REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

January 31, 1918 to May 15, 1918.

JOSEPH COGHLAN
REPORTER

VOLUME 39

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BY JOSEPH COGHLAN, SUPREME COURT REPORTER

FOR THE STATE OF NORTH DAKOTA.

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. ANDREW A. BRUCE, Chief Justice.
HON. A. M. CHRISTIANSON, Judge.
HON. LUTHER E. BIRDZELL, Judge.
HON. RICHARD H. GRACE, Judge.
HON. JAMES E. ROBINSON, Judge.

---

[1] H. A. LIBBY, Reporter.
J. H. NEWTON, Clerk.

[1] The cases reported in this volume were tried during the period when Mr. Libby was the Reporter, and were reported by Mr. Libby; but not being published until after the appointment of Mr. Joseph Coghlan, as Reporter, the cases have been prepared for publication, indexed, etc., by Mr. Coghlan.

85949

PRESENT JUDGES OF THE DISTRICT COURTS.

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HON. CHARLES M. COOLEY.
District No. Two,
HON. CHARLES W. BUTTZ.
District No. Three,
HON. A. T. COLE.
District No. Four,
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HON. W. L. NUESSLE.
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District No. Eight,
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District No. Nine,
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District No. Eleven,
HON. FRANK FISK.
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SEC. 101. Where a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reason therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the Clerk of the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom may give the reasons for his dissent in writing over his signature.

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

COUNTY COURTS.

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

Constitutional Provisions.

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

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

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

Statutory Provisions.

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

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

TABLE OF CASES REPORTED IN THIS VOLUME.

A

		PAGE
Auth v. Kuropi Elevator Co.	167 N. W. 389	245
Arnston v. First Nat'l Bank	167 N. W. 760	409
Aeves Co. v. Lownevik L.R.A.1918F, 160,	167 N. W. 370	387
Armitage v. Braeder	168 N. W. 171	555
Adams v. McCaull-Webster Co.	167 N. W. 330	259

B

Brocket Mercantile Co. v. Lemke	166 N. W. 800	37
Barnett v. Will	166 N. W. 511	51
Bendewald v. Ley	168 N. W. 693	272
Birch & Sons Constr. v. Fargo	167 N. W. 390	371
Besler v. Moore	167 N. W. 218	243
Broeder v. Armitage	168 N. W. 171	555
Buchannan v. Prall	167 N. W. 488	423
Blum v. Farmers Equity Exchange	166 N. W. 822	86
Bryan v. Gilbert Mfg. Co.	166 N. W. 805	13
Bryn v. Hilmer	167 N. W. 219	211
Brostrup v. Merchants Nat'l Bank	168 N. W. 42	619

C

Catto v. Hollister	166 N. W. 506	1
Colter v. Dill	167 N. W. 720	463
Coverdell v. Erickson	168 N. W. 367	579
Chaffee v. Farmers Co-op. Elevator Co.	168 N. W. 616	585
Coddington v. Dalen	167 N. W. 334	321

D

Dalen v. Coddington	167 N. W. 334	321
Dolwig v. Fischer	166 N. W. 793	161
Dill v. Colter	167 N. W. 720	463
Dernste Land Co. v. Quinlivan	168 N. W. 51	607

E

Eckstrand v. Johnson	167 N. W. 521	490
Everson v. Nelson	168 N. W. 36	523
Erickson v. Coverdell	168 N. W. 367	579
Equity Co-operative Pub. Co. v. McCue	167 N. W. 225	191

F

Farmers Equity Exchange v. Blum	166 N. W. 822	86
Fischer v. Dolwig	166 N. W. 793	161

		PAGE
Froelich v. Northern Pacific Railway Co.	167 N. W. 366	307
Farmers Grain & Mill. Co. v. Sundberg	168 N. W. 55	553
Froemke v. Parker	169 N. W. 80	629
First Nat'l Bank v. Arnston	167 N. W. 760	409
Fargo v. Birch & Sons Constr.	167 N. W. 390	371
Farmers Co-op. Elevator Co. v. Chaffee	168 N. W. 616	585
Fargo v. Moulton	167 N. W. 717	502
Farmers Co-op. Elev. Co. v. State, use of Reilly	167 N. W. 223	235
Frazier v. State ex rel. Show	167 N. W. 510	430

G

Gilbert Mfg. Co. v. Bryan	166 N. W. 805	13
Grabau v. Nurnberg	166 N. W. 508	57
Gibbert v. Loff	166 N. W. 810	181
Goodman v. McCarty L.R.A.1918F, 1038,	167 N. W. 503	389
Gillespie v. State	168 N. W. 38	512

H

Hopper v. Howard	166 N. W. 511	83
Hilmer v. Bryn	167 N. W. 219	211
Hendricks v. Jackson	167 N. W. 757	467
Hanel v. Obrigewitsch	168 N. W. 45	540
Hollister v. Catto	166 N. W. 506	1
Haslam v. O'Brien	167 N. W. 487	427

J

Johnson v. Muller	167 N. W. 326	246
Jackson v. Hendricks	167 N. W. 757	467
Johnson v. Eckstrand	167 N. W. 521	490

K

Kapau v. Minneapolis Threshing Machine Company..	166 N. W. 826	27
Klink v. Kelly	167 N. W. 220	207
Kvale v. Keane	168 N. W. 74	561
Kelly v. Klink	167 N. W. 220	207
Keane v. Kvale	168 N. W. 74	561
Kuropi Elevator Co. v. Auth	167 N. W. 389	245
Kearines v. Minneapolis Drug Co.	167 N. W. 326	319

L

Lohart v. Minnesota Grain Co.	166 N. W. 828	158
Loff v. Gibbert	166 N. W. 810	181
Lomevik v. Aeves	167 N. W. 370	287
Lemke v. Thompson	167 N. W. 754	492
Lemke v. Brocket Mercantile Co.	166 N. W. 800	37
Ley v. Bendewald	168 N. W. 693	272

M

Middle West Fire Ins. Co. v. Yusko	166 N. W. 539	67
McCue v. Equity Co-operative Pub. Co.	167 N. W. 225	191
Moore v. Besler	167 N. W. 218	243
Miller v. Stenseth	167 N. W. 753	257
McCaull-Webster Elevator Co. v. Adams	167 N. W. 330	259
Muller v. Johnson	167 N. W. 326	246

		PAGE
Minneapolis Threshing Machine Co. v. Kapau	166 N. W. 826	27
Minnesota Grain Co. v. Lohart	166 N. W. 828	158
Minneapolis Drug Co. v. Keairnes	167 N. W. 326	319
McCarty v. Goodman, ... L.R.A.1918F, 1038,	167 N. W. 503	389
Moulton v. Fargo	167 N. W. 717	502
Merchants Nat'l Bank v. Borstrup	168 N. W. 42	619
McCormick v. Sheridan	168 N. W. 59	641

N

Nelson v. Everson	168 N. W. 36	523
Northern Pacific Railway Co. v. Froelich	167 N. W. 366	307
Nurnberg v. Grabau	166 N. W. 508	57
Northern Pacific Railway Co. v. Reichert	167 N. W. 127	115
Northern Pacific Company v. Rozell	167 N. W. 489	475
Nichols v. State ex rel. Stevenson Twp.	166 N. W. 813	4
Northern Pacific Railway Co. v. Schantz	167 N. W. 370	317

O

Obrigewitsch v. Hanel	168 N. W. 45	540
O'Brien v. Haslam	167 N. W. 487	427
Olson v. Ross	167 N. W. 385	372

P

Page v. Smith	167 N. W. 218	270
Peterson v. Swanson	167 N. W. 389	301
Paulson v. Reeds	167 N. W. 371	329
Prall v. Buchannan	167 N. W. 488	423
Parker v. Froemke	169 N. W. 80	629

Q

Quackenbush v. Shively	167 N. W. 387	157
Quinlivan v. Dernste Land Co.	168 N. W. 51	607

R

Rothecker v. Wolhowe	166 N. W. 515	97
Reichert v. Northern Pacific Railway Co.	167 N. W. 127	115
Robinson v. Shively	167 N. W. 388	155
Re Kahoutek, L.R.A.1918D, 728	166 N. W. 816	215
Rozell v. Northern Pacific Railway Co.	167 N. W. 489	475
Rice v. State	168 N. W. 369	597
Ross v. State ex rel. Germain ..... — A.L.R. —	— N. W. —	631
Riley v. Weber Chimney Company	167 N. W. 753	487
Ross v. Olson	167 N. W. 385	372
Reeds v. Paulson	167 N. W. 321	329

S

Sundberg v. Farmers Grain & Mill Co.	168 N. W. 55	553
Stenseth v. Miller	167 N. W. 753	257
Smith v. Page	167 N. W. 218	270
Swanson v. Peterson	167 N. W. 389	301
Shively v. Quackenbush	167 N. W. 387	157
Shively v. Robinson	167 N. W. 388	155
State ex rel. Stevenson Twp. v. Nichols	166 N. W. 813	4
State ex rel. School Dist. No. 94 v. Tucker	166 N. W. 820	106

		PAGE
Starks v. Spring Gate L.R.A.1918E, 233,	167 N. W. 221	229
State use of Reilly v. Farmers Co-operative Elevator Company	167 N. W. 223	235
Schantz v. Northern Pacific Railway Company	167 N. W. 370	317
Spring Gate v. Starks L.R.A.1918D, 233,	167 N. W. 221	229
Swingle v. Swingle	167 N. W. 715	364
State ex rel. Show v. Frazier	167 N. W. 510	430
Swingle v. Swingle	167 N. W. 715	364
State v. Gillespie	168 N. W. 38	512
Shellburg v. Wilton Bank ..... 3 A.L.R. 1029,	167 N. W. 721	530
State v. Rice	168 N. W. 369	597
State ex rel. Germain v. Ross ..... — A.L.R. —,	— N. W. —	631
Sheridan v. McCormick	168 N. W. 59	641

T

Thompson v. Lemke	167 N. W. 754	492
Tucker v. State ex rel. School Dist. No. 94	166 N. W. 820	106

W

Weber Chimney Company v. Riley	167 N. W. 753	487
Wilton Bank v. Shellburg ..... 3 A.L.R. 1029,	167 N. W. 721	530
Will v. Barnett	166 N. W. 511	51
Wolhowe v. Rothecker	166 N. W. 515	97

Y

Yusko v. Middle West Fire Ins. Co.	166 N. W. 539	67

TABLE OF CASES CITED IN OPINIONS.

A

		PAGE
Amenta, Vail v.	4 N. D. 239	9
American Mortg. Co. supra v. Mouse River Live Stock Co.	10 N. D. 290	89
Andrews, Balding v.	12 N. D. 267	138
Anderson v. Johnson	16 N. D. 174	354

B

Buchanan v. Occident Elev. Co.	33 N. D. 346	121
Balding v. Andrews	12 N. D. 267	138
Beck, State Finance Co. v.	15 N. D. 374	244
Brooks, Prescott v.	11 N. D. 93	269
Blackorby v. Ginther	34 N. D. 258	328, 363
Beal, Scatterlind v.	12 N. D. 122	399
Beck, Clark v.	14 N. D. 287	399
Barstad, State v.	27 N. D. 533	445
Barry v. Traux	13 N. D. 131	445
Borsheim, Plummer v.	8 N. D. 565	459
Burleigh County v. Rhud	23 N. D. 362	482
Butler Bros v. Schmidt	32 N. D. 360	489
Burr, State ex rel. Erickson v.	16 N. D. 581, 593	518, 596
Blanchett, Colean Mfg. Co. v.	16 N. D. 341, 345	614
Beavestad, Styles v.	12 N. D. 527	634

C

Carrol v. Rye Twp.	13 N. D. 458	122
Clark v. Beck	14 N. D. 287	399
Colonial & W. L. Mortg. Co. v. Northwest Thresher Co.	14 N. D. 147	399
Clark, State ex rel. Johnson v.	21 N. D. 517	444
Colean Mfg. Co. v. Blanchett	16 N. D. 341, 345	614

D

Dak. F. & M. Ins. Co., Johnson v.	1 N. D. 167	77
Dolwig, Fisher v.	29 N. D. 564	175
Dennison Land Co., Griffin v.	18 N. D. 246	244
Doolittle v. Nurnberg	27 N. D. 521	398
Daisy Roller Mills v. Ward	6 N. D. 324, 317	650, 646

E

Eppeland, Skaar v.	35 N. D. 116	251
Erickson v. Wiper	33 N. D. 206	23
Ex parte Corliss	16 N. D. 470	447, 462
Ehr v. Reid	36 N. D. 552, 557	251, 256

F

		PAGE
Farmers Mercantile Co. v. N. P. Ry. Co.	27 N. D. 302	139
Fargo-Moorhead Street Ry. Co., Lathrop v.	23 N. D. 246	143
Fisher v. Dolwig	29 N. D. 564	175
Fluegel v. Henchel	7 N. D. 276	646

G

Grand Forks, McLauren v.	6 Dak. 397	105
Great N. Ry. Co., McGregor v.	31 N. D. 471	121
Grain Constr. Co. v. Mpls. St. Paul & S. Ste. M. Ry. Co.	36 N. D. 164	127
Great N. Ry. Co., Meehan v.	13 N. D. 443	137
Garraghty v. Hartstein	26 N. D. 148	137
Guild v. Moore	32 N. D. 432	148
Griffin v. Dennison Land Co.	18 N. D. 246	244
Gudmundson v. Thingvalla Lutheran Church	29 N. D. 291	300
Ginther, Blackorby v.	34 N. D. 258	328, 363
Glaspwell v. Jamestown	11 N. D. 86	443, 459
Glerum, Runge v.	37 N. D. 618	447
Gaar, S. Co. v. Green	6 N. D. 48	618
Green, Gaar, S. Co. v.	6 N. D. 48	618

H

Halverson v. Lasell	33 N. D. 613	121
Hannaher v. St. Paul, M. & M. Ry. Co.	5 Dak. 23	122
Hartstein, Garraghty v.	26 N. D. 148	137
Hoellinger v. Hoellinger	38 N. D. 636	269
Hawthorne, Martin v.	5 N. D. 66	403
Hardy, Porter v.	10 N. D. 551, 556	624
Hart, State v.	30 N. D. 368	633
Henchel, Fluegel v.	7 N. D. 276	646
Hayes, Rosenbaum Bros. & Co. v.	5 N. D. 476	585

J

Johnson v. Dak. F. & M. Ins. Co.	1 N. D. 167	77
Johnson v. N. P. Ry. Co.	1 N. D. 354	144
Jacobson, Mulroy v.	24 N. D. 354	326
Johnson, Anderson v.	16 N. D. 174	354
Jamestown, Glaspwell v.	11 N. D. 86	443, 459
Jackson v. Sobie	36 N. D. 49, 59	594
J. I. Case Threshing Mach. Co., Westby v.	21 N. D. 575	614

K

Kennedy, Northern Light Lodge v.	7 N. D. 146	242

L

Lucas, McCurdy v.	34 N. D. 613	12
Lisen v. St. Paul F. & M. Ins. Co.	20 N. D. 316	78
Lasell, Halverson v.	33 N. D. 613	121
Lathrop v. Fargo-Moorhead Street Ry. Co.	23 N. D. 246	143
Louva v. Worden	30 N. D. 401	342

M

		PAGE
McCurdy v. Lucas	34 N. D. 613	12
Mouse River Live Stock Co., American Mortg. Co., v.	10 N. D. 290	89
McLauren v. Grand Forks	6 Dak. 397	106
McGregor v. Great N. Ry. Co.	31 N. D. 471	121
Meehan v. Great N. Ry. Co.	13 N. D. 443	137
Moore, Guild v.	32 N. D. 432	148
Miller v. Thompson	34 N. D. 63	258
Mulroy v. Jacobson	24 N. D. 354	326
Martin v. Hawthorne	5 N. D. 66	403
Mpls. St. Paul & S. Ste. M. Ry. Co., Grain Constr. Co. v.	36 N. D. 164	127

N

Northern Light Lodge v. Kennedy	7 N. D. 146	242
N. P. Ry. Co., Soules v.	34 N. D. 7	121, 127, 140, 143, 150
N. P. Ry. Co., Rober v.	25 N. D. 394	139
N. P. Ry. Co., Johnson v.	1 N. D. 354	144
N. P. Ry. Co., Smith v.	3 N. D. 553	326
N. P. Ry. Co., Soules v	34 N. D. 10	363
Nurnberg, Doolittle v.	27 N. D. 521	398
Northwest Thresher Co., Colonial & W. L. Mortg. Co. v.	14 N. D. 147	399
N. P. Ry. Co., Farmers Mercantile Co. v.	27 N. D. 302	139

O

Occident Elevator Co., Buchanan v.	33 N. D. 346	121

P

Philips v. Semingson	25 N. D. 460	242
Prescott v. Brooks	11 N. D. 93	269
Page v. Smith	33 N. D. 369	270
Paulson v. Reeds	24 N. D. 211	331
Paulson v. Reeds	33 N. D. 141, 153	331, 338, 339, 342
Plummer v. Borsheim	8 N. D. 565	459
Paulson v. Sorenson	33 N. D. 488	489
Porter v. Hardy	10 N. D. 551, 556	624
Paulson v. Ward	4 N. D. 100	646

R

Rye Twp., Carrol v.	13 N. D. 458	122
Rober v. N. P. Ry. Co.	25 N. D. 394	130
Reid v. Ehr	36 N. D. 552, 557	251, 254, 256
Reeds, Paulson v.	24 N. D. 211	331
Reeds, Paulson v.	33 N. D. 141, 153	331, 338, 339, 342
Roquette Bros. Sunshine Cloak & Suit Co. v.	30 N. D. 143	354
Runge v. Glerum	37 N. D. 618	447
Rhud, Burleigh County v.	23 N. D. 362	482
Rosenbaum Bros. & Co. v. Hayes	5 N. D. 476	585

S

		PAGE
State ex rel. Byrne v. Wilcox	11 N. D. 329	12
St. Paul F. & M. Ins. Co., Lisen v.	20 N. D. 316	78
School Dist. v. Thompson	27 N. D. 459	111
School Dist. v. Special School Dist.	33 N. D. 353	111
Special School Dist., School Dist. v.	33 N. D. 353	111
State ex rel. Reynolds Special School Dist. v. School Dist.	6 N. D. 488	113
School Dist., State ex rel. Reynolds Special School Dist. v.	6 N. D. 488	113
Soules v. N. P. Ry. Co.	34 N. D. 7	121, 127, 140 143, 150
St. Paul, M. & M. Ry. Co., Hannaher v.	5 Dak. 23	122
Scherer v. Schlaberg	18 N. D. 421	138
Schlaberg, Scherer v.	18 N. D. 421	138
Semingson, Philips v.	25 N. D. 460	242
State Finance Co. v. Beck	15 N. D. 374	244
Skaar v. Eppeland	35 N. D. 116	251
State Loan Co. v. Whiteearth Coal Min. Brick & Tile Co.	34 N. D. 101	268
Smith, Page v.	33 N. D. 369	270
Smith v. N. P. Ry. Co.	3 N. D. 553	326
Sunshine Cloak & Suit Co. v. Roquette Bros.	30 N. D. 143	354
Soules v. N. P. Ry. Co.	34 N. D. 10	363
Swingle v. Swingle	36 N. D. 611	366
Styles v. Theo P. Scotland & Co.	22 N. D. 469	395, 400, 404 405, 408
Satterlind v. Beal	12 N. D. 122	399
State ex rel. Johnson v. Clark	21 N. D. 517	444
State v. Barstad	27 N. D. 533	445
Schmidt, Butler Bros. v.	32 N. D. 360	489
Sorenson, Paulson v.	33 N. D. 488	489
State ex rel. Erickson v. Burr	16 N. D. 581, 593	518, 596
Sobie, Jackson v.	36 N. D. 49, 59	594
State ex rel. Gaulke v. Turner	37 N. D. 635	596
State v. Hart	30 N. D. 368	633
Styles v. Beavestad	12 N. D. 527	634
Scotland & Co., Styles v.	22 N. D. 469	395, 400, 404 405, 408

T

Thompson, School Dist. v.	27 N. D. 459	111
Thompson, Miller v.	34 N. D. 63	258
Thingvalla Lutheran Church, Gudmundson v.	29 N. D. 291	300
Traux, Barry v.	13 N. D. 131	445
Turner, State ex rel. Gaulke	37 N. D. 635	596

V

Vail v. Amenia	4 N. D. 239	9

W

Wilcox, State ex rel. Byrne v.	11 N. D. 329	12
Wiper, Erickson v.	33 N. D. 206	23
Whiteearth Coal Min. Brick & Tile Co., State Loan Co. v.	34 N. D. 101	268
Worden, Louva v.	30 N. D. 401	342
Westby v. J. I. Case Threshing Mach. Co.	21 N. D. 575	614
Ward, Paulson v.	4 N. D. 100	646
Ward, Daisy Roller Mills v.	6 N. D. 317, 324	646, 650

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

FLORENCE N. CATTO, Respondent, v. ALBERT HOLLISTER, Van Sant Investment Company, a Foreign Corporation, Bruce W. Sanborn, and Reuben M. Cecil, also Known as R. M. Cecil, Appellants.

(166 N. W. 506.)

Real property — title to — forged deed — cannot be obtained through.
Title to real property cannot be obtained through a forged deed.

Opinion filed January 31, 1918.

Appeal from the District Court of Burleigh County, Honorable *W. L. Nuessle,* Judge.

Defendants appeal.

Affirmed.

Sullivan & Sullivan, for appellants.

The appointment of an agent need not be by express language, but may be and often is implied from the relation of the parties and from their conduct. 1 Am. & Eng. Enc. Law, 957, note 5, 959, 960, 1144 and cases cited in note 1.

Silence, when there is a duty to speak, is deemed equivalent to concealment when the person had a full knowledge of the facts and of his

rights. 10 R. C. L. 693; Pom. Eq. Jur. 802, 804; Lansdale v. Smith, 106 U. S. 391, 27 L. ed. 219, 1 Sup. Ct. Rep. 350.

A person cannot conceal facts from another for the purpose of protecting some other from the consequences of his crime, and after such concealment come in and claim forgery, after passively and knowingly permitting a purchaser to buy land, upon the record title, under an honest, though erroneous belief, that his vendor's title is perfect. A person so acting is estopped to claim title. Wampol v. Kountz, 14 S. D. 334, 86 Am. St. Rep. 765, 85 N. W. 595; Manufacturers' & T. Bank v. Hazard, 30 N. Y. 226; Lansdale v. Smith, 106 U. S. 391, 27 L. ed. 219, 1 Sup. Ct. Rep. 350; Sweatman v. Deadwood, 9 S. D. 380, 69 N. W. 582; Lee v. Sandy Hill, 40 N. Y. 448; Locke v. Stearns, 1 Met. 560, 35 Am. Dec. 382.

The principal is liable whether the injury to third persons is caused by the negligence or positive misfeasance of the agent. Higgins v. Watervliet Turnp. & R. Co. 46 N. Y. 24, 7 Am. Rep. 293; 1 Am. & Eng. Enc. Law, 1158.

The doctrine of estoppel is based upon the idea that he who is silent when conscience requires him to speak shall be barred from speaking when conscience requires him to keep silent. 16 Cyc. 681; Mohall State Bank v. Duluth Elevator Co. 35 N. D. 619, 161 N. W. 287; Branthover v. Monarch Elevator Co. 33 N. D. 454, 156 N. W. 927; Phillips v. Clark, 4 Met. (Ky.) 348, 83 Am. Dec. 471; Leavitt v. Fairbanks, 92 Me. 521, 43 Atl. 115.

Under the circumstances here, it was the duty of the defendant to act promptly and to make known the hidden vice. Johnson v. Erlandson, 14 N. D. 518, 105 N. W. 722; Mays v. Shields, 117 Ga. 814, 45 S. E. 68; Costello v. Meade, 55 How. Pr. 356; Haven v. Kramer, 41 Iowa, 384; Quick v. Milligan, 108 Ind. 419, 58 Am. Rep. 71, 9 N. E. 392; Connell v. Connell, 32 W. Va. 319, 9 S. E. 252; McConnell v. Rowland, 48 W. Va. 276, 37 S. E. 586.

Miller, Zuger, & Tillitson (*L. R. Pearson,* of counsel), for respondent.

"The law is well settled that no question of estoppel by deed can arise where the instrument is absolutely void." 11 Am. & Eng. Enc. Law, 393; Smith v. Ingram, 130 N. C. 100, 61 L.R.A. 878, 40 S. E. 984; Harkness v. Underhill, 1 Black, 316, 17 L. ed. 208; Powell v. Patison,

100 Cal. 236, 34 Pac. 677; Hunt v. Reilly, 24 R. I. 68, 59 L.R.A. 206, 96 Am. St. Rep. 707, 52 Atl. 681.

Failure to notify the grantees and encumbrancers defendants afterwards could work no estoppel, for in such case an estoppel does not arise after the fact. Hunt v. Reilly, supra.

The answers are wholly inadequate to support an estoppel, because they contain no allegation that defendants acted upon any act or omission or statement of plaintiff. Ibid., 8 Enc. Pl. & Pr. 10 and 11.

Where reliance is made upon an estoppel, it must be pleaded with fullness and certainty as to the facts constituting estoppel. Robbins v. Magee, 76 Ind. 381; Hanson v. Chiatovich, 13 Nev. 395.

Even silence or acquiescence on the part of an owner, after knowledge that third persons have already taken his property and dealt with it as their own, will not, as a general rule, work an estoppel. 11 Am. & Eng. Enc. Law, 439; Hamlin v. Sears, 82 N. Y. 330.

A forged deed can always be attacked. Vesey v. Solberg, 27 S. D. 618, 132 N. W. 254.

A principal is only liable for and chargeable with the lawful acts of an agent. The principal is not responsible for the wrongs or unlawful acts of the agent. 11 Am. & Eng. Enc. Law, 433, and cases cited.

ROBINSON, J. The plaintiff brings this action to quiet her title to all the land described in the complaint. She obtained a judgment. She is the owner of the patent title. Defendant claims under a deed which is clearly and confessedly forged, and appeals to this court. The claim is that plaintiff was negligent in not looking after her title, procuring abstracts, and promptly commencing an action to cancel the forged deeds.

The claim is futile. A party who has a good title to real property under recorded deeds has no occasion to keep watch of his title. Every purchaser or mortgagee must at his peril see that he gets title from one having title to convey. The appeal presents nothing worthy of any consideration or comment.

Judgment affirmed.

STATE OF NORTH DAKOTA ON RELATION OF STEVENSON TOWNSHIP, and H. H. Hanson as Clerk of Said Township, Appellant, v. LEE NICHOLS, County Auditor, Morton County, North Dakota, Respondent.

(166 N. W. 813.)

County — division of — general election — vote of — civil township — congressional township — identity presumed.

When a county is divided by a vote at a general election, and the dividing line runs through a civil township which is composed of a congressional township and nineteen sections of land in addition thereto, so that such congressional township is located in the county which has been newly created and the additional nineteen sections in the old county, such additional territory still maintains its identity as a township in the county to which it formerly belonged and in which it now remains, and such original township is not dissolved save to the extent of the territory which is taken from it, and which becomes unorganized territory in the new county.

Opinion filed January 31, 1918.

Mandamus to compel delivery of assessor's books.

Appeal from the District Court of Morton County.

Judgment for defendant. Plaintiff appeals.

Reversed.

Langer & Nuchols, for appellant.

The method of organizing civil townships provided by § 1 of chapter 112 of the Session Laws of 1883 has been continued in force to the present time in exactly the same language. Comp. Laws, 1913, § 4073.

Every township is a body corporate, with rights and powers of local self-government. Comp. Laws, 1913, § 4083.

The cases all seem to express the rule that the legislature, subject to constitutional limitation, has the power to create, divide, alter, or dissolve township organizations. Bay County v. Bullock, 51 Mich. 544, 16 N. W. 896.

The enlargement of a county does not necessarily extend the boundaries of a township lying on the side or boundary of the county to which the adjacent territory was added on the same side, so as to include in

the township such added territory. Morris County v. Hinchman, 29 Kan. 90.

L. H. Connolly, State's Attorney, for respondent.

A township is a subdivision of a county and cannot exist in more than one county, *i. e.,* one part cannot lie in one county and one part in another county. Township organization is brought into existence by a majority vote of all the legal voters of the county voting at a general election. Const. § 170; Abbott's Law Dict.; Comp. Laws, 1913, §§ 670, 4072, 4074, 4161, 4167, 4174, 4237, 4256.

Obligations cannot be shifted or canceled by the division of a county. Plunkett's Creek Twp. v. Crawford, 27 Pa. 107.

A township cannot consistently exist in two counties. Farley v. Boxville, 113 Minn. 203, 129 N. W. 381.

BRUCE, Ch. J. This is an appeal from a judgment denying a peremptory writ of mandamus which was sought by the plaintiff and appellant to compel the defendant, as auditor of the county of Morton, to prepare and deliver to the relators the assessment book as provided by law, and the necessary blanks for the assessment by the assessor of Stevenson township, for the purpose of taxation for the year 1917 of the property within that portion of said Stevenson township located within the territorial limits of said county of Morton.

It is a result of the general election of 1916, which divided Morton county by segregating a portion thereof and creating the same into the new county of Grant.

The whole of the Stevenson township was originally in the county of Morton and was composed of congressional township 133 north range 83, 83 west and fractional congressional township 133 north of range 82 west. After the creation of the new county of Grant this fractional township, containing approximately nineteen sections, was located in Morton county, and the congressional township of thirty-six sections, in the new county of Grant; and the auditor of Morton county, North Dakota, defendant herein, refused to deliver to the assessor of relator township the assessment book and necessary blanks for the assessment of property within that portion of Stevenson township lying in the county of Morton for the purpose of taxation for the year 1917. This refusal was based upon the advice of the state's attorney of Morton

county, who held that Stevenson township had been dissolved by the segregation of Grant county from Morton county, and that the territory now within Morton county, and which was formerly included in Stevenson township, became unorganized territory of the county of Morton and a part of the assessor's district in said county to which the same was adjacent.

The question which is presented to us for determination is not without difficulty. We are satisfied that in North Dakota a township must always be looked upon as a subdivision of a county. Abbott's Law Dictionary. It is created by the board of county commissioners of the county in which it is located, on a petition of the voters, rather than by the independent act of the voters themselves. See § 4072 of the Compiled Laws of 1913. This being the fact, and since no means have been provided for the dissolution of a township, except by a vote of the majority of the electors residing therein (see §§ 4277 et seq., Compiled Laws of 1913), we are satisfied that it was the intention of the legislature that, once being created, the entity of a township should be preserved and should continue except where it, the legislature, chose to expressly otherwise provide. Our conclusion is that the nineteen sections in Morton county still constitute the township of Stevenson, and that the thirty-six sections in Grant county constitute unorganized territory in such new county.

We are satisfied that the ultimate control in such cases is in the legislature, and that the legislature can authorize the division of townships by the creation of new counties, as it has done in the case at bar. Since, however, § 4079 of the Compiled Laws of 1913 expressly provides that, where a congressional township borders on a lake or river (as does the township in the case at bar), a civil township may be composed of a portion thereof, provided such portion contains more than eighteen sections of land and contains at least one hundred inhabitants, we are satisfied that a division of a county which divides a township and places a portion of its territory in the new county about to be created, does not destroy the entity of that portion of the township which has been left in the old county, nor does it make of it unorganized territory, provided such portion still contains 18 sections and 100 inhabitants. In such a case all that is effected is an alteration of the territorial limits of the original township.

We are satisfied that a township when once created is not merely a corporate entity, but that it is subordinate to and is a part of the general system of county management and control of the county in which it is situated. No man can serve two masters, and it is out of the question that for election purposes a fractional township should be considered a political entity and for taxation purposes it should be considered unorganized territory. See Springwells v. Wayne County, 58 Mich. 240, 25 N. W. 329; Courtright v. Brooks Twp. 54 Mich. 182, 19 N. W. 945; Farley v. Boxville, 113 Minn. 203, 129 N. W. 381.

In both taxation and election matters, the unit is the county, township, or precinct; and there is no provision in the statutes for two precincts in two counties, nor for the election of two assessors in so far as townships are concerned. It is true that in the case of elections which are held in cities and in villages whose territory stretches into two counties, two or more precincts are provided for in each county. No such provision, however, is to be found in the case of townships. See §§ 950, 4271, 4079, 4087, 4146, 4144, 4174, 2125, 4212, 3934–3938, 3564, 3556, 3932–3941. See also § 121 of the Constitution, which limits the right of suffrage to those who have resided in the state one year, the county six months, and the precinct ninety days.

The judgment of the District Court is reversed and the cause is remanded for further proceedings according to law.

ROBINSON and GRACE, JJ. I concur in the result.

CHRISTIANSON, J. (concurring specially). I concur in the conclusion that the township of Stevenson was not dissolved by operation of law by the creation of a new county out of a portion of its territory. I am not, however, fully convinced of the soundness of the views of my associates, or prepared to concur in their conclusion, that the change of the boundaries of Morton county *ipso facto* changed the boundaries of Stevenson township.

The civil township of Stevenson was duly organized in Morton county in 1910, Stevenson township consisted of a full congressional township and an adjoining fractional township containing approximately nineteen sections of land. The fractional township was caused by the Cannon Ball river, which divided the congressional township

almost diagonally from northeast to southwest, and which river formed the boundary between Morton county and Sioux county. At the general election in November, 1916, Morton county was divided by segregating a portion thereof and creating the same into a new county, to wit, Grant county. The boundary line between the counties of Grant and Morton divided Stevenson township in such manner that the full congressional township is located in Grant county and the fractional township is located in Morton county.

The respondent contended that this change in the county boundaries *ipso facto* dissolved the township of Stevenson. The trial court sustained this contention. The sole question argued by the parties on this appeal was whether Stevenson township became dissolved.

It is conceded that the legislature has, subject to constitutional restriction, full power to create, abolish, consolidate, or divide civil townships. 38 Cyc. 604. And it is elementary that, where the legislature has prescribed that a certain act shall be done in a particular manner, such affirmative declaration contains an implied negative that it shall not be done in any other manner. In this state the legislature has, by general law, prescribed the specific manner in which townships may be organized, divided, or dissolved. §§ 4072–4078, 4079–4081, 4277–4281.

A civil township can be organized only whenever a majority of the legal voters thereof petition the board of county commissioners that the township be organized. Comp. Laws 1913, § 4072. This is the only method provided in this state for organizing civil townships. Even the name of a civil township must be "in accordance with the expressed wish of a majority of the legal voters residing therein." Comp. Laws 1913, § 4074.

"Each township is a body corporate, and has capacity: (1) To sue and be sued; (2) To purchase and hold lands within its limits and for the use of its inhabitants, subject to the powers of the legislative assembly; (3) to make such contracts and purchase and hold such personal property as may be necessary for the exercise of its corporate or administrative powers; (4) to make such orders for the disposition, regulation, or use of its corporate property as may be deemed conducive to the interest of its inhabitants." Comp. Laws, 1913, § 4083.

A fraction of a township may be attached "to an adjoining township

or be divided between two or more townships or organized separately, according to the wishes of a majority of the legal voters to be affected thereby." Comp. Laws, 1913, § 4073. An organized township may be divided by setting apart therefrom and organizing as a separate civil township, a "congressional township or fraction thereof, bordering on a lake or bordering on a river, containing more than eighteen sections of land, which has residing therein one hundred or more inhabitants." But such division can be made only upon a "petition signed by a majority of the legal voters residing within such proposed township." Comp. Laws, 1913, §§ 4079–4081.

An organized township may be dissolved. But the only method provided by statute for dissolution is by an election. Such an election may be called by the board of supervisors, when an application therefor is presented signed by one third of the legal voters of the township. In order to effect a dissolution, however, it is essential that "a majority of all the legal voters in such township" vote in favor of the dissolution. Comp. Laws, 1913, § 4278.

It is elementary that the only function of the courts is to ascertain and give effect to the legislative intent, and, though situations may sometimes arise not contemplated by the legislature, this does not justify the courts in speculating upon what action the legislature might have taken if it had anticipated the situation. 36 Cyc. 1113.

The legislative intent with respect to township organization as disclosed by these statutory provisions is that the will of the majority of the legal voters, residing in the township, shall be controlling in all cases affecting the creation, division, or dissolution of townships. And this court has said that "with us townships are voluntary organizations" (Vail v. Amenia, 4 N. D. 239, 59 N. W. 1092).

The majority opinion is predicated upon the proposition that, inasmuch as our laws make no special provision for the administration of, or for the holding of general elections in, townships lying in part in two counties, the legislature must have intended that such townships should not exist.

Most of the argument with respect to the confusion likely to arise in the administration of a township so situated, and the levy and collection of taxes therein, would apply with equal force to school districts. For, although the legislature has expressly authorized territory in one county

to be annexed to an adjacent school district in another county (Comp. Laws, 1913, § 1142), it has made no provision and prescribed no procedure for the guidance of the county and school officers in solving the administrative questions peculiar to such districts.

Thus it is made the duty of the clerk of a school district to forward to the county superintendent within ten days after a school election a certified list of the officers elected thereat. Comp. Laws, 1913, § 1158. He is also required to prepare and transmit to the county superintendent an annual report. Comp. Laws, 1913, § 1197. The school treasurer's bond must be filed with the county auditor. Comp. Laws, 1913, § 1171. In case the school board refuses to approve of the school treasurer's bond he may present it to the county superintendent for approval. And in case a vacancy occurs in the office of the school treasurer it becomes the duty of the "county treasurer of the county . . . , upon being notified by the county superintendent or clerk of such school district that such vacancy exists, to perform the duties of treasurer of such school district until the vacancy is duly filled." Comp. Laws, 1913, § 1165. The school board is required to cause a school census to be taken and returned to the county superintendent prior to the 10th day of July of each year. Comp. Laws, 1913, § 1195. The clerk is required to notify the county auditor in writing of the amount of the tax levied by the school board for school purposes. Comp. Laws, 1913, § 1222. The superintendent of schools is required to apportion among the several school districts the state tuition fund (Comp. Laws, 1913, § 1217), and the county tuition fund (Comp. Laws, 1913, § 1225). It is the general duty of the county superintendent of schools to generally superintend the common schools of his county, except those in districts which employ a city superintendent of schools. Comp. Laws, 1913, § 1123. He is required to visit each common school at least once a year (Comp. Laws, 1913, § 1124); arrange for meetings with school officers (Comp. Laws, 1913, § 1126), and convene the members and clerks of school boards once in each year for the purpose of discussing plans and matters for the improvement and general care of the schools. Comp. Laws, 1913, § 1127. In case a vacancy occurs in the office of director or treasurer of school district, the county superintendent of schools is authorized to appoint some competent person to

fill the vacancy until the next annual school election. Comp. Laws, 1913, § 1324.

It will be noted that these different provisions of the school laws refer to school districts lying in one county. Would it not be just as logical to argue that inasmuch as the legislature has made no specific provisions for the government of school districts lying in more than one county it intended that such school districts should not exist, as to argue that, because the legislature failed to provide specifically for the administration of a township lying in part in two counties, it intended that such township should be dissolved or its boundaries changed whenever a change in the county boundaries placed it partly in two counties?

For it is quite apparent that the provisions relative to the administration of school districts are not wholly applicable to, and do not provide for the different contingencies which may arise in, the administration of a school district lying in part in two counties. Yet it is a well-known fact that there are many such school districts in the state. Some of these districts, to the personal knowledge of the writer, have been in operation for many years; and, although the statutory provisions with respect to the administration of such school districts are incomplete, the county and school officers have devised systems of their own, carrying into effect the intent and purpose of the general school laws. And, so far as I know, no serious complications have ever arisen, at least none have ever been brought to this court for determination. So, apparently the difficulties in the administration of the corporate affairs, including the levy and collection of taxes, which the majority members of this court assume to be insuperable obstacles to the conduct of the government of a public corporation lying in part in two counties have, as to school districts so situated, been solved by the school and county officers of this state without serious trouble.

Nor are there any insuperable obstacles to the holding of an election for county and state officers in a township situated in part in two counties. There would be no greater difficulty in holding such election in a township so situated, than in holding it in a city or village similarly situated. And under the laws of this state it has been permissive, since March 12, 1907, to incorporate as a village or city territory lying in more than one county. Laws 1907, chap. 266, Comp. Laws, 1913, §§ 3564a–3564c. Under the laws then existing a village or city might

constitute but one election precinct. Comp. Laws, 1913, §§ 950, 3667. In other cases the statute declared each city ward to constitute an election precinct. Comp. Laws, 1913, § 3667. But, although this was so, the legislature made no special provision for the conduct of elections for county and state officers in villages and cities so situated until in 1911. Laws 1911, chap. 314. Prior to that time no statute existed specifically applicable to elections in such cities and villages, but the general election laws must have been, and were, applied thereto. The election laws are necessarily somewhat general, and it has been found that their provisions do not apply to or cover peculiar or unusual local conditions which at times exist. See State ex rel. Byrne v. Wilcox, 11 N. D. 329, 91 N. W. 955; McCurdy v. Lucas, 34 N. D. 613, 159 N. W. 22.

It is for the legislature to provide for the dissolution or change of boundaries of public corporations. The sole function of the courts is to ascertain and give effect to the legislative will as expressed in the statute with respect thereto. I am by no means satisfied that the legislature ever contemplated the situation existing in this case. On the contrary I am strongly convinced that it never did. Under such circumstances the court ought not to speculate as to what the legislative intent might have been in the event it had foreseen the situation. 36 Cyc. 1113.

There is nothing said in the statutes relating to division of counties, from which it can reasonably be inferred that the legislature intended that such division should *ipso facto* destroy, or change the boundaries of, civil townships whose boundaries might be traversed by the new county lines thus established. In absence of language from which such intent can be gathered, the laws should not be construed to bring about this result. State v. Independent School Dist. 46 Iowa, 425; State ex rel. Lowe v. Henderson, 145 Mo. 329, 46 S. W. 1076.

While the legislature has power, except as restricted by the Constitution, by general law, to provide for the organization or dissolution of township and other public corporations, it "has been declared that the power of the state to alter or destroy its corporations is not greater than the power of the state to repeal its legislation. Exercise of the latter power has been repeatedly held to be ineffectual to impair the obligation of a contract. The repeal of a law may be more readily under-

taken than the abolition of cities, townships, or other municipal corporations, or the change of their boundaries." 1 Dill. Mun. Corp. 5th ed. § 338. See also 19 R. C. L. p. 705. As it will not be presumed that the legislature intended to repeal an existing statute unless it has clearly manifested its intention to do so, so it should not be presumed that the legislature intended summarily to destroy, in whole or in part, an existing public corporation unless its intention to do so is clear and unmistakable.

GILBERT MANUFACTURING COMPANY, a Corporation, Respondent, v. WILLIS BRYAN, Appellant.

(166 N. W. 805.)

Written contract — terms — fully stated and complete — plain and specific — prior parol contract — testimony to show — inadmissible.

1. Where a written contract is full and complete as to all of the terms of the contract, and the terms of such contract are plain and specific, and set forth fully the subject-matter of the contract, and such written contract covers the subject-matter of the contract fully so as to be a complete contract, oral testimony is inadmissible to show a prior parol agreement entered into between the parties prior to the time of the execution of the written contract.

Written contract — incomplete — subject-matter — not fully covered — contract partly written — partly oral — parol evidence — as to oral part.

2. Where a written contract is not complete, and where it does not cover the whole subject-matter of the contract, where there is a part of the subject-matter of the contract not incorporated in the written agreement, oral testimony is admissible to establish such part as is not included in the written agreement; or if the contract is partly written and partly verbal, that part which is verbal may be proved by oral testimony, but in so far as the written contract covers and treats of the subject-matter and sets forth the covenants entered into and terms agreed upon, such written contract and the terms thereof cannot be varied by the introduction of oral testimony.

NOTE.—The general rule that evidence of prior or contemporaneous agreements is not admissible to contradict or vary the terms of a written contract; nor can a verbal agreement made prior to the written contract be admitted to contradict or vary the written contract,—is discussed in a note in 17 L.R.A. 273.

Written contracts — supersede oral agreements — subject-matter covered — as to.

3. Written contracts supersede oral negotiations and prior parol agreements so far as the subject-matter of the contract is covered and included within such written contract.

Subject-matter — all substantially covered — written contract — will be given effect — fraud — mistake — absence of — effect given to.

4. Where a written contract is entered into between the parties, which substantially covers all the subject-matter of the contract, and one of the parties, in resisting the legal effect of such written agreement, undertakes to set up a prior contemporaneous oral agreement made at or prior to the time of the execution of the written agreement, in the absence of fraud, delusion, or false representations which induced the signing of the contract, or unless the contract was signed by mutual mistake of law of both of the parties, or a misapprehension of the law by one party of which the other party was aware at the time of the making of the contract, which was not rectified, the written contract will be given effect, and oral testimony is not admissible to vary its terms or the meaning thereof.

Opinion filed February 6, 1918.

Appeal from the judgment of the District Court of Burleigh County, and from an order overruling a motion for a new trial, Honorable, *W. L. Nuessle,* Judge.

Affirmed.

Theodore Koffel, for appellant.

Where it is claimed that the contract is partly in writing it is proper to show prior oral statements and representations not in conflict with the written portions. Hanley v. Chicago, M. & St. P. R. Co. 154 Iowa, 60, 134 N. W. 417.

Parol evidence is admissible to show prior or contemporaneous collateral agreements between the parties, though a written contract was entered into. Clare County Sav. Bank v. Featherly, 173 Mich. 292, 139 N. W. 61; Kempsy v. Metcalf, 61 Iowa, 320, 16 N. W. 146; Coit v. Churchill, 61 Iowa, 296, 16 N. W. 147.

It is also permissible to show that at the time the writing was made it was agreed between the parties that the same should not take effect until the happening of some stated contingency. McCormick Harvesting Mach. Co. v. Richardson, 89 Iowa, 525, 56 N. W. 682; Manu-

facturers' Furnishing Co. v. Kremer, 7 S. D. 463, 64 N. W. 528; Hinsdale v. McCune, 135 Iowa, 682, 113 N. W. 478.

Under a blank indorsement of a promissory note, it is competent to show by parol evidence a different contract than that implied by law. Geneser v. Wissner, 69 Iowa, 119, 28 N. W. 471.

It is competent to show by parol evidence the amount that several joint makers should each pay under a mortgage (Comeau v. Hurley, 24 S. D. 275, 123 N. W. 716); or that the price agreed to or paid for goods is different from that shown in the invoice (Edwards & McC. Lumber Co. v. Baker, 2 N. D. 289, 50 N. W. 718); or where the written memorandum is different it is competent to show the actual agreement (Hendrix v. Letourneau, 139 Iowa, 451, 116 N. W. 729; Norris v. Clark, 33 Minn. 476, 24 N. W. 128).

It is error to refuse a party the right to offer evidence in rebuttal of incompetent evidence allowed to remain of record before the jury, or to limit cross-examination to test the witness's memory. Ingram v. Wackernagel, 83 Iowa, 82, 48 N. W. 998; Julius King Optical Co. v. Treat, 72 Mich. 599, 40 N. W. 912; People v. Hare, 57 Mich. 505, 24 N. W. 843; Rhomberg v. Avenarius, 135 Iowa, 176, 112 N. W. 548; Plano Mfg. Co. v. Bergmann, 102 Wis. 21, 78 N. W. 157.

Evidence received without objection cannot be stricken out on motion after witness has been fully examined. De Laval Separator Co. v. Sharpless, 142 Iowa, 60, 120 N. W. 657.

An answer that is not responsible to a question should be stricken out. Davis v. Holy Terror Min. Co. 20 S. D. 399, 107 N. W. 374; Latman v. Douglas & Co. 149 Iowa, 699, 127 N. W. 661; Chase v. Woodruff, 138 Wis. 641, 120 N. W. 499; H. C. Behrens Lumber Co. v. Lager, 26 S. D. 160, 128 N. W. 698, Ann. Cas. 1913A, 1128.

No issue should be submitted to the jury unless there is evidence to support it. State v. Dahms, 29 N. D. 51, 149 N. W. 965; State v. Hall, 28 N. D. 649, 149 N. W. 970.

Instructions should not ignore material issues. Thompson v. State, 61 Neb. 210, 85 N. W. 62; Slingerland v. Keyser, 127 Mich. 7, 86 N. W. 390; Anderson v. Roberts, 112 Iowa, 749, 84 N. W. 928; Strong v. State, 61 Neb. 35, 84 N. W. 410.

An instruction based on an assumed state of facts, and of which no evidence has been introduced, was error. Eggett v. Allen, 106 Wis.

633, 82 N. W. 556; State v. Swallum, 111 Iowa, 37, 82 N. W. 439; Conrad v. Kelley, 106 Wis. 252, 82 N. W. 141; Bockoven v. Lincoln Twp. 13 S. D. 317, 83 N. W. 335; Locke v. Priestly Exp. Wagon & Sleigh Co. 71 Mich. 263, 39 N. W. 54; Whitsett v. Chicago, R. I. & P. R. Co. 67 Iowa, 150, 25 N. W. 104; Templin v. Rothweiler, 56 Iowa, 259, 9 N. W. 207.

The verdict of the jury to be warranted must be founded on reasonable certainty, and must appear to have been reached by a fair consideration of the evidence, and not upon conjecture or surmise or guesswork. It must be sustained by established facts. Samulski v. Menasha Paper Co. 147 Wis. 285, 133 N. W. 142; Spencer v. Chicago, M. & St. P. Ry. Co. 105 Wis. 311, 81 N. W. 407, 7 Am. Neg. Rep. 364; Poels v. Brown, 78 Neb. 783, 111 N. W. 798; Kraczek v. Falk Co. 142 Wis. 570, 126 N. W. 30; Hodson v. Wells & D. Co. 31 N. D. 395, L.R.A.1915F, 958, 154 N. W. 193; Russel v. Rosenbaum Bros. 24 Neb. 769, 40 N. W. 287.

Immaterial and irrelevant testimony admitted over objection, and having a tendency to influence or mislead the jury, furnishes good ground for a new trial. Harrison v. Baker, 15 Neb. 43, 14 N. W. 541; Tunell v. Larson, 37 Minn. 258, 34 N. W. 29.

When it appears from the record that a fair trial has not been had and justice has not been done, a new trial should be granted. Finney v. Northern P. R. Co. 3 Dak. 270, 16 N. W. 500; Barrett v. Wheeler, 71 Iowa, 662, 33 N. W. 230; D. M. Osborne & Co. v. Carpenter, 37 Minn. 331, 34 N. W. 163; Doyle v. Burns, 138 Iowa, 439, 114 N. W. 1; Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; Parry Mfg. Co. v. Tobin, 106 Wis. 286, 82 N. W. 154.

Where it is probable to think that the newly discovered evidence will produce a different result upon a new trial it should be granted. City Sav. Bank v. Carlon, 87 Neb. 266, 127 N. W. 161; Hawk v. Mulhall, 133 Iowa, 695, 110 N. W. 1026; Hunt v. Tuttle, 133 Iowa, 647, 110 N. W. 1026; Brooke v. Byrnes, 133 Iowa, 697, 110 N. W. 1028.

Newton, Dullam, & Young, for respondent.

Written contracts supersede all oral negotiations. The execution of a contract in writing, whether required by law or not, supersedes all oral regulations or stipulations concerning the matter which preceded or accompanied the execution of the instruments. Comp. Laws 1913,

§ 5889; Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; American Case & Register Co. v. Walton & D. Co. 22 N. D. 187, 133 N. W. 309; Rieck v. Daigle, 17 N. D. 365, 117 N. W. 346; Reeves v. Bruening, 13 N. D. 157, 100 N. W. 241.

"Parol evidence is not admissible to show that the contract is different from that contained in the accepted offer." Johnson v. Kindred State Bank, 12 N. D. 336, 96 N. W. 588; National German American Bank v. Lang, 2 N. D. 66, 49 N. W. 414; Northwestern Fuel Co. v. Bruns, 1 N. D. 137, 45 N. W. 699; Harney v. Wirtz, 30 N. D. 292, 152 N. W. 803.

The rule is that a new trial will not be granted on the ground of newly discovered evidence when such evidence was not produced at the former trial because it had been forgotten, or where the defendant did not use due diligence. Upton v. Levy, 39 Neb. 331, 58 N. W. 95; Jackson v. Grinnell, 144 Iowa, 232, 122 N. W. 911; First Nat. Bank v. Union Trust Co. 158 Mich. 94, 133 Am. St. Rep. 362, 122 N. W. 547; Butterfield v. Beaver City, 84 Neb. 417, 121 N. W. 592.

Such evidence must also be relevant and material. Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; Fisk v. Fehrs, 32 N. D. 119, 155 N. W. 676.

The granting of a motion for a new trial on such ground is largely within the discretion of the trial judge, and his decision thereon will not be disturbed except in case of clear abuse. Fisk v. Fehrs, supra; Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419.

GRACE, J. Appeal from the judgment of the district court of Burleigh County, and from an order overruling a motion for a new trial.

The complaint states an action for recovery upon a promissory note bearing date December 4, 1914. The note is for the sum of $218, with interest at 10 per cent. The complaint admits the payment of $130, and claims a balance due upon said note of $107.37.

The answer admits that the defendant is a foreign corporation, and also interposes a general denial, and then sets up the following defense to such note: "That plaintiff and defendant entered into an agreement whereby defendant was to receive into his possession and put up or construct certain galvanized corrugated grain bins manufactured by the plaintiff, and plaintiff was to sell such grain bins to the public after

having been so assisted by the defendant; and thereupon, at the special instance and request of the plaintiff, and as an evidence of good faith on his part, the defendant executed and delivered the said note, without consideration, and solely for the accommodation of said plaintiff, and upon plaintiff's promise to sell such grain bins and release defendant from liability upon the note, and to compensate the defendant for his labor and services therein.

"That thereafter the plaintiff sold the said grain bins from the proceeds of which the sum of $130 has been indorsed upon said note as a payment.

"That the plaintiff is not a bona fide holder of the note in suit for a valuable consideration, but received the same with notice of the foregoing facts, and without paying any consideration therefor."

The defendant for a counterclaim states that, prior to the execution and delivery of the note described in the complaint, plaintiff and defendant entered into an agreement whereby plaintiff was to consign to defendant certain knocked down, galvanized corrugated grain bins, and defendant was to receive the same into his possession, and plaintiff was to sell the same to the public; and defendant agreed to construct or put them up, for and in consideration of the compensation hereinafter mentioned. That according to the terms of said agreement defendant received into his possession certain grain bins consigned to him by plaintiff, and defendant paid the freight charges thereon in the sum of $27, no part of which has been paid, except as hereinafter stated. That according to the terms of said agreement, defendant constructed and put up three of said grain bins, for which services, according to the terms of said agreement, the plaintiff agreed to pay the sum of $30 per bin, or a total sum of $90, no part of which has been paid except as hereinafter mentioned. Defendant further states that the plaintiff, in connection with the selling and delivering of such grain bins, and in collecting pay for same, hired from the firm of Bryan & Son, of Bismarck, North Dakota, certain automobiles and drivers for which plaintiff agreed to pay said Bryan & Son the reasonable value for the use and service thereof, which was and is the sum of $75. Then follows an allegation of the assignment of such claim of Bryan & Son to the defendant. The defendant claims by reason of such counterclaim $27 due for freight, $90 for putting up or constructing the bins, and $75

for hire of automobiles and drivers, and claims that no part of the said sums has been paid except $125, and claims a balance due from the plaintiff in the sum of $67.

To this answer and counterclaim the plaintiff interposed a reply, the substance of which is that on the 5th day of August, 1914, at Bismarck, North Dakota, the plaintiff and defendant entered into two certain sale contracts and orders in writing in and by which plaintiff sold to defendant, and the defendant bought of the plaintiff, three certain 1,000-bushels capacity Dakota-Montana special grain bins, at the price of $105 each f. o. b. Aberdeen, South Dakota, and two pair of channel irons for partitions; that thereafter, in pursuance to said written sale contracts and orders, the plaintiff delivered to said defendant at Aberdeen, South Dakota, said three grain bins and two pair of channel irons for partitions. Thereafter, on October 24, 1914, the defendant paid the plaintiff the sum of $105 upon said contracts; and thereafter, on the 4th day of December, 1914, the defendant, in pursuance of the terms of said contracts hereinbefore mentioned, executed and delivered to the plaintiff the note sued upon and described in the complaint herein, which note was given as a settlement of the amount due plaintiff from the defendant under said contract; that in and by said agreement, among other things, it was agreed that the defendant should sell in the territory of Bismarck and vicinity the grain bins manufactured by the plaintiff and mentioned in said agreement, and was also to set up any grain bins sold by him to the farmers in said territory, and not to leave same to be set up by the farmers, and guaranteed to erect the bins in a first-class and workmanlike manner and place anchors in the ground, put in all bolts, and to do any necessary work to make the bins perfect when turned over to the farmer. That the said channel irons for partitions were of the reasonable worth and value of $8; and that they were settled for between plaintiff and defendant at such price of $8.

Plaintiff, further replying, denies each and every allegation, matter of fact, and thing set forth and alleged in said counterclaim except as hereinbefore admitted or qualified, and specifically denies that it is indebted to the firm of Bryan & Son in the sum of $75 or any other sum or amount whatever, or that it ever hired any automobiles and drivers, or either, from said Bryan & Son.

The foregoing reply contains the language which substantially sets

forth the covenants and agreements contained in the written contracts entered into by and between plaintiff and defendant, and, as offered in the testimony in this case, are respectively marked exhibits B and C.

It appears that one of the grain bins had been paid for by the defendant in the sum of $105, and the remaining two bins each $105 plus $8 for the channel irons, in all the sum of $218, is represented by exhibit A, the promissory note in question executed and delivered by the defendant to the plaintiff. We have set out in substance all the pleadings, for the merest inspection of the case determines there is an oral contract relied upon by the defendant, claimed to have been entered into prior to the execution of the written contracts, exhibits B and C, and prior to the delivery of the note in question. The defendant, while not denying the execution of the written contracts, exhibits B and C, claims that contemporaneously with the execution of such written contracts it had an oral agreement with the plaintiff through its agent McKenzie, which is fully set out in defendant's answer. The merest inspection also further determines that the agreements and covenants set forth in defendant's answer, and relied upon by him as a defense against payment of the note, are entirely inconsistent with and opposed to the terms of the written instruments, exhibits B and C, which was the agreement and contract in writing entered into prior to the execution of the note, and which written agreements and contracts are claimed to cover all the agreements and covenants between the parties with reference to the subject-matter, and which are claimed to have been executed and delivered after all negotiations were had with reference to the subject-matter of the contracts. It is apparent that the terms of the alleged oral agreement are so in conflict with the written contracts, and the oral agreement, if given its full meaning, so varies the terms of the written contracts, that the alleged oral agreement and the written contracts cannot stand together. If the oral agreement contended for by the defendant is to be given full force and effect, then the written contracts must fail. The purported oral agreement is not such as relates to some matter or part of the subject-matter upon which the written contract is silent. Neither is the purported oral agreement one which is sought to be proved in order to explain any of the terms or parts of the written contract. Either the alleged oral agreement must be accepted and proof allowed of it, or it must be entirely rejected and testimony tending to

establish the oral agreement must be rejected as incompetent, irrelevant, and immaterial and having a tendency to vary the terms of a written instrument.

The appellant assigns fifty-two errors. In his discussion of such errors the appellant has grouped them into four divisions. The first includes all errors from 1 to 37 inclusive and relates to the exclusion of evidence at the trial over the objection of defendant's counsel. Most, if not all, of the evidence thus excluded related to the effort of the defendant to introduce testimony to prove his alleged oral agreement. Timely objection was made to such evidence, and it was ruled out by the trial court upon the theory that all of such evidence tended to vary the terms of the written contracts admittedly signed and executed by the defendant. In this we think there was no error on the part of the court. The written contracts in question are full, complete, and comprehensive, and deal fully with the subject-matter of the contracts. Such written contracts specify that they are entered into between plaintiff and defendant at Baldwin, North Dakota. They specify the price of bins of different capacity. They specify that the bins purchased by the defendant are to be paid for in cash or before the 1st day of October, 1914, and, if they are not paid for, then the amount should draw interest at 10 per cent, and the defendant was to execute and forward to the company bankable notes for the purchase price of the grain bins. The defendant also agreed not to handle any other grain bin of a competitor company during the life of his contract. He agreed to set up any grain bin sold by the defendant to the farmers in the territory, and not to leave the same to be set up by the farmer, and agreed to erect the bins in a first-class and workmanlike manner, put in anchors in the ground, and put in elbows, and do any necessary work to make the bin perfect when the same was turned over to the farmer. The defendant agreed in said written contract that all grain bins purchased by him during the season were to be purchased under the agreements contained in the written contract. The price of the grain bins to the defendant was f. o. b. Aberdeen, South Dakota. This contract is executed on the 5th day of August, 1914, by the plaintiff and defendant. There is no allegation of fraud in the signing or procuring of the signing and execution of the contract. It is a plain, full, and complete contract with reference to the subject-matter it covers. There is nothing contained in the contract

that needs any explanation. The terms are fully stated. The testimony offered by the defendant was such as would have varied the terms of those written instruments, and was very properly excluded, and in fact it would have been prejudicial, reversible error not to have excluded it. It is a rule well settled in the jurisprudence, not only of this state, but of this country, and jurisprudence generally, and is a general rule, that oral testimony cannot be introduced where it tends to vary the terms contained in the written instrument. Especially is this true where the written instrument is full and complete, and covers and sets up the terms and conditions of the agreement fully, and treats and deals fully with the subject-matter of the contract. Under the testimony as sought to be offered in support of defendant's alleged oral agreement, it appears evident that all such testimony sought to be offered related to negotiations at or prior to the time of the execution of the written contracts; and the alleged oral agreement being entirely repugnant to the written agreement, all such testimony was properly rejected.

It is a well-settled rule that oral testimony cannot be introduced to vary the terms of a written contract. The alleged oral agreement relied upon by the defendant and set forth in his answer as part of his defense, and again set forth in his counterclaim, is entirely different from the written contract. Section 5889, Comp. Laws 1913, reads as follows: "Written contracts supersede oral negotiations. The execution of a contract in writing whether the law requires it to be written or not supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument." The language of this section appears to be perfectly plain and is easily understood. It would seem that this is a most salutary rule of law, the intent of which is to add certainty to business transactions, and to afford a means whereby positive proof of the agreements of parties may be had. A written contract is a protection against the inability of the mind to retain all that was said and done concerning the terms contained in the contract. They protect one against the lapse of memory, and retain the terms of the contract as made, thus affording a safe receptacle to which the mind may return and be refreshed as to the actual terms of the contract. South Dakota has a statute on this subject similar to the section of the North Dakota Compiled Laws of 1913 just above set forth. In the South Dakota case of DeRue v. McIntosh, 26 S. D. 47, 127 N.

W. 532, the following language is used: "This provision of our Code embodies the common-law rule upon the subject of written contracts; and, while 'the execution of a contract in writing, whether the law requires it to be written or not, supersedes all of the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument,' nevertheless, as contended by the appellant, there are exceptions to the rule. And one of the exceptions seems to be that agreements or representations made prior to the written contract under which the party was induced to sign the contract may be shown; in other words, where the parol contemporaneous agreement was the inducing and moving cause of the written contract, or where the parol agreement forms part of the consideration for the written contract, and where he executed the written contract upon the faith of the parol contract or representation, such evidence is admissible."

This language was quoted with approval in the case of Erickson v. Wiper, 33 N. D. 206, 157 N. W. 592. To support this contention, cases from several states are cited in the South Dakota case. The South Dakota case was one where the plaintiff agreed to construct for the defendant a flowing well on defendant's farm. The agreement was reduced to writing, and the supreme court of South Dakota, in analyzing a part of said written contract, used the following language: "It will be observed that the contract in this case provides that the plaintiff shall drill a flowing well on the terms and conditions specified, and drill and sink same to an artesian flow if possible, granitical formations excepted. The amount of water that should be discharged from such well is not provided for in the contract." The defendant in the South Dakota case served an amended answer in which he alleged that at the time of the making of the contract for the construction of said well, the defendant was the owner of a large tract of land upon which said well was to be drilled. That said land was used and designed to be used as a stock range, whereon the defendant kept and intended to keep a large number of cattle and horses, and that the sole object and purpose in drilling and constructing said well was to procure a flowing well to furnish sufficient water for said stock, all of which was well known to the plaintiff. In his original answer the defendant in the South Dakota case alleged that plaintiff abandoned said well before he drilled the same to the artesian flow, and failed, neglected, and refused to drill the same

to said artesian flow, although it was and is possible to drill a well to said artesian flow on defendant's land; that plaintiff failed to secure a flowing artesian well, and that said well as drilled and left by plaintiff is without value and utterly useless to the defendant. We have no doubt the South Dakota supreme court was right in stating the defendant in that case should have been allowed to have introduced his amended answer. Under such amended answer the defendant introduced testimony to explain certain terms of the contract, which, as found in the contract, were not readily understood, such as the term "flowing well." So, likewise, if any other term of the contract was uncertain in its meaning, might there be introduced testimony to show the actual and real meaning of the term. The meaning of the term "flowing well" could have likewise been determined by the testimony of other persons familiar with and having knowledge of what a flowing well really is. If there was a parol agreement that the particular well should have a certain capacity, such as to furnish water for all the stock of defendant on his large farm, all of which was in contemplation and referred to in the parol agreement, if any, then such parol agreement was concerning a matter which was not included in the written contract, and it would have been perfectly proper to have introduced testimony concerning a part of the subject-matter not embraced in the written contract. We are of the opinion that the rule is well settled that where the terms of a written contract are vague or uncertain, testimony may be introduced to explain such terms and explain the true meaning of them; and also where an agreement is partly written and partly in parol, that part which is in parol and is not mentioned or covered in the written contract may be proved by competent testimony. In the South Dakota case under consideration, the written contract was silent on the capacity of the well to produce a certain amount of water in contemplation by both parties at the time of the execution of the written contract. Surely it was proper to permit the defendant to plead and prove by parol agreement that it was understood and agreed, and that it was part of the contract, though not included in the written contract, that the flowing well should be one of such capacity as to furnish a sufficient supply of water for use on the defendant's said farm for the amount of stock which were to be kept upon such farm. But the pleading and proof of a parol agreement relating to a part of the subject-matter of the contract, and

which was agreed upon at the time of the understanding and agreement of the parties, with reference to the whole subject-matter of the contract, but which particular subject-matter was inadvertently overlooked, and the parties had neglected to incorporate it in the written contract so that, while such part of the subject-matter was agreed upon, yet it was not incorporated in the written contract, is an entirely different matter from the submission of proof which seeks to change some of the terms of the written contract, or which proof tends to establish a parol contract whose terms are materially different from the terms of the written contract. A written contract should be exclusive evidence of the agreement made and contained therein so far as it deals with all the subject-matter of the contract, unless such contract is procured through fraud, either actual or constructive, undue influence, restraint, deception, in a dishonest manner, or by false representations which induce the signing of the contract; or unless there is a mutual mistake of law by both parties, a misapprehension of the law by one party of which the other party was aware at the time of making the contract, which was not rectified, or some other illegal manner. There must have been some very good reason in the contemplation of the legislature in passing the statute to which we have before referred. The reason must have been that experience must have proved that very frequently, though one had a contract in writing covering the subject-matter of the contract, that it was permissible before the passage of such statute to plead and be allowed to give proof of a parol agreement relative to the same subject-matter claimed to be entered into contemporaneously with the execution of the written contract, and, to avoid the evil arising from such condition, the statute in question was passed in order to cut off and prevent such procedure. The legislature in enacting the statute in question made it possible to have a certain method by which the terms of the contract could be preserved so that they could not be disputed by either party, or so that it could not later be claimed that the terms of the contract were different from what they were at the time the contract was made. The rules of evidence which prevent the introduction of oral testimony to vary the terms of a written instrument, and the rule of evidence which prevents the reception of oral testimony of conversations and negotiations prior to the time of the execution of the written contract, are salutary rules, adopted by the courts for the purpose of pre-

serving the rights and agreements of parties when reduced to writing and signed by them.

