collusion, the corroboration need not be very strong, or extend to every feature of the cause alleged.

Physical violence — extreme cruelty — what constitutes — conduct — mental feelings — impairment of health — ends of matrimony.

2. Physical violence is not necessary to constitute extreme cruelty within the meaning of §§ 4380, 4382, Compiled Laws 1913 (relating to divorce), but any unjustifiable conduct on the part of either husband or wife which so grievously wounds the mental feelings of the other as to seriously impair bodily health, or utterly destroy the legitimate ends and objects of matrimony, constitutes extreme cruelty within the meaning of the statute, although no physical or personal violence may be inflicted.

Opinion filed January 10, 1916.

From a judgment of the District Court of Divide County, *Leighton,* J., defendant appeals.

Affirmed.

E. R. Sinkler, for appellant.

Note.—For various illustrations of the doctrine that cruelty which will justify a divorce does not necessarily involve violence, but may consist of any unjustifiable conduct which destroys the legitimate ends and objects of matrimony, see Miller v. Miller, 89 Neb. 239, 34 L.R.A.(N.S.) 360, 131 N. W. 203; Hooe v. Hooe, 122 Ky. 590, 5 L.R.A.(N.S.) 729, 92 S. W. 317, 13 Ann. Cas. 214; McClintock v. McClintock, 147 Ky. 409, 39 L.R.A.(N.S.) 1127, 144 S. W. 68; Bechtel v. Bechtel, 101 Minn. 511, 12 L.R.A.(N.S.) 1100, 112 N. W. 883; Robinson v. Robinson, 66 N. H. 600, 15 L.R.A. 121, 49 Am. St. Rep. 632, 23 Atl. 362; Barnes v. Barnes, 95 Cal. 171, 16 L.R.A. 660, 30 Pac. 298.

And for discussion of the general question of cruelty as ground for divorce, see notes in 29 Am. Dec. 674; 73 Am. Dec. 619; 40 Am. Rep. 463; 51 Am. Rep. 736; and 65 Am. St. Rep. 69.

There is no corroboration of the plaintiff, and her charge of cruel and inhuman treatment is unsupported and is based only on her own testimony. Rev. Codes, § 4069; Reid v. Reid, 112 Cal. 274, 44 Pac. 564.

Further, in such cases, where the testimony of the parties is in conflict, that of the defendant is entitled to the greater weight. Rie v. Rie, 34 Ark. 37; Ortman v. Ortman, 92 Mich. 172, 52 N. W. 619; Sowers v. Sowers, 33 Phila. Leg. Int. 220; Jenkins v. Jenkins, 86 Ill. 340; Paden v. Paden, 28 Neb. 275, 44 N. W. 228; Hagle v. Hagle, 74 Cal. 608, 16 Pac. 518; Potter v. Potter, 75 Iowa, 211, 39 N. W. 270.

C. E. Brace, for respondent.

The object of the statute which provides that no divorce shall be granted upon the uncorroborated statement, admission, or testimony of the parties is to prevent collusion. That there was no collusion in this case is clearly shown by the record—the attitude of the parties, and in consequence, very slight corroboration is necessary. Tuttle v. Tuttle, 21 N. D. 503, 131 N. W. 460, Ann. Cas. 1913B, 1; Clopton v. Clopton, 11 N. D. 212, 91 N. W. 46.

CHRISTIANSON, J. Plaintiff brought an action for divorce on the statutory ground of extreme cruelty. The trial court found in favor of plaintiff, and entered judgment of absolute divorce, and awarded her the custody of the only child, a daughter about two and a half years old; and also permanent alimony in the sum of $1,100, $100 attorney's fees, and $150 for expenses and suit moneys. Defendant appeals from the judgment, and demands a trial *de novo* in this court.

Appellant asserts that the judgment appealed from must be reversed for two reasons: (1) That plaintiff's testimony is uncorroborated; (2) that such testimony, even though sufficiently corroborated, is insufficient to establish the charge of extreme cruelty. The undisputed evidence shows that the parties to this action were married in Norway, on July 10, 1910. A few days after the marriage, they returned to defendant's home, near Crosby in this state, where they have lived since that time. On July 20, 1912, a daughter was born. The plaintiff became afflicted with tuberculosis, and during the winter of 1912–1913, was confined to her bed a great deal of the time. Defendant did not obtain any medical assistance for her, and he gave her only $15 in all

to enable her to go to the local doctor, and to one Dr. Vig, at Kenemare, for medical treatment. Defendant does not claim to have sought or furnished any medical aid for his wife; and plaintiff testifies that he told her "there was nothing to do for it, no use to go to a doctor." Plaintiff also testifies that defendant refused to obtain milk necessary for the nourishment of herself and child.

We quote from her testimony:

Q. When the baby was small, did Thompson ever refuse to have milk in the house for the baby and you?

A. I stayed a long time and was without milk in the house.

Q. Why didn't you have milk?

A. Because he wouldn't get any milk. I asked him if he would not get a milk cow, and it was just as impossible for me to be without milk as it was to be without food.

Q. Did he have any milk cow at that time?

A. Yes.

Q. But he just quit milking her, did he?

A. She milked some, but he quit milking her.

Q. What did you do for milk?

A. I stood it as long as I could, and then I took the baby on my arm and walked after milk to a neighbor a couple of miles off.

Q. And did you get milk from the neighbors when you went after it yourself?

A. Yes, when I had been one month without milk, four weeks.

Q. Did you have consumption when you came to America, Mrs. Thompson?

A. No. I wasn't sick or anything. I didn't know I was sick until I was without milk so long.

Q. That was when your baby was small that you were without milk?

A. Yes.

Q. From your experience with Mr. Thompson both before and after the first suit, are you sure that you cannot live with him any longer?

A. Yes, when I cannot get the necessary nourishment I need, and he didn't go after a doctor for me until a long time after I had asked for a doctor, I lay there all winter long and was so sick I could hardly raise up in bed, and it appeared to me that he didn't care whether I was sick or not.

The testimony also shows that while sick, plaintiff was frequently required to carry water for the house for quite a long distance,—about 20 rods; that the defendant frequently failed to carry either water or coal, and became angry with plaintiff when she requested him to do so, and that at times he scolded her for being sick.

She also testified:—

Q. Did you at any time walk to Crosby to see the doctor?

A. Yes.

Q. Why did you walk?

A. Sometimes when I would get the horse to go, he wouldn't like it, then I thought it would be best to walk.

Q. Then you walked to save trouble with Mr. Thompson?

A. I walked because I did not like to see him get mad, on account of the horses. And then I thought I could remain a longer time so I could find the doctor if I walked."

In the fall of 1913, plaintiff brought an action for divorce against her husband, but a reconciliation was effected, and she went back and lived with him. About this time defendant gave the plaintiff $100. Some time afterwards he demanded that she return him part of the money. The plaintiff refused to return it, and they had some trouble about it.

The following is the version of the trouble as related by Selmar Simonson, a neighbor boy, who was present at the time:—

(Direct examination.)

Q. You know Mr. and Mrs. Thompson?

A. Yes.

Q. Were you out there at their place this winter when Mr. Thompson was trying to make Mrs. Thompson give him some money?

A. Yes.

Q. Tell us what you saw and heard?

A. Well I saw him go out and get a hatchet and broke open the trunk and wanted the money, and he threw out the bedclothes off the bed. That is all I saw.

Q. Did you see him hurt her at all?

A. Yes, he sat her down on a chair.
Q. Was he talking to her in an angry manner?
A. Yes.
Q. Tell us what you heard him say to her, if you remember?
A. I couldn't understand but he was swearing some.

(Cross-examination.)

Q. You say Mr. Thompson was looking for some money?
A. Yes.
Q. How do you know he was looking for some money?
A. He said he was.
Q. He went and took a hatchet and pried under the lid of the trunk and opened it up?
A. Yes.
Q. That is the way you mean he broke open the trunk?
A. It was locked before.

. . . . . .

Q. He took the bedclothes back from the bed and looked?
A. He threw them off on the floor, yes.

. . . . . .

Q. Did she say she was going away because he was looking for that money?
A. Yes, she was scared of him.
Q. Did she say so?
A. No, she didn't say so.
Q. How do you know she was scared of him then?
A. Because I saw she was scared.

. . . . . .

Q. He sat her down on the chair and said: "You go and find the money."
A. Yes.
Q. And she sat down and didn't look for the money?
A. No, she went upstairs then.
Q. And she stay upstairs?
A. No, she came down, and he met her and he got the money.

This incident is admitted by defendant, although he denies that he broke the trunk, or used any unusual amount of force in seating plain-

tiff on the chair. The testimony, also, shows that defendant at times would get drunk.

1. It is true as asserted by appellant's counsel that under the laws of this state "no divorce can be granted . . . upon the uncorroborated statement, admission, or testimony of the parties." Comp. Laws, 1913, § 4400. The meaning and object of this statutory provision was fully considered by this court in Clopton v. Clopton, 11 N. D. 212, 91 N. W. 46, and it was there held that the purpose of the statute is to guard against the evil of granting collusive divorces, and that where the case considered as a whole precludes any possibility of collusion the corroboration need be very slight. The rule laid down in Clopton v. Clopton was again followed by this court in Tuttle v. Tuttle, 21 N. D. 503, 131 N. W. 460, Ann. Cas. 1913B, 1.

The record in this case shows that defendant has twice been adjudged guilty of contempt for refusing to comply with the court's orders requiring him to pay temporary alimony. There is not the slightest reasonable probability of collusion between the parties to this action, and we believe that (within the rule announced by this court in Clopton v. Clopton, supra) there is sufficient corroboration of plaintiff's testimony to justify the judgment rendered by the trial court. See also Tuttle v. Tuttle, supra, and extensive note thereto in Ann. Cas. 1913B, 1; 14 Cyc. 689.

2. We also believe that the evidence, considered as a whole, is sufficient to establish the charge of cruel and inhuman treatment. It is true (with exception of the incident related by the witness, Selmar Simonson), there is no evidence of physical violence. But it does appear from the evidence that defendant failed to procure proper medical attendance for his wife. He neglected her, even while she was confined to her bed with illness. He failed to do anything to alleviate her suffering, and by his neglect aggravated both her physical and mental suffering. He exhibited a total want of affection or consideration for his wife, and even failed to manifest that degree of care and sympathy which might be expected from a man toward any sick woman, even though she were a total stranger. It is not alone physical violence which constitutes cruel and inhuman treatment. Other acts may occasion far greater pain than any inflicted by physical violence. Mental suffering may be much greater than physical suffering. In this case there is

evidence of both. "It was formerly though that to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence is necessary; but the modern and better considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation; and it is now very generally held that any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the health . . . or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty under the statutes." Carpenter v. Carpenter, 30 Kan. 712, 46 Am. Rep. 108, 2 Pac. 144. See also 14 Cyc. 609 (B); McDonald v. McDonald, 155 Cal. 665, 25 L.R.A.(N.S.) 45, 102 Pac. 927; Doolittle v. Doolittle, 78 Iowa, 691, 6 L.R.A. 187, 43 N. W. 616; Mercer v. Mercer, 114 Ind. 558, 17 N. E. 182; Mosher v. Mosher, 16 N. D. 269, 12 L.R.A.(N.S.) 820, 125 Am. St. Rep. 654, 113 N. W. 99; Tuttle v. Tuttle, 21 N. D. 503, 131 N. W. 460, Ann. Cas. 1913B, 1; Briggs v. Briggs, 56 Wash. 580, 106 Pac. 126; Benfield v. Benfield, 44 Or. 94, 74 Pac. 495.

The conclusion reached by the learned trial court was correct, and the judgment appealed from is affirmed.

W. A. MARIN, as Receiver of the American Biscuit Company, of Crookston, an Insolvent Corporation, v. OLE J. AUGEDAHL.

(156 N. W. 101.)

The receiver of a defunct Minnesota corporation brings action against a North Dakota stockholder for a superadded liability under the Minnesota laws. No personal service was had upon defendant. A demurrer to the complaint was sustained.

Note.—For other cases construing the provision of the Minnesota Constitution exempting stockholders in manufacturing or mechanical corporations from superadded liability, see Cowling v. Zenith Iron Co. 65 Minn. 263, 33 L.R.A. 508, 60 Am. St. Rep. 471, 68 N. W. 48, and Anderson v. Anderson Iron Co. 65 Minn. 281, 33 L.R.A. 510, 68 N. W. 49.

Defunct foreign corporation — receiver of — suit by — against North Dakota stockholder — complaint — demurrer — service of process in — superadded liability — under foreign state laws — resident stockholder — liability.

The complaint shows that the defunct corporation was organized for manufacturing purposes and the stockholders of such corporation were, therefore, not liable for superadded liability. For the reasons stated in the opinion the demurrer was properly sustained.

Opinion filed January 10, 1916.

Appeal from the District Court of Cass County, *Pollock*, J.

Affirmed.

W. J. Mayer and *A. A. Miller*, for appellant.

The district court of Polk county, Minnesota, had jurisdiction of the subject-matter of the action as set forth in the complaint herein, and its determination is conclusive upon all the stockholders of the defunct corporation, and cannot be challenged in any other tribunal, regardless of the place of residence of the stockholders. Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36; London & N. W. American Mortg. Co. v. St. Paul Park Improv. Co. 84 Minn. 144, 86 N. W. 872; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755.

The statute of Minnesota controlling this controversy is constitutional. Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. and London & N. W. American Mortg. Co. v. St. Paul Park Improv. Co. supra.

The order of the Minnesota court fixing the assessment against each share of stock is conclusive, and cannot be questioned in any court. Minn. Rev. Laws 1905, § 3186; Swing v. Red River Lumber Co. 105 Minn. 336, 117 N. W. 442; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. supra; Spargo v. Converse, 112 C. C. A. 337, 191 Fed. 823; Neff v. Lamm, 99 Minn. 115, 108 N. W. 849, and cases cited; Ward v. Joslin, 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. Rep. 807; Swing v. Humbird, 94 Minn. 1, 101 N. W. 938.

The jurisdiction of the Minnesota court gave jurisdiction over each individual stockholder whether he was resident of Minnesota or elsewhere, and notice to the corporation was notice to all the stockholders,

and they are bound by the order of that court, whether or not they received other notice. Howarth v. Lombard, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. supra; Spargo v. Converse, 112 C. C. A. 337, 191 Fed. 823.

The proceeding in Minnesota was against a corporation, which represented its stockholders, and the order and judgment of that court cannot be disregarded. Minn. Rev. Laws 1905, § 3186; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. supra; Bernheimer v. Converse, 206 U. S. 516, 532, 51 L. ed. 1163, 1175, 27 Sup. Ct. Rep. 755; Howarth v. Lombard, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888; Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476; Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220; Marson v. Deither, 49 Minn. 423, 52 N. W. 38; Parker v. Stoughton Mill, 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751; Mutual F. Ins. Co. v. Phœnix Furniture Co. 108 Mich. 170, 34 L.R.A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095; Warner v. Delbridge & C. Co. 110 Mich. 590, 34 L.R.A. 701, 64 Am. St. Rep. 367, 68 N. W. 283.

The same doctrine here applies as would in an action to recover on premium notes. Insolvency made the assessment necessary, and this assessment stands on the footing, as would premium notes. Hanson v. Davidson, 73 Minn. 454, 462, 76 N. W. 254; Holland v. Duluth Iron Min. & Development Co. 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50; 3 Thomp. Corp. 3499; Howarth v. Lombard, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888; Hamilton v. Glenn, 85 Va. 901, 9 S. E. 129; Glenn v. Williams, 60 Md. 93; Sheafe v. Larimer, 79 Fed. 921; Howarth v. Ellwanger, 86 Fed. 54; Howarth v. Angle, 39 App. Div. 151, 57 N. Y. Supp. 187, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506.

The representation which a stockholder has by virtue of his membership in the corporation is all to which he is entitled, and it is not necessary that he be personally served with process in an action wherein the assessment is made. Howarth v. Lombard, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888; Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184,

9 Sup. Ct. Rep. 739; Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 336, 40 L. ed. 986, 990, 16 Sup. Ct. Rep. 810.

A. W. Fowler and *L. L. Twichell,* for respondent.

The Minnesota court had no jurisdiction to enter the judgment set forth in the complaint.

"Neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, or the act of Congress pursuant thereto, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered." Want of jurisdiction, either as to person or subject-matter, in proceedings *in rem* as to the thing, may be shown. Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; National Exch. Bank v. Wiley, 195 U. S. 257, 49 L. ed. 184, 25 Sup. Ct. Rep. 70; Ward v. Joslin, 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. Rep. 807.

The liability sought to be enforced in the case at bar is a superadded liability of defendant. If the defunct Minnesota corporation was a manufacturing business within the exception of the constitutional provision, then there was no superadded liability, and defendant was not liable to assessment, and there was no subject-matter upon which the jurisdiction of the Minnesota court could operate, and its judgment was therefore void, and the question of its conclusiveness is not involved. State ex rel. Clapp v. Minnesota Thresher Mfg. Co. 40 Minn. 213, 3 L.R.A. 510, 41 N. W. 1020; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36.

The American Biscuit Company is a corporation organized for the purpose of carrying on a manufacturing business, within the meaning of the Minnesota Constitution, and therefore a demurrer to the complaint lies, because, admitting all property pleaded facts, no liability exists. Comp. Laws 1913, Subdivs. 63 and 64, of § 7938; Foster County Implement Co. v. Smith, 17 N. D. 178, 115 N. W. 663.

Conclusions of law are no part of a pleading, and hence are not admitted by demurrer. Van Dyke v. Doherty, 6 N. D. 263, 69 N. W. 200; Iowa & D. Teleph. Co. v. Schamber, 15 S. D. 588, 91 N. W. 78; King v. Lawson, 84 Fed. 209; Stutsman Co. v. Mansfield, 5 Dak. 78,

37 N. W. 304; Johnson v. Kindred State Bank, 12 N. D. 336, 96 N. W. 588.

In a proceeding to enforce personal liability of stockholders for corporation debts, the articles of the association are the sole criterion as to the purposes for which the corporation was formed. Senour Mfg. Co. v. Church Paint & Mfg. Co. 81 Minn. 294, 84 N. W. 109; Cuyler v. City Power Co. 74 Minn. 22, 76 N. W. 948; Nicollet Nat. Bank v. Frisk-Turner Co. 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160; Hastings Malting Co. v. Iron Range Brewing Co. 65 Minn. 28, 67 N. W. 652; Vencedor Invest. Co. v. Highland Canal & Power Co. 125 Minn. 20, 145 N. W. 611.

BURKE, J. Appeal from judgment of the trial court sustaining a demurrer to plaintiff's complaint and dismissing the action with prejudice. The amended complaint is very long, and states in substance that defendant is a stockholder of a defunct Minnesota corporation; that said corporation was in the hands of a receiver appointed by the district court of the fourteenth judicial district of the state of Minnesota; that a judgment remained unsatisfied against the said corporation, and that said district court in Minnesota had deemed it necessary to levy an assessment against the stockholders. Those allegations are not set out in full, as we do not deem them necessary to a decision of the controversy presented. Paragraph 6 of the complaint alleges that the said defunct corporation was organized on or about the 18th of February, 1905, "with a capital stock of $50,000, divided into 500 shares of a par value of $100 each, and that by its articles of incorporation it was empowered *to manufacture* and sell biscuits, crackers, candies, confections, cereals, and other kindred products," etc. Paragraph 2 of the complaint reads as follows: "That at the time of the creation and organization of the American Biscuit Company it was and still is the law of the state of Minnesota that each stockholder of any corporation organized for the purposes specified in the articles of incorporation of the said American Biscuit Company, as hereinafter set forth, is personally liable to the creditors of such corporation to the amount of the stock held or owned by him, which said law is, and at all times was, part and parcel of the corporate charter of the said corporation." Plaintiff was the receiver of the said American Biscuit Com-

pany, insolvent. To this amended complaint a demurrer was interposed upon the grounds that said complaint does not state facts sufficient to constitute a cause of action. The Minnesota statutes upon which plaintiff relies for his recovery are §§ 3184–3187, inclusive, Revised Laws of Minnesota 1905, and § 3 of article 10 of the Minnesota Constitution, the latter reading as follows: "Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him."

There is little dispute as to the law in this case, and no dispute as to the facts. Appellant insists that the complaint shows a judgment of the district court of Minnesota to the effect that the American Biscuit Company is insolvent; that it owes debts over and above its assets; that there is a judgment unsatisfied and outstanding, and that in the judgment of the trial court an assessment upon the stockholders is necessary. These findings of said Minnesota court are claimed to be unassailable in the present action. Respondent concedes that *if the Minnesota district court had jurisdiction,* appellant is right upon his construction of the law, but insists that the complaint itself discloses affirmatively that said Minnesota court did not have jurisdiction. This is the only controversy.

(1) We have already set forth extracts from the amended complaint which show that this company was organized for the purpose *of manufacturing* biscuits, etc. Under the holdings of the supreme court of Minnesota, the stockholders of such corporations were exempt from superadded liability. Senour Mfg. Co. v. Church Paint & Mfg. Co. 81 Minn. 294, 84 N. W. 109; Cuyler v. City Power Co. 74 Minn. 22, 76 N. W. 948; Hastings Malting Co. v. Iron Range Brewing Co. 65 Minn. 28, 67 N. W. 652; Vencedor Invest. Co. v. Highland Canal & Power Co. 125 Minn. 20, 145 N. W. 611.

In the Senour Case they say: "In proceedings to enforce the individual liability of stockholders [for the debts]of a corporation, the articles of incorporation are the sole criterion as to the purposes for which the corporation was formed." In the said case their articles read: "The general nature of the business of this corporation shall be to manufacture painters' materials and supplies, and the owning, holding, and using of letters patent pertaining to the manufacture of such ar-

ticles, and the selling of such manufactured articles, and the doing of anything that is properly incident to or necessarily connected with such manufacturing business." In the Cuyler Case the articles read: "The general nature of its business shall be the acquiring and holding, either by purchase or lease, of real estate and water power, and the purchasing, hiring, building, improving, or construction of canals, locks, ponds, or watercourses . . . for the purpose of producing and creating water, steam, and other motive power," etc.

In all of these cases the corporations were held to be manufacturing and the stockholders exempt. It is thus apparent that plaintiff has pleaded facts showing conclusively that the Minnesota district court was without jurisdiction to make this assessment. Paragraph 2, which we have already quoted, to the effect that under the laws of Minnesota each stockholder of any corporation organized for the purposes specified in the articles of incorporation of the said American Biscuit Company, as hereinafter set forth, is personally liable to the creditors, is a mere conclusion of law. Plaintiff might as well have pleaded that the defendant owed plaintiff $100 and let it go at that. The facts disclose that the Minnesota court did not have jurisdiction.

The fact that the said court thought it actually had jurisdiction is not conclusive. Having no jurisdiction of the subject-matter, and not having personal service upon Augedahl, the assessment falls. The demurrer was properly sustained. Affirmed.

JOHN F. BEYER v. NORTH AMERICAN COAL & MINING COMPANY, Herbert Williams, L. V. Williams, A. E. Wolpert, D. C. Wolpert, A. Maud Wolpert, J. L. Trevillyan, F. B. Nicoll, J. L. Ludvig, John E. Tappen, and Investors Syndicate, a Corporation.

(156 N. W. 204.)

Litigation connected with Investors' Syndicate v. Letts, 22 N. D. 452; Beyer v. Investors' Syndicate Co. 31 N. D. 247, and Beyer v. Robinson, post, 560, just decided. The facts are disclosed in the opinions above cited. Lower court sustained demurrer to complaint.

Demurrer — to complaint — suit or action — interest sufficient to maintain — minority — stockholder — assets — corporation — impounding.

1. Plaintiff had sufficient interest to maintain the suit on account of his interest as a minority stockholder and because he has another action pending to impound the assets of the corporation.

Complaint — cause of action — former adjudication — facts.

2. The complaint does not show that the matter involved in this suit has been already adjudicated.

Mortgage — held in trust — foreclosure — defense — disclosed by statements in complaint.

3. The complaint shows an available defense to the foreclosure of the mortgage held in trust by the defendant.

Delay in bringing suit — sufficient cause shown.

4. The complaint shows sufficient excuse for the delay in bringing the suit.

Complaint — fraud — collusion — action.

5. The complaint shows the existence of fraud and collusion sufficient to maintain the action.

Legal remedy — adequate — absence of.

6. The complaint shows the absence of an adequate legal remedy.

Complaint — cause of action — certainty and particularity.

7. The complaint states a cause of action with certainty and particularity.

Opinion filed January 10, 1916.

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

Reversed.

M. A. Hildreth, for appellant.

The complaint shows that the majority of the stockholders and directors are prejudiced against Mr. Beyer and his interests. He can maintain this action. Pom. Eq. Jur. § 1095; Thomp. Corp. 2d ed. § 4568; 2 Machen. Corp. § 1179; Kley v. Healy, 127 N. Y. 555, 28 N. E. 593; Continental Securities Co. v. Belmont, 206 N. Y. 12, 51 L.R.A.(N.S.) 112, 99 N. E. 138, Ann. Cas. 1914A, 777; Pollitz v. Wabash R. Co. 207 N. Y. 113, 100 N. E. 721.

There has been no acquiescence in or ratification by the plaintiff of the acts of the corporation. Arnot v. Union Salt Co. 186 N. Y. 501, 79 N. E. 719; San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co. 112 Cal. 53, 33 L.R.A. 788, 44 Pac. 333.

This principle also applies where a plaintiff against whom it is in-

voked remained silent or inactive when there was the opportunity and the duty to act or speak. Rothschild v. Title Guarantee & T. Co. 204 N. Y. 458, 41 L.R.A.(N.S.) 740, 97 N. E. 879; Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co. 90 N. Y. 607.

The complaint states a valid cause of action. Jacobson v. Brooklyn Lumber Co. 184 N. Y. 152, 76 N. E. 1075.

Where in a stockholder's action the defendants against whom the wrong is charged are the executive officers of the corporation, who also constitute a majority of the acting board of directors, a prior demand upon the corporation to bring the action is not necessary. 10 Am. & Eng. Enc. Law, 790; Kelsey v. Sargent, 40 Hun, 150; Copeland v. Johnson Mfg. Co. 47 Hun, 235; Barnes v. Brown, 80 N. Y. 527; Ziegler v. Hoagland, 52 Hun, 385, 5 N. Y. Supp. 305; Beers v. New York L. Ins. Co. 66 Hun, 75, 20 N. Y. Supp. 788; Duncomb v. New York, H. & N. R. Co. 84 N. Y. 190; Munson v. Syracuse, G. & C. R. Co. 103 N. Y. 58, 8 N. E. 355; 21 Am. & Eng. Enc. Law, 2d ed. 897–910; Cook, Stock & Stockholders, 3d ed. § 657; Taylor, Priv. Corp. 5th ed. 646– 648; Billings v. Shaw, 209 N. Y. 265, 103 N. E. 142.

Where the trustee's act consists not in possessing himself of the property of the beneficiary as owner, but in taking collateral security for a debt honestly due him, the rule can have no application, since the payment of the debt or the discharge of the liability is an essential prerequisite of the avoidance. But where fraud enters into the transaction, a demand to bring action is not necessary. Delaware & H. Co. v. Albany & S. R. Co. 213 U. S. 435, 53 L. ed. 862, 29 Sup. Ct. Rep. 540; Denver & R. G. R. Co. v. Alling, 99 U. S. 463, 25 L. ed. 438; Davis v. Rock Creek Lumber Flume & Min. Co. 55 Cal. 359, 36 Am. Rep. 40.

One cannot faithfully serve two masters whose interests are diverse. Andrews v. Pratt, 44 Cal. 309; San Diego v. San Diego & L. A. R. Co. 44 Cal. 106; 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; Field, Corp. §§ 174, 175.

Where directors, in violation of their duty and in betrayal of their trust, secured their own debts by mortgage to the injury of the stockholders and creditors, the mortgage is void. Koehler v. Black River Falls Iron Co. 2 Black, 717, 17 L. ed. 341; Rothwell v. Robinson, 39

Minn. 1, 12 Am. St. Rep. 608, 38 N. W. 772; Pencille v. State Farmers' Mut. Hail Ins. Co. 74 Minn. 67, 76 N. W. 1026; Schwab v. E. G. Potter Co. 194 N. Y. 409, 87 N. E. 670; Wilbur v. Lynde, 49 Cal. 290, 19 Am. Rep. 645; San Diego v. San Diego & L. A. R. Co. 44 Cal. 112; Wyman v. Bowman, 62 C. C. A. 189, 127 Fed. 257.

A corporation holds its property in trust for its stockholders. The stockholders have a joint interest in the same property. Wheeler v. Abilene Nat. Bank Bldg. Co. 16 L.R.A.(N.S.) 892, 89 C. C. A. 477, 159 Fed. 391, 14 Ann. Cas. 917; Jackson v. Ludeling, 21 Wall. 616, 22 L. ed. 492; Jones v. Missouri-Edison Electric Co. 75 C. C. A. 631, 144 Fed. 765; Booker v. Crocker, 65 C. C. A. 627, 132 Fed. 8.

A minority stockholder has the right to maintain an action against wrongdoers, in his own name on behalf of the corporation. Hingston v. Montgomery, 121 Mo. App. 451, 97 S. W. 202; Dodd v. Pittsburg, C. C. & St. L. R. Co. 127 Ky. 762, 16 L.R.A(N.S.) 898, 106 S. W. 787.

Bangs, Netcher, & Hamilton and *W. J. Mayer,* for respondents.

Neither party, privy, nor stranger may impeach a judgment by an action in equity, as a matter of right, or on the ground only that the judgment is wrong. An action brought for such purpose is *res judicata.* 1 Van Fleet, Former Adjudication, § 1, p. 95; Nichols v. Stevens, 123 Mo. 96, 45 Am. St. Rep. 514, 25 S. W. 578, 27 S. W. 613; 2 Van Fleet, Former Adjudication, p. 998; Willoughby v. Chicago Junction R. & Union Stockyards Co. 50 N. J. Eq. 656, 25 Atl. 277; 11 Enc. Pl. & Pr. 1168.

The remedy against such a judgment is provided by statute. Rev. Codes 1905, § 6884, Comp. Laws 1913, § 7483; Bruegger v. Cartier, 20 N. D. 72, 126 N. W. 491; Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; Routledge v. Patterson, 146 Wis. 226, 131 N. W. 346.

The party seeking relief from a judgment must plead an available defense to the original action, in addition to pleading an acceptable excuse for not using such defense at the proper time, and pleading no present available remedy. 11 Enc. Pl. & Pr. 1192.

"Where the defense set up consists only of matters which were litigated at law, whether before or after judgment, there can be no relief." 11 Enc. Pl. & Pr. 1192, 1193.

Where an action is brought in a court of equity to enjoin or vacate

a judgment, facts must be alleged excusing the failure to resort to all remedies in the original action. Freeman v. Wood 11 N. D. 1, 88 N. W. 721; 11 Enc. Pl. & Pr. 1193, 1194.

The appellant is bound by the original judgment. The so-called fraud, to which he refers in the complaint, is not a fraud or matter that was or should have been an issue in the original action. Nichols v. Stevens, 123 Mo. 96, 45 Am. St. Rep. 514, 25 S. W. 578, 27 S. W. 613; Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095; 3 Enc. Pl. & Pr. 627, 628, 630.