So far as the written contract in this case is concerned, it is full, fair, and specific in setting forth the terms of the contract. The written contract was one signed by the plaintiff and the defendant, whereby the defendant purchased certain grain bins upon certain terms and conditions specified in the written contract. Such contract was duly executed by both parties. All testimony introduced or sought to be introduced for the purpose of showing a prior contemporaneous oral contract with reference to the same subject-matter treated in the written contract was properly excluded by the court, as was other testimony which tended to vary the terms of the written contracts in this case, exhibits B and C. Referring to assignments of error 38 to 42, which have reference to alleged errors in the court's instructions, we find no error in such instructions. There was no error in the court receiving the verdict of the jury and entering judgment in favor of the plaintiff. The defendant's motion for a new trial was properly denied. The verdict of the jury is sufficiently supported by the evidence.

With reference to the counterclaim in all its parts or subdivisions, including the livery hire of auto rigs and the drivers thereof, all of such matters and all matters in the counterclaim were questions of fact submitted to the jury and by them determined against the defendant. The finding of the jury upon these questions of fact is conclusive.

The order overruling the motion for a new trial and the judgment appealed from are affirmed, with costs.

CHRISTIANSON, J. I concur in result.

ROBINSON, J. (concurring specially). On December 4th, defendant made to plaintiff a promissory note for $218, with interest at 10 per cent. Payment of $130 was made October 1, 1915. For the balance, with interest, amounting to $107.35, the jury found a verdict against defendant, and he appeals.

The defense is that defendant arranged with the plaintiff to receive and set up certain of its galvanized grain bins, and as evidence of good faith he gave the note without any consideration. As the evidence shows, the plaintiff is a manufacturer of grain bins at Aberdeen, South Dakota.

The retail price of a grain bin is $135. Defendant gave the plaintiff a written order for three grain bins, to be shipped to him from Aberdeen, at $105 a bin f. o. b. The bins were duly shipped and received by the defendant, and each bin was sold by him with the aid of one McKenzie, an agent of the company. One bin was sold to Christianson, and he paid $130, which is indorsed on the note. One bin was sold to Mr. Andahl, and defendant received the price, $125. One bin was sold to Lundeen, and he paid $130, and defendant received the money. Thus, according to the testimony of the defendant himself, he has received the price of the three bins,—$130 from Christianson, $130 from Lundeen, and $125 from Andahl. (30, 31.) The note for $218 was given for the wholesale price of two bins at $105 each, making $210, and some irons amounting to $8.

The defense is a pure and manifest sham, and it well deserves a severe rebuke.

Judgment affirmed.

C. J. KOPAN, Appellant, v. MINNEAPOLIS THRESHING MACHINE COMPANY, a Corporation, Respondent.

(166 N. W. 826.)

Foreign corporation — threshing machine company —head office — of given territory — general manager or agent of — authority to do everything necessary, proper, and useful — in the ordinary course of its business — purpose of his agency.

1. Where one, a foreign corporation, a threshing machine company, with its principal place of business at Hopkins, Minnesota, does business in other states, and has certain of other states arranged into particular territory in which there is maintained a head office in which there is a general manager, such as a territory comprising a part of North Dakota, Minnesota, and

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NOTE.—For authorities discussing the question as to whether one having exclusive sales agency in a specified territory can recover commissions on a sale made by another outside that territory simply because the vendee is a resident of the territory, see note in 40 L.R.A.(N.S.) 971, on right of one having exclusive sales agency within given district, to commissions on sales made by another outside of the district to a resident thereof.

Montana, with head office at Grand Forks, North Dakota; and it appears that the authority and power of the manager in the head office in such territory extend to and include the making of contracts with the local agents in his territory for the sale of defendant's machinery, subject to the approval of the company; and, further, the authority and power to sell from the head office the machinery of the company, the defendant in this case,—such general manager and agent, having such authority to sell such machinery, under § 6340, Comp. Laws 1913, has authority to do everything necessary, proper, and useful in the ordinary course of business for effecting the purpose of his agency.

Directed verdict — for defendant — questions of fact pending — for jury — error.

2. Under the circumstances of this case, it was error to grant the request and motion of the respondent when both sides had rested, for a peremptory instruction to the jury, and for a directed verdict on behalf of the defendant, there being questions of fact involved in the case which should have been submitted to the jury and their verdict had thereon.

Opinion filed February 6, 1918.

Appeal from the judgment and order of the District Court of Grand Forks County, *Chas. M. Cooley,* J.

Reversed.

J. F. T. O'Connor and *Sveinbjorn Johnson,* for appellant.

Hypothetical questions should always embrace all the former testimony given upon the question in hand, and should not merely call for a critical opinion or review of the testimony. Link v. Sheldon, 136 N. Y. 1, 32 N. E. 696; Abbott, Civ. Trial Brief, 2d ed. 144 et seq.; Guiterman v. Liverpool, N. Y. & P. S. S. Co. 83 N. Y. 358.

The "scope of the business" of the respondent comprehended the sale of threshing machines in the territory of this agency, of which the manager or agent had full control so far as the usual and ordinary business of the respondent was concerned. Therefore admissions, declarations, or representations made by such managing agent in the sale of a threshing separator are binding upon the principal, when they are made at the time and as a part of the transaction. 2 C. J. 856; Edwards v. Thomas, 66 Mo. 468; Sidney School Furniture Co. v. Warsaw School Dist. 122 Pa. 494, 9 Am. St. Rep. 124, 15 Atl. 881; Franklin Bank v. Pennsylvania, D. & M. Steam Nav. Co. 11 Gill & J. 28, 33 Am. Dec. 687; Haven v. Brown, 7 Me. 421, 22 Am. Dec. 208; Conkling v. Standard Oil Co. 138 Iowa, 596, 116 N. W. 822.

The statements made to plaintiff by Wood, the agent, and the information given by Wood, were authorized by implication because they were the natural incidents to the position which the agent Wood occupied. Mechem, Agency, § 1780; Adams Exp. Co. v. Berry & W. Co. 35 App. D. C. 208, 31 L.R.A.(N.S.) 309; First Nat. Bank v. Stewart, 114 U. S. 224, 29 L. ed. 101, 5 Sup. Ct. Rep. 845; Burnham v. Grand Trunk R. Co. 63 Me. 298, 18 Am. Rep. 220; Hill v. Adams Exp. Co. 77 N. J. L. 19, 71 Atl. 683.

"If the party alleging the agency has made out a prima facie agency against the principal, any declarations made by the agent in the prosecution of and relative to the business contemplated by such agency are admissible against the principal." Peck v. Ritchey, 66 Mo. 118; Francis v. Edwards, 77 N. C. 271; Jones, Ev. 256; Comp. Laws, 1913, § 6340; 2 C. J. 939, 940; Lemcke v. Funck, 78 Wash. 460, 139 Pac. 234, Ann. Cas. 1915D, 23; Avery v. Turner, 3 Ala. App. 627, 57 So. 255; Missouri, K. & T. R. Co. v. Walden, — Tex. Civ. App. —, 46 S. W. 87; Harvey v. McAdams, 32 Mich. 472; Crawford v. Moran, 168 Mass. 446, 47 N. E. 132.

Corporations can only act through a natural person,—an agent,—and the public is entitled to the protection that any rule based upon this difference in the character of the principals affords. Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008.

The term "manager" or "general manager" when applied to an agent suggests broad powers to act in behalf of his principal. It indicates one who has general direction and control of the affairs of the corporation at that particular point and for the territory embraced. It means, virtually, the corporation itself. Louisville, E. & St. L. R. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770; Robert E. Lee Silver Min. Co. v. Omaha & G. Smelting & Ref. Co. 16 Colo. 118, 26 Pac. 326; Atlantic & P. R. Co. v. Reisner, 18 Kan. 458; Tourtelot v. Whithed, 9 N. D. 467, 84 N. W. 8; Sencerbox v. First Nat. Bank, 14 Idaho, 95, 93 Pac. 369; Mullin v. Sire, 34 Misc. 540, 69 N. Y. Supp. 953; Calhoon v. Buhre, 75 N. J. L. 439, 67 Atl. 1068; Raike v. Manhattan Rubber Mfg. Co. 127 Mo. App. 480, 105 S. W. 1100; Benesch v. John Hancock Mut. L. Ins. Co. 16 Daly, 394, 11 N. Y. Supp. 714; Cox v. Albany Brewing Co. 56 Hun 489, 10 N. Y. Supp. 213; Mechem, Agency, § 980.

Where a corporation intrusts a manager with general supervision of

its business in a given territory, it clothes such person with the authority of a general agent coextensive with the business intrusted to his care, which is not limited by private instructions, so as to protect the corporation from liability for acts within the manager's ostensible authority. Anderson v. National Surety Co. 196 Pa. 288, 46 Atl. 306; American Car & Foundry Co. v. Alexandria Water Co. 218 Pa. 542, 67 Atl. 861; Carrigan v. Port Present Improv. Co. 6 Wash. 590, 34 Pac. 148; Saunders v. United States Marble Co. 25 Wash. 475, 65 Pac. 782; 2 C. J. 569; Central Cartage & Storage Co. v. Cox, 74 Ohio St. 284, 113 Am. St. Rep. 959, 78 N. E. 371.

McIntyre & Burtness, for respondent.

The burden of proving authority of an agent to make a contract under which it is sought to bind the principal, as well as the burden of proving agency, rests upon him who claims under the contract and against the principal. Grant County State Bank v. Northwestern Land Co. 28 N. D. 479, 150 N. W. 736; Miller v. House, 67 Iowa, 737, 25 N. W. 899; Dispatch Printing Co. v. National Bank, 109 Minn. 440, 50 L.R.A. (N.S.) 74, 124 N. W. 236.

There is no difference in determining what facts shall constitute either actual or ostensible authority of an agent, whether he be acting for an individual or a corporation. Merchants' Nat. Bank v. Nichols & S. Co. 223 Ill. 41, 7 L.R.A.(N.S.) 752, 79 N. E. 38; New York P. & B. R. Co. v. Dixon, 114 N. Y. 80, 21 N. E. 110; Jones v. Williams, 139 Mo. 1, 37 L.R.A. 682, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353; Comp. Laws, 1913, §§ 6337 and 6338.

One dealing with a supposed agent is bound to ascertain the scope of his authority. Otherwise he assumes the risk and must abide the consequences. Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; Franklin F. Ins. Co. v. Bradford, 88 Am. St. Rep. 780, note, 1; Baker v. Seaweard, 63 Or. 350, 127 Pac. 961.

An agent can only contract for his principal within the limit of his authority. Swindell v. Latham, 145 N. C. 144, 122 Am. St. Rep. 430, 58 S. E. 1010; A. Blum Jr's Sons v. Whipple, 120 Am. St. Rep. 556, note; Moore v. Skyles, 33 Mont. 135, 3 L.R.A.(N.S.) 136, 114 Am. St. Rep. 801, 82 Pac. 799; Corey v. Hunter, 10 N. D. 12, 84 N. W. 570.

The declarations of an agent not made when acting within the scope of his agency are not binding on the principal. Rounseville v. Paulson,

19 N. D. 466, 126 N. W. 221; Gordon v. Vermont Loan & T. Co. 6 N. D. 455, 71 N. W. 556.

Custom and usage of the business or similar transactions are not proof of agency or authority to make a certain specific contract. Grant County State Bank v. Northwestern Land Co. 28 N. D. 479, 150 N. W. 736.

"A principal is bound by acts of his agent under mere ostensible authority to those persons only who have in good faith and without negligence incurred a liability or parted with value upon the faith thereof." Comp. Laws, 1913, § 6352.

GRACE, J. This action is brought by the plaintiff against the defendant for the purpose of recovering commissions claimed to be due the plaintiff by reason of his services claimed to be rendered to the defendant by assisting in rendering services to the defendant by, through, and under the direction of one Wood, the general manager for the defendant for a certain territory including part of North Dakota, part of Minnesota, and other territory; to one Gunderson, who purchased a Minneapolis separator from the defendant at the general office for such territory, which said office is located at Grand Forks, North Dakota.

The complaint is in the ordinary form for such kind of actions. The answer is in the form of a general denial, with the exception that it admits it is a foreign corporation.

The facts in the case are substantially as follows: The defendant is a foreign corporation, with its principal office at Hopkins, Minnesota. The defendant has an office at Grand Forks, North Dakota, which is the headquarters of the defendant for a large part of North Dakota and part of Minnesota and Montana. Mr. Wood is in the employ of the defendant, and as such employee has charge of the head office of the defendant at Grand Forks, and at the time of this action, and for several years prior thereto, had been the general manager of such territory. The defendant, in disposing of its machinery, does so largely through local agents located in some of the various towns within the territory. The general manager has charge of the territory. It appears it was part of his business and duty to make contracts with local dealers for the sale of the machinery of the defendant, and to submit such contracts to the home office at Hopkins, Minnesota, for

approval. His further duties were to make contracts with collectors, and to have supervision of other matters within his territory. It appears, also, that Wood as such general manager had charge of the sales of the machinery of the defendant within his territory, and had the authority to sell machines and to assist in making sales of machines within the territory. It appears that Wood, the manager of the head office at Grand Forks, North Dakota, had the right, authority, and duty to sell machines and to have supervision over the selling of the machines, and that he could also sell to persons desiring to purchase his machines even in a territory where there was a local agent of the defendant, where the purchaser did not desire, or for some reason would not, purchase from the local dealer.

In the summer of 1916, in June or July, the appellant went to the head office at Grand Forks and asked for the general manager, Mr. Wood, who appeared and talked with the appellant. The appellant informed Mr. Wood, the general manager, that he had a prospect then in the city to purchase a separator. Appellant inquired from Wood, the general manager, if he would be willing to pay him something if the appellant brought a customer for a separator, who purchased a separator. Mr. Wood told the appellant that depended on who the party was, and where he was from, whether he could give him anything or not. Kopan testified that "he [Wood] asked me where the man was from, and I told him he was from Leeds county, and he said, 'We have an agent there.'" Appellant then said: "This man won't deal with your agent up there. He seems to have a sore spot somewhere or other, and he says he won't deal with him." Mr. Wood says, "Well, in that case we can get around it and allow you what it is worth to make the sale." Mr. Wood denies that he used the words, "we can get around it and allow you what it is worth." Wood, the general manager, in effect claims that, before Kopan could be allowed any commission, he would have to enter into a salesman's contract with respondent, which contract would have to be approved in the home office.

The main question in this case is whether Wood, the general manager for the territory above mentioned, with office at Grand Forks, North Dakota, had the authority and power to make the agreement which it is apparent that he did make with Kopan, and thereby bind

his principal, the defendant, for the payment of the commission claimed to be earned by the appellant. If Wood, the general manager, had either the authority or power to enter into such agreement or arrangement, and the appellant acted upon and in pursuance of such agreement or arrangement, and thereby furnished or procured for the defendant a purchaser of the separator in question, with whom the sale was consummated, then the defendant is liable for the payment of such commissions as the appellant shows himself entitled to. There is no dispute but what Mr. Wood is general manager for a certain territory heretofore mentioned. We are of the opinion that this fact is fully established by the testimony.

The authority and power of Mr. Wood, the general manager, may be divided into two main divisions: (1) His authority and power to make contracts with the local agents in his territory, subject to the approval of the company; (2) the authority and power to sell from the main office machinery of his company, to supervise and look after salesmen and collectors, and to look after and file papers necessary to be filed, taken in settlement for machinery sold within the territory assigned to the general manager, Mr. Wood.

The respondent in its brief admits the authority and power of the general manager to sell threshing machines direct from the office at Grand Forks. Respondent's brief with respect to this matter reads as follows: "The only authority possessed by Mr. Wood, other than securing agents in the manner outlined, was to sell threshing machines direct from the office in Grand Forks, and to have charge of salesmen and collectors employed throughout his territory. That is, charge in the sense that he directed them where to go and what to do."

The respondent really concedes that Mr. Wood, the general manager, had no authority to appoint agents otherwise than as heretofore stated, and that the appellant was not so appointed. The agreement which Kopan had with Mr. Wood, the general manager, was not an agreement made by an agent appointed in the manner required by defendant. The appellant, strictly speaking, was not regularly and according to the requirement of defendant's agency contract really appointed defendant's agent. But even if it be true that appellant was not properly appointed defendant's agent and his appointment

confirmed by the defendant, this alone does not prevent appellant's right of recovery in this case.

A more serious question presents itself when we consider the right, power, and authority of Mr. Wood, the general manager, to make sales of threshing machines or the machinery of the defendant direct from the office at Grand Forks. It is conceded that such general manager had such right. If the general manager had such right, authority, and power, he also had the right to do all that was necessary, proper, and useful in the ordinary course of such business for the purpose of effecting the sales of threshing machines, or the machinery of his company, which was sold from the head office at Grand Forks.

Section 6340, Comp. Laws 1913, reads as follows: "An agent has authority: 1. To do everything necessary or proper and useful in the ordinary course of business for effecting the purpose of his agency, and, 2. To make a representation respecting any matter of fact not including the terms of his authority, but upon which his right to use his authority depends, and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made."

If Mr. Wood, the general manager, could do everything proper and useful for the purpose of selling the separator or threshing machine, it would seem that it would be proper for him to employ assistance in making the sale of the threshing machine, even though the person employed and who assisted in making the sale of such threshing machine could not be considered a regularly appointed agent of the defendant. It is apparent that Mr. Wood, the general manager, must have had a wide discretion in these matters, being manager of the head office at Grand Forks, having had the conceded right and authority to make sales from the head office at Grand Forks, of threshing machines. As we understand the record, purchasers of threshing machines were not always required to deal with defendant's agents in the local territory to which such local agents were assigned; but if such intending purchasers were dissatisfied with the local agent, or for any good reason did not care to deal with him, they could deal directly with the head office at Grand Forks, and purchase their machinery therefrom, and in that event the local agent of the territory in which the purchaser resided would not be entitled to a commission. Even though the

defendant has paid a commission on the sale of such machinery to the local agent of the territory in which such purchaser resided, that does not necessarily excuse him from paying a commission to the plaintiff under the circumstances in this case. Suffice it to say that the general agent, Mr. Wood, had the authority to make the sale of the separator from the head office. In making such sale he could do anything necessary, proper, and useful to effect the completion of the sale. If it were necessary to pay plaintiff a reasonable commission by reason of the plaintiff procuring such purchaser, General Manager Wood had the power, and, if not the express, at least the implied, authority to do so by reason of his being general manager for the defendant in the territory mentioned, and by reason of his having the conceded right to make sales of machinery from the head office. It necessarily follows, therefore, that the general manager, Wood, had the power and implied authority to do everything necessary, useful, and proper in and about making such sale of such machinery, including the power to arrange for a reasonable commission to any person who could assist him in making such sale, even though such person had not been regularly appointed an agent of the defendant in the manner we have before indicated. There is no dispute but that plaintiff brought Gunderson, the purchaser, to the office of the defendant at Grand Forks. It was further shown at such time the proposed purchaser would not deal with the agent in the Leeds territory. The defendant, therefore, was in position to deal with the purchaser, and did deal with him, and made a sale which was apparently very satisfactory. What was a reasonable commission under all the circumstances was a question of fact for the jury, to be established by competent testimony.

The appellant has assigned thirteen errors. We think it necessary only to consider fully one of such errors, this being assignment of error No. 12, which is as follows: "It was error to grant the request and motion of the attorney for the respondent when both sides had rested, for a peremptory instruction to the jury, and for a directed verdict on behalf of the defendant." The granting of the motion of the respondent for a directed verdict in this case is reversible error. It was for the jury to say, under all the testimony, facts, and circumstances of the case, what amount of commission plaintiff had shown himself entitled to, if any. The jury were also the exclusive judges of the

fact whether or not the plaintiff and the defendant through its manager Wood had entered into a contract whereby plaintiff was to receive a reasonable commission for his services in bringing such purchaser to the defendant's head office, where a sale was made to such purchaser of the machinery in question.

Upon examination of errors 2, 3 and 4, which have reference to the exclusion of the testimony sought to be introduced by plaintiff, tending to show that Wood was the general manager for the defendant, we are of the opinion that it was error for the court to exclude such testimony. Any testimony which would show or tend to show that Wood was the general manager for the defendant for the territory heretofore mentioned, with the head office at Grand Forks, North Dakota, was competent and proper testimony, and showing or tending to show the power or implied authority of Wood, the general manager of the defendant, to enter into and make the agreement which the plaintiff claims was made, with reference to paying him a reasonable commission for procuring a purchaser for the machinery in question.

Considering assignment of error No. 8, we are of the opinion it was error to exclude the testimony which showed or tended to show that the purchaser had difficulty with the local agent. This testimony would show or tend to show the power and authority of the manager, Wood, to make the sale from the head office at Grand Forks, which he did make.

The judgment is reversed and the case is remanded for a new trial.

ROBINSON and CHRISTIANSON, JJ., concur in result.

BROCKET MERCANTILE COMPANY, a Corporation, Plaintiff and Appellant, v. FRED LEMKE, Defendant and Respondent, IMPERIAL ELEVATOR COMPANY, a Corporation, and John W. Maher, Garnishees and Respondents, HENRY LEMKE and William Lemke, Interveners and Respondents.

(166 N. W. 800.)

Garnishee process — one served with — affidavit or answer — property in his hands — facts fairly and fully set forth — no issue taken — default in — facts stated are conclusive.

1. Where one is served with garnishment process, and within the time required by law makes and serves on the person who brought such garnishment proceedings his affidavit or answer which fairly and fully sets forth the facts and circumstances relative to the property in his hands or under his control belonging to the defendant, and no issue is taken with such answer or affidavit of the garnishee within thirty days, the time specified by law in which persons maintaining such garnishment proceedings shall take issue with such garnishee's affidavit or answer, the facts and matters stated in such affidavit or garnishee answer are conclusive and must be taken as true.

Garnishee — disclosure by — full and fair statement — denial of liability — no issue taken — conclusive.

2. In the case at bar there were two garnishees, the first being John W. Maher; the second being the Imperial Elevator Company. John W. Maher disclosed that he was in no manner indebted to the defendant. He further disclosed that he had security upon the crops grown upon certain lands sold by him to Fred Lemke, the defendant. Nowhere was there any admission of liability in such affidavit or answer, and there was a denial of such liability therein. No issue was taken on such affidavit or answer of John W. Maher within thirty days, and hence his statement of nonliability to the defendant must be taken as conclusive.

Garnishment proceedings — affidavit or answer — setting up other claims — prior in right to plaintiff's claim, if true — no issue joined — statements — conclusive — no garnishable claim — owned by defendant.

3. The Imperial Elevator Company disclosed in their affidavit or answer that the property in question, the wheat and barley which was delivered at their elevator, was supposed to be owned by John W. Maher and one Havener. That after such grain was delivered to the elevator, notice was served upon them by many persons, naming them, who claimed an interest or lien upon said grain, and claimed they owned the same in whole or in part. It appears from the record that there were sufficient liens filed against defendant's

alleged half of such crop to more than equal the value thereof, which claims were filed prior to the time of the service of the garnishment process. Most or all of such liens were disclosed by the affidavit of the garnishee. No issue was taken on such affidavit, and the truth of the matters stated therein became conclusive. The plaintiff not having taken issue with such allegations, nor any steps to bring in any of the claimants by serving the order of the court upon them, and thus proceeding in the way prescribed by law to compel such claimants to prove and establish the validity of their claims, it must be concluded as a matter of law that all of the allegations and statements in the garnishee affidavit or answer are true, and that the claimants referred to in such affidavit are the owners, in whole or in part, of half of such grain which is alleged as belonging to the defendant; and no issue having been taken so as to compel the claimants to establish the validity of their liens admitted to be on file at the time of the service of the garnishment summons and process, such liens must be *held* to be valid, and the defendant *held* to have no garnishable interest in such grain at the time of the service of the garnishment process.

Sale of land — under crop-payment contract — crops raised — ownership of — garnishable interest — in defendant — none appearing.

4. It appearing by the testimony that John W. Maher sold to Fred Lemke certain land upon crop payment, said Lemke to pay for such land by delivering one half of the crop raised thereon during each year of the life of the contract; and it appearing by the testimony that the defendant leased said land to one Havener for the year 1909, being the year in question, when the crops in dispute were raised upon said land,—it was *held* so far as the record disclosed, by reason of the leasing of such land as aforesaid, that at the time of the service of the garnishment process Fred Lemke had no garnishable interest in such crops.

Garnishment process — liability of garnishee — indebtedness to defendant — facts and circumstances — service of process — changed conditions thereafter — cannot affect rights.

5. Where garnishment process is served upon the garnishee the liability of the garnishee is determined by the facts and circumstances with reference to his indebtedness to the defendant, if any, at the time of the service of the garnishee summons. A change in events after the service of the garnishee summons upon the garnishee cannot increase his liability.

Opinion filed February 6, 1918.

Appeal from the judgment and order of the District Court of Ramsey County, Honorable *C. W. Buttz,* Judge.

Affirmed.

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

Under a crop contract like the one here, the interest of Fred Lemke became garnishable as soon as the crop came into existence. He became the owner of an interest in such crops at once. Minneapolis Iron Store Co. v. Branum, 36 N. D. 355, L.R.A.1917E, 298, 162 N. W. 543; Stavens v. National Elevator Co. 36 N. D. 9, 161 N. W. 558.

Unless the affidavit in garnishment specifically states that the garnishees, two or more, are proceeded against jointly, the several garnishees shall be deemed severally proceeded against. Comp. Laws 1913, §§ 7568, 7580, 7581.

W. M. Anderson, M. H. Brennan, and *D. V. Brennan,* for respondents (*E. T. Burke,* on oral argument).

In garnishment proceedings an interpleaded claimant is a party defendant to the garnishment proceedings, and such a claimant stands in the same position as the garnishee and may urge all his defenses, as well as his own. Comp. Laws 1913, § 7582.

If such a claimant has such right, then there is no apparent reason why an intervener who comes in voluntarily making claim has not the same right. Wilde v. Mahaney, 183 Mass. 455, 62 L.R.A. 813, 67 N. E. 337; McMahon v. Merrick, 33 Minn. 262, 22 N. W. 543; Sutton v. Heinzle, 84 Kan. 756, 34 L.R.A.(N.S.) 238, 115 Pac. 560.

A case allowed to run for five years with prosecution should be dismissed. Comp. Laws 1913, § 7598.

Where the garnishee's answer discloses that no property or debt is claimed by a third person, and the plaintiff fails to have such claimant cited to litigate his claim, the garnishee is entitled to his full discharge. 20 Cyc. 1101; Donald v. Nelson, 95 Ala. 111, 10 So. 317; Brunswick Gaslight Co. v. Flanagan, 88 Me. 420, 34 Atl. 263; Look v. Brackett, 74 Me. 347; Cram v. Shackleton, 64 N. H. 44, 5 Atl. 715; Mansfield v. Stevens, 31 Minn. 40, 16 N. W. 455.

The Imperial Elevator Company in their answer mentioned many claimants, giving their names and addresses, and yet for five years the plaintiff failed to bring in any such claimants. Blake v. Hubbard, 45 Mich. 1, 7 N. W. 204.

The answer of the garnishees stood undisputed and uncontested for five years, no issue thereon being joined. Spears v. Chapman, 43 Mich. 541, 5 N. W. 1038; Banning v. Sibley, 3 Minn. 389, Gil. 282; Chase v. North, 4 Minn. 381, Gil. 288.

"Funds due under a contract of employment are not subject to garnishment where the property upon which the contract is being performed is subject to a lien of laborers, employed to execute the contract, but may be retained to satisfy them." 20 Cyc. 994, and cases cited; Petrie v. Wyman, 35 N. D. 126, 159 N. W. 616.

The law indulges no presumption that the garnishee is liable, and his liability must be made affirmatively to appear in order to justify a judgment against him. 20 Cyc. 1098; Edney v. Willis, 23 Neb. 56, 36 N. W. 300; 20 Cyc. 992.

The liability or nonliability of the garnishee is determined solely with reference to the facts as they existed at the time the garnishment was served. No subsequent event can increase, diminish, or affect it. Hopson v. Dinan, 48 Mich. 612, 12 N. W. 875; Cogswell v. Mitts, 90 Mich. 356, 51 N. W. 515; Old Second Nat. Bank v. Williams, 112 Mich. 564, 71 N. W. 150; 20 Cyc. 1066; Stavens v. National Elevator Co. 36 N. D. 9, 161 N. W. 558.

A debt which is uncertain and contingent and may never become due and payable is not subject to garnishment; it is only indebtedness which is in its nature absolute and payable at some time without contingency that can be reached by such process. 20 Cyc. 1007; Comp. Laws 1913, § 7583; Edwards v. Roepke, 74 Wis. 571, 43 N. W. 554; Goode v. Barr, 64 Wis. 659, 26 N. W. 114; Drake v. Harrison, 69 Wis. 99, 2 Am. St. Rep. 717, 33 N. W. 81; Ingram v. Osborn, 70 Wis. 184, 35 N. W. 304; Mundt v. Shahow, 120 Wis. 303, 97 N. W. 897; Foster v. Singer, 69 Wis. 392, 2 Am. St. Rep. 745, 34 N. W. 395; Taylor v. Donahoe, 125 Wis. 513, 103 N. W. 1099; Hopson v. Dinan, 48 Mich. 612, 12 N. W. 875; Case v. Dewey, 55 Mich. 116, 20 N. W. 817, 21 N. W. 911; Cogswell v. Mitts, 90 Mich. 353, 51 N. W. 515; Old Second Nat. Bank v. Williams, 112 Mich. 564, 71 N. W. 150; Chicago, B. & Q. R. Co. v. Van Cleave, 52 Neb. 67, 71 N. W. 971; Edney v. Willis, 23 Neb. 56, 36 N. W. 300; Streeter v. Gleason, 120 Iowa, 703, 95 N. W. 242; McConnell v. Denham, 72 Iowa 494, 34 N. W. 298; Geis v. Bechtner, 12 Minn. 279, Gil. 183.

GRACE, J. Appeal from the judgment and order of the district court of Ramsey county, Honorable C. W. Buttz, Judge.

This is an action where the plaintiff sued the defendant, Fred Lemke,

and at the same time garnisheed John W. Maher and the Imperial Elevator Company. The case came on for trial and resulted in a judgment for the plaintiff in the sum of $1,709.95.

Fred Lemke had theretofore purchased from John W. Maher certain lands in Ramsey county, North Dakota, aggregating 960 acres, for the sum of $19,200. The contract with reference to such purchase was in writing and was a purchase on the crop-contract plan; that is, one half of the crop raised upon the land each year, commencing with the year 1904, was to be turned over by Lemke to Maher, to be applied in reduction of the purchase price of said land and in accordance with the terms of the contract. There was a stipulation in the contract "that until the delivery of one half of the grain as aforesaid during each and every year of this contract, the legal title to, and ownership of, all of said grain raised during each and every year shall remain in the first party."

Maher admits in his affidavit of disclosure that this clause was intended as security for the purchase price of the land sold to Fred Lemke. Under the contract Fred Lemke also had the right to accelerate the payments of the purchase price. In the year 1909 there was raised upon the premises in question 9,085 bushels of wheat and 1,030 bushels and 30 pounds of barley, all of which grain was delivered to the elevator of the Imperial Elevator Company at Brocket, North Dakota, and storage tickets issued therefor in the name of John W. Maher.

The principal action was commenced on October 11, 1909, and the garnishee summons was served upon the garnishees on that date. Judgment was entered against Fred Lemke on December 17, 1912; and in September, 1914, about two years after the entry of such judgment, the plaintiff made a motion to procure an order directed against all persons mentioned in the affidavit of the Imperial Elevator Company, which is as follows:

This action having been instituted by the plaintiff, Brocket Mercantile Company, a corporation, against Fred Lemke, defendant, and the Imperial Elevator Company, a corporation, and J. W. Maher, as garnishees, and the garnishee Imperial Elevator Company having made its disclosure that there has been deposited in its elevator at

Brocket, North Dakota, 9,085 bushels of wheat, 1,031 bushels and 30 pounds of barley, for which storage tickets were deposited with the clerk of the district court, and that, by the deposit of said storage tickets with the clerk of this court, it delivers the grain so stored to the clerk of said district court to be held to abide the order of the district court in this action.

And said garnishee having stated by its disclosure that it supposed that the same belonged to John W. Maher and F. W. Havener, but that since said grain was stored various disputes and differences have arisen, and that said grain was being claimed by various other parties, and that the following-named persons have served notices of large and various claims to and against said grain: The Citizens Bank of Brocket, John W. Maher, B. Kennedy, John Bartley, J. S. Robinson, S. E. Martin, Allen Leith, Roy Havener, F. W. Havener, and Fred Lemke.

That by reason thereof this garnishee is unable to determine who of the said claimants are entitled to said grain, and that it desires that the said grain be distributed as the various claimants may agree or the court may decide, and the garnishee Maher claiming to hold said property as security only;

And it further appearing that judgment has been rendered against the defendant, Fred Lemke, for the full amount of plaintiff's claim in the sum of $1,709.95, but that no judgment was rendered against the garnishees or either of them, and that no proceedings were had in said garnishment, and that no part of said judgment has been paid.

Now therefore, said matter having been reargued upon the application of the plaintiff, the Brocket Mercantile Company, it is hereby ordered that the following-named persons: Citizens Bank of Brocket, F. W. Havener, A. F. Moravetz, John W. Maher, B. Kennedy, John Bartley, J. S. Robinson, S. E. Martin, Allen Leith, and Roy Havener be interpleaded as defendants to such garnishee action, and that notice thereof, with a copy of said motion and a copy of this order, be served upon each of the above-named persons, and that they and each of them have thirty days after service thereof to make answer in said garnishment proceeding, and that after determination of the rights of said claimants that the garnishee Imperial Elevator Company make delivery or payment according to the rights of the various named claimants. Dated this 19th day of June, 1915.

C. W. Buttz, Judge.

This order was not served upon any of the persons mentioned in the affidavit of the Imperial Elevator Company. That Fred Lemke, one of the persons mentioned in the order of the court, intervened, as also did William Lemke and B. W. Lemke, by permission of the court. The case was tried before a jury in the November, 1916, term of court of Ramsey county. At the trial, after plaintiff had rested his case, counsel for the defendant, garnishees, and interveners asked for a dismissal of the case, so far as it affected the garnishees, on the ground that there had been no issue taken on the affidavits made by John W. Maher and the Imperial Elevator Company, and that such affidavits became conclusive and effected a discontinuance of the garnishee action. It is conceded that no issue was taken on either the affidavit of John W. Maher or that of the Imperial Elevator Company.

It is clear there is but a single issue involved on this appeal; and that is, Had Fred Lemke at the time of the service of the garnishment summons upon the garnishees any garnishable interest in the grain? It is clear that, if he had no garnishable interest in such grain at such time, the court acted properly and legally in directing a verdict dismissing the garnishment proceedings against the garnishees and the interveners.

Maher, one of the garnishees, within thirty days after the service of the garnishment summons upon him, made and served upon plaintiff his affidavit of disclosure. Such affidavit states in substance that the affiant was in no manner and upon no account indebted to or under liability to the defendant, and did not then have in his possession or under his control real estate, personal property, effects, or credits of any description belonging to the defendant, or in which defendant had any interest; and further states that the garnishee is in no way liable in the action. Such affidavit further refers to the land contract between the affiant and the defendant with reference to the sale of the land heretofore described, and the affiant further states that the defendant was indebted to the affiant for the purchase price of the land, to secure which the legal title to the crops grown on said land were claimed to be held by the affiant, and that the crop under consideration was stored in affiant's name with the Imperial Elevator Company. The affidavit of the Imperial Elevator Company was made on their behalf by J. F. White, then the secretary of the Imperial Elevator Company,

a corporation, with headquarters in Minneapolis, Minnesota. The substance of such affidavit is that the Imperial Elevator Company operates an elevator or warehouse at Brocket, North Dakota. That during the fall of 1909 there were deposited 9,085 bushels of wheat, 1,031 bushels and 30 pounds of barley, in said elevator, for which storage tickets were issued. The affiant further states that the grain was grown in the year 1909 upon the land in question, being the same land as is described in the land contract between Maher and Fred Lemke. Affiant further states that at the time of the storage and deposit of said grain it was supposed by the affiant, and by all of the officers of said elevator company, that the same belonged to and was the property of F. W. Havener and John W. Maher. That since said grain was so stored and deposited various disputes and differences have arisen, and that the said grain and the proceeds thereof are now claimed by various other and outside parties as well as by the persons named, either in whole or in part, and that such claims are adverse to each other. The affiant further disclaims any personal interest in such grain other than to deliver the same or pay the proceeds to the person or persons rightfully and legally entitled to receive the same; and claims further that the company was merely bailee or custodian of such property, but was unable to determine to whom such property rightfully belonged, or who was entitled to the possession or payment therefor. Affiant further states that the following-named persons served notice upon the said elevator company, of large and varied claims which such persons alleged they held against such grain, such as mortgages, threshers' liens, and labor liens: The Citizens Bank of Brocket, North Dakota; F. W. Havener; A. F. Moravetz; John W. Maher; B. Kennedy; John Bartley; J. S. Robinson; S. E. Martin; Allen Leith; Roy Havener; and Fred Lemke; and others whose names and postoffice addresses were unknown to the affiant or to the said elevator company. The affidavit further recited the recovering of a judgment by the plaintiff against the defendant in the sum of $1,400. The affiant further states in substance that the elevator company and its officers are wholly unable to determine who of said numerous parties are entitled to said grain or its proceeds, either in whole or in part, and therefore, and herewith, deposit with the clerk of the district court in and for Ramsey county, North Dakota, being the county in which said action is pending, each

and all storage tickets issued for, and representing, the said grain in dispute, and by such deposit deliver the said grain to the said clerk of the said district court to be held to await and abide the order of the district court in said action, or to be distributed as the parties interested may agree or the court may decide.

It is conceded that the plaintiff never took any issue with the statements, allegations, or matter set up in either of the foregoing affidavits, and hence it must follow as a matter of law that all of the statements in each of the affidavits are conclusive of the truth of the facts therein stated. This is in harmony with § 7578, Comp. Laws 1913. Maher in his affidavit denied any indebtedness whatever to Fred Lemke, and denied that he had real estate, personal property, money, or effects under his control belonging to him. This statement in such affidavit, with which no issue is taken within the time and in the manner required by law, would seem to be almost conclusive against the appellant's position, if the effect is to be given such words as is required in the section to which we have just referred.

Another statement in such affidavit is that the affiant holds legal title to certain land and legal title to the crops grown on such land as security for the purchase price. Without stating at this time whether or not the affiant had the legal title, it is sufficient to say he at least had security on all the crops grown on said land for the purpose of securing the purchase price of such land. The appellant took no issue with this statement, and in accordance with § 7578, where such facts are contained in the answer of the garnishee, they shall in all cases be conclusive of the facts therein stated, unless the plaintiff within thirty days serves written notice on the garnishee that he takes issue upon his answer, in which case the issue shall stand for trial as a civil action in which the affidavit on the part of the plaintiff shall be deemed a complaint and the garnishee affidavit the answer thereto.

Referring to the affidavit of the Imperial Elevator Company, it will be noticed that it admits the receiving of all the grain in question. It shows that it was grown upon the land in question, and that all of said grain is claimed to be owned by certain particular persons, naming them.

Section 7582, Comp. Laws 1913, was enacted no doubt for the purpose of meeting just this kind of condition. It reads as follows:

"When the answer of the garnishee shall disclose that any other person than the defendant claims the indebtedness or property in his hands, and the name and residence of such claimant, the court may on motion order that such claimant be interpleaded as a defendant to the garnishee action; and that notice thereof, setting forth the facts, with a copy of such order, in such form as the court shall direct, be served on him, and that after such service shall have been made, the garnishee may pay or deliver to the officer or the clerk such indebtedness or property, and have a receipt therefor, which shall be a complete discharge from all liability to any party for the amount so paid or property so delivered. Such notice shall be served in the manner required for service of a summons in a civil action, and may be made without the state or by publication thereof, if the order shall so direct. Upon such service being made, such claimant shall be deemed a defendant to the garnishee action and within thirty days shall answer, setting forth his claim, or any defense which the garnishee might have made. In case of default, judgment may be rendered which shall conclude any claim upon the part of such defendant."

It will be noticed that if, from the answer of the garnishee, it appears that any other person than the defendant claims the property in his hands, the court may require such claimants to be interpleaded as defendants in the action, and that notice thereof setting forth the facts, together with a copy of such order, shall be served upon the person so interpleaded; and that, after such service shall have been made, the garnishee may pay or deliver to the officer or clerk the property or money under his control, and take a receipt therefor, which shall be a discharge from further liability to any party for the property so delivered. It is to be further observed that the service of such notice and order must be made in the same manner as the summons in a civil action. After the service being had, the claimant shall be deemed a defendant in the garnishment action, and shall have thirty days in which to answer, setting forth his claim and defenses. It appears from the record that the court did make an order that the claimants, mentioning them, should be interpleaded; but it nowhere appears that, notwithstanding the making of such order, the same was served upon the claimants or any of them. No steps having been taken on the part of the appellant to serve the notice and order of the court, the claimants

were never interpleaded. It will be noticed by the affidavit of the Imperial Elevator Company that at the time of the storage and deposit of said grain it supposed and believed that such grain belonged to Havener and Maher, but that, since the grain was stored and deposited, said grain and the proceeds thereof were claimed by various other and outside parties as well as by the persons named, either in whole or in part. The failure of the appellant to take issue upon this affidavit is in effect, under § 7587, an admission of the truth of all such statements. The failure of the appellant to take issue with the affidavit of the Imperial Elevator Company was to admit all the facts therein stated. The appellant therefore admitted that Maher and Havener and the claimants therein mentioned were the owners of the grain described in the affidavit, or, as the same is termed in law, the answer of the garnishee. Having failed to take issue on such affidavit or answer within the time specified by law, the appellant was without legal right to apply to the court for an order to interplead the claimants mentioned in the garnishees' answer. The thirty-day period within which they must take issue on the garnishees' answer is a period of limitation, and unless action is taken within the thirty-day period, which is allowed to take issue upon the answer of the garnishees, such right is lost. The thirty-day period is the only time in which the appellant had the right to commence what would be termed an action against the claimants, even if it be conceded, for the sake of argument, that the order of the court was valid. In other words, before the plaintiff could make the motion and procure the order of the court interpleading the claimants, it must appear that within the thirty-day period he took issue upon the matters, or some of the matters, stated in the affidavit or answer of the garnishee. Otherwise, the statements or matters set forth in the affidavit must be taken as true, or, in the words of § 7578, "the answer of the garnishee shall in all cases be conclusive of the truth of the facts therein stated, unless the plaintiff shall within thirty days serve upon the garnishee a notice in writing, that he elects to take issue on his answer."

The affidavit or answer of the garnishee, the Imperial Elevator Company, disclosed that part of all of the property was so claimed by certains claimants, naming them, and also referred to others (claimants) whose names and postoffice addresses were unknown to the affiant or to

said elevator company. The record discloses the amount and character of such claims, they consisting of chattel mortgages, seed liens, and labor liens, which were filed at the time of the garnishment summons, and the total sum of which claims, which were filed at the time of the service of the garnishment summons, equaled or exceeded the value of the share of Fred Lemke in such grain, if he had any such share of crop.

The answer of the appellant to the complaint in intervention admits that the mortgages and liens described in paragraph 2 of the petition in intervention are filed in the office of the register of deeds of Ramsey county in the amounts and at the dates specified therein. Paragraph 2 of the complaint in intervention sets forth a memorandum of all such liens and the date of filing of the same in the register of deeds' office, all of which dates of filing are conceded by the answer to be correct. It appears therefrom that all of such liens were filed prior to the service of the garnishee summons, and, as before stated, the total sum of all such liens exceeds Fred Lemke's alleged half share or interest in all of such crops or grain. As we have noticed, all of these liens were on file in the office of the register of deeds at the time the garnishment summons was served on the Imperial Elevator Company, and the affidavit or answer of the elevator company sets forth the names of the various claimants to part or all of the crop, as well as referring to other claimants. No action having been taken upon such affidavit or answer, and no action having been taken to determine the validity of any of said liens, and no action having been taken to set them aside, as void or as being without any consideration, or for any other cause, they must be held, so far as this record appears, to have been legal and valid claims, and their validity cannot be attacked collaterally. If the appellant desired to test the validity of such claims, he should have taken issue on the answer of the Imperial Elevator Company as garnishee within thirty days, procured the order of the court interpleading all such claimants, and then have served the notice and order of the court upon each of said claimants, and proceeded against them and each of them to determine the validity of each of their claims in a proper action against them and each of them. Having failed to take issue upon the affidavit or to bring action against any of such claimants to determine the validity of their claims, such claims and liens must be held to have

been valid and binding, and they are not now subject to collateral attack. The liability or nonliability of the garnishee is fixed and determined by the facts as they existed at the time of the legal service of the garnishment summons and papers. If at such time the garnishee was liable, his liability continues, and is of the same nature and effect as it was at the time of the service of the garnishment. His liability can neither be increased nor diminished regardless of events subsequent to the time of garnishment. If at the time of the service of the garnishment upon the garnishees he was not indebted to the defendant, or if the whole amount of property, money, or effects in his hands are equaled or exceeded by the sum of other prior valid liens thereon, it is apparent that the garnishee has nothing which can be procured by plaintiff in his garnishment proceedings to apply upon the plaintiff's debt, and if the garnishee discloses fairly and truthfully all the facts and sets out in its affidavit, such as that all of such property is claimed by other claimants, and no issue is taken upon such answer or affidavit, and no action is properly, timely, and legally maintained by the plaintiff against the claimants to determine the validity or invalidity of their claims, it must be assumed that all such prior liens are legal, and, if the sum of them exceed the amount of property in the hands of the garnishee, then it must be held that there is no liability on the part of the garnishee, and he ought to be discharged.

The appellant's offer of proof in regard to the sale of the grain by the Imperial Elevator Company on the 16th day of January, 1910, was properly excluded. The question is, or would have been had the appellant taken the proper procedure, What was the liability of the Imperial Elevator Company, if any, at the date of the service of the garnishment summons? Whatever their liability was at that date, if any, was *all* their liability, and their liability could not be increased or diminished by subsequent events. Second Nat. Bank v. Williams, 112 Mich. 564, 71 N. W. 150; Edwards v. Roepke, 74 Wis. 571, 43 N. W. 554; Rood, Garnishment, p. 68.

Considering another branch of this case, we find it appears from the testimony, and it is undisputed, that Fred Lemke leased the land in question for the year 1909 to Havener. It is conceded under the contract for the sale of the land that Maher was entitled to one half of the crop, and that Fred Lemke was entitled to the other half of the crop

upon the performing of the covenants of contract. Lemke having leased the land, the half of the crop which he would have received, assuming that he had performed his part of the contract, must necessarily have gone to Havener, the lessee. If, therefore, Maher was entitled to one half of the crop for 1909, and Havener was entitled to the other half of the crop for 1909, Fred Lemke was not entitled to, and could not have received under this arrangement, any part of the crop for the year 1909, and at the time of the garnishment could not, therefore, have had any garnishable interest.

The interveners in the complaint claim that half of the crop that would have belonged to Fred Lemke, if he were entitled to any portion of such crop for said year, was applied in payment of the chattel mortgages, seed liens, and labor liens from 1 to 10 inclusive, as set forth in the complaint of intervention. The interveners claimed to have purchased and taken over by assignment the interest of Havener and Fred Lemke. These allegations in the complaint are denied by the answer, and the answer also denies that certain liens, mentioning them by number, as set out in the complaint of intervention, are paid. There is no testimony on any of these matters, and we do not regard it necessary to decide all of such matters in view of the state of the record and the lack of testimony. We are of the opinion that the plaintiff and appellant is bound by the conditions as they existed at the time of the serving of the garnishment, and having taken no issue on the answer of the garnishees, as we have before fully shown, the garnishment action was properly dismissed. We are of the opinion there is no doubt but what Fred Lemke, except for the lease to Havener under the contract, had a half interest in the crops raised upon the land in question after delivering free of all expense and charges the one half of all such crops to Maher; and if there were no liens of any kind against the crops, and if he had not leased the land to Havener, Fred Lemke's share of the crops would have been a garnishable interest; but it clearly appears from the record that at the time of the garnishment the chattel mortgages and liens of various kinds against the crops from the land were in excess of the total value of the crop in question, and that the land was for the year 1909 leased to Havener. This being true, Fred Lemke at the time of the garnishment had no interest in such crop which was garnishable. His interest, if any, was all consumed by prior liens. This would be

true even if it were conceded that half of the crop was Lemke's; but it appears from the testimony conclusively that Havener leased the land from Lemke for the year 1909, so that necessarily he would have been entitled to take Lemke's half of the crop. Havener was not garnisheed, and there was nothing to prevent either him or Fred Lemke from assigning their interest in the crop to the interveners.

The record as a whole is not very satisfactory. The testimony is very limited. But on the whole record, and in view of the law that the liability of the garnishee is fixed at the time of the service of the garnishment, we are of the opinion that the court was right in ordering a dismissal of the garnishment proceedings.

The judgment and order of the court appealed from are therefore affirmed.

ROBERT L. BARNETT, Respondent, v. CHARLES WILL, as Sheriff of Billings County, North Dakota, Appellant.

(166 N. W. 511.)

Appeal and error — judgment — modification of — jurisdiction — execution — levy under by sheriff — personal property — claimed by a third person — action — claim and delivery — failure to prosecute — with effect — motion to dismiss — order made dismissing — without ordering a return of the property — judgment entered — no appeal.

1. Where a sheriff, the defendant, levied an execution upon certain personal property and took it into his possession, and another, who claimed to be the owner and entitled to possession of such property, brought an action of claim and delivery against the sheriff, and under the writ took possession of the property, but failed and neglected to prosecute the action with effect for more than five years, and the sheriff, the defendant, made a motion to dismiss such action for want of prosecution, and an order was made by the court ordering such action dismissed without ordering a return of the property, or, in the event return could not be had, judgment for the value thereof, and judgment of dismissal was entered upon such order, and no appeal was taken from the order or judgment, the court, at the time of the entry of judgment of dismissal of such action, had lost jurisdiction of both the persons and the subject-matter, and had no authority to entertain a motion made more than seven months after the entry

of the judgment of dismissal, and make an order modifying such judgment, awarding the defendant the return of such property or judgment for the value thereof.

Court without jurisdiction — person or subject-matter — modification of judgment order — order void — inherent power — to vacate void order — as between the parties — others in privity.

2. Where the court was without jurisdiction to make an order modifying a judgment, its order and judgment entered thereon being void, the court nevertheless has the inherent authority and power to entertain a motion and enter its order setting aside and vacating such void order and judgment at any time as between the parties to the action, or others in privity with them.

Opinion filed December 22, 1917.

Appeal from an order of the District Court of Billings County, *W. C. Crawford,* J.

Affirmed.

F. C. Heffron, for appellant.

That district court has a right within one year to modify its judgments by inserting therein provisions inadvertently, or through excusable neglect, omitted therefrom, is too elementary to require comment. Comp. Laws 1913, § 7483.

Plaintiff's remedy was by appeal from the order of the court if he claimed relief therefrom. Comp. Laws 1913, § 7841.

But plaintiff's delay for over two years to make any move is gross laches on his part. Wannemacher v. Vance, 23 N. D. 634, 138 N. W. 3; Re Peekamose Fishing Club, 8 App. Div. 617, 40 N. Y. Supp. 959; Keeney v. Fargo, 14 N. D. 423, 105 N. W. 93; St. Paul Land Co. v. Dayton, 39 Minn. 315, 40 N. W. 66.

One who moves to vacate a judgment must show due diligence and furnish an affidavit of merits, neither of which was done in this case. Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; St. Paul Land Co. v. Dayton, 39 Minn. 315, 40 N. W. 66; Gauthier v. Rusicka, 3 N. D. 1, 53 N. W. 80; Comp. Laws 1913, § 7483.

A modification of a judgment relates back to the original judgment and becomes a part of it. 23 Cyc. 883.

The order vacating the judgment, and from which this appeal is taken, having been made more than two years after entry of the judg-

ment, is void. Comp. Laws 1913, § 7483; Yerkes v. McHenry, 6 Dak. 5, 50 N. W. 485; Parrott v. District Ct. 20 Wyo. 494, 126 Pac. 45; Greene v. Williams, 13 Wash. 674, 43 Pac. 938.

Plaintiff is bound by his allegation of value in his replevin affidavit, and therefore cannot complain that the value fixed by him is inserted in the modified judgment. Capital Lumbering Co. v. Learned, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454; Cyclone Steam Snowplow Co. v. Vulcan Iron Works, 3 C. C. A. 352, 10 U. S. App. 387, 52 Fed. 920; Eisman v. Whalen, 39 Ind. App. 350, 79 N. E. 514, 1072; McFadden v. Fritz, 110 Ind. 1, 10 N. E. 120; Tuck v. Moses, 58 Me. 461; Swift v. Barnes, 16 Pick. 194; Cobbey, Replevin, § 1313.

A final judgment of dismissal entitles defendant to a judgment for return of the property or for its value. Branch v. Branch, 5 Fla. 447; Terryll v. Bailey, 27 Minn. 304, 7 N. W. 261; McCrory v. Hamilton, 39 Ill. App. 490; Town v. Evans, 11 Ark. 9; Pabst Brewing Co. v. Butchart, 68 Minn. 303, 71 N. W. 273; Calloway v. McElmurray, 91 Ga. 166, 17 S. E. 103; Fleet v. Lockwood, 17 Conn. 233; Lowe v. Brigham, 3 Allen, 429; Walbridge v. Shaw, 7 Cush. 560; Thurber v. Richmond, 46 Vt. 395; Collamer v. Page, 35 Vt. 387; Van Alstine v. Kittle, 18 Wend. 524; McArthur v. Hogan, Hempst. 286, Fed. Cas. No. 8,659a; Salkold v. Skelton, Cro. Jac. 519, 79 Eng. Reprint, 443; Funk v. Israel, 5 Iowa, 438.

GRACE, J. Appeal from an order of the district court of Billings county, W. C. Crawford, Judge.

The only real question in this appeal is one involving the authority or jurisdiction of the court in making its certain order of February 4, 1916, which order set aside a certain judgment for $849.90, bearing date September 18, 1914, and otherwise modified such judgment so that it should be a judgment for the dismissal of the action, with costs of $10.75, in favor of the defendant. The judgment as modified then corresponded to a judgment entered on the 19th day of February, 1914.

A brief history of the case will clearly present the questions involved in the appeal.

The plaintiff brought an action of claim and delivery against the sheriff for the possession of certain personal property described in the

complaint, consisting of a cash register, two cigar machines, one pool table, and other paraphernalia usually found in pool rooms. The answer denied the allegations of the complaint, and also pleaded an affirmative right of possession of all such property in the sheriff by reason of the seizure thereof on September 15, 1906, by virtue of an execution issued on a judgment issued in favor of the Dickinson Mercantile Company against Frank B. Stone. The answer demanded a return of the property, or the value thereof in the sum of $600, and $100 damages for the seizure and detention of said property by the plaintiffs. The action was commenced September 22, 1908. On the 19th day of January, 1914, on motion of the defendant, the court ordered the action dismissed, and judgment of dismissal was entered dismissing such action and allowing defendant $10.75 costs. No appeal was taken from such order of dismissal, and it became a final order, and judgment of dismissal was entered. About seven months after the date of the entry of such judgment of dismissal, the defendant gave notice of and served a motion on the plaintiff to have such judgment of dismissal modified so as to include a return of the property described in the complaint, or the value thereof. The motion was supported by the affidavit of F. C. Heffron, attorney for the defendant. On August 26, 1914, the court made its order granting the motion of the defendant to modify such judgment as asked for in the motion and affidavit. The modified judgment to that effect was entered on the 18th day of September, 1914, wherein such judgment of dismissal of such action was modified so as to include a return of the property from the plaintiff to the defendant, or in the event that the property could not be returned to the defendant, then judgment in his favor for $849.90. On February 9, 1915, the plaintiff procured an order to show cause why the judgment in the action of date September 18, 1914, against the plaintiff in the sum of $849.90 should not be set aside and vacated as void, or why the said judgment should not be modified so as to be simply a dismissal of said action, and for the sum of $10.75 costs taxed by the clerk. This order to show cause was supported by the affidavit of plaintiff's attorney. It was returnable February 25, 1915. It was not heard on such date, and the hearing was continued from February 25, 1915, to June 10, 1915. On August 9, 1915, defendant's attorney served a notice on plaintiff's attorney that the defendant would treat the order

to show cause as abandoned. The order was finally heard on August 17, 1915, the attorneys for plaintiff and defendant present. The judgment was again modified to correspond to the judgment of January 19, 1914.

One of the assignments of error by the appellant is that the district court erred in assuming jurisdiction to make the order appealed from, or any part thereof. The district court in making such order modified the judgment entered September 18, 1914, wherein a judgment was rendered against the plaintiff in the sum of $849.90, which was a modification of the judgment of date January 19, 1914, dismissing the case, with costs.

When the court made its order of dismissal of the action on the 19th day of January, 1914, and judgment of dismissal was entered in pursuance of such order, and no appeal was taken from either the order or judgment of dismissal within the time prescribed by law for such appeals, the court was thereafter without jurisdiction either as to the parties or the subject-matter of such action, hence, any orders or judgment made or entered after the court had thus lost jurisdiction would be void. The order of the court in modifying the judgment entered September 18, 1914, was a void order, and the judgment entered on such order was void. The court, however, had the inherent power and authority to set such void order and judgment aside, the same having been made without jurisdiction. In making the order appealed from, the court did not exercise jurisdiction either over the parties or the subject-matter of the action, except for the purpose of setting aside and vacating its order of September 18, 1914. Courts have inherent power and authority to set aside and vacate a void order at any time so far as the parties to the action are concerned.

The order appealed from is affirmed, with costs.

ROBINSON, J. I concur in the result.

CHRISTIANSON, J. (concurring). I concur in an affirmance of the order appealed from.

Under our statute "all actions . . . commenced, . . . in any of the courts of record in this state wherein the plaintiff, . . . shall neglect for a period of five years after the commencement of said

action, to bring the same to trial and to take proceedings for the final determination thereof, are . . . deemed dismissed and abandoned . . . and the defendant . . . may apply to the court for a formal order dismissing said action." Comp. Laws 1913, § 7598.

The instant action was commenced in September, 1908. On January 8, 1914, the defendant applied for a dismissal thereof, under the provisions of the above statute. The motion was granted and judgment of dismissal entered on January 19, 1914. Thereafter on August 26, 1914, the defendant moved the court to modify the judgment of dismissal by inserting therein a provision adjudging defendant to be entitled to the return of the property seized under the claim and delivery proceedings, or the value thereof in event it could not be returned in the same condition it was when taken from the defendant. So far as the record shows, no appearance was made by the plaintiff upon the hearing of this application. The court granted the application, and the modified judgment was entered on September 18, 1914. The court's order did not attempt to determine the value of the property, but in the judgment entered by the clerk the value is fixed at $849.90. As already stated, the court did not attempt to fix the value of the property in its order, and manifestly the clerk had no authority to do so. So far as the record shows no notice of entry of the modified judgment was ever served upon the plaintiff or his counsel. On February 25, 1915, the plaintiff, pursuant to notice, moved the court that the modified judgment be vacated and set aside and the original judgment reinstated. The court granted the motion. This appeal is from the order granting the motion.

It should be borne in mind that, in his original application, defendant merely asked for a dismissal of the action. It is quite possible that he might also have been entitled to a judgment for a return of the property if he had asked for it. But he failed to do this, and there was nothing to prevent him from asking for a judgment of dismissal only. This is what he asked for, and this is what he received. He apparently was entirely satisfied with the judgment entered, until more than seven months had expired, when for some reason he asked for a modification or amendment of the judgment, so as to award him a judgment considerably more favorable than that originally applied for. Apparently the application for modification was occasioned by certain allegations

in the answer which had been interposed in an action instituted by the defendant upon the undertaking in claim and delivery. The defendant apparently assumed that the recitals in the modified judgment would be conclusive upon, and prevent any inquiry into, the right of possession and value of the property in the suit pending on the undertaking in claim and delivery. Whether defendant's theory was correct is not before us, and need not be discussed. In any event the dismissal of the action constituted a breach of the condition in the claim and delivery undertaking to prosecute the action with effect. The breach of this condition entitles plaintiff to recover the value of whatever actual interest he had in the property and whatever damages he may actually have sustained by reason of its detention. It would seem as though any legitimate rights defendant has are protected, and may be fully vindicated under this condition. If he had any actual interest he cannot be prejudiced by the order appealed from. If he had no interest it would be a manifest injustice to award him the value of the property. It seems to me that under the circumstances the trial court was entirely justified in entering the order appealed from. In any event I am satisfied that it neither exceeded its power nor abused its discretion in so doing.

RUDOLPH GRABAU, Respondent, v. HERMAN NURNBERG, Appellant.

(166 N. W. 508.)

District court — term of — day of opening — adjourns to day certain — affidavit of prejudice — filed after opening of term — before adjourned date — not timely filed — court — may disregard.

1. Where, on the day of the opening of the term of district court, the court convenes, continues pending matters, and adjourns to a day certain, an affidavit of prejudice, filed after the opening of the term but before the date to which the adjournment was taken, is not filed within the time required by § 7644, Comp. Laws 1913, and may be disregarded by the court.

Cropper's contract — farming — complaint — allegations of — advances to plaintiff — plaintiff's share of crops was security for — credit extended — crops raised — accounting.

2. Where a complaint alleges that plaintiff had farmed the land for defendant for two years under cropper's contract; that defendant had received practically all of the crops; that plaintiff had purchased on credit defendant's share of some of the crops; that defendant had made advances to the plaintiff, for which plaintiff's share of the crop was security; that defendant had extended credit to the plaintiff on a store account; and that defendant kept account of the amount and value of crops received, advances made, etc.,—the complaint states a cause of action for accounting.

Compromise negotiations — admissions made during — independent facts — with respect to — subsequent litigation — admissions so made — may be received in evidence.

3. Where, during compromise negotiations, a party makes an admission with respect to independent facts, such admission may be received in evidence in subsequent litigation.

Evidence — sufficiency of.

4. Evidence examined and *held* to support the judgment.

Opinion filed December 14, 1917. Rehearing denied February 7, 1918.

Action for an accounting.

Appeal from District Court of Stutsman County, *J. A. Coffey,* J.

Affirmed.

John A. Jorgenson, for appellant.

A court of equity cannot assume jurisdiction of every transaction between individuals in which an accounting is to be adjusted. 1 C. J. 613, note 59.

There must be need of discovery, the accounts must be complicated, and there must exist a trust or fiduciary relation, to warrant equitable interposition. 1 C. J. 613, note 62; Clements v. W. S. Cooper Co. 136 N. Y. Supp. 93; Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404; 1 C. J. 617, note 6; Foley v. Hill, 2 H. L. Cas. 28, 37, 9 Eng. Reprint, 1002; Nesbit v. St. Patrick's Church, 9 N. J. Eq. 76; Babbott v. Tewksbury, 46 Fed. 86; Kuhl v. Pierce County, 44 Neb. 584, 62 N. W. 1066; Lamaster v. Scofield, 5 Neb. 148; Uhlman v. New York, L. Ins. Co. 109 N. Y. 421, 4 Am. St. Rep. 482, 17 N. E. 363; Marvin v. Brooks, 94 N. Y. 71; Smith v. Bodine, 74 N. Y. 30; Williams v. Slote, 70 N. Y. 601; Niehaus v.

Niehaus, 141 App. Div. 251, 125 N. Y. Supp. 1071; Howell v. Crosby, 89 Hun, 355, 35 N. Y. Supp. 328; Abbey v. Wheeler, 85 Hun, 226, 32 N. Y. Supp. 1069; Hackett v. Equitable Life Assur. Soc. 30 Misc. 523, 63 N. Y. Supp. 847; Bellingham v. Palmer, 54 N. J. Eq. 136, 139, 33 Atl. 199; Fluker v. Taylor, 3 Drew. 183, 192, 61 Eng. Reprint 873; State v. Churchill, 48 Ark. 426, 3 S. W. 352, 880.

The fact that many book accounts, books, and entries are to be examined before the party sued can be fixed with liability does not oust the jurisdiction of a court of law. Fowle v. Lawrason, 5 Pet. 495, 8 L. ed. 204; Baker v. Biddle, Baldw. 394, Fed. Cas. No. 764; Pollak v. H. B. Claflin Co. 138 Ala. 644, 35 So. 645; Beggs v. Edison Electric Illuminating Co. 96 Ala. 295, 38 Am. St. Rep. 94, 11 So. 381; State v. Bradshaw, 60 Ala. 239; Church v. Anti-Kalsomine Co. 118 Mich. 219, 76 N. W. 383; 1 C. J. 620, note 37.

An offer to do something by way of compromise cannot be called an admission. West v. Smith, 101 U. S. 263, 25 L. ed. 809; White v. Old Dominion S. S. Co. 102 N. Y. 661, 6 N. E. 289.

An unaccepted offer of compromise is irrelevant to the issue of liability. Feibelman v. Manchester F. Assur. Co. 108 Ala. 180, 19 So. 540; Dennis v. Belt, 30 Cal. 247; Davis v. Simmons, 1 Ariz. 25, 25 Pac. 535; Holy Cross Gold Min. & Mill Co. v. O'Sullivan, 27 Colo. 237, 60 Pac. 570; Fowles v. Allen, 64 Conn. 350, 30 Atl. 144; Kelly v. Strouse, 116 Ga. 872, 43 S. E. 280; Kroetch v. Empire Mill Co. 9 Idaho, 277, 74 Pac. 868; Chicago, E. & L. S. R. Co. v. Catholic Bishop, 119 Ill. 525, 10 N. E. 372; Louisville, N. A. & C. R. Co. v. Wright, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584, 14 Am. Neg. Cas. 488; Rudd v. Dewey, 121 Iowa, 454, 96 N. W. 973; Myers v. Goggerty, 10 Kan. App. 190, 63 Pac. 296; Groff v. Hansel, 33 Md. 161; Hutchinson v. Nay, 183 Mass. 355, 67 N. E. 601; Ward v. Munson, 105 Mich. 647, 63 N. W. 498; Melby v. Osborne, 35 Minn. 387, 29 N. W. 58; Smith v. Shell, 82 Mo. 215, 52 Am. Rep. 365; Boice v. Palmer, 55 Neb. 389, 75 N. W. 849; Greenfield v. Kennett, 69 N. H. 419, 45 Atl. 233; Scheurle v. Husbands, 65 N. J. L. 681, 48 Atl. 1118; Tennant v. Dudley, 144 N. Y. 504, 39 N. E. 644; Ely v. Norfolk, S. R. Co. 102 N. C. 42, 8 S. E. 779; Sherer v. Piper, 26 Ohio St. 476; Fisher v. Fidelity Mut. Life Asso. 188 Pa. 1, 41 Atl. 467; Norris v. Hartford F. Ins. Co. 57 S. C. 358, 35 S. E. 572; Reagan v. McKibben,

11 S. D. 270, 76 N. W. 943, 19 Mor. Min. Rep. 556; Strong v. Stewart, 9 Heisk. 137; International & G. N. R. Co. v. Ragsdale, 67 Tex. 24, 2 S. W. 515; Brown v. Shields, 6 Leigh, 440; Richards v. Noyes, 44 Wis. 609; West v. Smith, 101 U. S. 263, 25 L. ed. 809; Knowles v. Crampton, 55 Conn. 336, 11 Atl. 593.

"A covenant on the part of the lessee to repair or keep in good repair imposes on him an obligation to rebuild the demised premises if they are destroyed during the term by fire, or other casualty, even where he is without fault." 24 Cyc. 1089.

John W. Carr, for respondent.

"In the absence of statutory provision, bias or prejudice on the part of the judge does not disqualify him. Disqualifying a judge on the ground of prejudice is so liable to abuse that many states have refused to adopt such rule, and even where it has been adopted liability to abuse induces the most rigid construction of its terms." 23 Cyc. 582 and cases cited in note.

Objection to a judge must be made timely or it will be disregarded. 23 Cyc. 591 and cases cited; Stockwell v. Crawford, 21 N. D. 261, 130 N. W. 225.

The order refusing to grant an application for a change of judges is an appealable one. White v. Chicago, M. & St. P. R. Co. 5 Dak. 508, 41 N. W. 730; Robertson Lumber Co. v. Jones, 13 N. D. 112, 99 N. W. 1082.

Whenever the subject-matter involved in the litigation cannot be fully investigated in a court of law, a court of equity exercises a sound discretion in decreeing an account. 1 C. J. 612, 614–616, 618, 619, §§ 56–58, 63.

"An accounting in equity may generally be had where the funds or property are jointly owned or held, and one party refuses to account to the other for his share." 1 C. J. 619, 620, 624, §§ 64, 75.

BIRDZELL, J. This is an appeal from a judgment entered by the district court of Stutsman county in an action for an accounting. The facts are as follows:

During the years 1914 and 1915 the plaintiff farmed certain land owned by the defendant. His lease was in the form commonly called a cropper's contract, in which the title to the crops was reserved in the

defendant until settlement. There was very little crop grown on the land in 1914, and by reason of this fact, together with the poor quality of that which was grown, no grain was marketed, except a small quantity of wheat. Plaintiff bought the defendant's share of the oats and speltz. The defendant sold the wheat, amounting to about $63, and retained the money. In the year 1915, the crops consisted of wheat, barley, oats, and speltz, which the defendant received and sold, retaining the proceeds. During this time, the defendant had a store in Jamestown, at which the plaintiff ran an account. Defendant also advanced to the plaintiff sums of money at various times. The defendant owned a threshing machine in 1915, which the plaintiff operated for him for a short period. When the parties undertook to settle in the fall of 1915, they could not reach an agreement. Several conferences were held, at some of which the parties and their attorneys were present, but no satisfactory settlement was concluded. Whereupon plaintiff brought this action for an accounting. The action resulted in a judgment in favor of the plaintiff for $995.66, with interest at 6 per cent from November 1, 1915, and costs. The items of account, as found by the trial court and upon which the judgment is based, are as follows:

"The court finds that the defendant sold the entire wheat and barley crop raised on said land under said contract in the season of 1915, and received therefor the following amounts: For the wheat crop, the sum of $1,980.80; and for the barley crop, the sum of $2,785.55,—making a total sum received by the defendant for the entire wheat and barley crops of 1915 of $4,766.35. That the defendant now retains the entire amount last named.

"The court finds that the plaintiff is entitled to the following credits in addition to the above, to wit:

Twelve days' services in charge of defendant's threshing outfit in the season of 1915, at $10 per day	$ 120.00
For hauling the defendant's threshing outfit to his farm	15.00
For teams and wagons in threshing season of 1915, furnished to defendant, at deft. request	78.75
One half of 125 bushels of oats used for feed by defendant in threshing season of 1915, at 50 cents per bushel	31.25
Plaintiff's total credits	$2,628.17

That there should be deducted from the above sum of plaintiff's credits, $2,628.17, the following credits due to the defendant, to wit:

609 bushels of oats at 50 cents per bu.	$ 304.50
Interest on this sum at 10 per cent, from Jan. 1, 1915, to Nov. 1	25.40
400 bus. speltz at 50 cents per bu.	200.00
Interest on above sum at 10 per cent from Jan. 1, 1915, to Nov. 1	16.17
Money paid Klingman	48.25
Money paid Walters	4.95
Money paid Padden	62.00
Note dated March 19, 1915, for $110, with interest at 10 per cent to Nov. 1, 1915	116.78
Fletcher's thresh. bill for threshing wheat, 1915 crop	130.30
Threshing speltz, 1915	50.09
Threshing barley, 1915	222.60
Threshing oats, 1915	46.62
Plaintiff's account at defendant's store	130.05
Interest on above, October 23, 1915, at 10 per cent to Nov. 1	.30
Agreed price under contract for pasture for 1915	150.00
Agreed price for potato and millet land for 1914	34.00
For the use of the land included by plaintiff in the pasture, and designated in the evidence as "the flat" for the year 1915, on the basis of its value for pasture land, the defendant should be allowed the sum of	100.00

The court finds from the evidence that, until this action was commenced by the plaintiff, that the defendant asked only $100 for the use of this flat for the two years, 1914 and 1915. The court finds that as early as July, 1914, the defendant knew that this land designated as the flat was fenced in by the plaintiff as a part of the pasture land, and that defendant made no objection to this land being so used. And that the land designated as the flat, and fenced in as pasture by the plaintiff, is in fact land that is of poor quality, and land best adapted to grazing purposes. That only a small part of said tract had ever been broken, prior to the year 1915, and that at the time the plaintiff took possession of said farm, this tract had gone back to sod.

"Total credits due to defendant $1,632.51

"That there should be deducted from plaintiff's total credits, mentioned in paragraph five (5) herein, the defendant's total credits, as

set forth above, which leaves the balance due to the plaintiff herein, $995.66."

The appellant argues eighteen assignments of error, some of which are so obviously without merit that a discussion of them could serve no useful purpose. We will, therefore, confine our discussion to the main propositions advanced by the appellant.

It is first contended that this action should not have been tried by the trial judge who tried it, for the reason that an affidavit of prejudice was filed. Section 7644, Comp. Laws, 1913, provides that, upon the filing of an affidavit of prejudice before the opening of the term, the presiding judge shall proceed no further with the case. The time for the opening of the term in which the action was to be tried was June 19th. On this day the court convened at 9:30 A. M., and took up certain citizenship matters and entered a minute order continuing motions, demurrers, and other pending matters until July 10th at 10 A. M. On the same day a jury was called for the term which was thus continued to July 10th. The affidavit of prejudice was filed in this case on July 8th, and it was disregarded by the court for the reason that it was not filed in time. While the statute giving to suitors the right to file an affidavit of prejudice makes it the mandatory duty of the court to refrain from further proceedings and to call in another judge, it also fixes definitely the time for the filing of such affidavits as being before the opening of the term. We are of the opinion that a term is begun, within the meaning of this statute, on the day fixed by law for the convening of the term. If the term is adjourned to a later date, such adjournment does not fix a new date for the opening of the term, but only operates to suspend for a definite interim the proceedings that may be had within the term that has already opened.

It is next contended that the court erred in refusing to sustain an objection to the introduction of evidence, on the ground that the complaint failed to state a cause of action for accounting. In support of this contention, the appellant relies upon the doctrine that equity will not assume jurisdiction of any controversy where a money judgment is sought, merely upon the grounds that the transactions between the parties are numerous and involve matters of set-off. We are of the opinion, however, that the complaint states a cause of action properly cognizable in equity. It alleges that plaintiff farmed the land two years

and produced crops; that the amount of the crops is unknown to the plaintiff and known to the defendant, who had actually received the same and the proceeds thereof; and it admits that the plaintiff was indebted to the defendant on account of advances made by the defendant, of which the plaintiff had kept no account but of which the defendant had a record. So, not only were the items numerous and somewhat complicated, but the defendant was in a position superior to that of the plaintiff with regard to the knowledge of the transactions involved. Furthermore, under the contract in question, the defendant must be held to have received the plaintiff's portion of the crops as security merely, and, having received them in this capacity, is bound to account to the plaintiff as a fiduciary. See Pom. Eq. Jur. § 1421.

It is contended that a finding of the court relative to the rental value of certain lands designated as "the flat" can only be supported by incompetent evidence. The testimony referred to as being incompetent is in the nature of admissions which were made during the progress of the negotiations looking toward a settlement of the controversy. It is true, as contended, that an unaccepted offer of compromise should not be received in evidence as an admission; but it is also true that where, as here, during negotiations looking toward a compromise, one of the parties makes a definite statement relative to independent facts, such statement is admissible regardless of the fact that it was made during the negotiations. See 16 Cyc. 950.

When the evidence is examined in the light of the rule as thus properly qualified, there can be little question but what it supports the finding of the court.

As to the remaining assignments, they are not of sufficient merit to warrant attention. The record discloses that a fair trial was had, and that it resulted in an accounting as just, if not more so, than could be awarded by this court upon the cold record, no matter how painstaking our efforts might be. We find nothing in the record which would warrant us in disturbing the judgment or in granting a new trial. The judgment of the trial court is affirmed.

ROBINSON, J. (concurring). This case presents an appeal from a judgment against defendant for $1,045.46 and costs. The action arises from one of those cut-throat cropping contracts under which plaintiff

farms certain lands of the defendant during the years 1914 and 1915. Each party was to have an equal share of the crops, and until a division the title of all the crops was to be in the defendant. In 1914 the crop was poor and the plaintiff run in debt to the defendant. In 1915 the crop was good and defendant took it all and neglected and refused to make any division. When he got the plaintiff's money into his pocket he concluded that was a good place to keep it. He trumped up false claims and forced the plaintiff to incur the needless expense of this action, and now he presents a printed brief of 125 pages and asks this court to consider eighteen assignments of error. The alleged errors amount to nothing. The case presents no question of law. It depends entirely on questions of fact. The question is: Does the evidence sustain the findings? As the record shows, the trial court has carefully stated the account between the parties, and it might well have been a few hundred dollars more in favor of the plaintiff.

The plaintiff is given credits amounting to	$2,628.17
The defendant has credits	1,632.51
The balance is	995.66
The interest made it	1,045.46

As the record shows, defendant presented to the court a trumped-up and dishonest account against the plaintiff, claiming a balance of $2,554.98. It included these items:

In 1914, 75 acres tillable land used by plaintiff as pasture	$ 375.00
Interest at 10%	50.00
In 1915, 75 acres used as pasture	750.00
Interest at 10%	12.50
In 1915, 35 acres used as corn ground	350.00
Interest at 10%	5.80
7 acres millet ground	70.00
Damage to house by negligence of plaintiff	100.00

Such manifestly dishonest charges in a verified account give to other items a strong suspicion of dishonesty. The same is true of defendant's testimony. It does not bear criticism. It is in keeping with his accounts. The minister of justice—the attorney retained by the defendant in this case—should not have permitted the filing of such an account,

and much less should he have sworn to it. Just think of $10 an acre for 75 acres of poor, gravelly, stony, sandy pasture land.

If the defendant had kept a fair and honest account, as in duty bound, and had promptly paid the plaintiff the money due him on a sale of his crops, there would have been no occasion for this action. The findings are well sustained by the evidence. Judgment affirmed.

GEORGE YUSKO, Respondent, v. MIDDLEWEST FIRE INSURANCE COMPANY, OF VALLEY CITY, NORTH DAKOTA, a Corporation, Appellant.

(166 N. W. 539.)

Fire insurance — contract of — standard form policy — commissioner of insurance —other insurance — without consent of first insurer — provisions of policy as to — waiver of — retention of all premiums paid — after knowledge of other insurance — without objection — defense of double insurance — estopped to make.

1. Where a contract of fire insurance, being the standard form of fire insurance contract on file with the Commissioner of Insurance of the state of North Dakota, contains a provision to the effect that said policy, unless otherwise provided by agreement indorsed thereon or added thereto, should be void if the insured should thereafter make or procure any other contract of insurance, whether valid or not, on the property covered in whole or in part by defendant's policy; and the insured after the issuing of defendant's policy did procure other insurance without written consent in the manner above stated; and the property upon which such double insurance was procured was struck by lightning, and fire ensued therefrom causing the total destruction of such property, and after such loss the defendant acquired full knowledge of such additional insurance, and notwithstanding such knowledge retained all the premiums for the whole time for which such policy was issued, the policy being for a definite time, and never returned, offered to return, or tendered to the insured at any

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NOTE.—Where a policy of insurance provides the taking out of other insurance without the written consent of the company indorsed upon the policy, knowledge of other insurance not followed by dissent on the part of the company, it was held to be a waiver of the forfeiture, as will be seen by an examination of the cases in notes in 25 L.R.A.(N.S.) 1, and 51 L.R.A.(N.S.) 261.

On effect of breach of condition in insurance policy against other insurance, see note in 4 Am. St. Rep. 123.

time or in its answer to the complaint of the plaintiff seeking to recover upon such policy contract, any of the unearned premiums; the defendant at all times maintaining its right to retain all such unearned premiums, and never having canceled, or demanded the cancelation of such policy in its said answer, or otherwise,—*held*, that defendant by its conduct and its retention of all such unearned premiums waived the provisions of forfeiture of such policy providing against additional insurance, and is estopped to deny its liability on such policy contract.

Double insurance — loss under — adjusted and payable ratably — premiums paid — kept by company — with knowledge of other insurance — before loss — risk cannot be avoided — conditions of policy waived.

2. Section 6548, Compiled Laws of 1913, is as follows: "In case of double insurance the several insurers are liable to pay losses thereon as follows: 1. In fire insurance each insurer must contribute ratably towards the loss without regard to the dates of the several policies." *Held*, that such provision in a fire insurance policy, to the effect that it will become void if the insured procures additional insurance without the written consent of the insurer indorsed on such policy, when construed in the light of this section, is not void but voidable only; and where such provision in such policy against additional insurance may be waived by written consent of the insurer indorsed on such policy, and the insured takes out additional insurance, which fact becomes known to the insurer, and the insurer keeps all the unearned premiums and takes no steps to cancel such policy, such policy contract does not become absolutely void thereby, but at the most becomes only voidable, and the insurer cannot, after loss has ensued, avoid its risk.

Opinion filed October 11, 1917. Rehearing denied February 8, 1918.

Appeal from the judgment of the District Court of Morton County, *J. M. Hanley*, J.

Affirmed.

Barnett & Richardson and *Nathan H. Chase*, for appellant.

A provision in a fire insurance policy to the effect that no other or additional insurance shall be taken out on the property insured by the insured, without the written permission of the first insurer, and that if such other insurance is placed upon the property without such written permission, the policy shall be void, is customary and reasonable and will be enforced. 2 Clement, Fire Ins. 83, and cases cited; Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799.

Upon receiving a policy of insurance, the assured is legally chargeable with notice and knowledge of the entire terms of the insurance con-

tract, and is estopped to deny such knowledge. Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W 837; Hronish v. Home Ins. Co. 33 S. D. 428, 146 N. W. 588.

The mere attaching to an ordinary policy of fire insurance of a "percentage value clause" is not a written consent, or indorsement of consent, to other insurance. Palatine Ins. Co. v. Ewing, 34 C. C. A. 236, 92 Fed. 111; Dolan v. Missouri Town Mut. F. Ins. Co. 88 Mo. App. 666; Bush v. Missouri Town Mut. Ins. Co. 85 Mo. App. 155.

Attaching to an ordinary fire insurance policy, of the "lightning clause," is not a written indorsement of consent to other insurance, especially where it is placed thereon, subject to all the other provisions of the policy. Palatine Ins. Co. v. Ewing, 34 C. C. A. 236, 92 Fed. 111.

The defendant neither had knowledge of the subsequent additional insurance nor in any manner consented thereto. Calmenson v. Equitable Mut. F. Ins. Co. 92 Minn. 390, 100 N. W. 88, and cases cited; Frost's Detroit Lumber & W. W. Works v. Millers' & Mfrs. Mut. Ins. Co. 37 Minn. 300, 5 Am. St. Rep. 846, 34 N. W. 35; Allemania F. Ins. Co. v. Hurd, 37 Mich. 11, 26 Am. Rep. 491; Eagle F. Ins. Co. v. Globe Loan & T. Co. 44 Neb. 380, 62 N. W. 895; Home F. Ins. Co. v. Wood, 50 Neb. 381, 69 N. W. 941; Baumgartel v. Providence Washington Ins. Co. 136 N. Y. 547, 32 N. E. 990.

The plaintiff's cause of action here is based upon the insurance policy, and all prior or contemporaneous agreements are merged in such policy, and plaintiff is bound by its provisions. Union Nat. Bank v. German Ins. Co. 18 C. C. A. 203, 34 U. S. App. 397, 71 Fed. 473; Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674; Germania Ins. Co. v. Bromwell, 62 Ark. 43, 34 S. W. 83.

Jacobsen & Murray, for respondent.

Forfeiture clauses for additional insurance against loss by lightning is invalid.

Such clauses, in the first instance, relate to losses by fire only. 19 Cyc. 764, note 20.

No matter how many policies against loss by fire, the insured could only recover for the value of the property covered and lost. The number of policies or the amount of insurance cannot be said to offer an

incentive to carelessness or destruction by the insured, for his recovery is limited to value. Comp. Laws 1913, §§ 6547 and 6548.

But that part of the policy or lightning clause limiting the liability of the defendant in case of other insurance constitutes a consent to subsequent insurance and a waiver of the forfeiture clause in the policy. Bolte v. Equitable Fire Asso. 23 S. D. 240, 121 N. W. 773.

This court is confined to the construction to be placed upon the policy from the standpoint of the insured. Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837; Bolte v. Equitable Fire Asso. supra.

Defendant by its acts and conduct waived forfeiture and is now estopped to assert same as a defense. Expressions by insured to defendant's agent, that he desired such a certain stated amount of insurance on his property (which was more than defendant's policy), and being informed that he could take out other insurance thereafter, gave plaintiff the right to assume that such right was or would be incorporated in the policy, especially when he could not read or write the English language. The agent's knowledge was that of defendant. Independent School Dist. v. Fidelity Ins. Co. 113 Iowa, 65, 84 N. W. 956; Wensel v. Property Mut. Ins. Asso. 129 Iowa, 295, 105 N. W. 522; Bank of Anderson v. Home Ins. Co. 14 Cal. App. 208, 111 Pac. 507; Erb v. Fidelity Ins. Co. 99 Iowa, 727, 69 N. W. 261; Phenix Ins. Co. v. Grove, 215 Ill. 299, 25 L.R.A.(N.S.) 1, 74 N. E. 141; Hulen v. National F. Ins. Co. v. Hartford, 80 Kan. 127, 102 Pac. 52; Western Nat. Ins. Co. v. Marsh, 34 Okla. 414, 42 L.R.A.(N.S.) 991, 125 Pac. 1095; Fitchner v. Fidelity Mut. Fire Asso. 103 Iowa, 276, 72 N. W. 530; Hagan v. Merchants' & B. Ins. Co. 81 Iowa, 321, 25 Am. St. Rep. 493, 46 N. W. 1114; Price v. North American Acci. Ins. Co. 28 Idaho, 136, 152 Pac. 805; McKune v. Continental Casualty Co. 28 Idaho, 22, 154 Pac. 990; Schmidt v. Williamsburgh City F. Ins. Co. 95 Neb. 43, 51 L.R.A. (N.S.) 261, 144 N. W. 1044; Coppoletti v. Citizens' Ins. Co. 123 Minn. 325, 143 N. W. 787; Swedish American Ins. Co. v. Knutson, 67 Kan. 71, 100 Am. St. Rep. 382, 72 Pac. 526.

A retention by the company of unearned premium, or its failure to cancel the policy after it receives notice of additional insurance, constitutes a waiver of the subsequent insurance, and estops the defendant to assert a forfeiture on that ground. Phenix Ins. Co. v. Grove, 215 Ill.

299, 25 L.R.A.(N.S.) 1, 74 N. E. 141; Farmers & M. Ins. Co. v. Bodge, 76 Neb. 31, 106 N. W. 1004, 110 N. W. 1018; Bank of Anderson v. Home Ins. Co. 14 Cal. App. 208, 111 Pac. 507; 19 Cyc. 798, ¶ C; Brashears v. Perry County Farmers Protective Ins. Co. 51 Ind. App. 8, 98 N. E. 889; Western Ins. Co. v. Ashby, 53 Ind. App. 518, 102 N. E. 45; Swedish American Ins. Co. v. Knutson, supra.

GRACE, J. Appeal from the judgment of the district court of Morton county, J. M. Hanley, Judge.

This action is one wherein the plaintiff seeks to recover from the defendant upon a certain fire insurance policy issued by the defendant to the plaintiff, which insured certain property of the plaintiff against loss or damage by fire, lightning, and tornado. The complaint is in the proper and usual form in such cases. It sets forth the issue and delivery of the policy, the amount thereof, the different items insured, the sum for which each item was insured, the total value of the property, and an allegation of the total destruction by lightning and fire of the barn, one of the items insured, on July 25, 1913.

The answer puts in issue the value of the barn and the amount of damages to such barn by reason of lightning and fire, and denies that the defendant's policy was of any force and validity at the time such barn was struck by lightning. Defendant further by way of affirmative defense sets forth in its answer certain conditions of its policy contract, providing the policy should be void if the insured procured any other contract of insurance, whether valid or not, on the property covered in whole or in part by defendant's policy.

The answer further sets forth that plaintiff, without the knowledge or consent of defendant, on July 8, 1913, procured other insurance upon the barn, grain, and live stock with the Northwestern Fire & Marine Insurance Company of Minneapolis, Minnesota, which was a valid and subsisting insurance on said property at the time plaintiff's barn was struck by lightning.

As further defenses the defendant alleges fraud and false swearing by plaintiff in his sworn statement furnished to it by plaintiff at the time of the loss and damage; and for a further defense the provisions of defendant's policy contract relating to prorating in the event of other insurance are pleaded in the answer.

The facts concisely stated are substantially as follows: The defendant, the Middlewest Fire Insurance Company, of Valley City, North Dakota, by its policy contract of insurance dated September 16, 1912, then issued and delivered to the plaintiff, insured plaintiff for a period of five years against all direct loss or damage by fire, lightning, and tornado to certain property for stated amounts as follows: On barn, $1,000; on grain, ground feed, and seed in building or in stacks, $350; on horses, mules, and colts, $400.

On the 8th day of July, 1913, the plaintiff procured other and additional insurance on some of the property covered and described in defendant's policy. Such additional insurance was a policy contract of insurance procured from the Northwestern Fire & Marine Insurance Company of Minneapolis, Minnesota, and was for $3,275,—$1,200 of which was insurance upon the same barn covered by defendant's policy, $565 on horses, mules, and colts, $200 on hay, fodder, and silage, and other small amounts on various items of property. The policy contract of insurance with the Northwestern Fire & Marine Insurance Company was issued for a term of three years from the 8th day of July, 1913.

On the 25th day of July, 1913, the barn was struck by lightning, whereupon fire immediately ensued, resulting in the total destruction of the barn.

The plaintiff in his complaint claims the value of the barn to be $2,500. The value of the barn was proved by plaintiff's witnesses to the satisfaction of the jury, and the jury found in favor of the plaintiff, thus, as defendant concedes, disposing of this question. The value of the barn, therefore, may be considered to be, as claimed by plaintiff, of the value of $2,500. The total destruction of the barn by lightning and fire at the time heretofore stated was also conclusively determined by the jury.

With this statement of facts in mind, we may proceed to consider the issues presented for our consideration.

The defendant at the trial in the court below abandoned the issue of fraud and false swearing, which leaves for our consideration the following propositions only: (1) The provision in the policy contract against additional insurance; (2) the prorating provision of the policy contract and the lightning clause; (3) waiver and estoppel by the defendant of the provision of the policy contract against additional insurance by

failure to return the unearned premium and to cancel the policy after notice of the breach of the conditions of the policy contract.

As affecting the present case, the third proposition above mentioned relating to waiver and estoppel by the defendant is of the greater importance and in reality decisive of the case. In connection with this proposition, however, we will be aided by considering at the same time and in connection therewith the first proposition, which relates to the provision in the policy contract against additional insurance.

The defendant's policy bears date September 16, 1912, and is for the full term of five years, and would terminate according to its terms on the 16th day of September, 1917. The Northwestern Fire & Marine policy was issued the 8th day of July, 1913, and by its terms terminated the 8th day of July, 1916. Each policy was for a definite time, and the premium in each case was paid at or about the time of the issuance of the policies. Each policy covered the barn in question. The defendant's policy provided for $1,000 insurance on such barn, and the Northwestern Fire & Marine Insurance Company's policy provided for $1,200 insurance on the barn. A period of a little more than nine months intervened between the issuing and delivery of the defendant's policy and the issuing and delivery of the Northwestern Fire & Marine policy to the insured. The premium paid the defendant for its policy of insurance was $43.75, which was the full premium for the full five years.

It is evident that the defendant's policy went into effect upon its issuance and delivery, and that the risk was at that time assumed by the defendant. The defendant further claims that, at the time of the issue and delivery to the insured of the policy in the Northwestern Fire & Marine Insurance Company, its liability ceased, for the reason that the additional or double insurance brought about by the insured procuring the additional policy in the Northwestern Fire & Marine Insurance Company without the written consent of the defendant avoids the defendant's policy. The defendant, however, claims the right to retain the whole of the premium notwithstanding that it claims that its policy became void after a little more than nine months of the five-year period had expired, and this on the principle that the policy having once attached and the risk having been once assumed for a time, no matter how short the time, entitled it to retain all the premium. This was the theory of the defendant in the trial of the case in the court below, and

special stress is laid upon this point in its brief in this court. From a thorough examination thereof it is clear that a demand for the return of the premium by the plaintiff would have been useless, and, if a demand would have been necessary, the attitude of the defendant relieved the plaintiff from any such requirements; and so far as this case is concerned, in view of all the circumstances, a demand for return of unearned premium and a tender of the return of the policy was not necessary to entitle the plaintiff to a return of all unearned premiums.

Section 6533, Compiled Laws of 1913, is as follows: "If a peril insured against has existed and the insurer has been liable for any period, however short, the insured is not entitled to a return of premium so far as that particular risk is concerned, unless the insurance was for a definite period of time, in which case he is entitled to a proportionate return under §§ 6517 and 6530."

The defendant's policy in question was for a definite time. It became effective for a period of five years from noon on the 16th day of September, 1912, until noon on the 16th day of September, 1917. The defendant's policy did not become absolutely void by reason of the insured taking out a subsequent policy of insurance in another company covering some of the same property insured by defendant's policy. The most that can be claimed by the defendant is that its policy became voidable by reason of the insured taking out such additional or double insurance without the written consent of the defendant indorsed upon its policy. It is conceded that the written consent, and the indorsement of such consent on defendant's policy, were not procured by the insured. The only reason, if any, that double or additional insurance would not be permissible so long as it does not exceed the cash value of the property insured is that such insurance is effected without the written consent of the first insurer indorsed upon its policy. In the case at bar, if the insured had applied to the defendant and procured its written permission indorsed upon its policy, permitting the insured to take additional or double insurance for $1,200 in the Northwestern Fire & Marine Insurance Company, then there could have been no contention by defendant that it could avoid its proportionate part of the loss, if such loss ensued.

In such case there would be double insurance, but with the consent

of the insurers. Section 6547, Compiled Laws of 1913, defines double insurance as follows:

"A double insurance exists when the same person is insured by several insurers separately in respect to the same subject and interest."

Section 6548 provides: "In case of double insurance the several insurers are liable to pay losses thereon as follows: 1. In fire insurance each insurer must contribute ratably towards the loss without regard to the dates of the several policies."

It therefore appears that the policy contract would not be illegal or void on account of other contracts of insurance on the same property, or, in other words, double insurance. If the insurer in its contract is protected against liability on its policy by reason of the insured procuring other or double insurance without the knowledge or consent of the insurer, nevertheless, the insured can enforce the contract against the insurer if the conduct, statements, or actions of the insurer are such as to constitute a waiver of such provision in the contract, or if the insurer retains the unearned premium after having received full notice and knowledge of the loss and knowledge and notice of the double insurance.

The testimony in this case shows that Burmeister, the local agent of the defendant, Phirmister, who was engaged in the lumber business at Glen Ullen, and Henry L. Prissler, the adjuster for the defendant company, about ten days subsequent to the fire went to the premises of Yusko, where proof of loss was taken by the adjuster on behalf of the company, which, as the testimony shows, was reduced to writing. Mr. Prissler, the adjuster, testifies that it was about two weeks after this visit that he became aware of other insurance on the same property. It follows, therefore, that knowledge of the double insurance was brought home to the defendant, according to the testimony of its witness, within two weeks after the proof of loss. The testimony of the adjuster is that, at the time of the proof of loss, he asked Yusko if there was other insurance upon the property, and Yusko said there was not. After the defendant had received full knowledge of the double insurance it nevertheless continued to claim the premium as earned for the full five years, and the claim and theory of the defendant at all times is that it is entitled to retain all the premium for the whole five years, and this without incurring any liability after the time of the double insurance. With this we cannot agree. The contract did not become illegal, fraudu-

lent, or void by reason of procuring the double insurance. The most that can be said is that it became voidable. It is not improbable, if the defendant had, at the time of acquiring knowledge of the double insurance, given notice of the cancelation of the policy and tendered back the unearned premium, it might have escaped liability; but not having done this, and having retained all the unearned premium, and claiming the right to retain it, its retention became an election to consider the policy in full force and effect, and operated as a waiver of any defenses which the defendant may have had.

That part of the defendant's policy contract relating to the existence, procuring, or making of other contracts of insurance upon the same property, reads as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void if the insured *now has* or shall hereafter make, or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

An examination of the Northwestern Fire & Marine Insurance policy discloses an exactly similar provision, it being also a standard policy. If the reasoning of the defendant is sound when it claims its policy was absolutely void for the reason that other insurance was procured, then also would the policy of the Northwestern Fire & Marine Insurance Company likewise be void; for at the time it was issued and delivered to the insured, the insured at that time had insurance on the same property with the defendant. It will be noticed that the provision also refers to the *existence* of other insurance *at the time of the issuing of the policy.* But the defendant in its answer uses the following language concerning the Northwestern Fire & Marine Insurance policy contract: "This defendant further alleges that said policy contract of said Northwestern Fire & Marine Insurance Company was still outstanding, and constituted valid and subsisting insurance on said property, at the time plaintiff's said barn was struck by lightning, as hereinbefore and in plaintiff's complaint set forth and alleged."

The insured had insurance upon this barn with the defendant at the same time he took the Northwestern Fire & Marine Insurance policy, which contained the same clause relied upon by the defendant, and which says that the policy shall be void if the insured *now has* or shall hereafter make or procure any other contract of insurance, whether

valid or not, upon the property covered in whole or in part by its policy. If the meaning and force contended for by the defendant be given to its reasoning, the policy of the Northwestern Fire & Marine Insurance Company never went into effect, for the reason that at the time of its issuance and delivery there was other insurance on the same property, and the policy would be void from its inception. The defendant, however, notwithstanding the fact that its policy was long in effect prior to the time of the issuance of the policy of the Northwestern Fire & Marine Insurance Company, and notwithstanding the clause in the policy of the Northwestern Fire & Marine Insurance Company providing the policy should be void if there existed or was procured other insurance on the same property, alleges the validity and subsistence of the Northwestern Fire & Marine insurance on the barn at the time it was struck by lightning. It seems to us, therefore, that if either policy was void it must have been the policy of the Northwestern Fire & Marine Insurance Company, and if it were void it was void from its inception and never attached, and no risk was ever assumed by it, so it never was an insurance. If this were true, then there was no additional or double insurance on the property so far as the defendant was concerned. We do not believe, however, that the defendant's reasoning in this branch of the case is sound. As before stated, we are of the opinion that the most that can be said is that either of the policies were not void, but merely voidable. The provisions referred to in the policy could be waived or the conduct and acts of the defendant could be such as to create an estoppel. Each of the policies was in force and effect at the time of the loss. If the defendant's policy were voidable it did not take any steps to assert the avoidability of the policy. It had collected all of the premium for the entire period of time. It did not offer at any time to return it, and when suit was brought against it, in its answer it made no tender of the return of the premium, nor did it demand the cancelation of the policy, but simply denied the policy was in force and effect or of any force and validity whatsoever. The contract of double insurance is not illegal, and it is enforceable unless the insurer avails itself of its defenses, or if the insurer, after full knowledge of the double insurance, retains the full amount of the unearned premium, gives no notice of the cancelation of the policy, and maintains the same attitude throughout the litigation, when the

insured brings his action to recover upon the above policy. It seems clear that the defendant by its conduct and acts has waived the benefits of any of the clauses referred to, and is estopped from denying its liability upon the policy. This is true even if the defendant had no knowledge of the double insurance until after the loss occurred. There is testimony, however, tending to show that the defendant at the time it issued its policy had knowledge that other insurance would be procured by reason of statements made by the insured to defendant's agent. The testimony by Yusko with reference to what was said at the time of procuring the policy from the defendant is as follows:

"I asked Burmeister, I said, I want insurance for my barn. He asked me how much I wanted. I want from $1,800 to $2,500. He told me, that is too much. I said, it cost me over $1,800 for materials, besides my work. He said, I would give you $1,000, and you got a chance to take out other insurance if you want to."

If this testimony is true, and the credibility of the witnesses was a matter for the jury, it would be sufficient to constitute a waiver of the clause against other insurance.

With reference to the same matter, Burmeister, the defendant's witness and agent, testified that he made the following statements to Yusko at the time of the application for insurance with the defendant company:

"I will tell you what I told him. He wanted $1,500 to $1,800 insurance, and I found out what his lumber bill was, and we went over it and estimated the stone work. I told him [Yusko] that it was too much. You will be paying for something you will never get. One thousand dollars is all that you ought to have in insurance, because if you take more than that you will be paying for something you cannot get."

This statement differs materially from the statement of Yusko concerning the same matter. It was for the jury to determine which of the two witnesses was entitled to the greater credibility, and evidently the jury believed the statements of Yusko, as they determined the case in his favor.

In the case of Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799, an action brought by the insured against the defendant company for the recovery of the loss, the defendant pleaded the for-

feitures of the policy, and by way of counterclaim also pleaded the premium given by the plaintiff as consideration for the issuing of the policy. It was held in such case that the pleading of such counterclaim operated as a waiver of the forfeitures of the policy. That case, therefore, lays down the law that the forfeitures of the policy may be waived, and in that case was waived, by the pleading of the counterclaim. The principle laid down in that case is applicable to the case at bar. It makes no difference that the premiums were paid in cash at the time of the issuance of the policy. In the case at bar, when an action was maintained for the loss, if the defendant intended to rely upon the forfeitures contained in its policy, and after pleading such forfeitures, it was its duty to plead and tender the return of the unearned premium, and a failure to do so would operate as a waiver of the forfeitures relied upon. It was held in the Johnson Case that the policy, by reason of the forfeitures, was not void but voidable at the option of the insurer. In the Johnson Case, after the knowledge of the forfeitures, the defendant saw fit to demand judgment for the premium. In the case at bar, after knowledge of the forfeitures, the defendant saw fit to retain all the unearned premium, and claimed to retain it as a matter of right, and has strenuously maintained its right to retain all the unearned premium, and earnestly insists on that right in this court. This being true, the defendant is estopped from denying liability on its policy.

In the case of Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837, we find in the syllabus thereof the following: "Where a fire insurance company, with full knowledge of facts which under the stipulation contained in the application or policy renders such policy void at its inception, issues and delivers the same and collects and retains the premium therefor, it will be deemed in law to have impliedly waived such forfeitures, and will not be permitted to allege the invalidity of the policy, in an action to recover for loss thereunder." Where a policy of insurance has been delivered and the premium collected with full knowledge of all the facts, it would operate as a fraud upon the insured if the insurance company was permitted to avoid the policy after the loss, by alleging the invalidity thereof at its inception on account of stipulations contained therein.

The same reasoning applies even if the invalidity, if any, of the

policy, is brought about at a time subsequent to the inception of the policy, by reason of some act of the insured which results in some of the conditions of forfeiture in the policy becoming operative. If in such case the insurance company desires to avoid liability upon the policy, it must, in making such election return, offer to return or tender all of the unearned premium. Unless it does so, it must be and is held to have elected to continue the policy in full force and effect. And this is true even though the premiums had all prior thereto been voluntarily paid.

In the case of Schreiber v. German American Hail Ins. Co. 43 Minn. 367, 45 N. W. 708, the following language appears: "After it [the insurance company] learned that it might elect to avoid the policy, honesty required that before so electing it should restore the money, payment of which was thus exacted. The retention of that money was—in morals, certainly—inconsistent with an intention to avoid the policy. . . . Under the circumstances it was defendant's duty as soon as it learned of the breach of condition to determine whether it would abide by the policy and retain the premiums, or restore them and elect to avoid it. It has never returned or offered to return the premiums, and, by retaining them, must be deemed to have elected to abide by the policy."

The principles in the Schreiber Case were to some extent discussed and distinguished, but not reversed, in the case of Taylor v. Grand Lodge, A. O. U. W. 96 Minn. 441, 3 L.R.A.(N.S.) 114, 105 N. W. 408.

In the case at bar the defendant admits receiving the premium for the whole time. Its agent at the time of the issuance of the policy had some information that other insurance would be procured, and the knowledge of the agent was the knowledge of the company, and immediately after the time of the loss the defendant acquired full knowledge of the other insurance, but, notwithstanding the existence of all such matters and knowledge, the defendant still retains all the premium, and claims the right to all such premium, and vigorously maintains such claim in this court, but seeks to avoid any liability upon its policy, claiming the same is of no force or effect. We disagree with the contentions of the defendant, and hold that its policy is in full force and effect, and defendant is liable thereon.

We cannot discuss all the authorities cited by the appellant, but will consider fully the two upon which appellant most relies. The first is Parsons v. Lane (Re Millers' & Mfrs.' Ins. Co.), 97 Minn. 98, 4 L.R.A. (N.S.) 231, 106 N. W. 485, 7 Ann. Cas. 1144. The appellant claims this case, with the authorities cited therein, is conclusive upon the principle, where the policy is not illegal and once attaches, and the risk is assumed, the entire premium is earned; and, if forfeiture results from breach of a promissory warranty or of a condition subsequent, the insurer cannot be required to return any part of the premium upon the theory that it is all earned when the risk attaches. Notwithstanding the case cited and the authorities therein enumerated to sustain this contention, we are satisfied that such decisions do not rest upon sound principles of justice, nor are they securely based upon the far-reaching principles of common honesty and fair dealing which should exist between the insurer and the insured, nor are they in harmony with the principles of right and equity between the parties, and are not based upon reason which merits the approval of conscience. The rule laid down in the Millers' & Mfrs.' Ins. Co. Case, and the cases therein cited to sustain the point which we are now discussing, rests upon a foundation of technicality rather than on the broad basis of justice, equity, and fair treatment to be accorded all parties to the contract. The insured is just as important a party to an insurance contract as is the insurer. If it were not for the insured there would be no insurers. The main business of courts when matters of contract between the insured and insurer comes before them is to give the contract such a construction according to its terms as would result in justice and fairness to each of the parties to the contract. We quote with approval the splendid and enduring language of Lord Mansfield in Tyrie v. Fletcher, Cowp. pt. 2, p. 666, 98 Eng. Reprint, 1297, where, speaking of the subject we are considering, he said: "Where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured or to any other cause, the premiums shall be returned, because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running a risk of indemnifying the insured, and whatever cause it would be owing to, *if he does not run the risk, the consideration for which the premium or money was put into his hands fails and therefore he ought to return it.*"

Such a principle appeals to us at once as being sound, right, just, and fair, and at once our conscience stamps thereon its approval. Upon such a principle as this for a foundation it is well to rest the point we have been discussing.

The defendant having received in cash and retained the premium for the whole time, the policy being for a definite time, and it further claiming the right to retain all of such premium, it is estopped to deny its liability upon the policy.

The second case upon which the appellant relies is the case of Hronish v. Home Ins. Co. 33 S. D. 428, 146 N. W. 588. Upon a close examination of this case we are of the opinion that it is only in point to a limited extent, for reasons which we will point out. In South Dakota, under chapter 164 of the Laws of 1909, not only is the standard form of fire insurance policy provided by such law, but the form of the policy is enacted into law, and the standard form of such policy is set out in full in such chapter of the South Dakota law. Therefore, in South Dakota, not only the form of the contract of fire insurance is provided, but such contract is enacted into a law by the legislature of that state. The enactment of the form of the policy in South Dakota into law to a large extent relieves the court of that state of the necessity of interpreting the contract of fire insurance. What is true as to South Dakota in respect to the matter we have been discussing is not true as to North Dakota. North Dakota, by § 6625, Compiled Laws of 1913, has provided a standard form for use by fire insurance companies doing business within the state, which form must correspond to a printed form of contract filed in the office of the Commissioner of Insurance, but the form of such standard policy is not enacted into law, nor has such form become part of the statutory law of this state. For this reason the standard form of policy as filed in the office of the Commissioner of Insurance of this state provides only the form of the contract of fire insurance, but does not prescribe the law of such contract, nor the construction thereof. This is clearly shown by § 6626, Compiled Laws of 1913, which reads as follows: "Policies of insurance in the form prescribed by the last section shall be in all respects subject to the same rules of construction as to their effect, or the waiver of any of their provisions, as if the form thereof had not been prescribed." It will be seen, therefore, that the legislature of South Dakota has not

only provided a form of the contract, but also the law of the contract, having made the same a part of the statutory law. That is the reason why the South Dakota court said: "Its provisions not only constitute the contract between the insurer and the insured, but also the law governing the rights of the parties as well." The same reasoning, therefore, cannot be applied to the case at bar as to the Hronish Case. The provisions of our standard form of contract of fire insurance rest upon the same basis as any other written contract, and are subject to the same rules of construction, and the law of waiver and estoppel may be applied to such contract with the same force and effect as to any other written contract.

Considering the matter of prorating, the second proposition referred to in the first part of this opinion, to which reference is also made in paragraph 4 of defendant's answer, we are of the opinion that the matter was fully and fairly considered in the court below, the court having given full, positive, and clear instructions with reference thereto to the jury, which were acted upon and followed by the jury.

The total insurance upon the barn was $2,200, $1,200 of which was in the Northwestern Fire & Marine Insurance Company. The court below instructed the jury that the defendant, if liable at all, was liable to pay 10/22 of the loss. This was a proper instruction, as it was defendant's *pro rata* share of the liability, if liability was found to exist.

We do not think it necessary to further analyze any part of the policy contract in question, nor the lightning clause, as to whether it amounted to a permit to other insurance; and as this opinion has already become quite lengthy, and as the main questions involved in this case have received quite thorough attention, we do not deem it necessary to extend the discussion any further. All of the instructions of the court which are assigned as error we are of the opinion were proper instructions, and there was no error in giving such instructions. All of the other errors assigned by appellant have been considered, including all of the rulings of the court upon testimony admitted or excluded, and we find no reversible error therein.

The judgment of the lower court is therefore in all things affirmed, with costs.

ROBINSON and CHRISTIANSON, JJ., concur in result.

BRUCE, Ch. J. I dissent.

REBECCA HOPPER, Appellant, v. GUNDER HOWARD and the Hillsboro National Bank, a Corporation, Respondent.

(166 N. W. 511.)

Judgment — evidence — supported by.
Evidence examined and *held* to support the judgment.

Opinion filed December 12, 1917. Rehearing denied February 8, 1918.

Appeal from the District Court of Traill County, Honorable *Chas. A. Pollock,* Judge.

Plaintiff appeals.

Affirmed.

Carmody & Leslie, for appellant.

Under a farming contract providing that the owner shall have and retain title and possession of all the crops raised thereunder and shall have the right to payment out of the share that might ultimately belong to the tenant or worker of the farm for all debts due him from such tenant, and for all advances made to such tenant, the owner of the land is the absolute owner and entitled to the possession of all of the crops grown, until the tenant has performed fully his part of the contract, and paid all his debts to the landowner, and until the tenant's share is set apart to him. Any third person taking any of the crops from the tenant is responsible therefor to the landowner. Angell v. Egger, 6 N. D. 391, 71 N. W. 547; Bidgood v. Monarch Elev. Co. 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561; Hawk v. Konouzki, 10 N. D. 37, 84 N. W. 563; Van Gordon v. Goldamer, 16 N. D. 323, 113 N. W. 609; Aronson v. Oppegard, 16 N. D. 595, 114 N. W. 377; Wadsworth v. Owens, 17 N. D. 173, 115 N. W. 667; Simmons v. McConville, 19 N. D. 787, 125 N. W. 304; Consolidated Land & Irrig. Co. v. Hawley, 7 S. D. 229, 63 N. W. 904; Wentworth v. Miller, 53 Cal. 9; Moulton v. Robinson, 27 N. H. 550; Edson v. Colburn, 28 Vt. 631, 67 Am. Dec. 730.

Such contracts cover hay or any other produce of the farm. Hawk v. Konouzki, 10 N. D. 37, 84 N. W. 563.

Theo. Kaldor, for respondents.

In construing a farming contract containing both printed and written matter, the matters written in with pen and ink, where there is any conflict or ambiguity, shall control. In a contract containing a written clause to the effect that upon final settlement "wheat, barley, oats, or winter rye" shall be divided, such contract does not include timothy seed grown for which the tenant himself furnished the seed to plant, and a mortgage given thereon by the tenant is superior to the contract, nor does it include crops grown from meadow land, and a mortgage on such crops is superior to the contract. A renter has an interest in crops grown under such contracts, which he may mortgage to others. Minneapolis Iron Store Co. v. Branum, 36 N. D. 355, L.R.A.1917E, 298, 162 N. W. 543.

Robinson, J. The plaintiff brings this action to recover 300 bushels of timothy seed. The bank claims the seed under a chattel mortgage duly made to it by W. H. Ambrosius. The court found in favor of the bank, and plaintiff appeals. The claim of plaintiff is based on a contract with Ambrosius for the farming of section 29, 144–51 during the years 1916, '17, and '18. The contract is in ordinary legible printing and typewriting, excepting a large paragraph, which is in microscopic print. The lessee agrees in a proper manner to farm the land and to furnish all necessary seed for one half of all the grains, wheat, barley, oats, or winter rye secured upon the farm during said years. He agrees to pay a cash rental of $2.50 an acre for the meadow land and $1.25 per acre for the pasture land on the 1st day of December in each year. The paragraph in small print, which was probably never read, contains numerous covenants on the part of the lessee, among which are that, until settlement and division of the crops, the title and possession of all hay, grain, crops, produce, stock increase, income, and products raised and grown and produced on said premises shall be and remain in the owner of the land, who may take and hold the crops, stock increase, income, and produce that would, on a division of the same, belong to the owner of the land. Now, on a division of the crops, no part of the timothy seed would belong to the owner of the land. The lessee agreed to pay $2.50 an acre for the meadow land, and it is manifest there was to be no division of the crops which grew on that land. And that is made more certain by the agreement in typewriting

to deliver to the landlord one half of the grains, wheat, barley, oats, and winter rye. This agreement fairly shows that there was to be an equal division of the cultivated crops, but there was to be no division of the crops grown on the meadow land, for which the lessee agreed to pay $2.50 an acre. The lessee had at all times an absolute title to the crops of hay and timothy seed, and had a right to mortgage the same. He had a right to mortgage his interest in all the other crops, regardless of any agreement that the title should be in the landlord. When a cropping contract is in microscopic print which cannot be read without straining the eyes, and when, by such means, it is turned into an oppressive chattel mortgage, it deserves no favor of the courts. A chattel mortgage should be a chattel mortgage and a lease should be a lease, and nothing more. When it obliges a tenant to do a thing it should not tie him down and deny him the means of doing it. A person who farms land on shares is not a capitalist. To farm the land he must often borrow and expend large sums of money, and pledge his share of the crops to secure the loan. Hence it is but proper to hold that a person who spends time, labor, and money in growing a crop has an interest in the crop and a right to mortgage his interest. As a rule that would be true even if he were a trespasser on the land. In this case the lessee took the meadow and pasture land for a cash rental, and became the owner of all the crops of grass, hay, and timothy thereon grown, and he had a right to mortgage all of the same. On August 28, 1916, to secure a large sum of money, he gave to the bank a mortgage on all the timothy seed in question. The seed has been turned into money and deposited in the bank, pursuant to a stipulation of counsel. The judgment of the trial court is clearly right, and it is affirmed.

BRUCE, Ch. J. (specially concurring). I concur in the above opinion, but on the sole ground that there is no proof that the bank had any notice or knowledge of the claim or lien of the plaintiff at the time the chattel mortgage was given to it by Ambrosius. I am satisfied that the contract gave to the plaintiff such a claim or lien.

FARMERS' EQUITY EXCHANGE, a Corporation, Respondent, v. PETER BLUM, Appellant.

(166 N. W. 822.)

In an action brought to recover damages from a vendor, occasioned by the sale of grain to which vendor had no title and of which the vendee had been deprived in a suit brought against him by the owner, it is *held:*

Sale of grain — by one having no title — damages — action for — judgment in former suit — admissible — evidence.

1. That the judgment in the former suit against the present plaintiff is admissible for the purpose of showing that he had been deprived of the grain.

Purchase of land — contract for — reservation of title to grain grown — by grantor — as security for purchase price — evidence.

2. A contract for the purchase of land upon which the grain was grown, in which the vendor reserved title to the grain grown thereon in security for the payment of the purchase price, was properly admitted in evidence for the purpose of showing lack of title in the defendant.

Land sale contract — execution of — fraud in — not affecting strangers thereto — not proper evidence — title to grain — from same source.

3. Evidence offered to show fraud in the execution of the land sale contract was inadmissible where both plaintiff and defendant were strangers to the contract, where both derived the title to the grain from the purchaser of the land, and where the purchaser had not attempted to avoid the contract on the ground of fraud. Such evidence would establish that the contract was at most voidable, and not void.

Recorded contract — for sale of land — record of — proper evidence — original not produced — not accounted for.

4. Sections 5597 and 7916, Comp. Laws 1913, construed and *held* to permit the introduction in evidence of a record of a recorded contract for the sale of land, without accounting for the nonproduction of the original contract.

Complaint — deceit — implied contract — defendant apprised of claim — sufficient — damages — for breach of warranty.

5. Though a complaint sounds in deceit, rather than implied contract, where it is sufficient to apprise the defendant of the nature of the claim made, and where the evidence supports a recovery of damages for breach of warranty of title, the judgment is within the issues presented for trial.

Evidence — verdicts — supported by.

6. Evidence examined and *held* sufficient to support the verdict of the jury.

Opinion filed December 18, 1917. Rehearing denied February 20, 1918.

Appeal from the District Court of Hettinger County, *W. C. Crawford,* J.

Affirmed.

Charles Simon, for appellant.

A fact or question which was actually and directly in issue in a former suit and was there judicially passed upon, is conclusively settled by the judgment therein so far as concerns the parties to that action and persons in privity with them. 23 Cyc. 215.

To constitute a judgment an estoppel, there must be an identity of parties and subject-matter. 23 Cyc. 1237, 1240; A. T. Albro Co. v. Fountain, 15 App. Div. 351, 44 N. Y. Supp. 150; Knickerbocker v. Worthing, 138 Mich. 224, 101 N. W. 540; Nelson v. Illinois R. Co. 98 Miss. 295, 31 L.R.A.(N.S.) 689, 53 So. 619; Goldberg v. Sisseton Loan & Title Co. 24 S. D. 49, 140 Am. St. Rep. 775, 123 N. W. 266; Grand Forks v. Paulsness, 19 N. D. 293, 40 L.R.A.(N.S.) 1158, 123 N. W. 878; State v. Coughran, 19 S. D. 271, 103 N. W. 31; McPherson v. Julius, 17 S. D. 98, 95 N. W. 428.

The original contract is the best evidence. The record thereof cannot be used unless a foundation is laid showing among other things that the original cannot be produced. American Mortg. Co. v. Mouse River Live Stock Co. 10 N. D. 290, 86 N. W. 965; Conrad v. Adler, 13 N. D. 199, 100 N. W. 722; McClerry v. Lewis, 104 Me. 33, 19 L.R.A. (N.S.) 442, 70 Atl. 540; Durkin v. Cobleigh, 17 L.R.A. 272, note.

Thos. H. Pugh and *Otto Thress,* for respondent.

The verdict will not be disturbed merely because there is a conflict in the evidence. In a proper case, like the one at bar, questions of fact are for the sole consideration of the jury, and when a jury has once passed upon them, its finding and verdict are conclusive. Lowry v. Piper, 20 N. D. 637, 127 N. W. 1046; Nilson v. Horton, 19 N. D. 187, 123 N. W. 397; Libby v. Barry, 15 N. D. 286, 107 N. W. 972.

Birdzell, J. This is an appeal from a judgment in favor of the plaintiff, and from an order denying a motion for a new trial, in an action brought to recover damages occasioned by a sale to the plaintiff by the defendant of certain grain, for the conversion of which the plaintiff was subsequently held liable in damages at the suit of one Charles H. Stoffel. It appears that Stoffel entered into a contract

with one George Doerner, in November, 1910, to sell to him the northeast quarter of section 21, township 136, range 96, upon a combined money consideration and crop payment plan. It was stipulated in the contract that the title to all the grain raised upon the land was to remain in Stoffel until sold, and when sold the proceeds were to be applied to the payment of interest, taxes, and principal. This contract was duly recorded in the office of the register of deeds. Doerner paid some cash, entered into the possession of the land, farmed it from year to year, and turned over the crops or part of them to Stoffel under the contract. This controversy arises over the crop raised in 1914. During this year it appears that Doerner raised 1,415 bushels wheat, part of which was delivered to Stoffel, and the remainder, amounting to some 785 bushels, was disposed of to other parties. It is claimed that the defendant herein obtained some 400 bushels of that portion of the grain that was not delivered to Stoffel, and that he sold the same either as his own or as that of Doerner to the plaintiff, which operates an elevator in New England. In February, 1915, the plaintiff was sued by Stoffel for the conversion of the grain which it had bought of other parties, the title to which had been reserved in Stoffel. The jury returned a verdict in favor of Stoffel for $775, upon which judgment was entered and later satisfied. This action was brought against Blum as one of the persons who had obtained and sold to the plaintiff a portion of the grain on account of which plaintiff was compelled to pay the judgment in favor of Stoffel. In the court below the action resulted in a verdict against the defendant for $290, and interest, upon which judgment was entered. Upon this appeal appellant relies for reversal upon rulings in regard to the admissibility of evidence and upon the instructions of the trial court to the jury. He also contends that there is no evidence admissible under the pleadings, upon which the verdict of the jury could be predicated. The specific rulings and instructions upon which the errors are predicated will be referred to in the order in which they are discussed in the appellant's brief.

It is claimed that the court erred in sustaining an objection to a question directed to Doerner, asking whether or not one Graeber, Stoffel's agent, had read and explained to him the contract for the sale and purchase of the land at the time it was entered into. The court sustained the objection on the theory that the judgment in the action by

Stoffel against the plaintiff was conclusive and binding upon the parties as to the terms of the contract. It matters little whether the trial court gave a correct reason for sustaining the objection to this testimony. The evidence was clearly inadmissible in this case between strangers to the contract and under the issues framed by the pleadings. It was by virtue of the terms of that contract that Stoffel was enabled in the former action to recover from his plaintiff. Plaintiff's title to the grain was disproved in that action, and in this case we are not concerned with the contract for the sale of the land further than to note that its provisions deprived the plaintiff of the grain he had purchased from Blum.

Furthermore, the same contract is in evidence in this case, and under its terms the title to the grain was in Stoffel, and could not have been either in Doerner or in his vendee, Blum. The contract cannot be reformed in this action or made to convey a meaning not warranted by its terms. It appears that Doerner was a witness in the former case, and he must have known as much about the fraud perpetrated upon him, if any, in inducing him to enter into the contract as he knew at the time of this trial. The most that can be urged against the contract is that it is voidable, not void, and under its terms the title to the grain vested in Stoffel, and would not be devested until the contract were rescinded by Doerner. There is no contention that this was even attempted. Nor could a rescission or reformation be properly decreed as against a good-faith purchaser from Stoffel; and this plaintiff, having paid to Stoffel a judgment based upon the value of the goods, occupies as favorable a position as though a purchaser of the goods from Stoffel. Plaintiff's good faith in the transaction is not questioned.

It is next contended that the court erred in admitting in evidence the record of the Stoffel-Doerner contract, without first requiring the plaintiff to account for the nonproduction of the original contract. In this connection appellants rely upon the case of American Mortg. Co. v. Mouse River Live Stock Co. 10 N. D. 290, 86 N. W. 965, and other cases adhering to a similar rule. The decision of this question in the case of American Mortg. Co. v. Mouse River Live Stock Co., supra, was based upon statutory provisions entirely different from those now governing the question. That decision was based upon § 5696 of the Revised Codes of 1899, which provided expressly that the record of a

recorded instrument, or a duly authenticated copy of the record, may be read in evidence with like effect as the original, *"on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing such record or copy."* Section 3597, Comp. Laws 1899, also provided expressly that the recording of an instrument did not entitle the instrument *"or record thereof, or the transcript of the record, to be read in evidence."* Section 5696, Revised Codes of 1899, is still in force as § 7916, Comp. Laws 1913, but § 3597 was amended in 1901 (Sess. Laws 1901, chap. 145), so that it now reads as follows (Comp. Laws 1913, § 5597): "The recording and deposit of an instrument approved and certified according to the provisions of §§ 5549, 5569, 5570, 5571, and 5572 are constructive notice of the execution of such instrument to all purchasers and encumbrancers subsequent to the recording; and all instruments entitled to record, the record thereof, or a duly certified transcript of such record, or copy of such instrument, *shall be admissible in evidence in all the courts of this state, and may be read in evidence without further proof."* It requires no argument to demonstrate that the record of an instrument entitled to be recorded, and which is recorded, is admissible in evidence under the above section without further proof, and that the rule in the case of American Mortg. Co. v. Mouse River Live Stock Co. is to that extent altered by legislation.

It is next contended that the court erred in striking out certain testimony of Doerner, relating to his understanding of the contract between him and Stoffel. This testimony was properly stricken out, as, in this case, we are only concerned with the contractual relations between Doerner and Stoffel to the extent that they afforded the occasion for the judgment against the plaintiff which deprived it of the benefit of the property it had obtained from Blum. If this action were between Doerner and Stoffel, and issues were involved looking toward a reformation or cancelation of the contract, other considerations would enter in and the rule invoked by the appellant here would be applicable.

The appellant complains of the instructions of the trial court wherein the court instructed the jury that the action was in the nature of an action for the recovery of money had and received in payment for certain grain defendant sold to the Farmers' Elevator Company, and to which grain he had no title. Also wherein the trial court told the jury

in substance that the judgment in the previous action of Stoffel against the elevator company was a binding adjudication of the rights of the parties under the Stoffel-Doerner contract, and that it determined Stoffel's ownership of the grain. It is true that the complaint seems to have been drawn upon the theory of deceit, rather than upon the theory of implied contract, but the complaint is nevertheless sufficient to apprise the defendant of the exact nature of the claim made, and the defendant is in no position to complain of an instruction that ignores the theory of deceit and limits the plaintiff's recovery to the amount actually paid out by the plaintiff to the defendant for grain sold to it by the defendant and which was grown upon the Stoffel land.

As to that portion of the instruction which embodies a reference to the adjudication in the Stoffel action against this plaintiff, little need be said in addition to what has been stated heretofore in this opinion. While it is true that Blum was not a party to that judgment, and is not bound by it in so far as it imposes liability, the judgment was nevertheless admissible as heretofore pointed out. No prejudice could have resulted from this instruction, as, under the terms of the contract which Blum is not in a position to dispute for the reasons hereinbefore set forth, the jury could not have done otherwise than to have found the title in Stoffel.

It is also contended that there is no evidence supporting the verdict of $290.10 against Peter Blum, but that, on the contrary, the evidence establishes conclusively that Peter Blum received but $120.10 in payment of three loads of the six, upon which the verdict is based. The evidence of Van Burgen, the elevator man, is to the effect that the scale tickets were made out to the order of Peter Blum, but that when Blum came in for his check Van Burgen told him that, inasmuch as there was some controversy about the ownership of the grain, he would draw a check in favor of Doerner, and that Blum could get Doerner to indorse the check; that he asked Blum if that would be all right, to which Blum replied in the affirmative. The circumstances of the sale were fully presented to the jury, and, from all the facts and circumstances surrounding the transaction, we believe the jury were warranted in finding that Blum sold the grain as his own, and merely consented that the check should be drawn in favor of Doerner.

A careful perusal of the affidavits submitted in support of the mo-

tion for a new trial convinces us that the trial court did not err in denying a new trial. After considering all of the assignments of error which were argued in appellant's brief, we are convinced that the judgment is correct and should be affirmed.

It is so ordered.

GRACE, J. I dissent.

ROBINSON, J. (dissenting). This is an appeal from a judgment against defendant for the value of 296 bushels of wheat at 98 cents per bushel. This wheat he sold to the elevator company, receiving payment in a check payable to the order of George Doerner. The claim is that he had no title, and that by suit and judgment the company was compelled to pay another party for the same wheat, and also that the judgment against the company is conclusive that defendant had no title to the wheat. And, contrary to the fundamental principles of law, it has been held that defendant is concluded by a judgment in the suit to which he was not a party or a privy.

In each of said actions, the complaint and the evidence show that in November, 1910, Stoffel agreed to sell to George Doerner a quarter section of land for $4,400 in cash and crop payments. The contract is in writing and in the form quite usual in cropping contracts. It is agreed that legal title to all grain raised on the land during each year shall be in the owner of the land. As the contract regarding the title of the grain was made to secure payments, it was in effect a chattel mortgage. It gave the landowner merely a lien on the grain, but it was not executed and filed as a chattel mortgage. It was recorded, but the record is not noticed to subsequent purchasers. Under this contract Doerner farmed the land during the years 1911, 1912, 1913 and 1914. During the last year he raised on the land 1,415 bushels of wheat. He gave Stoffel about half of the wheat, and from the remaining half he gave Peter Blum 296 bushels, which he sold the company at 98 cents per bushel, receiving a check payable to the order of George Doerner. Doerner sold the elevator company the remainder of the wheat.

On February 16, 1912, Stoffel, the owner of the land, commenced an action against the company to recover the value of the wheat purchased from Doerner and from Peter Blum, and recovered a judgment for

$775.50 and costs. That action was commenced by serving a summons and complaint on the secretary of the company, who gave an admission of service and retained Otto Thress to appear as his attorney. Then on February 25, nine days after the service, an order was made for the entry of judgment. The judgment roll is in evidence, and it contains the summons, complaint, the order for judgment, and the judgment and the check given to Peter Blum in the name of George Doerner, and indorsed by George Doerner, but the judgment roll contains no answer by the company. It shows no defense, but it does show marks of collusion and a design to permit judgment in haste, and then to bring an action against Doerner and an action against Blum by the same attorney who permitted the hasty and collusive judgment against the company. It is true that, in said rush action, George Doerner and Peter Blum were subpœned and appeared as witnesses for the plaintiff, but they were given no opportunity to defend the action and there was no bona fide defense. Pter Blum is a poor, ignorant man, who cannot speak or read English. When called as a witness, the chances are he knew nothing of the nature of the proceeding.