The statutory remedy by motion to vacate a judgment obtained by fraud is exclusive, where it is not shown that such remedy was not available. Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; Kitzman v. Minnesota Thresher Mfg. Co. 10 N. D. 26, 84 N. W. 585; 6 Enc. Pl. & Pr. 1515; 11 Enc. Pl. & Pr. 1197; English v. Savage, 14 Ala. 342; Roebling Sons Co. v. Stevens Electric Co. 93 Ala. 39, 9 So. 369; Reagan v. Fitzgerald, 75 Cal. 230, 17 Pac. 198; Piggott v. Addicks, 3 G. Greene, 427, 56 Am. Dec. 547; Myrick v. Edmundson, 2 Minn. 259, Gil. 221; Gould v. Loughran, 19 Neb. 392, 27 N. W. 397; Mosley v. Southern Mfg. Co. 4 Okla. 492, 46 Pac. 508; Given's Appeal, 121 Pa. 260, 6 Am. St. Rep. 795, 15 Atl. 468; McIndoe v. Hazelton, 19 Wis. 568, 88 Am. Dec. 701; Coon v. Seymour, 71 Wis. 340, 37 N. W. 243; Kidwell v. Masterson, 3 Cranch, C. C. 52, Fed. Cas. No. 7,758.

The complaint further discloses that appellant, in some form or other, participated in the former adjudication, and he has shown no sufficient reason why he should not be bound by the same. 11 Enc. Pl. & Pr. 1187.

BURKE, J. This case is also connected with the litigation commencing with Investors' Syndicate v. Letts, 22 N. D. 452, 134 N. W. 317, and Beyer v. Investors' Syndicate Co. 31 N. D. 247, 153 N. W. 476. It is also remotely connected with the case of Beyer v. Robinson, post, 560, 156 N. W. 203, just handed down by this court. The facts have been so often stated by this court that we will do little more than mention them. The case at bar seeks to enjoin the Investors' Syndicate from continuing the foreclosure of the $500 Dana mortgage given in 1888 by the Letts's upon the N.W.¼ of 16, 139–94. This quarter was first homesteaded by Jeremiah Letts, who received a patent from the

government about 1888. The same year he executed a mortgage thereon in favor of Mrs. Dana for $500, being the mortgage involved in the present action. About the year 1895 one Williams, a promoter, persuaded Letts and Beyer to organize a coal mining company to develop lignite mines upon this and three other quarter sections in the vicinity. After an ineffectual effort to organize, a corporation known as the North American Coal Mining Company was brought into existence with a capital stock of $50,000. The Letts's were to contribute their equity in this quarter section and another tract of land and received $10,000 in stock in the new company. Beyer, this plaintiff, was to furnish money enough to purchase this Dana mortgage and other similar items to the amount of $3,440, and he also received $10,000 in stock. Williams, the promoter, received $30,000 in stock. In this manner Beyer became the owner by assignment of the $500 mortgage, and he, in turn, assigned it to the North American Coal Mining Company. In 1895 Williams, who was in control of the coal mining company, made a fraudulent transfer of this mortgage to the Investors' Syndicate Company. The details of this fraudulent transfer are set forth in Investors' Syndicate v. North American Coal Min. Co. 31 N. D. 259, 153 N. W. 472. It is sufficient to say that the action of Williams and his colleagues was illegal and *ultra vires,* and was so known to the Investors' Syndicate Company at the time of the alleged transfer, and that the said assignment was void. The effect of that decision was to show that the title to this Dana mortgage was really in the North American Coal Mining Company. About the same time as this transfer, Beyers attempted to rescind his contract with the coal company and recover the Dana mortgage and other property, but was defeated in the United States court upon the grounds that he had gone into the deal with his eyes open. Shortly thereafter the Investors' Syndicate started to foreclose the mortgage, and Beyer intervened, alleging that he—rather than the Investors' Syndicate—was the owner of the mortgage. He was met with a plea of *res judicata* and defeated. See Investors' Syndicate v. Letts, supra. It was, however, held that Beyer was not defending for the coal company or the minority stockholders. The sale under such foreclosure has never been made, and the present action is one to permanently enjoin the Investors' Syndicate from asserting title to the mortgage and attempting to foreclose the same. The complaint is

lengthy,—covering twenty-four pages of the printed abstract. As this case will have little value as a precedent, we will not attempt to reproduce it. It alleges all of the facts which we have heretofore mentioned, with the formal parts alleging the corporate existence, and further alleges that as the said litigation progressed it developed from time to time that Williams and the secretary of the Investors' Syndicate were in collusion, "fraudulently contriving and designing to take over all the assets of said company." The various acts of collusion and fraud are then set forth in minute detail. It is incidentally said: "As part of said pretended scheme and fraud an assignment was made of the said Dana mortgage to the said Investors' Syndicate." The facts regarding the foreclosure, and Beyer's ineffectual effort to recover the same, are set forth. It is alleged that the officers and directors of the coal company have fraudulently refrained from taking any action to recover the said Dana mortgage, and that "none of the other stockholders of said corporation or any of the officers of said corporation have at any time attempted to protect the rights of the North American Coal Mining Company, . . . but, on the contrary, the said Herbert Williams, L. B. Williams, and F. B. Nichols have aided and assisted the Investors' Syndicate in carrying out the scheme and fraud hereintofore referred to." Plaintiff further alleges that he has at all times endeavored to wind up the affairs of the said coal company and dispose of its property among its stockholders; that he has commenced an action to have himself reimbursed upon the assets of the coal company for moneys advanced by himself; that he has requested the officers and directors of the said mining company to bring suit, but they have at all times refused and neglected to do so. He further alleges that there have been no meetings of the directors of the said corporation, no proceedings had in any respect whatsoever to change the status of any of the parties since the beginning of the litigation, so that there are no innocent parties intervening. These and other matters of a similar nature are set forth, and a permanent injunction requested against the Investors' Syndicate Company, taking further steps towards the foreclosure.

To this complaint there was interposed a demurrer by the Investors' Syndicate Company, coal company, and the other parties defendant. It was sustained upon the the grounds that the said complaint failed to state a cause of action. The decision of the trial court was rendered and

the briefs in the present action filed before the decision of the case of Investors' Syndicate Co. v. North American Coal Min. Co. supra. For this reason the briefs cover many points decided by said opinion. Therefore, we will not, of course, discuss all of the propositions covered by the briefs.

1. Respondent's first argument is that no party may impeach the judgment by an action in equity as a matter of right, or upon the grounds only that the judgment was wrong. It is complained that Beyer is a stranger to the foreclosure proceedings and therefore should not be allowed to attack them. A complete answer to this contention is that Beyer has alleged that he is a stockholder in the company which owns this mortgage, and has requested the officers and directors to bring a suit to protect its assets, and has himself brought a suit to impound the assets and to give him a lien thereon for the money advanced by him. He has, therefore, sufficient interest to maintain this suit.

2. It is further alleged that defendant was a party to the foreclosure suit as an intervener, and that the decision of the court is *res judicata*. Two answers can be made to this. Plaintiff in the first action represented merely himself. In this action he is representing the minority stockholders. Besides, the plea of *res judicata* should be raised by answer, and not by demurrer, unless the fact and the nature of the prior adjudication appear on the face of the complaint.

3. Respondent further says that a party seeking relief from a judgment must plead an available defense, in addition to pleading an excuse for not interposing such defense at the proper time. In answer to this it can be said that a sufficient excuse is pleaded. Plaintiff's complaint shows that he did not learn of the various acts of fraud, or all of them at least, until shortly before the commencement of the present action. He does not show that he knew all of those defenses at the time of the former action. The merits of his defense are that he is an interested minority stockholder of the company which owns this mortgage, and that the Investors' Syndicate Company is asserting hostile ownership.

4. Respondent further states that a party seeking relief from a judgment must plead sufficient excuse for his failure to litigate his defenses upon its merits in the original action in addition to pleading such defense. We believe the complaint sets forth such excuse. The plaintiff,

as is shown in the North Dakota case, at 31 N. D. 259, did not learn of his defense until too late for the former action.

5. Respondent further says that a party seeking relief from a judgment must prove the existence of fraud or collusion between his party and the opposing party in addition to pleading an available defense and no legal remedy. We have said enough already to show that the complaint does plead the existence of fraud and collusion, and, in fact, this question is settled by the case in 31 N. D. 259, just mentioned.

6. Respondent further asserts that plaintiff has not shown an absence of a legal remedy. It is insisted that plaintiff's remedy was by timely motion to open up the judgment in the foreclosure suit, and that, if he has neglected this, he is debarred from equitable relief. To this, the same answer is made. The pleadings show that the fraud was not discovered in time either to interpose it in the former action, or to use it as a basis for opening up the judgment.

7. Lastly, it is contended that all of the matters requested to be plead in a complaint and an equity action which impeaches a judgment, must be pleaded with certainty and particularity. It is pointed out that the complaint does not show the date of the former trial, nor the entry of the original judgment, nor the day of the discovery of the fraud. We do not believe there is merit in any of those objections. All of those dates were known to these defendants, and they are not prejudiced by their omission. The court knows all of the dates and can take judicial cognizance thereof. The complaint alleges that the fraud was not discovered until after the former trial and after the day for application for relief had past. We realize that the omission of the text of the complaint from this opinion renders the opinion of little use as a matter of public precedent, but the trial court who conducts the next trial will have it before him in full. It is sufficient to say that, in our opinion, it states a good cause of action. As authority for our decision we cite: Pom. Eq. Jur. § 1095; Thomp. Corp. 2d ed. § 4568; 2 Machen, Corp. § 1179; Kley v. Healy, 127 N. Y. 555, 28 N. E. 593; Continental Securities Co. v. Belmont, 206 N. Y. 12, 51 L.R.A.(N.S.) 112, 99 N. E. 138, Ann. Cas. 1914A, 777; Pollitz v. Wabash R. Co. 207 N. Y. 113, 100 N. E. 721; San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co. 112 Cal. 55, 33 L.R.A. 788, 44 Pac. 333; Jacobson v. Brooklyn Lumber Co. 184 N. Y. 152, 76 N. E. 1075; Reed v. Hollingsworth, 157 Iowa,

94, 135 N. W. 37; Strong v. Repide, 53 L. ed. 853, and note (213 U. S. 419, 29 Sup. Ct. Rep. 521). And the cases cited by us in Investors' Syndicate v. North American Coal Min. Co. 31 N. D. 259, 153 N. W. 472. The judgment of the trial court is reversed.

O. E. OLSGARD v. FRED LEMKE and B. W. Lemke.

(156 N. W. 102.)

Signature — forgery — precluded from setting up — estoppel — ratification or adoption — not included in term — statutes.

1. Section 6908, Compiled Laws of 1913, which in effect provides that a signature which is forged or unauthorized is wholly inoperative unless the party whose signature has been forged, etc., "is precluded from setting up the forgery or want of authority," is construed and *held*, that the word "precluded" is used as synonymous with the word "estopped," and that it does not include ratification or adoption in their strict primary meaning, but only when they involve some of the elements of an estoppel.

Pleadings — issues — ratification — theory of — elements of estoppel.

2. Furthermore, the issues framed by the pleadings are not sufficiently broad to permit plaintiff to recover on the theory of ratification or adoption, except to the extent that one or both involve some of the elements of an estoppel.

Instructions to jury — issues — estoppel — adoption — ratification.

3. The instructions to the jury fully and correctly covered the issue as to the alleged liability of defendant through estoppel by ratification or adoption, under § 6908, supra.

Evidence — admission of — rulings of court — nonprejudicial.

4. Certain rulings on the admission of evidence examined and *held* correct or nonprejudicial.

Opinion filed January 10, 1916.

Appeal from the District Court of Towner County, *C. W. Buttz*, J.

From a judgment and order in defendants' favor, plaintiff appeals. Affirmed.

Frich & Kelly, for appellant.

Forgery of an instrument like the note in question takes place whenever any person, with intent to defraud, falsely makes, alters, forges, or

counterfeits any instrument in writing, purporting to be the act of another, by which any pecuniary demand or obligation is or purports to be created. Criminal intent must be shown. Comp. Laws 1913, § 9898; Eaton & G. Com. Paper, § 129.

The liability of the person who claims his name was forged on the instrument may arise by his adoption or ratification, even though his signature was forged. Selover, Neg. Inst. p. 309; Clark & S. Agency, § 118; Hefner v. Vandolah, 62 Ill. 483, 14 Am. Rep. 106; Casco Bank v. Keene, 53 Me. 103; Greenfield Bank v. Crafts, 4 Allen, 447; Corser v. Paul, 41 N. H. 24, 77 Am. Dec. 753; Howard v. Duncan, 3 Lans. 174; notes to Traders' Nat. Bank v. Rogers, 36 L.R.A. 539; and Dominion Bank v. Ewing, 1 Ann. Cas. 181; 31 Cyc. 1249, and cases cited in notes; Comp. Laws 1913, §§ 6328, 6886.

The word "precluded" as used in our statute is not synonymous with the word "estopped." Comp. Laws 1913, § 6908; Reid v. Field, 83 Va. 26, 1 S. E. 395; 7 Words & Phrases, 5928.

There is a distinction even between the terms "adoption" and "ratification." One may adopt for his own use a contract that suits his purpose; but he can only ratify a contract when it was originally made for him without authority. But the transaction was fully ratified by the acts and conduct of B. W. Lemke, by the adoption of the act of his brother, as his own act. 31 Cyc. 1246, and cases cited.

Kehoe & Moseley, for respondents.

Where the act of the agent is complete before knowledge comes to the principal, and the complaining party is not shown to have been in anywise injured by the principal's failure to act, the rule or presumption of ratification does not apply. Smyth v. Lynch, 7 Colo. App. 383, 43 Pac. 670, and cases cited at p. 673; 31 Cyc. 246, and cases cited; Capps v. Hensley, 23 Okla. 311, 100 Pac. 515, and cases cited on pp. 517 and 518; McArthur v. Times Printing Co. 48 Minn. 319, 31 Am. St. Rep. 653, 51 N. W. 216.

Forgery means "to fabricate by false imitation; in law, to make a false instrument in similitude of an instrument by which one person could be obligated to another, for the purpose of fraud and deceit." Bouvier's Law Dict.; 2 Bishop, Crim. Law, § 523; People v. Mitchell, 92 Cal. 590, 28 Pac. 597.

A ratification by a principal can only be effectual between the parties

when the act is done under the relationship of principal and agent, and the act is done on account of the principal. 1 Am. & Eng. Enc. Law, 2d ed. 1188, and cases cited; 31 Cyc. 1251, and cases cited; Ellison v. Jackson Water Co. 12 Cal. 542, 4 Mor. Min. Rep. 559; Ferris v. Snow, 130 Mich. 254, 90 N. W. 850; Minder & J. Land Co. v. Brustuen, 26 S. D. 38, 127 N. W. 546; Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 26 Pac. 902; Mitchell v. Minnesota Fire Asso. 48 Minn. 278, 51 N. W. 608; Henry Christian Bldg. & Loan Asso. v. Walton, 181 Pa. 201, 59 Am. St. Rep. 636, 37 Atl. 261; Comp. Laws 1913, § 6328.

One who commits the crime of forgery by signing the name of another to a promissory note does not assume to act as the agent of the person whose name is forged. Henry v. Heeb, 114 Ind. 275, 5 Am. St. Rep. 613, 16 N. E. 606.

A mere promise by one whose name has been forged to a note to pay the same creates no liability on the part of the promisor, when there appear no circumstances to create an estoppel, and the promise is made after maturity and without consideration. Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546; Owsley v. Philips, 78 Ky. 517, 39 Am. Rep. 358; Barry v. Kirkland, 6 Ariz. 1, 40 L.R.A. 471, 52 Pac. 771, 2 Ann. Cas. 295; Shinew v. First Nat. Bank, 84 Ohio St. 297, 36 L.R.A.(N.S.) 1006, 95 N. E. 881, Ann. Cas. 1912C, 587; Henry v. Heeb, supra.

Where the act of signing constitutes forgery, while the person whose name has been forged may be estopped by his admissions, upon which others may have changed their relations to their detriment, from pleading the truth of the matter, the act from which the crime springs cannot, upon consideration of public policy, be ratified without a new consideration to support it. Shisler v. Vandike, 92 Pa. 447, 37 Am. Rep. 702; McHugh v. Schuylkill County, 67 Pa. 391, 5 Am. Rep. 445; Workman v. Wright, 3 Am. Rep. 546, and note, 33 Ohio St. 405; Owsley v. Philips, 78 Ky. 517, 39 Am. Rep. 358; Brook v. Hook, 24 L. T. N. S. 34, 40 L. J. Exch. N. S. 50, L. R. 6 Exch. 89, 19 Week. Rep. 506; 3 Alb. L. J. 255; 2 Dan. Neg. Inst. §§ 1351, 1353; 2 Randolph, Com. Paper, § 629.

Fisk, Ch. J. This is an appeal from an order denying plaintiff's

motion for judgment *non obstante veredicto* or for a new trial, and also from the judgment of dismissal. Plaintiff seeks to hold defendant B. W. Lemke liable on a certain $2,700 note, upon the theory that, while conceding and alleging that about the date of its maturity his name was affixed thereto by another without authority, he fully ratified the unauthorized act and has estopped himself from denying liability. In support of the alleged ratification, plaintiff relies upon a certain letter written on November 22, 1909, by said Lemke to plaintiff's counsel, Frich & Kelly, as follows:

Dear sirs:—

While in your office sometime ago, you told me that you held that Olsgard note for collection. Now, what I would like to have you do if at all possible, is to have Mr. Olsgard consent to carry the note till November 1, 1910. The note, I think, draws 10 per cent interest. Considering the old, antiquated, and out-of-date machinery which he sold Fred in part; the interest is too much. Fred, of course, signed for me also, but I am not trying to shirk the obligation, which in reality would be no obligation on my part. I have already paid $500 on the note; and if you can get Mr. Olsgard to extend the note another year at 8 per cent interest, we will secure it with a collateral note signed by Will, Henry, and myself. Have already paid out over $5,000, and that is about all I want to pay this year. Most of those fellows were in no great hurry nor very particular while Fred was in business, and they had ought to be just a little considerate now. Hoping that you are meeting with success in the final windup of the Heavener mix-up,

I am, very respectfully,
(Signed) B. W. Lemke.

In support of the alleged estoppel of respondent Lemke to question his liability on such note, appellant relies upon the alleged fact that at or about the date of the maturity of such note the same was presented to Lemke for payment, and he paid thereon the sum of $500 without questioning his liability, and in other ways by his conduct led plaintiff to believe that he was liable, and plaintiff acted on such belief to his prejudice.

The cause was tried to a jury, and at the close of the evidence plain-

tiff moved for a directed verdict upon the principal ground that the sending of the letter above quoted constituted a ratification, and effectually fastened liability upon B. W. Lemke for the payment of the note. The trial judge denied such motion, and such ruling constitutes appellant's principal assignment of error.

Appellant's counsel state that, as to the issue of liability through estoppel, there was a conflict in the evidence; and they concede that were this the only issue they would rest content with the verdict. But they strenuously contend that the trial court erroneously restricted the issues, and that it should have submitted to the jury the broad issue as to whether respondent had, by his representations and conduct, *precluded* himself from setting up want of authority or forgery as a defense to the note. In support of this contention they refer to § 6908, Comp. Laws 1913, and argue that its provisions uphold their contention. This section reads: "Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly imperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

On the other hand, counsel for respondent contend that the word "precluded" as used in such statute has no broader meaning than the word "estopped," and that the former as therein employed is synonymous with the lattter. In support of this construction they direct our attention to the definitions of the words "estoppel" and "preclude" as given in the Century Dictionary, also to the definition of "estoppel" given in Bouvier's Law Dictionary as "the *preclusion* of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims." To these we add the definition of the verb "estop" as given in Funk & Wagnall's New Standard Dictionary, as follows: "To preclude from averring in an action what is contrary to prior acts or admissions." Counsel for respondent assert that, under the word "precluded" as used in the statute, the issues both of ratification and adoption were not excluded, but were properly submitted to the jury in so far as those issues involved the

elements of estoppel. The instructions to the jury on this phase of the case were as follows:

"I charge you, therefore, that if you find by a fair preponderance of the evidence, as I shall hereafter explain that term to you, that the defendant B. W. Lemke, by remaining silent when he should have spoken, or by his acts or by declarations, whether oral or written, led the plaintiff to believe he had signed the note in suit, or that he had authorized the signature or would pay this note, and that the plaintiff has acted on such belief, and has suffered, or may be made to suffer, some material injury, loss, or detriment with respect to such note, or the enforcement thereof, your verdict will be for the plaintiff for such sum as may be due thereon at this time, if you further find from the evidence, by a like preponderance, that any sum is due upon the note. So, in this case, if B. W. Lemke so acted or conducted himself, or so spoke, or remained silent when it was his duty to speak, and knew or had reason to know that Mr. Olsgard might rely on his conduct, acts, speech, or silence, and Mr. Olsgard did so rely, and because of such has parted with property or security which he held against Fred Lemke, or Fred Lemke doing business as Lemke Brothers Implement Company, to secure the indebtedness sued on in this action, and B. W. Lemke would be estopped to deny his liability, and would be found to pay this note, even though he never signed it nor authorized his signature."

We are satisfied that the above instruction fully and fairly embraced the entire issues which were proper for submission to the jury.

In the first place, we do not construe the above-quoted statute as including ratification or adoption as used exclusively in their primary sense; but only when they involve some of the elements of an estoppel. As respondent's counsel very clearly point out in their printed brief, there is a wide distinction between these terms as used in their primary sense and as used when they involved some of elements of an estoppel. This distinction is made clear by the Colorado court in Smyth v. Lynch, 7 Colo. App. 383, 43 Pac. 670, and the authorities cited on page 673 of the opinion. See also McArthur v. Times Printing Co. 48 Minn. 319, 31 Am. St. Rep. 653, 51 N. W. 216; Capps v. Hensley, 23 Okla. 311, 100 Pac. 515, and cases cited; also 31 Cyc. 1246.

Secondly, the issues raised by the pleadings do not include an alleged liability either through a ratification or adoption excepting as they

involve some of the elements of an estoppel. This, we think, is quite clear from the pleadings, and is an all-sufficient answer to appellant's contention on this point. Paragraph 4 of the complaint reads:

"That the signature of B. W. Lemke was attached to said instrument by said Fred Lemke, or by someone else at his direction, and without authority from said B. W. Lemke so to do; that the plaintiff did not know that said signature was other than the signature of said B. W. Lemke until said note became due; that at or about the maturity of said note the plaintiff presented same to said B. W. Lemke, who then paid him thereon the sum of $500 and fully ratified by an instrument in writing, and became estopped to deny the act of the said Fred Lemke in affixing his signature to the same, and in reliance upon such ratification the plaintiff, at the instance and request of the defendants, duly conveyed to one Albert Thompson the real and personal property situated in the county of Ramsey, North Dakota, held by him as security to said indebtedness, thereby fulfilling his part of the agreement outlined in the second paragraph hereof."

Paragraph 4 of the answer is as follows:

"That as to the allegations contained in paragraph 4 of said complaint this defendant admits that the signature of this defendant to said alleged note was attached thereto without authority thereto from this defendant to attach the same, and that as to each and all of said other allegations contained in said paragraph 4 of said complaint this defendant denies having any knowledge or information thereof sufficient to form a belief, and therefore denies the same; and this defendant denies that the plaintiff ever presented the $2,700 note to this defendant for payment, and denies that he ever in any manner ratified the attaching of his signature to said note, and denies that he ever paid the plaintiff $500 to be applied on said $2,700 note."

Even if we should concede, which we do not, that the issues as framed by the pleadings were broad enough to entitle plaintiff to show a ratification or adoption in their primary sense, and that the word "precludes" as employed in § 6908, Compiled Laws of 1913, should be construed to cover such a ratification or adoption, we would still hesitate to uphold appellant's contention. In view of our conclusion above announced, we shall not take the time nor space necessary to state our reasons, or do more than cite without comment some of the authorities

throwing light on the rights of the parties under such circumstances. See Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 26 Pac. 902; Mitchell v. Minnesota Fire Asso. 48 Minn. 278, 51 N. W. 608; Henry v. Heeb, 114 Ind. 275, 5 Am. St. Rep. 613, 16 N. E. 606; Barry v. Kirkland, 6 Ariz. 1, 52 Pac. 771, 2 Ann. Cas. 295; Shinew v. First Nat. Bank, 36 L.R.A.(N.S.) 1006, and cases cited in note (84 Ohio St. 297, 95 N. E. 881, Ann. Cas. 1912C, 587).

Most of the cases apparently holding to the contrary will be found on a careful perusal of the opinions to relate merely to a ratification or adoption involving elements of an estoppel.

Moreover, we think it is entirely clear, as contended by respondent, that the case was tried throughout in the court below upon the sole theory of alleged liability of B. W. Lemke, by virtue of the fact that he had estopped himself from denying liability by his acts and admissions which it was claimed constituted a ratification of the unauthorized act in signing his name to such note. The present contention of appellant that there was, in addition to the issue of estoppel by alleged ratification and adoption, also issues raising the questions of ratification and adoption without reference to any of the elements of estoppel, was apparently presented for the first time in his motion for a directed verdict, and the trial court was justified in denying such motion for the above reason, and also because such issues were not raised by the pleadings.

In passing, we desire to state that we have not overlooked or failed to consider the various provisions of the Code cited in appellant's brief, nor have we overlooked or failed to consider the authorities therein referred to. Extended notice of these would be of no avail to appellant. Suffice it to say that we deem such references and citations of no controlling force in the decision of the questions here involved. Appellant, by his first specification of error, complains of the ruling refusing to sustain his objection to the following question propounded by the court to the witness Henry Lemke: "Tell all the conversation between you and Ben and Olsgard there in the bank at that time, that you remember—what was said?" We discover no merit in this specification. Appellant, both in his complaint and at the trial, claimed that respondent paid $500 on this $2,700 note in suit, with knowledge that his name was forged or signed thereto without authority, and that this took place in the bank at Cando. Respondent sought to show that this

$500 payment was not made to apply on that note, but upon other notes entirely, upon which his liability was conceded. We think the question was clearly both relevant and material under respondent's theory of defense. The fact that such question could, as appellant states, have no bearing upon plaintiff's claim of ratification by means of the letter heretofore quoted, is not controlling.

What we have just said as to specification numbered one is equally applicable to, and disposes of, the second specification.

The third specification is aimed at the ruling denying plaintiff's objection to the question asked respondent: "Did you ever receive any money or property of any kind on account of your name being attached to that note?" Conceding all that appellant claims as to the immateriality of this question, we fail to see how it could have mislead the jury or have been in any way prejudicial to him. As the instructions heretofore quoted clearly disclose, the case was tried and submitted to the jury on the clear-cut issue as to whether respondent B. W. Lemke had, by his acts or declarations, either oral or written, and which were relied on by plaintiff, precluded himself from denying liability. In other words, the case was tried and submitted upon a theory which in no manner took into account as in the least material the question or fact as to whether any consideration was received by respondent for such note. Appellant most certainly did not at any time contend that respondent in fact received any consideration, for otherwise he would not have relied solely upon the doctrine of estoppel, through ratification or otherwise, to fasten liability upon him. The jury, therefore, could not very well have been mislead by such testimony.

The foregoing disposes of all the specifications of error argued in appellant's brief, and results in an affirmance of the order and judgment appealed from, and the same are accordingly affirmed.

JOHN F. BEYER v. ARTHUR B. ROBINSON, Administrator, et al.

(156 N. W. 203.)

Appeal from an order setting aside a sale of land made after appeal and supersedeas bond.

Sale of lands — order setting aside — made after appeal — application for such order — notice of — not jurisdictional.

1. Under the facts in this case the giving twenty-four hours' notice to the adverse party of intention to apply for an order fixing the amount of the supersedeas bond is not a jurisdictional requirement.

Trial court — decree — correction of — order to show cause — true description of land — old decree as corrected — binding judgment — supersedeas bond — effect of.

2. The trial court had, upon due notice, made a correction in its decree in order to show the true description of the land to be sold. It is apparent that the old decree as corrected remained the binding judgment of the court from which the appeal was taken and to supersede which the bond was given. It follows that the judgment was properly superseded; the sale thereafter made, void; and the order of the trial court setting it aside, proper.

Opinion filed January 10, 1916.

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

Affirmed.

M. A. Hildreth, for appellant.

District courts have the power to amend their records and to correct same to correspond to the actual facts. The original decree in this case was so amended by order of the court, before appeal and supersedeas bond, from the original judgment entered. The bond, therefore, had no effect upon the corrected decree. The appeal was from the decree erroneously entered, and not from the amended decree and judgment. Dedrick v. Charrier, 15 N. D. 515, 125 Am. St. Rep. 608, 108 N. W. 38.

The order fixing the supersedeas bond was void because of lack of notice to the adverse party, of application therefor. Rev. Codes 1905, § 7220, Comp. Laws 1913, § 7836.

Bangs, Netcher, & Hamilton and *W. J. Mayer*, for respondents.

There is but one judgment in this action, and it is from such judg-

ment that the appeal is taken. The court had the right to correct clerical mistakes in its records, and to make them show the judgment actually intended to be entered. 15 Enc. Pl. & Pr. 220.

So long as a judgment remains unexecuted, the court has the undoubted right to make or allow amendments to agree with the facts and with what was actually intended, and to make the judgment speak the truth. McClure v. Bruck, 43 Minn. 305, 45 N. W. 438.

The appellate court, on appeal, may correct the judgment, instead of reversing the case. The amended decree is only in effect, that the judgment—former judgment—be corrected to conform to the facts and to the intent of the court. There is but one judgment, and an appeal taken therefrom amounts to and is an appeal from that judgment, notwithstanding any amendment. 15 Enc. Pl. & Pr. 225, 228.

An interlocutory order, fixing the amount of supersedeas bond on appeal, is not subject to collateral attack. Notice of application for such order is not a condition precedent to jurisdiction. The action was pending. Comp. Laws 1913, § 7966; 15 Enc. Pl. & Pr. 317; 17 Am. & Eng. Enc. Law, 1041.

Supersedeas to stay execution is effective if filed and approved prior to sale thereunder. 20 Enc. Pl. & Pr. 1240, 1246; 17 Am. & Eng. Enc. Law, 1004, 1005.

BURKE, J. This is still another chapter in the litigation begun by Investors' Syndicate v. Letts, 22 N. D. 452, 134 N. W. 317, and continued in Beyer v. Investors' Syndicate Co. 31 N. D. 247, 153 N. W. 476, where a statement of facts appears. In 1912 Beyer brought an action to determine adverse claims involving the N.W.¼ of section 16, 139–94, and three other quarter sections in Stark county, North Dakota. This original complaint gave a correct description of the lands involved, but shortly thereafter an amended complaint was served in which this particular quarter was erroneously described as the S.E.¼ of the same section. Judgment was entered after trial, on August 26, 1913. Throughout the findings of fact and judgment this quarter is described both correctly and incorrectly,—both descriptions appearing in those papers. The judgment, however, contained the erroneous description. Execution issued in August, 1913, containing the wrong description for this quarter and the correct description for the other

three, and the sale was made thereunder. Shortly after the sale and on January 13, 1914, upon due application, the trial court corrected the findings of fact and judgment, and incidentally vacated the sale in so far as it affected this particular quarter. On the 29th of January, 1914, a new execution was issued upon the corrected judgment by which levy was made upon the proper land. After the levy, but before the sale, the Investors' Syndicate, the defendant in the action, determined to appeal, and applied to the court for an order fixing a supersedeas bond. The court fixed the bond at $300, and the same was executed, and the trial court ordered all further proceedings suspended, which order was served upon Beyer's attorney. It is conceded, however, that no notice of this application was given to Beyer, and there are several serious irregularities in the form of the bond itself. This lawsuit hinges upon the effect of the bond. If the said bond and the order of the trial court given thereon stayed further proceedings, this judgment should be affirmed. However, plaintiff believed the irregularities so serious that the bond itself amounted to a nullity, and ignored the order of the trial court suspending proceedings. The sale of the land was accordingly made on March 10, 1914, two weeks after the appeal to this court had been perfected. In September, 1914, the court, upon due notice, set aside the sale. This appeal is from such order. The original appeal reached this court and was affirmed June 4, 1915, the opinion being found at 31 N. D. 247, 153 N. W. 476.

Appellant insists that the supersedeas bond and the order of the trial court based thereon are nullities because the application to the trial court to fix the amount of the bond was made without notice to the adverse party, and, as he says, the supersedeas bond merely stayed the old, erroneous judgment, and did not apply to the amended and corrected judgment. Respondent, upon his part, contends that those were mere irregularities which could only have been attacked in the district court, and that the order of the trial court superseding all proceedings was made in the exercise of the discretion of the trial court, and cannot be successfully assailed in those proceedings.

(1) Taking up the first proposition, we inquire whether or not the interlocutory order of the trial judge, fixing the amount of supersedeas bond, is subject to attack at this time. Section 7828, Comp. Laws 1913, reads: "If the judgment appealed from directs the sale or delivery

of possession of real property, except in actions for foreclosure of mortgages, the execution of the same shall not be stayed, unless an undertaking is executed on the part of the appellant by at least two sureties in such sum as the court or presiding judge thereof shall direct, to the effect that during the possession of such property by the appellant he will not commit nor suffer to be committed any waste thereon, and that, if the judgment is affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof pursuant to the judgment." Section 7836, Comp. Laws 1913, provides that in undertakings required by this chapter where the sum or effect of an undertaking is required to be determined by the court, at least twenty-four hours' notice of the application thereof shall be given to the adverse party. It is conceded that this was not done in the case at bar. Section 7840, Comp. Laws 1913, reads: "When a party shall in good faith give notice of appeal and shall omit through mistake or accident to do any other act necessary to perfect the appeal to make it effectual or to stay proceedings, the court from which the appeal is taken or the presiding judge thereof or the supreme court, or any one of the justices thereof, may permit an amendment or the proper act to be done on such terms as may be just." This latter section has been upon our statute books since 1887 at least. It is at least an intimation of the legislative desire to do away with technicalities founded upon oversight and inadvertence. While it does not, of course, directly apply to supersedeas bonds, yet it is at least analogous. The undertaking on appeal and upon supersedeas may be, and frequently are, joined, and they were in fact joined in the case at bar. This court in Beddow v. Flage, 20 N. D. 66, 126 N. W. 97, held that the service of an undertaking on appeal upon the exact time specified by the statute was not jurisdictional, and was allowed to furnish a new undertaking. This court indulged in quite a lengthy discussion of this subject upon its merits, and committed itself to a liberal construction of said § 7840. See also Sucker State Drill Co. v. Brock, 18 N. D. 8, 118 N. W. 348. In the case at bar the order fixing the amount of the supersedeas was served upon Beyer, and he made no complaint, either of the size of the bond nor the failure of the notice. We believe the orderly conduct of litigation in the trial court requires an application to the trial court in such cases, rather than the ignoring of the order. The notice was not a jurisdictional requirement.

(2) Appellant further insists that the supersedeas bond, if held to be such, merely suspended the old, incorrect judgment, which ordered the sale of the wrong quarter section, and that, therefore, there was no appeal at all from the amended and correct order. We are unable to agree with this proposition. There could not be two orders of the trial court in existence at the same time. If the old order was merely corrected, it remained the order of the trial court. If a new and correct order was substituted for the old one, then it became the real order, and the old one was entirely superseded. The undertaking itself recites that appellant feels aggrieved by the judgment of the district court rendered and entered on the 26th of August, 1913. The order of the trial court merely recites that the "defendants . . . desiring to appeal from a judgment of the district court in the above-entitled action, and further desiring that judgment be stayed herein pending the final determination of such appeal, having made application to the court to specify and direct the sum for which such bond staying execution shall be executed, now, therefore, it is hereby ordered that the execution, service, and filing of an undertaking with surety to be approved by the clerk of the district court conditioned as in such cases it is by law provided, in a sum not less than $300, shall stay execution pending appeal herein." The order of the trial court allowing the correction in the description of the land recites: "Now, therefore, it is ordered that the amended complaint, findings of fact, and conclusions of law, judgment, and decree herein, be amended to conform to the true facts as to the description of said lands,—and that an amendatory decree be entered in accordance with the true description. The supplemental and amendatory decree provides "that there be inserted in said decree in lieu of the description of the S.W.¼, section 16, . . . the true description thereof, to wit, the N.W.¼ section 16. . . ."

Upon the whole record we believe and hold that the original decree stood as the decree of the court, with certain amendments thereinafter ordered, and that the appeal was taken from such order, and the supersedeas bond was given in aid of such appeal. It follows, therefore, that all further proceedings in the judgment were legally stayed, and the trial court was justified in setting aside a sale made in violation of such order. The judgment is affirmed.

MURRAY BROTHERS and Ward Land Company, a Corporation, v. CARROL L. BUTTLES, Ida M. Buttles, David R. Brockman, Alson Wells, and Kate Wells.

(156 N. W. 207.)

Vendor — vendee — special assessments — statutes — lien — drainage assessments — incorporated cities.

1. Chapter 35 of the Laws of 1903, which provides that "as between vendor and vendee, all special assessments upon real property for local improvements shall become and be a lien upon the real property upon which the same are assessed, from and after the 1st day of December, next after such assessments shall have been certified and returned to the county auditor, to the amount so certified and returned, and no more," is applicable to drainage assessments upon country property as well as to property which is benefited by local improvements within the limits of incorporated cities.

Terms of act — doubtful — legislature — intention — words — parts and provisions — construed as whole — statutes — pari materia — general law.

2. Where the terms of an act are doubtful, an attempt must be made to give effect to the intention of the legislature, and, in doing so, all parts, words, and provisions of the act must be examined and considered, and, if possible, all parts must be brought into a harmonious whole; and statutes which are *pari materia* should be considered, and an attempt made to harmonize the particular statute with such statutes and with the general law.

Statutes — system — relating to same class or subject — uniform application.

3. If statutes are a part of a general system relating to the same class or subject and rest upon the same reason, they should be construed, if possible, so as to be uniform in their application and in the results which they accomplish.

Lien of general taxes — drains — assessment of benefits — cities — outside of — bonds — pari materia statutes.

4. Section 2186 of the Compiled Laws of 1913, which provides that the lien of general taxes shall attach on the 1st day of December of each year; chapter 62 of the Laws of 1905, which provides for special assessments in case of city improvements, and §§ 2474 and 2475 of the Compiled Laws of 1913, which provide for the assessment of benefits in the case of drains outside of the limits of incorporated cities, and § 2494 of the Compiled Laws of 1913, which provides for the issuance of bonds in such cases,—are *pari materia*.

Statutes — repeal of — act — title of — scope of — incorporated cities — country property.

5. Section 193 of chapter 62 of the Laws of 1905 does not repeal chapter 35 of the Laws of 1903, being § 3743 of the Compiled Laws of 1913, in so

far as such section relates to country drainage assessments and to the liens thereof, since the title of said act of 1905 relates merely to incorporated cities, and country property is not mentioned or included thereon.

Opinion filed January 17, 1916.

Appeal from the District Court of Cass County, *Pollock*, J.

Action to determine the liens of country drainage assessments as between vendor and vendee. Judgment for defendants. Plaintiff appeals.

Affirmed.

F. G. Kneeland, for appellant.

Engerud, Holt, & Frame, for respondents.

BRUCE, J. This appeal involves a construction of chapter 35 of the Laws of 1903 (Comp. Laws 1913, § 3743), and its application to special assessments or special taxes for drains located in the body of the county and outside of the corporate limits of cities. The act in question reads as follows: "An Act to Provide for the Lien of Special Assessments as between Vendor and Vendee. Section 1, Special Assessments Shall Become a Lien, When. As between vendor and vendee all special assessments upon real property for local improvements shall become and be a lien upon the real property upon which the same are assessed, from and after the 1st day of December next, after such assessments shall have been certified and returned to the county auditor, to the amount so certified and returned, and no more. Section 2. Emergency. There being no law providing when special assessments shall become a lien on real property as between vendor and vendee, this act shall take effect and be in force after its passage and approval."

The trial court found as its conclusions of law that: "1. Chapter 35, Laws of 1903, is a general law and refers to local improvements outside as well as within an incorporated city. 2. That the attempted repeal in § 193, chapter 62, Laws of 1905, of all of chapter 35, Laws of 1903, is inoperative in so far as it applies to local improvements outside an incorporated city and in violation of § 61 of the Constitution. 3. That § 4986, Revised Codes of 1905, § 5531, Comp. Laws 1913, defining encumbrances, must be read in connection with the living provisions of chapter 35, Laws of 1903, which fixes the date when encum-

brances with reference to special assessments become a lien as between vendor and vendee as of December 1st. 4. That since there were no drain assessments due at the time the defendant sold the property in question, the unpaid and unmatured instalments of the assessments in question do not constitute a lien or encumbrance upon the property such as were covered by the general warranties found in the deed against encumbrances upon the land. 5. That defendants are entitled to judgment dismissing the plaintiff's action on its merits and for their costs and disbursements to be taxed by the clerk." Practically all of these conclusions are assailed by plaintiff and appellant.

Defendants and respondents contend that chapter 35 of the Laws of 1903 applies to drain taxes outside the limits of incorporated cities; that as to such drains it has never been repealed, and that it should be so interpreted as to make such taxes a lien as between vendor and vendee only as the successive instalments become due, that is, on the 1st of December of each year.

Plaintiff and appellant contends: (1) That the statute has been specifically repealed. (2) That it never had any application to drain assessments or taxes outside the limits of incorporated cities. (3) That if the statute has or had any application to drain taxes, it makes the total amount assessed a lien on December 1st, following the filing of the special tax list with the county auditor, which, in the case before us, would have been on December 1, 1908, regardless of when the instalments became due. Any one of these constructions will result in a reversal of the judgment.

It must be presumed that the act of 1903 was enacted with knowledge on the part of the legislature of the then existing law in relation to special taxes and assessments for drains and other local improvements. 36 Cyc. 1146; Endlich, Interpretation of Statutes, § 182.

Under the laws then existing (see §§ 2792, 2793, 2799, 2801, 2803, and 2804, Rev. Codes 1905, §§ 3717, 3718, 3724, 3726, 3728, and 3729, Comp. Laws 1913) the cost of local city improvements was assessed against the property thereby benefited by a special assessment committee. The assessment was reviewed by the city council, and the assessment list as finally determined was filed in the city auditor's office, and remained there. The total assessment was divided into instalments by the city auditor, payable annually, covering a period of years,

—for water mains, ten years; sewers, twenty years, etc. Each year when certifying to the county auditor the general city tax levy for that year, the city auditor also certified a list of lots assessed for local improvements, and extended against the description of each lot the part of the assessment against such lot falling due December 1st of such year, and no more. The county auditor then extended the amount falling due that year, and "so certified and returned" to him, upon the tax list, which he turned over to the county treasurer, and the collection of such special assessments was then made in the same manner as general taxes are collected. This is a procedure which is still in vogue even after the passage of chapter 62 of the Laws of 1905 (chap. 30, Rev. Codes 1905, chap. 44, Comp. Laws 1913), as § 180 of chap. 62 of the Laws of 1905 (§ 2818, Rev. Codes 1905, and § 3743, Comp. Laws 1913) is an exact copy of the 1903 statute, although § 193 of the act of 1905 expressly repealed chapter 35 of the Laws of 1903, which formerly contained this provision, also chapter 210 of the Laws of 1903, which related to water systems and special assessments therefor in incorporated cities, and chapter 123 of the Laws of 1899, and chapter 28 of the Political Code of the Revised Codes of 1899 (§§ 2108–2343 inclusive), and which related entirely to cities and the problems incident to the government and finances thereof.

Now and at the time of the passage of chapter 35 of the Laws of 1903 (Comp. Laws 1913, § 3743) the procedure in relation to assessments against lands which were benefited by drains and which lay outside of the limits of incorporated cities and villages is and was somewhat different. The procedure is outlined by §§ 1831, 1832, Rev. Codes 1905, and §§ 1457 and 1458, Rev. Codes 1899, which are now contained in §§ 2474 and 2475 of the Compiled Laws of 1913, and under which statutes the board of drain commissioners assesses these taxes against the lands benefited by the drains, and *files* a list of such taxes with the county auditor, who thereupon extends the same upon the tax lists, and collection is then made by the county treasurer. The statute (chap. 39 of the Laws of 1901, § 1849, Rev. Codes 1905, amended by chap. 93 of the Laws of 1907, § 2494, Comp. Laws 1913) provides also that the county commissioners may issue bonds for the cost of the drains for a period not exceeding fifteen years (as the law was in 1908), the time of payment, within certain limits, being left to their discretion.

When bonds are so issued (and they were issued in the case at bar) the total tax is not put on the tax list for one year as provided in § 1831, Rev. Codes 1905, § 2474, Comp. Laws 1913, but the matter is covered by an act which provides that "whenever such bonds shall be issued, the tax hereinbefore provided for shall not be collected all in one year, but shall be divided into as many parts as such bonds have years to run, and one of such parts shall be extended upon the tax lists by the county auditor against the proper parcels of land and property liable to taxation for that purpose . . . and collected in such year, and such fund shall constitute the sinking fund provided by this section." (chap. 39, Laws of 1901; § 1849, Rev. Codes 1905, amended by chap. 93 of the Laws of 1907; § 2494, Comp. Laws 1913.)

The argument of counsel for appellant is, then, that chapter 35 of the Laws of 1903 provides that "as between vendor and vendee all special assessments upon real property for local improvements shall become and be a lien upon the real property upon which the same are assessed from and after the 1st day of December, next, after such assessment shall have been *certified and returned* to the county auditor, to the amount so certified and returned, and no more," and that in the case of special taxes for drains there is no certification to the county auditor, the only act in the nature thereof being when the drain commissioners file their list with such auditor, showing the total amount which each tract of land is liable to pay on account of the drain. When this is done, counsel say, the drain commissioners are through, and there is no certifying to any-one of yearly instalments. The whole record is in the county auditor's office for the inspection of the public. If the county commissioners, however, issue bonds, the county auditor makes a record of their proceedings as one of the duties of his office. Without further direction from anyone, he must extend the yearly instalment year by year upon his books. For convenience, he may, of course, make a division if the total taxes into the yearly payments and enter the amount in a book, but there is no legal requirement to that effect. Counsel points out that as to city assessments, and on the 1st of December of each year, the records of the county auditor will show the amount then due and no more, and that that is the amount which, in the language of the 1903 act, has been "so certified and returned, and no more." The instalments not then returned, he says, are of record in the *city auditor's*

office, and a prospective purchaser has no means of ascertaining from the county auditor's office or any other county office whether there are any instalments of such assessments coming due in the future. On the other hand, he claims, and in relation to drainage assessments, that even if the filing of the list with the county auditor may be held to be a certification thereof, which counsel for appellant denies may be done, even then the tax or assessment certified is the whole amount shown by such list to lie against the property, and not the yearly instalments into which the tax is afterwards divided, representing the number of years the bonds have to run and which are extended upon the tax lists by the county auditor.

We think the distinction is at the most technical, and could never have been intended to be made. The act in question provides that the tax shall become a lien "from and after the 1st day of December next, after such assessments shall have been certified and returned, and no more." It is made to apply to "*all* special assessments upon real property for local improvements." In the case of assessments for county drains, and when bonds are issued, the tax or main assessment is divided into equal portions which are to be collected each year. The only difference in procedure between city and county improvements lies in the fact that in the case of city assessments, except in cities of under 2,000 inhabitants where the city council orders otherwise (see Rev. Codes 1905, § 2804, Comp. Laws 1913, § 3729), the record of the assessments is kept in the office of the *city* auditor, and that official certifies each year to the *county* auditor the portion of the assessment falling due that year, such certification apparently being necessary because the county auditor has no other source of official information, while in the case of county drainage assessments, the record of the assessments is filed in the office of the *county* auditor by the drainage board as soon as the assessment is completed and the drainage board has no other duties in respect to placing these assessments upon the tax list. To state the case in another way, in the case of city assessments, the *county* auditor, in extending the assessments on the tax lists, acts on the information furnished him year by year by the *city* auditor, while in county drainage assessments he acts upon information furnished him *once for all* by the *drainage board* and kept on file in his own office; but this distinction, except perhaps such as may be based upon the use of the word

"certify" in connection with the return of the city auditor (see Comp. Laws 1913, § 3729), and the word "file" used in connection with the return of the drainage board (Comp. Laws 1913, § 2474), disappears when the auditor of a city of less than 2,000 inhabitants certifies to the county auditor the assessment as a whole; for here, as in the case of country drainage assessments, the *county* auditor each year looks to his own records and files to determine the portion of the assessment to be extended upon the tax list for that year. Comp. Laws 1913, § 3729. The question is, Do the words, "certify and return," which are used in the act of 1903, under examination cover cases where the total tax or assessment is *filed* with the county auditor?

If chapter 36 of the Laws of 1903 is doubtful, the rule is well established that an attempt must be made to give effect to the intention of the legislature. State ex rel. Erickson v. Burr, 16 N. D. 581, 113 N. W. 705; State ex rel. Flaherty v. Hanson, 16 N. D. 347, 113 N. W. 371; Vermont Loan & T. Co. v. Whited, 2 N. D. 99, 49 N. W. 318. We think few would deny that the act either certainly applies to county drainage assessments or else is doubtful.

There is no essential difference as far as the property owner is concerned between a general tax and a special assessment, and there is no essential difference between a special assessment for improvements within an incorporated city and a special assessment for drains which are constructed outside of the limits thereof. Each is an exercise of the taxing power, and, except as to the area covered, the limitation of the amount to the benefits conferred and the collection of interest and penalties, has the same characteristics as any general property tax. See Rolph v. Fargo, 7 N. D. 647, 42 L.R.A. 646, 76 N. W. 242; State ex rel. Moore v. Furstenau, 20 N. D. 540, 129 N. W. 81; Hackney v. Elliott, 23 N. D. 373, 137 N. W. 433; State ex rel. Viking Twp. v. Mikkelson, 24 N. D. 175, 139 N. W. 525.

Such being the case, it is certainly a matter of public convenience that there should be uniformity as to the collection and liens of all of these taxes, and there can be no doubt that it was the intention of the legislature that this should be the case. It certainly cannot have been the intention of the legislature that a vendor of real estate upon which a city special assessment has been levied should not be liable for more than one year's instalment of that assessment, and that a vendor of

farm lands which has been assessed for the construction of a drain for which bonds have been issued, and which is to be paid for in yearly instalments, and the vendor of city property in cities of less than 2,000 inhabitants where the entire assessment has been certified to the county auditor at one time, would be liable for the whole assessment. Why, we ask, should a distinction be made between cities of less than 2,000 inhabitants and cities of more, or between city property and farm lands? We do not believe that the legislature has evidenced any such intention. The general taxes become a lien upon real property upon the 1st day of December of each year. Comp. Laws 1913, § 2186. Why should not special assessments become so also?

The rules for arriving at the legislative intention are well established. All parts, words, and provisions of the act must be examined and considered, and, if possible, all parts must be brought into a harmonious whole; and it is the duty of the courts to, "if possible, give effect to the manifest intent of the legislature, as disclosed by the provisions of the whole act, although in doing so it becomes necessary to disregard the strict letter of the law in some of its provisions. State ex rel. Flaherty v. Hanson, and Vermont Loan & T. Co. v. Whithed, supra; Henry v. Perry Twp. 48 Ohio St. 671, 30 N. E. 1122.

The title of the act may be considered as a means for arriving at that intention. McKenzie v. Mandan, 27 N. D. 546, 147 N. W. 808. Not only this, but the policy which is announced in statutes which are *pari materia* should be considered, and an attempt made to harmonize the particular statute with the general law. Vermont Loan & T. Co. v. Whithed, supra; Sutherland Stat. Constr. 316. If "statutes are parts of a general system relating to the same class of subjects, and rest upon the same reasons, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish." Sheldon v. Boston & A. R. Co. 172 Mass. 180, 51 N. E. 1078. Courts will be astute to read the law in such a way as to give a uniform and harmonious body of law upon the subjects with which the various statutes deal. People ex rel. Wood v. Lacombe, 99 N. Y. 50, 1 N. E. 599.

These rules are general and well established, and they have been uniformly applied in relation to statutes which deal with the subject of taxation, where, perhaps, more than in any other classes of cases the state is interested in uniformity. See United States v. Collier, 3

Blatchf. 325, Fed. Cas. No. 14,833; Kansas P. R. Co. v. Wyandotte County, 16 Kan. 587; Burke v. Monroe County, 77 Ill. 610; Hannibal & St. J. R. Co. v. Shacklett, 30 Mo. 550.

If we apply these rules of construction to the statute before us, we have no question that the words, "special assessment," which are used in § 1 and in the title of chapter 35 of the Laws of 1903, were intended to cover country drainage as well as city special assessments; that the word "certified," which is therein used, was intended to include "filed" under the circumstances under which the list of drainage assessment taxes are filed with the county auditor; and that when in that act it says that, "from and after the 1st day of December next, after such assessments have been certified and returned to the county auditor to the amount so certified, and no more," there shall be a lien, etc., it does not mean the full amount of the drainage taxes when bonds are issued, but only the part due each year. It is a mistake, indeed, to say that in such cases there is no certification. In the case of city assessments, the city auditor, it is true, certifies to the county auditor each year only the assessment or tax to be paid that year, and keeps within his own records the data on which the future assessments must be certified. But the office of the city auditor is a permanent office with permanent records, while that of a county drainage commission is not, and it is but natural that, in the latter case, a slightly different procedure should be adopted. Though the procedure is different, there is a certification none the less. The drainage board certifies to the county auditor the assessment as a whole, and it does this knowing that it is its duty to divide it into as many parts as there are years to the life of the bonds which are issued, and to see to the yearly collection of such parts. In effect and in all practical common sense the drainage board certifies to the county auditor the total tax or assessment divided into the number of years that the bonds are to run; and it is no straining of language to say that when it certifies to the assessment and files it with the county auditor with all of the records of its office relating thereto, and of which thereafter he is to be the sole custodian, that it practically certifies to the auditor the amounts which are to be yearly collected. It is perfectly clear to us, also, that if we construe the words, "special assessment," where they occur both in the title and in the body of chapter 35 of the Laws of 1903, to apply to county drainage taxes and assessments, and to assess-

ments that are levied in the incorporated cities for local improvements, we are not giving any unusual meaning to the words which are used. The terms, "special taxes" and "special assessments," indeed, have been quite generally interchanged; and it is to be remembered that the statute in question says *all* special assessments, and does not limit the term in any way. Special assessments, indeed, are merely special taxes. Rolph v. Fargo, 7 N. D. 647, 42 L.R.A. 646, 76 N. W. 242.

Section 3728 of the Complied Laws of 1913 says that *special assessments* shall be and remain a paramount lien on the property benefited, and have a priority over all liens except *ordinary* taxes. Surely the term "special assessments" as used in this section must include county drainage taxes or assessments as well as urban. If so construed in this section, why should it not be so construed in the section that is before us?

We think that few can doubt that it has been the purpose of the legislature that the lien of taxes shall be as uniform as possible. Section 2186, Comp. Laws 1913, provides that the lien of general taxes shall attach on the 1st day of December of each year. This statute, and those providing for the liens of special assessments both for urban and country improvements, are, we believe, all *pari materia,* and must be construed together, and as promotive of and declaratory of a common and harmonious purpose. We do not believe that it could ever have been the intention of the legislature that, as between vendor and vendee, the vendee of city property should take such property subject to the general tax lien and special assessment liens from and after December 1st, but that the vendee of country property should hold such property subject to the general tax lien, but free and protected under the general covenants of the deed from the liens of all special assessments for drains, which would be the case if we either hold that chapter 35 of the Laws of 1903 was not, in any event and in the first instance, intended to be applicable to country drainage assessments, or that it had been repealed in so far as the county assessments were concerned by the repealing clause in the city and villages act. Neither do we believe that it was the intention of the legislature that the vendor of country property should, in such a case, be liable during the first year, and under the general covenants of his deed, for the total amount of the assessment where bonds had been issued and the payment of the same spread over a series of years.

If once we concede, as we must, that chapter 35 of the Laws of 1903 was originally intended to apply to country drainage assessments as well as to those for city improvements, we have no hesitation in answering in the negative appellant's contention that the same was repealed by § 193 of chapter 62 of the Laws of 1905. This act, it is true, recopied chapter 35 of the Laws of 1903, and incorporated it within itself, and having done this, repealed chapter 35 of the Laws of 1903 as being no longer necessary. This repeal, however, must be construed to repeal the chapter only in so far as the matter was covered by chapter 62 of the Laws of 1905, that is to say, in so far as it was applicable to cities. Any other construction, indeed, would make the repealing statute altogether unconstitutional, as if applicable to country drains, the subject-matter is in no way foreshadowed by the title. The title of the act is: "An Act for the Organization and Government of Cities and to Provide for the Limitation of Actions to Vacate Special Assessments Heretofore Made." We hold that § 193 of chapter 62 of the Laws of 1905 is unconstitutional in so far as it repeals chapter 35 of the Laws of 1903. This construction, however, in no way affects the act as far as cities are concerned, as chapter 35 of the Laws of 1903 is re-enacted in the act of 1905.

The judgment of the District Court is affirmed.

EDWARD W. EMERY v. FIRST NATIONAL BANK OF BOWBELLS and A. C. Wiper.

(156 N. W. 105.)

Conveyance — action to set aside — suit in equity — jury — Newman act — statutes — appeal — supreme court — review — errors.

1. Where, in a suit in equity to set aside a conveyance of land, a jury is requested and certain issues are submitted to it for determination, the provisions of § 7846 of the Compiled Laws of 1913, being the so-called Newman act, do not apply, and upon appeal the supreme court will not try the case anew, but will sit as a court of review for the correction of errors merely.

Conveyance — suit in equity — to set aside — undue influence — jury — ratification — trial court — dismissal of jury — findings — conclusions.

2. Where, in a suit in equity to set aside a conveyance of land, a jury is

requested for the trial of certain issues, and there is merely submitted to such jury the question whether undue influence was exerted upon the plaintiff to induce him to execute the deed in controversy and at the time of its execution, but it transpires upon the trial, and the proof is positive and uncontradicted that subsequently to the time of such execution the plaintiff fully ratified the same and under circumstances where no duress or undue influence could exist, it is not error for the trial judge to dismiss the jury without listening to its verdict on the issue submitted to it, and to make findings of fact and conclusions of law, and to himself determine the case on the issue of ratification, which was reserved to himself, and not so submitted.

Discretion of court — trial judge — pleadings — amendment of — mental incompetency — other and different issues.

3. It is not an abuse of discretion for a trial judge to refuse to allow an amendment to the pleadings setting up a claim of mental incompetency after the plaintiff has closed his case and such plaintiff has allowed the case to be tried for a number of days upon other and different issues.

Opinion filed February 4, 1916.

Appeal from the District Court of Ward County, *F. E. Fisk,* Special Judge.

Action to set aside a deed to real estate and a bill of sale of personal property. Judgment for defendant. Plaintiff appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an action to set aside a deed to real estate and a bill of sale of personal property executed by the plaintiff to the defendant, A. C. Wiper, the cashier of the defendant bank, the First National Bank of Bowbells. The reason given in the complaint is that "the plaintiff herein is not strong physically, and, under the severe strain necessarily imposed by the demands of the defendants and their threats to settle their claims, he was not mentally responsible for his actions; that said defendants took advantage of their confidential relations with him, and his distress and physical and mental condition, and induced this plaintiff to execute conveyances of all of his property to them." It is also alleged in the complaint "that the reasonable value of plaintiff's real estate heretofore described, and consisting of 380 acres of land is, at the present time, $25 per acre without improvements; that

the improvements on said land, consisting of a seven-room, two-story house, two large barns, and fencing around all of the divisions of such farm, are worth $3,500 to $5,000." This would make a total of $14,-500, or about $31 an acre. The testimony varies from $20 to $50 an acre. According to the testimony, as we view it, the plaintiff on the 14th day of December, 1911, was the owner of 380 acres of farm lands located within a mile of the center of the business part of the town of Bowbells, in Burke county, North Dakota. He was also the owner of some 13 or 18 head of horses and colts and of a considerable amount of farm machinery and appliances. Upon the farm there existed a first mortgage for $5,000. At that time he was also indebted to the First National Bank of Bowbells in the sum of $2,700, for which sum the bank held a mortgage upon his personal property. He also appears to have been owing some $3,000 for back taxes and to his general creditors. He was a single man, having secured a divorce from his wife some years before, and had living with him on the farm two young children. He was forty-eight years of age. He had come from Canada in 1906, and had brought with him several thousand dollars which he had invested in the farm and in his farming operations at Bowbells. A few days prior to December 14, 1911, and before the execution of the deed and bill of sale in question, the defendant bank seized the personal property of the plaintiff under its chattel mortgages, and, at the time of the execution of such deed and bill of sale, notices of foreclosure were in the hands of the printer for publication. It appears, however, that before such seizure and before the execution of the said instruments, the said Emery had consulted a member of the firm now representing the plaintiff, and that such lawyer had gone with him to the bank to see the defendant Wiper, and had asked for a statement of the accounts between the parties, which the said Wiper agreed to furnish him the next day; that before furnishing such statement, however, Mr. Wiper sent for the plaintiff, and after a meeting at the bank, which occupied some hours and which was held in the night of December the 14th, the plaintiff executed the deed and bill of sale in question, and later fully ratified the same. The evidence of this ratification will be found in the opinion. Later the plaintiff brought the present action to set aside the conveyances. The consideration for the said deeds and bill of sale appears to have been a certificate of deposit for $900, which was tendered in court

and offered to be returned on the trial, three cows at the agreed price of $100; an oral agreement to pay the outstanding debts and past-due taxes of the plaintiff, amounting to about $3,000; the assumption of the $5,000 mortgage upon the farm, and the extinguishment of the claims of the bank which were secured by chattel mortgages and which amounted to about $2,700. This amounted in all to about $11,900, or, exclusive of the chattel mortgage debts, to $9,200. It is proved that 1910 and 1911 were dry years and that poor crops were raised.

On November 16, 1912, and about sixty days before the trial began, the presiding judge of the district court of Ward county, at the request of the plaintiff, made an order that seven certain questions and "such other questions as might be deemed proper" should be submitted to a jury and answered upon the trial. These original seven questions were as follows:

First: Was the plaintiff induced by the defendants, or either of them, to execute and deliver the deed and bills of sale referred to in ¶ 6 of the complaint, by the deceit or misrepresentation of facts by the defendants, or either of them, and on which the plaintiff relied?

Second: If your answer to the foregoing question is "Yes," then state whether such deceit was practised or misrepresentation was made by one or both of said defendants, and, if only one, specify which.

Third: If your answer to the first question is "Yes," then was such deceit practised, or were such misrepresentations made, with the intent to cheat or defraud the plaintiff?

Fourth: Did the defendants, or either of them, make use of their confidential relations with the plaintiff, or take oppressive or unfair advantage of the plaintiff's necessities or distress to induce him to execute and deliver such deed and bill of sale?