Regardless of the cropping contract, the court should take judicial notice of the conditions governing such contracts. The cropper is never a capitalist. He cannot live on air. He cannot produce a crop without using a part of it to finance the deal. Those who furnish seed wheat, do work to produce or thresh a crop, have a lien for the same, and they have a right to receive pay from the crop they aid in producing. Peter Blum did such work, and he had a right to his three loads of wheat. Stoffel got his share of the wheat. He had no right to hog it all.

In regard to the law of the case it is this: 1. An express grant of title conveys merely a lien when it is made to secure a debt; and a lien, or contract for a lien, conveys no title to the property subject to the lien. Comp. Laws, § 6709. 2. When a party brings an action to recover on a lien, he must state the amount due on the lien to show the extent of his interest in the property. 3. When a party has a lien on lands and crops, a subsequent purchaser or lien holder may protect himself by paying and acquiring the prior liens, and in that manner the company might well have protected itself. 4. The complaint in this action against Peter Blum and the former complaint against the

company failed to state a cause of action. Neither complaint shows that anything is due to Stoffel on the land contract. The cash payment and the crops of three years may have paid the price of the land. Neither the complaint nor the evidence shows anything due on the contract. 5. Peter Blum was in nowise bound by the judgment against the company, even if it were not a collusive judgment, and still the trial court held that judgment binding on all parties. In a collusive action against the company, it seems there was a jury, and in this action the court instructed the jury thus: "The court instructs you as a matter of law that in a previous action by which a verdict of the jury determined the rights of the parties under the previous contract is binding, and that judgment adjudicating as to the rights under that contract, and under the contract Stoffel is entitled to the possession and was the owner.

"The court instructs you as a matter of law the previous judgment adjudged them to pay directly to the original owner of the grain under the contract, so that now, from the evidence, has the plaintiff established that the defendant procured grain from George Doerner raised on the quarter section described in the complaint. If so, how much and what was paid therefor? Then they are entitled from Peter Blum that amount back." Thus the court directed a verdict against Blum, and that was gross error.

The judgment is binding only on the parties to the action or their privies, and a privy is one who stands in the shoes or seat of one from whom he derives his title. A privy to a deed or judgment takes as an heir or by title subsequent to the deed or judgment. To say that Blum is in any way concluded or bound by judgment recovered against Doerner, subsequent to the sale and delivery of the wheat to Blum, is contrary to the first principle of law. Manifestly the judgment should be reversed and a new trial ordered.

On Petition for Rehearing.

BIRDZELL, J. In the petition for rehearing, counsel for the appellant emphasizes his contention that the evidence is insufficient to support the verdict, for the reason that it appears that the grain for which the check of $290.10 was given was delivered to the elevator by Blum

before the threshing had been done upon the Stoffel land. It is true that there is strong testimony tending to show that the grain which Blum hauled to the plaintiff elevator and for which he was paid by the check, exhibit "A" in this action, was grown on other land, but there is also testimony, which went in without objection, from which the jury would be warranted in finding that the check in question covered grain that had been hauled from the Stoffel land. In the state of the record in this case, that question was a question for the jury, and they have decided it contrary to the appellant's contention. We do not feel warranted in disturbing the verdict.

The petition for rehearing is accompanied by a certified statement from the clerk of the district court of Hettinger county, to the effect that the plaintiff in this action obtained a judgment against George Doerner for the sum of $1,234.28, and costs, which was docketed on February 29, 1916, and satisfied on May 8, 1917. The certificate does not identify the cause of action in which the latter judgment was obtained as embracing the cause upon which the recovery of the plaintiff in this action was based. Even if the cause of action in the instant case were embraced in the judgment referred to, such fact would constitute no ground for the reversal of the judgment of the trial court or the granting of a rehearing herein. If the appellant's contention as to the identity of the causes of action, however, is correct, when the fact is established in the district court, in a proper proceeding, the respondent herein would be precluded from enforcing the judgment rendered in this action. Obviously, a judgment creditor who obtains separate judgments against separate defendants for a single cause is entitled to but one satisfaction.

The petition for rehearing is denied.

MARTIN ROTHECKER, Axel Lyng, and K. Rensla, as Supervisors of Falsen Township, and Falsen Township, a Municipal Corporation, Respondents, v. CHARLES WOLHOWE, Appellant.

(166 N. W. 515.)

Highway — establishment of — county commissioners — statute — compliance with — damages — assessment — payment — property owner — mere acquiescence — waiver of rights — is not petition for highway — signed by such owner — improvements made — knowledge of owner — aid given by in construction — legality of highway — cannot question — limited to damages.

Where county commissioners seek to establish a highway under the provisions of § 1927 of the Compiled Laws of 1913, they should comply with the provisions of the statute in regard to the assessment and payment of damages; and where such has not been done mere acquiescence by a property owner in the establishment of the road will not in itself amount to a waiver of the right to such determination of damages. Where, however, the property owner himself signed the petition for the highway, and stood by while improvements were made on an approach thereto, and in order that the same might be used, and for a number of years acquiesced in the use of the road, and himself aided in the construction of a small improvement thereon, he will not be allowed to question the right to the highway or to obstruct the use thereof, but will be limited to his right to damages alone. This right, however, may be asserted in an action which is brought against him for an injunction to restrain the obstruction of the highway, and even though the injunction is allowed.

Opinion filed January 18, 1918. Rehearing denied February 20, 1918.

Action to restrain the obstruction of a highway.

Appeal from the District Court of McHenry County, Honorable *A. G. Burr,* Judge.

Judgment for plaintiffs. Defendant appeals.

Modified.

C. W. Hookway and *E. R. Sinkler,* for appellant.

It is admitted in this case that no order such as is required by law was ever made or filed by the county commissioners. A public highway is never legally established until the making and filing of the order. Comp. Laws 1913, § 1927; Wayne v. Caldwell, 1 S. D. 483, 35 Am. St. Rep. 750, 47 N. W. 547.

No improvements were put upon the so-called highway, on the land of this defendant. No money was expended on same on his land. Defendant therefore is not estopped. Stewart v. Stevens, 10 Colo. 440, 15 Pac. 786.

Bagley & Thorpe, for respondents.

Even when the county commissioners failed to make and file the required order declaring a public highway, where the defendant, the owner of lands affected, stood by and saw work being done and aided to some extent in the same, and where such highway was used thereafter, he cannot question the legality of such highway. By his acts and conduct he is estopped. Cory v. Spencer, 67 Kan. 648, 63 L.R.A. 275, 73 Pac. 920; Lawrence v. Leidigh, 58 Kan. 594, 62 Am. St. Rep. 631, 50 Pac. 600.

He must show in any event that he was prejudiced by the laying out of the highway in some substantial way at the time, and that by reason of the acts of the county commissioners his position was changed to his detriment. Semerad v. Dunn County, 35 N. D. 437, 160 N. W. 855.

"Where a highway has once been opened and put into use, its existence or nonexistence cannot be questioned in a prosecution for obstructing it on account of any irregularity of the supervision in opening it." Miller v. Porter, 71 Ind. 521; 37 Cyc. 128, and cases cited; Ekwortzell v. Blue Grass Twp. 28 N. D. 20, 147 N. W. 726.

The defendant is estopped to question the legality of this highway.

"Besides these owners have allowed the town to expend thereafter sums in making the highway and building bridges thereon without raising any question of the validity of the order laying it out. Under these circumstances both the defendant and the grantor have acquiesced in the validity of the highway altogether too long to be heard now to dispute it." State v. Wertzel, 62 Wis. 184, 22 N. W. 150; 16 Cyc. 91, and cases cited; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; Ekwortzell v. Blue Grass Twp. 28 N. D. 20, 147 N. W. 726; Orient Min. Co. v. Freckleton, 27 Utah, 125, 74 Pac. 652.

Bruce, Ch. J. This is an appeal from a judgment enjoining the defendant from obstructing a certain highway within Falsem township, in McHenry county, North Dakota.

The stipulated facts are as follows:

"There was, on the 31st day of March, 1909, or about that time, a

petition for the laying out of this certain road, or highway, described in the complaint, signed by a great many taxpayers and voters of the vicinity, and, among others, signed by this defendant,—the road going over land owned by the defendant, and the land in controversy. This was properly posted, as the affidavit will show; filed with the county commissioners,—it not being organized into a township,—and the county commissioners had hearing on the petition; fixed a day for hearing, and notice of hearing was properly given by posting and service. The county commissioners met at the time set for hearing, as appears by the records of the auditor; that is, that on the return day of that notice, the time set for hearing, the commissioners were in session; but there the proceedings, so far as the county auditor's office is concerned, were stopped,—there is nothing to show any road was ever laid out by any order in writing, or any formal order, and no award shown, if any. And there is nothing to show any claim for damages by anybody."

"The record is entirely silent as to any further proceedings. There is no showing whatever as to whether the petition was taken up or not. The facts, however, further are that, immediately after this time, the county commissioners expended a large amount of money in the improvement of this road, building bridges and so on. And the road was opened to the public for use, and has been used all the time since then until the defendant attempted to stop its use."

In addition to this stipulation the evidence shows that a notice of a day of hearing was served upon the defendant, but that he made no appearance before the board of county commissioners to object to the laying out of the road. He testifies that he supposed for over three years that the final order had been made. He accepted material from the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company, which was given to the people of the county for use on the road and helped to construct with it a bridge 6 yards south of the quarter line. He, it is true, says that he did not think that there would be any road there, but he thought that he would have the bridge anyway; but the fact remains that the lumber was given for the improvement of the road. He permitted McHenry county to spend over $2,000 in constructing a bridge over the Mouse river, which, although not directly on the line, connected the travel on this road and would serve but little purpose without the road. The record also shows that the road was but a short distance from

the defendant's home and buildings, and that there had been continual travel in the vicinity of said road and upon the same ever since 1886.

The first contention of the defendant is that, before an injunction may issue restraining a property owner from interfering with the free use by the public of a thoroughfare which crosses through his land, it must first be established that a public highway exists. He maintains that the record does not disclose that such highway was ever legally laid out. He relies upon § 1927 of the Compiled Laws of 1913, which provides: "Whenever such board of county commissioners or supervisors shall lay out, alter, or discontinue any highway, they shall cause a survey thereof to be made when necessary, and they shall make out an accurate description of the highway so altered, discontinued or laid out, and incorporate the same in an order to be signed by them, and shall cause such order, together with all the petitions and affidavits of service of notice, to be filed in the office of the county auditor, if by county commissioners, and in the office of the town clerk if by township supervisors, who shall note the time of filing the same; but on the refusal of said board to lay out, alter or discontinue such road they shall note the fact on the back of the petition and file the same as aforesaid. All orders, petitions and affidavits, together with the award of damages, shall be made out and filed within five days, after the date of the order for laying out, altering or discontinuing such highway. But the county auditor or town clerk shall not record such order within thirty days, nor . . . then unless such order is confirmed, and when such order, together with the award, has been recorded by said county auditor or town clerk as the case may require the same shall be filed in the office of the county auditor. And in case the board having jurisdiction shall fail to file such order within twenty days they shall be deemed to have decided against such application."

He also relies upon the provisions of the statutes, which provide:

"1929. The damages sustained by reason of laying out, altering or discontinuing any road may be ascertained by the agreement of the owners and county commissioners or township supervisors, as the case may be, and unless such agreement is made, or the owners shall, in writing, release all claim to damages, *the same shall be assessed in the manner hereinafter prescribed before the same is opened, worked or used.* Every agreement and release shall be filed in the town clerk's office when

with a township and in the county auditor's office when with a county and shall forever preclude such owners of land from all further claims for damages. In case the board and the owners of land claiming damages cannot agree, or if the owner of any land through which any highway shall be laid out, altered or discontinued is unknown, the board shall in their award of damages specify the amount of damages awarded to all such owners, giving a brief description of such parcel of land in their award; the board having jurisdiction shall assess the damages at what they deem just and right to each individual claimant with whom they cannot agree. Supervisors shall deposit a statement of the amount of damages assessed with the town clerk, county commissioners with the county auditor, who shall note the time of filing the same. The board in assessing damages shall estimate the advantages and benefits the new road or alteration of an old one will confer on the claimant for the same as well as the disadvantages. Any person living on United States land who has made his declaratory statement for the same in the proper land office, shall for all the purposes of this article be considered the owner of such lands."

"1935. Any person who shall feel himself aggrieved by any determination or award of damages made by the supervisors of any town or towns, or by the commissioners of any county, either in laying out, altering or discontinuing, or in refusing to lay out, alter or discontinue any highway or cartway, may, within thirty days after the filing of such determination or award of damages, as provided in this chapter, appeal therefrom to a justice of the peace of the county for a jury to hear and determine such appeal; provided, the amount of damages allowed in such appeal does not exceed $100."

"1938. In case the amount of damages claimed exceeds $100, appeal may be taken within thirty days to the district court of the county in which said damages are sustained, by filing in the office of the clerk of such court a bond to be approved by the judge of such district court, or the court commissioner, or the county auditor of the county, of the same nature as provided in the two preceding sections and by the service of a written or printed notice of such appeal upon the chairman of the board of supervisors or county commissioners as the case may be, signed by the party making the appeal, or his attorney. Such appeal shall bring before the appellate court the propriety of the amount of damages

and all matters referred to in such notice of appeal; unless the parties otherwise agree, the matter shall be submitted to a jury and tried as other appeal cases are tried, and the court or jury, as the case may be, shall reassess the damages aforesaid, and make the verdict conform to the justice and facts in the case; but the rule for ascertaining and fixing such judgment shall be based upon the same principles as the supervisors or commissioners were required to adopt in originally determining the same; and upon judgment being rendered the clerk of said court shall serve a certified transcript of such judgment upon the chairman on whom the notice of appeal was served as aforesaid. If the determination of the board of supervisors or commissioners appealed from be affirmed, or if the amount of damages allowed be reduced, . . . or if such determination shall be altered, modified or reversed in said district court, otherwise than as to the amount of damages, such costs and disbursements shall be paid by the town or county, as the case may be; said costs and disbursements to be taxed and adjusted as in other cases in said district court, and judgment entered therefor in like manner."

He maintains that there must be some record by which the public and private rights in a proposed public highway are clearly defined.

He also maintains that there is no award of damages or pretense of an award.

The plaintiffs on the other hand, maintain that the defendant is estopped from questioning the legality of the road by reason of his silence, his acquiescence, and his conduct.

There is merit in the contention that no award of damages was made or reported to the board. There is nothing in the record to show that even the report of the viewers was acted upon, and there is certainly no evidence that the board in any way complied with the provisions of § 1927, which requires them to "make out an accurate description of the highway so altered, discontinued or laid out and incorporate the same in the order to be signed by them, and shall cause such order together with all the petitions and affidavits of service to be filed in the office of the county auditor," etc. Nor is there any compliance shown with the provision of the same section that "all orders, petitions and affidavits together with the award of damages shall be made out and filed within five days after the date of the order for laying out, altering, or discontinuing such highway;" nor is there any answer or de-

fense, unless it be estoppel, to the provision of the same section that "in case the board having jurisdiction shall fail to file such order within twenty days, they shall be deemed to have decided against such application."

There is, it is true, a claim that the petition was granted, but the proof falls far short of showing the issuance of even a verbal order, or that any finding of damages or lack of damages was made by the county commissioners. All that the record shows is the acceptance of the petition, and the passage of a motion to appoint a board of viewers and to fix the date of hearing of the report of the viewers and complaints of said landowners, if any, on the 6th day of April, 1909.

The testimony is as follows:

Q. Have you the records here that will show the proceedings of the board of county commissioners of this county on March 17, 1909?

A. Yes, sir.

Q. I will ask you to turn to the proceedings of the board of county commissioners of that date, and state what the record shows in reference to the granting of this road petition.

The Court: Here is the record for that date.

A. The record shows a road petition, signed by A. E. Walley and others, asking to have a certain highway laid out along the Mouse river in a northwesterly direction, was accepted and approved. After taking this petition under consideration the motion was made, seconded, and carried, the same was accepted, and a board of viewers appointed by the chairman, and consisting of A. G. Anderson, M. G. Myhre, and J. B. Reider. The auditor was also instructed to get out the proper notices of hearing and to have the same posted, according to law. Also, to have personal service made on the owners of the land through which the said proposed highway shall run.

The date of hearing report of viewers and complaint of said landowners, if any, shall take place on the 6th of April, 1909, at 2 o'clock P. M.

Q. Now, do you know if there is anything in the records, or any order made by the board of county commissioners of McHenry county, declaring that a public highway?

A. I do not.

Q. Further than what you have already testified to?

A. I do not.

Q. As a matter of fact, have you searched the records of your office for any orders, or for an order of the board of county commissioners declaring that opened up and dedicated to the public as a highway?

A. I have looked for such an order, but found none.

Q. As a matter of fact, you have made a pretty thorough search for such an order, have you not?

A. I have, for the order on that road and many others, and I have not found any. *It seems the board always quit when they got that far.*

It is very clear that the defendant could have enjoined the plaintiff from taking possession of the highway before the provisions of the statute had been complied with and the award of damages made, or in the proper case maintained an action of ejectment. 10 R. C. L. 228, 231; Diedrichs v. Northwestern Union R. Co. 33 Wis. 219; Bohlman v. Green Bay & L. P. R. Co. 30 Wis. 105; Southern R. Co. v. Hood, 126 Ala. 312, 85 Am. St. Rep. 32, 28 So. 662.

There is in short no escape from the conclusion of the supreme court of Nebraska when in the case of Kime v. Cass County, 71 Neb. 677, 101 N. W. 2, 8 Ann. Cas. 853, it said: "There are two vital matters disclosed thereby upon which the conclusion is based, both of which, we think, are justified by the record. The first is that no damages were appraised or provisions made for their payment before or at the time of the attempted establishment of the alleged public road in controversy. Under the Constitution of 1866 . . . as well as under that of 1875, . . . such omission defeated the alleged right to appropriate the land to a public use. If, as counsel for appellee contend, the Statute of 1866, under which the proceedings were had, contemplated that the right of the landowner should be treated as waived by failure to demand compensation before or at the time of the taking, we are of opinion that to that extent the enactment was void. If the legislature could rightly require of the landowner one affirmative and initiatory act as a condition precedent to obtaining damages, they might require of him any other, or a series of acts which might be difficult or onerous, or, in some circumstances, impossible of performance, and so the constitutional guaranty might thus be seriously impaired or wholly frittered away. We are of opinion that the spirit, if not the letter, of the Constitution, requires that the public seeking to

appropriate private property to its use should, unless damages have been waived by some affirmative and unequivocal act, take steps of its own motion to ascertain their amount and secure their payment, and that mere passive acquiescence by an individual in the appropriation of property, unaccompanied by any conduct indicative of affirmative assent thereto, should not, unless continued for the statutory period of limitations, be regarded as a waiver of his rights."

It may be true that where a property owner has stood by and allowed expensive improvements to be constructed upon his land, and the property to be taken for a public use, as where he allows a railway company to construct a line upon a public street and to equip and operate the same for a year, his only remedy will be an action for damages. See Louisville, N. A. & C. R. Co. v. Soltweddle, 116 Ind. 257, 9 Am. St. Rep. 852, 19 N. E. 111.

But be this as it may, there is no conclusive proof of any such standing by in the case at bar.

The record shows that the trail had been used for a number of years with the permission of the defendant, like so many of the roads and trails throughout North Dakota. This, however, did not preclude the defendant from contesting the right at any time until prescriptive rights had been acquired, and his acquiescence, after the proceedings which were taken by the board in the case at bar, was no different than it had been in the past.

In the case of Byer v. New Castle, 124 Ind. 86, 24 N. E. 578, it is held that "in proceedings to enjoin a town from opening a street," and where "it appeared that the record of the board of trustees failed to show that they accepted the report of the commissioners appointed to assess benefits and damages within twenty days from the filing of the same with the town clerk as" declared "by Revised Statute Ind. 1881, §§ 3370–3372 . . . , parol evidence was inadmissible to show that the trustees had actually accepted the report within the time prescribed." And this seems to be the general rule. See 1 Elliott, Roads & Streets, 3d ed. § 409. We do not, however, have to go so far as this in the case at bar, nor do we desire to express an opinion on the subject. It is sufficient to say that in the case at bar there is no pretense that any estimate of damages was ever made or that any final order was ever entered. The only testimony on the subject is by the

auditor. In answer to the question whether he had made a thorough search, he answered, "I have for the order on that road and for many others, and I have not found any. *It seems the board always quit when they got that far.*"

In spite of the provision of § 1927, which provides that "in case the board having jurisdiction shall fail to file such order within twenty days they shall be deemed to have decided against such application," it may be that, if there were positive proof that the order for laying out the highway had been entered, the defendant would be estopped to deny the existence of the road, since he himself signed the petition. See 2 Elliott, Roads & Streets, 3d ed. § 733. The signing of the petition, however, did not estop him as to subsequent improper steps and irregularities not caused thereby. See 2 Elliott, Roads & Streets, 3d ed. § 733; McLauren v. Grand Forks, 6 Dak. 397, 43 N. W. 710.

The fact that one signs a petition for a highway which is to run through his land is in itself no waiver of the provisions of the statutes in relation thereto and under which alone it may be dedicated, and a person may well consent to the opening of a highway, but at the same time vigorously protest against his property being taken therefor without an award of damages. Propst v. Cass County, 51 Neb. 736, 71 N. W. 748; Lewis v. Lincoln, 55 Neb. 1, 75 N. W. 154.

The general rule of law in all cases of condemnation of course is that the damages shall be paid, or a finding be made that none exist, before the property is actually taken. The constitutional provision is clear that "private property shall not be taken or damaged for public use without just compensation having been first made." And though this provision is, in North Dakota, somewhat modified by the words, "no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money or ascertained and paid into court" (Const. § 14), this qualification merely applies to rights of way which have been already dedicated to a public use.

The statute, too, in the case at bar expressly provides that such damages "shall be assessed in the manner hereafter prescribed before the same (highway) is opened, worked, or used." Comp. Laws 1913, § 1929.

So far all of the members of this court are agreed. The majority,

however, though not the writer, are of the opinion that the injunction should be granted, and this on account of the delay on the part of the defendant, the fact that he himself signed the petition for the highway, and that he afterwards stood by and allowed the so-called Masteller bridge to be constructed, as well as the small bridge upon his own land.

The judgment of the District Court is therefore affirmed, but without prejudice to the defendant to file additional pleadings, and in this action to prove and recover his damages for the taking of his property, and the construction of the highway, if, in fact, any there have been.

ROBINSON, J. I concur in result.

STATE OF NORTH DAKOTA EX REL. SCHOOL DISTRICT NO. 94, a Corporation, Respondent, v. W. R. TUCKER, Auditor of Cass County, North Dakota, J. W. Riley, Superintendent of Public Schools, Cass County, North Dakota, John Schmitz, T. M. Crawford, H. H. Vowles, and Special School District No. 33, Tower City, a Corporation, Appellants.

(166 N. W. 820.)

School board — special meeting of — arbitrator appointed — meeting not called in manner prescribed by statute — absent member — not notified — appointment of arbitrator — not binding on school district.

1. An appointment of an arbitrator which is made at a special meeting of a school board which is not called in the manner prescribed by the statute, and from which one of the members is absent on account of having received no notice thereof, is not binding upon the school district.

Taxes — levied and assessed — not collected — annexation to school district — portion of another district — assets — funds on hand — debts — interests of respective parts — equalized.

2. Taxes levied and assessed, but uncollected, should be taken into account, under the provisions of § 1328 of the Compiled Laws of 1913, which, in the case of the annexation by one school district of a portion of another, provides for the appointment of a board of arbitrators, and that "such board shall take an account of the assets, funds on hand, the debts properly and justly belonging to or chargeable to each corporation, or part of a corporation affected by

such change, and levy such a tax against each as will in its judgment justly and fairly equalize their several interests."

Arbitrators — minority of number — failure to meet majority — after due notice — constitutes dissent — from action taken — majority award — rendition of — authorized when.

3. The failure of one or a minority of a number of arbitrators to appear and act with the majority, after a sufficient notice and reasonable opportunity therefor, constitutes substantially a dissent from the action of the majority, which will enable the latter to proceed in the absence of such member or minority to the rendition of a majority award, in a case where a majority award has been authorized, and unless an unanimity of action is required by the statutes.

Opinion filed February 20, 1918.

Mandamus to compel a board of arbitrators appointed under the provision of § 1327 of the Compiled Laws of 1913, to reconvene and to cause a levy to be made.

Appeal from the District Court of Cass County, Honorable, *A. T. Cole,* Judge.

Judgment for plaintiff. Defendants appeal.

Reversed.

A. A. Twichell, for appellants.

Special meetings of school boards are called on notice of forty-eight hours before meeting, left at residence or a personal service. Comp. Laws, 1913, § 1247.

Meetings, except stated meetings, are invalid unless members are duly notified as required by statute. 10 Cyc. 323 (2) and cases cited.

School officers possess only such powers as are granted by statute or result by fair implication from those so granted. Watts v. McLean, 28 Ill. App. 537.

Statutory powers given to school boards will not be exempted by implication, but in determining their extent and scope a strict interpretation will be adopted, and any ambiguity or doubt must be resolved in favor of the public. Seeger v. Mueller, 133 Ill. 86, 24 N. E. 513.

The school directors may bind the district by a contract made at a meeting at which the third member was present, but no contract can be made except at a meeting, and no meeting can be held unless the

absent member had due notice. School Dist. v. Bennett, 52 Ark. 511, 13 S. W. 132.

But if a single member having the right to vote is not notified in the prescribed manner, and is absent and refuses to consent to proceedings had at a meeting, such proceedings are illegal and void, unless the charter or governing statute otherwise provides. 10 Cyc. 326, (9) and cases cited; Stanhope v. School Directors, 42 Ill. App. 570; Burns v. Thompson, 64 Ark. 489, 43 S. W. 499.

A board of education can perform official acts only when a quorum is assembled, as a board, by due notice to all the members. Cunningham v. Board of Education, 53 W. Va. 318, 44 S. E. 129; Beck v. Kerr, 75 App. Div. 173, 77 N. Y. Supp. 370; 10 Cyc. 324 (4) and cases cited; Hunt v. Norwich School Dist. 14 Vt. 300, 39 Am. Dec. 225; 35 Cyc. 903 (4); Schafer v. School Dist. 116 Mich. 206, 74 N. W. 465.

Such a meeting, although irregularly assembled, may be valid if all members attend and act. 10 Cyc. 323 (D) and cases cited.

A custom or usage repugnant to the express provisions of the statute is void; and whenever there is a conflict between a custom or usage and the statute, the statute must prevail. 12 Cyc. 1054 (2) and cases cited.

The indebtedness of or between school districts shall be equalized. Comp. Laws, 1913, § 1327.

If the submission provided for a time and place of meeting of the arbitrators, the arbitrators must meet at such time and place. 3 Cyc. 639 (2) and cases cited.

Interested parties are always entitled to a hearing before a board of arbitration. 3 Cyc. 638 (d) and cases cited; Barrows v. Sweet, 143 Mass. 316, 9 N. E. 665.

Mistakes of arbitrators may be corrected either by themselves or by the court. First Nat. Bank v. Brenneman, 114 Pa. 315, 7 Atl. 910.

At such meeting of arbitrators all interested parties have a right to be heard by proof and argument. Hart v. Kennedy, — N. J. Eq. —, 20 Atl. 29.

The hearing of testimony by arbitrators, in the absence of and without notice to a party, is fatal to an award against said party. Vessel Owners' Towing Co. v. Taylor, 126 Ill. 250, 18 N. E. 663; Citizens

Ins. Co. v. Hamilton, 48 Ill. App. 593; Dormoy v. Knower, 55 Iowa, 722, 8 N. W. 670; Curtis v. Sacramento, 64 Cal. 102, 28 Pac. 108; McFarland v. Mathis, 10 Ark. 560; Hills v. Home Ins. Co. 129 Mass. 345; Wood v. Helme, 14 R. I. 325; Warren v. Tinsley, 3 C. C. A. 613, 2 U. S. App. 509, 53 Fed. 689; Conger v. Dean, 3 Iowa, 463, 66 Am. Dec. 93.

The award of arbitrators must be in accordance with the submission. Fooks v. Lawson, 1 Marv. (Del.) 115, 40 Atl. 661; Brown v. Mize, 119 Ala. 10, 24 So. 453; Century Dig. 1899 p. 364; Century Dig. 1898 p. 344, note 28.

The state board of arbitration is bound to observe those broad rules of law and equity without which a just decision cannot be had. They have quasi judicial powers. New Orleans City & Lake R. Co. v. State Bd. of Arbitration, 47 La. Ann. 874, 17 So. 481.

Arbitrators are not partizans. They represent both parties. 3 Cyc. 625 (b) and cases cited.

The board did not consider the matters which the law compels its members to consider,—such as assets, funds on hand, schoolhouse, school sites, furniture and fixtures, school levy, and cash in treasury. Comp. Laws, 1913, § 1328; McCavick v. Independent School Dist. 25 S. D. 449, 127 N. W. 476; School Directors v. School Directors, 81 Wis. 428, 51 N. W. 871, 52 N. W. 1049; School Dist. v. School Dist. 118 Wis. 233, 95 N. W. 148; 3 Cyc. 664 (A) and cases cited.

An award which is void because of contravention of mandatory provisions of a statute is incapable of ratification by the court, and cannot be enforced. 3 Cyc. 754 (A), 818 (2) and cases cited.

A majority of the arbitrators must be present at the meeting, and a refusal of a minority to act after being duly notified is equivalent to a dissent from the award, and a majority may proceed unless unanimity of action is required by statute. 3 Cyc. 654 (11) and cases cited; Doyle v. Patterson, 84 Va. 800, 6 S. E. 138; Hewitt v. Craig, 86 Ky. 23, 5 S. W. 280.

M. A. Hildreth, for respondent.

There being no charge of corruption or bad faith in the arbitration, if they made an error in judgment, the award cannot be disturbed by this court. Perkins v. Giles, 50 N. Y. 228; New York Lumber & Wood Working Co. v. Schneider, 119 N. Y. 475, 24 N. E. 4; Re Burke,

191 N. Y. 437, 84 N. E. 405; Green-Shrier Co. v. State Realty & Mortg. Co. 199 N. Y. 70, 92 N. E. 98.

Such decisions are favored by the courts. Hackney v. Adam, 20 N. D. 131, 127 N. W. 519; Johnsen v. Wineman, 34 N. D. 116, 117, 157 N. W. 679; Caldwell v. Brooks Elevator Co. 10 N. D. 575, 88 N. W. 700; Karthaus v. Ferrer, 1 Pet. 222, 7 L. ed. 121, and cases cited; Burchell v. Marsh, 17 How. 344, 15 L. ed. 96.

In the absence of fraud or collusion, the award cannot be impeached. Diedrick v. Richley, 2 Hill, 271; Wood v. Auburn & R. R. Co. 8 N. Y. 160; Robertson v. M'Niel, 12 Wend. 578; Burnside v. Whitney, 21 N. Y. 148; Pierce v. Kirby, 21 Wis. 125; Conger v. Dean, 3 Iowa, 463, 66 Am. Dec. 93; Wood v. Tunnicliff, 74 N. Y. 38.

Corporations may submit demands to arbitration in the same manner as individuals, unless the charter or the statute prohibits it. Brady v. Brooklyn, 1 Barb. 584; Kane v. Fond du Lac, 40 Wis. 495; People ex rel. Benedict v. Oneida County, 24 Hun, 413; Campbell v. Upton, 113 Mass. 67.

It is not necessary that there be an express agreement to abide by the award made, for the law implies this from the submission. Valentine v. Valentine, 2 Barb. Ch. 430; Byers v. Van Deusen, 5 Wend. 268; Wood v. Tunnicliff, 74 N. Y. 38.

Plaintiff's action is upon the award. It is no defense that the award is contrary to law. Jackson ex dem. Van Alen v. Ambler, 14 Johns. 96; Shepard v. Watrous, 3 Caines, 166; Cranston v. Kenny, 9 Johns. 212; Mitchell v. Bush, 7 Cow. 185.

The decision of the arbitrators is conclusive as well in respect to questions of law as to those of fact. Emmet v. Hoyt, 17 Wend. 410; Winship v. Jewett, 1 Barb. Ch. 173; Fudickar v. Guardian Mut. L. Ins. Co. 62 N. Y. 392; Perkins v. Giles, 50 N. Y. 228; Morris Run Coal Co. v. Salt Co. 58 N. Y. 667.

Every reasonable intendment will be indulged for the purpose of upholding the award. Hiscock v. Harris, 74 N. C. 108; Curtis v. Cokey, 68 N. Y. 300; Locke v. Filley, 14 Hun, 139; Ott v. Schroeppel, 5 N. Y. 482; Unterainre v. Seelig, 13 S. D. 148, 82 N. W. 394; Coleman v. Wade, 6 N. Y. 44; Boyden v. Lamb, 152 Mass. 416, 25 N. E. 609; Fudickar v. Guardian Mut. L. Ins. Co. 62 N. Y. 392; Witz v. Tregallas, 82 Md. 351, 33 Atl. 719; Hoffman v. De Graaf, 109 N. Y.

638, 16 N. E. 357; Sweet v. Morrison, 116 N. Y. 19, 15 Am. St. Rep. 376, 22 N. E. 276; Henry v. Hilliard, 120 N. C. 479, 27 N. E. 130; 2 Am. & Eng. Enc. Law, 794.

The claim defendant had has been merged in the award. Fudickar v. Guardian Mut. L. Ins. Co. 62 N. Y. 397; Coleman v. Wade, 6 N. Y. 44.

Courts are strict in sustaining awards. Error honestly made will not open the door for the award to be assailed. Fraud or misconduct must be shown. Hoffman v. DeGraaf, 109 N. Y. 638, 16 N. E. 357; Masury v. Whiton, 111 N. Y. 679, 18 N. E. 638.

The judgment roll is without defects, and no assignment of error is predicated thereon. Comp. Laws 1913, § 7846.

Mandamus is not an action triable *de novo* in the supreme court. It is a special proceeding. State ex rel. Bickford v. Fabrick, 16 N. D. 94, 112 N. W. 74.

BRUCE, Ch. J. This is a sequel to School Dist. v. Thompson, 27 N. D. 459, 146 N. W. 727, and School Dist. v. Special School Dist. 33 N. D. 353, 157 N. W. 287.

A mandamus is sought to compel a board of arbitrators to reconvene and cause a due and proper levy to be made upon the seal and personal property of Special School District Number 33, Tower City, North Dakota, for a sufficient sum to pay an award of $239.89, with interest at 6 per cent, which it is claimed was made on the 27th day of April, 1914.

The controversy is over which one of two awards should prevail, the regularity of the one sought to be enforced being challenged by the defendants and appellants, and a subsequent award of $72.62 in favor of school district No. 33, and against school district No. 94, and on which the said defendants rely, being challenged by the plaintiffs and respondents.

It is clear to us that the first award, and upon which award the plaintiff and respondent relies, was a nullity, or at any rate is not controlling in this case. Section 1247 of the Compiled Laws of 1913 provides that "special meetings may be called by the president, or in his absence by any two members of the board . . . or by causing

a written or printed notice to be left at his place of residence at least forty-eight hours before the time of such meeting."

It is clear from record that no such written or printed notice was given at this first meeting and at which T. A. Crawford was appointed arbitrator for school district No. 33. There is some testimony to the effect that it was the custom to give notice by telephone, and probably that such notice was given in this instance. One of the members of the school board, Stein, however, positively denies having received any notice, and it is undisputed that both he and Kelly were absent from the meeting. It is no doubt the law that in such a case, and where there is a failure to give the statutory notice, if all members of the board are present and participate, the action of the board will be controlling. It is equally clear, however, that where no such legal notice is given, and all of the members are not present, the action of the board at such a meeting will be a nullity. School Board No. 33, therefore, had no legal representative at the first meeting of the board of arbitrators. See School Dist. v. Bennett, 52 Ark. 511, 13 S. W. 132; Burns v. Thompson, 64 Ark. 489, 43 S. W. 499; Cunningham v. Board of Education, 53 W. Va. 318, 44 S. E. 129; Beck v. Kerr, 75 App. Div. 173, 77 N. Y. Supp. 370; 10 Cyc. 323, 324, 326.

As far as the second meeting of the school board of school district No. 33 is concerned, and at which A. M. Voorhees was appointed to represent the said district at the second meeting of the board of arbitrators, though no legal notice was given, all of the members of the board were present and participated, and no legal fault can be found. Dill. Mun. Corp. 5th ed. § 534 (263).

Not only is this true, but § 1328 of the Compiled Laws of 1913 provides that "such board [the board of arbitrators] shall take an account of the assets, funds on hand, the debts properly and justly belonging to or chargeable to each corporation, or part of a corporation affected by such change, and levy such a tax against each as will in its judgment justly and fairly equalize their several interests."

The testimony shows that defendant's school district No. 33 attached the part of the plaintiff's territory in October, 1911, and that in October, 1911, the plaintiff had its 1911 levy of its school taxes assessed and uncollected and amounting to $1,000 to its credit on the tax records of Cass county. It is clear from the record that at the first meeting

of the board of arbitrators, which was held on the 27th day of April, and on which the plaintiff and respondent relies, this item of $1,000 was not mentioned or considered; and it is clear that for this reason alone a review of the award could and should have been had, and that the county superintendent was justified in calling another meeting of the board of arbitrators. State ex rel. Reynolds Special School Dist. v. School Dist. 6 N. D. 488, 71 N. W. 772.

Nor is there any merit in the contention that all of the members were not present at second meeting of the board of arbitrators. All that the statute says upon the subject is that the award must be "signed by a majority of the board of arbitrators." See § 1329 of the Compiled Laws of 1913.

The rule seems to be that "the failure of one or a minority of a number of arbitrators to appear and act with the majority, after a sufficient notice and reasonable opportunity therefor, constitutes substantially, a dissent from the action of the majority, which will enable the latter to proceed, in the absence of such minority, to the rendition of a majority award in case a majority award has been authorized, unless unanimity of action be absolutely required by statute as a condition precedent to the exercise of authority." See 3 Cyc. 654 and cases cited.

Counsel for respondent appears to be of the opinion that this action is one in equity, and comes within the section of the statute which provides for a trial *de novo* in this court. It is immaterial to our decision how this point may be decided. We are, however, of the opinion that, being in mandamus, the proceeding is one at law.

We are clearly of the opinion that the second meeting of the board of arbitrators was properly and legally called by J. M. Reilly, the county superintendent, and that the second award that was made on the 22d day of May, 1914, was binding upon the parties.

The judgment of the District Court is reversed, and the cause remanded, with directions to dismiss the petition.

HENRY L. REICHERT and William G. Ray, Copartners, Doing Business under the Firm Name and Style of Reichert & Ray, Respondents, v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Appellant.

(167 N. W. 127.)

Natural water course — court — failure to instruct jury as to — what constitutes — instruction not requested — not reversible error.

1. Under the facts of the case it was not reversible error to fail to instruct the jury as to what constituted a natural water course or drainway, no specific instruction being asked.

Railway company — natural drainway — embankment constructed across by company — culvert — outlet — duty to provide — sufficient to carry surplus water off — damages — railway company liable for.

2. Where a railway company constructs an embankment across a natural drainway, it is its duty to prepare a culvert or other outlet sufficient for any flood which may reasonably be anticipated; and where the culvert or outlet is in fact insufficient for such purposes, the mere fact that competent engineers are employed or that the embankment is constructed in the manner usually adopted by railway companies will not save such company from liability.

Actual facts — opinions of experts — cannot prevail over.

3. The opinion of experts cannot prevail over actual facts.

Proof required of plaintiff — preponderance of evidence — facts — jury passes upon.

4. A plaintiff is not bound to exclude the possibility that the accident complained of might have happened in some other way than that contended for by him. He is merely required to satisfy the jury by a fair preponderance of the evidence of the truth of his contention.

Ditch or culvert — inadequacy of — property flooded — by reason of — embankment across natural drainway — excessive rainfall — not anticipated — burden of proof — jury.

5. Where property is flooded by the inadequacy of a ditch and culvert through a railway embankment which is constructed across a natural drainway, the burden of proof to show that the rainfall was so unnatural and unprecedented that it need not have been anticipated is upon the defendant, and the fact is one primarily for the jury, and not the court, to pass upon.

Flood — unusual — mere fact of — does not absolve company — ordinary anticipation — question to determine.

6. The mere fact that a flood is unusual does not absolve a railway company from liability if its ditches and culverts constructed through an embankment across a natural drainway are inadequate to carry off the water and to save

the adjoining property from loss. The question is whether it was beyond ordinary anticipation.

Railway company — natural water courses — obstruction of — application of law — same rule applies.

7. The same rule of liability applies in cases of the obstruction of natural water courses and of natural drainways.

Natural drainway — proof of — topography of the country — climatic conditions — courts must take notice of.

8. It is not necessary to the proof of a natural drainway that there should be proof of water flowing at all times or of a wearing away of the grass at the bottom. In treeless areas, such as those in North Dakota, the courts must take cognizance of the natural topography of the country and of its climatic condition, and that large volumes of water rush down such drainways in a few days or hours which in wooded areas would form continuous streams and take months to pass away.

Action in tort — damages — allowance of interest — indiscretion of jury — verdict in excess of ad damnum — presumed to include interest — absence of objection — absence of request to have verdict made more definite.

9. Where in an action in tort in which, under the provisions of § 7143 of the Compiled Laws of 1913, interest is allowable in the discretion of the jury, and in which the complaint asks for interest and the jury returns a verdict in excess of the *ad damnum*, but not in excess of the *ad damnum* and interest thereon, if interest had been allowed, the court will presume, in the absence of any objection at the time of the rendition of the verdict or request to have the same made more definite, that the amount so returned included interest, and the verdict will not, for the reasons given, be set aside.

Special verdict — argument of counsel on.

10. Argument by counsel on a special verdict *held*, under the facts of the case, not to constitute prejudicial or reversible error.

Requested instructions — refusal of — by trial court — not prejudicial.

11. The refusal of certain offered instructions *held* not to have been prejudicial.

Opinion filed September 25, 1917. Rehearing denied March 1, 1918.

Action to recover damages for the flooding of a building.

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

Judgment for plaintiffs. Defendant appeals.

Affirmed.

Watson, Young, & Conmy, for appellant.

There is no negligence on the part of defendant proximately causing the loss claimed, shown by the testimony in this case. The plaintiff insists that, without reference to the question of negligence, the defendant is answerable in damages. Such is not the law. Broom, Legal Maxims, 8th ed. 365, and authorities cited; Carroll v. Rye Twp. 13 N. D. 458, 101 N. W. 894.

In building its embankment and in putting in its culvert, defendant was not required to anticipate extraordinary floods or superhuman agencies. Hannaher v. St. Paul, M. & M. R. Co. 5 Dak. 24, 37 N. W. 717; Morrissey v. Chicago, B. & Q. R. Co. 38 Neb. 406, 56 N. W. 946; Chicago, R. I. & P. R. Co. v. Shaw, 63 Neb. 380, 56 L.R.A. 341, 88 N. W. 510; Gulf, C. & S. F. R. Co. v. Huffman, — Tex. Civ. App. —, 81 S. W. 537; Berninger v. Sunbury, H. & W. R. Co. 203 Pa. 516, 53 Atl. 361; Bellinger v. New York C. R. Co. 23 N. Y. 49; Cleveland, C. C. & St. L. R. Co. v. Wisehart, 161 Ind. 208, 67 N. E. 993; Harris v. Lincoln & N. W. R. Co. 91 Neb. 755, 137 N. W. 865; Wallace v. Columbia & G. R. Co. 34 S. C. 62, 12 S. E. 815; Chicago, B. & Q. R. Co. v. Schaffer, 26 Ill. App. 280.

Assuming that the proof offered by the plaintiffs here, tending to show inadequacy of the culvert, would be sufficient to sustain a finding of the jury to that effect, we contend that the other testimony in the case clearly disproves any such contention. Soules v. Northern P. R. Co. L.R.A.1917A, 501, 157 N. W. 823.

The undisputed testimony shows that the loss here might just as well have been occasioned by causes for which this defendant cannot be held responsible. The evidence shows that the defendant's culvert was blocked by a city crossing floating over it, and the flood and consequent loss were caused by this condition, and not by the inadequacy of the culvert. Meehan v. Great Northern R. Co. 13 N. D. 443, 101 N. W. 183; Garraghty v. Hartstein, 26 N. D. 148, 143 N. W. 390; 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; Andrews v. Kinsel, 114 Ga. 390, 88 Am. St. Rep. 25, 40 S. E. 300; Wm. Tackaberry Co. v. Simmons Warehouse Co. 170 Iowa, 203, 152 N. W. 785; Berninger v. Sunbury, H. & W. R. Co. 203 Pa. 516, 53 Atl. 361.

It is mere speculation for the jury to say that an insufficient culvert

was the proximate cause of the flood and loss. Atlantic Coast Line R. Co. v. Woolfolk, 189 Ala. 253, 66 So. 464; Sentman v. Baltimore & O. R. Co. 78 Md. 222, 27 Atl. 1074; Treichel v. Great Northern R. Co. 80 Minn. 96, 82 N. W. 1110; Garraghty v. Hartstein, 26 N. D. 148, 143 N. W. 390.

The excessive rains and storms which came were unusual and extraordinary, and could not have been anticipated within reason, and need not have been provided for. Soules v. Northern P. R. Co. supra; Wm. Tackaberry Co. v. Simmons Warehouse Co. 170 Iowa, 203, 152 N. W. 779; Kansas City, M. & B. R. Co. v. Smith, 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 81.

"Freshets are regarded as ordinary which are well known to occur in the stream occasionally through a period of years, although at no regular intervals."

The storms, rain, and flood here were unusual and very extraordinary, and could not, in reason or from precedent, have been anticipated. Gould, Waters, 2d ed. § 211; Dorman v. Ames, 12 Minn. 451, Gil. 347; Berninger v. Sunbury, H. & W. R. Co. 203 Pa. 516, 53 Atl. 361; Ætna Mill & Elevator Co. v. Atchison, T. & S. F. R. Co. 89 Kan. 38, 130 Pac. 686; Louisville & N. R. Co. v. Conn, 166 Ky. 327, 179 S. W. 195; American Locomotive Co. v. Hoffman, 105 Iowa, 343, 6 L.R.A. (N.S.) 252, 54 S. E. 25, 8 Ann. Cas. 773; Sentman v. Baltimore & O. R. Co. 78 Md. 222, 27 Atl. 1074; Greiner v. Alfred Struck Co. 161 Ky. 793, 171 S. W. 405; Ilfrey v. Sabine & E. T. R. Co. 76 Tex. 63, 13 S. W. 165.

A special verdict must cover all the issues in the case, including those admitted in the pleadings or undisputed in the testimony. Elliott v. Miller, 158 Fed. 868; Harbaugh v. People, 33 Mich. 241.

The special verdict here returned does not include and cover all the issues, and therefore the judgment entered on it cannot stand. Hodges v. Easton, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 307; Elliott v. Miller, supra; Standard Sewing Mach. Co. v. Royal Ins. Co. 201 Pa. 645, 51 Atl. 354.

The finding of the jury in the special verdict on the amount of damages is not sustained by the pleadings or the instructions of the court, and will not sustain any judgment. Johnson v. Northern P. R. Co. 1 N. D. 354, 48 N. W. 227.

If the jury intended to allow interest the verdict should have so found and so definitely stated. Fiore v. Ladd, 29 Or. 528, 46 Pac. 145; Cookville Coal & Lumber Co. v. Evans, — Tex. Civ. App. —, 135 S. W. 750; Morrissey v. Morrissey, 180 Mass. 480, 62 N. E. 972.

Plaintiffs waived the right to interest by failing to request instructions thereon. Parsons v. Jameson, 70 N. H. 625, 46 Atl. 687; Hesse v. Zaffke, 183 Ill. App. 160.

The argument of counsel before the jury on a special verdict is limited to such verdict, and counsel has no right to argue generally. Morrison v. Lee, 13 N. D. 599, 102 N. W. 223.

The sole purpose of a special verdict is to submit to the jury certain questions which they are required to answer, without any knowledge of the effect of their answers. Ward v. Chicago, M. & St. P. R. Co. 102 Wis. 215, 78 N. W. 442; Morrison v. Lee, supra; Guild v. More, 32 N. D. 476, 155 N. W. 44; Snider v. Washington Water Power Co. 66 Wash. 598, 120 Pac. 88.

On special verdicts the court should instruct intelligently on the issues so presented. One of the points in issue was as to the unusual character of the storm. This was not touched upon. Lathrop v. Fargo-Moorhead Street R. Co. 23 N. D. 246, 136 N. W. 88; Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 56 Am. St. Rep. 359, 32 N. E. 529; Kansas City, M. & B. R. Co. v. Smith, 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 81; Eagan v. Central Vermont R. Co. 81 Vt. 141, 16 L.R.A.(N.S.) 928, 130 Am. St. Rep. 1031, 69 Atl. 732; Pittsburg, Ft. W. & C. R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98.

This instruction should have been given without request. It covers an issue in the case. Rev. Codes 1905, § 7021, Comp. Laws 1913, § 7620; Putnam v. Prouty, 24 N. D. 530, 140 N. W. 93; Forzen v. Hurd, 20 N. D. 43, 126 N. W. 224.

Damages suffered by plaintiff from surface water diverted by highways is not traceable to any misconduct on the part of defendant. Carroll v. Rye Twp. 13 N. D. 458, 101 N. W. 894; Hannaher v. St. Paul, M. & M. R. Co. 5 Dak. 22, 37 N. W. 717; Moore v. Booker, 4 N. D. 543, 62 N. W. 607; McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685.

Murtha & Sturgeon and *Thomas Pugh,* for respondent.

There was sufficient proof of negligence to go to the jury. The defendant should have known that the culvert built was entirely insuf-

ficient. The failure to provide for the run-off of such water as might reasonably be expected to come down the drainage was negligence for which defendant is answerable. Soules v. Northern P. R. Co. 34 N. D. 7, L.R.A.1917A, 501, 157 N. W. 823.

Building the embankment and culvert in most approved manner does not excuse defendant if the flowage is insufficient. Fremont, E. & M. Valley R. Co. v. Harlin, 50 Neb. 698, 36 L.R.A. 417, 61 Am. St. Rep. 578, 70 N. W. 263, 1 Am. Neg. Rep. 312; Houghtaling v. Chicago G. W. R. Co. 117 Iowa, 540, 91 N. W. 811.

The testimony of expert engineers to the effect that the railway culvert was sufficient does not control over actual facts. The jury was not bound to accept the opinions of defendant's experts. 17 Cyc. 131, 262, 269, 276, et seq.; 5 Enc. Ev. 643; Laughlin v. Street R. Co. 62 Mich. 220, 28 N. W. 873; Jones, Ev. ¶ 390, p. 491; Hull v. St. Louis, 42 L.R.A. 762, note; Potter v. Grand Trunk Western R. Co. 157 Mich. 216, 22 L.R.A.(N.S.) 1039, 121 N. W. 808; Com. v. Leach, 156 Mass. 99, 30 N. E. 163; 8 Decen. Dig. Evidence, ¶ 574.

The defendant should have provided for the run-off of all water that might reasonably be expected, and this is a continuing duty. Soules v. Northern P. R. Co. supra.

The court need not submit to the jury questions admitted in the pleadings or upon which there is no dispute. Lathrop v. Fargo-Moorhead Street R. Co. 23 N. D. 246, 136 N. W. 88; State v. Hanner, 24 L.R.A.(N.S.) 35, note.

It is wholly immaterial whether or not defendant employed competent engineers. Hitchins Bros. v. Frostburg, 68 Md. 113, 6 Am. St. Rep. 422, 11 Atl. 826.

The test of liability is not the fitness of the engineer, but the efficiency of the work. Lion v. Baltimore City Pass. R. Co., 90 Md. 266, 47 L.R.A. 127, 44 Atl. 1045; Houghtaling v. Chicago G. W. R. Co. 117 Iowa, 540, 91 N. W. 811.

Objections to the argument of counsel upon a special verdict come too late after counsel has closed. If objectionable argument or statements are made by counsel, the opposing counsel should enter his objections at the time, and should be specific in pointing out wherein the argument is objectionable, in order to give court and counsel an opportunity to correct any such error if error was made. Snider v. Wash-

ington Water Power Co. 66 Wash. 598, 120 Pac. 88; 38 Cyc. 1507, (1) 1509, J.; Columbia & P. S. R. Co. v. Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25; West Chicago Street R. Co. v. Annis, 165 Ill. 475, 46 N. E. 264.

BRUCE, Ch. J. This is an action to recover damages for an injury to the basement of a hotel and a stock of cigars and other articles contained therein by the obstruction and throwing back of storm waters.

The complaint alleges generally "that upon said right of way, on said date and for a long time prior thereto, the defendant maintained a high grade or embankment of earth rising several feet above the level of the surrounding surface of the land; . . . that said grade or embankment crossed a natural water course; . . . that said water course had a well-defined bed and banks, and a stream of water flowing through said water course; that said water course and the bed thereof is the natural drainage for surface and storm waters for a large part of the city of Dickinson and surrounding territory; . . . that the defendant company in constructing said embankment . . . carelessly and negligently entirely filled up and destroyed said water course and channel of drainage, and in the place and stead thereof put through its embankment, part way, a small crooked open ditch and the other part of the way a small iron culvert connecting with said ditch, which said ditch and culvert were entirely insufficient in size and fall to carry off the waters of said water course or storm water of said drainage area or basin in times of rain, and were so carelessly and negligently constructed and maintained that they entirely failed to carry off said waters; that, because of the negligent construction and maintenance of said embankment, the negligent construction and maintenance of said ditch and culvert, and the lack of size, fall, and capacity of said ditch and culvert, on July 28, 1914, storm waters dammed up against said embankment and flowed over and upon the hereinbefore described premises of the plaintiffs, and into said basements," etc.

The answer is a general denial to which is added the further defense "that the damage and injury suffered by the plaintiffs herein were occasioned and caused by an unusual and unprecedented storm and flood."

The injury complained of was the result of the same storm which

was considered by this court in the case of Soules v. Northern P. R. Co. 34 N. D. 7, L.R.A.1917A, 501, 157 N. W. 823, the hotel of the plaintiff being situated on Villard street and just one block west of the property damaged and under consideration in the prior action. With the exception of that part which pertains to the property injured and the value thereof, the evidence is very similar. Though, therefore, we will seek to point out and to consider the points in which a difference occurs, we will not retail all of the evidence, but will satisfy ourselves by referring generally to the prior decision.

In the case of Soules v. Northern P. R. Co. supra, we found that the jury was justified in holding, and the special verdict in the case at bar also finds, that the swale or ravine down which the waters ran was a natural drainway. In the present case, however, it is contended that the court erred in not instructing the jury as to what, under the law, constitutes such a drainway or water course.

There is no merit in this contention. It would seem generally that a jury of intelligent men is fully competent, without instructions upon the subject, to decide what a natural water course or a natural drainway is. In any event the error, if error at all, was one of nondirection, and not misdirection; and the defendant, if he desired a specific instruction upon the subject, should have asked for one. Buchanan v. Occident Elevator Co. 33 N. D. 346, 15 N. W. 122; Halverson v. Lasell, 33 N. D. 613, 157 N. W. 682; McGregor v. Great Northern R. Co. 31 N. D. 471, 154 N. W. 261, Ann. Cas. 1917E, 141.

It is next contended by counsel for the defendant that the plaintiff put no expert engineers on the stand, and that the engineers of the defendant testified that the culvert was constructed according to approved methods, and by competent engineers, and in such a manner as is usually adopted by railway companies. He argues from this that no negligence is shown on the part of the defendant railway company; and that, therefore, no recovery can be had.

We are satisfied, however, that, provided the ravine or swale is a natural drainway, building an embankment or culvert in the most approved manner does not excuse the defendant in a case such as that which is before us, provided that the provision for the flowage is actually insufficient and that the flowage of which the defendant had reasonable warning was not provided for. Freemont, E. & M. Valley

R. Co. v. Harlin, 50 Neb. 698, 36 L.R.A. 417, 61 Am. St. Rep. 578, 70 N. W. 263, 1 Am. Neg. Rep. 312; Houghtaling v. Chicago G. W. R. Co. 117 Iowa, 540, 91 N. W. 811; Skinner v. Great Northern R. Co. 129 Minn. 113, 151 N. W. 968; Lion v. Baltimore City Pass. R. Co. 90 Md. 266, 47 L.R.A. 127, 44 Atl. 1045; Hitchins Bros. v. Frostburg, 68 Md. 113, 6 Am. St. Rep. 422, 11 Atl. 826.

It is true that in the cases of Carroll v. Rye Twp. 13 N. D. 458, 101 N. W. 894, and Hannaher v. St. Paul, M. & M. R. Co. 5 Dak. 23, 24, 37 N. W. 717, we seem to have held that actual negligence in construction was necessary to be proved. These cases, however, relate to surface waters merely, and not to waters which flow in a natural channel, and the case of Carroll v. Rye Twp. was one in which a municipal corporation was involved and where the strict rule of liability does not apply.

In the case of Hannaher v. St. Paul, M. & M. R. Co. supra, the opinion largely, if not entirely, turned upon the fact that the plaintiff had deeded to the railway company its right of way. The court held that the same rule applied in such cases as if the right of way had been condemned, and that the property owner would be presumed to have been awarded damages, and that the consideration of his deed would be presumed to have been based upon the injury which would naturally and probably follow from the construction of the railroad in the ordinary and usual manner.

In the case at bar there is no proof of any such grant or of any such deed, nor that any compensation was made to the plaintiffs at any time on account of the construction of the railroad. It is also fair to add that the decision in the Hannaher Case was handed down in 1888, and before the adoption of the North Dakota Constitution; and that the Federal Constitution, which then alone prevailed and was operative in North Dakota, merely provided that property should not be *taken* for a public use without compensation. The Constitution of North Dakota now provides that property shall not be taken or *damaged*, etc.

In the case of Houghtaling v. Chicago G. W. R. Co. 117 Iowa, 540, 91 N. W. 811, also cited by counsel for appellant, the court, among other things, said: "The duty of the railroad company in constructing its road when it crosses a stream is to provide a passageway for the water reasonably sufficient to allow it to flow through without being

backed up so as to cause damage to property. . . . It is not bound to provide for unprecedented floods, but must anticipate and make provision for such floods *as may occur in the ordinary course of nature.* It must foresee and *provide* for *unusual storms, such as occasionally occur, whether they* be called *ordinary or extraordinary.* . . . But the railroad company is not guilty of negligence in failing to provide for a flood which is not only extraordinary, but unprecedented, *and could not reasonably have been foreseen.* . . . There was evidence that the flood which resulted in the damage in question was due to a heavy, but not unprecedented, rainfall; and therefore the verdict must be sustained, unless there was error in the admission of evidence or in the instructions of the court. Defendant introduced evidence that, in the construction of the culvert in question, it acted upon the advice of competent and skilful engineers, and asked instructions to the effect that, having done so, it was not responsible for any damage due to insufficiency of the culvert. *But this is not the rule governing the liability of railroad companies in such cases.* The engineers whose judgment was relied on in the construction of the culvert were the servants of the defendant, and it will be liable for any lack of skill or of proper judgment in the particular case, no matter what their general skill or competency may have been. *It was their duty, as servants of the defendant, to prepare a culvert sufficient for any flood not extraordinary and unprecedented.* The instructions of the court as to this matter were as favorable to appellant as it had a right to ask. It is not the danger which a competent and skilful engineer does in fact anticipate, but that which, in the reasonable exercise of his skill, he ought to have anticipated, which the company is bound to provide for. Baltimore & O. R. Co. v. Sulphur Spring Independent School Dist. 96 Pa. 65, 42 Am. Rep. 529; Libby v. Maine C. R. Co. 85 Me. 34, 20 L.R.A. 812, 26 Atl. 943. Counsel for appellant, however, rely upon cases holding that a city is not liable for damage to property from flooding by water resulting from the improvement of streets, the construction of sewers, etc., where the city council has in good faith adopted and followed the plans of competent engineers. Van Pelt v. Davenport, 42 Iowa, 308, 20 Am. Rep. 622; Hoehl v. Muscatine, 57 Iowa, 444, 10 N. W. 830. *But these cases are predicated on the view that, in the exercise of its general duty to make public improvements, the*

municipal corporation will not be chargeable with negligence, if, in acting, as it must, through the agency of others, it selects a competent agent to perform the duty required of it. Van Pelt v. Davenport, supra. No such principle is applicable to *a private corporation chargeable with* no duty to make an improvement, and doing so for its own special benefit. The authorities relating to the immunity of municipal corporations, where a plan prepared by a competent engineer has been adopted in good faith and in the belief that it is sufficient, as well as those limiting the application of the doctrine, are collected in an article in 51 Cent. L. J. 185, but they need not be further discussed. *Our attention is not called to any case in which the doctrine* is extended to the case of a railway or other private corporation." This case certainly is not an authority for the defendant.

We have also carefully examined the other cases cited by counsel for appellant. The case of Morrissey v. Chicago, B. & Q. R. Co. 38 Neb. 406, 56 N. W. 946, 57 N. W. 522, related to surface waters merely.

The case of Chicago, R. I. & P. R. Co. v. Shaw, 63 Neb. 380, 56 L.R.A. 341, 88 N. W. 508, although cited by counsel for the appellant, is also in fact an authority for the rule which we announce. Although, indeed, it contains other general language, it specifically says: "In Town v. Missouri P. R. Co. 50 Neb. 768, 70 N. W. 402, 1 Am. Neg. Rep. 631, it is said: 'Surface water may have such an accustomed flow as to have formed at a *certain place a channel or course, cut in the soil by* the action of the water, *with well-defined banks,* and having many of the distinctive attributes *of a water course;* and though there are no exceptions to the general rule, *except from necessity, this may constitute an exception,* and, if the flow is stopped by the erection of an embankment across and in the channel, some provision may be necessary for the allowance of the regular flow of the surface waters. Whether such embankment has been negligently constructed with reference to the obstruction of the flow of the surface waters, and whether such negligence, *if any, is the proximate cause* of an alleged injury, *are generally questions to be submitted to the jury.*' We think that the case last cited from is decisive of the one at bar, and we fully agree with the reasoning of that case. *It would be an unfortunate rule of law which would allow a railroad company, or any other proprietor of land, to erect an embankment across a ravine in which a large body of water is*

accustomed to run during the rainy season or upon the melting of snow, without making the necessary provision for its flow in the usual manner. In the present case there was a ravine of some miles in length, *down which the water poured in large quantities at certain seasons.* It was fed by other like draws and streams. The fact that it cut its way through the solid embankment on different occasions is evidence sufficient to show the volume and force of the water which it carried. It might, almost as a matter of law, be said to be *negligence to throw an embankment across a ravine without providing adequate means for the flow of the water,* and it certainly ought not to be contended that the *finding of the jury* that such an act *was negligence* ought to be disturbed by the court. *We regard it as now settled by the former decisions of this court that a railway company, or other proprietor of land, cannot throw an embankment across a ravine or draw, into and through which the surface water of a large scope of country is accustomed to flow, without providing adequate means for the usual flowage of the water naturally seeking an outlet.* We think the court was fully justified in giving its eighth instruction by the cases above quoted, and that error cannot be predicated thereon."

We cannot see the applicability of the case of Gulf, C. & S. F. R. Co. v. Huffman, — Tex. Civ. App. —, 81 S. W. 537.

The case of Wallace v. Columbia & G. R. Co. 34 S. C. 62, 12 S. E. 815, turned on the construction of the complaint, and holds that such complaint announced conclusions of law, rather than issues of fact.

The case of Berninger v. Sunbury, H. & W. R. Co. 203 Pa. 516, 53 Atl. 361, turned on the proposition that the flood or ice gorge was extraordinary and unprecedented.

In the case of Cleveland, C. C. & St. L. R. Co. v. Wisehart, 161 Ind. 208, 67 N. E. 993, the negligence complained of was the fact that the railroad company, while constructing its railroad bridge, caused dirt to fall into a ditch or waterway which it had constructed so as to prevent the water of the plaintiff from flowing into the river. It was on this ground that the decision was rendered and that the court used the language, elsewhere cited by counsel for appellant, that "it is certainly elementary that no action can arise from the doing of a lawful act in a lawful manner, and unless it is done in an unlawful, wrongful, or negligent manner; and, wherever the act complained of is or may be in itself

lawful, in order to constitute a good cause of action based thereon, the complaint must aver that the lawful act was unlawfully done, wrongfully, negligently, or carelessly."

The opinion in fact took pains to state that the complaint alleged negligence while constructing the bridge, and not in obstructing the stream after the bridge had been erected. Whether the distinction is a good one or not, we are not prepared to say. We do say, however, that the case is not an authority in the action which is before us.

The case of Harris v. Lincoln & N. W. R. Co. 91 Neb. 755, 137 N. W. 865, simply turned on the point that the evidence did not show that the injury had been occasioned by the railway company.

The case of Chicago, B. & Q. R. Co. v. Shaffer, 26 Ill. App. 280, seems to be in no way applicable. It does, however, hold, and this will be for the benefit of the plaintiff rather than of the defendant, that the question as to whether the storm was extraordinary was one for the jury to pass upon.

Counsel, however, cites the case of Bellinger v. New York C. R. Co. 23 N. Y. 42–46, and urges that a railway company in constructing a railroad acts under authority of law and cannot be held liable except for positive negligence, and then only for damages which accrue and for the immediate results thereof.

The case, however, referred to, is practically the only one cited by counsel which supports this proposition, and it is faulty in two respects. Its premise that a railroad corporation is an agency of the state is not correct, nor was the Constitution of New York at the time of this decision similar to our own.