Fifth: If your answer is "Yes," to the last question above, then state whether such conduct was that of both the defendants or of only one, and, if by one only, state which.

Sixth: Was the plaintiff induced to execute and deliver such deed and bill of sale by threats of the defendants, or either of them, of injury to the person or property of the plaintiff?

Seventh: If "Yes," is your answer to the last question, state whether such threats were made by both said defendants, or only by one, and, if by one only, state which.

Later and on the trial, the Honorable Frank E. Fisk, who had been called in to try the case in the place of the presiding judge of the district, refused a request of the plaintiff to submit certain additional questions to the jury, and which questions related entirely and exclusively to the value of the land and of the personal property which was seized under the chattel mortgage.

In refusing to submit these questions, the court said: "I think under that order we have a right, as far as that is concerned, to submit additional questions, but I do not believe that these questions are proper as to value. Of course, the jury, in determining the question of fraud, will have a right to consider in their own minds whether it was an equitable deal between the parties, but I do not believe it is proper to have them bring in a verdict finding the value, because that is a matter for the court, and an accounting of the court determines that. As far as their taking that into consideration, the question of fraud, they will do that anyway, and I will deny the motion." To this ruling the plaintiff excepted. Counsel for plaintiff later, and at the close of his case, asks to have the following interrogatory submitted:

"Nine: At the time of the making, execution, and delivery of the deed and bill of sale whereby the plaintiff conveyed to the defendant Wiper the real and personal property described in the complaint, was his mental capacity such as to make him incompetent to transact the business involving the execution and delivery of such conveyances?"

This offer was objected to "on the grounds set forth in prior objections, and on the further ground that the same was not admissible under the pleadings as shown and set forth in ¶ 8 of plaintiff's complaint, reading as follows: "That the plaintiff herein is not strong physically, and, under the severe strain of necessity imposed by the demands of the defendants, and their threats to settle their claims, he was not mentally responsible for his actions; that said defendants took advantage of their confidential relations with him, and his distress and physical and mental condition, to induce this plaintiff to execute conveyances of all of his property to them." The motion of the plaintiff for the submission of the questions was then overruled and an exception taken. A motion was then made by the defendant for a dismissal of the action on the ground "and for the reason that plaintiff has failed to substantiate the allegations of the complaint by proof which is clear and con-

vincing, and which is sufficient to leave in the mind of the court no hesitancy in setting the same aside and declaring them null and void, and failed in every particular to prove such allegations." This motion was in turn overruled. All of these latter motions were made at the close of the plaintiff's case.

Shortly thereafter, and after the examination of one of the witnesses for the defendant, the plaintiff asked leave to amend the complaint so that the first line of ¶ 8 would read as follows: "At the time of the transaction herein referred to, the plaintiff was not strong physically or mentally," and which amendment would have made the paragraph as a whole read: "That at the time of the transactions herein referred to plaintiff was not strong physically or mentally, and, under the severe strain of necessity imposed by the demands of the defendants, and their threats to settle their claims, he was not mentally responsible for his actions; that said defendants took advantage of their confidential relations with him, and his distress and physical and mental condition, to induce this plaintiff to execute conveyances of all of his property to them." This amendment was objected to on the ground that "the amendment entirely changes the issues in this case, and raises new issues which the defendants are not ready to meet, the same comes as a surprise at this time to the defendants, the trial of this action having commenced in this court on the 7th day of January of this month, having been consumed in the taking of testimony on the original pleadings, and the defendants having been prepared to meet the allegations as contained in the original pleadings, and are not at this time ready to meet the allegations as they would stand in the amendment, and could not be prepared to meet the same for some little time, and in the event said amendment is allowed, the defendants would ask that the jury be dismissed and discharged, and a continuance granted said defendants, and the case set for hearing at some future date, and the costs of the present trial taxed to the plaintiff." The motion was then denied and the amendment disallowed. At the close of the trial plaintiff again asked to amend the complaint, the amendment asked being substantially the same as before, but being in the words: "That at the time of and during the negotiations leading up to the execution of the deeds and bill of sale referred to, the plaintiff herein was not strong physically or mentally, and that, under the severe strain of necessity imposed by the demands

of the defendant and their threats to enforce their claim, he was not mentally responsible for his actions; that such defendants took advantage of their confidential relations with him, and his distress and physical and mental condition, to induce this plaintiff to execute the conveyances of all of his property to them." This motion was denied. The defendant then moved that the jury be discharged, and that the court dismiss the action and enter judgment in favor of the defendant upon the ground and for the reason "that the plaintiff has failed to substantiate any and all of the allegations of his complaint, and that there is at this time no testimony or proof before the court of a sufficient nature to base a judgment upon in favor of the plaintiff and sustain any allegations of the complaint, or instruct the jury to answer any and all interrogatories submitted to them in this case in favor of the defendant in this action, and that said action be dismissed." The court then said: "I will grant the motion, and the jury will be dismissed, and the case will be dismissed." Counsel for plaintiff then excepted to this ruling.

Thereupon the trial judge made his findings of fact and conclusions of law, the findings of fact being to the effect that the value of the real estate was $13,000; that the indebtedness to the defendant bank was $10,500; *that immediately subsequent to December 14, 1911,* the plaintiff ratified the agreement; that no confidential relations existed between the parties; that at the time of entering into the agreement the plaintiff was not weak mentally, but knew and understood the nature of his every act in connection therewith, and entered into the transaction of his own free will, and that his acts in entering into the same were not caused or brought about by fraud or duress or threats. A judgment was accordingly entered dismissing the action and confirming the title of A. C. Wiper in the real estate and the personal property. From this judgment the present appeal has been taken, and errors have been specified.

Palda, Aaker, & Greene, for appellant.

In an equity action, where a jury is called in to try certain specified issues of fact, the general rule is that the verdict is merely advisory. But it would seem that the rule would be different here, where the procedure is to receive all the evidence offered, and where a trial *de novo*

may be had in the supreme court. Reed v. Cline, 9 Gratt. 136; Baker v. Williamson, 2 Pa. St. 116; Adams, Eq. 376, note 1; McDaniel v. Marygold, 2 Iowa, 500, 65 Am. Dec. 786; Learned v. Tillotson, 97 N. Y. 1, 49 Am. Rep. 508.

The verdict of the jury in such a case may be used, followed, or abandoned, in the judicial discretion of the court. Miller v. Wills, 95 Va. 337, 28 S. E. 337; Peckham v. Armstrong, 20 R. I. 539, 40 Atl. 419; 16 Cyc. 423–426; Beach, Eq. Jur. 125.

"Any relation may be deemed confidential arising from nature or granted by law, or resulting from contract, where one party is so situated as to exercise a controlling influence over the conduct and interests of another, or where the law requires the utmost good faith." People ex rel. Crunney v. Palmer, 152 N. Y. 217, 46 N. E. 328; Robins v. Hope, 57 Cal. 493; Brown v. Mercantile Trust & D. Co. 87 Md. 377, 40 Atl. 256.

D. C. Greenleaf, Bradford & Nash, and *Francis J. Murphy,* for respondents.

Duress, menace, and undue influence must be shown by evidence of the clearest and most satisfactory character, before the deed will be set aside. Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454.

It must clearly appear that the deed would not have been given excepting for the threats and undue influence. McGuin v. Lee, 10 N. D. 160, 86 N. W. 714.

In suits in equity the verdict of a jury is merely advisory on the question submitted, and therefore is subject to the control of the court. Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012.

The plaintiff's original complaint is a direct charge that defendants brought about the mental condition of the plaintiff, and defendants prepared their defense along those lines. His general mental condition was not in issue, and no preparation was made to meet such issue, and no amendment covering same was sought or asked until after nine days' continuous trial. The motion to so amend was properly denied. Wood v. Pehrsson, 21 N. D. 357, 130 N. W. 1010.

Bruce, J. (after stating the facts as above). According to the brief of appellant, his discussion is limited to the following points:

1. Had the trial court the right upon the record in this case to dis-

charge the jury and make the findings of fact and the order dismissing the action?

2. The insufficiency of the evidence to sustain the three vital findings of fact; namely, the second, fourth, and fifth.

3. The error of the court in refusing the plaintiff's application to amend his complaint.

The first question that presents itself is whether an equitable action to set aside a deed, and in which a jury is summoned, comes within the provisions of the Newman act so that a trial *de novo* can be had in this court.

In passing upon this question this court in the case of Peckham v. Van Bergen, 8 N. D. 595–597, 80 N. W. 759, said: "The question is this, whether § 5630 of the Revised Codes, § 6193, Comp. Laws 1913 [being the Newman act] as amended by chapter 5 of the Laws of 1897 governs the procedure in the district court and in this court in an equity case wherein the trial court calls a jury to its aid for advisory purposes. It is our opinion that said statutes do not govern in such cases. That the district court may, at its discretion, call in a jury for an advisory verdict in an equity case is entirely clear. This is the old and well-established practice in courts of equity, and this practice is clearly recognized in the Code of Civil Procedure, Revised Codes, § 5420. But when this course is adopted in the trial of equity cases, the practice which regulates such trials—the same not being governed by statutory provisions—must be sought for in elementary treatises, and in the decisions of the courts. In the absence of controlling statutory provisions, the ordinary rules of evidence would be applicable in such cases, and would govern in the elicitation of the evidence; and upon appeal this court would not try the case anew, but would sit as a court of review for the correction of errors, as was the practice here in all cases prior to the enactment of the statute found in chapter 83 of the Laws of 1893, popularly known as the 'Newman Law.'" This case seems to be conclusive upon the matter before us, and to limit our investigation to errors of law and to errors of law alone.

The next point is whether a jury having been summoned and questions submitted to it, it was within the power of the court to discharge that jury and to withdraw the questions from it, and this point is presented in two ways by counsel for appellant. He first contends that

the verdict of the jury upon the questions of fact submitted would, if rendered, have been as conclusive upon the court as a finding of fact of a jury in a common-law action, and that it was therefore error not to wait for and to listen to them. He then states that, even if this is not so and the jury in such cases merely acts in an advisory capacity, the court cannot pass upon the questions of fact himself without having first listened to and had the advice of the jury, and that the advice of the jury is, as it were, in the nature of expert evidence in the case.

These propositions seem also to have been considered in the case of Peckham v. Van Bergen, supra. On page 599 the court says: "Nor does the fact that a jury in this case was called in an advisory capacity militate against the construction we have given this statute. The terms of the statute confine its operation to all cases tried in the district court 'without a jury.' It is true that the verdict of a jury is not binding upon the court in equity cases. The trial court is vested with a discretion to vacate such verdict in whole or in part, but *this does not alter the fact that such verdicts are entitled to receive grave consideration at the hands of trial courts.* Juries are not called, even in equity cases, as a mere formality; and their findings are seldom disregarded by courts of chancery, *unless the same are clearly wrong.* Experience has shown that, for the trial of many questions of fact, an average jury is the best of all tribunals. It is for this reason that courts of equity have always been clothed with a discretion to call a jury to their aid in determining mere questions of fact; and, in our judgment, it is quite as important in an equity case as in a law case to exclude from the consideration of juries composed of laymen all evidence which is inadmissible under the established rules of evidence."

This case seems to establish two propositions: One, that the verdict of the jury is merely advisory, and the other, that the verdict of the jury should be listened to and given its weight. We do not infer that this court meant to state that such verdicts should always be controlling. In fact, nowhere in the authorities do we find any such rule except in cases which were handed down under the ancient practice. The most extreme limit of the rule that we can find being that if, after the receipt of the verdict, the chancellor was still in doubt, or his mind still oscillated *as to the question so* submitted, his doubt should be resolved in favor of the verdict. See McDaniel v. Marygold, 2 Iowa, 500, 65 Am. Dec. 786.

The cases, indeed, are innumerable which hold that in an equity case, and even where questions of fact are submitted to the jury, the mind to be convinced is, after all, the mind, not of the jury, but of the chancellor, and that the suits none the less partake of the nature of suits in equity. Re Hudson, — Minn. —, 155 N. W. 393; Bethany Hospital Co. v. Philippi, 82 Kan. 64, 30 L.R.A.(N.S.) 194, 107 Pac. 530; 38 Cyc. 1936; Watson v. Borah, 37 Okla. 357, 132 Pac. 347; Re Peck, 87 Vt. 194, 88 Atl. 568; Avery Mfg. Co. v. Crumb, 14 N. D. 57, 63, 103 N. W. 410.

Although, too, there is a conflict of authority as to whether, after issues have once been submitted to a jury, that submission may be withdrawn and the cause thereafter be tried by the court alone; that is to say, whether the court may withdraw these issues and questions, and pass upon the questions submitted, without first listening to and having his conscience made acquainted with that verdict; and this court has held that where a verdict is actually received it should be duly considered, and that, after it has been received, the court has no power to order further evidence, or to have his conscience affected by evidence which was not presented to the jury upon the questions submitted to them. Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 759. There can be no dispute that in a suit in equity to cancel or set aside a deed, the conscience or the mind that is ultimately to be affected and to which the proof must appear clear and convincing is the mind of the chancellor. It follows, therefore, that if, during the course of the trial, it becomes evident to the chancellor that the questions submitted are outside of the real issues of the case or are not controlling, he may withdraw the submission of the same, and can decide the case on the issues, retained exclusively by him and which are controlling. He, under the established principles of equity practice and under the provisions of our Code, has the ultimate power to set aside or modify the verdict, when once received, even though he should carefully consider it. He must, therefore, have the power to refuse to consider it at all when its determination would have no effect, one way or another, on the final issues in the case. Kohn v. McNulta, 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298; Perege v. Dodge, 163 U. S. 160, 41 L. ed. 113, 16 Sup. Ct. Rep. 971, 18 Mor. Min. Rep. 364; 7 Enc. U. S. Sup. Ct. Rep. 756.

Section 7608 of the Compiled Laws of 1913 provides that "an issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial is waived as provided in § 7637, or a reference is ordered as provided in §§ 7645 and 7646. Every other issue is triable by the court, which, however, may order the whole issue or any specific question of fact involved therein to be tried by a jury or by a referee as provided in §§ 7645 and 7646." Section 7645 provides: "All or any of the issues in an action whether of fact or law or both may be referred by the court or judge thereof upon the written consent of the parties," etc., and this section relates merely to references and to referees. Section 7646 provides: "When the parties do not consent to the reference the court may upon the application of either party or of its own motion direct a reference in the following cases: [1 and 2, generally in cases where an accounting is necessary]. 3. When a question of fact other than upon the pleadings shall arise upon motion or otherwise in any stage of the action."

One cannot read § 7608 in conjunction with §§ 7645 and 7646, to which it refers, without being firmly convinced that a reference, whether to a jury or to a referee, is, in North Dakota, a matter which is entirely within the discretion of the trial judge. It is worthy of notice, indeed, that in § 7608 the statute expressly states that an issue of fact in an action for the recovery of money only, or of specific real or personal property, *must* be tried by a jury unless a jury trial is waived, but when it comes to other issues it expressly provides that "every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury or by a referee, as provided in §§ 7645 and 7646." The words "must" and "may" are antithesized. They must be held to have been advisedly used, and it is perfectly clear to us that the statute in equitable actions merely intended to re-enact the well-established law which allowed the chancellor in such a case, if he saw fit, but only if he saw fit, and in the exercise of his sound discretion, to submit any or all of the issues to a jury for an advisory verdict thereon. In the states where the procedure is unaffected by statute and is such as prevails under the ancient law, there has never been any pretense that a reference to a jury of an issue in an equitable case was a matter of constitu-

tional right. Thomas v. Ryan, 24 S. D. 71, 123 N. W. 68; De Graff v. Manz, 251 Ill. 531, 96 N. E. 516; 38 Cyc. 1936, and cases cited; Hogan v. Leeper, 37 Okla. 655, 47 L.R.A.(N.S.) 475, 133 Pac. 190; Bethany Hospital Co. v. Philippi, 82 Kan. 64, 30 L.R.A.(N.S.) 194, 107 Pac. 530.

There is nothing in our Constitution which leads us to any such inference, and the statute (Comp. Laws 1913, § 7608) clearly leaves the matter within the discretion of the trial judge.

It is perfectly true that we have held that where an issue is once referred to a jury, the verdict of the jury is entitled to receive grave consideration at the hands of the trial court. Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 759. We have never held, however, that where, during the course of a trial, it becomes apparent that an issue of fact which has not been submitted to the jury and a request for the submission of which has not even been made, in controlling in the case, the mere fact that other facts or issues have been submitted, takes away from the chancellor his inherent powers, and that he cannot decide the case on this issue without waiting for and considering the verdict of the jury and when that verdict would not have affected that issue, no matter in whose favor it had been rendered. Sanders v. Simcich, 65 Cal. 50, 2 Pac. 741.

Such is the state of the issues and of the record in the case at bar. The questions which were submitted to the jury relate purely to the execution of the deed and bill of sale *on the 14th day of December, 1911,* and are illustrated by the first question, which reads: "Was the plaintiff induced by the defendants or either of them to execute and deliver the deed and bill of sale referred to in ¶ 6 of the complaint, by the deceit or misrepresentation of facts by the defendants or either of them, and on which the plaintiff relied?" and the fourth, which reads: "Did the defendants or either of them make use of their confidential relations with the plaintiff or take oppressive or unfair advantage of the plaintiff's necessities or distress to induce him to execute and deliver such deed and bill of sale?" and the sixth, which reads: "Was the plaintiff induced to execute and deliver such deed and bill of sale by threats of the defendants or either of them, of injury to the person or property of the plaintiff?" Even the additional question subsequently requested, the submission of which was refused as it did not appear

to the court to be covered by the pleadings, was to the same effect, and covered the same point and the same transaction. It was: "9. *At the time of the making and execution and delivery of the deed and bill of sale* whereby the plaintiff conveyed to the defendant Wiper the real and personal property described in the complaint, was his mental capacity such as to make him incompetent to transact the business involving the execution and delivery of such instruments?"

If this later question proposed to amend the pleadings, and was intended to raise the new contention that the plaintiff was insane or generally feeble-minded so as to be generally incapable of executing contracts, there was, of course, no error committed in refusing its submission, as well as the requested amendment to the pleadings on which it was sought to be based. The amendment to the pleadings was not asked until after the trial had proceeded for several days, and after the conclusion of the plaintiff's case, and it can hardly be said that it was an abuse of discretion to refuse to allow such an amendment at such a time.

The plaintiff, however, does not pretend any such thing, and the record before us negatives any such intention. We have no evidence of the appointment of a guardian or conservator, and the suit at bar is not even brought by a guardian *ad litem* or by a next friend. It is brought by the plaintiff himself, and by attorneys employed by him, and the deed is sought to be set aside almost entirely upon his own testimony. If he is mentally incompetent to make any contract, it is difficult to see how he could make any valid contract of employment even with his attorney. The case, indeed, is brought on the theory and on the theory alone (and we are now quoting from the language of counsel himself, in his brief on the rehearing), "that is to say, on the theory that the plaintiff, *though not insane or generally contractually incompetent,* was a weak man and liable to be easily influenced, and that the defendant Wiper *on the 14th day of December, 1911,* overpowered his will be inducing him to sign a deed and bill of sale in the absence of his counsel, when he was harassed by the fact that the bank has seized his personal property under its chattel mortgage and was threatening to foreclose and sell the same, and by fraudulent concealment of his actual indebtedness and the actual state of his account." "The proof shows," says counsel in his petition for a rehearing, "that the plaintiff was weak-

minded and easily influenced, and was in dire distress; he was persuaded that his financial condition was hopeless. He says Wiper told him that if he did not give him the deed and bill of sale he (Wiper) would follow him. He was possessed of a farm, but without means of tilling it, and he faced the necessity of supporting his family of little children. The jury saw the two men, and under all of these circumstance can this court say, from the cold record before us, that there was no overmastering influence on one side and mental weakness, necessity, and distress on the other? Can it so determine that such weakness, supplemented by the necessity and distress, was not the cause of plaintiff's yielding to the overmastering influence of the successful banker, who seems to have had his hand on everything and was disposed to yield nothing."

We very much doubt if these facts are as conclusively proved as counsel maintains, but rather the folly of a weak, but not insane, man who, for fear of incurring a lawyer's bill, chooses to go ahead with a business transaction without sufficient legal advice. Even if all that counsel maintains, however, is true, and was supported by the proof, that fact would have no effect on the real and controlling issue in the case and which is ratification.

Counsel for plaintiff and appellant do not pretend that there is any proof of actual fraud, or that there is any proof of any false statements, and he ignores entirely, in his petition for a rehearing and in his brief on such rehearing, the plaintiff's subsequent ratification of the deed and bill of sale, and which was evidenced by the giving of orders to his creditors on the money which he was to get out of the transaction, and the taking of certain cows which were to be given to him under the agreement, in place of a hundred dollars of the purchase price, and accepting as a gift machinery and horses which were covered by the chattel mortgage, and by stating to several persons that he was thoroughly satisfied with the transaction. That these acts were done plaintiff himself does not seriously dispute. In fact, as to his giving the orders for the payments and the receipt of the stock and machinery, he enters no denial whatever, and three of these orders were, according to his own testimony, given at least eight days after the principal transaction. One of these orders, indeed, he attempted to have dated back and prior to the time of the giving of the deed, and in this transaction he clearly

shows not merely cunning, but a lack of honesty, which entitles him to but little credit or consideration in a court of equity.

This question of ratification was not one of the questions which were submitted to the jury. It was a matter which, even after the submission to the jury of the specific questions, was reserved for the consideration of the chancellor, and of the chancellor alone. It was controlling in the case. 6 Pom. Eq. Jur. 687. No matter if the plaintiff's will was overcome at the time of the making of the deed, it cannot be claimed that it was overcome at the time of the making of these orders and of receiving these benefits under the contract. This was a matter for the chancellor alone to pass upon. The jury was not involved in it in any manner. Even if all of the questions propounded to the jury had been answered in favor of the defendant, the answers would not have affected the real issues in the case at all, and even though the submission of certain facts or certain issues in an equitable action to a jury may make the action partake of the nature of a law action, in so far as these issues are concerned, it cannot be contended that as to the issues not submitted the power of the chancellor is in any way limited or controlled. It was for him ultimately to say whether the proof was so clear and convincing that the deed should be set aside. Thomas v. Ryan, 24 S. D. 71, 123 N. W. 68; Hogan v. Leeper, 37 Okla. 655, 47 L.R.A. (N.S.) 475, 133 Pac. 190; Bethany Hospital Co. v. Philippi, 82 Kan. 64, 30 L.R.A.(N.S.) 194, 107 Pac. 530. And this in view, not merely of the evidence on which specific questions had been submitted to the jury, but of that the consideration of which had been reserved to him alone.

Even if we were reviewing this case under the latitude of the Newman act, we would hesitate in holding that the proof was clear and convincing of undue influence in the first transaction. On the other hand, we are sure that it conclusively proved a ratification of the transaction, and under circumstances where no pressure was brought by the defendants, and after every opportunity was afforded for deliberation, and even after counsel had been consulted.

The plaintiff himself testified on cross-examination: I am acquainted with John Norlin. He ran the blacksmith shop there. I might have had a talk with him just before I made this settlement,

telling him that I was figuring on making a settlement, and that, if I made it, he could get his money. After I had made the statement, I told him I had settled with the defendants, and that, if he would go to the defendants' bank, he could get his money. I also told him that I had transferred my property to the bank, and received for my interest a thousand dollars in cash, farm implements, and horses sufficient to start farming, etc., getting all of my debts paid. I think he went to the bank and got his money. He never asked me for it any more. I cannot say that he told me that he had gotten it. I should say he had, probably. We talked different times on this proposition afterwards.

Q. Did you tell him that you had made the deal; that you were well pleased with the settlement; that you had made a better settlement than you had expected to be able to make, and that you intended to go to Montana and take a homestead and start farming anew without debts?

A. It would not surprise me if I told him that the day after.

On this point the witness John Norlin testified:

I am a blacksmith at Bowbells.

Q. Did you see Emery up there at that date after he had made settlement with the bank and with Wiper?

A. Yes, he said he had made settlement. It was the next morning —the next day. He did not appear to be intoxicated. He did not have the appearance of a man that had been drinking. I have never seen him take a drink. At that time he owed me some money. At that time I dunned him for it. He said I could go up to the bank and get my money any time I wanted to, because he had made settlement, and Wiper was going to pay it. I did not go just then.

Q. Did you go any time?

A. Yes, I got my money, you bet. The conversation was by Wiper's barn. Mr. Robins was there. Emery said he felt better. He told me about what he had got. Some of the stuff he had got. He said he made settlement and felt better.

The plaintiff Emery again testified: I am acquainted with Mr. Moore, of the Moore Implement Company. In December, 1911, I was owing the Moore Implement Company a bill of something like $25 or $40. I remember telling Mr. Moore I was about to make a deal with Mr. Wiper for the property, and that if that went through I would pay him.

Q. Do you remember telling him that on about the 22d day of December—telling him that you had made a settlement with Wiper and the bank?

A. I met Mr. Moore—

Q. Answer!

A. No.

Q. You don't remember that? Do you remember that on or about the 22d day of December you gave Mr. Moore an order on the First National Bank, the defendant in this action, and A. C. Wiper, wherein you told them to pay M. B. Moore Implement Company $34.75 and charge to my account and signed your name to it?

A. Yes, sir.

Q. That was one of the deals that the bank and Wiper was to pay for you in this settlement?

A. Yes, I gave him an order.

Q. That was on the 22d day of December, wasn't it? Some eight days after you had made the deal with the bank?

A. Sometime after—yes.

Q. At the time of giving the order, didn't you tell him you had made the settlement with the bank.

A. I told him I calculated to break that settlement. At the time I gave him the order I asked him to let me date it back.

Q. And at that time he told you he could not date it back, and even if he did, and were afterwards asked as to the date it was signed, he would have to say on the 22d day of December?

A. I could not say "yes" to that, but possibly so.

Q. You asked Mr. Moore to date this order back?

A. Probably—I think so. I did not give him as a reason for wanting it done that I might have some difficulty with Wiper over the real.

Q. At that time you gave him as a reason for wanting it done that you might have some difficulty with Wiper over the deal, as you thought you might be able to recover some more property from them?

A. No, sir.

On this point the witness Moore testified:

I am manager of the M. B. Moore Implement Company. On December 22d, 1911, Mr. Emery owed us something. At about that time he gave me or the M. B. Moore Implement Company an order on the de-

fendant for the money. At that time he made a request as to whether it was to be dated back. He said he would like to date it back some time, and I asked him how much, and he said he would like to date it back to about the 13th, if I remember right. He said that he was informed that he could get more money out of this deal, and he thought if he would sign the order now it would kind of hurt him from getting any more money. It would show that he had made settlement.

Q. Would you agree to having the order dated back?

A. No, I would not. I told him even though it was dated back, if I was questioned I would not go different from the date.

Q. Is that the same order Mr. Emery admitted on the witness stand the other day?

A. It must be. It was the only order he ever gave me. I do not know whether he had been drinking or not at the time he gave me this order.

Q. Did he say anything to you at any time about having made the deal with the defendants?

A. Yes, sir. He called at my office shortly after he had made the deal. I do not know what day he made the deal, but he said it was yesterday. He expressed himself as being well pleased. He said that certainly was a great load off his mind. I believe that is the words he used,—something to that effect.

Again the plaintiff Emery testified on cross-examination:

I am acquainted with Jens Pederson, of Bowbells. He was engaged in running a mercantile store.

Q. Do you remember going into his store and telling him that you had sold your place to Wiper and made settlement with the bank?

A. Yes, I think I did. About that time I was owing him about $60.

Q. Do you remember telling him that the defendant had agreed to pay your indebtedness and your outstanding indebtedness around Bowbells, and that if he would go to the bank he could get his money?

A. I don't recollect that part about his going to the bank and that he would get his money.

Q. Did you tell him that he would get his money?

A. I would not say. I would not be surprised.

Q. Did he get it?

A. I believe he told me afterwards he got part of it.

Q. Do you remember telling Mr. Pederson that you had transferred your property to Mr. Wiper and had received certain horses and a thousand dollars, and was to have all debts paid,—do you remember of telling him that?

A. I do not recollect, exactly, but I do not dispute it.

Q. Do you remember telling him that you were well satisfied with the deal?

A. I do not remember that.

On this point the witness Jens Pederson testified:

I remember about the time Emery made a deal and deeded this property to Mr. Wiper. At that time he owed me about $60. I had talked with him a number of times about paying us before that. I talked to him after the deal, on the 15th of December. He came into my store in the evening, and he started to tell me about a deal he made with the bank, so I said to him, "I suppose, then, you will have some money." He said, "That is in the deal. Mr. Wiper agreed to pay your bill."

Q. Did he tell you to go to the bank and get your money?

A. No, he did not tell me to go to the bank because I took that. That was quite enough when Mr. Wiper agreed to pay it. He told me that Wiper had agreed to pay it. I did not go to Mr. Wiper for the money the same day.

Q. Did you at any time?

A. Yes, I did. Yes, sir, Mr. Wiper paid it. Emery said he was well pleased with the deal, and he told me he was to get a thousand dollars and enough to start in farming, a team and some machinery and that the best he could do was to go and get him a new home now.

In addition to this the plaintiff himself testified that he had given similar orders to at least three other persons for payments out of the same fund. It is absurd, in the face of all of this evidence, to contend that there was not merely proof of ratification, but that the ratification was not overwhelmingly proved. Three of these transactions, at least, took place on the 22d of December, and nine days after the signing of the deed and bill of sale. The defendants were not present on any of these occasions, and there was no duress, undue influence, or any other pressure exercised. The question of ratification was not submitted to the jury in any way, and their verdict, even if it had been received,

would have had no weight or influence. The trial court, therefore, did not err in making his findings for the defendant and dismissing the action. 6 Pom. Eq. Jur. 687; 1 Mod. Am. Law, 415; note to Miller v. Sterringer, 25 L.R.A.(N.S.) 601.

The judgment of the District Court is affirmed.

HARRY FISHER v. GEORGE J. SMITH.

(156 N. W. 242.)

Action for damages for alleged misrepresentation inducing a trade of properties. Plaintiff was a farmer, and defendant a real estate dealer and newspaper man. A trade was made of a farm and personal property thereon situated, for a newspaper plant. Plaintiff alleges certain misrepresentations inducing the trade, and seeks damages.

Misrepresentations — trade of properties — damages — action for — evidence — value — sufficiency of.

1. Evidence examined and *held* insufficient to establish misrepresentation as to the value of the plant.

Newspaper — earning capacity — representations as to — evidence.

2. Evidence examined and *held* insufficient to sustain the allegations of the complaint to the effect that the earning capacity of the newspaper plant was $120 to $150 per month.

Subscription list — newspaper — evidence.

3. Evidence examined and *held* insufficient to establish the alleged misrepresentation relative to the subscription list.

Partnership — representations — evidence.

4. Evidence examined and *held* insufficient to show misrepresentation as to the fraudulent inducement relative to a partnership between plaintiff and one T.

Representations — taking back property exchanged — evidence — sufficiency of.

5. Evidence examined and *held* insufficient to sustain the allegations of the complaint relative to representations that defendant would trade back properties.

Opinion filed December 6, 1915. Rehearing denied February 5, 1916.

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

Reversed.

F. F. Wycoff and *Greenleaf, Bradford, & Nash*, for appellant.

A mere failure to perform a promise cannot relate back to render the same fraudulent. Fraud cannot be predicated upon a mere promise or statement of intention. 14 Am. & Eng. Enc. Law, 2d ed. pp. 47, 48; Cerny v. Paxton & G. Co. 78 Neb. 134, 10 L.R.A.(N.S.) 640, 110 N. W. 882; Miller v. Sutliff, 241 Ill. 521, 24 L.R.A.(N.S.) 735, 89 N. E. 651.