"A railroad, although acting under an authority derived from the state, does not act, properly speaking, in behalf of the state, or as its agent or representative" in this respect, and is not similar to a municipal corporation which constructs highways for and under the authority of the parent state. See 23 Am. & Eng. Enc. Law, 2d ed. 676; Bradley v. New York & N. H. R. Co. 21 Conn. 306; Houghtaling v. Chicago G. W. R. Co. 117 Iowa, 540, 91 N. W. 811.

In New York also, at the time of the handing down of the decision referred to, the Constitution merely provided that "no property shall be *taken* for a public use without just compensation being made." The Constitution of North Dakota, however, provides that "no property shall

be taken *or damaged* for a public use without compensation being made." This difference in the Constitutions is very important and has radically altered the tenor of the decisions. Gram Constr. Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 36 N. D. 164, 161 N. W. 732.

The general rule, indeed, appears to be that, "though a man do a lawful thing, yet if any damage thereby befalls another he shall be answerable if he could have avoided it. So use your own property as not to injure the rights of another is a very general application in cases of conflicting interest, and, it has been observed, will generally serve as a clue to the labyrinth in such cases." Broom, Legal Maxims, 357 et seq.; People's Ice Co. v. The Excelsior, 44 Mich. 229, 38 Am. Rep. 246, 6 N. W. 636.

It is next contended by counsel for appellant that there is no testimony to show any inadequacy or defect in the culvert which proximately caused the loss in question. He contends that the plaintiffs offered no testimony showing any negligence either in the construction of the railway embankment or in the size of the culvert maintained. He contends that it affirmatively appeared without contradiction, that the embankment and roadbed were constructed properly and in the ordinary and usual manner; that plaintiffs offered no proof by engineers or otherwise showing the insufficiency of the culvert under the tracks; and that they contented themselves merely with offering testimony that on July 28, 1914, the culvert ran full. He contends that they did not show that at the time of the loss the culvert was running over, but rather, and on the other hand, that the railway company showed without contradiction that the culvert was completely obstructed by a wooden crossing getting over its mouth. He contends that proof even of the culvert running full is not proof of its insufficiency. He also contends that under plaintiffs' proof no negligence is shown, and that there is simply a showing that possibly the railway embankment and the culvert helped in the obstruction and holding back of the waters. He maintains that the testimony in the present case differs somewhat from that produced in the case of Soules v. Northern P. R. Co. 34 N. D. 7, L.R.A.1917A, 501, 157 N. W. 834. He maintains that in the case at bar the record shows that the storm started at about 12 o'clock in the evening of the 27th day of July, 1914; that the worst part was over about 4 o'clock on the 28th, although it rained somewhat

between then and 6 o'clock; that up to 6 o'clock A. M. on the morning of July 28, 1914, 2½ inches of rain fell; that the water stopped running into the hotel at about 4 o'clock A. M.; that the engineers, Taylor, Atkinson, and Burt, all testified that the culvert in question would handle a rainfall of 2½ inches if it all came down in fifteen minutes; that these men testified to a knowledge of the drainage basin in question, its soil, and of everything else which might be necessary for them to have in order to give an intelligent opinion, and were entirely familiar with the area of the basin, its grade, the approximate area covered by houses and business blocks, the approximate area covered by streets and sidewalks, and the general situation therein; that they all agree that the formula and the variables used by the engineer constructing the culvert (Berkli-Zeigler formula) and the variables used in determining the run-off were the proper ones to be used, and that such formula was given an actual test in connection with the particular basin and found to be accurate. He also contends that on a prior occasion and on June 26, 1915, it rained 1.16 inches in one and one-half hours; that this amount was above the average, and that during this rain, although the water came up over the sidewalk in front of Soules & Butler's store and within 5 feet of their building, still the culvert never at any time was forced to more than one third of its capacity; that under such circumstances, and the culvert in such a condition, the water would only have had to rise .15 of a foot or about 2 inches to get into Soules & Butler's basement; that during this storm the elevation of the water was much greater around Soules & Butler's property than at the mouth of the culvert,—99.15 inches at Soules & Butler's, and only 96.3 inches at the culvert. He also maintains that the engineers of the defendant railway company accounted for this high level of the water to the west and north of the culvert during the storm on June 26, 1915, and on July 28, 1914, which is the storm in controversy in the present lawsuit, on the ground or theory of the piling up of the waters because of the intersecting city streets and the comparatively level ground of the portion of the basin just to the north and west of the culvert, which they claim prevented the water from flowing away as fast as it came down the outlying slopes. This test, he claims, proves three things: (1) That the culvert was wholly adequate and the formula and variables used by the engineers proper

in all respects; (2) that the flooding around Soules & Butler's property at previous times was caused by the natural formation of the watershed and the inadequate city culverts; and (3) that the flood of July 28, 1914, was caused by the culvert being blocked. He does not contend that on July 28, 1914, the culvert was not covered with water, but he does contend that the reason it was covered was because it was prevented from doing its work on account of the city crossing being over its mouth. In this connection he emphasizes a fact, which he claims to have been established,—that the high-water elevations taken by the railroad engineers show that the water on July 28, 1914, was higher at the St. Charles Hotel (property of the plaintiffs) than at the mouth of the culvert, and that this is accounted for because of the piling up of the waters, the streets intersecting at right angles, and the level ground in the basin. He maintains that the evidence shows that the culvert could handle a rainfall of 4 inches in one hour's time and a rainfall of 2½ inches if it all came in a period of fifteen minutes.

It was not necessary, however, that the jury should have been controlled by the opinions of the expert witnesses, provided that they were satisfied that the ditch and culvert were actually inadequate, and that the storm or flood was not so unprecedented that it should have been anticipated, and provided that they found and had reason to find that the ravine or water course was a natural drainway. No opinion of an expert can prevail over actual facts. Laughlin v. Street R. Co. 62 Mich. 220, 28 N. W. 873; 17 Cyc. 131; Jones, Ev. § 390, p. 491; 5 Enc. Ev. 643.

"I am of opinion," says the supreme court of New York in Bellinger v. New York C. R. Co. 23 N. Y. 42–46, "though not without some hesitation, that there was evidence enough to submit the case to the jury upon the question whether the road and its embankments and bridges were constructed with suitable care and skill. There was no evidence directly bearing upon the point, by any witnesses of competent knowledge and experience. But the fact that, on three several occasions between the time of the construction of the road, in 1835, to the trial, in 1856, the water and ice had been forced out of the stream upon the plaintiff's land; and that, in the judgment of witnesses who had seen the breaking up of the ice, the diversion of the flood from its natural course on the west side, where it would have been harmless, to

the creek and on to the land on the other side, was caused by the embankment, and the want of sufficient apertures for the passage of the water afforded some evidence that the structures referred to were faulty. When the character of the stream, the peculiar suddenness and violence of the freshets which caused the injury, and their infrequency, are taken into consideration, it is evident that the plaintiff's case was not a strong one; but I think it was to be determined by the jury. I am, therefore, in favor of sustaining the ruling of the court in denying the motion for a nonsuit."

In the case at bar there was at least some evidence to show, and from which the jury might find, that the culvert and ditch were inadequate, and that the defendant had a prior notice and warning of the fact, and that the flooding of plaintiff's property was occasioned by this fact. The trial court was therefore justified in submitting the question to the jury.

James G. Kittleson testified that he had worked for Soules & Butler, whose property is only about a block distant from that of the plaintiff's, since 1907 with the exception of about six months; that he remembered the storm of July 28, 1914; that the present culvert of the railway company was put in in 1919; that *he had seen the culvert fill up a good many times and in different years;* that after the culvert would fill up the water would come up on the sidewalk and keep crawling west on Villard street until sometimes it looked as though that store was going to be crowded over; that they had to pile sacks in front of the store, build a dam in front of the store to keep it from going in; that the water would later recede; that there was nothing to stop the water, but the culvert wasn't large enough he supposed; that nothing ever blocked the mouth of the culvert that he ever saw; since the culvert was put in and before the flood of the 28th day of July, 1914, the water filled up over the culvert two and three and perhaps four times a year; that they had two right in succession there in 1914.

Q. Before this flood, before the middle of July?

A. Well, one Sunday. I couldn't say, but it was before this one of July 28th, perhaps a week or maybe two weeks, I don't remember now. I know there was baseball over at the ball park that Sunday. I wasn't there in July, 1914, but the culvert must have been running full. I don't know whether it was at the time I saw this culvert running full.

The water was over the grade over Villard street and up on the sidewalk. There is a city culvert right by the corner of lot 7 and 8 and the city culvert is about half as large as the railway culvert. The city culvert was perhaps 2 feet under water. If the city culvert wouldn't fill there would be no danger of the other one. I don't know anything about the size of the new culvert, between 3 and 4 feet in diameter. I don't know anything about the amount of water it will accommodate when running full, or the contents that goes through there in a certain length of time. When I testified that the culvert was running full I couldn't see the culvert. I saw the water couldn't run through fast enough to accommodate it. I *couldn't see the culvert; it was under water.* I know the culvert was running full because the water in the lulls would go down perhaps as much as 50 feet down Villard street from the store and recede down as far perhaps as lot 7, and if a little rain came it would come right up. I know that culvert was doing its work as much as it could, or else it would not recede and come back again. It stands to reason it was doing its work, as much as it could. The culvert was under water.

Q. Have you seen the culvert running full since the year 1908?

A. I haven't seen the culvert, but I know the culvert has been running full each year. 1909, I think the culvert was put in there, because in 1908 it was flooded out before and they thought they fixed it. In 1908 we flooded out once before,—flooded our basement. That was before this culvert was put in.

Q. Did it flood in 1910, 1911, and 1912?

A. Well each year as I remember it, each year we have those rains so that it always comes up there on the sidewalk. If it comes in in the night, you can see where the water has been up in the lumber yard, and on the store, and on the sidewalk. It leaves a mud trace. I never saw anybody go down to clean the culvert out. I saw some fellows stand up on the track and try to pole some rubbish away once. When the water would get high the culvert would go out of sight under the water.

James Soules testified that he occupied the corner, lot 7, in block 5, for eleven years; that he was about his place of business nearly every day; that during the last five or six years the culvert failed to carry off the water after a rain; that on July 28, 1914, it failed; and

then it failed the other time when we were flooded out there. I don't know what that date was now, I forget, but it was before that; that it had blocked up as far as the lumber office; that on these occasions the water would get deeper to the south and east of the lumber office. It would back up from that way.

Q. What held it on the south side?

A. As we always viewed it, it couldn't get through there.

Q. What kept it from running off in some other direction?

A. This lower place. Across this low place there is an open ditch, —a culvert. The culvert goes under the railroad. My lumber office is on lot 7, block 5. That would be the corner of Villard and Second avenue.

Q. On how many occasions would you say during the four years prior to July, 1914, high water came up as far as your lumber office?

A. Oh, it has been up there lots of times, probably half a dozen or over. Several times it got up as far as my hardware store. On two or three occasions we had to take sacks to keep it from running in on the floor, filled them with dirt and stuff. It came up to my property line and I kept it back, kept it out of the cellar, by damming it back. As far as I know the culvert was dammed up. I don't know of it being blocked up, I cannot say that I do. The water was subsided after these floods. I don't think anybody went down there to clean it out. It was probably in 1911 that the water came into the basement of my building. It was in the summer during the rainy season here. At other times water threatened to come into my basement during times of rain. I probably have been to the culvert. Whether it was running full or whether it was blocked up I cannot just recollect. I was there several times. I was there the last time of course. I cannot recollect that I went down there to see whether that culvert was running full at the time the water was in my basement. There is a ditch running along the west side of Second avenue, running down towards this culvert put in by the city, and there is one runs along First street, runs west. No, the ditch runs over here, angling across and then this ditch runs directly east and then straight across.

Q. You don't understand me. This ditch runs north up Second street, does it not?

A. Yes, sir. And then runs west along First street over to Sims

street, probably 3 or 4 feet deep. There is a culvert here on Villard street, where Second avenue and Villard street meet. It has not the capacity of the railroad culvert.

William G. Ray testified that he had lived in Dickinson for thirty-two years; that when he came to Dickinson there was a bridge; that the railroad grade went through the town just where it is now; that the bridge appeared to be in the low spot, and he supposed the culvert was in the low spot. The culvert is where the bridge used to be; that the part of the town where the St. Charles Hotel is located drained off towards the east and through the bridge; that he thought the whole plat of Dickinson, all the hills and everything, practically graded down that way through the bridge; that the bridge was over a kind of ravine that was graded into the river, not graded by men, but natural; that the water from this ravine ran south into the Heart river; that the Heart river is probably about 400 feet from Villard street; that the ravine extended down north a short distance across Villard street and then it was all level country; that it was a kind of a basin; that it all emptied through that way; that when he came to the country it was what you would probably call a dry run. There was no water there except after a rain, and in the spring of the year the water went through this very fast. It drained quite a lot of territory. Of course, it had worn a small channel right under the bridge, the deepest part, and in the river, and the other way to Villard street. Across the street on the east side was high and the water came all from the west, and the bank on the east side all along there was rather high. It kind of slanted up about 10 or 12 feet, a pretty steep raise. The west bank slanted off very gradually; probably a couple of feet raise. The bottom of the channel at the bridge was about 5 or 6 feet wide.

Q. At Villard street?

A. Well, it got a little smaller as it went up. The bottom of the channel was dirt, I suppose, gravel, whatever it was. I think the grass had been washed away. At the time I am speaking of, Villard street had not been plowed or graded or worked. High water after a rain ran in considerable volume through this channel. There was no other place or way for the water to get away except through this bridge. Now, the water flowing around the St. Charles Hotel goes through this culvert.

On the 28th day of July, 1914, there was a basement under my hotel. In the early morning the water commenced to get into the basement. I went down to the hotel at about 2 in the morning. It had been raining prior to the time when I went down. It had started raining about 1 o'clock. It was raining little showers when I came down to the hotel. When I got to the hotel there was about 3 feet of water in the basement, and it was still coming in; running right over the front sidewalk. The main floor of the hotel is above the street. The new part is about 6 inches above and the old part about 3 feet. The basement windows come up to the sidewalk. If water came over the sidewalk there would not be anything to prevent it from running into the windows. If water came running up over the sidewalk there was nothing to prevent it running down the stairways. The windows held the water out for a while, but the pressure got so strong against them they just broke, and the water went right through. The water got about 7 feet in the basement. I stayed there until about 5 o'clock. The water stopped running in when I left. The water came from the east. The water naturally drains off from my place from the west; that is, the water ordinarily runs east from my place, and this night the water was backing up from the east. There was water towards the east and south of my place. When it was at its highest point it was just one lake of water right from the hotel all the way down to the railroad embankment to the culvert. There beside the culvert was much higher in the east end. It didn't go that way, it came west. Extended on down to the east side of Second avenue, east. There to the south of me to keep the water from running away was the railroad embankment. From the time I started down to the hotel until 5 o'clock there was considerable rain falling. A couple years previous to this time the water backed up a ways on Villard street. I think it was on the Fourth of July. No, it was the time of a picnic out here and hail storm. It came part way up Villard street, I know it was covered pretty well. It didn't run into my property. It was a sheet of water at that time from the culvert up part way in block 5. When I first came to Dickinson there were no buildings on what is shown as block 5. There was one on block 18. There were none east of there. There was probably one there in about nineteen or twenty. There was a kind of swale, a ravine in which sur-

face waters drained off through this culvert. It was dry most of the time.

Q. Is it a fact that at one time there was a slough or lake there?

A. No. I don't know anything about any lake. There was no lake.

Q. Was there a lake a little further over and up towards the east?

A. No. But the waters would run down there in that swale and all through about where this culvert was now located. The sides were grassy all along. I suppose it is a kind of ravine or swale that we see around the country, a good many of that kind. There was no grass on the bottom. There wasn't any grass there before the bridge was put in. I didn't come until after the track was laid. I don't know whether before the bridge was put in there was any worn spot along there. I am simply testifying that when I came to Dickinson there was a worn spot underneath where the waters went under that bridge. I came to Dickinson in 1884. I think the track was laid about three years before then. The water only ran down that ravine when it rained and in the spring of the year. There was no spring in the ravine. Nothing but surface water or storm waters or snow waters. I was awakened by the storm on the night of July 28, 1914, between 12 and 1, or about that time. The storm started, I think, about 1 o'clock. I got a telephone call from the hotel that the water was down in the basement, so I went down. It rained pretty hard for a while from 1 o'clock on, for probably about an hour. I left the house sometime around or about 2 o'clock. It was between 2 and 3 sometime.

Q. Were the streets covered with water as you walked down?

A. There was one place in particular that I know the water was over the sidewalk.

Q. The water was running down the street, was it; a good deal of it?

A. Yes, there was quite a little water. It wasn't raining so very hard when I went down town, little intermittent rainfalls. I would say I got to the hotel between 2 and 3 o'clock. At the time I got down there was water coming into the basement. It started with a hail storm, a little hail, but I don't think the hail was bad at all.

Q. At that time was the water flowing down Villard street towards the east?

A. When I came down there wasn't so very much on that end of town up there. There probably was some, the sidewalk was dry most

of Villard street. There was about one block covered along Villard street. The bottom of these basement windows are lower than the sidewalk. I imagine the deepest one is about 3 feet below the sidewalk. I think it was in 1911, two or three years before I saw water back up on Villard street. That was the only time I noticed it. I never had any water in my basement before.

I have conducted a hotel about ten years. There was some water on Villard street on this morning on the 28th of July, 1914, before I got to the hotel. Where I struck the water was about five blocks west of the hotel. There is a low place there. I think the water drains into a ditch. The other way, not past the hotel. *The city sewer emptied south of the culvert and on the south side of the railroad track, and below the culvert.*

When I first came here there was a bare spot which extended about 6 or 8 feet over the place where the culvert is now, and north up towards Villard street. It extended out to Villard street and probably across the street and then it disappeared; ran out into the grass there.

Q. A good portion of the city is drained in other places than in this culvert?

A. I don't think so. I think nearly all the city drains that way. I said there was one spot up here in the west of town, it kind of runs into a ditch. That's the only spot that I know.

Defendant next contends that "the undisputed testimony shows that the loss here might just as well have been occasioned by causes for which this defendant cannot be held responsible." He contends that the witness Leisch testified that he went down after the heaviest rain was over, and saw the city crossing together with several two by fours blocking the mouth of the culvert, and that at that time the culvert was not covered with water. "How long," he says, "the crossing had been there before Leisch came down, of course, nobody can say, and nobody seems to know how long it stayed there. Mr. Hughes and Mr. Reichert went down to the culvert between 4 and 5 o'clock, and they tell us that at that time the crossing was rather on top of the culvert, the water being completely over the mouth of the culvert. They cannot say whether the crossing was over the mouth of the culvert before they came down or whether somebody pulled it away from the mouth of the culvert or not. And they do not know whether Joe Leisch had made a

trip to the mouth of the culvert prior to their coming. What would be more expected than that the action of the waters as they kept getting higher would raise the street crossing up and finally, when the water was over the mouth of the culvert, deposit it on the top of the culvert?" "We thus," he argued, "have the fact undisputed that when Joe Leisch went down to the culvert alone it was blocked by this street crossing thus preventing and obstructing the flowage of the waters through it. Isn't it more than probable that this situation caused the waters to flood plaintiffs' premises, rather than any inadequacy of the culvert to take care of the waters if unobstructed? *We say the record conclusively shows that this flood and consequent loss might just as well have been occasioned by the blocking of the culvert as from any reason for which this defendant could be held responsible. And if this is true then, under the decisions of this court and the well-settled law, the judgment here cannot stand.*"

We can hardly concede the correctness of this contention. It is true that in the case of Meehan v. Great Northern R. Co. 13 N. D. 443, 101 N. W. 183, we held that in an action to recover damages for an injury alleged to have been caused by defendant's negligence, where it appears that there are two or more possible causes of the injury, only one of which is chargeable to defendant's negligence, the burden is upon the plaintiff to make it appear that it is more probable that the injury resulted from the cause for which the defendant is responsible. All that was proved in that case, however, was the fact of the accident, and all that we held was that the burden of proof was on the plaintiff to show the reason therefor; and that, since the conclusions from the fact of the accident would be just as apparent to a jury of intelligent men as they would have been to experts, it was error to inject into the case the opinions of the witnesses.

The case of Garraghty v. Hartstein, 26 N. D. 148, 143 N. W. 390, cited by counsel, falls far short of bearing out his contention. All that it holds is that it is the province of the court to determine whether, upon the facts most favorable to the plaintiff, negligence can properly be inferred; and that the jury cannot be permitted to arbitrarily and without evidence infer negligence; and that the evidence must affirmatively establish some circumstances from which the inference fairly

arises that the injury resulted from the want of some precaution which the defendant ought to have taken.

In the case of Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000, we held that a recovery was erroneously sought to be had upon expert testimony based upon evidence which was not positive, and the court in addition was satisfied from the positive evidence that contributory negligence existed.

In the case of Balding v. Andrews, 12 N. D. 267, 96 N. W. 305, 14 Am. Neg. Rep. 615, there was no evidence as to the cause or origin of the fire, and the same was sought to be proved by a declaration of a servant which was not part of the *res gestæ*. The holding was merely that the burden of proof was on the plaintiff to show both the cause of the fire and the negligence of the defendant, and that the evidence introduced for this purpose was not competent.

We can see no applicability in the case of Kinsel v. Andrews, 111 Ga. 390, 88 Am. St. Rep. 25, 40 S. E. 300. It was a case merely of the act of an intervening third party, which was the proximate cause of the damages, and which was shown by the complaint itself.

In the case of Wm. Tackaberry Co. v. Simmons Warehouse Co. 170 Iowa, 203, 152 N. W. 779, the court held that the flood was unprecedented, and that such being the case, positive negligence was sought to be proved in the construction of the bridge, and that, as the bridge was a bridge of a public corporation, its mere inadequacy was not sufficient, provided it was constructed according to plans and specifications of skillful engineers familiar with the locality.

In the case of Berninger v. Sunbury, H. & W. R. Co. 203 Pa. 516, 53 Atl. 361, the ice gorge was extraordinary.

The case of Atlantic Coast Line R. Co. v. Woolfolk, 189 Ala. 253, 66 So. 464, turned entirely on the proposition that the complaint did not show that the loss was occasioned by the defendant railway company at all.

The case of Sentman v. Baltimore & O. R. Co. 78 Md. 222, 27 Atl. 1074, merely decided that the question whether the damage was caused by the act of God was properly left to the jury.

In the case of Treichel v. Great Northern R. Co. 80 Minn. 96, 82 N. W. 1110, the court did not pass upon the question of negligence or the duty to maintain a culvert at all, but merely said that the

evidence did not prove that the embankment had anything to do with the flooding, but rather tended to show that the whole country was equally flooded.

In the case at bar there is at least some testimony which tends to show that the damage was occasioned by the ditch and culvert being insufficient in size, or by the entrance to the culvert being insufficient; the complaint alleging a lack of size, fall and capacity in both ditch and culvert. There is some evidence to the effect that the water was above the culvert. There is a claim, it is true, that the pressure of the water from the hills and the lay of the land made it stand above the level of the streets and the ditch. There is, indeed, some evidence that it had stood this way before. It was for the jury to say, however, whether this standing was not occasioned, if standing there was, by the insufficiency of the fall and the insufficiency of the size of the culvert. Perhaps the culvert would have been sufficient if the fall and approach had been sufficient. The standing in the past also and the runnings of the culvert full was evidence as to a lack of care and foresight on the part of the defendant.

It is also true that there is some evidence that the culvert was blocked by a part of the sidewalk. The evidence, however, does not show for how long this was, or with definiteness to what extent. It is not impossible, also, that the jury may not have believed the witness at all; for only one witness testifies to the fact, and he was an employee of the defendant company, and the relative size of the wooden piece and the iron culvert make the fact somewhat impossible. Must we say that a jury must believe a witness under these circumstances, or that this court, if the jury refused to believe him, must say that it does, and reverse the judgment?

A plaintiff is not bound to exclude by his proof all possibility that the loss may have occurred in some other manner or from some other cause than that contended for by him. He is merely required to satisfy the jury by a fair preponderance of the evidence of the truth of his contention. Farmers' Mercantile Co. v. Northern P. R. Co. 27 N. D. 302, 316, 146 N. W. 550; Rober v. Northern P. R. Co. 25 N. D. 394, 142 N. W. 22; Adams v. Bunker Hill & S. Min. Co. 12 Idaho, 637, 11 L.R.A.(N.S.) 844, 89 Pac. 624.

This brings us to a consideration of the question whether the rain-

fall or flood was so unprecedented and so extraordinary that it need not have been anticipated.

In considering this point we must first begin with the premise that the question before us is one primarily for the jury to pass upon, and all that we have to decide is whether the evidence is such that reasonable men could not have differed upon the proposition and whether the judgment of reasonable men *must* have been in favor of the contention of the defendants. See Soules v. Northern P. R. Co. 34 N. D. 7, L.R.A.1917A, 501, 157 N. W. 823; Chicago B. & Q. R. Co. v. Schaffer, 26 Ill. App. 280; Sentman v. Baltimore & O. R. Co. 78 Md. 222, 27 Atl. 1074.

We must also adopt the premise that the burden of proof in the matter is upon the defendant. See Soules v. Northern P. R. Co. supra.

The defendant contends that it has overcome the burden of proof by positive testimony; that never before did the waters flood the property of the plaintiffs; that the present culvert had been under the track since 1909, and that one just one fourth its size had been used for years prior to that time. This point, he says, was not strongly urged in the prior case of Soules v. Northern P. R. Co. supra, and that the conclusion is inevitable that either the flood was unusual and extraordinary or that the culvert was blocked up. In support of this contention he cites the case of Wm. Tackaberry Co. v. Simmons Warehouse Co. 170 Iowa, 203, 152 N. W. 779. In this case, however, not merely was the bridge constructed by a municipal corporation, but the fact of the extraordinary nature of the rainfall was conceded by the plaintiffs; the claim being merely that at the particular point of injury the flood was not unprecedented. On this point the court also held that the creek, *even if unobstructed, could not have carried the volume of water.*

He also cites the case of Kansas City, M. & B. R. Co. v. Smith, 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 81. The case, however, is not one of the obstruction of a stream or drainage channel, but of the obstruction of the overflow of a stream after it had become obstructed; the roadbed of the company running parallel thereto and about ¾ of a mile distant from the stream. He concedes and cites authority to the effect that freshets are regarded as ordinary which are well known to occur in the stream occasionally through a

period of years, although at no regular intervals. Gould, Waters, 2d ed. § 211 C.

He contends that the record shows that in the storm of July 28, 1914, and which is the one involved in the suit at bar, 2½ inches of rain fell between the hours of 1 or 2 and 6 o'clock, and the greater part of this rain fell between 12 and 4. He says that this rainfall is not unusual and extraordinary, "but the point he wishes to bring before the court is that this particular storm was unusual because of its character; the violence of the elements thus causing the water to rush down the streets in sheets and in sheds, as described by the witness." The position, on the other hand, of the plaintiffs was that the jury found, and correctly, that the storm or flood was one that a reasonably prudent man might reasonably have expected in the vicinity; that, although the property of the plaintiffs had not been flooded before, a rise of 1 or 2 inches on several prior occasions would have flooded it, and the railway company could not gamble upon so narrow a margin. They contend, and correctly, that the records of the Experimental Station show a 2.6 inch rainfall in a twelve-hour period in 1903, and the Bismarck Station, larger rainfalls in the same length of time, and that the flood of July 28, 1914, differed from prior ones in degree, and not in kind. They also point to proof of rainfalls of 1.06 inches in half an hour at Dickinson, and of 1.89 inches in half an hour at Bismarck, and .37 inches in five minutes and .73 inches in ten minutes. They also point to the evidence of the witness Hughes, to the effect that he had seen two storms just as hard as the one in question; to that of the witness Ray, who said that he did not think the storm was unusual until he went down town; to that of Reichert, who testified to a storm in 1912 when he was handling a broom in the lobby of a hotel and trying to keep the water from flowing into the lobby, and one about the same summer about as hard, and still another one on some Sunday, and that on several times the water had come back on the east to the St. Charles Hotel and had covered the street, and that he had packed mud and dirt around the tailor-shop window several times to keep out the water.

The question, to our mind, is one of notice and warning, more than it is of an unusual or extraordinary storm. And although the point is a close one, we do not feel justified in interfering with and overruling

the finding of the jury in this respect. Sentman v. Baltimore & O. R. Co. 78 Md. 222, 27 Atl. 1074; Bellinger v. New York C. R. Co. 23 N. Y. 42–46. We must, indeed, hold to what we believe to be the prevailing American rule, that the defense in such cases can only be that of *vis major* or the act of God, and that the act of God in its legal sense applies only to events in nature so extraordinary that the history of the climatic variations and other conditions in the particular locality affords *no reasonable warning of them,* and that damages cannot be avoided on the ground that the flood was an act of God, where, from geographical and climatic conditions, the flood *might have been anticipated, though it occurred infrequently.* Gulf Red Cedar Co. v. Walker, 132 Ala. 553, 31 So. 374, 11 Am. Neg. Rep. 179; Kansas City v. King, 65 Kan. 64, 68 Pac. 1093; Ohio & M. R. Co. v. Ramey, 139 Ill. 9, 32 Am. St. Rep. 176, 28 N. E. 1087.

Generally speaking, we are satisfied that the law applies practically everywhere that where a railroad obstructs a natural water course it must provide for the unobstructed flowage of the water. And when we come to the determination of what is or what is not a natural water course or drainway, we must be guided by the facts around us. We realize that in some states the test as to whether the grass has been worn from the ravine or gulley and whether the water usually flows therein is used. In the case at bar, however, there is some evidence that the grass from the bottom of the gulley was worn away for some distance north of the track. We do not, however, believe this to be material. No matter what may be the law in other states, we must, in North Dakota, take cognizance of the natural topography of the country, of its climatic conditions, and of the condition of its vegetation, and we must adapt the law thereto. It is not necessary in the case at bar to lay down a rule as to all surface waters. It is enough to hold, and we do hold, that the jury was justified in finding, or at least that there was competent evidence from which they could find, that the ravine or swale or depression served as a drainage conduit for a large area of country and was a natural drainway. It is sufficient to hold, and we do hold, that such natural drainways are subject to the same rules as if they were running streams and water flowed continuously therein. We find, indeed, throughout the authorities the words, "drain, drainway," and "depression," used just as often as

we find the word "waterway." See note to Soules v. Northern P. R. Co. L.R.A.1917A, 501.

In North Dakota practically all of these ravines or swales were in early days the beds of running streams. Our large treeless areas, indeed, have interfered with the continuous flow of most of our so-called rivers, such as the Mouse, the Goose, the Cannon Ball, and the James, and at certain seasons of the year grass grows over large portions of their bottoms. At other seasons they are raging torrents, and in a few weeks or days carry off large volumes of water which in a wooded area would take months to pass away. We cannot make any distinction between our so-called rivers and our natural drainways which drain large areas of land; for all these drainways are of great agricultural value. Often the only reason why springs are not therein (and their presence is insisted upon by some writers), is that the water, which in wooded areas sinks through the earth and later on comes up again in the form of springs, in North Dakota, rushes off at one time. Soules v. Northern P. R. Co. supra; 3 Farnham, Waters, 2555; Aldritt v. Fleischauer, 74 Neb. 66, 70 L.R.A. 301, 103 N. W. 1084.

Defendant and appellant next alleges that the court erred in refusing to submit a number of questions in the special verdict. This contention hardly deserves notice. As far as the first seven of these questions are concerned, it is sufficient to say that the trial court need not submit to a jury questions which are admitted by the pleadings or upon which there is no dispute. Lathrop v. Fargo-Moorhead Street R. Co. 23 N. D. 246, 136 N. W. 88; State v. Hanner, 143 N. C. 632, 24 L.R.A.(N.S.) 35, 57 S. E. 1.

As far as the eighth and ninth questions are concerned, and in which the court was asked to submit to the jury the question whether competent engineers had been employed to determine the size of the culvert, not only was there no dispute in the evidence, but, as we have before stated, the question was not one of the fitness of the engineers, but of the efficacy of the work.

It is next contended that the finding of the jury in the special verdict on the amount of the damages is not sustained by the pleadings or the instructions of the court. In reply to the question, "What was the amount of that damage?" the jury replied, "$3,200." All that the complaint prayed for was $2,999, and interest thereon at the rate of 7

per cent from the time of the service of the answer by the defendant. It is claimed by counsel for appellant that no proof was offered showing when the answer was served; that the attention of the jury was not directed to the date of service; that they were not instructed that it was their privilege to give or withhold interest as they saw fit; and that the proof offered by the plaintiffs tended to show damages totaling about $4,000. It also appears that the interest on the $2,999 claimed would have amounted to about $250, so the jury must have either found that the damages were less than $2,999, or else they ignored the *ad damum* clause entirely, and rendered a general verdict without the addition of interest for more than the sum asked or for less than the total proof. It is also urged that the plaintiff waived his right to interest by failing to request instructions on that point.

We find no merit in these contentions. The defendant admits that the case is one where interest could be allowed in the discretion of the jury. Johnson v. Northern P. R. Co. 1 N. D. 354, 48 N. W. 227. He admits that the plaintiffs' proof tended to show a damage totaling about $4,000. The complaint prayed for interest. The verdict, therefore, was not for an amount in excess of what the jury might have returned. If the defendant was doubtful whether the $3,200 included interest or not, he could have raised the question on the trial. This he does not appear to have done. It would appear to be too late to raise it at this time. The cases cited by counsel are not in point. The case of Parsons v. Jameson, 70 N. H. 625, 46 Atl. 687, simply held that the court was powerless to add interest on his own motion, where no interest had been allowed by the jury or instruction asked therefor.

In the case of Fiore v. Ladd, 29 Or. 528, 46 Pac. 144, also, the jury had been discharged.

The same is true of Cookville Coal & Lumber Co. v. Evans, — Tex. Civ. App.—, 135 S. W. 750.

The same is also true of Morrissey v. Morrissey, 180 Mass. 480, 62 N. E. 972.

In all of these cases the court held that the allowance of interest was for the jury, and that the court could not allow it of his own motion. They are not cases where the presumption would be that the jury allowed it. Section 7143 of the Compiled Laws of 1913 provides that "In an action for the breach of an obligation not arising from

contract, and in every case of oppression, fraud, or malice interest may be given in the discretion of the jury."

We must presume at this time that the jury followed the law, and limited their estimate of the injury to the property to $2,999, and that the excess was allowed as interest.

It is next urged that the trial court erred in allowing the attorneys for the plaintiffs to argue the case generally to the jury, and to explain the legal effect of certain of the special findings. After the address of Mr. Pugh, who opened the closing argument for the plaintiff, the following objection was made by the attorney for the defendant:

"Counsel for the defendant objects to the nature and character, the general nature and character, of the argument made by counsel for the plaintiffs to the jury, and objects specifically to the following statements made by counsel: 'If this culvert was too small then, of course, the railway company would be liable.' And objects to the statement made by counsel for the plaintiffs when the court's attention was called to this statement: 'If it was too big, then I don't know whether they would be liable or not. Anyhow, that's our contention.' And the further statement made in the course of the argument, that the railway company is liable for damage occurring if this was not an unusual storm, and we ask the court to let the record show that these statements were made and objected to at the time of the argument."

The Court: "All right."

Mr. Pugh: "Of course, we would like to have it appear that those statements were not made in that language."

There can be no question of the impropriety of the remarks made by Mr. Pugh if the remarks ascribed to him were in fact made. We cannot, however, reverse the judgment on that account.

Not only was this objection not made until after counsel for appellant had himself argued his case to the jury, but the record does not show what the argument really was, and we have no means of ascertaining the fact. The only error that we can consider, therefore, is that raised by counsel for defendant later on, and in relation to the closing argument made by the other attorney for the plaintiffs. This we can consider as the argument was taken down in shorthand and is in the record.

The objection is as follows:

Mr. Conmy: "During Mr. Pugh's argument, counsel interrupted at various times and called his attention to the improper features of his argument, especially where the jury was told as to how these answers to various questions would affect the liability of the defendant. To avoid constant interruption of counsel we asked the court reporter to take down Mr. Murtha's argument to the jury, and we now except to that argument as being wholly unfair, containing misstatements of fact, and telling the jury time and time again what effect its answer to various questions would have on the liability of this defendant, and that it is an attempt to prejudice and bias the judgment of this jury in its answers to the various questions given."

"Counsel also assigns as error the failure of the court to instruct the jury to disregard the statements of counsel as to how their findings or answers to certain other questions in the special verdict would affect the legal liability of the defendant for the damage in question."

As far as the argument of Mr. Murtha was concerned, counsel for the appellant points out no particular defect, with the exception that he argued the case generally to the jury. It is urged that he frequently told the jury what would be the effect of their particular answers. We can, however, find no evidence of this in the argument. It is true that he said: "To establish the negligence, to establish the liability of the railway company, it is necessary for the plaintiff to prove that the railroad company were negligent in some way, and we have shown that they put a pipe in there to carry off the water; that by actual test it was too small, and time and time again before this flood in question that pipe had filled up and failed to carry off the water; and it is our contention that a reasonably prudent man under those circumstances would have put in a bigger pipe, and the test on that would be what a man would do in regard to his own property," etc. Among the questions submitted to the jury, however, are the questions:

(2) "Was the 4-foot culvert maintained by the defendant, if not obstructed by any floating street culvert, crossing or other *débris,* of sufficient size and capacity to take care of the ordinary and usual storm waters which might come to it?"

(3) "If you answer question No. 2, 'No,' should an *ordinarily pru-*

dent man in the exercise of ordinary and usual care have known that said culvert was not sufficient in size or capacity?"

(4) *"Would an ordinarily prudent person under similar circumstances* have installed the 4-foot culvert in question here?"

(5) "Is it just as probable that the flooding of plaintiffs' premises and the damage to his property was occasioned by causes *other than the negligence of the defendant railway company,* if *you find said railway company was negligent?"*

(9) "Should the ordinary prudent man residing in this region have anticipated from his general experience such a storm and rainfall as occurred on July 28, 1914?"

These questions were asked by the defendant himself, and clearly submitted the question of negligence to the jury.

The complaint specifically alleged negligence on account of the insufficient size of the culvert, and the whole case was tried on that theory.

It is true, as said by us in the case of Morrison v. Lee, 13 N. D. 599, 102 N. W. 223, that "the object of the law is to secure fair and impartial answers to the questions submitted, 'free from bias or prejudice in favor of either party or in favor of a particular result.' The jury should not, therefore, be informed, either by the instructions or by the form of the questions, how any particular answer will affect the case, or what judgment will follow in consequence of it, 'for to impart such information would almost necessarily defeat the object intended to be secured by a special verdict.' And for this reason it is error to inform the jury under what circumstances the plaintiff can or cannot recover."

In the case at bar, however, the questions which were submittd by the defendant himself, to say nothing of the pleadings and the whole conduct of the trial, must have made the importance and consequence of the inadequacy of the culvert known to the jury, and it would be absurd to contend that a party is prejudiced by reference to a fact on argument which is already well known to the jury and which has been called to their attention by the defendant himself.

The cases cited by counsel for defendant are not in point. In the case of Morrison v. Lee, supra, the error complained of was found in the instructions of the court, and not in the arguments of counsel.

In the case of Snider v. Washington Water Power Co. 66 Wash. 598, 120 Pac. 88, the court was merely dealing with the discretion of

the trial court in granting a new trial after supposedly prejudicial remarks had been made by counsel.

In the case of Guild v. Moore, 32 N. D. 432–476, 155 N. W. 44, we said: "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."

We did not say, however, that a verdict would be overthrown when the remarks merely alluded to facts of which the jury must have been cognizant, and which the defendant himself had caused to be submitted to them.

It is next urged that the trial court erred in refusing to give the following instructions:

"One of the questions submitted to you for determination is whether the storm and flood in question here was an ordinary storm and flood, or an extraordinary one. This question you should answer in accordance with the facts and the law with reference to what constitutes an ordinary storm. I charge you that extraordinary floods are floods which are of such unusual occurrence that they could not have been foreseen by men of ordinary experience and prudence. Ordinary floods are those the occurrence of which may be reasonably anticipated from the general experience of men residing in the region where such floods happen.

"I further charge you that, even if it should appear that one or two times before there had been storms and floods the equal of the one in question here, still that would not warrant you in holding this storm a usual and ordinary storm, unless it appears that it was such a storm as could be reasonably anticipated from the general experience of men residing in this region."

The refusal of these instructions could not possibly have prejudiced the defendant, as they placed a greater liability on the defendant than did the mere question of whether the storm was unusual and extraordinary which was submitted to the jury in the special questions. Under the proposed instructions, indeed, the defendant would have been liable for a storm which should have been anticipated, even though not usual. The questions as submitted, and without instructions, left the jury to decide if the storm was usual. If it was usual the defendant should have anticipated it, and a finding that it was usual would have carried

with it the legal consequence. The only question is whether there was any evidence to show that the storm was usual and to sustain the finding. We are satisfied that there was.

It is next claimed that the court erred in sustaining plaintiffs' objection as follows:

Q. Have you ever found any of them to be insufficient?

Counsel for plaintiff: We object to that on the ground that it is not a proper test of the qualifications, and has no bearing on this case.

The Court: Objection sustained.

Mr. Conmy: The defendant offers to show by this witness that he has at various times installed culverts in similar basins to this, and that these culverts have at all times proven sufficient.

Mr. Murtha: I have no objection to that if you will let me show that they have put in other culverts that are insufficient.

The Court: Objection sustained.

We think there was no error in this matter, and that the admission of the testimony would merely have drawn in collateral controversies the hearing of which would have extended the litigation beyond limit.

It is next contended that the court erred in admitting in evidence exhibit A on account of a writing or indorsement which occurred thereon. Exhibit A was a map, and the writing or indorsement was explanatory thereof. Appellant has shown no prejudice likely to have arisen therefrom, and we can see none.

It is next urged that the court erred in overruling defendant's objection to the following question:

"And prior to this filling in, was the railroad property north of the tracks and south of Villard street higher or lower than Villard street?"

The objection to this question is based upon the theory that the railway company would only be liable for positive negligence in the construction of the embankment. We have, however, already held that the question was one of duty and sufficiency, rather than of positive negligence; and such being the case, and the lay of the land, its drainage, and the nature of the drainage area, being matters of much moment, the evidence was not inadmissible.

The judgment of the District Court is affirmed.

CHRISTIANSON, J. (dissenting). I concurred in the opinion in Soules v. Northern P. R. Co. 34 N. D. 7, L.R.A.1917A, 501, 157 N. W. 823, as I believed that under the evidence in that case it was for the jury to say whether the defendant was negligent in constructing its culvert; whether the flooding of the premises involved in that case was occasioned by the inadequacy of such culvert; and also whether the storm was of an unusual and unprecedented character. The evidence in the present case, however, is in many particulars different from that adduced in the Soules Case. In the Soules Case there was evidence of the amount of rainfall during a nine-hour period only. 34 N. D. 28. In this case the evidence shows that 2.6 inches of rain fell from the time the storm commenced (about 1 o'clock A. M.) until 6 o'clock A. M. The worst part of the storm was over about 4 o'clock, although it rained somewhat between then and 6 o'clock. The water stopped running into the hotel around 4 o'clock.

In this case there is, also, a far stronger showing as to the adequacy of the culvert. The elements of uncertainty with respect to the surrounding conditions which existed in the Soules Case do not exist here. The testimony of three civil engineers of unquestioned competency and integrity (including a former state engineer of this state) shows that the culvert was adequate, not only to take care of all the rain which fell, but was adequate to take care of a rainfall of 2½ inches if it all fell in fifteen minutes. While it is true that, as a general rule, the testimony of experts is not necessarily conclusive upon the jury and may be disregarded, there are certain facts which have been established by experiments and observation, and certain deductions based upon past experience, which are accepted as the best evidence of the matters to which they relate. The testimony of witnesses contradicting almanacs, tables of logarithms, or interest tables, would hardly be held to raise an issue of fact as to any question on which the witnesses differed from the almanac or such tables. Now, would the testimony of a witness based upon his feelings and observation as to heat and cold be deemed sufficient to overcome the registrations of a thermometer of conceded or proven accuracy? The testimony of the engineers in this case is based upon measurements which they made of the drain basin, the slope of the ground, and the size of the culvert. These are not matters of uncertainty. They are established as absolute facts. There is, of

course, no difficulty in determining how much rain will fall in a given area where there is a rainfall of 2.6 inches. Nor is there any serious difficulty in determining how much water can run through a culvert of a given size placed at a certain angle, during a given time. These matters can be established by computation based upon certain well-established physical laws. There is no contention that the computations made and testified to by the engineers in this case are inaccurate or based upon inaccurate premises.

In my mind there is no question of fact in this case upon which reasonable men can differ. The evidence shows that the culvert in question received actual tests as to its capacity on various occasions, among others on June 26, 1915, when 1.16 inches of rain fell in half an hour. During this rain although the high water came up over the sidewalk in front of Soules & Butler's store and within 5 feet of their building, still the culvert was never forced to more than one third of its capacity, and during this storm the elevation of water was greater in the street in front of Soules & Butler's store than at the entrance to the culvert, *viz.*, 99.15 inches at the Soules & Butler's store and only 96.3 inches at the culvert. The unimpeached testimony of the engineers based upon the physical facts in the case, and such physical facts themselves, in my opinion, clearly show that the overflow was not caused by the inadequacy of the culvert. In fact they fully bear out the contention of Judge Robinson that "had there been no embankment the water would have piled up just the same and would have run over the curbing and into the unprotected basement."

ROBINSON, J. (dissenting). The complaint avers that on July 28, 1914, the plaintiffs were in possession of certain hotel property in Dickinson. The basement was used as sample and store rooms and as a pool and billiard hall. That upon its right of way through the city the defendant maintained a high-grade embankment and crossed a natural water course, the natural drainage for the surface and storm waters of a large area. The hotel is in the basin drained by the water course, and that in constructing its road and embankment defendant filled up and obstructed the water course, leaving only a small open ditch and a small iron culvert to carry off the water; that on July 28 storm waters dammed against the embankment and flooded the base-

ment of the hotel and damaged them to the amount of $3,000. Defendant appeals from an order denying a new trial and from a verdict and judgment for $3,200.

The jury gave a special verdict. In answer to the material question: Was the storm and flood of July 28th an unusual or extraordinary one? the answer was, "No." The answer was clearly and obviously untrue. There is no claim that there ever was another such a flood in Dickinson. If the flood were of ordinary occurrence, then it was an act of folly and neglect for the plaintiffs to put their goods in an unprotected basement liable to be flooded by an ordinary storm. It must be presumed they knew of the embankment and the culvert and the water course and the drainage of the city, and with that knowledge they did not fear a flood and they took no precaution to protect their hotel basement by cement walls or otherwise.

The hotel is on a rather level basis at the foot of a long and rapid descent on a street which had been curbed and paved, so that when the rain fell in torrents the water rushed down the rapid incline and piled up on the level of the hotel. Had there been no embankment the water would have piled up just the same, and it would have run over the curbing and into the unprotected basement.

Dickinson is in a semiarid country, where the average annual rainfall is about 22⅐ inches. One inch in twenty-four hours would be a normal or rather excessive rainfall. For ten years prior to July 28, 1914, the average precipitation on days of snow and rain was less than a quarter of an inch. It was about ⅓ of an inch. Except on July 28, 1914, the largest rainfall shown on the record of the weather bureau was 2.6 inches. That was in May, 1903. In the year 1914 the total precipitation was 15.39 inches, and yet in July, 1914, there was over 4 inches in a few hours. That is, the rainfall in a few hours of that day was one fourth of all that fell during the year; and the jury says that was not extraordinary. Now, that is perfectly absurd and manifestly untrue, and every juror knew it. Every juror knew the rainfall was extraordinary and very extraordinary.

But railroad companies do so many mean things, and make overcharges, and pile up so much wealth, that jurors and judges do like to get even with them once in a while; and while that may be some excuse, we must not turn the law into a mockery of justice.

The Dickinson storm of July 28th was such a storm as never occurred before and may never occur again. No party was bound to look for and to guard against any such an extraordinary occurrence. Hence, the judgment should be reversed.

On Rehearing.

BRUCE, Ch. J. An able and exhaustive reargument has been had in this case, yet we are constrained to adhere to our original holding. The complaint alleges:

"That the defendant company in constructing said embankment through the city of Dickinson, and across said water course and channel of drainage, unnecessarily, carelessly, and negligently entirely filled up and destroyed said water course and channel of drainage, and in the place and stead thereof put through its embankment, part way, a small crooked open ditch and the other part of the way a small iron culvert connecting with said ditch, which said ditch and culvert were entirely insufficient in size and fall to carry off the waters of said water course or storm waters of said drainage area or basin in times of rain, and were so carelessly and negligently constructed and maintained that it entirely failed to carry off said water; that because of the negligent construction and maintenance of said embankment, the negligent construction and maintenance of said ditch and culvert, and the lack of size, fall, and capacity of said ditch and culvert, on July 28, 1914, storm waters dammed up against said embankment and flowed over and upon the hereinbefore described premises of the plaintiffs, and into said basements.

"That on July 28, 1914, and for a long time prior thereto, the defendant had notice and knowledge of the fact that said embankment entirely destroyed said drainage channel, and that said ditch and culvert were insufficient to carry off the waters of said drainage basin and channel in times of rain."

There can be no question that, before the construction of the railroad embankment, the waters of the area in question flowed down to the Hart river through a natural water course, ravine, gully, or natural depression, having a fixed and determined course and which formed the natural and usual channel for the escape of the waters," and that,

even if the so-called common-law rule of surface waters had maintained, the upper landowners would have had the right to use such channel. It is also the established law that surface waters having an accustomed flow in a drainage channel or waterway having well-defined banks, may not be stopped by an embankment across the channel so as to divert the waters to the injury of adjoining proprietors. See 40 Cyc. 648; Aldritt v. Fleischauer, 74 Neb. 66, 70 L.R.A. 301, 103 N. W. 1084.

It seems to be well established also, and this, even where the common-law rule applies, that where a railroad crosses a ravine, gully, or natural depression in the earth, which forms the natural and accustomed channel for the escape of surface waters, it is incumbent upon the company to make provision for the flowage of the same. See Jungblum v. Minneapolis, N. U. & S. W. R. Co. 70 Minn. 153, 72 N. W. 971; Smith v. Chicago, B. & Q. R. Co. 83 Neb. 387, 119 N. W. 669; Quinn v. Chicago, M. & St. P. R. Co. 23 S. D. 126, 22 L.R.A.(N.S.) 789, 120 N. W. 884; 40 Cyc. 644.

The controversy in the case at bar has been mainly over the question of the size of the culvert. The complaint, however, charges that the defendant carelessly and negligently entirely filled up and destroyed said water course and channel of drainage, and in place thereof put through its embankment, part way, a small crooked open ditch, and the other part of the way a small iron culvert connecting with said ditch; that because of the negligent construction of said embankment, the negligent construction of said ditch and culvert, and the lack of size, fall, and capacity of said ditch and culvert, on July 28, 1914, storm waters dammed up against said embankment, etc.

If, then, the jury were led to believe, and we think there was evidence from which they might form the belief, that after the filling in and erection of the embankment the construction of both the ditch and the culvert in the place of the original water course were not sufficient to carry off the waters of the water course as it originally existed, then they were justified in holding for plaintiff. In this view of the case, even if the culvert was sufficient to carry off the waters which were in the ditch, which was a matter of fact, not more than 30 yards in length, it by no means followed that the ditch and culvert together, as constructed, were adequate for the purpose, and to take the flowage of the

original water course over which in earlier years the railroad company had constructed a pile bridge.

We realize that the opinion of experts, such as those as in the case before us, should be given great weight. Those experts, however, only testify as to the adequacy of the culvert when the waters got to it. They did not testify positively as to the adequacy of the whole arrangement, and there is much conflict in relation thereto.

BEN ROBINSON, Plaintiff and Respondent, v. GEORGE W. SHIVELY et al., Defendants, JOHN D. GRUBER COMPANY, a Corporation, Defendant and Appellant.

(167 N. W. 388.)

Conversion — personal property — wrongfully taken — value of — action to recover.

This is an action to recover the value of personal property wrongfully taken from the possession of the plaintiff and sold on an execution against a third party. The facts stated clearly show the taking and conversion of the property, and that it was wrongful, and that plaintiff is clearly entitled to recover the value of his property, with interest and costs.

Opinion filed July 21, 1917. Rehearing denied October 3, 1917.

An appeal from the District Court of Towner County, Honorable *C. W. Buttz,* Judge.

Affirmed.

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

Kehoe & Moseley, for respondent.

ROBINSON, J. This action was commenced in justice court to recover $195, and interest, for the conversion of one dark brown mare named Floss. The plaintiff recovered judgment for $211.15 and the defendant appealed to the district court. Then, in April, 1915, judgment was rendered in favor of the plaintiff for $246.11, and the defendant appeals to this court. The appeal was filed November 11, 1915. While the records are voluminous, the case presented is very simple.

As the complaint and the evidence show, and as the trial court found, one C. G. Day was the owner of the mare, and he mortgaged the same, with other property, to Crocus State Bank to secure $1,500. Then, to Henry Hawkinson, he made a second mortgage on the same mare and other property, to secure $200. Then, to the defendant Gruber Company he made a third mortgage on the mare to secure $75. Then, in October, 1913, with consent of all the parties interested, Day made a public sale of all his property to satisfy the mortgages according to their priority. The sale was in legal effect a foreclosure. At said public auction the plaintiff purchased the mare fairly and in good faith and thereby acquired the right, title, and lien of both Day, the mortgagor, and the Crocus State Bank, the mortgagee, and the same was superior to all other titles and liens. At the sale made by Day pursuant to such agreement the agent of the third mortgagee was present and purchased and took certain personal property. Then under a warrant of foreclosure against Day the Gruber Company caused the sheriff to take from the plaintiff and levy on the mare in question. It is claimed defendant corporation did not consent to the auction sale, but its agent was present and purchased for it property at the sale. And we are agreed that there is evidence to justify the finding of the jury that defendant waived the lien of its mortgage. In any view that may be taken of the case, the plaintiff is clearly entitled to recover the value of the mortgage, with interest and costs. Judgment affirmed.

ERNEST QUACKENBUSH, Plaintiff and Respondent, v. GEORGE W. SHIVELY, Individually and as Sheriff, et al., Defendants, JOHN D. GRUBER COMPANY, a Corporation, Defendant and Appellant.

(167 N. W. 387.)

Conversion — personal property — wrongfully taken — value of — action to recover.

This is an action to recover the value of personal property wrongfully taken from the possession of the plaintiff and sold on an execution against a third party. The facts stated clearly show the taking and conversion of the property,

and that it was wrongful, and that plaintiff is clearly entitled to recover the value of his property, with interest and costs.

Opinion filed July 25, 1917. Rehearing denied October 3, 1917.

An appeal from the District Court of Towner County, Honorable *C. W. Buttz,* Judge.

Affirmed.

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

Kehoe & Moseley, for respondent.

ROBINSON, J. This action was commenced in justice court in May, 1914, to recover $185, with interest, for the conversion of a gray mare named Nettie. Judgment was given in favor of the plaintiff for $200, and the defendant appealed to the district court. In that court judgment was given for $253.62, and defendants appeal to this court. The appeal was filed November 11, 1915. The verdict of the jury was for $175, and interest.

The complaint and the evidence show that one C. G. Day was the owner of the mare in question, and he mortgaged the same, with other property, to the Crocus State Bank to secure $1,500. Then he made a second mortgage on the same property to Henry Hawkinson to secure $200. Then he made to the defendant corporation a third mortgage on the mare, with other property, to secure $90. Then in October, 1913, with consent of all the parties interested, Day made a public sale of all his property to satisfy the mortgages according to their priority. The sale was the same as a foreclosure. At the public auction sale the plaintiff fairly and in good faith purchased and took possession of the mare and thereby acquired all the title and interest of Day, in addition to the mortgage lien, and his title became superior to all other titles and liens. At the sale which was made by Day pursuant to the agreement, the agent of said third mortgagee was present, and purchased and took and carried away certain personal property. Then, under a warrant of foreclosure against Day, the defendants levied upon and took the mare from the possession of the plaintiff. It is claimed the defendant corporation did not consent to the auction sale. That is quite immaterial. Its agent was present at the sale and purchased property for it. And we are agreed that there is evidence to justify the finding of the jury that

defendant waived the lien of its mortgage. In any view of the case the plaintiff is clearly entitled to recover the value of his mare, with interest and costs. The case is too clear for any discussion. Judgment affirmed.

J. W. LAHART, Respondent, v. MINNESOTA GRAIN COMPANY, Appellant.

(166 N. W. 828.)

Complaint — cause of action — money had and received — testimony — conflict in — questions for jury — verdict — final — trial otherwise fair.

The complaint states a cause of action for money had and received and three separate causes of action for goods bargained, sold, and delivered. On each point and issue there was a sharp and decided conflict of testimony. The jury found generally and specifically in favor of the plaintiff. There was a fair trial and no error, and the judgment is affirmed.

Opinion filed January 30, 1918.

Appeal from the District Court of Eddy County, Honorable *C. W. Buttz,* Judge.

Defendant appeals.

Affirmed.

James A. Manly (*Alvord C. Egelston,* of counsel), for appellant.

"Any unexpected situation in which a party may be placed without any default on his part and which will be injurious to his interests may be termed 'surprise', entitling him to a new trial." Delmas v. Margo, 78 Am. Dec. 518, note.

"Where the moving party presents a clear case of surprise, which has resulted to his prejudice, and was himself without fault and in a situation to protect his interests in a new trial, the court will regard the motion with favor, and will grant it if that decision of the matter will promote substantial justice." Baylies, New Trial, p. 530; Platt v. Munroe, 34 Barb. 291; Nudd v. Home Ins. & Bkg. Co. 25 Minn. 100; Delmas v. Margo, 25 Tex. 1, 78 Am. Dec. 518.

Ordinarily when a party is taken by surprise at a trial he should move for a continuance, but this rule is not an inflexible one, and each

case must be decided by itself, in the furtherance of justice. Nudd v. Home Ins. & Bkg. Co. 25 Minn. 100; Russell v. Reed, 32 Minn. 45, 19 N. W. 86; Alger v. Merritt, 16 Iowa, 121; Sutherland, Code, Pl. & Pr. § 1581.

Where a party is surprised by false testimony of the witness, it is ground for a new trial. 14 Enc. Pl. & Pr. 1739.

It is settled that a foreign corporation that has complied with the laws of the state so that service of process can be made upon it at any time can avail itself of the Statute of Limitations. Ability to obtain service of process is the test of the running of the statute. 13 Am. & Eng. Enc. Law, 2d ed. p. 904; Wall v. Chicago & N. W. R. Co. 69 Iowa, 498, 29 N. W. 427; McCabe v. Illinois C. R. Co. 4 McCrary, 492, 13 Fed. 827; United States Exp. Co. v. Ware, 20 Wall. 543, 22 L. ed. 422; 22 Am. & Eng. Enc. Law, 1238; Darrell v. Hilligoss, M. M. & R. Gravel Road Co. 90 Ind. 264.

Maddox & Rinker, for respondent.

Where a party claims surprise at the trial because of adverse material testimony given, he is not entitled to even a continuance to obtain the presence of witnesses to contradict such testimony, and much less is it ground for a new trial. It is the duty of a litigant to have his known witnesses present, and to anticipate the nature of the proof required touching material issues. Further, questions not brought to this court by specifications of error are not before the court for consideration. Kaye v. Taylor, 28 N. D. 293, 148 N. W. 629; Webb v. Wegley, 19 N. D. 606, 125 N. W. 562; Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605, and cases cited.

A new trial should be granted only when, from the special verdict, it cannot be determined whether it accords or conflicts with the general verdict. Fisk v. Chicago, M. & St. P. R. Co. 74 Iowa, 424, 38 N. W. 132, and cases cited.

Objections that a special verdict is not sufficiently definite and certain are waived, unless advantage is taken when the verdict is rendered and request is then made to have the jury reconsider and the questions answered more definitely. Elgin, J. & E. R. Co. v. Raymond, 148 Ill. 241, 35 N. E. 729; Reeves v. Plough, 41 Ind. 204; Bradley v. Bradley, 45 Ind. 67; Huss v. Chicago G. W. R. Co. 113 Iowa, 343, 85 N. W. 627; Arthur v. Wallace, 8 Kan. 267; Kansas P. R. Co. v. Pointer,

14 Kan. 37; Manny v. Griswold, 21 Minn. 506; Crandall v. McIlrath, 24 Minn. 127; Varco v. Chicago, M. & St. P. R. Co. 30 Minn. 18, 13 N. W. 921; Moss v. Priest, 1 Robt. 632, 19 Abb. Pr. 314.

A special verdict must clearly show that the jury adopted theory different from that of the prevailing party, and not involved in and covered by the issues submitted for determination, to warrant a reversal of the judgment. Aultman & T. Machinery Co. v. Wier, 67 Kan. 674, 74 Pac. 227; Phœnix v. Lamb, 29 Iowa, 352.

ROBINSON, J. In this case the complaint contains four causes of action. The jury found a verdict for the plaintiff, $3,977.12, and the defendant appeals from the judgment and from an order denying a new trial.

The first cause of action is $800, and interest from October 1, 1909, for money had and received from J. H. Shepard for the use of the plaintiff. To this the answer is a general denial. The jury specifically allowed the claim. The plaintiff testified that Shepard was owing him $800 and paid it to defendant for the use of the plaintiff in October, 1909. On this it cannot be claimed that the verdict is not sustained by the evidence, but on this item defendant moves for a new trial on the affidavit of two persons. The trial court denied the motion, holding that there was no reasonable excuse for their absence at the trial, and in this we fail to see any abuse of discretion. On this matter the testimony of Lahart was given at the opening of the trial on the first day, and the trial lasted about three days.

The second cause of action is for lumber sold and delivered, $330; the third cause is for grain, $1,147.90; the fourth cause is for grain, $451. The answer to each is a denial, and to the third and fourth causes of action, that is, for the grain sold and delivered, there is a plea of the Statute of Limitations. On each cause of action and each issue there was a sharp conflict of evidence, and it is rather hard to say on which side the evidence preponderates. It is certain there is ample evidence to sustain the verdict.

The third and fourth causes of action were for the sale of grain which was left over in two grain elevators which the plaintiff sold to the defendant. The sale was made in June or July. The jury found it was made in July, and found specifically that the plaintiff was to have credit

for the grain in the summer of 1908, and the evidence of the testimony of Lahart is very positive that he did not have any credit for the grain, while on the part of the defendant there is testimony that he did have credit. The jury found specifically that the plaintiff was to have credit for the grain in July, 1908. The action was commenced in March, 1914, and they found that defendant took the lumber before November 1, 1908.

The charge of the court to the jury is exceedingly fair and unexceptional, and the case appears to have been fairly tried, and the questions of fact were fairly submitted to the jury. There is nothing to be gained by a discussion of the testimony.

The order and judgment of the District Court is affirmed.

GRACE, J. I concur in the result.

BIRDZELL, J. The only serious question in this case, in my opinion, is that of the Statute of Limitations; and while the testimony of Lahart as to the time he was to receive credit is somewhat inconsistent and unsatisfactory, I am not prepared to say that the construction placed thereon by the jury was unwarranted. I concur in the affirmance of the judgment.

THERESIA DOLWIG FISCHER, Plaintiff and Appellant, v. JOHN DOLWIG, Defendant and Respondent, and Elizabeth Willer, Susanna Kunz, Katherina Duckhorn, and Magdalena Schiller, Defendants.

(166 N. W. 793.)

Antenuptial agreement — other than to marry — void unless in writing.

1. An antenuptial agreement other than a mutual promise to marry is, under the provisions of § 5888 of the Compiled Laws of 1913, void unless made in writing.

NOTE.—On postnuptial written contract to confirm antenuptial oral contract relinquishing rights in property, see note in 11 L.R.A.(N.S.) 593, where it is held that a written ratification after marriage of an oral antenuptial contract in regard to the disposition of property was valid and enforceable between the parties.

Oral antenuptial agreement — void under statute — after marriage reduced to writing — does not validate.

2. An oral antenuptial agreement, void under the Statute of Frauds because not in writing, cannot be validated by reducing the same to writing after the marriage has been consummated.

Probate proceeding — party to — service of citation — may waive — appointment of administrator — joining in — waiver of notice.

3. A party to a probate proceeding may waive the service of citation by joining in the appointment for an administrator and by waiving such service in such petition.

Actual notice of proceeding — seasonable appearance in — no citation served — cannot complain.

4. One who has actual notice and seasonably appears cannot complain that a citation was insufficient or that no citation was given.

Final decree of distribution — of estate — party standing by and allowing — without making claim to exemptions — judgment of probate court — no effort to set aside — no appeal — validity of judgment — cannot be questioned — on grounds which could have been considered on appeal.

5. A person who stands by and allows a final decree of distribution to be entered, without in any way claiming the exemptions provided for by §§ 8725 and 8727 of the Compiled Laws of 1913, and who does not seek to have said judgment set aside or modified by said county court, and does not appeal therefrom, may not afterwards question the validity of such judgment on grounds which could have been presented on such appeal.

Opinion filed February 9, 1918.

Action to set aside a decree of the County Court of Stark County distributing the estate of a deceased person.

Appeal from the District Court of Stark County, *W. C. Crawford,* J. Judgment for defendants. Plaintiff appeals.

Affirmed.

Charles Simon and *Casey & Burgeson,* for appellant.

The marriage settlement is void under our Statute of Frauds because it was not signed until some length of time after marriage. An oral antenuptial contract other than to marry is void and cannot be validated after marriage. 21 Cyc. 1293; Comp. Laws 1913, § 588. Rowell v. Balber, 142 Wis. 937, 27 L.R.A.(N.S.) 1140, 125 N. W. 937; McAnnulty v. McAnnulty, 120 Ill. 26, 60 Am. Rep. 552, 11 N. E. 397; Richardson v. Richardson, 148 Ill. 563, 26 L.R.A. 305, 36 N. E. 608.