Where a vendor represents the value of land lying in a neighboring county, the vendee cannot maintain an action for deceit even if he has never seen the land, as he has it in his power to ascertain the value. Saunders v. Hatterman, 24 N. C. (2 Ired. L.) 32, 37 Am. Dec. 404; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172, 6 Mor. Min. Rep. 544; 14 Am. & Eng. Enc. Law, 2d ed. p. 41; Valuable note to Hedin v. Minneapolis Medical & S. Institute, 35 L.R.A. 417; Kent, Com. 485.

When the terms of a bill of sale as to consideration are contractual, parol evidence is not admissible to show a different consideration. Pickett v. Green, 120 Ind. 584, 22 N. E. 737; Thompson v. Bryant, 75 Miss. 12, 21 So. 655; McFarland v. McGill, 16 Tex. Civ. App. 298, 41 S. W. 402.

One may not rely upon the truth of a statement which he knows to be untrue, or which is manifestly false. Manley v. Felty, 146 Ind. 194, 45 N. E. 74; Dunning v. Cresson, 6 Or. 241; Morse v. Rathburn, 49 Mo. 91; Hess v. Young, 59 Ind. 379; Fargo Gas & Coke Co. v. Fargo Gas & E. Co. 37 L.R.A. 595, note "A."

A court, in submitting the issue of fraud to a jury, does not perform its duty without instructions upon the nature of the proof required to support fraud. Such proof must be clear and satisfactory, and not merely by a preponderance of the evidence. Parker v. Hull, 71 Wis. 368, 5 Am. St. Rep. 224, 37 N. W. 351; F. Dohmen Co. v. Niagara F. Ins. Co. 96 Wis. 38, 71 N. W. 69; Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 188; Richmond v. Smith, 117 Wis. 290, 94 N. W. 35.

Linde & Murphy, Geo. A. McGee, F. W. Medbery, and *W. H. Cherry*, for respondent.

The proof in the record is insufficient to support the allegations of

the complaint. The measure of plaintiff's damages, if any, is the difference between the value of the property obtained had the statements been true and the value of what he actually received. This represents his actual loss by reason of the fraud of the seller, where recovery is sought on the contract. He might rescind the contract and recover back what he had paid. Fargo Gas & Coke Co. v. Fargo Gas & E. Co. 4 N. D. 219, 37 L.R.A. 593, 59 N. W. 1066; Page v. Wells, 37 Mich. 415; Vail v. Reynolds, 118 N. Y. 297, 23 N. E. 301; Morse v. Hutchins, 102 Mass. 439; Doran v. Eaton, 40 Minn. 35, 41 N. W. 244; Wollman v. Wirtsbaugh, 22 Neb. 490, 35 N. W. 216; Drew v. Beall, 62 Ill. 167; Woodward v. Thacher, 21 Vt. 580, 52 Am. Dec. 73; 3 Sutherland, Damages, pp. 389, 390, 392; Beare v. Wright, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 6 Ann. Cas. 1057.

Further, the amount of damages to which respondent is entitled has been passed upon by the jury, and is conclusive on appeal. Cox v. Cox, 39 Kan. 121, 17 Pac. 847; Griffin v. Farrier, 32 Minn. 474, 21 N. W. 553; Long v. Davis, 136 Iowa, 734, 114 N. W. 197.

Plaintiff was not required to prove each and all of the statements which he claimed defendant made as inducement to the sale. Long v. Davis, supra; Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1, 40 Atl. 1046; Somers v. Richards, 46 Vt. 170.

If a vendor has superior knowledge of the property sold, and knowingly gives a false opinion in regard to a material fact, with the intention of defrauding the purchaser, an action may be maintained against him for fraud. Collins v. Jackson, 54 Mich. 186, 19 N. W. 947; Cressler v. Rees, 27 Neb. 515, 20 Am. St. Rep. 691, 43 N. W. 363; Rimer v. Dugan, 39 Miss. 477, 77 Am. Dec. 687; Berge v. Eager, 85 Neb. 425, 123 N. W. 454; Smith v. Werkheiser, 152 Mich. 177, 15 L.R.A.(N.S.) 1092, 125 Am. St. Rep. 406, 115 N. W. 964; Harvey v. Smith, 17 Ind. 272; Shaeffer v. Sleade, 7 Blackf. 178.

And the intention to misrepresent and defraud is generally a question for the jury. Nowlin v. Snow, 40 Mich. 699.

Where reliance upon statements of the vendor is pleaded and proved by plaintiff, the burden is upon defendant to establish the fact that plaintiff did not rely upon his statements. Plaintiff had the right to rely upon his vendor's statements and to assume their truth, and he was not required to further inquire. 2 Pom. Eq. Jur. 891; Hicks v.

Stevens, 121 Ill. 186, 11 N. E. 241; Fargo Gas & Coke Co. v. Fargo Gas & E. Co. 4 N. D. 223, 37 L.R.A. 593, 59 N. W. 1066.

"If a vendor combines with a third person so that they conspire to mislead the purchaser as to the value of the property sold, it will be such fraud as will render him liable to an action." Kenner v. Harding, 85 Ill. 264, 28 Am. Rep. 615; Barron v. Myers, 146 Mich. 510, 109 N. W. 862; Griffin v. Farrier, 32 Minn. 474, 21 N. W. 553.

The fact that plaintiff made inquiries elsewhere which did not disclose the falsity of the representations is no defense. Foley v. Holtry, 43 Neb. 133, 61 N. W. 120; Graham v. Moffett, 119 Mich. 303, 75 Am. St. Rep. 393, 78 N. W. 132; Miller v. Curtis, 27 Jones & S. 127, 13 N. Y. Supp. 604.

The questions of value and of damages are questions for the jury. They are questions of fact to be determined from all the evidence and circumstances in the case. The jury, having passed upon them, settles these questions conclusively. Seckerson v. Sinclair, 24 N. D. 625, 140 N. W. 239; Tubbs v. Garrison, 68 Iowa, 44, 25 N. W. 921; Thomason v. Capital Ins. Co. 92 Iowa, 73, 61 N. W. 843; Ish v. Marsh, 1 Neb. (Unof.) 864, 96 N. W. 58; Chilson v. Houston, 9 N. D. 498, 84 N. W. 354; Bank of Spearfish v. Graham, 16 S. D. 49, 91 N. W. 340; National Bank v. Taylor, 5 S. D. 99, 58 N. W. 297; Moon v. McKinstry, 107 Mich. 668, 65 N. W. 546.

Burke, J. Action for damages for alleged misrepresentation inducing a trade of properties.

In November, 1911, the defendant, Smith, was a real estate agent and also was operating a newspaper, and plaintiff was a farmer. About the 8th of that month plaintiff came to the office of defendant and either requested him to print notices of sale of his property, or to list his farm for sale. The property which he had desired to sell, and which was afterwards traded to defendant, consisted of a quarter section of land upon which there was a mortgage of $1,000, four mules, one colt, one harvester and binder, one sulky plow, one wagon, one sled, one harrow, one drill, one disk, two sets of double work harness, which personal property was mortgaged in the sum of $770. There is some dispute as to the number of horses, but it is not material to a decision of the action. Defendant proposed to trade him a building at Berth-

hold for the property, and as an alternative offered to trade to him a newspaper plant at Max, North Dakota. Plaintiff made an examination of the property at Berthhold and was about to close a trade when, later, he exchanged said property for the newspaper.

This action is brought for damages alleged to have been sustained by false representations made by defendant in effecting the trade. Plaintiff has not rescinded, but seeks to recover the difference between the value of the plant as represented to him and what it is actually worth. In his brief, plaintiff said: "The false representations which we contend the appellant made to respondent and which constitute the fraud and deceit on the part of appellant, and which were made to induce the respondent to make the deal upon which the respondent in good faith relied, are the following:

"(a) That the newspaper plant, known as the Max Enterprise, was of the value of $3,000, whereas in truth and in fact the said newspaper plant was not worth more than $600 or $700.

"(b) That the Max Enterprise was earning and would earn for the plaintiff from $120 to $150 per month clear, whereas in truth and in fact, the said newspaper plant, while it was owned by the appellant, did not earn any sum whatsoever clear; and for the respondent, the gross receipts of two months were only between $60 and $70, which was insufficient to pay the expenses of its operation.

"(c) That the Max Enterprise had 600 subscribers, whereas in truth and in fact the said newspaper plant had only 260 papers, which included not only the paid subscribers, but all the papers printed for all purposes.

"(d) That the appellant, for the purpose of inducing the respondent to exchange property, represented to him that one Taylor would go into partnership with him, and that said Taylor was an expert printer and newspaper man, whereas in truth and in fact the said appellant suggested such a partnership as a part of his general fraudulent scheme to deceive and defraud the respondent in inducing him to make the exchange of the property.

"(e) That in order to induce the plaintiff to rely on his representations and to make the trade in reliance thereon, the appellant agreed to trade back in the event that the newspaper plant was not as represented, whereas, in truth and in fact, the appellant never had any intention of

trading back, but that said offer to trade back was made simply for the purpose of bringing about the exchange and for no other purpose."

At the trial, after the evidence was received, defendant moved for judgment dismissing the action on the grounds that plaintiff had entirely failed in his proof. This was followed by a motion for judgment notwithstanding the verdict. We will take up the five propositions upon which plaintiff relies, and consider them in the order named:

(1) Taking up the first item, that defendant represented the Max Enterprise to be worth $3,000; that plaintiff relied upon the same; that the plant was not worth, in fact, more than $600 or $700. The burden of proof is upon the plaintiff to establish each of these three propositions: First, as to the representation; this is supplied by the testimony of the plaintiff himself and was probably sufficient to go to the jury. Second, as to the actual value of the plant at the time of the transfer there is also a total failure of proof. Plaintiff testifies to the value of certain articles such as presses, type, and stock, which he placed at a small valuation, but he does not take into consideration the good will of the business, subscription list, or bills receivable. Besides, he has not shown himself qualified to place a valuation upon the stock given. The only other evidence offered was of later owners of the paper, and they were limited to giving the later value of the stock. It requires no argument to show that the value of the plant may have either increased or decreased rapidly within a year. Because of this failure alone, defendant was entitled to a directed verdict upon this cause of action. Third, that plaintiff relied upon such alleged misrepresentations.

An examination of the evidence, which we are unable to produce through lack of space, convinces a majority of the court—but not the writer—that there was sufficient evidence to go to the jury upon the question whether plaintiff relied upon the representation that the plant was worth $3,000. Ryder and Max are but 25 miles apart, and all of the tangible property in the printing shop was in plain sight. It is not claimed that Smith represented that the physical property was worth $3,000, but that the plant was worth so much. This is a hard matter to reduce to a certainty when we consider the good will, subscription list, bills receivable, and other items of possible value upon which there is no proof in this record. It is apparent that, so far as this alleged misrepresentation is concerned, there is a total failure of proof of the falsity of such representation.

(2) The next alleged misrepresentation is that the Max Enterprise was earning and would earn for the plaintiff from $120 to $150 per month. Plaintiff's testimony upon this point does not bear out the allegations of his complaint.

He testifies:

Q. What did he say, if anything, with reference to what the plant is earning? Was that $120 or $150 per month? Did he say whether that was what the plant earned, or what?

A. That is what the plant *ought to earn* clear (italics ours).

Q. When he was talking with you about this deal back at Plaza, when he was talking with you about how much the paper earned a month, did he say it was earning $120 or $150 a month, or did he tell you, if properly handled, it could be made to earn $120 clear?

A. He said that if I didn't make that, he would give the plant to me.

Q. Give me that again. What was it Smith said?

A. He said, "If you don't make that, he would give the plant to us." That is what he agreed to, trade back.

. . . . . .

Q. We want exactly what he said.

A. He said that the business *would bring* $120 to $150 per month clear.

Q. That it would do that?

A. Yes, that it would.

. . . . . .

Q. He said that the business would bring $120 to $150 a month clear?

A. That is what it would bring. It would make that much money for me.

It thus appears that in place of defendant having represented that the plant had been earning $120 to $150 a month, that all plaintiff claims is that the defendant said that it would earn that in the future. This is not proof of the allegations of this complaint. Beare v. Wright, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 6 Ann. Cas. 1057; notes in 10 L.R.A.(N.S.) 640, and 24 L.R.A.(N.S.) 735. Moreover the record does not disclose that those statements were false. The only

proof offered being that during the first month plaintiff was in charge of the paper, he collected between $60 and $70 *in cash.*

He was asked:

Q. Then you do not know how much that was put on the books that month?

A. I don't know anything about it. I told him, We have gotten around the business, and they would have to boom it for me.

Thus, so far as the proof goes, the paper may have been earning the amount represented.

(3) The third alleged misrepresentation relates to the subscription list. Here again there is a total failure of proof.

The only evidence offered was by plaintiff himself, who states:

Q. Do you know how many paid subscribers it had when you took possession in 1911, yes or no?

A. No.

While his counsel made a desperate effort by leading questions to induce him to testify as to his knowledge, he did not do so. It is needless to say that a verdict cannot rest upon this kind of testimony.

(4) This relates to the representation that Taylor would go into partnership with plaintiff. There is nothing in this to show the misrepresentation. Taylor did in fact go into partnership with the plaintiff. There is no evidence in the record sustaining plaintiff's contention that this partnership was a fraudulent scheme to deecive and defraud respondent. Taylor was working for defendant and was a distant relative of his by marriage, but these alone do not show a conspiracy. There is absolutely not a word of testimony in the record showing any such conspiracy.

(5) This relates to the alleged misrepresentation that defendant would trade back with plaintiff if he were dissatisfied. The evidence is undisputed that plaintiff sold a half interest in the newspaper to Taylor and never was in a position to rescind the contract. This being the case, it is impossible to tell whether or not defendant was acting in good faith in making this representation, if it were in fact made.

Upon an examination of the whole record it thus appears that there is a total failure of proof to sustain any of the causes of action alleged. For the errors above enumerated a new trial is ordered.

JAKOB QUASCHNECK v. ALSON BLODGETT, Jr., et al.

(156 N. W. 216.)

Real property — possession — open — actual — notorious — contract for deed — unrecorded — taxes — payment of — equities — notice of.

1. Plaintiff's actual, open, and notorious possession of real property under an unrecorded contract for deed under which he has paid the taxes, made valuable improvements, leased for a period the buildings thereon, and paid rent to no one, cannot be said to be consistent with title in another so as to deprive him of the benefit of the rule that actual, open, and notorious possession is notice to the world of the equities of one in such possession.

Lands — in actual open possession of — under unrecorded contract for deed — mortgage — assignee — executed and delivered — subsequently to contract — title or lien — subject to equities.

2. In a controversy as to the priority of their respective claims between plaintiff, who is in actual, open, and notorious possession of real property under an unrecorded contract for deed, and appellant, who is the assignee of a mortgage subsequently executed and delivered by plaintiff's grantor to appellant's assignor, *Held*, that appellant's mortgage lien is subject to the equities of plaintiff.

Possession — notice — equitable rights — subsequent mortgage — imputed notice.

3. Plaintiff's possession was not only notice of his equitable rights to the subsequent mortgagee, but it was also notice to appellant as the assignee of such mortgage, and knowledge of the terms of plaintiff's contract and of the fact of his having given notes for instalments of the purchase price will be imputed to him.

Mortgage — instalments — payment of — estoppel — equities.

4. The fact that plaintiff paid to appellant two interest instalments on the debt secured by appellant's mortgage does not, under the facts disclosed, estop him from now asserting his prior equities.

Mortgage — assignment of — purchase — recording act — equities.

5. Appellant's contention that in purchasing the assignment of the mortgage

he was protected under the recording act as against the equities of plaintiff under his unrecorded contract for deed,—*Held*, for reasons stated in the opinion, wholly without merit.

Notice of mortgage — rights under — payments — purchase money — notes — indorsee of — payments to holder.

6. While plaintiff, after receiving notice of appellant's mortgage, was bound to recognize appellant's rights thereunder, by making future payments to him instead of to H, his grantor, he was nevertheless justified in paying and satisfying such purchase-money notes as were held by indorsees thereof for value, appellant's rights under his mortgage being subordinate to the rights of the holder's of such notes.

Subrogation — right to — prior lienee — obligation to pay.

7. As against plaintiff, it is *held* that appellant is not entitled to be subrogated to the rights of prior lienees whose claims, it is contended, were paid out of funds advanced by appellant's assignor, it appearing that plaintiff was not under obligation to pay such prior liens, nor had he any knowledge of such payments.

Opinion filed October 9, 1915. On petition for rehearing February 5, 1916.

Appeal from the District Court of Dickey County, *Frank P. Allen*, J.

From a judgment in plaintiff's favor, defendant Blodgett appeals.

Affirmed.

Watson & Young and *E. T. Conmy*, for appellant.

Where possession of land is consistent with the record title, it is presumed to be under such title, and is not notice of outstanding unrecorded equities. Smith v. Yule, 31 Cal. 180, 89 Am. Dec. 167; Dutton v. McReynolds, 31 Minn. 66, 16 N. W. 486; Townsend v. Little, 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357; Williams v. Sprigg, 6 Ohio St. 585.

Where a vendor remains in possession after conveyance, such possession is not notice that he claims any rights inconsistent with the conveyance he has made. Abbott v. Gregory, 39 Mich. 68; Sprague v. White, 73 Iowa, 670, 35 N. W. 751; Eylar v. Eylar, 60 Tex. 315; Cook v. Travis, 20 N. Y. 400; Van Keuren v. Central R. Co. 38 N. J. L. 165; Groton Sav. Bank v. Batty, 30 N. J. Eq. 126; Red River Valley Land & Invest. Co. v. Smith, 7 N. D. 241, 74 N. W. 194.

Where a deed, or contract for a deed, has not been recorded, pos-

session is not actual notice, and does not protect the possessor against an otherwise innocent purchaser or encumbrancer. Tuttle v. Churchman, 74 Ind. 315; Brophy Min. Co. v. Brophy & D. Gold & S. Min. Co. 15 Nev. 113, 10 Mor. Min. Rep. 601; Exon v. Dancke, 24 Or. 110, 32 Pac. 1045; Lamb v. Pierce, 113 Mass. 72; Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573; Wilson v. Wall, 6 Wall. 83, 18 L. ed. 727; Pickford v. Peebles, 7 S. D. 166, 63 N. W. 779; Hull v. Diehl, 21 Mont. 71, 52 Pac. 782; Jackson v. Reid, 30 Kan. 10, 1 Pac. 308; McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Red River Valley Land & Invest. Co. v. Smith, 7 N. D. 236, 74 N. W. 194; 27 Cyc. 1200, 1201.

Plaintiff is estopped to question the validity of the mortgage, he having paid interest on the same as it became due, and generally recognized the mortgage as a valid lien. Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; Horn v. Cole, 51 N. H. 287, 12 Am. Rep. 111; Lee v. Porter, 5 Johns. Ch. 268; Buck v. Wood, 85 Me. 204, 27 Atl. 103; Leavitt v. Fairbanks, 92 Me. 521, 43 Atl. 115; Bates v. Leclaire, 49 Vt. 229; Herman, Estoppel & Res Judicata, 970.

Defendant Blodgett is a purchaser of negotiable paper in good faith and for value, and is not affected by equities existing between the original parties, or claims of third persons, even if such were known to his assignor. 1 Jones, Mortg. § 834; Carpenter v. Longan, 16 Wall. 271, 21 L. ed. 313; First Nat. Bank v. Flath, 10 N. D. 281, 86 N. W. 867; American Nat. Bank v. Lundy, 21 N. D. 168, 129 N. W. 99; Walters v. Rock, 18 N. D. 45, 115 N. W. 511.

Further, Blodgett is protected under the recording act. A contract for deed is a conveyance, and should be recorded, and failure to record it renders his assignment of the mortgage prior. Henninges v. Paschke, 9 N. D. 489, 81 Am. St. Rep. 588, 84 N. W. 350; Jackson ex dem. Hyer v. Van Valkenburgh, 8 Cow. 260; Recording Act, 1 Rev. Stat. 756, §§ 37, 38; Decker v. Boice, 83 N. Y. 215; Morris v. Beecher, 1 N. D. 130, 45 N. W. 696; 1 Jones, Mortg. §§ 469, 472, 814; Pritchard v. Kalamazoo College, 82 Mich. 587, 47 N. W. 31; Dulin v. Hunter, 98 Ala. 539, 13 So. 301; Ogle v. Turpin, 102 Ill. 148; Merrill v. Luce, 6 S. D. 354, 55 Am. St. Rep. 844, 61 N. W. 46; Fallass v. Pierce, 30 Wis. 443; Day v. Clark, 25 Vt. 402; Bacon v. VanSchoonhoven, 87 N. Y. 446; Swartz v. Leist, 13 Ohio St. 419; Yerger v. Barz,

56 Iowa, 77, 8 N. E. 769; Henderson v. Pilgrim, 22 Tex. 464; Boone, Mortg. § 92; Reeves v. Hayes, 95 Ind. 521, and authorities there cited; Connecticut Mut. Life Ins. Co. v. Talbot, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. 588; Thompson v. Cheesman, 15 Utah, 43, 48 Pac. 477; Ladd v. Campbell, 56 Vt. 529; Donaldson v. Grant, 15 Utah, 231, 49 Pac. 780; Frank v. Snow, 6 Wyo. 42, 42 Pac. 485, 43 Pac. 78; Hull v. Diehl, 21 Mont. 71, 52 Pac. 784; Jackson v. Reid, 30 Kan. 10, 1 Pac. 308; Harrison v. Yerby, — Ala. —, 14 So. 321.

The protection of the registry laws is not to be overthrown except upon clear evidence showing want of good faith on the part of subsequent purchasers. Betts v. Letcher, 1 S. D. 182, 46 N. W. 193; Woods v. Farmere, 7 Watts, 382, 32 Am. Dec. 772.

It was plaintiff's duty, upon discovering the mortgage, to make no further payments on his contract, and the defendant is entitled to credit for all payments made thereafter. Jaeger v. Hardy, 48 Ohio St. 335, 27 N. E. 863; Gouverneur v. Lynch, 2 Paige, 300; Young v. Guy, 87 N. Y. 457; 1 Warvelle, Vend. & P. p. 188; 2 Warvelle, Vend. & P. p. 687; Dalrymple v. Security Improv. Co. 11 N. D. 65, 88 N. W. 1033; Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310; Watkins v. Reynolds, 123 N. Y. 211, 25 N. E. 322; Gifford v. Corrigan, 117 N. Y. 257, 6 L.R.A. 610, 15 Am. St. Rep. 508, 22 N. E. 756; Fairbanks v. Sargent, 117 N. Y. 325, 6 L.R.A. 475, 22 N. E. 1039; Citizens' Bank v. Shaw, 14 S. D. 197, 84 N. W. 779.

Defendant is entitled to subrogation, as to the amount paid in satisfaction of prior mortgages of record at the time of the contract for deed. Emmert v. Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; Tradesmen's Bldg. & L. Asso. v. Thompson, 32 N. J. Eq. 133; Gans v. Thieme, 93 N. Y. 225; Sidener v. Pavey, 77 Ind. 241; McKenzie v. McKenzie, 52 Vt. 271; Cobb v. Dyer, 69 Me. 494; Levy v. Martin, 48 Wis. 198, 4 N. W. 35; Detroit F. & M. Ins. Co. v. Aspinwall, 48 Mich. 238, 12 N. W. 214; Crippen v. Chappel, 35 Kan. 495, 57 Am. Rep. 187, 11 Pac. 453; 3 Pom. Eq. Jur. §§ 1211, 1212; Harris, Subrogation, 811, 816; Dixon, Subrogation, 165; Home Sav. Bank v. Bierstadt, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161; Coe v. New Jersey Midland R. Co. 31 N. J. Eq. 105; Tyrrell v. Ward, 102 Ill. 29; Tradesmen's Bldg. & L. Asso. v. Thompson, 32 N. J. Eq. 133; Upton v. Hugos, 7 S. D. 476, 64 N. W. 523; Heisler v. C. Ault-

man & Co. 56 Minn. 454, 45 Am. St. Rep. 486, 57 N. W. 1053; Wilton v. Mayberry, 75 Wis. 191, 6 L.R.A. 61, 17 Am. St. Rep. 193, 43 N. W. 901; Union Mortg. Bkg. & T. Co. v. Peters, 72 Miss. 1058, 30 L.R.A. 829, 18 So. 497; Haverford Loan & Bldg. Asso. v. Fire Asso. of Philadelphia, 180 Pa. 522, 57 Am. St. Rep. 657, 37 Atl. 179; Bank of Ipswich v. Brock, 13 S. D. 409, 83 N. W. 438; Frederick v. Gehling, 92 Neb. 204, 137 N. W. 998; Bankers' Loan & Invest. Co. v. Hornish, 94 Va. 608, 27 S. E. 459; Home Invest. Co. v. Clarson, 21 S. D. 72, 109 N. W. 507.

The doctrine of substitution or subrogation may be applied although there is no contract, express or implied. Cheesebrough v. Millard, 1 Johns. Ch. 409, 7 Am. Dec. 494; 1 Story, Eq. Jur. § 493; Barnes v. Mott, 64 N. Y. 397, 21 Am. Rep. 625; Gans v. Thieme, 93 N. Y. 232; Upton v. Hugos, 7 S. D. 476, 64 N. W. 523; Home Invest. Co. v. Clarson, 15 S. D. 513, 90 N. W. 153; Arlington State Bank v. Paulsen 57 Neb. 717, 78 N. W. 303; Tradesmen's Bldg. & L. Asso. v. Thompson, 32 N. J. Eq. 133; Levy v. Martin, 48 Wis. 198, 4 N. W. 35; Rachal v. Smith, 42 C. C. A. 297, 101 Fed. 159.

Yonker & Perry and *Harrington & Dickinson,* for respondent.

The occupation of the premises involved, under the unrecorded contract for deed, was so open, visible, notorious, and exclusive as to put a mortgagee in good faith on inquiry. The possession of the holder under the contract was wholly inconsistent with the record title as it then was; the holder was not only in open, actual possession, but he paid the taxes, made all the improvements, leased the buildings, paid rent to no one, and exercised all rights of ownership. Watters v. Connelly, 59 Iowa, 217, 13 N. W. 82; Kent, Com. 179; Niles v. Cooper, 13 L.R.A. (N.S.) 104, note; Georgia State Bldg. & L. Asso. v. Faison, 114 Ga. 655, 40 S. E. 760.

Possession, as notice, is not confined to subsequent purchasers alone, but includes mortgagees and assignees. Meade v. Gilfoyle, 64 Wis. 18, 24 N. W. 413; Doolittle v. Cook, 75 Ill. 354; Humphrey v. Moore, 17 Iowa, 193; Niles v. Cooper, 13 L.R.A.(N.S.) 106, note, and cases cited; Jamison v. Dimock, 95 Pa. 52; Jaeger v. Hardy, 48 Ohio St. 335, 27 N. E. 863; Ranney v. Hardy, 43 Ohio St. 157, 1 N. E. 523.

There is no estoppel as to plaintiff in this case. The essential element of estoppel is that the party relying thereon has been prejudiced

by the other party. Nothing of such nature exists in this case. 16 Cyc. 722; Dumont v. Peet, 152 Iowa, 524, 132 N. W. 955; Gunn v. Mahaska County, 155 Iowa, 527, 136 N. W. 929.

One has the right at all times to question the validity of a mortgage placed on his land, without his knowledge or consent. Boone v. Clark, 129 Ill. 466, 5 L.R.A. 276, 21 N. E. 850.

The question here to be determined is that of the right of a party in possession, as against third parties claimant. It is a question of notice to the world by possession. The recording act is not involved. Coe v. Manseau, 62 Wis. 81, 22 N. W. 155; Meade v. Gilfoyle, 64 Wis. 18, 24 N. W. 413.

Subrogation can only be made in furtherance of justice, and cannot be invoked against the rights of a third person, as is plaintiff in this case. He purchased the land under contract, free of all encumbrance; took possession under his contract and has remained in possession. The mortgage was without his knowledge or consent. 37 Cyc. 471; Wormer v. Waterloo Agri. Works, 62 Iowa, 699, 14 N. W. 331; Shinn v. Budd, 14 N. J. Eq. 234; Kitchell v. Mudgett, 37 Mich. 81; Gilbert v. Gilbert, 39 Iowa, 657; 3 Pom. Eq. Jur. 1212.

Fisk, Ch. J. This case is here for trial *de novo*. Plaintiff seeks to have certain adverse claims determined, and to quiet his title to certain real property in Dickey county. The facts as we find them to exist are substantially as follows: On November 23, 1907, one George D. Hall, who was on such date the owner of the real property in controversy, entered into a written contract with the plaintiff whereby the latter agreed to purchase, and Hall agreed to sell, such property at the stipulated price of $9,920, of which $3,320 was paid in cash, and all the deferred payments were represented by promissory notes payable on or before their due dates. One of such notes was for $3,700 payable on or before November 23, 1917, which note was for a valuable consideration sold and indorsed by Hall to the First National Bank of Amboy, Illinois, as collateral security for certain indebtedness. There were two notes of $700 each, one payable November 23, 1908, and the other November 23, 1910, one of which was indorsed, "Paid November 18th, Bank of Monango," and the other is merely indorsed, "paid." Pursuant to such contract, plaintiff immediately went into possession of the land

upon which there was a house, barn, and artesian well, and which land, with the exception of 60 acres, was all under cultivation, and he has remained in actual possession thereof ever since. From October 1, 1908, until April, 1909, one Archie Smith, together with his family, occupied the buildings thereon under a written lease with plaintiff.

At the time plaintiff contracted to purchase, he made no examination of the record title, relying solely upon Hall's statements as to the condition of his title. Neither did plaintiff cause the contract to be recorded until February, 1910. At the date of such contract there existed two mortgages of $800 each against this land. On May 8, 1908, these mortgages were both satisfied and the instruments satisfying them were recorded on July 30, 1908. Thereafter and on October 7, 1908, Hall and wife gave a mortgage on the land to William A. Caldwell, to secure the payment of $4,000, which mortgage was recorded October 12, 1908. Such mortgage was on November 30, 1908, assigned to appellant, Alson Blodgett, Jr., and the assignment recorder December 5, 1908. Plaintiff received no notice of such mortgage until the fall of 1910. At the time Blodgett bought such mortgage he had no actual knowledge of plaintiff's contract to purchase.

In the fall of 1910 plaintiff learned that Hall had been adjudged a bankrupt, and for the first time he learned of the $4,000 mortgage. Being a German and unfamiliar with the English language, he consulted attorneys, and sought through them to effect a settlement with Hall. Prior to his knowledge of the above facts, plaintiff, in good faith, made all the deferred payments under his contract excepting the sum of $2,062. After employing counsel had upon a full statement of the facts, plaintiff, through his attorneys, and relying on their advice, entered into tentative negotiations for taking over certain other lands with a view to settling this difference, in which event he would assume the $4,000 mortgage. These negotiations continued during a period of two years, during which time plaintiff caused to be paid for Hall two interest payments of $280 each to apply on the $4,000 mortgage held by Blodgett. These payments were made pursuant to an agreement with Hall that such payments would be credited upon the contract price of the land, and they were so credited on the contract in Hall's hand writing. The pending negotiations by which plaintiff was to take over other lands fell through, and he was left in the same position with ref-

erence to the deal with Hall as though no such negotiations had ever been pending. Meanwhile Hall, who was largely indebted to the bank of Amboy, had assigned to it as collateral to his indebtedness the $3,700 note aforesaid. This was held by the Bank of Amboy as collateral to a balance due on October 10, 1911, in the sum of $1,529.07, which amount plaintiff paid on that date, taking up the $3,700 note.