In antenuptial contracts affecting property, good faith is the cardinal principle in such contract. If the provision made for the wife is unreasonably disproportionate to the means of the husband, the presumption of designed concealment is raised and the burden of disproving the same is upon him. Re Pulling, 93 Mich. 274, 52 N. W. 1116; Achilles v. Achilles, 151 Ill. 136, 37 N. E. 693; Tayor v. Taylor, 144 Ill. 436, 33 N. E. 532.

The waiver of notice and citation is not sufficient to excuse the service of such citation in the different proceedings had in the probate of an estate. Comp. Laws 1913, § 8530.

No waiver of any kind can be effective in a probate proceeding unless the person executing such waiver has already appeared in such proceeding,—at the date of the waiver here, no proceeding had been instituted in court. Comp. Laws 1913, § 8555.

Where a party understands and signs an instrument, he is estopped to question it, or where he assumes a position in a judicial proceeding. 16 Cyc. 796; Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233.

Property of decedent which is directed by statute to be set apart to the widow vests in her at once by operation of law, upon the death of the husband. 18 Cyc. 403; Fore v. Fore, 2 N. D. 260, 50 N. W. 712.

Marriage contracts do not bar the wife's statutory exemptions unless such exemptions are particularly mentioned and then only when there is full and sufficient provision made for the wife. 21 Cyc. 1260; Re Pulling, 93 Mich. 274, 52 N. W. 1116; McMahill v. McMahill, 105 Ill. 596, 44 Am. Rep. 819; Leach v. Leach, 65 Wis. 284, 26 N. W. 754; Zachmann v. Zachmann, 201 Ill. 380, 94 Am. St. Rep. 180, 66 N. E. 256.

Conveyances which leave the wife without support will be set aside as fraudulent.

Our statute expressly authorizes an action in the district court to recover real property or to set aside a decree of the county court in a proper case, at any time within three years after discovery of the fraud or other ground upon which such action may be instituted. Fischer v. Dolwig, 29 N. D. 561, 151 N. W. 431.

T. F. Murtha and *J. W. Sturgeon,* for respondents.

Any person not under disability may waive any notice or citation

designed to secure jurisdiction over his or her person. The county court secured jurisdiction over the property of this estate by the filing of the petition for administration. Attached to and accompanying the petition was a written and signed waiver of service of all citations and notices "which otherwise would be required by law in the course of the administration of said estate." Code, § 8565; 18 Cyc. 120, ¶ 4; Flood v. Kerwin, 113 Wis. 673, 89 N. W. 845.

Also lack of notice is immaterial to persons who appear and consent to the proceedings. 29 Cyc. 1117 (c).

A waiver by the party for whose benefit or protection notice should be given is equivalent to notice, and dispenses with it. Williams v. Addison, 93 Md. 41, 48 Atl. 458; Allured v. Voller, 107 Mich. 476, 65 N. W. 285; People ex rel. Martin v. Albright, 23 How. Pr. 306; Smyser v. Fair, 73 Kan. 773, 85 Pac. 408; Rice v. Hosking, 105 Mich. 303, 55 Am. St. Rep. 448, 63 N. W. 311.

Also a general appearance operates as a waiver of all defects in process. 3 Cyc. 510 (II), 512 to 514, 515 (II) of Person (A); 2 R. C. L. 324, § 4.

So also, a voluntary appearance waives all defects in service of citation. 1 Black, Judgm. 2d ed. § 225; Nashua Sav. Bank v. Lovejoy, 1 N. D. 211, 46 N. W. 411; Lower v. Wilson, 9 S. D. 252, 62 Am. St. Rep. 865, 68 N. W. 545; Waldron v. Chicago & N. W. R. Co. 1 Dak. 351, 46 N. W. 456; Bowler v. First Nat. Bank, 21 S. D. 449, 113 N. W. 618; State ex rel. Railroad Comrs. v. Duluth, W. & P. R. Co. 25 S. D. 106, 125 N. W. 565; Ramsdell v. Duxberry, 17 S. D. 311, 96 N. W. 132; Fanton v. Byrum, 26 S. D. 366, 34 L.R.A.(N.S.) 501, 128 N. W. 325, 1 N. C. C. A. 812; Forman v. Healey, 19 N. D. 116, 121 N. W. 1122; Hart v. Wyndmere, 21 N. D. 383, 131 N. W. 271, Ann. Cas. 1913D, 169; Rogers v. Penobscot Min. Co. 28 S. D. 72, 132 N. W. 792, Ann. Cas. 1914A, 1184.

Fraud must be proved. It cannot be presumed. 20 Cyc. 108 (j), 120 (l).

Plaintiff made all her discoveries six months before making or entering of final decree; she took no steps to correct same. If the waiver of notice had been procured by fraud and this fact had been brought to the attention of the county court, it must be presumed that the judge

would have required personal service of personal citation. By silence after full knowledge, plaintiff ratified the waiver and is estopped to repudiate it. Emerson-Newton Implement Co. v. Cupps, 15 N. D. 606, 108 N. W. 798; 2 Black, Judgm. 2d ed. § 633; 16 Cyc. 684, 685, 770, 772 to 805; 20 Cyc. 92; McDonough v. Williams, 8 L.R.A.(N.S.) 452, note; Bostwick v. Mutual L. Ins. Co. 116 Wis. 392, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246; Robertson v. Smith, 15 L.R.A. 274, note; Dolvin v. American Harrow Co. 28 L.R.A.(N.S.) 892, note.

Fraud could not be imputed to the other heirs, and as to them plaintiff owed the duty to promptly repudiate the waiver if it was wrong. 16 Cyc. 759 et seq; Bacon v. Mitchell, 14 N. D. 454, 4 L.R.A.(N.S.) 244, 106 N. W. 129; Fanton v. Byrum, 26 S. D. 366, 34 L.R.A. (N.S.) 501, 128 N. W. 325, supra.

The waiver must stand unless by clear, satisfactory, and convincing proof it is shown to have been obtained by fraud. Matchett v. Liebig, 20 S. D. 169, 105 N. W. 170.

Plaintiff's waiver gave the court jurisdiction of the person. The county court's judgment upon a matter within its jurisdiction ranks the same as a judgment of the district court. Comp. Laws 1913, §§ 8524, 8846; Fischer v. Dolwig, 29 N. D. 561, 151 N. W. 431; Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008.

It can only be attacked by moving for correction in the county court or by appeal. Crew v. Pratt, 119 Cal. 139, 51 Pac. 39; Civ. Code, §§ 715, 716.

In proceedings for final distribution of an estate devised in trust, it is the duty of the court under the law to adjudicate the question of the validity of the trust. Re Harrington, 147 Cal. 124, 109 Am. St. Rep. 118, 81 Pac. 546; Cunha v. Hughes, 122 Cal. 111, 68 Am. St. Rep. 27, 54 Pac. 535; Lasley v. Preston, 132 Mich. 208, 93 N. W. 253; Eddy v. Kelly, 72 Minn. 32, 74 N. W. 1020; Chadbourne v. Hartz, 93 Minn. 233, 101 N. W. 68; Winkle v. Winkle, 8 Or. 193; 1 Black, Judgm. §§ 246 et seq., 252, note 150, § 261, note 135.

The decree of the county court can only be attacked for fraud, or for want of jurisdiction, neither of which appears here. 1 Black, Judgm. 2d ed. §§ 245, 246, 261, note 235, p. 394, § 262, note 150, §§ 267, 268, 291; 23 Cyc. 1061, 1323, 1295 (9); 18 Cyc. 665, 402, note 83; 11 Decen. Dig. Judgments, §§ 470 et seq.

By signing the waiver and by her appearance personally, and by attorney in the county court, plaintiff has estopped herself from attacking the decree of the county court. Boyd v. Wallace, 10 N. D. 78, 84 N. W. 760.

Plaintiff is bound by her appearance and acts in the county court, and she cannot disclaim authority of her attorney because he may have erred in judgment on matters of law. Bacon v. Mitchell, 14 N. D. 454, 4 L.R.A.(N.S.) 244, 106 N. W. 129; Keenan v. Daniells, 18 S. D. 102, 99 N. W. 853; Corson v. Smith, 22 S. D. 501, 118 N. W. 705.

Plaintiff has not been deprived of any right by any act of others. Bruegger v. Cartier, 20 N. D. 72, 126 N. W. 491.

An oral marriage settlement made before marriage and reduced to writing after marriage is valid and enforceable where the settlement has been fully executed, and where the widow keeps the property received under such settlement. Erb v. McMaster, 88 Neb. 817, 130 N. W. 576; Claypoole v. Jaqua, 135 Ind. 499, 35 N. E. 285; Stubbs v. Whiting, 1 Rand. (Va.) 322; Woods v. Woods, 77 Me. 434, 1 Atl. 193; Powell v. Meyers, 23 Ky. L. Rep. 795, 64 S. W. 238; De Farges v. Ryland, 87 Va. 404, 24 Am. St. Rep. 659, 12 S. E. 805; Sanders v. Miller, 79 Ky. 517, 42 Am. Rep. 237; Lively v. Paschal, 35 Ga. 218, 89 Am. Dec. 282; Rhoades v. Davis, 51 Mich. 306, 16 N. W. 659.

By appropriate terms all statutory rights in the homestead or in exemptions may be waived. Rieger v. Schaible, 81 Neb. 33, 17 L.R.A. (N.S.) 866, 115 N. W. 560, 116 N. W. 953, 16 Ann. Cas. 700; Re Deller, 141 Wis. 255, 25 L.R.A.(N.S.) 751, 124 N. W. 278; 18 Cyc. 390 to 396.

The county court's final decree of distribution is conclusive on the right of exemptions. 18 Cyc. 390 to 396, supra; 23 Cyc. 1295.

BRUCE, Ch. J. This is an action to set aside a decree of the county court of Stark county, awarding to the defendants the real and personal property of one Jacob Dolwig, deceased, and asking that the defendants be compelled to account for the profits of the real estate of the said Jacob Dolwig since his death, and for all notes and accounts belonging to said estate; and that the plaintiff be decreed one third of the said notes and accounts as well as an undivided one-third interest as the wife of the said Jacob Dolwig in all of the real estate possessed by

him at the time of his death; and that before any division of the personal property be made there be set apart for the plaintiff $1,500 as her exemption as provided for by § 8725 of the Compiled Laws of 1913.

The defense was an alleged marriage settlement by which the said plaintiff, Theresia Dolwig Fischer, waived all right to the estate for the sum of 200 Austrian gulden. A final decree of distribution by the county court in October, 1911, to the effect that "Theresia Dolwig received her share of the estate of the said deceased during her lifetime and by an instrument in writing filed in this court and in this proceeding, and waived all right to any share in the estate of the said Jacob Dolwig, deceased," and that the plaintiff had notice and full knowledge of the proceedings in the county court, waived all service of notice, and impliedly, if not actually, consented to such proceedings and to such judgment.

The plaintiff, on the other hand, alleges that her signature to the waiver of all citation in the said administration proceedings was obtained by fraud, but on this point the trial court found that she signed the waiver; that she knew what she was doing; that no fraud was practised upon her; that she executed a marriage settlement, which waived her rights in the estate, and received $200 thereunder and kept it; that she employed one McBride to represent her in the probate proceedings; that although the judgment was not entered until the 13th day of October, 1911, the plaintiff and her attorney as early as March, 1911, knew that said waiver and said marriage settlement were on file in the county court and were being relied upon by the county court and by the defendants in the suit; that the plaintiff and her attorney knew within one week after final decree was entered that it was entered; that the plaintiff advised her attorney that she would put no more money into the case; that plaintiff made no application to the county court for exemption, real or personal, and took no steps in said court to set aside the said decree or to appeal therefrom.

The defendant also contends that even if it be conceded that the written marriage settlement was void as having been made after the marriage, and the oral settlement was void on account of not having been in writing, and even though the waiver of citation was obtained by fraud, and the judgment of the county court was not binding upon the plaintiff, still there is no ground for equitable interference, since after the

marriage the plaintiff expressly recognized the contract of settlement by joining in a deed of her husband's land to the defendant John, and taking from him an agreement for the support of the couple during their joint life, and that in this way all of the real estate of the deceased had been deeded away. As far, too, as the personal property is concerned, that is to say, the $1,700 in notes, he contends that as a condition of such support he had also agreed that the daughters should each receive $500, John to make up any deficiency; that the money in the estate was not sufficient for this purpose, and that John had paid the deficiency and made good the gifts, and that she should not be allowed at this time to withdraw from an executed agreement. This contention we hold to be sound.

Although there is some dispute in the testimony, the trial court found, and we believe correctly, the following facts:

In 1898 Jacob Dolwig, his wife Magdalena, his son John, and three daughters, came from Hungary to Stark county, North Dakota. Jacob had about $1,100 in money and no other property. John was then nineteen years old. The Dolwig family located on a tract of 160 acres of land in section 4, township 138, range 95, Stark county, as a homestead and made five-year proof thereon. In 1902 Jacob's wife died. John and the girls worked at home for the father and also worked out for hire and turned their money in to the father. In the spring of 1904 John was twenty-six years of age. Jacob was then worth in money, land, and property $2,500. This made up of Jacob's $1,100 and the work and earnings of John and the three girls. In the fall of 1903, at the request and direction of Jacob Dolwig, one Anton Duckhorn, Jacob's father-in-law, and the husband of the plaintiff's cousin, wrote to the plaintiff, a widow in Hungary, and told her that Jacob was a widower fifty years old and would give plaintiff a ticket to America and 200 gulden, about $80, if plaintiff would come to America and marry Jacob, plaintiff to get nothing more in case Jacob died before the plaintiff. On receipt of this letter the plaintiff wrote to Duckhorn, whom she had known in Hungary accepting Jacob's proposition, and Jacob sent the transportation, and plaintiff came to Dickinson in March, 1904, and married Jacob on April 18, 1904. Before the marriage, plaintiff visited with the Massereck and Willer families in Dickinson, and told them that she was only to get $200 from the Dolwig estate.

On the day after the marriage, that is to say, on April 19, 1904, Jacob and the plaintiff entered into an agreement in writing whereby and whereunder they agreed to convey to the son John the north half of section 3, township 138, range 95, and the southwest quarter of section 3, township 139, range 95, and sold to the said John four horses, a cow, two calves, and some farm machinery, and John, on the other hand, undertook to pay Jacob $400 in cash; to furnish during the lifetime of Jacob, flour, sugar, coal, etc., to the said Jacob and his wife; to furnish them with a home; to raise for them each year during Jacob's life 10 acres of wheat; keep for them during Jacob's life four head of cattle and one horse; and to furnish 1 acre of land to Jacob and his wife for garden purposes. John paid the $400 and immediately went into possession of the three quarter sections of land, farmed them and paid the taxes thereon. By this agreement Jacob turned over to John practically all of his property, having left a horse, four cows, and about $100. At the time of making this agreement it was also orally agreed between John, Jacob, and the three daughters, that the three daughters should have $500 apiece upon Jacob's death; that Jacob would pay what he could to the girls and that John would make up any deficiency. On May 28, 1904, and five or six weeks after her marriage and after Jacob had turned his property over to his son, the plaintiff, for the purpose of furnishing evidence of her prior agreement with Jacob, signed and delivered the following marriage settlement, or instrument in writing: "For and in consideration of $200, $100 receipt of which is hereby acknowledged and $100 as witnessed by note of even date due November 1, 1904, I hereby waive all claim in and to the estate of John Dolwig." To this instrument the plaintiff, Theresia Dolwig, fixed her mark. The instrument, however, was witnessed by one J. M. Hughes and F. Van der Las, who after appears to have been the county judge. The said J. Van der Las testifies that he explained the writing to the plaintiff in German; that she expressed her satisfaction with the contract, and said that it was in accordance with an oral agreement made prior to the marriage. Later and on July 18, 1908, and in accordance with the agreement of April 19, 1904, the northwest quarter of section 4 was conveyed to John, and still later and on the 29th day of April, 1909, and at the request of John, the northeast quarter was conveyed to one Frank T. Lefor, the plaintiff joining in both of the deeds with her husband,

Jacob. By agreement between Jacob and John, John then deeded the southwest quarter of section 33 to Jacob to stand as security for the performance on his part of the agreement of support of April 19, 1904, Jacob, however, never took possession of the southwest quarter of section 33, paid anything for it, paid any taxes thereon, or exercised any jurisdiction over it. The southeast quarter of section 3 was not paid for when John took it. He made payments to the amount of $260, the purchase price being $380. He put in improvements on the north half of section 4 to the value of $1,000. In 1909 John moved to Gladstone, having traded the north half of section 4 in part payment for a store. A few days later Jacob and the plaintiff came to live with John. They lived in a part of the house and did their own housekeeping. John furnished them with the necessities of life in accordance with his agreement of April 19, 1904. On December 19, 1909, Jacob died. On December 29, 1910, John Dolwig filed a petition for the administration of Jacob's estate and was appointed administrator. On December 1, 1911, the plaintiff signed the waiver of citation in said matter. About this time the plaintiff left John's house and went to live with her son by a former marriage, Franz Boor, who lived about 8 miles from Gladstone and the same distance from Dickinson. She testified that she left because she was getting nothing from her husband's estate. When she left she took her bed and other personal belongings and a cow which John gave her. She could not read or speak English, though she could speak German. She was fifty-six or fifty-seven years old when her husband died. She testifies that John told her, when she signed the waiver of citation, that it was for the purpose of having John appointed foreman, and that she repeatedly asked for a share in the estate. John testifies that he explained what was in the waiver; that he misrepresented nothing and held nothing from the plaintiff. There were many people in Gladstone who could read English and speak German. Plaintiff made no attempt to have the waiver read or explained to her by anyone except John. John signed the petition on January 12, 1911, and the court issued a citation naming February 7th as the return day. On February 7th the plaintiff and her son appeared in the county court in Dickinson, and the plaintiff requested the county court to call one Murtha, who was the attorney for the petitioner, and in response the said Murtha came to the county court. At the request of John, Mr. Murtha

advised the plaintiff through her son that it would take about six months to close up the estate; that plaintiff had signed the marriage settlement, and waived all rights to the estate; that the plaintiff had better hire a lawyer. On February 7, 1911, John was appointed administrator. On February 27th he filed an inventory. On February 25, 1911, the plaintiff employed attorney, M. L. McBride, of Dickinson to represent her in said court, and paid him small sums on February 25th, March 8th, and March 16th, in all $25. In February and March, 1911, one George Brown, a clerk in Mr. McBride's office, and who can speak and read German, twice went with the plaintiff, at Mr. McBride's request, to the chambers of the county judge in relation to the estate. There the county judge showed to Brown the marriage settlement, and Brown read the same to the plaintiff and explained it to her in German and did the same with the waiver of citation. This is not denied. At about the same time Mr. Murtha showed the marriage settlement to Mr. McBride and advised Mr. McBride that the other heirs claimed that plaintiff was entitled to nothing from the estate. At McBride's request Murtha had John orally notify the plaintiff of the final settlement. On the day of the final settlement, that is, on October 13, 1911, the plaintiff and her son, in response to John's notice, came to Dickinson and were advised by Murtha that the final decree was to be entered that day, and that plaintiff was to get nothing. On the day of the final settlement the county judge tried to get McBride over the telephone, but could not reach him. About a week after the final settlement the plaintiff and her son John came to McBride's office and McBride's clerk, Brown, at Mr. McBride's request, went with plaintiff and John to the county court and found that a final decree had been entered. They then went back to Mr. McBride's office, and plaintiff was advised that a final decree had been entered; that she had received nothing thereunder, and also advised of her right to appeal. Mr. McBride also told her that appeal would cost $50. The plaintiff then said that she would not spend any more money, and Mr. McBride was not directed to appeal or take any further steps in the action.

It also appears that John paid for the expenses of Jacob's last sickness and burial, $180, and for the cost of administration, $120, making a total expenditure as administrator of $300. He charged nothing for his personal service, he got nothing from the estate, except the south

half of section 33, which he already owned. The two lots in Dickinson were given to the daughters. John also added $300 to the $1,700 in notes, so that each of the four girls received $500 apiece in accordance with the oral agreement of April 19, 1904. He offered to do the same thing for the plaintiff, so that she would also receive $500. It was also found by the trial court, and we believe correctly, that although the south half of section 33 was inventoried as part of the estate, this was merely done as a matter of convenience and to clear the record title, as it already belonged to John under the contract of April 19, 1904, by which he had agreed to support the said Jacob and the plaintiff during the lifetime of the former, and which contract he had fulfilled.

As far as the oral antenuptial agreement was concerned, we are satisfied that it was as testified to by the witness, John Van der Las, who said, "Mr. Dolwig, when the three of us were together, told me that he had made an agreement with Theresia Dolwig, that if she would come to America he would marry her, advancing her the transportation from Europe here, and give her a hundred dollars after she arrived here, with the understanding that she was to relinquish all her interest and right to any property that he might leave in case he died first, *because his first wife and his children, now all grown, had earned and accumulated this property.*

There can be no doubt, too, that a postnuptial agreement was entered into in writing in conformity with this prior agreement.

We are satisfied that the so-called marriage settlement was invalid. It was not reduced to writing until after the marriage. Section 5888 of the Compiled Laws of 1913 requires "an agreement made upon consideration of marriage other than a mutual promise to marry" to be in writing. The antenuptial agreement was therefore invalid, and, to quote from the supreme court of Wisconsin, in construing a statute similar to our own, "we have been cited to no authority and have found none under a statute like ours which holds that an oral antenuptial agreement void under the Statute of Frauds can be validated by a postnuptial contract. Such a doctrine would in effect work a judicial repeal of the statute." See Rowell v. Barber, 142 Wis. 304, 27 L.R.A.(N.S.) 1140, 125 N. W. 937; McAnnulty v. McAnnulty, 120 Ill. 26, 60 Am. Rep. 552, 11 N. E. 397; Richardson v. Richardson, 148 Ill. 563, 26 L.R.A. 305, 36 N. E. 608.

In spite of this finding and conclusion, however, we are satisfied that the plaintiff is not entitled to any relief in this action, and that the judgment of the district court should be affirmed.

We are satisfied that there was a waiver of citation by reason of the written waiver of December 31, 1910. It is true that the petition for appointment of the administrator was not filed until January 12, 1911, and the probate court did not obtain jurisdiction of the case until that time. Even, however, if, as contended by counsel, § 8565 of the Compiled Laws of 1913, which provides that "a party who appears as hereinbefore prescribed, may waive in writing the service of any further citation, notice or papers in the proceeding and thereafter no such citation, notice or paper need be served on him," merely applies to cases where an appearance has already been made, we can see no reason why a party may not in advance, and prior to the filing of a petition for an administration, consent to the same and in advance waive all notice and citation as was done in the case at bar. The petition in the case at bar, for the document was a petition as well as a waiver, signed, by the plaintiff and was as follows:

The undersigned, Theresia Dolwig, Elizabeth Willer, Susanna Kunz, Katherina Duckhorn, and Magdalena Schiller, respondents, all being over twenty-one years, hereby consent that the petition of John Dolwig for the appointment of administrator, and for the administration of the above estate, be granted. And we and each of us hereby waive the service of all citations and notice which otherwise would be required to be given in the course of the administration of said estate. And we hereby consent that said estate be administered and final decree of distribution entered therein without further notice or citation to us or either of us.

Dated December 31, A. D. 1910.

Section 8565 of the Compiled Laws of 1913 provides: "An appearance in any proceeding is effected by giving notice of the appearance in open court either orally or in writing or by pleading or making application therein to the court for an order or direction of any kind. A party who appears, or is held to appear, as is hereinbefore prescribed, is deemed to have knowledge of each postponement and all other acts done

in the course of the proceeding from the commencement until the final disposition thereof, without further notice, except such as is imparted by the records of the court. A party who appears as hereinbefore prescribed, may waive in writing the service of any further citation, notice or papers in the proceedings and thereafter no such citation, notice or papers need be served on him."

In the petition which is before us the plaintiff, Theresia Dolwig, consented to the appointment of the administrator, and the filing of this petition amounted to an appearance. In the same paper she waived in writing the service of any further citation, and she was entitled to none. Not only is this true, but it is well established that one who has actual notice and seasonably appears cannot complain that a citation was insufficient or that no citation was given. See 18 Cyc. 121. The record in the case which is before us shows conclusively that, not merely did the plaintiff sign the petition, consent to the appointment of the administrator, and waive citation, but that she and her attorney were fully conversant of what was going on, and it is quite evident that both acted on the assumption that the agreement of conveyance and support, even if not the marriage settlement, were binding, and that they had no interest in the proceedings.

We can find nothing in the record which justifies us in setting aside the finding of the trial court that no fraud was practised upon the plaintiff either in signing the marriage settlement or the waiver of citation. It is clear, also, to us that she had abundant opportunity to withdraw such waiver during the probate proceedings, was at all times represented by counsel, and could have appealed from the judgment of the probate court if she had so desired. Surely a person who is entitled to exemptions may decline to claim them and may be estopped from afterwards asserting the right, if she has stood by with knowledge of the fact that they were not being allowed, and has taken no step to intervene in the matter, to have the judgment modified, or to appeal therefrom. There must somewhere be an end to litigation, and judgments which are rendered with jurisdiction of the person must have some force and effect, otherwise there would be ceaseless litigation and no security to titles or to property.

The final decree of a county court is of equal rank with judgments entered in other courts of record, and the same presumptions exist in its

favor. Fischer v. Dolwig, 29 N. D. 564, 151 N. W. 431. While § 8809 of the Compiled Laws of 1913 authorizes an action in the district court to set aside a final decree of the county court for fraud or other equitable ground, it manifestly does not authorize such action to review errors properly reviewable on appeal from the final decree.

In an equitable action to set aside the decree, the plaintiff has the burden of proof, and must overcome the presumptions in favor of the decree by a fair preponderance of all the evidence.

The trial court found that plaintiff had failed to sustain this burden, and this finding is clearly correct.

As we have before stated, we find no proof of fraud in the matter. A Hungarian witness testified that antenuptial agreements, such as the plaintiff attempted to enter into, are by no means uncommon in his country. When the deceased came to America he had only $1,000. When he married the plaintiff he was only worth about $2,500. It is shown conclusively that what property he had was accumulated largely through the labor of his children, and it is not unreasonable that he should attempt to protect them in the possession of that which they had earned. Nor, indeed, was the plaintiff rendered destitute thereby. Not only had she a son by her first marriage living in America, who appears to be a moving factor in this suit, but since the death of the deceased she again married.

The judgment of the District Court is affirmed.

BIRDZELL, J. (concurring). I have entertained grave doubts in this case relative to the propriety of the judgment of the trial court, particularly with reference to the portion sustaining the decree of the county court denying the plaintiff the benefit of the exemption provided for by § 8725, Comp. Laws, 1913. Under this section it is the duty of the probate judge to set apart to the surviving wife that portion of the estate of the deceased which would be exempt from execution if he were living, and other property to the value of $1,500. The purpose of this statute is plain. It is designed to protect the beneficiary from the contingencies incident to a sudden deprivation of reasonable means for securing the necessaries of life, and where such a policy is so clearly evidenced by the legislature, it is the duty of the courts to see that the benign legislative purpose is not thwarted or defeated even by the previ-

ous private contract of the immediate beneficiary. To this end, contracts involving a waiver of the benefit of exemption statutes are generally held to be void.

But in the instant case there appear to be two obstacles which prevent the granting of the relief sought. First, the record shows that everything that could have been done to apprise the plaintiff that her rights were in process of determination in the county court was done; that she was fully advised of the contention of those interested adversely to her as to the effect of her antenuptial agreement; that she took counsel of an attorney, both for the purpose of ascertaining the effect of her antenuptial agreement and of the terms of the final decree which she knew was entered; and that she was advised of her right to appeal. In view of the above facts, it is difficult to see how a finding of fraud can gain any support from the evidence. Clearly, fraud is not to be inferred from the mere obtaining of a waiver of the statutory notices of the procedure incident to the settlement of an estate. But, of course the plaintiff, in signing the waiver, had a right to assume that the estate would be legally administered, which would include the setting aside of the exemption provided for by § 8725. Inasmuch, however, as the plaintiff had timely warning that the estate was not so administered as to secure to her the benefit of this exemption, it was her duty to proceed in the legal way to secure a modification of the final decree. I fail to see wherein the record discloses that there was any fraud on the part of the defendants, or their attorney, that prevented the plaintiff from taking legal proceedings to protect her rights.

There being no fraud shown, the second objection to the maintenance of this action becomes insuperable. It is elementary that the proper way to correct an erroneous judgment of an inferior court is either by an appeal or, upon a proper showing made, by a proceeding to open or vacate the judgment. 23 Cyc. 1061. The judgment of the probate court, being conclusive on the parties as to the matters adjudicated therein, subject to the right to appeal, which was not exercised, and subject also to the exercise of the equitable powers of a court of general jurisdiction to set aside the decree for fraud (§ 8809, Comp. Laws 1913), as pointed out in the former decision of this case upon the demurrer to the complaint (Fischer v. Dolwig, 29 N. D. 561, 151 N. W. 431), which fraud was not established, the plaintiff is without remedy against these

defendants in the premises. There must come a time when the judgments of the courts having jurisdiction to enter them become finally binding upon the parties. The remedy open to a suitor to impeach a judgment for fraud within the time prescribed by § 8809, Comp. Laws 1913, cannot be considered as a mere substitute for an appeal, nor can the statute be given an interpretation which would have the effect of extending the time for appeal. I concur in the opinion of Mr. Chief Justice Bruce, affirming the judgment of the district court.

GRACE, J. (dissenting). Section 8725 of the Compiled Laws of 1913 is an exemption statute, designed to protect the surviving wife or husband or minor children. The property described under said section is not part of the estate, and is not to be considered part of the estate further than is necessary to do the one act of setting it aside as exempt. The property is in no way subject to the payment of debts, with the single exception of the charges of the last sickness and funeral, and then only when there are no other assets available for the payment of such charges. Under such section it is the mandatory duty of the court, upon the inventory being filed and appraisement had of the property, to set aside such exemption. No order of the court can affect this property except for the purpose of setting it aside in compliance with the mandatory duty of the court in that regard. The person or persons for whose benefit such exemption is provided in such section have an absolute right to such property, and coupled with this is the mandatory duty of the court to set such property aside. It is the general rule that orders and judgments of the county court not appealed from within the time required by law are conclusive until some action is brought to set them aside, or in some way vacate them. That rule does not apply in this case for the reason that the exemption can be considered no part of the estate in the sense that it is subject to any liabilities other than we have named, and hence, the orders, judgments, or decrees in this case not appealed from, cannot and do not affect this exemption. The person or persons entitled to such exemptions are not to be denied them simply because the court inadvertently neglected to perform its plain mandatory duty under said section.

I agree with Justice Birdzell, as expressed in his concurring opinion, that the purpose of the statute is to protect the beneficiary from the con-

tingencies incident to a sudden deprivation of reasonable means for securing the necessaries of life; and where such policy is clearly evidenced by the legislature it is the duty of the courts to see that the legislative purpose is not thwarted or defeated, even by the previous private contracts of the immediate beneficiary. I also agree with him as to the law that contracts involving a waiver of the benefits of exemption statutes are generally held to be void. This only more clearly shows the care which courts ordinarily use, and the great length to which they go in protecting the exemption. There is also another reason for the exemption, and that is that the surviving wife, husband, or children may not become dependents of the state, and thereby become a public burden. The $1,500 which is allowed to be set aside is not intended to be alone for the surviving husband or wife, although it may be set aside to them. It is intended for the protection and support as well of the children, if any. So, also are the additional amounts which may be set aside for the support of the surviving husband, wife, or children, as provided by law.

We are firmly convinced that the conclusion of the majority of the court as expressed in their opinion is not in harmony with the spirit of the exemption law.

ROBINSON, J. (dissenting). The plaintiff appeals from the judgment of the district court. She is the widow of Jacob Dolwig, deceased intestate. Defendants are his children. She brings this action against them to set aside a pretended judgment in the county court awarding them all his property. The plaintiff is an illiterate foreigner. She knows nothing of the language, the laws or the ways of this country, and by reason of her ignorance and mental incapacity she has been sadly duped and prevented from asserting her legal rights.

Jacob Dolwig, the deceased husband of plaintiff, died about December 15, 1910. He owned the south half of section 33–139–95, two lots in Dickinson, and $1,738.40 in good promissory notes. The estate amounted to over $6,000. On October 13, 1911, there was made a final decree of distribution. It gave four daughters of the deceased each $500 in cash and an undivided one-fourth interest in two lots in Dickinson. To John Dolwig it gave the rest and residue of the estate, including the south half of section 33–139–95. To Theresia Dolwig, the plaintiff, it

gave nothing, on the ground that during the life of Jacob Dolwig she had received her share and that she had waived all rights to any share.

On December 31, 1910, the defendant John Dolwig procured the signature of the plaintiff to a paper consent that he be appointed administrator, and that she waive the service of all citations or notices in the course of the administration. Then on February 7, 1911, without any notice to plaintiff, an order was made appointing John Dolwig administrator, and letters of administration were issued to him. On February 7, 1911, an order was made appointing appraisers. On October 13, 1911, there was filed a final report of the administrator. On October 13, 1911, an order was made fixing October 13, 1911, as the day for hearing the final report. On October 13, 1911, the final report was allowed. On October 13th, there was made a final decree of distribution. On October 13th, there was made an order discharging the administrator, and it was all done without any notice to the plaintiff. When Jacob married the plaintiff he was a widower of fifty-one years and she was forty-nine. He and his son John at once commenced to lay schemes to forestall and beat the plaintiff out of her rights. Soon after the marriage, as it seems, they obtained her mark to a paper waiving all her claims to the estate of Jacob Dolwig in consideration of $200. Then she and Jacob Dolwig deeded to the son John certain lands, four horses, some cows, and farm machinery. John was to pay $400 and during the life of Jacob to furnish them a house with some flour, sugar and coal. And thus Jacob turned over practically all his property to his son John and made himself a mere pauper and a dependent, and it was all done to defraud the wife of her inheritance. It was all a fraud on its face. It is of no use to discuss the testimony. On the conceded facts it is folly to argue that plaintiff knowingly and advisedly signed these papers to benefit the defendants and to reduce herself to a state of abject poverty and dependence and want. A person does not sell his birthright for a mess of pottage only when the purchaser takes advantage of his ignorance, necessity, or distress. If the plaintiff received $200 for signing an alleged waiver of her inheritance, it was no consideration at all. It was not even the pocket money to which she was justly entitled during the seven years she lived with deceased as his wife. During the life of Dolwig she received nothing only a poor living, and whatever she did to waive her rights, either during his life or afterwards, must

have been the act of an ignorant, incompetent, or weak-minded person. It must have been the result of deception and undue influence. The homestead and inheritance rights of the widow were fairly worth $3,000 or more. This should have been ascertained and set apart to her in accordance with the statute. Comp. Laws 1913, §§ 5743, 8724, 8725.

So far as concerns the rights of the plaintiff, the proceedings of the probate court were null and void. She was not served with any process; she did not appear, and the pretended waiver was a mere fraud. She knew nothing of a waiver or the legal import of the document which is claimed to be a waiver. There was no marriage settlement. The plaintiff is the surviving wife of the deceased, and as such she is entitled to all the rights of a surviving wife as provided by statute.

I fully concur in the dissenting opinion of Justice Grace. It is not true, as stated in the opinion of Justice Birdzell, that the planitiff was apprised of her rights, or that she ever had a day in court. She was a poor, ignorant, helpless woman, who could not read or write English, and knew nothing of our laws or customs. It was the bounden duty of the court to protect her rights and to guard her against imposition and the lack of competent counsel. When this court certifies that a person is competent and may safely be trusted to give counsel and to defend the rights of suitors, it becomes the duty of the court to make good its certificates by guarding the rights of the poor and ignorant when their counsel fail them.

The plaintiff gave one McBride $25 to advise her and to protect her rights. He accepted her money and did not a thing to protect her. He offered to accept $50 for taking an appeal, but he had done nothing to lay the foundation for an appeal. He showed either gross incompetency or neglect.

No judge can honestly assert that the plaintiff has been given her legal rights. She has been buncoed by a shameful and mock legal proceeding. The pretended judgment of the county court is manifestly and confessedly wrong. It is a fraud on the plaintiff and no court should hesitate to declare it null and void.

JOHN H. LOFF, Respondent, v. MIKE GIBBERT and Frank Budack, as Sheriff of Richland County, North Dakota, Appellants.

(166 N. W. 810.)

Contract — rescission — restoration of tender of consideration — precedent to right to rescind.

1. One who seeks rescission in equity must restore or tender to the adverse party as a precedent to the right to rescind the consideration received under the contract sought to be rescinded.

Rescission of contract — action in equity for — property or consideration — offer to return it — does not lose interest in — effective only by acceptance — by adverse party — or when rescission is adjudged — rescission not allowed — parties in same position as before.

2. A party who brings an equitable action for rescission does not become devested of his interest in the property offered to be returned by making the offer to return it. The offer to return becomes effective only if accepted by the adverse party or when a rescission is adjudged by the court. In event a rescission is not adjudged the parties stand in the same position as though rescission had not been sought, and the property offered to be returned remains the property of the party who seeks rescission.

Equitable estoppel — false representation of facts — concealment of facts — with knowledge — actual constructive — party to whom made — in ignorance of facts.

3. To constitute an equitable estoppel there must exist a false representation or concealment of facts made with knowledge, actual or constructive, and the party to whom it was made must have been without knowledge or means of knowledge of the real facts.

Truth known to both parties — means of knowledge — both parties — equitable estoppel — actual contract.

4. Where the truth is known to both parties, or where they both have actual means of knowledge, there can be no equitable estoppel short of one arising from actual contract.

Opinion filed February 21, 1918.

NOTE.—Authorities discussing the question of duty to place other party *in statu quo* on rescission of contract are collated in a note in 30 L.R.A. 44, 45, where it is held that a party cannot rescind a contract and at the same time retain the benefits under the contract.

From a judgment of the District Court of Cass County, *Pollock*, J., defendant appeals.

Affirmed.

Pollock & Pollock and *George S. Grimes*, for appellant.

A party who disclaims any title to certain personal property and suggests and in reality invites a third party to bring attachment against said property as the property of the judgment debtor of said third party, and such attachment proceedings are so instituted, is estopped to claim title to and ownership of such property thereafter. Dresbach v. Minnis, 45 Cal. 223; Kirkendall v. Davis, 41 Neb. 285, 59 N. W. 915; Easton v. Goodwin, 22 Minn. 426; Greengard v. Fretz, 64 Minn. 10, 65 N. W. 949; Staples v. Fillmore, 43 Conn. 510; Drew v. Kimball, 43 N. H. 282, 80 Am. Dec. 163; Horn v. Cole, 51 N. H. 287, 12 Am. Rep. 111; Dezell v. Odell, 3 Hill, 215, 38 Am. Dec. 628; Dewey v. Field, 4 Met. 381, 38 Am. Dec. 376; Peterson v. Woollen, 48 Kan. 770, 30 Am. St. Rep. 327, 30 Pac. 128; Zuehlke v. Stone, 148 Mich. 478, 111 N. W. 1065; Tolerton & S. Co. v. Casperson, 7 S. D. 206, 63 N. W. 908; Meister v. Birney, 24 Mich. 440.

A party having an adequate remedy at law is not entitled to injunctional protection. Minn. Linseed Oil Co. v. Maginnis, 32 Minn. 193, 20 N. W. 85.

Engerud, Divet, Holt, & Frame, for respondent.

The giving of a receipt to the sheriff for goods levied upon does not estop the receiptor, even while the receipt is outstanding, to deny and dispute the officer's right to the goods and to assert title in the receiptor. Barron v. Cobleigh, 11 N. H. 557, 35 Am. Dec. 505; Morse v. Hurd, 17 N. H. 250; Lathrop v. Cook, 14 Me. 414, 31 Am. Dec. 62; Penobscot Boom Corp. v. Wilkins, 27 Me. 345; Torrey v. Otis, 67 Me. 573; Dayton v. Merritt, 33 Conn. 184; Parks v. Sheldon, 36 Conn. 466, 4 Am. Rep. 95; Perry v. Williams, 39 Wis. 339; Adams v. Fox, 17 Vt. 361; Halbert v. Soule, 57 Vt. 358.

"A party giving a receipt for property seized by an officer upon execution or attachment is estopped from setting up against the officer that the property was his own, or that of any other person than the execution or attachment creditor. But the objection ceases to be binding as soon as the goods are surrendered, and leaves the obligor free to show who is the owner in any subsequent proceeding." Drake, Attachm.

§ 391; 2 Herman, Estoppel, § 635, p. 773; Johns v. Church, 12 Pick. 557, 23 Am. Dec. 651; Bursley v. Hamilton, 15 Pick. 43, 25 Am. Dec. 423; Mackay v. Holland, 4 Met. 75; Edmunds v. Hill, 133 Mass. 445; Fowler v. Bishop, 31 Conn. 562.

There is no presumption in favor of an estoppel. The party relying upon an estoppel must prove all the facts necessary to create it. Gjerstadengen v. Hartzell, 9 N. D. 275, 81 Am. St. Rep. 575, 83 N. W. 230; 2 Herman, Estoppel, § 741; Bigelow, Estoppel, 6th ed. pp. 774, 681, et seq.; Ketchum v. Duncan, 96 U. S. 659, 24 L. ed. 868; Brant v. Virginia Coal & I. Co. 93 U. S. 326, 23 L. ed. 927.

Defendant under the circumstances of this case ought to be estopped to urge any question or objection as to the propriety of hearing and deciding the merits in this form of action. Such objection must be promptly made or it is waived. Comp. Laws 1913, § 7355; 16 Cyc. 128, 133; Brown, B. & Co. v. Lake Superior Iron Co. 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604; Dan. Ch. Pl. & Pr. 555; Lewis v. Cocks, 23 Wall. 466, 23 L. ed. 70; Oelrichs v. Spain (Oelrichs v. Williams) 15 Wall. 211, 21 L. ed. 43; Whiting, McK. & Co. v. Root, 52 Iowa, 292, 3 N. W. 134; Baron v. Korn, 127 N. Y. 224, 27 N. E. 804; Ostrander v. Weber, 114 N. Y. 95, 21 N. E. 112.

"In an equitable action the defendant, in order to insist that an adequate remedy at law exists, must set it up in his answer." O'Hara v. Parker, 27 Or. 156, 39 Pac. 1004; Wilkeson Coal & Co. v. Driver, 9 Wash. 177, 37 Pac. 307; Johnson v. Huber, 106 Wis. 282, 82 N. W. 137; Hoff v. Olson, 101 Wis. 118, 70 Am. St. Rep. 903, 76 N. W. 1121; High. Inj. § 119.

But the mere existence of an adequate remedy at law is not of itself sufficient ground for refusing relief in equity by injunction, nor does the existence or nonexistence of a remedy at law accord a test as to the right to relief in equity. It must appear further that the remedy at law is plain, and that it is as practicable and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity. Ryan v. Parris, 48 Kan. 765, 30 Pac. 172; Overton v. Warner, 68 Kan. 96, 74 Pac. 651; Stout v. LaFollette, 64 Ind. 365; Springer v. Green, 46 Cal. 73; Grant v. Cole, 23 Wash. 542, 63 Pac. 263; Funk v. Brooklyn Glass & Mfg. Co. 25 Misc. 91, 53 N. Y. Supp. 1086; Halley v. Ingersoll, 14 S. D. 7, 84 N. W. 201; Sumner v. Crawford, —

Tex. Civ. App. —, 41 S. W. 825; Natalie Anthracite Coal Co. v. Ryan, 188 Pa. 138, 41 Atl. 462.

CHRISTIANSON, J. In December, 1913, the plaintiff Loff entered into an agreement with the Francis Merchandise Brokerage Company, whereby he agreed to exchange a section of Minnesota land for a stock of merchandise and give $5,000 to boot. In performance of the contract, the plaintiff conveyed the land to the company and paid to it $2,500 in cash, and received shipments of goods purporting to be the merchandise described in the contract. The plaintiff, who is a merchant at Abercombie, sold some of the goods received in the first shipment, but on receipt of the remainder of the goods he discovered that the representations of the Francis Merchandise Brokerage Company, as to the value and quality of the goods, were false and fraudulent. Upon discovering the fraud he segregated the goods which he had received and kept the goods so segregated ready for redelivery to the company. At the same time he commenced an action in the United States district court in Minnesota, wherein he offered to restore to the Brokerage Company the goods still in his possession and to pay the value of the goods sold. And in such action Loff asked that the contract be rescinded and set aside, that the defendants therein be required to reconvey the land, and that the Brokerage Company be ordered and required to accept, take, and remove the goods and pay to the plaintiff the difference between the $2,500 paid by the plaintiff to the Brokerage Company and the sums received by him from the sale of part of the goods.

The defendant Gibbert had obtained a verdict against the Brokerage Company for $1,708.53 in the district court of Hennepin county on January 30, 1914. On February 9, 1914, plaintiff's attorney, Judge Engerud, had a conversation with Grimes, Gibbert's attorney, with respect to the Francis Brokerage Company. In that conversation the transaction between Loff and the Brokerage Company was fully discussed, and Judge Engerud informed Grimes that Loff intended to bring an action in the United States district court to obtain a rescission of the contract and a reconveyance of the land which Loff had conveyed to the Brokerage Company. The action for rescission was commenced, February 10, 1914. Thereafter on February 17, 1914, Grimes wrote Engerud as follows: "In reference to your suit against Francis Mer-

chandise Brokerage Company I understand that your client has rescinded the contract and brought an action in the Federal court at Fergus Falls to recover his land, and has tendered back to the Brokerage Company the invoice of the merchandise shipped to him. Kindly advise me whether this is so, and if it will in any way prejudice your client's interest for me to levy an attachment upon these goods as the property of the Francis Merchandise Brokerage Company. If your client still has any claim upon the goods, of course I do not want to dip in or have any contest of any kind with him, but if he has rescinded the contract and does not claim any title to the goods, I would like to put an attachment upon them in favor of the claim in hand."

Judge Engerud replied to this letter on February 18, 1914, as follows: "In reply to yours of the 17th inst. will say that we have brought suit to rescind the contract with the Francis Merchandise Brokerage Company, the suit being now pending in the United States district court at Fergus Falls. The goods which we received are in the hands of our client John Loff at Abercombie, North Dakota, being held by him for the defendant, we, of course, claiming and asserting that the goods belong to the defendant and that we are ready to turn them over to the corporation. I would think, therefore, that it would be entirely proper for you to attach them as the goods of the Francis Merchandise Brokerage Company. There is certainly no objection to that course so far as our client is concerned. The goods are worth about $2,000."

The defendant Gibbert thereafter instituted an action in the district court of Cass county, and a warrant of attachment was issued therein, under which the sheriff of Richland county levied upon the stock of merchandise in Loff's possession at Abercombie. The sheriff did not remove the goods but left them in Loff's possession, taking his receipt therefor.

Gibbert obtained judgment against the Brokerage Company by default. He thereupon caused an execution to be issued, and by virtue thereof the defendant sheriff, on or about April 20, 1914, removed the goods from Loff's possession for the purpose of selling them at an execution sale, the sale being advertised to be held on May 7, 1914.

At the time the sheriff removed the goods he, at the request of Gibbert's attorney, presented to Loff, and requested that he execute, a certain instrument disclaiming "any right, title, or interest in or to" the

merchandise. This disclaimer bears date March 2, 1914, and was prepared by Gibbert's attorney. Loff refused to sign the paper.

Shortly after the removal of the goods the plaintiff, Loff, served upon the sheriff a notice of claim and demand, claiming ownership of the property. In his claim the facts with respect to Loff's ownership and the pending action for rescission are fully set forth. On the same date Judge Engerud wrote defendant's attorney are follows:

April 22, 1914.

George Grimes Esq.,
Minneapolis, Minn.
Dear Mr. Grimes:—

Mr. Loff informs me that the sheriff of Richland county was at Abercrombie and took away the goods which he had previously attached against Francis Mdse. Brokerage Co. I was somewhat surprised at this. I have caused to be served on the sheriff the demand and notice, a copy of which I inclose.

As you will readily see the title to these goods depends on the outcome of the rescission suit which we now have pending in the Federal court in Minneapolis. If that suit is decided in our favor, which I feel fairly confident it will, then of course the goods belong to the defendant in your attachment suit and they are at your disposal. On the other hand, if the suit is decided against us, then the title to the goods is in Loff, and he will have to keep them and stand the loss represented by the difference between the value of these goods and the value of the property parted with. Of course until that lawsuit is decided we have to maintain the *status quo.* I trust you will recognize this situation, and not make it necessary for me to commence proceedings to restrain any disposal of the goods pending the lawsuit in question.

Yours,
Edward Engerud.

Mike Gibbert and the sheriff insisted on proceeding with the execution sale. The plaintiff thereupon instituted this action to enjoin it, and a temporary injunction was granted enjoining the sale during the pendency of the action.

The action brought by the plaintiff against the Brokerage Company

for a rescission was thereafter tried. And it was found that the Brokerage Company had conveyed the land to one McGrath, a good faith purchaser for value and without notice. Consequently, the suit for rescission was dismissed. It is undisputed that the Brokerage Company was insolvent. Its officers and stockholders had absconded. In fact the concern was probably organized for fraudulent purposes.

The above facts were clearly established upon the trial of this case. The trial court made findings and ordered judgment in favor of the plaintiff. Defendant appeals from the judgment.

Appellant's first proposition is that Loff is estopped from claiming the property as against Gibbert and the sheriff. This is based on the proposition that the letter written by Engerud to Grimes encouraged Gibbert to institute the attachment proceeding. We are unable to agree with appellant's contention. It clearly appears that defendant's attorney Grimes was fully cognizant of the facts in the case; he knew that the plaintiff, Loff, had been swindled by the Francis Merchandise Brokerage Company, and that he had brought an action for the purpose of obtaining a rescission of the transaction.

It is a general rule that where a vendor has executed and delivered a conveyance of property to a purchaser, he cannot avoid the contract or conveyance at law because of the purchaser's fraud or misrepresentation, but must seek his remedy in an equitable action to rescind. 39 Cyc. 1372. It is a maxim of equity jurisprudence that he who seeks equity must do equity. 9 C. J. 1209. In applying this maxim the courts require that the one who seeks rescission in equity must restore or tender to the purchaser what he has received thereunder as a precedent to his right to rescind. 39 Cyc. 1378. And it is a well-settled principle in courts of equity that relief will never be extended to a party against his own contract without exacting from him strict justice to his adversary. 39 Cyc. 1379. In this case Loff sought to be relieved from a certain executed contract and to obtain the cancelation of a certain conveyance of real property. In order to be in position to obtain this relief in a court of equity, he must restore or tender to the adverse party the consideration received. The segregation of the goods and the offer to return them were conditions precedent to the right to rescind. The contract, however, was not rescinded until the court adjudged rescission. If it did so adjudge, the contract would be set aside and the parties

placed in their original position in respect thereto. If a rescission was not adjudged the parties would stand in the same position as though the action for rescission had not been brought.

An equitable estoppel arises when one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. 16 Cyc. 722, 223. Such estoppel is said to arise when, in good conscience and honest dealing, a party ought not to be permitted to gainsay a fact asserted by him. Ridgway v. Morrison, 28 Ind. 203. The doctrine of estoppel is derived from the courts of equity, and is interposed to prevent injustice and to guard against fraud. "It will be allowed to shut out the truth only where necessary to do justice, *and never where it would itself operate as a fraud or work injustice.*" 16 Cyc. 724, 725.

To constitute an equitable estoppel, "there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts, and the party to whom it was made must have been without knowledge or the means of knowledge of the real facts." 16 Cyc. 726.

"There can be no equitable estoppel short of one arising from actual contract, where the truth is known to both parties or where they both have equal means of knowledge." 16 Cyc. 741.

Manifestly the facts in this case do not establish an equitable estoppel. Here there was no misrepresentation of material facts, or misrepresentation of facts at all. Gibbert's attorney (Grimes) was fully informed of the facts. If any mistake was made it was with respect to the legal conclusion drawn from the facts. Clearly he was not misled or deceived so far as the facts were concerned. He even deemed it necessary to have the sheriff obtain from Loff a disclaimer or release of any and all interest Loff had in the goods. If the action for rescission had terminated in plaintiff's favor, then the goods would have belonged to the Brokerage Company and the attachment of the defendant Gibbert would doubtless have been good. The effect of the attachment was pivoted upon the outcome of the rescission suit. Inasmuch as the rescission suit was determined adversely to the plaintiff, the property attached did

not become the property of the Brokerage Company, but remained the property of the plaintiff, Loff, and consequently it was not subject to attachment for a debt of the Brokerage Company.

Appellant's next contention is that the plaintiff had an adequate remedy at law and consequently was not entitled to an injunction restraining the sheriff from selling the property.

We do not believe the point to be well taken. In the first place the question was not seasonably raised in the trial court. In the second place "the aid of an injunction is frequently sought for the purpose of preventing a threatened sale of one's property under execution against a third person. While the authorities are not wholly uniform or reconcilable on this question, the better rule, and that having the clear weight of authority in its support, undoubtedly is that, where one's personal property is being taken in execution to satisfy the debt of another, equity may interfere for the purpose of retaining the property in specie, notwithstanding the remedy at law for the recovery of the property or of damages for its detention (High, Inj. § 119. See also §§ 30 and 370).

Appellant also contends that there is no evidence in the case showing Loff to be the owner of the property or entitled to possession thereof; and that there is no evidence supporting the findings of the trial court that Loff was holding the merchandise pending the outcome of the action in the Federal court in order to be able to surrender the property to the Brokerage Company, in event a rescission of the fraudulent transaction was decreed. These contentions are wholly devoid of merit. There is absolutely no dispute about the facts in this case with respect to the ownership of the goods. It is undisputed that Loff received them from the Brokerage company in a certain trade. In his petition in the action in the Federal court he pleaded the facts with respect to the receipt of the goods, and the subsequent segregation from other goods in his store, and offered to return them to the Brokerage Company. The only deductions which can possibly be drawn from the evidence are the ones which were drawn by the trial court.

The judgment appealed from must be affirmed.

It is so ordered.

T. F. McCUE, Respondent, v. EQUITY CO-OPERATIVE PUBLISHING COMPANY of Fargo et al., Appellants.

(167 N. W. 225.)

Free speech — opinions of subjects — one may write or speak them — privilege — abuse of — injury done — responsibility.

1. In this state every man may freely write, speak, and publish his opinions on all subjects, but is responsible for an abuse of that privilege to any person injured by such abuse.

Libel and slander — defamation from — protection of persons — freedom of speech — liberty of the press — abuse of privilege — libelous matters — publication of — injury occasioned — liability for.

2. Under the laws of this state every person has, subject to the qualifications and restrictions provided by law, the right to protection from defamation by libel or slander. And any person who abuses the privilege of freedom of speech and liberty of the press by maliciously publishing libelous matter of or concerning another is liable to the person libeled for the injury occasioned by the publication.

False and unprivileged publications — writings — printing — picture — effigy — hatred — contempt — ridicule or obloquy — injury to person mentioned or represented — libelous.

3. Any "false and unprivileged publication, by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation," is libelous.

Publication — doubt as to meaning — extrinsic evidence — needed to determine — publication — susceptible of two constructions — one innocent — the other libelous — question for jury — instructions of court.

4. If there is any doubt as to the meaning of a publication claimed to be libelous, so that extrinsic evidence is needed to determine whether it is of actionable character; or if such publication is reasonably susceptible of two con-

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NOTE.—For a discussion of the question of constitutional freedom of speech and of the press, see note in 32 L.R.A. 829, where it is stated that since the various constitutions nearly all provide expressly that persons exercising liberty of speech or of the press shall be responsible for an abuse of that liberty without specifying what shall constitute an abuse, it is plain that the intent was to leave the legality of any speech or publication to be determined by common-law principles and statutory declarations of the police power.

As to what publications are libelous *per se*, see note in 12 Am. St. Rep. 698.

structions, the one innocent and the other libelous, then it is a question for the jury which construction is the proper one.

Complaint — general demurrer to statements contained in — susceptible to libelous construction — overruled.

5. A general demurrer to a complaint in an action for libel will be overruled if any of the statements therein, when construed in connection with the remainder of the article of which it forms a part, is reasonably susceptible of the libelous meaning ascribed thereto in the complaint.

Opinion filed February 23, 1918.

Appeal from the District Court of Cass County, *Pollock*, J.

From an order overruling a demurrer to the complaint, defendants appeal.

Affirmed.

William Lemke, for appellant.

To say of an ex-officer that he did not enforce the law while in office is not libelous. Pandow v. Eichsted, 90 Wis. 298, 63 N. W. 284.

The defendants here are only responsible for the meaning which the words, reasonably interpreted and applied, would convey to the minds of the readers or hearers. Herringer v. Ingberg, 91 Minn. 71, 97 N. W. 460.

Plain, simple words, or their natural and usual meaning, cannot be extended, enlarged, or restricted by innuendo. Hofflund v. Journal Co. 88 Wis. 369, 60 N. W. 263.

The entire matter must be considered, and therefrom the plain import and natural meaning as intended, and the sense in which it was understood, determined. Hollenbeck v. Hall, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518.

In a complaint for libel the purpose of an innuendo is to give the true meaning of the language that would otherwise be obscure. It cannot be used to enlarge the scope of common language which is plain, simple, and unambiguous. Hofflund v. Journal Co. 88 Wis. 369, 60 N. W. 263; Robertson v. Edelstein, 104 Wis. 440, 80 N. W. 724; Gunderam v. Daily News Pub. Co. 175 Iowa, 60, 156 N. W. 840; Lydiard v. Wingate, 131 Minn. 355, 155 N. W. 212.

All persons have an interest in good government. Ready attempt to curb criticism of parties, leaders, and officials is not to assist good gov-

ernment. The people have the right to be informed concerning the plans and purposes of persons and organizations in the public affairs of our state. Greenwood v. Cobbey, 26 Neb. 449, 42 N. W. 413; Hollenbeck v. Hall, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518; Myers v. Longstaff, 14 S. D. 98, 84 N. W. 233; People v. Detroit Post & Tribune Co. 54 Mich. 457, 20 N. W. 528; Farley v. McBride, 74 Neb. 49, 103 N. W. 1036; Marks v. Baker, 28 Minn. 162, 9 N. W. 678; Wason v. Walter, L. R. 4 Q. B. 94, 8 Best. & S. 671, 38 L. J. Q. B. N. S. 34, 19 L. T. N. S. 409, 17 Week. Rep. 169; Seymour v. Butterworth, 3 Fost. & F. 372.

The article is not libelous *per se;* there is no damage shown, and the complaint fails to state a cause of action for slander or libel. Gundram v. Daily News Pub. Co. 175 Iowa, 60, 156 N. W. 842.

W. S. Lauder, for respondent.

A demurrer to a pleading admits every allegation set forth in such pleading, which is well pleaded and the truth of fact so pleaded. Foster County Implement Co. v. Smith, 17 N. D. 178, 115 N. W. 663; Baldwin v. Aberdeen, 23 S. D. 636, 26 L.R.A.(N.S.) 116, 123 N. W. 80; Gustin v. Evening Press Co. 172 Mich. 311, 137 N. W. 674, Ann. Cas. 1914D, 95; Belknap v. Ball, 83 Mich. 583, 11 L.R.A. 72, 21 Am. St. Rep. 622, 47 N. W. 674; 25 Cyc. 469, and cases cited; Comp. Laws 1913, § 4352.

If the matters here published are not libelous *per se,* are the words as explained by the inducement and colloquium reasonably susceptible of the meaning which is attributed to them by the innuendoes? Lauder v. Jones, 13 N. D. 541, 101 N. W. 907.

An article or publication which imputes to one holding an office improper conduct therein, or to an attorney at law professional misconduct, is libelous *per se.* Mosnat v. Snyder, 105 Iowa, 505, 75 N. W. 356; Sharpe v. Larson, 67 Minn. 428, 70 N. W. 1, 554; 18 Am. & Eng. Enc. Law, 961, and cases cited; Palmerlee v. Nottage, 119 Minn. 351, 42 L.R.A.(N.S.) 870, 138 N. W. 312; Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318; Atkinson v. Detroit Free Press Co. 46 Mich. 341, 9 N. W. 501; Gribble v. Pioneer Press Co. 34 Minn. 342, 25 N. W. 710; Hetherington v. Sterry, 28 Kan. 426, 42 Am. Rep. 169; Stewart v. Minnesota Tribune Co. 40 Minn. 101, 12 Am. St. Rep. 696, 41 N. W. 457.

It is not necessary that the person libeled should at the time of the publication still hold office. Pratt v. Pioneer Press Co. 32 Minn. 217, 18 N. W. 836, 20 N. W. 87; Smith v. Stewart, 41 Minn. 7, 42 N. W. 595; Sharpe v. Larson, 67 Minn. 428, 70 N. W. 1, 554; 18 Am. & Eng. Enc. Law, 990 and cases cited.

False statements, contemptuous allusions, and sarcastic phrases, well calculated to humiliate, vex, and annoy the person to whom reference is made, and to bring him into ridicule, are libelous. Williams v. Hicks Printing Co. 159 Wis. 90, 150 N. W. 188; Lauder v. Jones, 13 N. D. 541, 101 N. W. 907; 18 Am. & Eng. Enc. Law, 991 and cases cited.

CHRISTIANSON, J. This is an action for libel. The defendants interposed a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant appeals to this court.

The complaint, the sufficiency of which is the sole question here, is as follows:

For his cause of action herein the plaintiff alleges and shows to the court:

1. That during the times hereinafter mentioned the defendant the Co-operative Publishing Company was and still is a corporation duly organized, created, and existing under the laws of the state of North Dakota, and having its main office and principal place of business at the city of Fargo, in Cass county, North Dakota; that during said times the said defendant, the Co-operative Publishing Company, published and still publishes a weekly newspaper at Fargo, North Dakota, known as "The Co-operators' Herald;" that the defendant A. M. Baker was, at said times and still is, the editor and manager of said newspaper; that said newspaper has a wide circulation among the people throughout the state of North Dakota, and in adjoining states, and is read by many persons in the said state of North Dakota and elsewhere.

2. That at the times hereinafter mentioned, the plaintiff was, and for a long time prior thereto had been, an attorney and counselor at law, duly admitted and licensed to practise as such in all the courts of the state of North Dakota, and in the Federal courts, and having his office and place of business at Carrington in Foster county, North Dakota; that at said times, and for many years prior thereto, plaintiff was and

had been actively engaged in the practice of his said profession at said Carrington and elsewhere, and was and had been an attorney at law in good repute and had conducted and tried many important actions in the district courts of the state of North Dakota and the supreme court of said state, and also in the Federal courts, and had and enjoyed in a high degree the confidence and respect of the community generally as a lawyer of ability and integrity, and was and had been in receipt of a large income derived from his professional services as a practising attorney as aforesaid; that during said times and for a long time prior thereto, plaintiff had enjoyed throughout the state of North Dakota and elsewhere, a good reputation as a man of personal integrity and as a business man who uniformly dealt honestly and fairly with those with whom he did business; that during said times and for a long time prior thereto, the plaintiff had and still has a large acquaintance throughout the state of North Dakota among the business and professional men of said state.

3. That the said defendants maliciously wishing, intending, and contriving to injure plaintiff in his good name, fame, and standing as a practising lawyer and as a man and business man, and maliciously wishing, intending, and contriving to bring plaintiff into public disrepute as a lawyer and man and business man, and to cause him to be shunned and avoided by the people throughout the state of North Dakota and elsewhere, wrongfully and maliciously printed, published, and circulated in the column 5 of the said Co-operators' Herald, in its issue of August 11, 1916, on its editorial page and in large bold-face type, of and concerning plaintiff, the following false, malicious, and libelous article, to wit:

A DIFFERENCE WITHOUT MUCH DISTINCTION.

Last week the Herald ran an editorial in which reference was made to an alleged railroad trip of Secretary McHugh and the attorney general of North Dakota.

The spirit of the editorial was all right, but we got the wrong pig in the dead fall.

Secretary McHugh can establish an alibi. It was another person and not the "$10,000 Beauty" who sat and conversed with Mr. Linde.

The Herald wants to print the truth—hard as it is to tell all the truth about the Minneapolis Chamber of Commerce and the stalwart gang in North Dakota.

Therefore we hasten to correct ourselves—it was another McCue—one T. F. McCue of Carrington, who was commiserating with Mr. Linde and bragging, so it is alleged, that he was raising a fund to help defeat the candidates for the supreme court who have the Nonpartisan League indorsement.

With McCue collecting an alleged "slush fund" to defeat the candidates of the League there ought to be no question of their election. McCue was formerly attorney general of North Dakota, but he was so blind to the operation of the blind pigs that the people discarded him on the first opportunity.

McHugh or McCue—take your choice—they are a fine pair and stand for the same proposition.

That the defendants intended by publication of said article to charge and convey and did thereby charge and convey to the readers of said newspaper that plaintiff was wrongfully and unlawfully engaged in the business of collecting a fund of money to be used wrongfully, unlawfully, and corruptly to defeat the candidates of the said Nonpartisan League for the supreme court of this state, and that plaintiff was actively engaged in corrupting the morals of the people and voters of the state of North Dakota by the unlawful use of money in purchasing votes to defeat candidates for the high office of justice of the supreme court of this state, and meaning thereby and intending to charge and convey that as a man plaintiff is and was personally corrupt and disreputable, and that as a business man plaintiff is and was dishonest, corrupt, crooked, and contemptible, and that plaintiff was engaged in wilfully violating the Corrupt Practice Act of the state of North Dakota, and was engaged in the commission of criminal acts; that the persons who read said article so understood its meaning and import, and many of the persons who read said article believed the said matters and things therein charged and conveyed to be true; that the said charges made against plaintiff in said article as aforesaid were and are each and all absolutely false and were known to be false by the said defendants when the said article was published as aforesaid.

4. That said article was widely read by many of the men engaged in the grain business and by other business men and professional men and farmers throughout the state of North Dakota, and was frequently discussed by the people of the state of North Dakota.

5. Plaintiff further alleges that one McHugh, being the McHugh mentioned in said article, is secretary of the Chamber of Commerce at the city of Minneapolis in the state of Minnesota; that prior to the publication of said article it had been frequently charged through the columns of said newspaper and many other newspapers printed and published in the state of North Dakota and Minnesota, and elsewhere, and by many persons in the state of North Dakota, that the said McHugh was and is a thief, a rogue, and a rascal, and was engaged in crooked, fraudulent, and disreputable business practices, and that said McHugh and his business associates were engaged on a large scale in cheating and defrauding farmers of North Dakota by wrongfully, fraudulently, and corruptly manipulating the prices of grains and in weighing and grading grains; that in stating and charging in said article that "McHugh or McCue [this plaintiff meaning]—take your choice—they are a fine pair and stand for the same proposition," the defendants intended to charge and assert, and did charge and assert, that plaintiff was a thief, and was engaged in the business of defrauding the public, and particularly was engaged in the business of defrauding the farmers of North Dakota in connection with the marketing and grading of grain and otherwise, and that as a business man plaintiff was and is crooked, dishonest, deceitful, and fraudulent in his business transactions, and was in all respects the same kind of a man that said McHugh was represented as being as aforesaid,—all of which statements, charges, and assertions were and are absolutely false and were known to be false by defendants when said article was published as aforesaid; that many of the persons who read said article, however, believed said statements, charges, and assertions as hereinbefore interpreted to be true.

6. That prior to the publication of the said article the plaintiff had been for a term of two years the duly elected, qualified, and acting attorney general of the state of North Dakota; that by the use of the following words in said article, to wit:

"McCue [meaning this plaintiff] was formerly attorney general of

North Dakota, but he was so blind to the operation of the blind pigs that the people discarded him on the first opportunity," the defendants intended to charge, assert, and convey to the readers of said newspaper, and did assert, charge, and convey, that plaintiff, when occupying the said office of attorney general as aforesaid, had violated his oath of office; that he had wrongfully, fraudulently, and corruptly acted in collusion with violators of the Prohibition Law of this state; that he had wrongfully and corruptly closed his eyes to the acts of persons who were engaged in the lawful sale of intoxicating liquors, and had wilfully, wrongfully and corruptly permitted such persons to carry on their business in violation of the law of the state of North Dakota, and that as a public officer plaintiff had acted wrongfully, wilfully and corruptly; that as an attorney at law plaintiff was crooked, dishonest, corrupt, and wholly untrustworthy, and was open to corrupt influences; that the persons who read said article understood it as thus interpreted, and many of said persons believed said charges and assertions as thus interpreted to be true; that said charges and assertions, and each thereof and all thereof, are and were absolutely false and were known to be false by defendants when said article was published as aforesaid.

7. That said article was printed, published, and circulated by defendants, as aforesaid, designedly, wickedly, and maliciously, and with intent upon the part of said defendants to expose plaintiff to hatred, ridicule, contempt, and obloquy; that said article was printed, published, and circulated as aforesaid, without cause or provocation or excuse.

8. That on the 18th day of August, 1916, plaintiff caused to be served upon the said defendants a proper and sufficient notice, stating that said article as published was, as respects plaintiff, wholly false, untrue, and defamatory, and demanding that defendants retract the same in so far as the same reflected upon the personal character and business and professional standing of plaintiff, which notice and demand was duly served upon said defendants; that the said Co-operators' Herald is a weekly newspaper, and is usually printed and circulated on Friday of each week; that regular issues of said newspaper were printed, published, and circulated on the 18th day of August, 1916, the 25th day of August, 1916, and the 1st day of September, 1916, and that not-

withstanding the service upon said defendants of said notice and demand for retraction, no retraction of any kind was printed and published in any of the said issues of said newspaper; that said defendants have wrongfully and maliciously refused and still wrongfully and maliciously refuse to publish in said newspaper, or otherwise, any retraction whatsoever of any of the statements, assertions, or charges contained in the article aforesaid.

9. That the publication of said article, as aforesaid, caused plaintiff great shame and humiliation, and greatly injured plaintiff in his standing in the state of North Dakota both as a man and as a business man, and also greatly injured plaintiff in his standing and reputation in the state of North Dakota as a practising lawyer, and greatly lessened the income of plaintiff arising from his professional services; and that by reason of all the premises plaintiff has been damaged in the sum of fifty thousand dollars ($50,000) no part of which has ever been paid.

Wherefore, plaintiff prays judgment against defendants for the sum of fifty thousand dollars ($50,000), together with his costs and disbursements of this action.

It is elementary that a demurrer admits the truth of all issuable, relevant, material facts well pleaded. 31 Cyc. 333; 6 Enc. Pl. & Pr. 334, 6 Standard Proc. 943. Hence a general demurrer to a complaint in an action for libel "admits allegations of falsity and publication and malice and the correctness of the innuendoes as averred in the petition, unless the innuendo attributes a meaning to the words which is not justified by the words themselves or by the extrinsic facts with which they are connected." 25 Cyc. 469; 13 Enc. Pl. & Pr. 91, 92. And such demurrer "will be overruled if any of the words laid therein are actionable." 25 Cyc. 468.

In this state "every man may freely write, speak, and publish his opinions on all subjects, *being responsible for an abuse of that privilege.* In all civil and criminal trials for libel the truth may be given in evidence, and shall be a sufficient defense *when the matter is published with good motives and for justifiable ends;* and the jury shall have the same power of giving a general verdict as in other cases." N. D. Const. § 9. But every person has, subject to the qualifications and restrictions provided by law, the right to protection from personal insult or defamation. Comp. Laws 1913, § 4350. Defamation may be

effected by libel or slander. Comp. Laws, § 4351. "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Comp. Laws, § 4352.

Section 4354, Comp. Laws 1913, provides: "A privileged communication is one made:

"1. In the proper discharge of an official duty.

"2. In any legislative or judicial proceeding, or in any other proceeding authorized by law.

"3. In a communication without malice to a person interested therein by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information.

"4. By a fair and true report without malice of a judicial, legislative or other public official proceeding, or of anything said in the course thereof.

"In the cases provided for in subdivisions 3 and 4 of this section, malice is not inferred from the communication or publication."

The right to "freely write, speak, and publish his opinions," which is guaranteed to every man by our Constitution, does not mean unrestrained license to publish false and libelous matter. For while the Constitution makes it permissive to publish the truth with good motives and for justifiable ends, it also recognizes the responsibility for injury to others occasioned by one who abuses the privileges of liberty of speech and of the press. "The provisions [guaranteeing freedom of speech and liberty of the press] of the Federal and state Constitutions . . . were designed to secure rights of the people and of the press for the public good, and they do not license the utterance of false, slanderous, or libelous matter. Individuals are free to talk, and the press is at liberty to publish, and neither may be restrained by injunction, but they are answerable for the abuse of this privilege in an action for slander or libel under the common law, except where by that law, or by statute enacted in the interest of public policy, the publication is privileged and deemed for the general good, even though it works a private

injury." Stuart v. Press Pub. Co. 83 App. Div. 467, 82 N. Y. Supp. 408.

In discussing the subject of newspaper publications, Ruling Case Law (17 R. C. L. p. 349, § 95) says: "While the law of libel cannot be invoked to redress every breach of good morals or manners in newspaper publications, the general rule independent of statute is that a newspaper has no more right than a private individual has to trifle with the reputation of any citizen, or by carelessness or recklessness to injure his good name or business without answering therefor in damages. Publishers of newspapers have the right to publish the truth, but they have no right to publish falsehood to the injury of others."

We are not called upon to determine whether the newspaper article under consideration standing alone is plainly libelous; nor are we called upon to determine whether any of the words used therein are actionable *per se*, as plaintiff has by inducement, colloquium, and innuendo, and by allegation of special damages, averred that the language published referred to plaintiff, and was intended to, and did, convey to the readers thereof a certain defamatory meaning, whereby plaintiff sustained certain special damages. This being so, the complaint is not demurrable unless the court can say as a matter of law that the publication of the newspaper article in question of and concerning plaintiff did not expose him "to hatred, contempt, ridicule, or obloquy," and could not have caused him "to be shunned or avoided," or had "a tendency to injure him in his occupation." Comp. Laws, § 4352. If reasonable men in the exercise of their judgment and reason might differ as to whether the publication of the article had such effect, then it is for the jury to determine what the fact is. 25 Cyc. 542; 13 Enc. Pl. & Pr. 106; Newell, Slander & Libel, pp. 281, 290, 291. "If there is any doubt of the meaning of a publication claimed to be libelous, so that extrinsic evidence is needed to determine its character as to its being actionable or not actionable, it is then a question for the jury, under proper instruction from the court, to find its true character and significance." Newell, Slander & Libel, 2d ed. p. 290, § 3. And where the words of an alleged libelous publication "are reasonably susceptible of two constructions, the one innocent and the other libelous, then it is a question for the jury which construction is the proper one. In such a case if the defendant demurs to the declaration his demurrer will be overruled.

Or, in other words, the rule may be stated thus: It is for the court to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and for the jury to determine whether such meaning is truly ascribed. Newell, Slander & Libel, 2d ed. p. 291, § 5. See also Black v. State Co. 93 S. C. 467, 77 S. E. 51, Ann. Cas. 1914C, 989.

It will be noted that the complaint alleges that the article makes three different libelous charges against the plaintiff: (1) That he is engaged in collecting a "slush fund" for wrongful use in an election; (2) He is compared with, and said to stand for the same proposition as, one McHugh, whom it is charged the Co-operators' Herald has continually and consistently held out to its readers as being dishonest, deceitful, and fraudulent in his business transactions, and engaged in cheating and defrauding the farmers of North Dakota; (3) that the plaintiff while attorney general of the state of North Dakota failed to perform his official duties by neglecting to enforce the Prohibition Law of the state, and by permitting persons to engage in the unlawful selling of intoxicating liquors.

In determining the actionable quality of words claimed to be libelous, the entire writing, including the title or headlines, must be considered. 18 Am. & Eng. Enc. Law, 985; 25 Cyc. 357. And particular words or phrases must be construed in connection with remainder of the article of which they form a part. Ibid.

The actionable quality of the words is dependent primarily upon the effect which the language complained of was fairly calculated to produce and would naturally produce upon the minds of persons of reasonable understanding, discretion, and candor. 18 Am. & Eng. Enc. Law, 977. But in arriving at the sense in which the defamatory language is employed it is proper and necessary to consider the circumstances surrounding the publication and the entire language used. 17 R. C. L. p. 313. A person who libels another cannot escape liability by the use of obscure or ambiguous language, or language which is figurative, ironical, or comparative. But the courts and juries will understand it according to its true meaning and import, and the sense in which it was intended to be gathered from the context, and from all the facts and circumstances under which it was used. 18 Am. & Eng. Enc. Law, 977. Townshend on Slander & Libel, § 133, says: "For the purpose of its

construction, language is to be regarded not merely in reference to the words employed, but according to the sense or meaning which, all the circumstances of its publication considered, the language may be fairly presumed to have conveyed to those to whom it was published. The language is always to be regarded with reference to what has been its effect, actual or presumed, and the sense is to be arrived at with the help of the cause and occasion of its publication. The court or the jury is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language in question according to its natural and popular construction."

As words gradually acquire a new meaning or as new words come into general use the court and jury cannot profess to be ignorant of such changes. Fowle v. Robbins, 12 Mass. 498. But the courts and juries will understand the language used according to its true meaning and import and the sense in which it was intended to be gathered from the context and from all the facts and circumstances under which it was used. 18 Am. & Eng. Enc. Law, 977.

Hence, it may be shown that certain words, harmless in themselves, have acquired a certain meaning rendering them libelous. In speaking on this subject the supreme court of Vermont said: "There is considerable conflict in the cases touching the admission of testimony of witnesses as to their understanding of alleged libelous language. The authorities are uniform that the meaning is a question for the jury, and the jury are to put themselves as nearly as may be in the shoes of the reader, and from his standpoint determine the character of the language. To determine this question it is obvious that the language will be construed by the reader, not only with reference to all the facts and circumstances recited in the article itself, but also with reference to such other facts as the writer might reasonably expect to be within the present knowledge of the reader. If an article adopts terms or forms of expression which have a provincial meaning unlike their natural import, and are addressed to persons of the locality where such provincialisms are understood, the writer is bound to expect that his language will be read in its provincial sense. If a person is known in a locality as having a nickname, or one given him by reason of some oddity of manner, peculiarity of gait, or dress, or some official character, and the article refers or may refer to such name or character instead of the

true name, all persons reading an article referring to somebody under such name, and knowing who bore the name, would feel well assured respecting the person alluded to. Such name or character is but an alias for the person's true name." Knapp v. Fuller, 55 Vt. 311, 45 Am. Rep. 618.

In Bailey v. Kalamazoo Pub. Co. 40 Mich. 251, it was held that the following words printed of a clergyman were libelous as implying a charge of adultery: "Then there was that Iowa Beecher business of his, which beat him out of a station at Grass Lake." And the Illinois supreme court held it to be a libel (under conditions then existing) to publish an article charging a person with being an "anarchist." Cerveny v. Chicago Daily News Co. 139 Ill. 345, 13 L.R.A. 864, 28 N. E. 692.

It is well settled that a publication imputing roguery, rascality, or general depravity, which carries with it a charge of moral turpitude and degradation of character, the natural tendency of which is to hold the party up to hatred, contempt, or ridicule and to expose him to the reprobation of virtuous and honorable persons, is libelous. 25 Cyc. 260; 17 R. C. L. pp. 290–291.

It is also well settled that a libelous charge may be made indirectly as well as directly; and may be couched in figurative, ironical, or comparative language. 17 R. C. L. p. 314; 18 Am. & Eng. Enc. Law, 977. Hence, if the Co-operators' Herald had continually vilified McHugh and held him out as, and led its readers to believe that he was, dishonest and corrupt, and engaged in fraudulent and dishonest business practices, then manifestly its subsequent statement to the same readers with respect to McCue that he stands for the same proposition as McHugh, and that there is little or no room for distinguishing between McHugh and McCue, might, and probably would, result in exposing McCue to "hatred, contempt, ridicule, or obloquy," or cause "him to be shunned or avoided," or have "a tendency to injure him in his occupation." Of course the actionable quality of these words depends upon proof, and in ruling on a demurrer this court cannot take judicial notice of what has or has not been published in the Co-operators' Herald, but must assume the facts to be as stated in the complaint.

A majority of the court therefore agree that in so far as the complaint charges that plaintiff has been libeled by comparing him with

McHugh, it states a cause of action. But a majority are of the further opinion that in so far as the complaint predicates libel upon the other two charges, it does not state a cause of action. The writer, however, does not share this latter opinion. He believes that it cannot be said as a matter of law that any of the three charges are not libelous, and believes that in any event the meaning to be attributed to such charges should be submitted to the jury. Especially is this true of the charge that McCue while attorney general was blind to the operations of blind pigs. In his opinion this statement, if not libelous *per se,* is clearly susceptible of a defamatory meaning.

The state now has, and since its admission into the Union, has had, constitutional prohibition. The attorney general is the principal law officer of the state. "His duties are general; his authority is coextensive with public legal affairs of the whole community." State ex rel. Miller v. District Ct. 19 N. D. 831, 124 N. W. 417, Ann. Cas. 1912D, 935. It is his duty, among other things, "to appear for and represent the state before the supreme court in all cases in which the state is interested as a party. And "when in his judgment the interest of the state requires it, he shall attend the trial of any party accused of crime and assist in the prosecution." Comp. Laws 1913, § 157. He is specifically charged with the duty of enforcing the State Prohibition Law in any county of the state wherein the state's attorney fails, neglects, or refuses to do so. Comp. Laws 1913, § 10,112. State v. Heiser, 20 N. D. 357, 127 N. W. 72. Under our laws any wilful omission on the part of a public officer to perform any duty enjoined upon him by law is a misdemeanor. Comp. Laws 1913, § 9432.

In the opinion of the writer the language used is capable of the meaning that plaintiff while attorney general wilfully failed to perform his duty in enforcing the State Prohibition Law. In fact it is difficult to understand how it is reasonably susceptible of any other meaning. Statements far less capable of defamatory meaning have been held libelous. See Sharpe v. Larson, 67 Minn. 428, 70 N. W. 1, 554; 10 Am. & Eng. Enc. Law, 949 et seq., and cases cited; 25 Cyc. 333, 346, et seq., and cases cited; 17 R. C. L. pp. 301, 307; Newell, Slander & Libel, pp. 184, 185; Odgers, Libel & Slander, 26; Pratt v. Pioneer Press Co. 32 Minn. 217, 18 N. W. 831, 20 N. W. 87. See also Estelle v. Daily

News Pub. Co. 99 Neb. 397, 156 N. W. 645, 101 Neb. 610, 164 N. W. 558.

Inasmuch as a majority are of the opinion that the complaint states a cause of action, the order appealed from must be affirmed.

It is so ordered.

GRACE, J. I dissent.

BRUCE, Ch. J. I concur in the opinion of Mr. Justice Christianson in its entirety, including his holding that "it cannot be said as a matter of law that any of the three charges are not libelous, and that in any event the meaning to be attributed to such charges should be submitted to the jury."

ROBINSON, J. (dissenting). This is a petty libel suit based on the publication of a rather harmless looking political squib. The case comes here on a demurrer to the complaint. The demurrer may save the parties and taxpayers the expense of long and vexatious trial resulting in a verdict of 5 cents or nothing. The squib is in plain simple every-day language. Its words are small and its sentences are all short and in no way complicated. To any reader the meaning is obvious, and it cannot be changed or varied by any averments or innuendoes. It charges no crime and nothing to cause anyone to be shunned or to bring anyone into hatred, contempt, or ridicule.

The squib was published during the last political campaign. Its manifest purpose was to forestall and curb the political activities of the ex-attorney general in working against the supreme court candidates who were indorsed by the Nonpartisan League. The publisher apparently did not know McCue, as he improved the name by spelling it McHugh. Hence, by way of correction, it was said: "The reference was not to Secretary McHugh of the Chamber of Commerce. It was another McCue,—one T. F. McCue, of Carrington, who was commiserating with Mr. Linde and bragging, so it is alleged, that he was raising a fund to help defeat the candidates for the supreme court. With McCue collecting an alleged slush fund to defeat the candidates of the League, there ought to be no question of their election. McCue was formerly attorney general of North Dakota, but he was so blind to the operation of the blind pigs that the people discarded him on the first

opportunity." Then there is added: "McHugh or McCue, take your choice—they are a nice pair and stand for the same proposition." That is all there is of the libel. The fair meaning and import was that the two Macs were old liners or standpatters and that they stood for the same thing politically. There is nothing to warrant the gross and far-fetched innuendo that McHugh was generally known to be a very bad man, with whom to be compared or classed was a disgrace to the other Mac.

In nearly every political campaign money is collected and used too freely, and each party charges the other with a slush fund or the use of money like slush. It is a well-known figure of speech which does not deceive or startle anyone. When in Scripture we read: "Rivers of water ran down my cheeks," we do not think of anything like the Missouri river.

In regard to the blind pigs it is said McCue was so blind that the people did not re-elect him. That does not suggest or convey the idea that he wilfully disregarded his official oath. It should not be accounted a libel to say of any person that he was a little blind to official duty, as that is true of nearly every person who has held office. Everyone knows that in the exercise of his duties an attorney general must have a large discretion, and that an apparent blindness may be on the side of charity and in accordance with his sense of duty.

Three of the judges are agreed that what is said concerning blindness to the blind pigs and the slush fund is not a libel and does not constitute a cause of action. That narrows the issues, but it seems there is a difference of opinion in regard to what is said of the Macs being a fine pair and standing for the same proposition. The complaint charges that McHugh is secretary of the Chamber of Commerce in Minneapolis, and in said newspaper and many other newspapers it was frequently published. "That said McHugh was and is a thief, a rogue, and a rascal, and engaged in a crooked and fraudulent and disreputable business, and that said McHugh and his business associates were engaged in a large scale in cheating and defrauding farmers of North Dakota, by wilfully and corruptly manipulating prices of grain." Now by fair construction the above charge against McHugh relates entirely to his doings as a member of the Chamber of Commerce. It does not by any fair construction charge that he had ever feloniously stolen and carried

away the personal property of anyone. It does not charge him with crime. It calls him a thief merely because of his dealings, and his regular business as secretary of the Chamber of Commerce. Such is the fair construction of the charge, and it accords with the facts of which the court should take judicial notice. This court is presumed to know what is generally known within the jurisdiction of the court, and we know that no one has ever heard of McHugh being charged with the crime of larceny, and were the plaintiff put to the test on a motion for a bill of particulars, he would not dare to charge McHugh with larceny or any other crime. A person charged with larceny or crime does not for a moment hold the place of Secretary McHugh, and there is no charge that the plaintiff has any connection with the Chamber of Commerce. The averment that the two Macs are a nice pair and stand for the same proposition cannot mean that they are in the same business or that either one has been guilty of a crime. The purpose of the political squib was to give them a political rating and to put them in the same class politically as old liners and standpatters. Hence there is no libel, and the action should be dismissed.

CHARLEY KLINK, as Executor of the Last Will and Testament of Christine Klink, Deceased, Appellant, v. JAMES KELLY, as Sheriff of Barnes County, North Dakota, Respondent.

(167 N. W. 220.)

Executor — suit by — personal property — value of — judgment against son — property sold under execution on — insolvency of son — transfer of personalty — actual and continued change of possession — void transfer as to creditors.

Plaintiff sues as the executor of Christine Klink to recover the value of a threshing-machine outfit which was purchased by her son Christ Klink and sold under an execution against his property. The son was insolvent. The aged mother had no use for a threshing machine. She never used it. The transfer was not followed by an actual and continued change of possession. *Held*, that as against creditors the alleged transfer was void.

Opinion filed February 27, 1918.

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

Plaintiff appeals.

Affirmed.

A. P. Paulson, for appellant.

The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer of the thing itself, identified, whether it is separated from other things or not. Comp. Laws 1913, § 5535; O'Keefe v. Leistikow, 14 N. D. 355, 104 N. W. 515, 9 Ann. Cas. 25.

After proof has been introduced to show a fraudulent combination on the part of the vendor and the vendee to defraud the creditors of the vendor, then the statements of the vendor, in the absence of the vendee, tending to defeat the title of the vendee, may be offered. O. S. Paulson Mercantile Co. v. Seaver, 8 N. D. 217, 77 N. W. 1001; Hartman v. Diller, 62 Pa. 37; Pier v. Duff, 63 Pa. 59; Cuyler v. McCartney, 33 Barb. 165; Boyd v. Jones, 60 Mo. 454; Hutchings v. Castle, 48 Cal. 152.

Declarations to third persons by a vendor of property after the delivery and sale thereof has been consummated are admissible against the vendee to impair the latter's title. Orr & L. Shoe Co. v. Needles, 15 C. C. A. 142, 32 U. S. App. 410, 67 Fed. 990; Zobel v. Bauersachs, 55 Neb. 20, 75 N. W. 43; Winchester & P. Mfg. Co. v. Creary, 116 U. S. 161, 29 L. ed. 591, 6 Sup. Ct. Rep. 369; Kurtz v. St. Paul & D. R. Co. 61 Minn. 18, 63 N. W. 1; Milling v. Hillenbrand, 156 Ill. 310, 40 N. E. 941; Williams v. Eikenberry, 25 Neb. 721, 13 Am. St. Rep. 517, 41 N. W. 770; Howland v. Fuller, 8 Minn. 50, Gil. 30; Zimmerman v. Lamb, 7 Minn. 421, Gil. 336; Benson v. Lundy, 52 Iowa, 265, 3 N. W. 149; Allen v. Kirk, 81 Iowa, 658, 47 N. W. 906; Derby v. Gallup, 5 Minn. 119, Gil. 85; Shaw v. Robertson, 12 Minn. 445, Gil. 334; Groff v. Ramsey, 19 Minn. 44, Gil. 24; Burt v. McKinstry, 4 Minn. 204, Gil. 146, 77 Am. Dec. 507; Buckingham v. Taylor, 74 Mich. 101, 41 N. W. 868; Fay v. Rankin, 47 Wis. 400, 2 N. W. 562.

The sale by Christ Klink to Christine Klink was good, except as to the creditors of Christ Klink at the time of the transfer. Bartlett v. Cheesebrough, 32 Neb. 339, 49 N. W. 360; Paxton v. Morovek, 31 Neb. 305, 47 N. W. 919; Oberfelder v. Kavanaugh, 21 Neb. 483, 32

N. W. 295; Williams v. McGrade, 13 Minn. 46, Gil. 39; Homberger v. Brandenberg, 35 Minn. 401, 29 N. W. 123; James v. Van Duyn, 45 Wis. 512.

The execution creditors were not creditors of Christ Klink within the meaning of the statute at the time of the transfer. Soly v. Aasen, 10 N. D. 108, 86 N. W. 108; Schaible v. Ardner, 98 Mich. 70, 56 N. W. 1105; Day v. Lown, 51 Iowa, 364, 1 N. W. 786; Petree v. Brotherton, 133 Ind. 692, 32 N. E. 300; Bongard v. Block, 81 Ill. 186, 25 Am. Rep. 276; Pierstoff v. Jorges, 86 Wis. 128, 39 Am. St. Rep. 881, 56 N. W. 735.

The evidence of an outside disinterested party as to declarations should be admitted. Comp. Laws 1913, § 7871; Regan v. Jones, 14 N. D. 591, 105 N. W. 613.

Winterer & Ritchie, for respondent.

In conversion or replevin cases it is the settled rule that defendant may offer proof of any fact or circumstance which tends to establish the conclusion that plaintiff is not the owner of or entitled to the possession of the property in question, and this is true under a general denial.

The burden is always upon the plaintiff in such cases to establish the cause of action set out in the complaint. Plano Mfg. Co. v. Daley, 6 N. D. 330, 70 N. W. 277; O. S. Paulson Mercantile Co. v. Seaver, 8 N. D. 215, 77 N. W. 1001.

A transfer of personal property must be accompanied by immediate delivery and continued change of possession, or it will be held void as against creditors. Comp. Laws 1913, § 7221; Conrad v. Smith, 6 N. D. 337, 70 N. W. 815; State v. Minneapolis & N. Elevator Co. 6 N. D. 41, 68 N. W. 81; Morrison v. Oium, 3 N. D. 76, 54 N. W. 288; Rosenbaum v. Hayes, 8 N. D. 461, 79 N. W. 987.

Any evidence which tends to show or does show that defendant does not unlawfully detain the property is admissible. Plano Mfg. Co. v. Daley, 6 N. D. 334, 70 N. W. 277, and cases cited.

Robinson, J. The plaintiff appeals from a judgment in favor of defendant and from an order denying a motion for a new trial. The plaintiff sues as the executor of Christine Klink to recover the value of a threshing-machine outfit which was purchased by her son Christ Klink and sold under an execution against his property. The case

presented only a simple question of fact on which the jury found a verdict against the plaintiff. The verdict is clearly right and it is well sustained by the evidence.

Under a judgment and execution against Christ Klink, the sheriff duly levied on and sold the threshing outfit as his property. The claim of the plaintiff is that, long prior to the judgment and execution, Christ Klink sold the outfit to his aged mother for $2,400, giving her a bill of sale, and that she paid him in cash, currency, and silver between $800 and $900 and gave up his past due paper amounting to $1,500.

The story is highly improbable. The mother was a woman of sixty-seven years. She knew nothing of threshing machines and she had no possible use for such a machine. She never attempted to use it. Her son was hopelessly in debt and he had no other property subject to execution. The son kept the outfit on his mother's place both before and after the pretended sale, unless when in use or when it was left in the field. Yet there never was an actual and continuous change of possession after the alleged sale. The son continued to use the property the same as before the sale. Hence the alleged sale is presumed to be fraudulent and void (Comp. Laws 1913, § 722) and that presumption is in accord with the testimony. The evidence must be weighed. In regard to the bill of sale the facts and circumstances outweigh the positive testimony of Christ Klink, the judgment debtor. There is no convincing testimony that his mother ever saw or heard of the bill of sale, much less that she paid over to her son such a large amount of currency and silver to apply on the purchase. Aged women are not doing business in that way. They do not buy threshing machines. When a distressed creditor makes a bill of sale to his wife or mother, it is most invariably made for the secret purpose, which is very obvious, the purpose of hindering, delaying and defrauding creditors, and that purpose is well shown by the testimony showing the declaration of Christ Klink, to the effect that he owned the threshing outfit though he was not supposed to own it.

The judgment is right, and it is affirmed.

GRACE, J. I concur in the result.

OSCAR S. HILMEN, Respondent, v. OLE A. BRYN, Peder Paulson, Lawrence Peterson, O. Torgerson, and Otto O. Aubol, Appellants.

(167 N. W. 219.)

Stay bond — undertaking to pay deficiency judgment — action on — judgment — appeal from.

This is an appeal from a judgment against defendants on a stay bond which was duly offered, accepted, approved, and filed. The appeal was from a judgment directing the sale of both real and personal property and, to secure a stay, defendants undertook and agreed to pay any deficiency that might arise under the sale of the property to an amount not exceeding $1,500. This was in accord with Compiled Laws, § 7829. The deficiency judgment is manifestly correct.

Opinion filed February 28, 1918.

Appeal from the District Court of Pierce County, Honorable *A. G. Burr,* Judge.

Defendants appeal.

Affirmed.

Harold B. Nelson and *Middaugh & Coger,* for appellants.

"The statutory undertaking on appeal will operate as a stay of execution; and where another undertaking is given for the purpose of staying the execution, it is without consideration and cannot be enforced either as a statutory or a common-law obligation against the sureties, though the judgment was for the foreclosure of a chattel mortgage on perishable property, and the obligee relied upon such obligation, and refrained from disposing of such property pending the appeal, and was thereby damaged, as the statutory undertaking did not contemplate a stay of sale of personal property." Powers v. Chabot, 28 Pac. 1070.

"If there was no consideration the sureties are not liable and the judgment must be reversed." Olson v. Birch, 81 Pac. 856; Cal. Code Civ. Proc. § 942.

"Where a bond on appeal has no validity as a statutory bond, a motion for judgment thereon should be denied, even if it is supported by a consideration, and is good as a common-law bond." Central Lumber

& Mill. Co. v. Center, 40 Pac. 335; Reay v. Butler, 50 Pac. 375; McCallion v. Hibernia Sav. & L. Asso. 33 Pac. 329.

A judgment for the mere sale of mortgaged premises does not give a judgment *in personam,* and no deficiency judgment is provided for thereby. Comp. Laws 1913, § 7829; Mareau v. Stanley (Colo.) 81 Pac. 759; Scott v. Marchant, 88 Ind. 349; Kountze v. Omaha Hotel Co. 107 U. S. 378; Supervisors v. Kenneott, 103 U. S. 554.

D. J. O'Connell, for respondent.

Where a deficiency judgment on foreclosure was rendered against the mortgagor, and an appeal was taken by a defendant who was in possession and desired to prevent a sale pending the appeal, the surety on the appeal bond, stipulating that appellant will pay any deficiency arising on the foreclosure sale, is liable for such deficiency. Johnson v. King, 91 Cal. 307, 27 Pac. 644; Gutzeit v. Pennie, 32 Pac. 584.

"Deficiency arising upon the sale" means the difference between the selling price and the amount of the mortgage indebtedness up to the amount of the bond." Boob v. Hall, 38 Pac. 977.

The matter of providing for stay bonds in appeals from judgments is purely the subject of legislative control. Boob v. Hall, 38 Pac. 977; 2 Cyc. 954; Buckner v. Bogard, 8 Ky. L. Rep. 701; Jenkins v. Hay, 28 Md. 547; Kennedy v. Nims (Mich.) 17 N. W. 735; Ogden v. Davis, 47 Pac. 722; Portland Trust Co. v. Havely, 36 Or. 234, 59 Pac. 466.

In adopting our statute the legislature intended evidently to obviate any question of judicial interpretation by including within the statute itself the construction placed upon it by the supreme court of the state from which the statute was taken. Comp. Laws 1913, § 7829. Babcock v. Carter, 67 Am. St. Rep. 193.

On appeal in such cases the respondent is entitled to security in substantial conformity to the statute, and in the absence of such conformity he may move to dismiss the appeal, and his motion will be granted. Jordan v. McKenny, 45 Me. 306; Putnam v. Boyer, 140 Mass. 235; Alberson v. Mahaffy, 6 Or. 412; Stroud v. State, 33 Tex. 650.

If there is a substantial compliance with the statute, mere technicalities and immaterial variances will be disregarded even when made the basis of a motion to dismiss the appeal. Corey v. Lugar, 62 Ind. 60;

McCrory v. Anderson, 103 Ind. 12; Asch v. Wiley, 16 Neb. 41; Halley v. Perry, 94 N. C. 30.

Where no motion is made to dismiss the appeal, and the judgment or decree has been affirmed by the appellate court, such affirmance establishes, as against the sureties, the fact that the court had jurisdiction of the appeal, and hence necessarily affirms the liability of the sureties in so far as their undertaking has stipulated for the payment of costs and damages. The sureties are estopped to claim want of jurisdiction. Gudtner v. Kilpatrick, 14 Neb. 347; Adams v. Thompson, 18 Neb. 541.

A bond apparently given to support an appeal, or for obtaining a stay of execution during an appeal, however much it may depart from the mandate of the statute, where respondent accepts it, is a good common-law obligation and enforceable against the sureties according to its terms. Munn v. Goodlet, 10 Ark. 89; Dore v. Covey, 13 Cal. 502; Mix v. People, 86 Ill. 329; Meserve v. Clark, 115 Ill. 580; Field v. Schriber, 14 Iowa, 119; Pray v. Wasdell, 146 Mass. 324; Healy v. Newton, 96 Mich. 228.

The sureties on their part cannot escape liability by urging formal defects in the bond which the respondent has apparently waived, and where the appellant has had the full benefit of all for which the bond was given. Jones v. Droneberger, 23 Ind. 74; Railsback v. Greve, 58 Ind. 72; Minor v. Rodgers, 65 Mich. 225; Granger v. Parker, 142 Mass. 186; Adams v. Thompson, 18 Neb. 541; Tevis v. Randall, 6 Cal. 633; Baber v. Bartol, 7 Cal. 551; Gardner v. Donnelly, 86 Cal. 367; Stephens v. Crawford, 1 Ga. 574; Dore v. Covey, 13 Cal. 502.

Robinson, J. In September 1914, Oscar Hilmen, the plaintiff, recovered a judgment against Tobias Nygaard and wife for $5,521 in an action to foreclose a mortgage on both real estate and personal property. An appeal was taken to the supreme court, and, to secure a stay of proceedings, the defendants made to plaintiff an undertaking whereby they promised to pay any deficiency not exceeding $1,500 which might arise on a sale of the property in case the judgment should be affirmed.

The result was to hold up and stay the proceedings on the judgment for a year. The appeal was dismissed. On October 30, 1915, the

sale was made. The land sold for $2,000 and the personal property for $2,229. The deficiency was $1,795.18.

By answer defendants allege that, by a mistake of law as to the legal effect of the undertaking, the plaintiff did not with diligence pursue his remedy against the personal property pending the appeal. That by not making a sale of the personal property pending the appeal it depreciated in value and resulted in a deficiency of $1,795.18. That if the property had been promptly sold there would have been no deficiency. The stay bond was offered, accepted, and filed on November 6, 1914, and it does not appear that any objection was made to the form or the conditions of the same. The manifest purpose and the legal effect of the bond was to stay all proceedings on the judgment. It was given under the statute which provides thus: Comp. Laws 1913, § 7829. "If the judgment appealed from directs the sale of mortgaged premises, the execution thereof shall not be stayed by the appeal, unless an undertaking is executed on the part of the appellant by at least two sureties, conditioned for the payment of any deficiency which may arise on such sale, not exceeding such sum as shall be fixed by the court or presiding judge thereof; to be specified in the undertaking, and all costs and damages which may be awarded to the respondent on such appeal."

Counsel for appellant insists that the conditions of the bond should have been for the payment of all damages which the opposite party may have sustained by reason of the appeal. Section 7831.

The time to have insisted on that point was prior to the making of the bond. In legal proceedings there is a time for all things. Appellants have had the full benefit of the stay, and it appears from the answer the conditions on which they now insist would have increased their liability to the full amount of the deficiency. Counsel for appellant assign several errors which amount to nothing unless to indicate that the appeal was taken for delay. Here is a specimen. "There is no evidence showing or tending to show that defendants and appellants received any consideration for the execution of the bond sued upon in this action." Pure nonsense it is to talk of showing a consideration for a stay bond. The stay is the consideration, and it is shown on the face of the bond.

The judgment appealed from directs the sale of mortgaged property, and it was legal and proper that the conditions of the stay bond should

be for the payment of any deficiency on a sale of the property, and that condition was entirely favorable to the appellant and the sureties.

The judge who writes this opinion, speaking for himself alone, believes that the defense of this action was clearly frivolous, and that the appeal was taken for delay, and that in all such cases the judgment should be affirmed with 10 per cent damages.

Judgment affirmed.

CHRISTIANSON and GRACE, JJ., concur in result.

IN RE ESTATE OF ANTON KAHOUTEK, Deceased.

ADOLPH KAHOUTEK, Appellant, v. MARY KAHOUTEK, Rosa Kahoutek, and Lena Kahoutek, Respondents.

(166 N. W. 816.)

Will — disposition of property by — ambiguity on face — description of property — not owned by testator — extrinsic evidence — property intended — indefiniteness — new will — courts cannot make — intention only gathered from will.

1. When there is no ambiguity or imperfect description on the face of a will to explain or to correct, the fact that it disposes of property which the testator did not own neither renders the instrument indefinite nor justifies the courts in making a new will for the testator based upon what, from extrinsic evidence, they assume he intended to convey. Such intention must be gathered from the terms of the will itself, and where the will is explicit the courts are powerless to vary its terms.

NOTE.—For authorities discussing the question of parol evidence of mistake in description of land devised, see note in 16 L.R.A. 321, where it is held that when the description of the subject-matter of the devise is mistaken, parol evidence has been admitted to aid the construction, by showing to what the testator must have referred. As to correction of misdescription of land in will, see notes in 6 L.R.A. (N.S.) 942, and L.R.A.1915E, 1008.

On parol evidence to correct misdescription of real estate in will, see note in 8 Am. Rep. 669.

A mistake in the description in a will either of the beneficiary or the subject-matter will not void the will if enough remains to show with reasonable certainty what was intended, as will be found by an examination of note in 29 Am. St. Rep. 492.

Description of property — not owned by testator — devised — bequest definitely made to another — amount deducted therefrom — to make up for mistake — courts will permit.

2. The fact that in one paragraph of a will a testator devises, by specific description, property that he does not own, will not justify the courts in taking an equivalent amount from a bequest which is definitely made to another, and in saying that the fact that the former property was not owned by the testator justifies the conclusion that he intended that his valid and definite bequest should be set aside.

Opinion filed January 2, 1918. On Reargument February 28, 1918.

Appeal from the District Court of Richland County, Honorable *Frank P. Allen,* Judge.

Application for the allowance of the account of an executor and for final distribution.

Cross petition for reformation of the will.

Judgment for cross petitioner. Executor appeals.

Reversed.

Engerud, Divet, Holt, & Frame, for appellant.

The controlling sections of our Code come to us from California and with them an unbroken line of decisions placing construction upon them.

"No more in wills than in any other writings is parol evidence admissible to vary the terms of the instrument." Comp. Laws 1913, §§ 5649, 5678, 5686, 5690, 5708; Cal. Civ. Code, §§ 1276, 1311, 1318, 1322, 1340; Re Young (Cal.) 55 Pac. 1011; Re Lynch, 75 Pac. 1086; Re Tompkin, 64 Pac. 268.

"It is incompetent to show by any extrinsic evidence that the testator has by his own mistake or that of some other person given a legacy of less value or of a different character from that which he in fact actually meant to give." Re Callaghan, 39 L.R.A. 689, 51 Pac. 860.

"The principle that the intention which a testator has clearly expressed in his will must be followed—and that the will cannot be construed as intending a direct devise where the clearly expressed intent is otherwise—is accepted as the law." Re Faies, 60 Pac. 442; Re Young, 55 Pac. 1011.

Courts do not make new wills. McGovern v. McGovern (Minn.) 77

N. E. 970; Sturgis v. Works (Ind.) 22 N. E. 996; Taylor v. Horst (Wash.) 63 Pac. 231; Patch v. White, 117 U. S. 210; Benzel v. Volz (Ill.) 31 N. E. 13; Re Young, 55 Pac. 1013; Griscomb v. Evans, 40 N J. L. 402.

Extrinsic evidence cannot be used to change or contradict, but only to select between different meanings that which the words used may have. Brown v. Quintard, 177 N. Y. (83); Lenz v. Sens (Tex.) 66 S. W. 110; Lomax v. Lomax, 6 L.R.A.(N.S.) 942, 75 N. E. 1076; Burnett v. Burnett, 30 N. J. Eq. 595; Sherwood v. Sherwood, 45 Wis. 357; Dougherty v. Rodgers (Ind.) 20 N. E. 780.

An erroneous description may sometimes be made to apply to different property than that technically described, if it be referred to as "my property," "belonging to me," or where two descriptions are given one of which may correctly describe the property. Zerkle v. Leonard (Kan.) 60 Pac. 318; Hanley v. Krablezky (Wis.) 96 N. W. 820; Eckford v. Eckford (Iowa) 58 N. W. 1093; Funk v. Davis (Ind.) 2 N. E. 739; Priest v. Lackey (Ind.) 39 N. E. 54; Patch v. White, 117 U. S. 219; Re Lynch, 75 Pac. 1037, 6 L.R.A.(N.S.) pp. 943 to 977 note.

"When a latent ambiguity can be removed by rejective false words and leaving a complete intelligible description, the words should be rejected; or where there are two descriptions, one good and the other bad, the latter may be rejected." Benzel v. Voltz, 31 N. E. 13; McGovern v. McGovern, 75 N. W. 970.

So much of the description as is false may be stricken out, and if enough then remains to identify the premises intended to be devised, the will may be read and construed with the false words eliminated. Waltcomb v. Rodman (Ill.) 40 N. E. 553.

In construing a will it is not proper to try to get at what the testator meant. The test is, what means the words and language embodied in the will. Lee v. Lee (Ind.) 91 N. E. 507.

The meaning must be gathered "from the words of the will." This forbids a resort to extrinsic evidence to show intention as is permissible in a case of latent ambiguity. Tompkin's Estate (Cal.) 64 Pac. 268; Re Lynch (Cal.) 75 Pac. 1086; Re Young (Cal.) 55 Pac. 1011; Re Marti (Cal.) 61 Pac. 964; Kauffman v. Grics, 77 Pac. 847; Re Walkerly, 41 Pac. 780; Re Fares, 60 Pac. 455; Re Granniss, 74 Pac. 324; Re Upham, 59 Pac. 318.

There is no call or proper occasion here to indulge in presumptions as to what the testator meant, nor to receive extrinsic evidence, or to describe the surroundings and circumstances of the testator. The words of his will determine what is meant. Re Lynch, 75 Pac. 1086; Lincoln v. French, 16 Otto (U. S.) 614, 26 L. ed. 1189; Re Callaghan, 39 L.R.A. 689; Priest v. Lackey, 39 N. E. 54; Griscom v. Evans, 40 N. J. L. 402; Sturgis v. Works, 22 N. E. 996; Re Young, 55 Pac. 1012; 6 L.R.A.(N.S.) 951, note.

Wolfe & Schneller, for respondents.

"A will is to be construed according to the intention of the testator." Comp. Laws 1913, § 5685.

"The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render some of the expressions inoperative." Comp. Laws 1913, § 5693.

The mistake in the will where the wrong section is mentioned, section 9, instead of section 10, of the same township and range, where he did own land, discloses a latent ambiguity in the will, which can be cured by extrinsic evidence. Comp. Laws 1913, § 5708; Pate v. Bushong, 161 Ind. 533, 63 L.R.A. 593, 69 N. E. 291.

The presumption is that the testator intended to devise his own lands, and not those of another. Pate v. Bushong, supra; Pstch v. White, 117 U. S. 210; 2 Redf. Wills, 3d ed. p. 116; Case v. Young, 3 Minn. 209, Gil. 140; Moreland v. Brady, 8 Or. 303.

"A devise of land described as in section 21, giving its boundaries, will pass land in section 22, having such boundaries, there being no land in section 21 with such description and he having owned no land in that section." Vestal v. Garrett (Ill.) 64 N. E. 345; Zirkle v. Leonard (Kan.) 60 Pac. 318; Re Pope (Minn.) 97 N. W. 1046; Hanley v. Krafteczyk (Wis.) 96 N. W. 820; Cleveland v. Spilman, 25 Ind. 95; Priest v. Lackey (Ind.) 39 N. E. 54; Eckford v. Eckford (Iowa) 58 N. W. 1093; Stewart v. Stewart (Iowa) 65 N. W. 976.

"The English courts from a very early date have given sanction to the principle that parol evidence is admissible to correct a mistake in the description of either land devised or personal property bequeathed." Bingle v. Volz, 16 L.R.A. 321, note, and cases cited.

It is the equitable object of our law to give effect to wills, rather than to destroy the intent of the testator and annul the true purpose of

his will. Here the testator did not own land in section 9, but he did own the described land in section 10 of the same town and range. He devised to appellant all the land he thought he owned, subject to his bequests. To the average layman "bequest" and "devise" mean the same, and it was in this sense that he used the words employed in his will. 6 L.R.A.(N.S.) 967, note, subd. XIV., and cases cited; Thorn v. Schofield, 107 N. W. 100; Merrick v. Merrick (Ohio) 37 Am. Rep. 493.

BRUCE, Ch. J. This is a petition for the construction of a will which was filed by the respondents, Mary, Lena, and Rosa Kahoutek, at the time of the application of the appellant, Adolph Kahoutek, for the allowance of his account as executor and for final distribution.

The petitioner Mary Kahoutek is the widow of the deceased, having been married to him for about twenty years. The respondent is a son of the deceased by his first marriage and for a number of years has lived on the southwest quarter of section 10, which is involved in the case at bar. He has three adult full brothers, one of whom is a cripple. The petitioners Rosa and Lena are children of the deceased by his second wife, and girls of the ages of fifteen and sixteen. For several years before his death the decedent and the petitioner Mary Kahoutek had lived together in the city of Lidgerwood in a home there acquired and, as far as the record shows, harmoniously.

The decedent was at one time the owner of the south half of the southeast quarter of section 9, township 130, range 52, but about fifteen years before his death deeded the same to his wife, the petitioner, for life with the remainder over to his son John. At the time of his death and at the time of making his will he was the owner of the southwest quarter of section 10 of the same township. There is no evidence that he had ever been the owner of the southwest quarter of section 9.

In spite of these facts, however, the will devises to the petitioner Mary Kahoutek a life estate in the southwest quarter of section 9, together with certain homestead property consisting of lots 1 and 2 in block 4—Maxwell's addition to Lidgerwood—and the household furniture.

It is the contention of the petitioner Mary Kahoutek that it was the intention of the deceased to will to her a life interest in the southwest quarter of section 10, which he actually owned, in place of the southwest quarter of section 9, which he did not own, and that the parol and

extrinsic evidence which was introduced on the trial in support of this contention justified a reformation.

The executor and appellant, on the other hand, claims that there is no ambiguity, either patent or latent, that can be explained by parol or other extrinsic evidence, and that it is incompetent to contradict the written will or to add to or to vary its express provisions.

He maintains that under the guise of construction the respondents, Mary Kahoutek, Rosa Kahoutek, and Lena Kahoutek, are seeking, and the lower court granted, a reformation of the will or the establishment of a parol disposition of testator's property by both adding to and taking from the plain and express terms of the written instrument. He maintains that this cannot be done.

The will is as follows:

Know all men by these presents that I, Anton Kahoutek, of the county of Richland and state of North Dakota, being of sound mind and memory, and thankful to God for the many blessings I have enjoyed, do hereby declare, make, attest, and publish this to be my last will and testament:

First: I direct that all of my legal debts and the expenses of my last sickness and burial shall be paid.

Second: I do give and bequeath unto my wife, Mary Kahoutek, the southwest quarter of section number nine in township number one hundred and thirty, north of range number fifty-two, Richland county, N. D., for the term of her natural life; also lots numbered one and two of block number four of Maxwell's first addition to the city of Lidgerwood, N. D., for the term of her natural life; also all articles of household furniture and utensils and the sum of one dollar in cash.

Third: I do give and bequeath unto my daughter, Anna Kahoutek, and to my sons, Frank Kahoutek, Charles Kahoutek, Anton Kahoutek, each, the sum of one dollar in cash.

Fourth: I do give and bequeath unto my son, John Kahoutek, the sum of five hundred dollars in cash to be paid out of the proceeds of the south half of the southeast quarter of section number nine in township number one hundred and thirty, north of range number fifty-two, Richland county, N. D.

Fifth: I do give and bequeath unto my daughter, Rosa Kahoutek,

the sum of five hundred dollars to be paid in cash out of the proceeds of the southwest quarter of section number ten in township number one hundred and thirty, north of range number fifty-two, Richland county, N. D.

Sixth: I do give and bequeath unto my daughter, Lena Kahoutek, the following real property, subject only to the life estate herein bequeathed unto my wife, *viz.*: Lots numbered one and two in block number four of Maxwell's first addition to the city of Lidgerwood, N. D.

Seventh: I do give and bequeath unto my son, Adolph Kahoutek, the south half of the southeast quarter of section number nine and the southwest quarter of section number ten in township number one hundred and thirty, north of range number fifty-two, Richland county, N. D., subject to the bequests hereinbefore made.

Eighth: I do give and bequeath unto my stepdaughter, Fannie Kahoutek, wife of Charles Kahoutek, the sum of one dollar.

Ninth: I direct that all of my personal property be sold and converted into money, and if there remains any balance after the payment of the expenses of my last sickness and burial and my legal debts, that the same shall be divided share and share alike between all of my children herein named.

Tenth: I do hereby appoint my son, Adolph Kahoutek, to be executor of this my last will and testament and direct that he shall not be required to furnish any bond for the faithful discharge of his duties as such executor.

In testimony whereof I have hereunto subscribed my name and have declared this to be my last will and testament and do hereby declare, attest, and publish this as such in the presence of witnesses whose names are hereto subscribed as Lidgerwood, N. D., this third day of June, 1910.

Anton Kahoutek.

The provisions of the statute upon the subject are as follows:

"Section 5685: A will is to be construed according to the intention of the testator. When his intention cannot have effect to its full extent it must have effect as far as possible.

"Section 5686: In case of uncertainty arising upon the face of a will, as to the application of any of its provisions the testator's inten-

tion is to be ascertained from the words of the will taking into view the circumstances under which it was made, exclusive of his oral declarations.

"Section 5687: In interpreting a will, subject to the laws of this state the rules prescribed by the following sections of this chapter are to be observed, unless an intention to the contrary clearly appears."

"Section 5689: All parts of a will are to be construed in relation to each other, and so as if possible to form one consistent whole, but when several parts are absolutely irreconcilable the latter must prevail.

"Section 5690: A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.

"Section 5691: When the meaning of any part of a will is ambiguous or doubtful it may be explained by any reference thereto or recital thereof in another part of the will.

"Section 5692: The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected and that other can be ascertained.

"Section 5693: The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render some of the expressions inoperative.

"Section 5694: Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy."

"Section 5708: When applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intention cannot be received."

"Section 5678: Every devise of land in any will conveys all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate."

We are satisfied that the will does not permit of the construction contended for by respondents. There is, in fact, no imperfect description in the will, nor is there either a patent or a latent ambiguity. The

terms of the will are clear and definite. The fact that it conveys property, which the testator did not own, does not render the instrument indefinite, nor does it permit us to make a new will for the testator, based upon what we may assume he intended to convey.

It is a well-established rule that "the expressed intention will not be varied under the guise of correction. . . . The inquiry will not go to the secret workings of the mind of the testator. . . . It is not, what did he mean, but what do his words mean. . . . The intention to be sought is not that which existed in the mind of the testator, but that which is expressed in the language of the will. . . . The inquiry of the court in construing the will comes to an end when the intention has been discovered from the language of the will. . . . It is never at liberty to supply an omission or to wrest language from its plain import or give it such a meaning as the testator would have intended if he had known that his own effort had resulted in failure. . . . Otherwise the court is not carrying out the last will of the deceased, but is making testamentary disposition of his property for him,—not such disposition as the testator named, but such disposition as the court thinks he would have named." Re Young, 123 Cal. 337, 55 Pac. 1011; Bingel v. Volz, 142 Ill. 214, 16 L.R.A. 321, 34 Am. St. Rep. 64, 31 N. E. 13; Re Lynch, 142 Cal. 373, 75 Pac. 1086; Re Fair, 132 Cal. 523, 84 Am. St. Rep. 70, 64 Pac. 1000; same case in which dissenting opinion (60 Pac. 451) becomes majority opinion; Sturgis v. Work, 122 Ind. 134, 17 Am. St. Rep. 349, 22 N. E. 996; Taylor v. Horst, 24 Wash. 446, 63 Pac. 231; Bingel v. Volz, 142 Ill. 214, 6 L.R.A.(N.S.) 321, 34 Am. St. Rep. 64, 31 N. E. 13, 6 L.R.A.(N.S.) 943–977 note; Jackson ex dem Van Vechten v. Sill, 11 Johns. 201; Kurtz v. Hibner, 55 Ill. 514; Fitzpatrick v. Fitzpatrick, 36 Iowa, 674, 14 Am. Rep. 538; Christy v. Badger, 72 Iowa, 581, 34 N. W. 427; Sherwood v. Sherwood, 45 Wis. 357, 30 Am. Rep. 757; McGovern v. McGovern, 75 Minn. 314, 74 Am. St. Rep. 489, 77 N. W. 970.

This seems to be the almost universal rule; for although cases are cited by counsel for the respondent, which he claims hold to the contrary, they are all cases where the meaning of the words used in the will are uncertain and are sought to be ascertained, and not cases where the meaning is clear, but a different intention is claimed.

"None of them hold that where the will is certain in its terms as to

the character of the devise, extrinsic evidence can be introduced to change or vary its terms." Taylor v. Horst, 24 Wash. 446, 63 Pac. 231.

The general rule, indeed, is that "the will of a deceased person must be entirely in writing, and that there must be sufficient in the will, after striking out the false terms, to designate with reasonable certainty the particular tract which the testator intended to dispose of. Re Lynch, 142 Cal. 373, 75 Pac. 1086; Re Tompkins, 132 Cal. 173, 64 Pac. 268.

Although § 5708 of the Compiled Laws of the North Dakota permits a reformation in certain cases, these cases are only those of *imperfect* descriptions and where no person or property *exactly answers* the descriptions.

There is a wide distinction between an imperfect description and no description at all, and between an imperfect description and a description which is definite and certain but which it is contended the testator could never have intended to have written, since it conveys property he never owned. Re Callaghan, 119 Cal. 571, 39 L.R.A. 689, 51 Pac. 860.

We have carefully examined the cases which are cited by counsel for respondents, but none of them appear to support his contention. It is true that in a number of them the introduction of extrinsic evidence is sanctioned and a reformation is permitted, but they are all cases where there is a general description of the property sought to be conveyed, followed by a specific description which is uncertain, or where, as in the case of Priest v. Lackey, 161 Ind. 399, 39 N. E. 54, in addition to the specific devise or description of land, which the testator does not own, he generally devises to the particular legatee all of his lands or estate, so that there is nothing over, and in such case the false description can be stricken out as surplusage without affecting any other bequest or any other remainder; or where reference is made in the will to some extrinsic fact which may make the intention certain, or there are two persons or pieces of property which equally comply with the description in the instrument. See Priest v. Lackey, supra; Pate v. Bushong, 161 Ind. 533, 63 L.R.A. 593, 100 Am. St. Rep. 287, 69 N. E. 291; Patch v. White, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710; Decker v. Decker, 121 Ill. 341, 12 N. E. 750; Bowen v. Allen, 113 Ill. 53, 55 Am. Rep. 398; Whitcomb v. Rodman, 156 Ill.

116, 28 L.R.A. 149, 47 Am. St. Rep. 181, 40 N. E. 553; Stewart v. Stewart, 96 Iowa, 620, 65 N. W. 976; Eckford v. Eckford, 91 Iowa, 54, 26 L.R.A. 370, 58 N. W. 1093; Merrick v. Merrick, 37 Ohio St. 126, 41 Am. Rep. 493; Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820; Re Pope, 91 Minn. 299, 97 N. W. 1046; Smith v. Wyckoff, 3 Sandf. Ch. 77; Pritchard v. Hicks, 1 Paige, 270.

Counsel also is incorrect in his assumption that the English authorities support his view of the case. An examination of these authorities will evidence this error. See Miller v. Travers, 8 Bing. 244, 131 Eng. Reprint, 395; Doe ex dem Hiscocks v. Hiscocks, 5 Mees. & W. 362, 151 Eng. Reprint, 154; Hart v. Tulk, 2 De G. M. & G. 300, 42 Eng. Reprint, 888, 22 L. J. Ch. N. S. 649.

Is it then apparent on the face of the will or from anything contained therein that the intention of the testator was to will and devise to the said Mary Kahoutek a life estate in the southwest quarter of section 10 in addition to a life estate in the lots in the city of Lidgerwood, the household furniture and utensils, and the life interest in the south half of the southeast quarter of section 9, which he had formerly deeded to her?

Surely it is not, but if anything the contrary; for by the 7th paragraph of the will this land in section 10, together with the south half of the southeast quarter of section 9, is given to his son Adolph "subject to the bequests hereinbefore made," and by paragraph 4 a charge of $500 in favor of his son John Kahoutek is made on the south half of the southeast quarter of section 9 and another of $500 in favor of his daughter Rosa, on the southwest quarter of section 10.

These bequests are clear and explicit. Surely it is not the law that the fact that in one paragraph of a will a testator devises by specific description property that he does not own will justify the court in taking an equivalent amount from a bequest which is definitely made to another, and in saying that the fact that the former property was not owned by the testator justifies the conclusion that he intended that his valid and definite bequests should be set aside.

The order of the District Court is reversed and the cause is remanded for further proceedings according to law.

GRACE, J. I dissent.

ROBINSON, J. (dissenting). In this case it appears that Anton Kahoutek made a will by the express terms of which he left to his wife the S.W. ¼ of section 9, town 130, range 52, for the term for life. He did not own any part of that quarter section, but he did own the S.W. ¼ of section 10 in the same town and range, and by some inadvertence it is clear that in the will section 9 was written for section 10. Manifestly the testator did not mean to mock his wife by an attempt to leave her a quarter section of land that he did not own. Now the statute is that: When applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omission must be corrected, if the error appears from the context of the will or from extrinsic evidence. § 5708. Now, from the will itself it does appear that the testator intended to leave to his wife a quarter section of land in the specified township and a quarter section that he owned, and from extrinsic evidence it appears that he owned the S.W. ¼ of section 10, and not the S.W. ¼ of 9. Hence, it is clear to a mathematical demonstration that the purpose of the testator was to bequeath to his wife the S.W. ¼ of section 10; and it is the plain duty of this court to give effect to the will, that is, to the testator's purpose, when it is manifest from the will and from extrinsic evidence. That is in accord with plain common sense and the letter and spirit of the statute. Hence, the judgment of the district court should be affirmed.

On Reargument.

BRUCE, Ch. J. A reargument has been had in the above-entitled case, but the majority of the court still adheres to its original opinion.

As we understand the law as declared by §§ 5686 and 5708, Comp. Laws of 1913, and as laid down by both the English and the American cases, including the case of Patch v. White, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710, and on which counsel for respondent chiefly relies, it is that extrinsic evidence is not permissible to correct a mere mistake, but is only permissible where there is a latent ambiguity and where the false words or false description may be stricken out, and there still remains enough in the will to clearly evidence the intention of the testator, and to describe the legatee or the property sought to be devised.

No such a situation is before us. At the most the question is merely, Did the testator intend that his wife should have a life estate in 80 or in

160 acres of land? Even if we strike out the false words "section 9" on the ground that the testator did not own the southwest quarter of that section, what is there in the will to prove that he intended to devise to his wife a life estate in the southwest quarter of section 10, and to thus limit the definite bequest of the same quarter to his son Adolph, burdened as it was by the bequest of $500 to his daughter Rosa?

Perhaps the testator believed that he owned the southwest quarter of section 9. Even if he had been told upon his deathbed that he did not, are we sure that he would have changed the remainder of his will, and the bequest to his son Adolph, in the light of the fact that he had already deeded to his wife a life estate in the south half of the southeast quarter of section 9?

Perhaps the false words were not "section 9" at all, but the words "southwest quarter," and it was the intention of the testator merely to confirm in his wife the life estate in the south half of the southeast quarter of section 9, which he had already deeded to her.

We are asked, indeed, not to correct a latent ambiguity in reference to a general description contained in the will with which a particular description is inconsistent, and this is usually the only case in which the courts can interfere, but to make a new will based on our belief as to what the testator should have done. This we cannot do. The right to devise property by will is not a natural, but a statutory, right. The statutes have placed certain restrictions upon the methods by which property can be devised, and we are bound thereby.

It may be well to suggest that in the case of Patch v. White, supra, not only did the court hold that there was a sufficient general description in the will to identify the property and to correct the mistake, but that the property in question was devised to no one else, and that it was the intention of the testator to devise all of his property. Here all of the testator's property is devised and here is no general description to rely upon.

MRS. E. O. STARKS, Respondent, v. R. C. SPRINGGATE, Appellant.

(L.R.A.1918D, 728, 167 N. W. 221.)

Broker — listing of property with — for sale — specified time and terms — definite commissions — owner of property — may sell through other agents — during such specified time — is liable to former agent — for commissions — purchaser procured by — during said time.

1. Where the owner of property lists the same for sale with a broker for a definite period of time upon specified terms, and definite commission for making such sale by such broker is specified, the owner of the property may during the period of time specified in the agency contract and sell the property through other agents, but cannot do so and relieve himself from liability to pay the agent who had the property listed for a certain time his commission as specified, where such agent, with no notice of any sale by another agent, and within the time, produces a person ready, able, and willing to buy the property upon the terms stated in the agency contract.

Instructions of court — jury — harmless error.

2. The instructions of the court examined, and *held* that if such instructions contain any error, such error is harmless.

Opinion filed March 1, 1918.

Appeal from the District Court of Hettinger County, Honorable *W. C. Crawford,* Judge.

Affirmed.

V. H. Crane, for appellant.

A contract of employment does not give the broker an exclusive agency, or an exclusive right to negotiate the particular transaction, unless it is so specified, either expressly or by implication. 9 C. J. 623; 19 Cyc. 264 (lx.); Head-Berry Co. v. Bannister, 153 Pac. 669; Henning v. Parson, 61 S. E. 866; Hammond v. Mau, 40 L.R.A. 1142; Blumenthal v. Bridges, 24 L.R.A.(N.S.) 279.

The mere listing of lands with a broker for sale purposes is not an

NOTE.—On the question of liability of owner upon revoking authority of real estate broker employed for a definite period, see notes in 38 L.R.A.(N.S.) 366, and L.R.A.1918D, 731; On broker's right to make sale of property exclusive of owner's right, see notes in 24 L.R.A.(N.S.) 279 and 40 L.R.A.(N.S.) 1142.

exclusive agreement that the agency shall continue for the specified time. 40 L.R.A.(N.S.) 1142 and text and notes; Talbott v. Matt Realty Co. 109 Pa. 128; Milligan v. Owen, 98 N. W. 792; Bryant v. Palmer, 171 Ill. App. 213; Johnson Bros. v. Wright, 99 N. W. 103; 9 C. J. 622.

It is only where an exclusive agency is granted upon sufficient consideration or it is plainly the intent of the parties that the agency shall be exclusive, that the principal is liable where he makes the sale on his own account. Hammond v. Mau, 40 L.R.A.(N.S.) 1142; Johnson Bros. v. Wright, 99 N. W. 103; Bears v. Hyland, 67 N. E. 1148; Wallace v. Figone, 61 S. W. 492; White v. Benton, 96 N. W. 876; Smith v. Preise, 136 N. W. 7; Dole v. Sherwood, 43 N. W. 569; Quist v. Goodfellow, 110 N. W. 65; 9 C. J. 522, note 17 (c); Ettinghoff v. Herewitz, 100 N. Y. Supp. 1002; Helling v. Darby, 79 Pac. 1073; Ahern v. Baker, 24 N. W. 341; McFarland v. Howell, 142 N. W. 860.

The owner may sell the land at any time and thereby terminate the agency of a broker given exclusive right to sell on specified terms, without incurring liability to the broker. 9 C. J. 622 note (a); Ingold v. Symons, 99 N. W. 713; Greene v. American Malting Co. 140 N. W. 1130; 19 Cyc. 233 g; Packing Co. v. Farmers Union, 55 Cal. 606; 44 L.R.A. 344 and cases cited.

Such an exclusive contract with the agent, which does not expressly negative the right of the owner to sell during such time, does not prevent the owner from selling in good faith, and the agent cannot recover commissions. Armstrong v. Wann, 29 Minn. 126; Ingold v. Symonds, 99 N. W. 712; McPike v. Siver, 150 N. W. 52; Michel v. Hoege, 160 N. W. 267.

It makes no difference whether the sale was made by the owner direct or through another agent. 9 C. J. 623; 19 Cyc. 264 (ix.); Henning v. Parsons, 61 S. E. 666; Johnson Bros. v. Wright, 99 N. W. 103; Goldsmith v. Cook, 14 N. Y. Supp. 878; Lux v. Nogl, 123 Pac. 949; note in 29 L.R.A.(N.S.) 985; note in 40 L.R.A.(N.S.) 1143; Ingold v. Symons, 99 N. W. 713; Greene v. American Malting Co. 140 N. W. 1130; note in 44 L.R.A. 337.

The theory of the case prevailing in the trial court is binding on all parties, as well as the court, and cannot be changed after trial, for

appeal or other purposes. Movius v. Proper, 23 N. D. 452; Peterson v. Coulan, 18 N. D. 205; Lynn v. Seby, 29 N. D. 420; Harris v. Van Vranken (N. D.) 155 N. W. 65.

The action is for commissions earned, and not for damages because of the owner's lapse from his agreement in other respects. Cukbert v. McCullough, 125 N. W. 173; Knudson & Richardson v. Laurent, 149 N. W. 392; Hallstead v. Ferring, 126 N. W. 1078; Goldman v. Weisman, 143 N. W. 933.