In June, 1912, plaintiff filed in the United States district court in which Hall's bankruptcy proceedings were pending, a claim for the amount that he computed was due him under the contract, but his claim was never approved or allowed.

Appellant's witness, W. C. Caldwell, testified that there were two $800 notes as he remembered it, given in connection with this contract, which plaintiff paid, and that plaintiff notified the Bank of Monango early in 1908 that he wanted to pay up on his contract in the fall of 1908, and, to get the title in marketable shape, the Bank of Monango paid the two Blackmore mortgages of $800 each. It is quite apparent that this witness had reference to the two $700 notes paid by the plaintiff, and that he paid them to the Bank of Monango, and it is also quite apparent that these notes were at least in the possession of said bank at the time it paid and satisfied the two Blackmore $800 mortgages.

Plaintiff tendered into court the sum of $402.30, being the balance which he claims he owes on his contract. The ultimate question for decision is whether this appellant, Blodgett, who is the assignee and holder of the $4,000 mortgage, is entitled as against plaintiff to a lien on the land for any sum. The trial court decided such question in plaintiff's favor.

In his brief, appellant treats the case under six points or subheads, as follows:

"1. Was the occupation of the premises involved herein so open, visible, notorious, and exclusive as to put a mortgagee in good faith on inquiry? 2. Plaintiff is estopped from questioning the validity of the $4,000 mortgage assigned to defendant Blodgett, he having paid interest on the said mortgage as it became due and generally recognized the mortgage as a valid lien. 3. The defendant Blodgett is a purchaser of negotiable paper in good faith and for a valuable consideration, and is not affected by equities existing between the original parties or claims

of third persons, even if such equities or claims were known to his assignor. 4. Conceding that Blodgett's note and mortgage is subject to all the equities existing between the original parties and even third parties, he is protected under the recording act because a contract for a deed is a conveyance under the act and should be recognized, and the failure to record such contract makes his assignment prior, he having no knowledge of the contract. 5. It was plaintiff's duty, upon discovering our mortgage, to make no further payments on his contract with Hall, and we are entitled to credit in the amount of any payments made thereafter. 6. Two thousand two hundred dollars of the money secured by Hall on the mortgage to Caldwell was used to pay off prior mortgages on record against this property at the time Quaschneck entered into his contract for purchase, and we are entitled to be subrogated to that amount so paid."

We will consider each of these propositions in the order they are thus presented. Under the first proposition counsel for appellant urge that plaintiff's possession was not of such character as to impart constructive notice of his equitable estate in the land, and that his possession was consistent with the record title. In support of their contention they cite and rely upon Red River Valley Land & Invest. Co. v. Smith, 7 N. D. 241, 74 N. W. 194; Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573, as well as certain authorities from other jurisdictions. We deem none of these in point under the facts before us. Plaintiff's possession was not consistent with the record title. Quite the reverse is true. Plaintiff paid the taxes, made valuable improvements, leased the buildings, paid rent to no one, but on the contrary he exercised all the rights of an owner of the premises. Surely such acts are wholly inconsistent with the title in another. We entertain no doubt that plaintiff's possession was sufficient to impart notice to the world of his equities in this land. The rule of law governing this proposition is too well settled to require extended discussion. See Simonson v. Wenzel, 27 N. D. 638, L.R.A.—, —, 147 N. W. 804; also Niles v. Cooper, 98 Minn. 39, 107 N. W. 744, and Garbutt v. Mayo, 128 Ga. 269, 57 S. E. 495, and the cases cited in the valuable notes to these authorities as reported in 13 L.R.A.(N.S.) pages 49–140. See also Bliss v. Waterbury, 27 S. D. 429, 131 N. W. 731.

At the time Caldwell took the $4,000 mortgage from Hall, he not

only had constructive notice of plaintiff's equities under his contract for deed, but we think the evidence fairly discloses that he had actual notice of plaintiff's rights in the land, for the defense attempted to show that Hall and Caldwell, after talking over the matter of such mortgage at the Bank of Monango, left there with the avowed purpose of interviewing plaintiff with intent to secure his assent to the giving of such mortgage by Hall. Whether such interview was had is a matter of dispute, but we are convinced from the record that plaintiff at least never consented to the giving of such mortgage. It follows that Caldwell took his mortgage, subject to all plaintiff's rights under his contract, he being chargeable with both constructive and actual notice of such rights. He, as such mortgagee, was also bound to know of the transfer by Hall of the purchase-money notes given by plaintiff, and of the latter's legal duty to pay such notes to the holders thereof. See Georgia State Bldg. & L. Asso. v. Faison, 114 Ga. 655, 40 S. E. 760; Meade v. Gilfoyle, 64 Wis. 18, 24 N. W. 413; Doolittle v. Cook, 75 Ill. 354; Humphrey v. Moore, 17 Iowa, 193; Van Baalen v. Cotney, 113 Mich. 202, 71 N. W. 491; Jaeger v. Hardy, 48 Ohio St. 335, 27 N. E. 863.

Plaintiff's possession was not only notice to Caldwell as such mortgagee, but it was also notice to this appellant, Blodgett, his assignee. Jamison v. Dimock, 95 Pa. 52, and Georgia State Bldg. & L. Asso. v. Faison, 114 Ga. 655, 40 S. E. 760.

Appellant's next contention is that plaintiff is estopped from questioning the validity of the $4,000 mortgage because of his having paid two instalments of interest thereon. Such contention is lacking in merit. The record discloses that these interest payments were made at Hall's request, who credited the same upon the plaintiff's contract, and also that they were made while tentative negotiations were pending with a view of plaintiff's assuming such mortgage in consideration of Hall deeding to him certain other property in settlement. Under the facts, there is no basis, whatever, for appellant's claim of estoppel. One of the essential elements constituting an estoppel, that the party relying thereon has suffered prejudice by the act of the other party, is wholly lacking in the case at bar. Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486.

Appellant's third contention is that he is a purchaser of negotiable

paper in good faith for a valuable consideration, and is not affected by equities existing between the original parties or claims of a third person, even if such equities were known to his assignor. In other words, he in effect contends that by his purchase from Caldwell of the $4,000 note and mortgage, executed by Hall, he acquired rights under the mortgage, as against this plaintiff, which Caldwell did not possess. We are unable to acquiesce in this view of the law. We fail to see how plaintiff's rights in this real property could be in the least changed or affected by such transaction had between third persons without plaintiff's knowledge or consent. By his purchase of such paper from Caldwell, appellant as against this plaintiff could acquire only such rights under the mortgage as his assignor possessed. This appears to us to be a self-evident proposition, which requires no argument. No doubt, appellant by such purchase, cut off any equities which may have existed in Hall's favor and against Caldwell, but this would in no manner affect the rights of this plaintiff, who did not give the mortgage and who knew nothing of it. Were the rule otherwise, a good-faith purchaser of a mortgage given by a stranger to the title would be nevertheless enforceable as against the true owner of the land who knew nothing of the giving of such mortgage. Such a proposition would, of course, be absurd. But appellant asserts that he should be protected as against plaintiff under the recording act, the latter having failed to record his contract for deed until after the mortgage and its assignment were executed and recorded. It is, no doubt, true as contended, that plaintiff's contract for deed was subject to the recording act. Appellant cites and quotes from numerous authorities in support of his contention, but none of them involve a state of facts like those in the case at bar where it is sought to invoke such rule as against one in open and notorious possession of the premises. If, as we have held, plaintiff's possession was notice to the world of his equitable estate in the land, how can it be properly asserted that to protect his rights he should also have given constructive notice of ownership by recording his contract? If he had procured from Hall a deed instead of a contract for a deed, and had gone into possession thereunder, could it be successfully argued that notice through his possession would not be equivalent to constructive notice given by recording the deed? Clearly not. We entertain no doubt that plaintiff's possession under his contract afforded him com-

plete protection as notice of his rights as against all persons thereafter acquiring liens upon the land. Constructive notice by possession has, in brief, the same force and effect as actual notice in putting third persons upon inquiry.

Appellant's fifth contention is that it was plaintiff's duty, upon discovering the $4,000 mortgage, to make all subsequent payments to the holder thereof. Such contention is no doubt sound in so far as any subsequent payments to Hall are concerned. But the record discloses that no moneys were thereafter paid to Hall, but plaintiff did pay the sum of $1,529.07 to the Bank of Amboy to take up the $3,700 note, which had been hypothecated by Hall to such bank to secure certain indebtedness. Plaintiff was legally obliged to make this payment, as such note had been duly indorsed before maturity and for value to such bank. As we have heretofore stated, appellant, at the time of his purchase of the Hall mortgage from Caldwell, was bound to know of the outstanding notes given by plaintiff to Hall for the purchase price of such land, and that they had been negotiated to third persons. (Georgia State Bldg. & Loan Asso. v. Faison, 114 Ga. 655, 40 S. E. 760.) His rights, under the assignment, were therefore subordinate to the rights of the holders of such notes. Plaintiff could not be required to pay the portion of the purchase price represented by such notes both to the holders thereof and to appellant. We know of no rule of equity which would require this from him. As before stated, he did only what he was legally required to do under the facts.

This brings us to appellant's last contention, which is, that he is entitled to be subrogated to the rights of the mortgagees under two certain mortgages existing of record against the land at the date of plaintiff's contract to purchase. He bases this claim upon the alleged fact that the proceeds of the $4,000 loan made by Caldwell to Hall, to the extent of about $2,200, was used in paying and satisfying these prior mortgages, and that consequently he, as assignee of the $4,000 note and mortgage, is entitled to the rights of his assignor, Caldwell, to such subrogation. This argument would be plausible were the facts as contended for by appellant. Appellant's rights to be subrogated, are, of course, the same as those of his assignor, Caldwell,—no greater and no less. Was Caldwell, while he owned the $4,000 note and mortgage, entitled to be subrogated to the rights of such prior mortgagees as

against this plaintiff? The trial court answered this in the negative, no doubt basing it upon the fact, as found in its 14th finding, that such mortgages "were not assumed by Jacob Quaschneck, and were, in fact, thereafter but prior to the execution of the Caldwell mortgage above mentioned, actually paid by George B. Hall without any request therefor on the part of Jacob Quaschneck." If such finding is correct there is concededly no merit in appellant's contention on this point, unless such payments were thus made by Hall out of funds advanced by Caldwell under an agreement that the same would be used for this express purpose, and with the expectation that Caldwell would be substituted in place of the holder of such mortgages. It should be remembered that Hall, and not this plaintiff, was under obligations to pay and satisfy such mortgages, in order to be in a position to fulfil his contract to furnish to plaintiff a deed free and clear of all encumbrances.

While it is strenuously asserted by counsel for appellant that the proceeds of the $4,000 loan were, in fact, used to the extent of $2,200 in paying this old mortgage indebtedness, we are not entirely convinced that such was the fact. It is true the witness Caldwell testified that about $2,200 was paid in satisfying liens against the property, but this is his bald conclusion. He gives no details regarding such payments. The undisputed evidence shows that these old mortgages were both paid and satisfied on May 8, 1908, and the satisfactions recorded on July 30, while the $4,000 mortgage was not executed until the following October. It also appears that plaintiff made a payment of just $2,200 on this contract on November 14, 1908.

Even though, as against Hall, it should be held that Caldwell had the right to be subrogated, we fail to see why, as against this plaintiff, such right should exist even under any view of the facts most favorable to appellant. In other words, we fail to see how Caldwell's alleged equitable right to subrogation is superior to the equities of this plaintiff. As we read them, none of the authorities cited by appellant go this far. They merely hold under certain facts that subrogation may be had *as against the mortgagor of person liable for the payment of the indebtedness and those acquiring subsequent rights with notice.* Plaintiff, as before stated, was in no manner obligated to pay such indebtedness. He was not a party to the negotiations of this mortgage, nor to its assign-

ment to appellant. He purchased the land under a contract with Hall, whereby the latter agreed to give him a title free and clear of all encumbrances, and his possession under such contract with Hall, whereby the latter agreed to give him a title free and clear of all encumbrances, and his possession under such contract was notice to the world of his rights. Caldwell, at the time of making the $4,000 loan to Hall, knew of the latter's contract duty to plaintiff to clear the title of these old mortgages, and any funds furnished to Hall for such purpose were therefore thus furnished without even an implied agreement that he, Caldwell, should keep such old mortgage liens in existence through the doctrine of subrogation or equitable assignment. The very purpose of the advancement negatives any such agreement. Furthermore, there is absolutely no evidence in the record either of an express or implied agreement upon which to support appellant's claim to subrogation, even as against Hall, much less the plaintiff. It is well settled that in the absence of an agreement, express or implied, that the claims which have been paid shall be kept alive for the benefit of the mortgagee who makes the advances for such payments, no subrogation can be had. The rule announced in McCowan v. Brooks, 113 Ga. 532, 39 S. E. 115, and Meeker v. Larsen, 65 Neb. 158, 57 L.R.A. 901, 90 N. W. 958, upon the law of subrogation, voices the general rule in this country and meets with our full approval. In the former case it was held: "One who, having no interest to protect, voluntarily pays off an encumbrance upon the land of another, is not subrogated to the rights of the holder of such an encumbrance, unless there is an agreement, either express or implied, between the person discharging the encumbrance and either the debtor or the creditor, that he shall be subrogated to the rights of the encumbrancer. Wilkins v. Gibson, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374.

The opinion in Meeker v. Larsen contains a very lucid discussion of the question, together with the review of numerous authorities. See also opinion of Circuit Judge Thayer, (8th C.) in Cumberland Bldg. & L. Asso. v. Sparks, 49 C. C. A. 510, 111 Fed. 647; also 37 Cyc. 471–475, and cases cited.

Our conclusions, as above announced, lead to an affirmance of the judgment appealed from, and it is so ordered.

On Petition for Rehearing.

PER CURIAM. After the foregoing opinion was filed, appellant's counsel presented a petition for a rehearing upon propositions numbered 2 and 5, and the prayer of such petition was granted, and these two propositions have again been exhaustively argued both orally and in briefs. We have expended much time in a consideration of the questions thus reargued, and we still entertain the views set forth in our first opinion. It would serve no useful purpose to elaborate upon the reasons there given for our conclusions as announced in the former opinion. The order therein made is adhered to.

C. H. STARKE v. GEORGE R. WANNEMACHER.

(156 N. W. 494.)

Promissory note — purchase of — by attorney — suit — intention.

1. Section 9412, Compiled Laws 1913, does not render illegal the purchase by an attorney of a promissory note, unless it is shown that it was purchased with intent to bring suit thereon.

Promissory note — delivery — consideration — failure of — evidence — conflicting — questions for jury.

2. Where the evidence on the questions of delivery and failure of consideration of a promissory note is in conflict, such questions are properly submitted to the jury.

Judgment — motion for — notwithstanding verdict — order denying — non-appealable.

3. Following Turner v. Crumpton, 25 N. D. 134, and Houston v. Minneapolis, St. P. & S. Ste. M. R. Co. 25 N. D. 469, it is *held* that an order denying a motion for judgment notwithstanding the verdict is non-appealable.

Opinion filed February 5, 1916.

Appeal from a judgment and an order denying a motion for judgment notwithstanding the verdict of the District Court of Stark County, *Crawford*, J.

Defendant appeals.

Affirmed.

F. C. Heffron (of record) and *Newton, Dullam, & Young* (on oral argument), for appellant.

Our statutes upon the question of right of an attorney at law to buy promissory notes with the intention to bring suit on them are practically declaratory of the doctrine of champerty. Comp. Laws 1913, §§ 9412, 9414, 9416 and 9417.

The purchase of the note in question with intent to sue, if necessary, was a criminal act, and void, and gives plaintiff no right to bring or maintain this action. Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258; Burke v. Scharf, 19 N. D. 227, 124 N. W. 79; Mann v. Fairchild, 14 Barb. 548, 2 Keyes, 106; Arden v. Patterson, 5 Johns. Ch. 48; Browning v. Marvin, 100 N. Y. 144, 2 N. E. 635; Maxon v. Cain, 22 App. Div. 270, 47 N. Y. Supp. 855; Dahms v. Sears, 13 Or. 47, 11 Pac. 891; Miles v. Mutual Reserve Fund Life Asso. 108 Wis. 421, 84 N. W. 159.

Nor does the fact that the purchase was made with intent to sue only in case of contingency make any difference. Moses v. McDivit, 2 Abb. N. C. 47.

When payment and delivery are concurrent, there is nothing to be done by either party, and if nothing is done by either, neither is in default, and neither party can hold the other for breach of the contract. The contract and the note in suit had been abandoned and canceled by the parties to the original contract, and therefore the note had no existence,—was not the subject of sale. Bartlett v. Scott, 55 Neb. 477, 75 N. W. 1102; Haynes v. Brown, 18 Okla. 389, 89 Pac. 1124; Cole v. Swanston, 1 Cal. 51, 52 Am. Dec. 288; Barnard v. Houser, 68 Or. 240, 137 Pac. 227.

T. F. Murtha, for respondent.

An order denying a motion for judgment notwithstanding the verdict is not an appealable order. Turner v. Crumpton, 25 N. D. 134, 141 N. W. 209; Houston v. Minneapolis, St. P. & S. Ste. M. R. Co. 25 N. D. 471, 46 L.R.A.(N.S.) 589, 141 N. W. 994, Ann. Cas. 1915C, 529.

A motion for new trial in the court below is necessary to secure a review of questions of fact in the supreme court. Comp. Laws 1913, §§ 7842, 7843.

The purchase of notes and choses in action by an attorney is not within the prohibition of the statute, and is not champerty; and appel-

lant was not a party to the alleged champertous contract, and therefore cannot raise such question, even if it here existed. Hall v. Bartlett, 9 Barb. 297; Moses v. McDivitt, 88 N. Y. 62; Wetmore v. Hegeman, 88 N. Y. 73; West v. Kurtz, 16 N. Y. S. R. 696, 2 N. Y. Supp. 110, 15 Daly, 99, 3 N. Y. Supp. 14; Van Dewater v. Gear, 21 App. Div. 201, 47 N. Y. Supp. 503; De Forest v. Andrews, 27 Misc. 145, 58 N. Y. Supp. 358; Wightman v. Catlin, 113 App. Div. 24, 98 N. Y. Supp. 1071; Bulkeley v. Bank of California, 68 Cal. 80, 8 Pac. 643; Tuller v. Arnold, 98 Cal. 522, 33 Pac. 445.

In order to come within the statute, the purchase of the note must be for the very purpose of bringing suit on it. West v. Kurtz, 16 N. Y. S. R. 696, 2 N. Y. Supp. 110.

It is the settled law that conveyances made at judicial or official sales, or under decree of court, of lands held adversely, are not champertous, either at common law or under the statute. State Finance Co. v. Halstenson, 17 N. D. 149, 114 N. W. 724; 6 Cyc. 858, 974, and cases cited; Electric Lighting Co. v. Rust, 117 Ala. 680, 23 So. 751; Humes v. Bernstein, 72 Ala. 546.

At common law where personal property was in the adverse possession of another, the sale or assignment was champertous, as against public policy. 6 Cyc. 857, and cases cited.

This rule is held not to apply to judicial sales. 6 Cyc. 858; Hoyt v. Thompson, 5 N. Y. 345; Bluefields S. S. Co. v. Lala Ferreras Cangeloist S. S. Co. 133 La. 424, 63 So. 96.

The question of champerty in the purchase cannot be raised by one not a party to the alleged champertous contract, to defeat a just debt. Woods v. Walsh, 7 N. D. 376, 75 N. W. 767; Randall v. Baird, 66 Mich. 312, 33 N. W. 506; Isherwood v. H. L. Jenkins Lumber Co. 87 Minn. 388, 92 N. W. 230; Walsh v. Allen, 6 Colo. App. 303, 40 Pac. 473; Prosky v. Clark, 32 Nev. 441, 35 L.R.A.(N.S.) 512, 109 Pac. 793; Croco v. Oregon Short Line R. Co. 18 Utah, 311, 44 L.R.A. 285, 54 Pac. 985; Pennsylvania Co. v. Lombardo, 49 Ohio St. 1, 14 L.R.A. 785, 29 N. E. 573; Taylor v. Gilman, 58 N. H. 417; Million v. Ohnsorg, 10 Mo. App. 432; Hart v. State, 120 Ind. 83, 21 N. E. 654, 24 N. E. 151.

CHRISTIANSON, J. This action was brought to recover upon a promissory note in the sum of $1,500, which it is alleged was executed

and delivered by the defendant to the Missouri Slope Brick & Tile Company for a valuable consideration, on or about March 30, 1908, and thereafter sold and assigned to the plaintiff for a valuable consideration. The answer interposed the defenses of (1) want of consideration; (2) failure of consideration; (3) nondelivery of the note; and (4) that the plaintiff was an attorney at law, duly admitted to practice and practising his profession in the state of North Dakota, and that he purchased the note with other choses in action from the said Missouri Slope Brick & Tile Company for the purpose of bringing suit thereon, and that hence the purchase was champertous, and plaintiff barred from maintaining the action. The latter defense was first tried to the court without a jury. The court held that the plaintiff's purchase of the note was not champertous, and that plaintiff had a right to maintain the action. A jury was thereupon impaneled, and the other issues were submitted to the jury, which returned a verdict in favor of the plaintiff. Judgment was entered pursuant to such verdict. Defendant did not move for a new trial, but, some time subsequent to the entry of judgment, moved for judgment notwithstanding the verdict. The appeal is taken from the judgment and from the order denying defendant's motion for judgment notwithstanding the verdict.

Appellant makes no specification of insufficiency of evidence, but presents for our consideration certain errors of law. A number of such assignments, however, have been abandoned, and the only errors argued in appellant's brief, and, hence, the only ones which we shall consider are: (1) Was the plaintiff's purchase of the note in question champertous and void under the laws of this state? (2) Was defendant entitled to a directed verdict upon the grounds of nondelivery of the note or want or failure of consideration thereof? We will consider these propositions in the order stated.

(1) The note sued upon was given by the defendant to Missouri Slope Brick & Tile Company for fifteen shares of stock in such company. The stock was purchased through the agency of one Kalman. At the time the note was given, the defendant also purchased ten shares of stock in the same company, owned by Kalman. The defendant executed and delivered his two notes, one for $1,000 for the ten shares of stock purchased from Kalman, and one for $1,500 for the fifteen shares of stock purchased from the Missouri Slope Brick & Tile Company

(the latter being the note involved in this action). Kalman testified that he sold the stock, prepared the note involved in this action, and that the defendant, Wannemacher, signed it in his presence.

He further testified:

Q. And what was that note given for?

A. For $1,500 worth of stock in the Missouri Slope Brick & Tile Company.

Q. Was there any understanding or agreement as to what was to be done with the stock?

A. The stock was to be held as collateral on the note.

Q. That is, Mr. Wannemacher was not to have the stock until he paid the note?

A. No, that says on the face of the note.

Q. I call your attention to some writing in the lower left-hand corner of the note as follows: 'Secured by Mo. Slope B. & T. Company stock No. —' and ask you in whose handwriting that is?

A. That's in my handwriting.

Q. And when was that put on there?

A. At the time this note was made.

. . . . . .

Q. At the same time that Mr. Wannemacher gave this "Exhibit F," the note for $1,500, did he purchase any other stock besides this of the Missouri Slope Brick & Tile Company?

A. He did.

Q. How many shares?

A. Ten.

Q. Who owned that ten shares?

A. I did.

Q. Did he give you a note for that?

A. I don't remember now which it was, but I think it was.

Q. Was it understood between you and Mr. Wannemacher that the stock could be issued and held as security for the note?

A. Yes, sir.

The defendant paid the thousand dollar note and received the canceled note and the ten shares of stock. Subsequently in 1910, the Missouri Slope Brick & Tile Company became insolvent and a receiver

was appointed. On April 5, 1913, the receiver, pursuant to the order of the court, offered for sale and sold at public auction all the remaining assets of the company, consisting of twenty-four accounts, notes and judgments against various parties, including the note involved in this action, and 16,850 miscellaneous bricks. All of such assets were purchased by the plaintiff at such receiver's sale.

Appellant contends that defendant's purchase of the note was champertous and void under the provisions of §§ 9412 and 9417 of the Compiled Laws of 1913. These sections read as follows: "Every attorney who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor." Comp. Laws 1913, § 9412.

"The provisions of §§ 9412, 9414, and 9416 relative to the buying of claims by an attorney, with intent to prosecute them, or to the lending or advancing of money by an attorney in consideration of a claim being delivered for collection, shall apply to every case of such buying a claim, or lending or advancing money, by any person prosecuting a suit or demand in person." Comp. Laws 1913, § 9417.

The only evidence on the question of champerty was the testimony of the plaintiff himself.

On being called by the defendant for cross-examination, under the statute, he testified in part as follows:

Q. How did you purchase this note?

A. I purchased this note at a sale which was advertised in the Dickinson Press, of the assets and uncollectable accounts of the receiver of the Missouri Slope Brick & Tile Company, at public auction at the front door of the courthouse in Dickinson.

Q. And was the note delivered to you at that time?

A. No.

Q. Did you buy any other choses in action at that time?

A. I bought a number of accounts at that time.

. . . . . .

Q. And you expected to sue on them when you bought them, if necessary, for collection?

A. I expected that if I couldn't collect them otherwise probably suit would be necessary on some of them.

Q. And in pursuance of your intent to sue, if necessary, you brought this action?

A. Yes.

Q. Did you ever demand this of Mr. Wannemacher before bringing suit?

A. No, sir.

Q. You knew he was a responsible party?

A. Why, I knew he wasn't.

Q. You knew he had considerable money in the bank here at that time?

A. No, sir. I knew just otherwise; that he wasn't a responsible party. Mr. Heffron, I'll tell you I knew that Mr. Wannemacher had no property in this country, and I thought the note was worth nothing, and I knew that all the property that he had was in his wife's name, and I didn't think the note was collectable. I also knew that he was a non-resident of this state.

Q. And that he was worth considerable money?

A. No. And I also knew that he had a number of legitimate debts around here which he had compromised, after getting his property out of his own hands, for a great deal less than half the face value of them.

Being called as a witness in his own behalf, he testified in part as follows:

Q. Did you buy this with the sole intent and purpose of suing Mr. Wannemacher?

A. No, sir. I had no idea of suing on any of the accounts at that time. My real inducement in making the purchase was the brick which I knew to be of value. The accounts had been in the hands of Mr. McBride for a number of years, and he had attempted collection of them and had set them out as uncollectable, and I felt that they were of little, if any, value.

Q. Mr. Starke, had you any idea or purpose at the time you purchased these notes, or any other time, of harassing or annoying Mr. Wannemacher?

A. Not at all. I knew Mr. Wannemacher not at all. Knew nothing of him.

It is not necessary to construe the statutory provisions invoked by defendant further than to say that this case is not within such provisions, or affected by them. The statute is penal. If the purchase was made in violation of the terms of the statute, then plaintiff is guilty of a misdemeanor. The presumption is that he is innocent. The statute does not pretend to prevent attorneys from making investments, or purchasing securities or obligations. It only forbids such purchase "with intent to bring suit thereon." The offense rests in the intention. It is not the purchase, but the "intent to bring suit thereon," which converts an act otherwise lawful into a crime. Such intent is the element which is criminal and vitiates the contract. See Woods v. Walsh, 7 N. D. 376, 75 N. W. 767; Tuller v. Arnold, 98 Cal. 522, 33 Pac. 445; Re Cummins, 143 Cal. 525, 77 Pac. 479; Bulkeley v. Bank of California, 68 Cal. 80, 8 Pac. 643; Moses v. McDivitt, 88 N. Y. 62; Wightman v. Catlin, 113 App. Div. 24, 98 N. Y. Supp. 1071; Van Dewater v. Gear, 21 App. Div. 201, 47 N. Y. Supp. 503.

There is no evidence in this case showing that plaintiff bought the note "with intent to bring suit thereon." But there is positive testimony to the contrary.

(2) The issues tried to the jury were in reality reduced to one,—whether the defendant's purchase of the stock was conditional or unconditional. The defendant contended that such purchase was conditional, and that the note was given for stock which was never delivered. Defendant's contentions are set forth in the motion for a directed verdict made at the close of the testimony, which was as follows: "Now comes the defendant and renews the motion for a directed verdict in his favor and against the plaintiff, and calls the court's attention to the following grounds of defendant's motion: That the evidence in this case having clearly shown that the note sued upon was given for stock in the Missouri Slope Brick & Tile Company, and that said stock was never tendered or delivered to the defendant; that this section cannot be maintained for the reason that no tender has been offered in the pleadings, and could not be offered by this plaintiff, the company being defunct. And, further, that the stock could not be assigned as collateral, because never delivered, and therefore never assigned; and, further, that this plaintiff could not tender the stock, for the reason that it has no authority and the company does not now exist."

Defendant's counsel earnestly contends that this motion should have been granted. The difficulty with the motion as well as with counsel's argument is that it is predicated solely upon defendant's testimony, and ignores the evidence offered by plaintiff. It is conceded that defendant on the same day executed two notes, one for $1,000 and one for $1,500, for capital stock in the Missouri Slope Brick & Tile Company; the thousand dollar note being for stock owned by Kalman and assigned by him to the defendant. That the defendant thereafter paid the thousand dollar note and received the canceled note and his stock certificate for ten shares of stock. The notes were executed and delivered March 30, 1908. The books of the company, which were offered in evidence by the plaintiff, show that on March 31, 1908, two stock certificates were issued to the defendant,—certificate No. 85, for ten shares originally issued to Kalman and transferred by Kalman to the defendant, and certificate No. 86, for fifteen shares purchased by defendant from the company. The certificate for ten shares was delivered to defendant when he paid the thousand dollar note. The certificate for fifteen shares (offered in evidence and contained in the record on this appeal) came into the hands of the plaintiff at the time of his purchase of the note involved in this suit. The indorsement, referred to by Kalman, to the effect that the note is secured by stock in the Missouri Slope Brick & Tile Company, appears on the note. Plaintiff also produced as witnesses the president and secretary of the company. Clearly the evidence of Kalman, if true, was sufficient to show that the note was executed and delivered unconditionally as payment for the fifteen shares of stock evidenced by the stock certificate offered and received in evidence, and that such stock certificate was retained by the company as collateral security for the payment of the note. Kalman's testimony is corroborated by the indorsement of the note, and the books of the company.

The defendant was therefore not entitled to a directed verdict. The disputed questions were submitted to the jury, under appropriate instructions, eminently fair to the defendant. The jury by its verdict determined these questions adversely to the defendant. This determination is binding on this court.

Error is also assigned on the court's ruling in sustaining objections to the following two questions put to plaintiff on his cross-examination:

Q. Do you know what the note was given for?

Mr. Murtha. Objected to as immaterial and improper cross-examination.

The Court. Objection sustained.

Q. How much did you pay for this note?

Mr. Murtha. I object to that as being immaterial, improper cross-examination, wholly without the issues of this case.

The Court. Objection sustained.

Mr. Heffron. Exception.

This specification, although mentioned on oral argument, was not supported by argument in appellant's brief, and therefore may be deemed abandoned. The specification, however, if considered, is without merit.

In his answer, among other things, defendant alleges "that C. H. Starke *purchased* this note with other choses in action from said Missouri Slope Brick & Tile Company for the purpose of bringing suit thereon; that at the time of obtaining said *transfer* of said note, said C. H. Starke knew or should have known that defendant did not owe the Missouri Slope Brick & Tile Company any sum of money whatever by reason of said note, *that said note was purchased* and this action was instituted and maintained by plaintiff," etc. Hence, it will be observed that defendant's answer affirmatively alleges that the note was purchased by, and transferred to, the plaintiff. Plaintiff's title, therefore, was not in issue, except as raised by the defense of champerty.

As already stated, the defense of champerty was first tried to the court without a jury. Both parties consented to this method of trial, and the record shows that, upon the trial of this issue before court, the plaintiff was fully cross-examined by defendant's counsel with reference to the purchase of the note in question and the amount paid by plaintiff for the assets of the Missouri Slope Brick & Tile Company. There was no dispute as to the consideration for the note, and it was conceded that plaintiff purchased the same after maturity, and subject to all defenses which defendant might have interposed against the original holder. Hence, the defendant could not possibly be prejudiced by the rulings on these objections. In fact, appellant's counsel does not seriously contend that this was proper cross-examination, but bases his argument on the theory that the testimony excluded was material to de-

fendant's defense as tending to corroborate defendant's contention that the note was conditionally delivered. It is at least very doubtful if it had any logical tendency to do this. Even if it did it was not necessarily proper cross-examination. The questions related to matters not in issue under the defenses tried to the jury, and to matters not covered by the examination in chief. The competency of the testimony sought to be elicited by the question is not apparent. It is virtually conceded that they did not constitute cross-examination. Hence, obviously it cannot be said that the trial court erred in sustaining the objections.

(3) Appellant, also attempted to appeal from an order denying defendant's motion for judgment notwithstanding the verdict. This order was nonappealable, and hence cannot be considered. Turner v. Crumpton, 25 N. D. 134, 141 N. W. 209; Houston v. Minneapolis, St. P. & S. Ste. M. R. Co. 25 N. D. 471, 46 L.R.A.(N.S.) 589, 141 N. W. 994, Ann. Cas. 1915C, 529. Appellant is not prejudiced by this fact, however, as such order merely reaffirmed the court's ruling in denying defendant's motion for a directed verdict. The error predicated upon the denial of the motion for a directed verdict was reviewable on the appeal from the judgment, and has been fully considered and determined adversely to defendant.

This disposes of all the questions presented for our determination, and it follows from what has been said that the judgment must be affirmed. It is so ordered.

NORTHERN PACIFIC RAILWAY COMPANY v. MORTON COUNTY, a Municipal Corporation.

(L.R.A.—, —, 156 N. W. 226.)

Under constitutional and statutory provisions governing taxation of sites of elevators, lumber yards, and oil-tank stations upon railroad right of way occupied under license of lease from the railroad company, it is *held:*

Taxation of elevator sites — lumber yards — oil-tank stations upon railroad right of way — constitutional and statutory provisions — industrial sites — private uses — real estate.

1. Such sites are industrial sites while so held and used, and as such are

devoted to private, and not railroad, use, and are therefore taxable as local real estate.

Tracts — railroad right of user — subject to — assessment as real estate.

2. While the tracts occupied by such sites are subject to the railroad right of user, and are taxable as a part of and in the manner of taxing of strictly railroad property, yet the tax therefor assessed by the state board of equalization upon such basis cannot constitute a tax upon the taxable private right of user enjoyed by the industrial sites, and which sites for such purposes can be assessed and taxed only after local assessment as real estate.

Industrial sites — taxation of — locally.

3. It is *held*, therefore, said industrial sites have escaped taxation during the years in question, and were taxable locally during said time.

Dual taxable right of user — assessment — state board of equalization — general taxation — private use.

4. The 1901 constitutional amendment to § 179 of the Constitution for taxation purposes recognizes a dual taxable right of user of right of way, *viz.*, (1) a right to tax the same upon the assessment of the state board of equalization as for railroad use; and (2) the right to locally tax by general taxation any portion of the site appropriated temporarily to private use.

Private right of user — constitutional amendment — assessment of property — for taxation.

5. Section 2118, Comp. Laws 1913, taken with said constitutional amendment, authorizes the assessment made upon the private right of user of these industrial sites.

Taxation — both rights of user — not double taxation.

6. This taxation of both rights of user does not constitute double taxation.

Industrial sites — assessment — levies — liens.

7. The taxes assessed and levied upon all these industrial sites are valid and constitute liens upon the tracts in question.

Opinion filed December 13, 1915. Rehearing denied February 5, 1916.

Cross Appeals from the District Court of Morton County, *Nuessle*, Special Judge.

Modified and affirmed.

Watson & Young, for plaintiff and for the Elevator Company, and *Miller, Zuger, & Tollotson*, for the Lumber Yard and Oil Sites.

A contemporaneous and practical construction of either a constitution or a statute is entitled to great, if not controlling, weight. Cooley,

Const. Lim. 4th ed. pp. 81–86; Gaar-S. & Co. v. Sorum, 11 N. D. 164, 90 N. W. 799; Wiles v. McIntosh County, 10 N. D. 594, 88 N. W. 710; Northern P. R. Co. v. Barnes, 2 N. D. 310, 51 N. W. 386; Barrett v. Stutsman County, 4 N. D. 175, 59 N. W. 964; State ex rel. Edgerly v. Currie, 3 N. D. 310, 55 N. W. 858; State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360.

The assessment now proposed would constitute double taxation, and in a case where there is nothing either in the Constitution or the statutes which would authorize it. Cooley, Taxn. 1st ed. 165, 166.

Railway right of way or station grounds temporarily occupied do not cease to be railroad property devoted to public use. The mere fact that they are so used for platforms, yards, warehouses, and buildings, though these may serve the convenience of others, does not change this rule. York & M. Line R. Co. v. Winans, 17 How. 30, 39, 15 L. ed. 27, 29; Beman v. Rufford, 1 Sim. N. S. 550, 20 L. J. Ch. N. S. 537, 15 Jur. 914; Winch v. Birkenhead, L. & C. J. R. Co. 13 Eng. L. & Eq. Rep. 506; Gue v. Tide Water Canal Co. 24 How. 257, 16 L. ed. 635; East Alabama R. Co. v. Doe, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869; Thomas v. West Jersey R. Co. 101 U. S. 71, 83, 25 L. ed. 950, 952; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 91, 99, 44 L. ed. 84, 88, 20 Sup. Ct. Rep. 33; Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 468, 23 L. ed. 356, 361; Gurney v. Minneapolis Union Elevator Co. 63 Minn. 70, 30 L.R.A. 534, 65 N. W. 136; Const. § 179; Chicago, M. & St. P. R. Co. v. Cass County, 8 N. D. 18, 76 N. W. 239.

A "roadway" within the Constitution, providing for taxation of the franchise, roadway, etc., includes not only the strip of land on which the main line is constructed, but all grounds necessary for the construction of side tracks, turnouts, freight houses, connecting tracks, station houses, and other accommodations reasonably necessary to accomplish the object of their incorporation. Minneapolis, St. P. & S. Ste. M. R. Co. v. Oppegard, 18 N. D. 1, 118 N. W. 830; Chicago, M. & St. P. R. Co. v. Cass County, 8 N. D. 18, 76 N. W. 239; Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County, 11 N. D. 107, 9 N. W. 260; Laws 1891, chap. 126; State ex rel. Stoeser v. Brass, 2 N. D. 482, 52 N. W. 408, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; Gurney v. Minneapolis Union Elevator Co. 63

Minn. 70, 30 L.R.A. 534, 65 N. W. 136; Roby v. New York C. & H. R. R. Co. 142 N. Y. 176, 36 N. E. 1053; Peirce v. Boston & L. R. Corp. 141 Mass. 481, 6 N. E. 96; Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356; Illinois C. R. Co. v. Wathen, 17 Ill. App. 582; Minneapolis, St. P. & S. Ste. M. R. Co. v. Douglas County, 159 Wis. 408, 150 N. W. 422; State ex rel. Milwaukee Street R. Co. v. Anderson, 90 Wis. 550, 63 N. W. 746; Washburn v. Washburn Waterworks Co. 120 Wis. 575, 98 N. W. 539; Chicago & N. W. R. Co. v. State, 128 Wis. 619, 108 N. W. 557; Chicago, St. P. M. & O. R. Co. v. Douglas County, 122 Wis. 273, 99 N .W. 1030; Chicago, St. P. M. & O. R. Co. v. Bayfield County, 87 Wis. 188, 58 N. W. 245; Superior Bd. of Trade v. Great Northern R. Co. 1 Wis. R. C. R. 619.

In states where the "roadway" or the right of way is assessed by a state assessing board, and other railroad property is assessed by local assessing officers or boards, it is a matter of some importance to know what is meant by this term. In this state it includes not only the strip of ground on which the main line is located, but also all ground necessary for the construction of side tracks, turnouts, station houses, freight houses, and all other accommodations reasonably necessary to accomplish the objects for which the railroad was incorporated. 2 Elliott, Railroads, §§ 738, 745; State ex rel. Stoeser v. Brass, 2 N. D. 482, 52 N. W. 408, affirmed in 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857.

Property used in connection with a carrier's business as such is assessable by the state board of equalization, and not by the local authorities. It is held in states having like statutes to ours, that grain elevators and other similar property fall within the designation or railway property used in a carrier's business. Herter v. Chicago, M. & St. P. R. Co. 114 Iowa, 330, 86 N. W. 266; Chicago, St. P. M. & O. R. Co. v. Douglas County, 122 Wis. 273, 99 N. W. 1030; Detroit Union R. Depot & Station Co. v. Detroit, 88 Mich. 347, 50 N. W. 302; State v. Jersey City, — N. J. L. —, 9 Atl. 782; Chicago, M. & St. P. R. Co. v. Crawford County, 48 Wis. 666, 5 N. W. 3; Auditor General v. Flint & P. M. R. Co. 114 Mich. 682, 72 N. W. 992; Chicago, St. P. M. & O. R. Co. v. Bayfield County, 87 Wis. 188, 58 N. W. 245; Board of Equalization v. Louisville & N. R. Co. 139 Ky. 386, 109 S. W. 303; Barhyte v. Shepherd, 35 N. Y. 238.

"It is well settled that assessors, in making assessments in all cases where they have jurisdiction, act judicially." Swift v. Poughkeepsie, 37 N. Y. 511; Barhyte v. Shepherd, 35 N. Y. 238; Buffalo & S. L. R. Co. v. Erie County, 48 N. Y. 105.

"The assessors in determining whether the plaintiff's property was taxable as a dwelling, or exempt as a seminary of learning, act judicially and within the sphere of their duty." Chegaray v. Jenkins, 5 N. Y. 381; Van Rensselaer v. Witbeck, 7 Barb. 133; Central Trust Co. v. Wabash, St. L. & P. R. Co. 27 Fed. 14; Harrington v. Glidden, 179 Mass. 486, 88 Am. St. Rep. 613, 61 N. E. 55, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574; Anniston City Land Co. v. State, 185 Ala. 482, 64 So. 110; 37 Cyc. 1072; Coulter v. Louisville Bridge Co. 114 Ky. 42, 70 S. W. 29; Chicago, St. L. & N. O. R. Co. v. Com. 115 Ky. 278, 72 S. W. 1119.

The action of such officers is conclusive. Coulter v. Louisville Bridge Co. 114 Ky. 42, 70 S. W. 29; Swift v. Poughkeepsie, 37 N. Y. 511; Weaver v. Devendorf, 3 Denio, 117; Vail v. Owen, 19 Barb. 22; Brown v. Smith, 24 Barb. 419; People ex rel. Mygatt v. Chenango County, 11 N. Y. 573; Easton v. Calendar, 11 Wend. 90; Hill v. Sellick, 21 Barb. 207; Fawcett v. Dole, 67 N. H. 168, 29 Atl. 693; Meade v. Haines, 81 Mich. 261, 45 N. W. 836.

The findings of the state board of equalization cannot be impeached collaterally. Yazoo & M. Valley R. Co. v. Adams, 77 Miss. 764, 25 So. 355; Robertson v. Donk Bros. Coal & Coke Co. 238 Ill. 344, 87 N. E. 373; National Docks R. Co. v. State Assessors, 64 N. J. L. 486, 45 Atl. 783.

"The supreme court will not allow a thing to be taxed in specie where it has been taxed already, but under an improper name, since that would be double taxation." Panola County v. Carrier, 92 Miss. 148, 45 So. 426; State ex rel. Pearson v. Louisiana & M. River R. Co. 196 Mo. 523, 94 S. W. 279; Com. v. Maysville & B. S. R. Co. 28 Ky. L. Rep. 1332, 91 S. W. 1139; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

Wm. Langer, State's Attorney, and *George E. Wallace,* for the State Tax Commission, defendant-appellant.

Local officials have authority to tax industrial sites on railway right of way. "Should any railroad allow any portion of its roadway to be

used for any purpose other than the operation of a railroad thereon, such portion of its roadway, while so used, shall be assessed in the manner provided for the assessment of other real property." Const. art. 4.

Railroad property held under a lease for a term of years, and not taxed as other property, shall be considered for all purposes of taxation as the property of the person so holding the lease. Comp. Laws 1913, § 2118.

If the property is used for railroad purposes or for the operation of a railroad, it is not to be taxed locally; if used for any other purpose, it will be taxed locally. Trustees of Academy v. Bohler, 80 Ga. 159, 7 S. E. 633.

Where corporate property which is assessed only by the central state authorities is rented out for profit, the exemption from local taxation is lost. Illinois C. R. Co. v. People, 119 Ill. 137, 6 N. E. 451; Re Swigert, 119 Ill. 83, 59 Am. Rep. 789, 6 N. E. 469; Farmers' Bank v. Henderson, 7 Ky. L. Rep. 454; St. Louis County v. St. Paul & D. R. Co. 45 Minn. 510, 48 N. W. 334; State ex rel. Hayes v. Hannibal & St. J. R. Co. 135 Mo. 618, 37 S. W. 532; State ex rel. Ziegenhein v. St. Louis & S. F. R. Co. 117 Mo. 1, 22 S. W. 910; State, Camden & A. R. & Transp. Co., Prosecutors, v. Mansfield, 23 N. J. L. 510, 57 Am. Dec. 409; State, New Jersey R. & Transp. Co., Prosecutors, v. Newark, 27 N. J. L. 185, 26 N. J. L. 519; New York Guaranty & Indemnity Co. v. Tacoma R. & Motor Co. 35 C. C. A. 192, 93 Fed. 51; Illinois C. R. Co. v. Irvin, 72 Ill. 452; Pacific Coast R. Co. v. Ramage, 4 Cal. Unrep. 743, 37 Pac. 532; St. Joseph & G. I. R. Co. v. Devereux, 41 Fed. 14; Delaware, L. & W. R. Co. v. Newark, 60 N. J. L. 60, 37 Atl. 629; State v. Baltimore & O. R. Co. 48 Md. 49; Toll-Bridge Co. v. Osborn, 35 Conn. 7; Hennepin County v. St. Paul, M. & M. R. Co. 42 Minn. 238, 44 N. W. 63; Milwaukee & St. P. R. Co. v. Crawford County, 29 Wis. 116; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Le Blanc v. Illinois C. R. Co. 72 Miss. 669, 18 So. 381; Chicago & P. R. Co. v. Hildebrand, 136 Ill. 467, 27 N. E. 69; Todd County v. St. Paul M. & M. R. Co. 38 Minn. 163, 36 N. W. 109; West Chester Gas Co. v. Chester County, 30 Pa. 232; State, New Jersey R. & Transp. Co., Prosecutors, v. Newark, 26 N. J. L. 519; Illinois C. R. Co. v. Irvin, 72 Ill. 452;

Ramsey County v. Chicago, M. & St. P. R. Co. 33 Minn. 537, 24 N. W. 313; Whitcomb v. Ramsey County, 91 Minn. 238, 97 N. W. 879; Delaware & H. Canal Co. v. Wayne County, 15 Pa. 351; Railroad v. Berks County, 6 Pa. 70; Lehigh Coal & Nav. Co. v. Northampton County, 8 Watts & S. 334; Schuylkill Nav. Co. v. Berks County, 11 Pa. 202; Erie County v. Erie & W. Transp. Co. 87 Pa. 434.

If the property is not retained by the corporation (railroad) and used for purposes incident to the proper construction, maintenance, or management of the railroad, or for use by road as a carrier of goods and passengers, it cannot be said to be used for railroad purposes, and will be the subject of local taxation. Delaware L. & W. R. Co. v. Newark, 60 N. J. L. 60, 37 Atl. 629; United New Jersey R. & Canal Co. v. Jersey City, 55 N. J. L. 129, 26 Atl. 135; State, New Jersey R. & Transp. Co., Prosecutors, v. Hancock, 35 N. J. L. 537; State, United New Jersey R. & Canal Co., Prosecutor, v. Jersey City, 57 N. J. L. 563, 31 Atl. 1020; Camden & A. R. Co. v. Atlantic City, 58 N. J. L. 316, 33 Atl. 198; Re Erie R. Co. 65 N. J. L. 609, 48 Atl. 601; Re Erie R. Co. 64 N. J. L. 123, 44 Atl. 976; St. Louis County v. St. Paul & D. R. Co. 45 Minn. 510, 48 N. W. 334; Illinois C. R. Co. v. People, 119 Ill. 137, 6 N. E. 451; Re Swigert, 119 Ill. 83, 59 Am. Rep. 789, 6 N. E. 469; Milwaukee & St. P. R. Co. v. Milwaukee, 34 Wis. 271; Grand Rapids & I. R. Co. v. Grand Rapids, 137 Mich. 587, 100 N. W. 1012, 4 Ann. Cas. 1195; Cook v. State, 33 N. J. L. 474.

The right of way of a railroad company, or the "roadway" of a railroad company, includes not only the strip of ground necessary for the construction of side tracks, turnouts, connecting tracks, station houses, freight houses, and all other accommodations reasonably necessary to accomplish the object of their incorporation. State v. Baltimore & O. R. Co. 48 Md. 49; Chicago, M. & St. P. R. Co. v. Cass County, 8 N. D. 18, 76 N. W. 239.

A telegraph line on the right of way used by the company for the running of its trains, and also for commercial purposes, is property subject to local taxation. Minneapolis, St. P. & S. Ste. M. R. Co. v. Oppegard, 18 N. D. 1, 118 N. W. 830.

The railroad had no power to enter into the elevator business. The powers of railway companies in this state are defined. Comp. Laws 1913, § 4613; Milwaukee & St. P. R. Co. v. Milwaukee, 34 Wis. 278;

State, New Jersey R. & Transp. Co., Prosecutors, v. Hancock, 33 N. J. L. 315; Illinois C. R. Co. v. People, 119 Ill. 137, 6 N. E. 451; Re Swigert, 119 Ill. 83, 59 Am. Rep. 789, 6 N. E. 469; St. Louis County v. St. Paul & D. R. Co. 45 Minn. 510, 48 N. W. 334; Re Erie R. Co. 65 N. J. L. 608, 48 Atl. 601; Grand Rapids & I. R. Co. v. Grand Rapids, 137 Mich. 594, 100 N. W. 1012, 4 Ann. Cas. 1195.

Elevator companies have the right of eminent domain equal to that of railway companies. Comp. Laws 1913, §§ 3118–3122, 8206.

The state board taxes the franchise, and all that is included in that term. It does not tax the fee. The right of way or "roadway" was taxed as a public use for a railroad; it is now taxed as a public use for and as an elevator. This is not double taxation. West Chester Gas Co. v. Chester County, 30 Pa. 232; 1 Cooley, Taxn. 3d ed. 36, 392, 393 and cases cited in note 2; Pacific Coast R. Co. v. Ramage, 4 Cal. Unrep. 743, 37 Pac. 532.

The railroad exemption is strictly construed. 1 Cooley, Taxn. 3d ed. 365.

The general rule of presumption in favor of the tax holds in the case at bar, and the record of the tax is prima facie proof that the same is correct. Pacific Coast R. Co. v. Ramage, 4 Cal. Unrep. 743, 37 Pac. 532; 1 Cooley, Taxn. 3d ed. 447, and cases cited.

The local taxing officers acted according to the statute. Comp. Laws 1913, §§ 2118, 2127, 2217; Const. § 179, as amended by art. 4.

Goss, J. This is in form an action to quiet title to three tracts of land included within the limits of the right of way of plaintiff company through said county. The object sought is to have declared void a tax levied in 1914 as for property then and prior years omitted from taxation. Three different classes of sites have thus been taxed, *viz.*, an elevator site, a lumber-yard site, and an oil-tank station site. The lumber and oil companies interested have also filed briefs and appear by separate counsel. The case was tried upon stipulated facts. The judgment canceled the lien and the tax as to the elevator site, but upheld the tax and the lien thereof upon the lumber-yard and oil-station sites. Both plaintiff and defendant have appealed. As the tax was levied under direction of the State Tax Commission upon these and all similar sites throughout the state, it champions by brief the cause of the county.

Accepting the statements in the briefs and on argument as true, assessments aggregating $30,000,000 upon a vast amount of taxable property and the validity of the alleged tax thereon is decided by this precedent. This is a case testing the right to tax the sites for 1914 and five prior years of no less than 2,038 licensed elevators, over 1,000 lumber yards and their warehouse sites, and 260 oil-tank station sites upon the right of way of the railroad companies within this state. Decision as to past taxes upon these sites also decides their future taxability. The elevator site involved is the Occident elevator site at New Salem, occupied for the years 1911 to 1914, inclusive, by it as licensee from said railroad company. Against this site as taxable property of the Occident Elevator Company there has been extended as a real estate assessment as property omitted from taxation for said years and upon which assessment as a basis a tax has been levied of $190.73. The lumber yard in question is in New Salem. It is held under a similar license by A. F. Dietz, and has been occupied for the years 1908 to 1914, inclusive, and against which site likewise there has been extended a tax of $53.07, as for property omitted in prior years from taxation. The third is an oil-tank station site upon the company's right of way at Hebron, held under license by the Standard Oil Company, and which it has occupied during 1913 and 1914, and against which for such occupancy there has been extended a tax of $46.31 as for property omitted from taxation. All of said written licenses or leases are in evidence. For the elevator site the lessee pays plaintiff company a stipulated annual rental of $20, "together with all taxes and assessments levied against the premises during the term." The lumber-yard rental is for "the sum of $15, payable annually in advance, together with all taxes and assessments that may be levied against said premises during the continuance of this lease." The oil-tank "lease or license" stipulates for "an annual rental" of "10, annually in advance," and the lessee is to pay all taxes, assessments, license fees or other charges that may be levied or assessed upon said improvements or against the lessor by reason of the use of said premises by the lessee." All said leases or licenses are terminable at will of the railroad company. Certain powers of superintendency of all sites are retained in the plaintiff company, allowing it a certain control to obviate danger of injury and destruction by fire, with indemnity and other provisions, such as that the elevator shall be of at least a

40,000 bushel capacity and a public warehouse business "for public use without discrimination," and "shall have sufficient and proper room to receive and store all grain when it is offered," with the maximum charges stipulated. A right of election to purchase the elevator and appliances at a fair cash value is reserved in the company upon its electing to revoke the lease or license granted the elevator company. Under the stipulated facts, during the years in question, the elevator was used "solely for the purpose of receiving and storing and shipping grain according to the custom and the usage of elevators, and in accordance with the laws of this state, as to all of which the court is asked to take judicial notice; that as a condition for operation said elevator it furnished a bond to the state and paid into the state treasury a license fee of $12 per annum for the privilege of operating." "That in this state the chief industry is grain raising, and that the volume of grain raised for market is so large that has been necessary for this and other railroads to permit the construction and operation of receiving elevators and grain elevators on side tracks on their right of way, which of necessity are located at frequent intervals and adjacent to its tracks; that the great bulk of grain raised and marketed is shipped to Minneapolis, Duluth, and Superior; that a quick market and ample facilities for ready marketing, storage, and shipment are necessary, which is accomplished by the erection and operation of grain elevators located adjacent to railroad tracks; that since statehood, through legislative acts, they have borne the character of public warehouses, and statutes have been enacted and are in force authorizing individuals complying therewith to obtain sites upon railroad right of way for elevator warehouses by condemnation, if necessary." "That plaintiff, without intending to segregate any portion of the land used and set apart for right of way to private individual use, but for the purpose of furnishing proper facilities for marketing and transportation of grain, made the revocable lease in question for the purpose of enabling said elevator company to operate as a public warehouseman, the said grain elevator to receive, store, and ship grain, according to the usage of grain elevators." A similar stipulation as to the lumber yard and oil site is made, and to the effect that the land embraced within its limits was not set apart thereby for private use, but only to furnish proper facilities for the particular business for the convenience of it and the railroad company in the

conduct of their respective business. It was stipulated further "that the said elevator company was assessed by the proper taxing officers, and paid taxes on its elevator building and upon the grain therein which was taxable under the law for each and every year in question," in addition to the license fee for the privilege of operating the elevator. As to the lumber-yard and oil-tank sites it was stipulated "that the tract occupied under said lease or license was a part of plaintiff's right of way, and was assessed by the state board of equalization for the years herein in question, and the taxes so levied and assessed were paid by it; that the oil company was assessed by local taxing officers for its oil tanks and oil and other property used on said site," and that "the local taxing officers assessed and taxed said Dietz for all of his buildings and lumber and other property situated upon the lumber-yard tract, and he paid all of said taxes so assessed for each of said years." That such a tax against the oil company's tanks and property was paid each year. The historical facts concerning the granting by the United States of the original right of way to plaintiff and the purposes for which the same was granted, including therein the reservation by the government of the right to use the same as a post and military road, are stipulated.

Simplified, the questions presented are whether the ordinary, usual, and typical site for the elevator, lumber yard, and oil-tank station, situated upon the railroad right of way of this common carrier so temporarily leased and occupied for such industrial purposes, can be taxed as sites to said industries and as property omitted from prior taxation, and where also the structure, equipment, and property on said sites has been taxed as local personal property during said years, and where, too, at all times the common carrier has also paid a tax levied and apportioned by the state board of equalization against it upon all of the roadway, right of way, franchises, and rolling stock, assessed under constitutional and statutory provisions requiring and authorizing such taxation, and where the portion of its right of way or particular tracts involved in these industrial sites have necessarily been included in such right of way or roadway tax determined upon a per mile basis. The railroad claims that these sites have thus been taxed and consequently cannot be taxed again; that the industries involved have paid their tax as a personal property tax upon their structures; that the sites not having been abandoned to private use are nontaxable property except to it, and

then only as part of its roadway; that in any event the sites are not taxable as property omitted from taxation under statutes authorizing the assessment and taxation of property escaping taxation. The contrary is the claim of the defendant and the Tax Commission representing it. The railroad company also claims that the sites in question have always been devoted to its exclusive use as a common carrier, within constitutional provisions, inasmuch as the sites in question are necessarily used for others at its license as its agents, and directly for railroad use either in the accumulation of or the unloading of railroad freight business, and as such these tracts, even though permitted to be used as sites, have been devoted to a necessary railroad use, and hence are not locally taxable, but instead can only be taxed by the state board of equalization; and therefore that they must have been taxed during the years in question; and are not again subject to taxation, as for property omitted from taxation, or at all.

Determination of whether this property has escaped taxation necessitates consideration of whether it has been taxed. This in turn relates back to the manner in which and the power under which it may have been taxable, and this again goes further back to the use of the property, which is the determining factor as to the manner and the taxing body authorized by the Constitution and statutes to assess and tax. Chicago, M. & St. P. R. Co. v. Cass County, 8 N. D. 18, 76 N. W. 239; Minneapolis, St. P. & S. Ste. M. R. Co. v. Oppegard, 18 N. D. 1, 118 N. W. 830. Taking these questions in inverse order, the character of use of the particular tract under the fact and law applicable will be determined.

As the elevator use as incidental to the railroad use is more closely related thereto, and probably more necessary in fact and public policy, than that of the use made of either of the other two sites, it will first be considered. The trial court found the elevator use to be a railroad use, for purposes of taxation, so far as the site was concerned, and this was not without some support in the authorities, especially among the early cases. The decision of the question depends upon the application of authorities concerning the use to the facts of the use. There is really almost harmony in the law. When the many adjudicated cases are read and considered in the light of the facts in each, certain general principles stand forth, which, taken altogether, announce the law of

this case as well as to distinguish and discriminate precedent. Most of the authority contended for by the appellant has been announced in terminal elevator and kindred cases, the authority concerning which divides according to the use made of the property as to method of taxation. The courts of Wisconsin, Minnesota, Michigan, and other states have held on nearly every phase of the question, and, taken together, their decisions are in harmony, and furnish to a large extent reasoning and precedent upon the instant case. For a few of many illustrative cases consult Chicago, St. P. M. & O. R. Co. v. Douglas County, 122 Wis. 273, 99 N. W. 1030; Minneapolis, St. P. & S. Ste. M. R. Co. v. Douglas County, 159 Wis. 408, 150 N. W. 422; Grand Rapids & I. R. Co. v. Grand Rapids, 137 Mich. 587, 100 N. W. 1012, 4 Ann. Cas. 1195; Chicago, B. & Q. R. Co. v. Rhein, 135 Iowa, 404, 112 N. W. 823; Hennepin County v. St. Paul, M. & M. R. Co. 42 Minn. 238, 44 N. W. 63; Cook v. State, 33 N. J. L. 475; United New Jersey R. & Canal Co. v. Jersey City, 55 N. J. L. 129, 26 Atl. 135; Re Central R. Co. 72 N. J. L. 86, 59 Atl. 1062; People v. International Salt Co. 233 Ill. 223, 84 N. E. 278; Herter v. Chicago, M. & St. P. R. Co. 114 Iowa, 330, 86 N. W. 266. But to revert to the facts: It is stipulated that this elevator is doing the usual and customary elevator business as done in this state, that of receiving for storage, shipment, and marketing of grain at the terminal markets of Minneapolis, Duluth, and Superior. Judicial notice must be taken of the usual conduct of the elevator industry. Many lines of elevators are engaged in this as a business and generally, wherever possible, from the very nature of the business and convenience, it is essential that their houses be situated within a few feet of a side track or spur track, rendering it usual for them to be found situated upon and conducting their elevator businesses upon the railroad right of way close to side tracks. It is generally known that in every city and village the railroad company has for this purpose, and upon its right of way, what is known as its industrial side track, for the convenience of elevator and other industries in loading cars, and for its own in switching them in and out. That all of these industries, whether carried on by old line elevator companies or independent elevators, are operating for profit as an established line of business, buying, screening, mixing, and grading, as well as storing, shipping, and marketing of grain, and this too wholly independent of

the common carriers upon whose right of way they are situated. It is also known, or at least generally supposed, that certain elevator companies in the past have been favored by particular railroads until the legislature has deemed it necessary to enact laws regulative of the warehousing industry, and protecting it against discrimination from the common carrier. One of these laws is that granting a restricted right of eminent domain for obtaining of elevator sites, regardless of the desires of the railway company, thereby placing in the hands of anyone seeking to engage in the elevator industry a right to force the granting of a site by the railroad company for the elevator business. This is mentioned in passing because some of the earlier cases place much emphasis upon the right of the exercise of the right of eminent domain by the railroad companies, and admeasure the use by that right; and perhaps it may have been the application of that principle on trial under which the elevator site was held exempt from taxation. It is a matter well known that a business location, whether for mercantile purposes or for elevator use, possesses a peculiar value incident to the use. This is illustrated by the fact that as between half a dozen or more elevator sites along an industrial railroad side track and upon the right of way, probably no two possess the same advantage as to trade facilities, so that one may be more advantageously situated to procure grain and trade than any of the others, and to that extent may be that much more valuable than the others. Then, again, the elevator situated upon the right of way possesses an advantage in convenience as well as in economy of use, over the elevator, usually an independent one, situated off the right of way, usually because denied a location thereon. In truth the warehouse business has grown beyond the mere accumulating of freight, or from being but an adjunct to the railroad business, into a separate industry of huge proportions. It is no longer necessary, if ever it was so, for any railroad to engage in that industry at primary markets, as one either necessary or reasonably incident to the purpose of its incorporation. The time has long gone by when it was necessary, if that time ever was in fact, for the railroad to build and operate elevators to keep the grain within its territory from being diverted to other carriers and channels of carriage. While such argument may be sound and rest upon facts and necessity as to terminal elevators and connecting transportation facilities for them, it cannot be so as to any elevators in this

state doing the usual local primary elevator business. There is no longer the same relation between the elevator and the railroad that used to be claimed for it and that may be found to-day between the elevator and the flour mill beside of it, engaged in the separate milling industry. In fact if the elevator sites are assessable by the state board of equalization, then flour mills and their storage elevators adjacent thereto and situated in close proximity to a spur track or an industrial track should be assessed likewise, because the flouring industries are also great gatherers of freight for the common carrier. Nor can there be a valid reason, so far as railroad use is concerned, why the fortunately situated elevator, enjoying a favored site by the right of way, should not pay taxes on that site as an industrial site the same as the less favored elevator operating adjacent to the right of way upon individually owned property is taxed upon its side as real estate, in addition to the structures and improvements thereon,—the elevator. Nor is there any reason why the elevator industry should not pay its just proportion of the public burden by taxation, whether situated adjacent to or upon the railroad right of way. No mercantile, banking, lumber and elevator business operated upon private property enjoys a privilege of the kind here urged in the nature of an exemption from the usual method of assessment and taxation. It is difficult to see any basic reason why this elevator site should be assessed differently from any mercantile or other industrial site, simply because of its location being upon railroad right of way.

Nor should the fact, as stipulated, that the tenure of holding has been as licensee or leasehold change the situation. The railroad company holds an easement in or fee to the property for railroad use, and has held the same for that purpose at all times in question, notwithstanding the temporary industrial use permitted of the tract. Such tenancy must be subject to the predominant right of railroad user, as it is doubtful, at least, if the railroad company can, by mere abandonment, forfeit any right of necessary railroad user. But it can and has permitted another business to hold forth under leasehold upon their property, and the right to the site so used by that other business has been a property right of value. By its occupancy a property right came into existence, and has been possessed and enjoyed by the tenant for years. There is no reason why this right is not as much a property as the structure, buildings,

and appliances for which the site was a foundation, and which structure thereon under the statutes have been separately taxed as personal property, and thus segregated for taxation purposes from said foundation. So far as the use is concerned, then, this tract has been devoted to an industrial use of a temporary nature, while it was subject to the paramount railroad right of user. This is the effect of the stipulated fact that the railroad has never abandoned it for railroad use so far as its necessities required. But such stipulation does not and cannot negative the character of the use actually made of the site as that of a private industrial use as distinguished from a strictly railroad use, so far as taxation purposes are concerned.

This leads to an examination of the power and method of taxation of the roadbed and right of way with the object of determining whether, under the Constitution and the laws in accordance therewith, this elevator site as used must be taxed as for a railroad use to the exclusion of the exercise of local taxing powers as for private use; and, second, whether in fact the property has been taxed for the uses to which it has been devoted.

Section 179 of the Constitution at statehood provided: "The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in this state shall be assessed by the state board of equalization at their actual value and such assessed valuation shall be apportioned to the counties, cities, towns, townships and districts in which said roads are located as a basis for taxation of such property in proportion to the number of miles of railway laid in such counties, cities, towns, townships and districts." This has been the method of taxing, in the absence of a gross-earnings tax permitted in legislative discretion in lieu thereof by § 176 of the Constitution, which provides that "the legislative assembly may by law provide for the payment of a per centum of the gross earnings of railroad companies, to be paid in lieu of all state, county, township and school taxes on property exclusively used in and about the prosecution of the business of such companies as common carriers, but no real estate of said corporation shall be exempted from taxation *in the same manner and on the same basis* as other real estate is taxed, except roadbed, right of way, shops and buildings *used* exclusively in their business as common carriers." Section 179 has undergone amendment, principally by the addition of these words: "But

should any railroad allow any portion of its roadway to be used for any purpose other than the operation of a railroad thereon, such portion of its roadway while so used shall be assessed in the manner provided for the assessment of other real property." More exact language could not have been used. It is certain to a certain intent in every particular. It leaves nothing for debate, no room for interpretation or construction; and what is more, it is in entire harmony with § 176, while the previously existing section was not, unless it be held that § 176 controlled the original § 179 so far as the exclusive use was concerned; as to which the portion of the roadway occupied for temporary industrial use as in this case, there might arise doubt as to the authority and method to tax independently such right of subordinate user. But the amendment passed in 1901 puts the matter beyond inquiry. This amendment was passed three years after the decision in Chicago, M. & St. P. R. Co. v. Cass County, 8 N. D. 18, 76 N. W. 239, wherein the word "roadway," as used in § 179 of the Constitution, was held to not only include the strip of ground upon which the railroad track was situated, but also the entire right of way at all places in question upon which are situated these sites as subject to necessary railroad use, and taxable in the manner specified, and as exempt from local assessment for general taxation. But that does not exclude or negative the taxing of these sites to the tenants under the amendment of 1901 to § 179, "while so used" "in the manner provided for the assessment of other real property." Sections 176 and 179 of the Constitution exempt railroad right of way from local taxation while "used exclusively in their business as common carriers," but also provides that property so devoted to railroad use shall be assessed and apportioned back to the municipalities by the state board of equalization, with the basis for the taxation of such property being "the proportion to the number of miles of such property within such counties" and municipalities. Not only is right of way through these villages taxable as such for the railroad use, but it is to be proportioned and apportioned upon a basis of mileage in such municipalities. Such is the mandate of the Constitution. Under this direction the state board of equalization would be powerless to assess other than upon a mileage basis as for right of way in its entirety, *i. e.*, without deduction whatever. It is so many miles of railroad roadbed, without reference to its width, except as the same may incidentally enter into the

value placed thereon, and under a mileage basis that must be taken as the basis for assessment by that board. This is important upon the question of whether any deduction could have been made in assessing the right of way for the railroad right of user. Manifestly, no such deduction could have been made in law.

These constitutional provisions recognized that a roadbed of a railroad may be applied to two uses: First, the railroad use in the strict sense of the term for which the railroad must hold its right of way intact as a public carrier to fulfil its duty under its charter and grant of roadway, which must be assessed in its entirety as railroad property devoted to railroad use. Whether it can permanently alienate any portion of the right of way, except in aid of the purposes of its incorporation, it is not necessary to decide. But its holding thereof as right of way presumes a necessity therefor, and also that the same continues impressed with such characteristics herein stipulated not to have been abandoned; and therefore assessable as right of way without deduction, because of temporary use for industrial sites, and upon a per mileage basis by the state board of equalization, and to the exclusion of any other method of assessment for ordinary taxation. And these sections of the Constitution contemplate a second and subordinate right of user under permission and by others; a temporary use, as compared with the permanent railroad use, other than for railroad purposes. Otherwise, the amendment to § 179 was wholly unnecessary. On the contrary, it was adopted after this court had defined the railroad's right of way as covering the entire roadway. It could have been adopted then for only similar purposes to those involved herein.

What has been said as to this elevator site can be no less true as to the lumber-yard and oil-tank site. Neither are the property of the railroad company, nor devoted exclusively to its use, except as merely convenient. As used, neither can be claimed as in any way necessary to the business of railroading. Every argument advanced to place them in the class of railroad property for assessment would apply equally to similar conveniences erected to facilitate any line of merchandising. If the lumber merchant needs to utilize the right of way as a site for the lumber business, likewise the coal man, machinery dealers, and general merchandising should be permitted to place expensive warehouses upon the railroad right of way and claim immunity from usual local taxa-

tion for the site of the business, however valuable it may be to them, identically as has this elevator company, acting by this plaintiff, endeavored to have itself classified as conducting a railroad business, so far as the site is concerned.

That the court of this state in Chicago, M. & St. P. R. Co. v. Cass County, 8 N. D. 18, 76 N. W. 239, declared that "it would indeed be a mistaken policy in our rapidly developing state to curtail any of the agencies which tend to render this (railroad) service efficient," is not, as is urged by the plaintiff, any reason why as a matter of public policy the railroad use should be held to blanket all industries to which it may find it convenient or profitable to lease sites upon its right of way. Assuming that such may have been the policy and construction that then would have been adopted, the amendment to § 179 of the state Constitution in express terms forbids its present application.

The only conclusion is that none of these three sites during the years in questions have been devoted exclusively to railroad use, but instead and on the contrary they have been devoted to a right of user by the railroad for necessary railroad purposes, and also have been permitted by it to be used for a purpose other than the operation of a railroad thereon or for railroad use, *i. e.*, the temporary but constant use of said sites for private industrial purposes.

The next question is whether, throughout this period and while said property was thus used, it was taxable as, for, and upon a basis other than that of railroad user. The necessary conclusion is that it was. While the constitutional provisions referred to have authorized its taxation as a part of the entirety of the roadbed and as upon a per mileage basis, and to that extent these sites have been included in the assessment levied and paid during these years by the railroad as upon its property and for the railroad use, at least since the amendment to § 179, in 1901, while this property was used in a dual capacity the subsidiary right of user of the lessee, his leasehold interest was taxable to him "as the property of the person so holding the same," under § 2118, Comp. Laws 1913, existing since 1897, it being § 29 of the revenue and taxation act, chapter 126 of the Laws of 1897. Omitting the portions immaterial to this inquiry, its terms are "property held under a lease for a term of years . . . belonging to the state . . . or to any railroad company or corporation whose property is not taxed in the

same manner as other property, shall be considered for all purposes of taxation as the property of the person so holding the same." Thus § 179 of the Constitution, as amended, declares the leasehold interest of this property to be taxable "while so used" and "in the manner provided for the assessment of other real property," while § 2118 declares it to be taxable "as the property of the person so holding the same," the lessee.

Nor can this constitute double taxation as contended by plaintiff. While the property as right of way is taxed to the railroad upon a basis of railroad user by the power authorized to assess for such purposes, it is as against the railroad strictly a railroad tax. But the tax levied for the use made and against the lessee upon the site as for property "not taxed in the same manner as other property" is a tax against the property possessed by the tenant. It is not the same class of tax. Nor is the same property taxed. That the land upon which the right of way is situated and upon which the industrial site thereon is located may give rise to certain separate taxes does not signify that there is necessarily double taxation of it. It is analogous to a real estate tax and real estate mortgage tax, both arising from the same real estate; a corporation tax and a personalty tax upon stock of the corporation; an inheritance tax and a tax upon the property of the inheritance. For a full discussion, see the very able opinion in Harvey Coal & Coke Co. v. Dillon, 59 W. Va. 605, 6 L.R.A.(N.S.) 643, 53 S. E. 928. It should be noted that these licensees are not in the position of the ordinary lessee of real estate, because usually the real estate is taxable "in the same manner as other property." These are licensees of a railroad right of way the lands of which are not taxable "in the same manner as other property."

And again, in the very language of § 2118, Comp. Laws 1913, is found a strong argument for this dual taxation under the facts in this case. This statute is drawn to cover just the situation here found. If it does not here apply, it can never apply to any property of a railroad company while railroad property is expressly mentioned in it, and the legislature must be thus convicted of gross ignorance. That this is so must be the result when it is remembered that only property devoted to railroad use is assessed by the state board of equalization, while other railroad property is assessed locally the same as any other real estate.

And to such properties of a railroad so assessed locally the railroad is taxed in the same manner as any other owner, and hence any power whatever to tax under § 2118 would be excluded by its phraseology, "or to any railroad company whose property is not taxed in the same manner as other property." Therefore, the statute could have been enacted for no other purpose than to cover leasehold interests in right of way of or property permanently devoted to railroad use. The legislature has furnished the machinery as well as classified the property for taxation, and has declared this leasehold right in property to be taxable as real estate, but to the lessees. And this leasehold interest is defined for taxation as real property under § 3, chap. 126, S. L. 1897, § 2076, Comp. Laws 1913, that "real property for the purpose of taxation includes the land itself . . . and all rights and privileges thereto belonging or in anywise appertaining." And under § 2 of said act, § 2075, Comp. Laws 1913, "all real and personal property in this state . . . except such as is hereinafter expressly excepted, is subject to taxation." Leasehold interests are not "expressly excepted" and are therefore taxable.

It is noticeable that the Code of 1895 (an original enactment) did not contain any such provision as is found in § 29 of chap. 126, S. L. 1897, § 2118, Comp. Laws 1913. Sections 1186, 1187 touching the subject do not cover it.

It should also be noticed that chap. 126, S. L. 1897, containing what is now § 2118, Comp. Laws 1913, originated as H. B. No. 3, and the concurrent resolution amending § 179 of the Constitution, becoming the amendment thereto of 1901, originated in the house. It is only a reasonable conclusion that § 2118 and this constitutional amendment were initiated with reference to one another and to cover the situation in this instant case.

The remaining principal question has already been touched upon. It is as to whether these leasehold interests of the sites, being taxable property to the lessees as real estate, have been omitted from taxation during these past years. This must be answered in the affirmative, inasmuch as the railroad has paid only its right of way tax and the lessees but their personal property tax upon the structures upon these sites for same years. That one site may have a greater value than another, according to advantages to be derived from its situation on the

right of way for business purposes other than its dealings with the railroad in the shipping of grain or the unloading of lumber and the like, cannot be doubted. This value peculiar to each site, together with its value of occupancy as a trade site, has been assessed and taxed as property escaping taxation. That this property right has escaped taxation under the stipulated facts, and under the widest contention of the plaintiff and the industries represented in this suit, cannot be successfully disputed. No matter what the extent of the investigation that may have been made by the board of equalization, it was powerless to assess a tax upon this leasehold interest, because under the terms of the constitutional amendment that must necessarily have been assessed as "other real property" is assessed, *i. e.*, by the process of local assessment and a tax spread thereon. The state board of equalization were thus wholly without power in the matter, and any inquiry made by them, which must pertain strictly to the value of the railroad right of way, its franchises, and roadway, are wholly immaterial to and in a field apart from that of the taxation of the leasehold interest of these tenants of the right of way, assessable only by local assessment as ordinary real estate. Thus it is not a matter of classification or values of property, but one instead of entire omission from taxation. As the state board of equalization is without power to assess this property, and the presumption that official duty has been properly performed applies, it must be presumed that said board not even considered the value of these leases in its valuation of the railroad right of way for railway use. It must be presumed to have performed its duty, instead of the contrary.

Nor has the question of state control of elevators as public warehousemen anything to do with the declared manner of taxation under constitutional and statutory provisions. All these lines of business are of great benefit, and are to be encouraged, but nevertheless they are under state control as to regulation of business and also as to method, manner, and means of taxation. That they are beneficial does not signify that they should not contribute their just share of taxation for the privileges enjoyed. And the tax, while great in the aggregate as to all sites as to which this decision will furnish precedent, is but comparatively trivial as to each. And had they not escaped taxation until they may have

considered themselves privileged to that extent, doubtless the right to impose this tax would have gone unchallenged.

A question is made in the brief as to the right to levy these taxes being a "violation of the commerce clause of the Federal Constitution, § 8, article 1, and the act of Congress of July 2, 1864, granting such right of way and the protection of which is now claimed." This is not briefed, and therefore is abandoned on this appeal. But under the decision of cases cited in Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 33 Sup. Ct. Rep. 116, this contention could not be successfully urged. The tax is a local one upon a local business, in no wise connected with interstate business. The taxing power at the utmost cannot in the least, in the enforcement of collection of these taxes, hinder the operation of the road or prevent it from the exercise to the full of all its franchise rights and privileges. Should the sites in question be sold, they would be taken subject to a right to retake them again for railroad use, upon payment of their value, by the railroad under its right of eminent domain, granting that the lien from the taxes levied might devest the property of its railroad use, should it go to tax deed.

The lien which must be defined must extend to the entire leasehold interest of the tenants sufficient to subject their interests or right of occupancy of the site to sale, and also extend to the railroad company's interest or title to said tracts, and constitute a first lien thereon. The taxes, as against all these lessees and the railway company are valid and liens upon the tracts comprising the respective sites, and for the amount of such taxes assessed and levied as for property otherwise omitted from taxation for said years in question. The cross appeal of the state concerning the tax upon said elevator site is sustained, and the trial court will, as to it, reverse its judgment and enter findings and conclusions in conformity with this opinion. Its findings and judgment is affirmed as to the lumber-yard and oil-tank sites. The state will recover its costs on appeal. Judgment will be entered accordingly.

EVAN GRIFFITH v. J. N. FOX.

(156 N. W. 239.)

Foreclosure — sheriff's certificate of sale — assignment — redemption period — rents — collected by assignee — action to recover — evidence — redemption and not sale — account for rents.

Plaintiff bought property upon which defendant held a sheriff's certificate of foreclosure sale. After conference with defendant he paid the full amount of the certificate, with interest, and received an assignment of the same. Defendant had collected rents during the year of redemption, and this action is for their recovery.

Evidence examined and found to support the finding of the trial court that the transaction was in fact a redemption, though in form a sale of the certificate, and that defendant must account for the rents.

Opinion filed December 31, 1915. On petition for rehearing February 10, 1916.

Appeal from the District Court of Burke County, *Leighton,* J.

Affirmed.

Francis J. Murphy, for appellant.

The defendant was the holder of a sheriff's certificate of sale upon foreclosure. It is the settled law that the holder of such a certificate is entitled to the rents during the year of redemption. Clement v. Shipley, 2 N. D. 432, 51 N. W. 414; Whithed v. St. Anthony & D. Elevator Co. 9 N. D. 224, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238; Comp. Laws 1913, § 7762.

A. W. Gray and *Karl H. Stoudt,* for respondent.

"An assignment of a sheriff's certificate of sale to a person having the right to redeem operates as a redemption from the execution sale." Smith v. Michigan State Bank, 102 Mich. 5, 60 N. W. 438; Banning v. Sabin, 51 Minn. 129, 53 N. W. 1; Sheley v. Detroit, 45 Mich. 431, 8 N. W. 52.

The position and rights of a purchaser under mortgage foreclosure sale, and under judicial or execution sale, are the same. F. A. Patrick & Co. v. Knapp, 27 N. D. 100, 145 N. W. 598; Ex parte Peru Iron Co. 7 Cow. 540; Banning v. Sabin, 51 Minn. 129, 53 N. W. 1.

A grantee within the time allowed for redemption from an original owner whose land has been sold under mortgage foreclosure is not a

redemptioner, but is a successor in interest of the original owner, and, as such, is entitled to redeem in the same manner as the judgment debtor in the foreclosure action, and need not comply with the conditions imposed on redemptioners. Phillips v. Hagart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843; Stocker v. Puckett, 17 S. D. 267, 96 N. W. 91; Sharp v. Miller, 47 Cal. 82; Yoakum v. Bower, 51 Cal. 539.

"The purchaser of the equity of redemption stands in the shoes of the mortgagor as a successor in interest." Styles v. Dickey, 22 N. D. 515, 134 N. W. 702; Comp. Laws 1913, § 7758.

Where a party is restored to his original estate he is entitled to the rents and profits from the time of sale. Warner Bros. Co. v. Freud, 138 Cal. 651, 72 Pac. 345.

The fact that a redemption has been established, the question of the right to an accounting at once arises. Styles v. Dickey, supra; Phillips v. Hagart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843; Comp. Laws 1913, § 7758.

A demand before action, for such accounting, is not necessary, if it were necessary, it has been waived by defendant, by words and actions. Madison v. Octave Oil Co. 154 Cal. 768, 99 Pac. 177.

BURKE, J. The defendant, Fox, was the holder of a sheriff's certificate upon mortgage foreclosure sale amounting to around $3,000. During the year of redemption he collected rents and profits, the sum of $349.60, and expended for insurance the sum of $16. The plaintiff, Griffith, purchased the premises during the year of redemption and opened the negotiations with Fox. The nature of these negotiations forms the basis of this lawsuit. At all events, about three days before the expiration of the period of redemption, Fox assigned his sheriff's certificate to Griffith. Shortly thereafter Griffith sued for the rents and profits collected by Fox during the year of redemption. A jury was waived, and the trial court made findings of fact generally in plaintiff's favor. Specifically, he found that "on the 10th of May, 1913, the plaintiff herein as owner in fee of the said premises redeemed the said premises from said mortgage-foreclosure sale. . . ." And again: ". . . That at the same time and place, in order to save additional expense and inconvenience occasioned through redeeming said premises

through the sheriff of Ward county, the said J. N. Fox, at the request of plaintiff herein, executed and delivered to the plaintiff, upon the payment to him of the said sums as specified herein, an assignment of the sheriff's certificate, dated the 10th day of May, 1913; that the said sheriff's certificate was assigned to the plaintiff instead of a certificate of redemption being issued to the defendant. That it was plaintiff's intention to redeem the said premises from the aforementioned foreclosure. . . . That the exact amount due the plaintiff from rents and profits was not readily ascertainable at the time of redemption, and for that reason was not accounted for at that time. . . ."

It is conceded that the findings of the trial court have the weight as a special verdict of the jury, and should not be disturbed unless clearly against the preponderance of the evidence. A decision of the controversy then rests upon the condition of the evidence.

(1) We will give a short extract from the testimony which, we think, amply supports the findings of the trial court. Griffith, the plaintiff, testified in part as follows:

"I stated that I was going to redeem the property, and asked him (Fox) if he would not just as leave give me an assignment of the sheriff's certificate. He said no, he would not; that he would prefer me to redeem through the sheriff's office in the regular way, and he would account to me personally for the rents. . . . He stated that he may have collected some more money, and there may have been other expenses that he had paid out, but at this conversation could not tell without checking up a little more carefully."

After this conversation, Griffith went to his attorney, Gray, and asked him to handle the matter for him. Mr. Gray testified:

"I said to Mr. Fox (over the telephone), Do you know of any reason why you would not just as soon let Mr. Griffith take that by sheriff's certificate as to require him to take it through the sheriff's office? And Mr. Fox replied, 'No, I do not know of any reason,' and I stated to him I would come over to see him. I then went to the Kenmare National Bank and saw Mr. Fox for about an hour in regard to this. Mr. Fox said, 'I thought I had some reason why I preferred to have Mr. Griffith take this up through the sheriff's office, but I can't think of it now.' He says, 'Do you know of any reason why he should take it up that way rather than this way?' 'No,' I said, 'I do not.' He says, 'Are

there any other people intervening that he will shut out by taking it?' 'No,' I said, 'I understand not.' That there is simply one matter of record that he has agreed to take up and has requested that the parties take up. Mr. Fox did ask me, I think, over the telephone, or while I was there, why Mr. Griffith wanted to take it up that way . . . and I told him simply for the reason, it made it a little less expensive for Mr. Griffith to do it that way, and I thought it left the abstract in a little better shape; and Mr. Fox referred to it again and said, 'I had something in mind, some reason that I preferred to have him do it the other way but can't think of what that reason is, now. Will you wait a little while until I think it over and see whether there was or not?' I said, 'I will call a little later, or you can call me up,' and I left the bank; and then later I did call Mr. Fox again, or he called me, and he says: 'I think that is all right. I do not know of any reason why I would not just as soon give that, and I will assign the sheriff's certificates.' . . ."

Pursuant to this agreement, Griffith paid the full amount of the certificate with interest, and received the assignment. We have not set forth all of the evidence. It is clear to us that a finding that both Fox and Griffith intended the assignment to operate as a redemption, and that Fox would personally account to Griffith for rents and profits, is not against the preponderance of all the testimony. If, as contended by appellant, Fox intended to keep the rents and profits for the favor of executing the assignment, it was a matter important enough to require mention. The rents collected by him exceeded 10 per cent of the face of the certificate, and it is not likely that Fox at that time believed that Griffith would pay so dearly for an assignment. Not believing that he could earn this $353.90 (the amount of the rents and profits with interest), it is not likely that he at that time thought it a part of the bargain he was making. It is reasonable to suppose that he was ready to grant to the attorney Gray the accommodation which he had refused Griffith, and that the understanding, either express or clearly implied, was that the rents should be accounted for. There is nothing in the argument of appellant that defendant was obliged to serve a written demand for an accounting under § 7762, Comp. Laws 1913. That section extends the period of redemption in case such a demand is made.

That, under the circumstances, a redemption was effected, is the holding of all the authorities which we have examined: Smith v. Michigan State Bank, 102 Mich. 5, 60 N. W. 438; Banning v. Sabin, 51 Minn. 129, 53 N. W. 1.

Judgment affirmed.

On Petition for Rehearing.

BURKE, J. Upon petition for rehearing we are reminded that there are some inconsistencies in the holding of this court upon the weight to be given to the finding of the trial court in a case where the jury has been waived. Upon a re-examination of the authorities we are convinced that the rule is correctly stated in Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454, and followed in many cases by this court: Re Eaton, 4 N. D. 517, 62 N. W. 597; Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 N. W. 717; Ruettell v. Greenwich Ins. Co. 16 N. D. 546, 113 N. W. 1029; Feil v. Northwest German Farmers' Mut. Ins. Co. 28 N. D. 355, 149 N. W. 358. Through inadvertence in a few cases the rule has been announced that the findings of the judge have the same weight as the verdict of a jury. This is due to the fact that in those particular cases the matter was not important, and did not receive the direct attention of the court. James River Nat. Bank v. Weber, 19 N. D. 702, 124 N. W. 952; State v. Banks, 24 N. D. 21, 138 N. W. 973; Updegraff v. Tucker, 24 N. D. 171, 139 N. W. 366; Taute v. J. I. Case Threshing Mach. Co. 25 N. D. 102, 141 N. W. 134, 4 N. C. C. A. 365; Steidl v. Aitken, 30 N. D. 281, L.R.A.1915E, 192, 152 N. W. 276, and possibly others.

In none of the cases, however, did the difference in the rule in any way affect the decision reached in the case. There was no preponderance of the evidence against the verdict in any case. The petition is denied.

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APPEAL AND ERROR—continued.

What Errors Warrant Reversal.

1. To maintain an action for deceit it is not necessary that the false representations should have been an inducement to a contract afterwards consummated; but, if the essential elements of actionable fraud are present, such action will lie for any false representation relied on by the plaintiff, whereby he was induced, to his injury, to part with property or surrender some legal right. Guild v. More, 432.
2. One who wilfully deceives another with intent to induce him to alter his position to his injury is liable, in an action of deceit, for any damage which the injured party suffers thereby. Guild v. More, 432.

1. The sales in bulk statutes apply only to stocks of merchandise and fixtures, or goods a part of a merchandise stock which are kept for sale as such. Johnson v. Kelly, 116.
2. The articles were utensils, fixtures, and equipment used in conducting a restaurant business. *Held*, it did not constitute any part of a stock of merchandise and fixtures within the meaning of chapter 247, Sess. Laws 1913 (Comp. Laws 1913, §§ 7224–7228), commonly known as the sales in bulk law. Johnson v. Kelly, 116.

A garnishee's liability is measured by his responsibility and relation to the defendant; and the plaintiff in a garnishment action cannot recover against the garnishee unless the defendant could recover against such garnishee in an action in defendant's own name and for his own use. Shortridge v. Sturdivant, 154.

SCHOOLS.

Action against superintendent of schools to recover overcharge of mileage, see Appeal and Error, 45–51; Evidence, 18–22.

1. The purpose of § 183 of our state Constitution in limiting the debt of certain municipalities, including school districts, to 5 per cent upon the assessed valuation of the taxable property therein, is to prevent such municipalities from inprovidently contracting debts for other than ordinary current expenses of administration, and to restrict their borrowing capacity; and the word "debt," as therein employed, should receive a broad meaning so as to cover liabilities created under executory contracts for public improvements, although nothing is due thereunder until the same are executed in part or in whole. Anderson v. International School Dist. 413.
2. Defendant school district, whose debt limit was about $16,000, entered into a contract on May 27, 1913, with defendant Bartelson for the erection of a schoolhouse at the agreed price of $24,000. Eighty-five per cent of the labor and materials furnished was payable monthly upon estimates of the architect, and the balance within a short time after the completion of the building, which was to be completed on or before October 15, 1913. It also in July and August, 1913, entered into two other contracts, one for heating and ventilating the building, and the other for lighting the same, which contracts called for the payment of $3,679 and $599.95, respectively, at the completion thereof. *Held*, that these contracts created a present debt against the district at the date they were entered into, which debt, after deducting available funds in the treasury applicable to the payment thereof, greatly exceeded the constitutional debt limit; and to the extent of such excess the contracts are void, and further payments thereon are enjoined. Anderson v. International School Dist. 413.
3. In ascertaining whether the constitutional limit has been exceeded, funds in the treasury available for meeting the district's liabilities may be considered, also taxes levied and uncollected; but the district officers have no right to anticipate revenues to be derived from tax levies to be made in future years. Anderson v. International School Dist. 413.
4. Section 2218, Compiled Laws 1913, construed, and *held* not to authorize the making of the contracts in question. The evident purpose of that statute was to limit public officers from incurring liabilities (within the constitutional debt limit) to such sum as may be liquidated during the current or subsequent years out of the revenues which may be raised within the maximum tax rate permitted by law. It does not purport to, nor could it legally, authorize the incurring of liabilities exceeding the constitutional debt limit. Anderson v. International School Dist. 413.

TRIAL—continued.

Questions of Law and Fact.

5. Ordinarily the question of materiality of a false representation is one of fact to be determined by the jury. Guild v. More, 432.
6. Questions of negligence and of contributory negligence are primarily for the jury, and not for the court, to pass upon. Messer v. Bruening, 515.
7. It is a matter of fact for the jury, and not of law for the court, to decide whether a traveler upon a public street of a city is guilty of contributory negligence who attempts to cross a railroad track behind and south of a freight or gondola car attached to an engine pointing away from him, and with several cars north and attached thereto, and when such engine or train of cars is standing still either on or near said crossing, and there are no gates or flagmen at the same. Severtson v. Northern P. R. Co. 200.
8. 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, the question of contributory negligence is one of fact to be determined by the jury. Felton v. Midland Continental R. Co. 223.
9. Where the evidence is conflicting, or the proximate cause of an injury depends upon a state of facts from which different minds might reasonably draw different inferences, the question of proximate cause is one of fact for the jury. Felton v. Midland Continental R. Co. 223.
10. Where the evidence on the questions of delivery and failure of consideration of a promissory note is in conflict, such questions are properly submitted to the jury. Starke v. Wannemacher, 617.

Direction of Verdict.

Effect of failure to make motion for directed verdict, see Appeal and Error, 31.
Prejudicial error as to, see Appeal and Error, 51.

11. It is error to take a case from the jury and to direct the verdict for the defendant where, though the facts are seriously disputed, there is evidence to show that a railway train was stopped on or immediately before a street crossing in a city, and that plaintiff's intestate, an old man, immediately before said accident, was seen struggling in the middle of the track a short distance in front of the engine, and either on the sidewalk which crossed the track or some 7 or 8 feet beyond it, and that, after he began to so struggle, the railway company started its engine and the cars thereto attached, and ran over said deceased. Severtson v. Northern P. R. Co. 200.