Jacobsen & Murray, for respondent.

An exclusive agency prohibits the principal from selling through another agent; such exclusive right prohibits him from selling the land himself. 9 C. J. 622.

Evidence not specified in the specifications of insufficiency cannot be considered by the court. Baumer v. French (N. D.) 79 N. W. 340; Jackson v. Ellertson, 15 N. D. 533.

These specifications are still necessary. The present law merely changes the time and manner in which they shall be served. Comp. Laws 1913, § 7058; King v. Lincoln (Mont.) 66 Pac. 836.

The agency here was an exclusive one for a specified time and upon specified terms, and could not be broken or abandoned by the principal—the landowner—until after such time. Comp. Laws 1913, § 6366, Cal. Civ. Code, 2356; Sill v. Ceschi, 140 Pac. 949; Laux v. Hogl (Mont.) 123 Pac. 949; Paulso v. Rourke (Colo.) 145 Pac. 711.

GRACE, J. Appeal from the district court of Hettinger county, Honorable W. C. Crawford, Judge.

Plaintiff maintains this action to recover commissions claimed to be due her for procuring a purchaser for a certain 160-acre tract of land owned by the defendant, situated in Hettinger county, North Dakota.

The facts are as follows: In 1915 plaintiff wrote the defendant, requesting his price and terms of sale of a certain 160-acre tract of land owned by the defendant, in Hettinger county, North Dakota. Defendant replied, stating price and terms, and also stating he made the same price and terms to other agents. Subsequently plaintiff wrote defendant, offering a purchaser who desired to make a trade for defendant's land, which offer defendant refused, but made some modification in his terms. Subsequently defendant again modified his terms of sale of

the land, and wrote plaintiff a letter wherein he stated he would allow her $1 per acre commission if she made the sale before November 1st. September 28, 1915, plaintiff wrote a letter notifying defendant that the purchaser would take the land on the terms as modified by the defendant. Between the date of the letter from the defendant wherein he modified the terms of the sale of said land and offering a commission of $1 per acre if the sale was made by November 1st, and the letter written by the plaintiff to the defendant that she had a buyer who accepted his terms of sale, defendant received a telegram from R. A. Grant, dated September 27th, offering to buy the land. A contract of sale of the land was entered into by Ethel Grant, wife of R. A. Grant, and the defendant on September 29th. The contract of sale was executed and acknowledged by the defendant on October 2d. It further appears that the defendant paid R. A. Grant a commission of $1.50 per acre for making such sale. Plaintiff first wrote to the defendant for price and terms on August 5, 1915. Defendant at Liberty, Missouri, August 16, 1915, answered this letter, and gave the terms of sale of such land as follows: $800 down and offered a commission of 50 cents per acre. August 6, 1915, at El Paso, Illinois, the defendant gave his price on the land as $25 per acre, $500 down November 1st, and the balance in five annual payments of equal amounts, interest at 6 per cent, with the privilege of paying the entire amount at any time given the purchaser. September 19, 1915, at Liberty, Missouri, defendant again wrote plaintiff, modifying the terms he had formerly given, in that the interest which would be owing at the time of the second payment or one fifth of the balance to be paid could be paid at the time of the third payment, which would be November 1, 1917, which would leave only $700 to pay November 1, 1916. It was in this letter the defendant stated that he would allow plaintiff $1 per acre commission if she made the sale by November 1st next. After that date the defendant stated that he would withdraw it from sale. The jury returned a verdict in plaintiff's favor for the full amount of her commissions of $160.

The appellant makes six assignments of error, and argues them under three different heads. One of the main assignments of error contains the following language: "The court erred in instructing the jury that the agency of the plaintiff was an exclusive agency." Another is:

"That the court erred in instructing the jury that the only issue in the case was whether or not plaintiff had procured a purchaser in good faith, and sold in good faith to the purchaser, able and willing to pay in accordance with the terms of the offer of sale." Another is: "That the court erred in denying the motion for judgment notwithstanding the verdict or a new trial."

All the assignments of error are considered by the appellant under three main heads as follows: First, was the agency of the plaintiff an exclusive agency? Second, if the agency was exclusive, can the agent recover her commissions if the sale was made in good faith through other agents, before notice of the acceptance of the terms by plaintiff's purchaser?"

If the agency is not exclusive, and sale is made by other agents within the period of listing, before the owner has notice of the acceptance of the terms by plaintiff's prospective purchaser, is the plaintiff entitled to her commissions?

If the first proposition of law is determined in plaintiff's favor, there is but little need of considering the other propositions, although we may analyze the other propositions in a conscise manner.

It is plain that the contract as to the terms upon which plaintiff was authorized to sell such land was not complete until the final letter that defendant wrote her, fixing the amount of her commissions limiting the time in which she might sell said land. Such letter reads as follows: "It occurred to me after writing you from Illinois that your prospective buyer for southeast of 21 would think the second payment of one-fifth balance and the interest added would be too much for him; if so, I would let the interest go until the third payment, which would be November 1, 1917, which would leave him only $700 to pay November, 1916. I will also allow you $1 per acre commission if you make this sale by November 1st, next. After that date I will withdraw it from sale. I will consider it a favor if you will answer this letter at once, as your reply will likely make some difference to me about renting for another year."

This is important as completing the terms upon which the land might be sold by the plaintiff, and the commission which she should receive in case of sale of the land, and the time in which she had authority to make such sale. It is clear that plaintiff had the right and

authority to make the sale of such land any time up to November 1st, and that she had all the time to November 1st in which to make the sale. It is also clear that she had made considerable effort to sell said land, and that she produced a purchaser able, ready, and willing to buy such land upon the terms finally agreed upon, and so notified the defendant by letter on September 20th. The plaintiff's authority and right to sell such land to November 1st was an exclusive agency, at least in one respect. Though the word 'exclusive' is not used in the letter, the language of the letter, which confers authority upon the plaintiff to sell said land up to November 1st, excluded the right of the defendant to sell the land through another agent, and by so doing defeat the right of plaintiff to recover her commission if by November 1st she produced a purchaser able, ready, and willing to buy upon the terms stated by the defendant. If the defendant could sell through other agents, he could not do so and relieve himself from liability and damages to plaintiff should she by November 1st produce a purchaser for the land ready, able, and willing to purchase the same. Plaintiff on September 28th notified the defendant that she had a purchaser, one Nelson, who would buy the land upon the terms stated by defendant. Nelson's ability and willingness to purchase said land was not questioned. Therefore it must be conceded. The defendant claims that he sold this land to Ethel Grant, just prior to receiving the letter from plaintiff, and that he paid R. A. Grant a commission for making such sale. As before stated, defendant could sell through another agent prior to the expiration of the time allotted to plaintiff in which to make sale of the land, but could not do so without being liable in damages to plaintiff for the amount of her commission agreed upon in case of sale, if she made a sale of the land prior to November 1st. The appellant claims that the defendant sold the land by reason of the telegram having been sent by R. A. Grant to him, stating that Grant would buy the land upon the terms stated in the letter of defendant of September 19th, and the telegram recites the terms. The testimony, however, does not bear out this claim. It is clear from the testimony that the sale was actually made to Ethel Grant, wife of R. A. Grant, and that R. A. Grant received a commission for making such sale, and therefore acted as agent of defendant. If the sale had been made by the defendant, and not through an agent, a different question would arise.

This question, however, is not presented in this case, and therefore needs no further attention.

The defendant knew he had authorized the plaintiff to sell said land any time up to November 1st. He knew that plaintiff was actively engaged in trying to secure a purchaser for said land. He knew that he had in his letter given her an agency to sell such land for a certain time. It is clear that if she produced a purchaser within such time who was ready, able, and willing to comply with the terms of sale of such land, she would have earned and would be entitled to her commission as agreed upon, and this though the land was sold by the defendant through another agent before notice of the sale of the land by the plaintiff. The defendant in the case never at any time revoked the authority of the plaintiff. She therefore had a right to make the sale of the land at the time she made a sale of the land to Nelson. It is competent for the principal to agree that the agent or broker shall have a certain time within which to find a purchaser, and if the broker or agent finds a purchaser who is able, ready, and willing to comply with the terms upon which the property is authorized to be sold by the principal within the time, the principal is liable for the commissions agreed to be paid, even though the property is sold through another agent before notice of the sale by the other authorized agent.

We have considered all the authorities cited by the appellant, and while they to some extent sustain appellant's position they are by no means conclusive upon the questions involved in this case. Where a contract of agency to sell property fixes a definite time in which the agent may sell such property the agent has the whole of said time in which to make the sale. If the principal may, through other agents, sell the property, and not become liable to an agent who has a contract for a definite time to sell the property, and who does sell such property within the time, then such contract for a definite time does not mean what it says.

This is not a contract where the principal has given the authority to different agents for a specified time in which to sell the principal's property; and providing further that whichever agent sells the property first and notifies the principal first will be entitled to the commission. That is not the kind of a contract which we are considering. In the case at bar the plaintiff had a specified time in which to sell the

property for a specified commission. She found a purchaser within the specified time who was ready, able, and willing to buy the land upon the terms stated by the principal. Her right to recover a commission must be governed by the contract made between her and the principal, and by the terms of that contract, having found a purchaser within the time specified, able, ready, and willing to buy the land upon the terms stated by the principal, she had earned her commission even though the principal had, before the sale made by the plaintiff, sold the land through another agent. The contracts made between principal and agent or principal and broker are many, and are of many different kinds, and are extremely varied in terms and meaning. The main duty of the court is to interpret the meaning of the terms of the contract, and state the legal effect of such terms. The error of the court, if any, in its instructions, was harmless. The appeal presents no reversible error.

The judgment is affirmed, with costs.

ROBINSON, J. I concur in result only.

BIRDZELL, J. I concur in the affirmance of the judgment for the reason that there appears to be no evidence from which it could have been found that the plaintiff knew the land was sold at the time her purchaser was supplied.

STATE OF NORTH DAKOTA IN BEHALF AND FOR THE BENEFIT OF THOS. E. REILLY, Appellant, v. FARMERS CO-OPERATIVE ELEVATOR COMPANY OF LANSFORD, NORTH DAKOTA, and the Northern Trust Company, a Corporation, Respondents.

(L.R.A.1918E, 233, 167 N. W. 223.)

Public warehouseman — bond of — surety on — default in — occurring more than three years after bond expired — surety not liable.

1. The surety on a public warehouseman's bond given pursuant to § 2247,

NOTE.—On the question of warehouseman's bonds generally, see note in L.R.A. 1918E, 235, where it is held that where a public warehouseman's bond is for a definite

Rev. Codes 1905 (§ 3111, Comp. Laws 1913), is not liable for a default of the principal occurring more than three years after the bond, by its terms, had expired, and after two successive renewal bonds had been given by the same principal, even though the default was in connection with grain stored while the surety's bond was in force.

Storage of grain — in public warehouse — storage ticket issued — to owner of grain — ticket presented — demand made for grain — refused to deliver — no default until after.

2. Where grain is stored in a public warehouse and a storage ticket issued therefor to the owner, no default sufficient to hold the surety on the warehouseman's bond occurs until the ticket is presented and demand made for the grain or its equivalent and the same is refused.

Opinion filed March 9, 1918.

Action in conversion against a public warehouseman upon storage of grain, and also against the surety upon the warehouseman's bond.

Appeal from a judgment of dismissal as to the surety by the County Court of Renville County, Honorable *Percy S. Crews,* Judge.

Affirmed.

J. E. Bryans, for appellant.

The bond of the elevator company which took the appellant's grain for storage provides that said company will, on demand, deliver to the ticket holder the grain, or a like quantity and kind of grain, or pay for same. The surety agrees that if the elevator company fails to do so, it will pay the value of the grain. Where judgment for the value of the grain is obtained against the elevator company, and not paid, the surety is liable. Comp. Laws 1913, §§ 3111, 3139, 6677; 32 Cyc. 32; Roberts v. Hawkins, 38 N. W. 575; 5 Cyc. 751.

The liability of the surety company is for tickets issued or grain stored in the elevator between the dates mentioned in the bond. It is for grain stored between those dates that liability is here claimed. 32 Cyc. 74; 10 Am. St. Rep. 843, note; Comp. Laws 1913, § 3114; State v. Hob Lawrence Co. 17 N. D. 257, 115 N. W. 846.

The default here occurred while the trust company was surety for

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period, a surety thereon is not liable for a default of the principal occurring several years after the bond by its terms had expired, and after other successive renewal bonds had been given, even though the default was in connection with property stored while such surety bond was in force.

the elevator company, and the elevator company not having relieved itself from such default, the surety company is liable. 40 Cyc. 407; Lane v. Kazey, 1 Met. (Ky.) 410; State ex rel. Ertelt v. Daniels, 35 N. D. 5, 159 N. W. 17.

Appellant was under no obligation to give to the surety company any notice of the condition of the elevator company. 32 Cyc. 81, 91, § D; Manchester Fassur Co. v. Redfield, 71 N. W. 709.

Pierce, Tenneson, & Coupler, for respondents.

The findings of the trial court upon disputed questions of fact are entitled to the same weight and are as conclusive as a verdict of a jury would have been had the cause been tried to and decided by a jury. Ruetell v. Greenwich Ins. Co. 16 N. D. 546, 113 N. W. 1029; Bank v. Weber, 19 N. D. 702; Griffith v. Fox, 32 N. D. 650; Northern Trdg. Co. v. Drexel State Bank (N. D.) 164 N. W. 153.

The rule that bonds executed by compensated sureties will be construed the same as insurance policies has no application where the language of the bond is unambiguous or where the conditions are prescribed by statute. Guarantee Co. v. Mechanics Bank, 183 U. S. 402, 46 L. ed. 253; Long v. Am. Surety Co. 23 N. D. 492, 137 N. W. 41; Knight v. Castle (Ind.) 27 L.R.A.(N.S.) 573, 87 N. E. 976; Granite Bldg. Co. v. Saville, 101 Va. 217, 43 S. E. 351; U. S. F. & G. Co. v. Overstreet, 27 Ky. L. Rep. 248, 84 S. W. 764; Union Cent. L. Ins. Co. v. United States F. & G. Co. 99 Md. 423, 105 Am. St. Rep. 313, 58 Atl. 437; American Bonding Co. v. Pueblo Invest. Co. 9 L.R.A.(N.S.) 557, 150 Fed. 17, 10 Ann. Cas. 357; Lonergan v. San Antonio L. & T. Co. 101 Tex. 63, 22 L.R.A.(N.S.) 364, 130 Am. St. Rep. 803, 104 S. W. 1061; Hormel & Co. v. Am. Bonding Co. (Minn.) 33 L.R.A. (N.S.) 513, 520, 128 N. W. 12.

The fact that a surety on a bond is compensated is immaterial and has no bearing upon the rights and remedies of parties. Natl. Surety Co. v. Berggren (Minn.) 148 N. W. 55; Columbia Bank v. United States F. & G. Co. 126 Pac. 566; Northern Trust Co. v. First Nat. Bank, 33 N. D. 1; Lewis v. United States F. & G. Co. 144 Ky. 425, 138 S. W. 305, Ann. Cas. 1913A, 564.

There is no competent evidence of the approval of the bond. Such a bond takes effect only from date of approval, and a surety certainly has the right to know and to be informed as to the date when his obli-

gation begins, so that he may know when it shall end, where it is to exist and to run between certain stated dates.

The secretary of the Railroad Commission may not certify as to when the bond was approved. Such certificate is not competent evidence of the fact. Rev. Codes 1899, § 5700; Sykes v. Beck, 12 N. D. 243; Comp. Laws 1913, § 7919, subd. 6, § 7920; Billingsley v. Hiles (S. D.) 61 N. W. 687; 5 Chamberlayne, Ev. § 3432; Marlow v. School Dist. (Okla.) 116 Pac. 797 and cases cited.

The terms of the undertaking limit the liability of the surety. 5 Cyc. 764, 765, 773–775; New York City Bank v. Travelers Ins. Co. 38 App. Div. 518, 56 N. Y. Supp. 668; Davis v. Copeland, 67 N. Y. 127; Scott v. Tyler, 14 Barb. 202; Ward v. Stahl, 81 N. Y. 406; Witte v. Wolfe, 16 S. C. 256; U. S. F. & G. Co. v. Amer. Bond Co. (Okla.) 122 Pac. 142; Pac. County v. Illinois Surety Co. 234 Fed. 97; U. S. of Amer. v. Bayly (D. C.) 41 L.R.A.(N.S.) 422, 426; Natl. Bk. of Humboldt v. Samuelson (Neb.) 118 N. W. 81; Ida County Sav. Bank v. Seidensticker (Iowa) 102 N. W. 821.

"It is the date of the conversion that determines the liability of sureties for successive terms." Ingram v. McCombs, 17 Mo. 558; State v. McCormack, 50 Mo. 568, 13 Mo. 7; Governor v. Robbins, 7 Ala. 484; Dumas v. Patterson, 9 Ala. 484.

No cause of action could here exist until a demand for the grain and a refusal to deliver. This did not occur until at a time long after the expiration of the time limit of liability of the surety as expressed in the bond. 5 Cyc. 212; 40 Cyc. 440–1; Comp. Laws 1913, § 6677; Northern Light v. Kennedy, 7 N. D. 146, 73 N. W. 524.

The defense of negligence in asserting a right or laches has no relation to the Statute of Limitations. Such defense may be interposed although the claim asserted by plaintiff is not barred by the Statute of Limitations. Hagerman v. Bates (Colo.) 38 Pac. 1100; Abraham v. Ordway, 158 U. S. 416, 39 L. ed. 1036; Hawley v. Von Lauken (Neb.) 106 N. W. 456; Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516.

The surety here is released and exonerated by the laches and delay of plaintiff in not timely making his demand and asserting his claim, failing to make it at a time when no person would be the loser. Comp.

Laws 1913, §§ 6681, 6683; 32 Cyc. 81, 91; Gillespie v. Darwin, 6 Heisk. 21; 32 Cyc. 91.

It is the duty of the creditor or obligee to notify the surety of dishonesty of the principal. 32 Cyc. 78.

There is no allegation in the complaint that the ticket in question is the only claim outstanding; in other words, that appellant is the only claimant. The complaint therefore does not contain a statement of facts sufficient to constitute a cause of action. Philips v. Semingson, 25 N. D. 460, 142 N. W. 47.

FISK, District Judge. The facts in this case are not seriously in dispute, but the parties do not agree as to the law. On August 5, 1909, the defendant Farmers Co-operative Elevator Company was engaged in the business of conducting a public elevator and warehouse at Lansford in this state. On that date said defendant as principal and the defendant the Northern Trust Company as surety executed and delivered to the state of North Dakota the public warehouseman's bond of the defendant Elevator Company in the sum of $5,000 as provided by § 2247, Rev. Codes 1905 (§ 3111, Comp. Laws 1913). On September 2, 1909, the plaintiff, Thomas E. Reilly, left with said Elevator Company for storage 635 bushels and 20 pounds of No. 1 hard wheat and said Elevator Company issued to said Reilly storage ticket No. 8 for said grain, which ticket contained the usual agreements and conditions provided by the statutes of this state, said company agreeing to store said grain in consideration of the payment of storage charges, insurance, and handling; and to return the said grain, or a like quantity of the same quality, kind, and grade, to plaintiff upon demand and surrender of said storage ticket and payment of said charges. Plaintiff made no demand for the grain in question, nor did he attempt to sell the same until in December, 1914, and on January 4, 1915, he made his first written demand for the grain or the value thereof, which was refused both by the Elevator Company and the Northern Trust Company.

In 1914, and prior to any demand being so made by plaintiff, the Elevator Company had become financially involved and insolvent, and all of its property and assets had been lost under foreclosure proceedings. During all of the time from 1909 to 1915 plaintiff was a stock-

holder in said Elevator Company and attended meetings of stockholders at which the financial condition of the company was discussed. Shortly after August 1, 1911 (the date the bond of the Northern Trust Company, by its terms expired), an agent of the Elevator Company weighed the grain then in the elevator, and the grain called for by plaintiff's storage ticket was actually on hand and remained there for some time afterwards. Reilly knew the grain was there, and was requested on several occasions by the officers of the company to present his ticket and take the grain, or its value. Shortly after the refusal of the demand made in January, 1915, this suit was instituted in the county court of Renville county for a conversion of the said grain, which resulted in a judgment in favor of plaintiff as against the Elevator Company, but in favor of the defendant the Northern Trust Company for a dismissal as to it. This appeal is by the plaintiff from the judgment of dismissal.

The bond of the Northern Trust Company was conditioned as provided by the laws of this state and in part was as follows:

"Now, therefore, if the said Farmers Co-operative Elevator Company shall faithfully perform its duty as public warehousemen, and comply with all of the laws of the state of North Dakota in relation thereto, then this obligation shall be null and void, but otherwise to be and remain in full force and effect, subject, however, to the following conditions:

First. The liability upon this bond shall commence on the date of the approval of the same by the proper officers, as provided by law, and shall end on the 1st day of August, 1911, A. D.

Appellant contends that the bond in question was intended to and did in law become liable for all storage tickets issued by the elevator company while said bond was by its terms in force. In other words, he contends that inasmuch as the plaintiff's grain was stored in September, 1909, while the bond was in force, that the bond continued good for said grain so long as the grain remained stored in the elevator, regardless of how long that was after the bond, by its terms, expired.

We cannot agree with appellant in his contention. Under the laws of this state (§§ 3107 et seq.) every elevator must secure a license biennially as a condition precedent to doing business, and must also file a bond in such sum as the Commissioners of Railroads shall fix, of not

less than $5,000 nor more than $75,000, conditioned exactly as the bond in question was conditioned. These licenses and bonds expire on August 1st every second year. The condition of the bond is for the "faithful performance" of duties, and compliance with the law during the two years the same is in force. It was intended to cover any wrongful or unlawful acts during that term. There is no claim that the Elevator Company in any manner breached the bond or did any act prohibited by statute or otherwise during that two-year period, but on the contrary it is clearly shown that the company was in a position to deliver the grain or pay for the same during all of said time. It is therefore clear to us that the wrongful acts of the Elevator Company did not occur until in January, 1915, when formal demand was made for the grain. From August, 1911, the date of the expiration of the bond in question, up to the time of the company's default, in 1914, it had two other bonds for the protection of its patrons. Surely when the renewal bond was written to become effective August 1, 1911, the amount of storage tickets outstanding would, or at least should, have been considered as obligations of the Elevator Company which the renewal bond would be liable for in case of a breach of duty by the company during that two-year period. In fact the statute specifically provides that each bond shall be sufficient in amount to protect the holders of outstanding tickets. Comp. Stat. 1913, § 3111. And the same would apply to the second renewal bond running from August, 1913, to August, 1915. And it would appear as though one of the reasons why the Commissioners of Railroads were clothed with the wide discretion in the matter of fixing the amount of these bonds was for the purpose of taking into consideration not only the probable amount of business the particular elevator would do, but also the amount of tickets outstanding at the time each new bond was given and went into effect.

Appellant says that, according to the conditions of the bond, the surety company agrees to pay for all grain stored in the defendant's elevator from the 5th day of August, 1909, to the 5th day of August, 1911, providing such grain was not paid for by the principal, the Elevator Company; and he cites Comp. Laws 1913, § 3139, in support thereof.

In the first place § 3139 does not exact such a condition. It simply says that the bond shall be good "for the faithful discharge of the duties of a public warehouseman."

In the second place § 3139 is not applicable in this case, as said section provides for a bond for public warehousemen engaged in the storage of goods, wares, and merchandise, excepting *grain in bulk*. See §§ 3138, 3139. The law applicable in this case as to the bond to be given is found in § 3111. We are of the opinion that so long as the Elevator Company complied with the law during the period the Northern Trust Company was surety for it, and paid all storage tickets presented during that time, that the responsibility of said surety then ceased. And we do not believe such surety liable simply because a storage ticket issued in 1909 while said company was surety was not redeemed by the elevator company some three years after the bond of the Northern Trust Company had, by its terms, become inoperative. The elevator company had in the meantime procured two new bonds, one running from August, 1911, to August, 1913, and the other from August, 1913, to August, 1915, both guaranteeing that the Elevator Company would, during their respective periods, comply with the law. Nor do we believe it necessary to cite any long list of authorities to sustain this position. However, as bearing upon the law relative to the propositions involved, see the following: 5 Cyc. 212, 773–775; 29 Cyc. 1458, 1459; 40 Cyc. 440, 441; Comp. Laws 1913, § 6677; Northern Light Lodge v. Kennedy, 7 N. D. 146, 73 N. W. 524.

The trial court also found that the plaintiff, with the knowledge he possessed of the conditions of the Elevator Company, was guilty of such laches in not sooner presenting his storage ticket as would bar a recovery by him as against the Northern Trust Company. While we do not expressly so hold, as it is unnecessary in view of our holding upon the first proposition, we are of the opinion that there is considerable merit in the conclusion as reached by the trial court. It is also unnecessary for us to pass upon the question raised by respondent Trust Company as to whether or not the complaint stated a cause of action by reason of there being no allegation as to whether this plaintiff held the only outstanding storage ticket which might be a claim upon the bond. Upon this point, see Phillips v. Semingson, 25 N. D. 460, 142 N. W. 47.

The judgment of the County Court is right and the same is therefore affirmed, with costs.

FISK, District Judge, sitting in place of GRACE, J., disqualified.

E. R. MOORE, Appellant, v. ADAM BESLER, Louise Besler, Louisa Besler, Louisa Baesler, Adam Baesler, E. A. Konantz, Jacob Satre, Peter Braun, John P. Galbraith, Hans P. Jacobsen, and J. K. Murray, Copartners as Jacobsen & Murray, Northwestern Improvement Company, a Corporation, and All Other Persons Unknown, Claiming Any Estate or Interest in, or Lien or Encumbrance upon, the Property Described in the Complaint, Respondents.

(167 N. W. 218.)

Statutes — construction — tax deed — validity of — lands described — sold in separate tracts — must have been — sale en masse — not valid.

Sections 2122, 2123, and 2124, Compiled Laws of 1913, construed, and, it is *held*, that in order that a tax deed may be valid, the lands described therein must have been assessed and sold in separate tracts, when they were as a matter of fact in two tracts, noncontiguous and with 80 rods intervening.

Opinion filed March 11, 1918.

Action to determine adverse claims.

Appeal from the District Court of Morton County, Honorable *J. M. Hanley,* Judge.

Judgment for defendants. Plaintiff appeals.

Affirmed.

J. A. Hyland, for appellant.

The law does not require lands to be listed in separate tracts for assessment and taxation purposes. The assessor is only required to assess the lands as found on the lists as prepared by the auditor. Code, § 2127; Griffin v. Dennison Land Co. 119 N. W. 1041; State Finance Co. v. Beck, 109 N. W. 357.

A. T. Faber, for respondents.

The assessment of two separate tracts of land as one parcel is invalid and void. Therefore the whole tax proceedings in relation thereto and the sale are void. State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Griffin v. Dennison Land Co. 18 N. D. 246, 119 N. W. 1041.

BRUCE, Ch. J. The only question which is involved in this case is whether, in order that a tax deed may be valid, the lands described therein must have been assessed and sold in separate tracts, when they were in two tracts noncontiguous and with 80 rods intervening.

This question has been twice passed upon by this court, and in both cases the proceedings and the deeds were held to be entirely void. See State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Griffin v. Dennison Land Co. 18 N. D. 246, 119 N. W. 1041.

Counsel for appellant, however, contends that these cases were decided without a thorough examination of the question, and without a recognition of the fact that the statute requires that the tax list shall be made by the auditor, that there is no requirement that such auditor shall list the property in separate tracts, and that the assessor is only required to assess such lands as are "listed for taxation."

The statutes are as follows:

Section 2123 of the Compiled Laws of 1913: "He [auditor] shall make out in the real property assessment book a complete list of all lands or lots subject to taxation (showing the names of the owners, if to him known, and if unknown, so state it) the number of acres and the lots and parts of lots on the blocks included in each description of property."

Section 2122: "He [auditor] shall value each article or description of property," etc.

Section 2127: "He [assessor] shall by actual examination determine the true and full value of each tract or lot of real property listed for taxation, and shall enter the value thereof in one column and the value of all improvements and structures thereon in another column, opposite each description of property."

Counsel contends that § 2127 does not require the value of each tract to be assessed and stated, but only the value of "each tract or lot of real property *listed* for taxation."

We think, however, that there is no merit in this contention. Section 2127 clearly makes it the duty of the assessor to, "by actual examination, determine the true and full value of each tract or lot of real property listed for taxation." It is clear also that though the auditor's list did not specifically state that there were two tracts of land the description itself did. The assessor's list described the property as

lot 4, and the southeast quarter of section 18, township 135, north range 89, west; and the fact that there were two noncontiguous tracts could not, except by the use of separate lines, have been made any more apparent.

The judgment of the District Court is affirmed.

GRACE, J. I concur in the result.

MRS. E. G. AUTH v. KUROKI ELEVATOR COMPANY.

(167 N. W. 389.)

Appeal — failure to prosecute — dismissal — motion for — order to show cause on — record already sent up — will not be granted.

Where an order to show cause to dismiss a case for want of prosecution or for failure to perfect the record on appeal has not been procured until after the record on appeal has been fully perfected, the appeal should not, ordinarily, be dismissed for want of prosecution.

Opinion filed March 12, 1918.

Order to show cause why appeal should not be dismissed.

J. J. Weeks, for respondent.

W. J. Cooper (and *H. S. Blood,* of counsel), for appellant.

GRACE, J. This is an order to show cause why the appeal in the above-entitled action should not be dismissed for nonprosecution and for unnecessary delay in causing the clerk of the district court to transmit the judgment roll and record on appeal, and delay in serving and filing appellant's brief. It appears from the record before us, including the affidavit in support of the order to show cause, that all of the proceedings necessary to perfect such appeal, including the filing of the record in supreme court and the service of the brief on appeal, had all been had, and all of such things were done and performed prior to the time the order to show cause was procured. At the time such order to show cause was procured, the appeal was in such condition and was so perfected that it could have been disposed of upon its merits. There were

two appeals, and order to show cause why such appeal should not be dismissed was procured in each appeal. It is held that such appeals in the above-entitled action should not be dismissed for the reason above stated.

BIRDZELL, J., did not participate.

SELMA A. JOHNSON, Appellant, v. JOHN MULLEN, H. C. Hanson, and Emil Everson, as Supervisors of Hendrickson Township, and Hendrickson Township, a Municipal Corporation, Respondents.

(167 N. W. 326.)

Township board — laying out highway — dividing farm into two tracts — damages — action for — award of damages — reasonable — absence of passion or prejudice — reduction or new trial — order for — error.

In district court the jury awarded plaintiff $450 damages for a highway dividing his farm into two tracts of 11 and 61 acres. *Held*, that the verdict is well sustained by reason and evidence. It is not affected by passion or prejudice, and the court was wrong in ordering a new trial unless the plaintiff should accept $200 as the damages.

Opinion filed March 22, 1918.

Appeal from the District Court of McHenry County, Honorable *A. G. Burr*, Judge.

Plaintiff appeals.

Reversed.

Theo. Kaldor, for appellant.

The charge of the court to the jury, standing unchallenged, becomes the law of the case, so far as the parties are concerned. Kramer v. N. W. Elev. Co. 106 N. W. 86; 8 Enc. Pl. & Pr. 253.

Misconduct of an attorney must be objected to at the time it occurs and the attention of the trial court called to it, and the objections must appear of record or the supreme court cannot review them. Lindsay

v. Pettigrew (S. D.) 2 N. W. 874; Pierce v. Manning (S. D.) 51 N. W. 332; Burdick v. Haggart (Dak.) 22 N. W. 589.

A witness upon the question of value of lands must show knowledge of such subject, before being permitted to testify. His competency must be established. Schuler v. Board of Supervisors (S. D.) 81 N. W. 890; Idaho, W. R. P. Co. v. Columbia Conference, 38 L.R.A. (N.S.) 497; Washburn v. Milwaukee R. R. Co. (Wis.) 18 N. W. 328; 5 Enc. Ev. p. 206.

A trial court has no power to reduce a verdict, except in cases where from the pleadings and evidence the court is able to calculate and to determine the excess. The rule has no reference to cases where the damages claimed are uncertain, and where the jury are the sole judges of the amount to award. Murray v. Leonard, 11 S. D. 22, 75 N. W. 272; Southern P. Co. v. Fitchett (Ariz.) 80 Pac. 359; Tifton v. Chastain (Ga.) 50 S. E. 105; Louisville R. Co. v. Earl (Ky.) 22 S. W. 607; Umfried v. Baltimore R. Co. (W. Va.) 12 N. E. 512; Brown v. McLeish (Iowa) 32 N. W. 385.

The discretion vested in the trial court to grant or refuse a new trial is neither an arbitrary nor a general discretion. It is a discretion that should be exercised with great care. Braitwaite v. Aiken, 2 N. D. 57, 49 N. W. 421; Hicks v. Stone, 13 Minn. 434.

The privacy of the home, the unusual noises and dangers caused by the running of automobiles, the inconvenience in crossing the road dividing plaintiff's farm in two parts, the expense of constructing fences, cattle ways, and all such matters, are proper for consideration by the jury in awarding damages. Chicago & A. R. Co. v. Stanley, 221 Ill. 405; Chicago & I. R. P. Co. v. Hopkins, 90 Ill. 316; Somerville R. Co. v. Doughty, 22 N. Y. L. 495; Littlerock R. Co. v. Allen, 41 Ark. 431; Whitewalk R. Co. v. McClure, 29 Ind. 526; Pittsburg R. Co. v. McClusky, 110 Pa. 436; Fayetteville R. Co. v. Comes, 41 Ark. 324; Weyer v. Chicago, W. & N. R. Co. (Wis.) 31 N. W. 710; Walker v. Coloney & N. R. Co. 103 Mass. 10; Blue Earth County v. St. Paul R. Co. 28 Minn. 503, 11 N. W. 73.

Bagley & Thorpe, for respondents.

It is the settled law in this state that a motion for a new trial upon the ground of excessive damages appearing to have been given under the influence of passion and prejudice is addressed to the sound discre-

tion of the trial court, and that its decision will not be disturbed except in case of clear abuse, apparent from the record. Reid v. Ehr, 36 N. D. 552, 162 N. W. 903; Wagoner v. Bodal (N. D.) 164 N. W. 147; Skarr v. Eppeland, 35 N. D. 116, 159 N. W. 707; Blackorby v. Ginther, 34 N. D. 248, 158 N. W. 354; 2 R. C. L. § 182.

Courts discriminate in favor of orders granting new trials because the same are not final, but are such as open the way for reinvestigation and possibly a better ascertainment of the facts. Pengilly v. J. I. Case Threshing Mach. Co. 11 N. D. 249, 91 N. W. 63; Patch v. N. P. R. Co. 5 N. D. 55, 63 N. W. 207; Gull River Lumber Co. v. Osborn McMillan Elev. Co. 6 N. D. 276, 69 N. W. 691; Galvin v. Tibbs, 17 N. D. 600, 119 N. W. 39; Ross v. Robertson, 12 N. D. 27, 94 N. W. 765; Dinnie v. Johnson, 8 N. D. 153, 77 N. W. 612; Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419; 2 R. C. L. § 184; 4 C. J. 830.

Robinson, J. The plaintiff owns and occupies as her home 72 acres of land south of and adjoining the village of Simcoe. The land is mainly the S. ½ of the S. E. quarter, section 18–154–79. The township supervisors caused to be laid out a highway 4 rods wide and 842 feet long, cutting off 11 acres of the east side of the land. They assessed plaintiff's damages at $100. The jury assessed the damages at $450, and the court made an order granting a new trial unless the plaintiff accepted $200, and she appeals to this court.

The motion for a new trial was made on these grounds: (1) That the damages are excessive and were given under the influence of passion and prejudice; (2) that the evidence is insufficient to justify the verdict. There is nothing in the case—the nature of the case—or the evidence, to warrant an inference that the verdict was in any way affected by passion or prejudice. The fair inference is that the verdict represents the calm, deliberate judgment of the jury, and as the record shows it is well sustained by the evidence. There is positive testimony of more than one witness that by reason of the highway the value of the entire tract is depreciated to the amount of $10 per acre, that the 11 acres east of the highway is made practically worthless, and the rest of the land is reduced in value.

In the memorandum decision the trial judge says: "It appears from the evidence that the taking of the strip results in a division of plain-

tiff's farm of 70 acres into two sections of 60 acres and 10 acres respectively. It appears to me there can be no diminution of value per acre in a farm of 70 acres by reason of a severance of 10 acres therefrom,—that is, a farm of 60 acres situated as plaintiff's farm is, is worth as much per acre as a farm of 70 acres." But that is wrong. Any person having experience in farming knows that a large farm is cultivated more advantageously than a small farm. In cultivating a small tract too much time is lost in turning the team and the machinery around and around. Hence, there may be no profit at all in cultivating a tract of 5 or 10 acres when there would be a good profit in cultivating a large tract. For ordinary cultivation an acre of land is obviously worth less even when a quarter section is worth $100 an acre.

The road which divides the plaintiff's farm must forever be a source of inconvenience and expense to anyone using the farm, and it must reduce the sale price at least $500. The verdict is not excessive, and it is well sustained by evidence and by reason.

Order reversed and judgment affirmed.

GRACE, J. I concur in the result.

BIRDZELL, J. (specially concurring). In granting the new trial the trial judge indicated that the verdict was, in his judgment, excessive, and he based this conclusion upon the proposition that a farm of 60 acres, situated as the farm in question was situated, is worth as much per acre as a farm of 70 acres. This is not a question of law, but one of fact, and the proposition is clearly one concerning which reasonable men might well differ. It is therefore a question concerning which a jury may ordinarily be trusted to form a rational conclusion. There are no circumstances going to indicate that the jury was swayed by passion or prejudice, other than that they have found a verdict for $450 where the judgment of the trial court was that the verdict should not have exceeded $200. There was ample evidence to support the verdict of the jury, and, except upon the hypothesis of the trial judge, it cannot be fairly said that the evidence was insufficient to sustain the verdict. Since this hypothesis cannot be accepted as absolute, it seems to me that the granting of a new trial was an abuse of discretion. In so far as the granting of the motion is based upon the insufficiency of the evidence, it was

apparently tested according to an absolute standard that does not amount to a rule of law. The statute authorizing the granting of new trials is not designed for the purpose of enabling a trial judge to substitute his judgment as to what the verdict should be for that of the jury.

It is true that, as a general proposition, an appellate court is reluctant to disturb an order granting a new trial; but where, as in the case at bar, the entire difference between the damages allowed by the jury and damages which the trial court thought the evidence fairly warranted will surely be consumed in repeated litigation, the ends of justice require closer scrutiny of the order.

Being of the opinion that the evidence so clearly substantiates the verdict that it cannot be said to be insufficient for that purpose, I concur in the reversal of the order granting a new trial.

CHRISTIANSON, J. (dissenting). I am unable to concur in the conclusions reached by my associates. I believe that the order appealed from should be affirmed.

The plaintiff owns a farm containing about 72 acres. This farm adjoins the town of Simcoe in McHenry county. Simcoe lies on the north side of the railway and the portion of plaintiff's premises involved in this controversy lies on the south side of the railway. The highway in question abuts upon, and will in reality be a continuation of, the main street in Simcoe. Only about 1¼ acres of land is actually taken for the highway. The highway cuts off a piece of land containing 11.02 acres. The piece cut off abuts upon the highway on the west and the railway on the north. It is not a narrow strip, but, so far as is possible in view of the northwesterly course of the railway, the tract of land so segregated is almost square.

The plaintiff obtained a verdict for $450. Defendant moved in the alternative for judgment notwithstanding the verdict, or for a new trial. The court made a conditional order granting a new trial, unless the plaintiff should consent to a reduction of the verdict to $200. The plaintiff refused to make the reduction, whereupon the court entered an order granting a new trial, and this appeal is taken from the latter order.

The motion for a new trial was based upon two grounds: (1) Excessive damages, appearing to have been given under the influence of

passion and prejudice: (2) insufficiency of the evidence to justify the verdict. "These grounds are closely analogous. Both of them involve a consideration of the sufficiency of the evidence. In determining a motion upon either ground the court must weigh the evidence. Hayne, New Tr. & App. § 95. This necessarily involves an exercise by the trial judge of the superior knowledge possessed by him as to matters incident to the trial itself. A motion for a new trial on either ground, therefore, is addressed to the sound, judicial discretion of the trial court, and its ruling will be disturbed only when an abuse of discretion is clearly shown." 4 C. J. 833–835; Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707; 2 R. C. L. (Appeal and Error) § 182. Reid v. Ehr, 36 N. D. 552, 557, 162 N. W. 905.

In determining a motion for a new trial on either ground the nature of the action must be considered. In certain actions, especially in most actions sounding in tort, the law furnishes no precise or definite rule for the measurement of damages, and, upon the same ultimate facts, reasonable men may differ greatly as to the amount of damages properly assessable. In such cases, the assessment of damages is peculiarly the province of the jury, and "the quantum of damages is deemed a matter of discretion of the jury to such an extent that the verdict will not be set aside on this ground [excessive damages] alone, unless the amount awarded is so excessive as to appear to have been given under the influence of passion or prejudice." Reid v. Ehr, supra. The reason for the rule ceases, however, to a considerable extent in actions where the law prescribes a definite measure of damages. And "in actions for breach of contract, or for injury to or detention of property, where there is a definite measure of damages, new trials will be more readily granted on the ground of excessive recovery." 29 Cyc. 843.

In the instant case the plaintiff was entitled to actual damages only. The jury had no discretion as to the rules to be applied in ascertaining what compensation plaintiff was entitled to receive. They were furnished with a definite and accurate standard by which such compensation must be determined. In assessing damages the jury were required to apply the standard furnished, and they had no right to adopt another. And it has been held that in cases of this kind the verdict may be set aside on the ground of the insufficiency of the evidence, even though it cannot be said to have been the result of passion or prejudice. See

Covert v. Brooklyn, 6 App. Div. 73, 39 N. Y. Supp. 744. See also De Brutz v. Jessup, 54 Cal. 119.

The majority opinion quotes from the memorandum decision made by the district court in granting a new trial. In my opinion the quotation is misleading and does not fairly present the views expressed by the trial court. I therefore deem it desirable to again quote the portion set out in the majority opinion, and in addition thereto the remainder of the memorandum decision relating to and connected with the portion quoted. The trial court said: "It appears from the evidence that the taking of the strip results in a division of plaintiff's farm of 70 acres into two sections of 60 acres and 10 acres, respectively. It appears to me that there cannot be a diminution of value per acre in a farm of 70 acres by the reason of severance of 10 acres therefrom,—that is, a farm of 60 acres, situated as the plaintiff's farm is, is worth as much per acre as a farm of 70 acres. If this be so, the only damage to which the plaintiff is entitled, other than the taking of the strip for road purposes, is the general damage which comes from the fact that there is a road running through the plaintiff's farm, after deducting whatever benefits accrue to her. It is not the province of this court to determine either the value of the strip of land taken, or the general damages. For that matter, also, it is not the province of the court to determine that the severance of a 10-acre plot from a farm of 70 acres would or would not reduce the average value per acre of the remaining piece. It is the province of the court, however, to determine whether a new trial should be granted. . . . From all the evidence in the case, it appears to me that $40 per acre is the best price to which plaintiff is entitled. This would amount to $50 for the strip taken, and if the severance of a 10-acre plot from a farm of 70 acres would not injure the remaining 60 acres so as to reduce the average value per acre, then the jury must have allowed the plaintiff in full for the 10 acres taken off, the same as if the whole of the 10-acre plot had been taken from her. In other words, the plaintiff received as a verdict in this case an amount equal in value to the road strip taken and the plot of ground severed. But she still owns the 10 acres. I cannot see how but what another jury would assess the reasonable damages at not to exceed $150 in excess of the value of the strip taken,—in other words, give the plaintiff a verdict not to exceed $200."

In connection with the memorandum decision it is desirable to consider the evidence offered upon the trial. The evidence related solely to the value of the land taken and the depreciation in value of the remainder by reason of the segregation of the strip taken. There was no evidence of any circumstances tending to show special damages.

The plaintiff did not testify, but her husband did. He testified that before the strip was taken the entire farm had a value of $60 per acre, and that the taking of the strip for highway purposes will reduce the value of the farm $1,200. The plaintiff called four other witnesses. One of these placed the value of the land before the taking of the strip, at $45 per acre, and the other two placed it at $50 per acre. The defendant called six witnesses. These witnesses are shown to be fully as well qualified as, and in some instances better qualified than, plaintiff's witnesses. The testimony of the defendants' witnesses is to the effect that the land is worth from $35 to $45 per acre; that the construction of the highway will not in any material manner decrease the value of the land, but will make the town of Simcoe more accessible, and that the resulting benefit will increase rather than decrease the value of the farm as a whole.

The verdict was against the apparent weight of the evidence. And while it is true that the credibility of the witnesses and the weight of their testimony was for the jury, it is also true that the district judge is vested with wide discretionary power in determining whether the jurors properly performed their functions.

Our statute confers express authority upon a district judge to grant a new trial either for insufficiency of the evidence to justify the verdict, or for excessive damages appearing to have been given under the influence of passion or prejudice, upon the application of the party aggrieved. Comp. Laws 1913, § 7660. Or even without such application, upon the court's own motion "when there has been such plain disregard by the jury of the instructions of the court or the evidence in the case as to satisfy the court that the verdict was rendered under a misapprehension of such instructions or under the influence of passion or prejudice." Comp. Laws 1913, § 7665. These statutory provisions not only vest in the trial court the power to set aside verdicts on the grounds specified, but imply that it is the duty of the court sometimes to set aside such verdicts.

Spelling (1 Spelling, New Tr. & App. Pr. § 237) says: "The mere fact that the jury are the exclusive judges of all questions of fact submitted to them does not justify the judge of the trial court in declining to examine the sufficiency of the evidence upon which the verdict rests, when it is challenged by a motion for a new trial. And whenever it is manifest that the jury have found against the clear weight of the evidence, and that the party asking for a new trial has not in all probability had a fair trial, nor received substantial justice, it is his imperative duty to set the verdict aside and grant a new trial."

It should be remembered that the power to grant new trials is vested in the trial, and not in the appellate, court. And that it is the trial, and not the appellate, court, which is vested with discretionary power in determining the motion for a new trial. The "appellate court is limited to a consideration of whether the trial court clearly abused its discretion in ordering a new trial. The question presented to the appellate court is not whether a new trial should be granted or denied, but whether the trial court abused its judicial discretion in ordering a new trial. 'A test of what is within the discretion of a court has been suggested by the question, May the court properly decide the point either way? If not, then there is no discretion to exercise. If there is no latitude for the exercise of the power, it cannot be said that the power is discretionary. The only limitation upon the exercise of discretionary power is that it must not be abused.' 2 Hayne, New Tr. & App. § 289, p. 1650." Reid v. Ehr, 36 N. D. 552, 558, 162 N. W. 903.

In Edwards v. Carson, 21 Nev. 460, 492, 34 Pac. 381, the court said: "The granting or refusal of a motion for a new trial on the ground of the insufficiency of the evidence to support the findings is addressed to the sound discretion of the judge who presided at the trial of the case in the lower court, and on an appeal from such order where the court below, in the exercise of sound discretion, grants a new trial on conflicting evidence, appellate courts have always refused to disturb the order."

It is suggested that it is an abuse of discretion for a trial judge to grant a motion for a new trial on the sole ground that a question of fact concerning which reasonable men might well differ has been decided contrary to his judgment, as to the way it should have been decided. And

that in a case like the one at bar, "the appellate court is not concerned as to whether the evidence sustains the opinion of the trial court, but it is only concerned as to whether the evidence presents a question of fact upon which reasonable men might well differ."

These alleged rules are manifestly not applicable in the appellate court. Nor for that matter are they proper rules to be applied by the trial court in considering a motion for a new trial. It is only when reasonable men might differ that there is room for the exercise of judgment or discretion. If the evidence upon a question of fact is in such condition that reasonable men could not entertain different opinions then the question ceases to be one of fact and becomes one of law.

"There is a well-established distinction between insufficiency of evidence in point of law and insufficiency in point of fact. The former is usually a question for appellate courts; while the latter is almost exclusively to be dealt with by trial courts." 1 Spelling, New Tr. & App. Pr. § 237.

In cases where the error upon which a new trial is sought resolves itself into one of law (as where the facts are undisputed), the appellate court is not concerned with the rule applicable to a review of judicial discretion, for the obvious reason that there was no room for the exercise of judicial discretion. The trial court occupied no superior position in ruling on the question, and the appellate court is merely called upon to review the correctness of a conclusion of law.

But in cases where the evidence is in conflict, or where different conclusions may reasonably be drawn therefrom, there is room for the exercise of judgment and discretion. In such cases the trial judge must necessarily, to a certain degree at least, weigh the evidence.

In considering this subject the supreme court of California said: "The court [below] was not satisfied with the verdict, but refused to disturb it because there was some conflict in the evidence. This is not the correct rule. In this court where there is a substantial conflict in the evidence we decline to set aside a verdict or finding of facts as being contrary to the weight of evidence, solely because we have had no opportunity to observe the manner of the witnesses, and to decide upon their credibility. But this reason does not apply to the district judge,—and though it is the peculiar province of the jury to decide upon the facts submitted to them, generally, in doubtful cases, the verdict ought not

to be set aside as contrary to the weight of the evidence; nevertheless, if the judge is not satisfied with the verdict and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. He has had the same opportunity as the jury to observe the manner of the witnesses, and to decide upon their credibility, and it is his duty to see that the verdict is not clearly against the weight of the evidence. He must exercise a wholesome and discrete supervision over the jury in this respect. 'The fact that there may have been evidence submitted to the jury on both sides of the points at issue does not exclude the exercise of this beneficial supervision.'" Dickey v. Davis, 39 Cal. 569.

Manifestly the trial judge, who has seen and heard the parties and the witnesses, and is familiar with every incident of the trial, occupies a position of great advantage over the members of an appellate tribunal and the rule is firmly settled that his determination will not be disturbed by an appellate court, unless it is so clearly wrong as to amount to an abuse of discretion. Hence, an appellate court is not justified in reversing an order granting a new trial on the ground of "excessive damages appearing to have been given under the influence of passion or prejudice," merely because it differs with the trial court as to what would have been just compensation, unless the difference of opinion is such as to justify the conclusion that the court abused its discretion. Reid v. Ehr, 36 N. D. 552, 558, 162 N. W. 903; Hayne, New Tr. & App. § 95.

In this case the trial court has said that the verdict is unjust; that it is contrary to the weight of evidence; that the amount awarded is grossly in excess of that which the evidence warranted; and that the jury by the exercise of fair, unbiased judgment could not have returned the verdict which it did. The trial court believed that injustice had been done, and sought to correct it. I do not believe that this court can say that the trial court was clearly wrong in its conclusions and abused its discretion in awarding a new trial. It is true the court had no right to direct a remission of a portion of the verdict in lieu of a new trial. This error, however, was error in favor of the plaintiff, and could not possibly prejudice her. And in any event this error was cured by the subsequent order granting a new trial, and it is from this order the appeal is taken.

In my opinion the order should be affirmed.

S. H. MILLER, George H. Miller, and A. S. Miller, Appellants, v. HERMAN STENSETH as Clerk of the District Court of Ramsey County, North Dakota, Respondent.

(167 N. W. 753.)

Moot questions — court will not determine — doing useless thing — will not require.

1. This court will not determine moot questions, nor require the doing of a useless thing.

Mandamus — writ of — will not issue — to compel the doing of a useless thing.

2. The writ of mandamus will not issue to compel the doing of an ineffectual act, or useless thing.

Opinion filed March 28, 1918.

Motion to dismiss an appeal from an order of the District Court of Ramsey County.

Motion granted.

Cuthbert & Smythe, for the motion.

William Anderson and *Dan V. Brennan,* on oral argument, opposed.

FISK, Special Judge. This matter comes before the court at this time on a motion to dismiss an appeal taken from an order of the district court of Ramsey county quashing an alternative writ of mandamus.

In order to a proper understanding of the motion we will briefly recite the facts leading up to this appeal. Plaintiffs some years ago brought an action against J. M. Thompson and the Devils Lake State Bank jointly, Mr. Thompson being then the cashier of said bank. Judgment was entered in said action against both defendants. Subsequently, and upon motion, the trial court vacated and set aside the judgment as to the bank, upon the theory that plaintiffs had no cause of action as against it, but refused to grant said motion as to defendant Thompson. No formal judgment of dismissal or otherwise was ever entered upon the order vacating and setting aside the judgment as to said bank. The defendant Thompson thereafter appealed to this court from the judgment entered against him, and after a hearing and mo-

tion for rehearing this court reversed the judgment of the trial court and dismissed the case upon the merits. See Miller v. Thompson, 34 N. D. 63, 157 N. W. 677.

The mandamus proceeding was later commenced to compel the clerk of the district court of Ramsey county to enter a formal judgment of dismissal as to defendant bank upon the order made by the trial court vacating the judgment as to the bank, the plaintiffs contending that upon the record as it stood there was no order from which they could appeal as to the defendant bank.

This court will not determine moot questions and neither will it bequire the doing of a useless thing.

"The doctrine is well settled that courts will not grant mandamus or any other writ, where for any reason it would be ineffectual or not serve any lawful purpose. It is familiar law that courts will not determine moot questions and even though the question originally was one proper to call for an adjudication."

Bailey, Habeas Corpus, p. 812; Robinson v. Boyd, 60 Ohio St. 57, 53 N. W. 496; State ex rel. Gold v. Secrest, 33 Minn. 381, 23 N. W. 545; Tenant v. Crocker, 85 Mich. 328, 48 N. W. 577.

It will readily be seen by a reading of the opinion in Miller v. Thompson, supra, that all questions which could possibly arise in an appeal by plaintiffs against the bank were fully determined by this court, so that any appeal which might be taken as to the bank becomes and is a moot question. In other words, the bank could under no theory be liable in the litigation unless Thompson was also liable. Therefore, it would be a useless thing to grant the writ of mandamus and compel the the clerk to enter a formal judgment for the sake of giving plaintiffs an opportunity to perfect a useless appeal, because the merits of the litigation have been fully and finally determined by this court in the appeal taken by defendant Thompson.

Counsel for the bank contend that the order made by the trial court vacating and setting aside the judgment as to the bank was an appealable order. Of course, if it was, then time for taking an appeal has long expired. But from what has been said in this opinion it is unnecessary for us to pass upon that question.

The motion is granted and the appeal is dismissed, with costs.

CHRISTIANSON, J., being disqualified, did not participate, Honorable Frank E. FISK, Judge of the Eleventh Judicial District, sitting in his stead.

McCAULL-WEBSTER ELEVATOR COMPANY, a Corporation, Appellant, v. E. W. ADAMS, Respondent.

(L.R.A.1918D, 1036, 167 N. W. 330.)

Materialman — materials furnished by — to owner of land — to be used on certain land — lien — may be perfected against such land — even though material is diverted — used on other land.

1. Where a materialman furnishes material to the owner of a certain tract of land with the agreement and understanding that the material is to be used upon such land, the materialman has a right to a lien, and may perfect a lien, against the land for which the material was furnished, even though the owner of the land divert the material, and the same is used upon a tract of land different from that for which the material was furnished under the agreement and understanding.

Materialman — furnishing materials to owner of certain land — same to be used on such specific land — agreement — is entitled to lien on land mentioned — not required to trace material — diversion of materials — by landowner — appropriated to different use — right to lien not affected.

2. Where a materialman furnishes material to be used upon a certain tract of land, he is not required to follow or trace such material and see that it is used upon the land for which it is furnished. If the purchaser of such material, after receiving the same, diverts it and uses such material, or permits it to be used, upon a different tract of land from that for which it was purchased, such diversion does not preclude the right of the materialman to perfect a lien against the land for which such material was furnished.

NOTE.—On the question as to whether materials furnished for structure but not actually used therein is basis of a mechanic's lien, see note in 31 L.R.A.(N.S.) 746, and L.R.A.1918D, 1041, where it is held that actual use is not essential to a lien for material furnished in good faith for the improvement of realty.

On the question of right to mechanic's lien for material furnished to be used, but not in fact used, see note in 64 Am. Dec. 678.

Materialman — lien of — for materials furnished — right extends to land as well as to structure — agreement as to use of material — on certain lands — violation of — diversion and different use — does not defeat lien on such land.

3. A materialman who furnishes material to improve certain land not only has a lien upon the building or improvement, but also has a lien upon the land in addition to the lien upon the improvement, and may have a lien upon the land even though the material is not used in making the improvement for which it was furnished and purchased, and even though the material be diverted by the purchaser and used upon other land than that to improve which the material was purchased and furnished.

Opinion filed February 9, 1918. On rehearing April 2, 1918.

Appeal from the judgment of the District Court of Hettinger County, Honorable *W. C. Crawford,* Judge.

Judgment modified.

Thomas H. Pugh and *Otto Thress,* for appellant.

Where the errors of which complaint is made appear upon the face of the record and judgment roll, no statement of the case is required to be settled, nor is any statement of the case necessary. Comp. Laws 1913, § 7842; Brown v. Skotland, 12 N. D. 445, 97 N. W. 543; Brandenberg v. Phillips, 18 N. D. 200, 119 N. W. 542; Savold v. Baldwin, 27 N. D. 342, 146 N. W. 544.

Our statute gives to a materialman who furnishes materials for a building agreed to be erected upon certain specified land, to the owner thereof, the right to a lien, not only upon the structure, but upon the land itself. If the landowner to whom was furnished such materials for such specific purpose diverts the materials, and uses them to construct a building or to make improvements on other land, the materialman has the right to claim and to perfect a lien upon the land originally intended to be improved by the use of the materials so furnished, and the law does not require him to trace such materials. Comp. Laws 1913, § 6814; Pittsburgh Plate Glass Co. v. Leary (S. D.) 31 L.R.A. (N.S.) 746, 126 N. W. 271; S. D. Code 1903, § 696; Small v. Foley (Colo.) 47 P. 64; Salzer Lumber Co. v. Lindemeier (Colo.) 131 Pac. 442; Rice v. Cassels, 48 Colo. 73, 108 Pac. 1001.

If the material in a given case be delivered into the physical possession of the owner, it seems clear that no court would hold that his failure

to deliver the same upon the premises would affect the right of the materialman. A rule requiring the materialman to follow the material to the premises would impose upon him an unnecessary burden and result in no benefit to the owner.

Thompson-McDonald Lumber Co. v. Morawetz (Minn.) L.R.A. 1915E, 302, 14 N. W. 301.

"In the ordinary understanding of the terms, furnish for the erection of, etc., the furnishing of the material is complete when it is sold and delivered for the purpose of the erection." Johnson v. Northwestern Telephone Exch. Co. (Minn.) 51 N. W. 224; Berger v. Turnblad (Minn.) 107 N. W. 53; Lamoreau v. Andersch (Minn.) L.R.A. 1915D, 204, 150 N. W. 908; Minneapolis Sash & Door Co. v. Hedden (Minn.) 154 N. W. 511, 20 Am. & Eng. Enc. Law, 2d ed. 347; Burns v. Sewell (Minn.) 51 N. W. 224.

Such acts alone, on the part of the materialman, give to the landowner complete ownership of and control over the materials, and he cannot defeat the right of lien. Trammel v. Mount, 68 Tex. 210, 2 Am. St. Rep. 479, 4 S. W. 377.

It is not necessary that the materials be actually used in the construction of the particular building. Hobson v. Townsend (Iowa) 102 N. W. 413; Frudden Lumber Co. v. Kinnan (Iowa) 90 N. W. 515; Lee v. Hoyt (Iowa) 70 N. W. 95; Bell v. Mecum (N. J. L.) 127 Am. St. Rep. 809, 68 Atl. 149; Schlosser v. Moore, 16 N. D. 185, 31 L.R.A. (N.S.) 746, 112 N. W. 78.

Jacobsen & Murray, for respondent.

A mechanic's lien depends upon the existence of certain facts, such as the making of a just and true account of the demand due, after allowing all credits and containing a correct description of the property to be charged with such lien and verified by affidavit. No such facts are found to exist. Comp. Laws 1913, § 6820.

"Findings are sufficient which show the facts essential to the support of the judgment. But the court must ascertain such facts as the particular statute requires, and the findings must show the existence of the conditions which, under the statute, justify the conclusion of the validity of the lien claimed." 27 Cyc. 425, subd. 2, ¶ 7; 38 Cyc. 1964, ¶ 5; 1980, ¶ b.

Ultimate facts, and not conclusions, constitute findings of fact. 38 Cyc. 1980.

Conclusions of law cannot be employed to supply defects or omissions in the findings of fact. 38 Cyc. 1978, 1979, ¶ 3; Dillon Imp. Co. v. Cleaveland (Utah) 88 Pac. 670.

"The findings of the court must cover so much of the issues raised by the pleadings as will sustain the judgment." Cochise County v. Cooper Queen Consol. Min. Co. (Ariz.) 71 Pac. 946; Ganow v. Denney (Neb.) 94 N. W. 959; Kane v. Rippey (Or.) 29 Pac. 1005.

"It must affirmatively appear from the complaint in a suit to foreclose a mechanic's or laborer's lien, that the notice filed contained all the essential provisions required by statute." Pilz v. Killingsworth (Or.) 26 Pac. 305; 27 Cyc. 386; 38 Cyc. 1987, note 887.

If there is no lien on the improvement certainly there is no lien on the premises or land, because under the statute a lien on the improvement is a condition precedent to a lien on the land. Comp. Laws 1913, § 6814.

Our mechanic's lien law has been strictly construed in all its phases, and a strict compliance with all its provisions is necessary to enable one to claim benefits thereunder. Stinson Mill Co. v. Los Angeles Traction Co. (Cal.) 74 Pac. 357; Silvester v. Coe Quartz Mine Co. (Cal.) 22 Pac. 217; Bewick v. Muir (Cal.) 23 Pac. 390; Roebling Sons Co. v. Bear Valley Irrig. Co. (Cal.) 34 Pac. 80; Hamilton v. Delhi Min. Co. (Cal.) 50 Pac. 378; 3 Kerr's Cyc. Codes of Cal. Civ. Code, pt. 2, p. 1681, notes 63 to 65 incl.

The findings must show that the materials were used on the premises. Kerr's Cyc. Codes of Cal. § 1183, p. 1673, supra; Bewick v. Muir, supra; Silvester v. Coe Quartz Mine Co. supra; 27 Cyc. 46.

GRACE, J. This appeal is one taken from the judgment rendered in the action.

The material facts are briefly as follows: About September 1, 1912, the plaintiff was engaged in the lumber business at Regent, Hettinger county, North Dakota. The defendant was the owner of the west half of the northeast quarter and the southeast quarter of the northeast quarter of section 28, township 135, range 96, in Hettinger county, North Dakota. On or about September 1st, plaintiff and defendant entered

into a contract whereby the plaintiff agreed to furnish to the defendant fence posts and fence wire to be used for fencing the premises above described. Between September 3 and 5, 1912, plaintiff delivered to the defendant said posts and wire of the value of $189.74. Within ninety days after furnishing the said posts and wire, and on December 3, 1912, the plaintiff made and filed its claim of mechanic's lien for said posts and wire upon the above-described premises. The plaintiff before filing such lien made a legal demand in writing for the payment of the account. Statutory notice of intention to foreclose the lien was duly served on the defendant, after which the action was commenced to foreclose such lien.

The complaint was in the ordinary and usual form for the foreclosure of a mechanic's lien. The defendant interposed a general denial. It was proved upon the trial of the case that the defendant did not use the material in building the fence provided for by the agreement, nor for the improvement of the premises aforesaid. The plaintiff did not consent to, and had no knowledge of, the diversion of such material. The plaintiff sold and furnished the defendant the material, not relying on the personal credit of the defendant, but relying upon the credit of the real estate. The material which was sold the defendant was used to build a fence upon a tract of land, not belonging to the defendant, but belonging to the defendant's wife.

That part of the judgment which is appealed from is as follows: "It is further ordered that, certain mechanic's lien filed and claimed by the plaintiff against the defendant and the following real estate, to wit: Northeast quarter of section 28, township 135, north of range 96, be, and the same hereby is, declared to be null and void, and of no force and effect, and that the same be canceled of record."

The appellant makes five assignments of error, all of which may be considered together. They are as follows: The court erred in its second conclusion of law. The court erred in concluding as a matter of law that the mechanic's lien is null and void. The court erred in holding and adjudging the mechanic's lien as null and void. The court erred in ordering and adjudging that the mechanic's lien be canceled of record. The court erred in awarding the defendant any relief whatever.

The defendant claims that part of the judgment appealed from

should be affirmed for two reasons: First, the findings of fact failed to show that the plaintiff filed with the clerk a verified account as required by statute. Second, that the findings show that the material was not actually used as an improvement on the premises. The disposition of these two questions will dispose of this case.

Section 6814, Comp Laws 1913, describes what persons are entitled to a mechanic's lien, and for what purposes. The section is too long to set out at length, and suffice it to say that such section in substance provides that any person who shall furnish any labor upon, or furnish any materials, machinery, or fixtures for the construction or repair of any work of internal, or for the erection, alteration, or repair of any building or other structure upon lands or in making any other improvements thereon, including fences, etc., upon compliance with the requirements of law, shall have for his labor done or materials, fixtures, or machinery furnished a lien upon such building, erection, or improvement, and upon the land belonging to such owner on which the same is situated, or to improve which said work was done or the thing furnished, to secure the payment for such labor, machinery, material, or fixtures, etc. The section under consideration contains certain requirements with which the lienor must comply in order to procure a mechanic's lien. The lienor is required to keep an itemized account of the material or labor separate and apart from all other items of account against the purchaser. He must make a written demand in accordance with law for the payment of such account, prior to the filing of the lien. There are several other provisions of the section under consideration which have no bearing on this case.

The respondent claims the appellant not having brought up the testimony in the case to this court, and the appellant depending entirely upon the face of the record for reversal, that if the findings of fact do not show the plaintiff is not entitled to a foreclosure of the lien, his appeal must fail.

Adverting to respondent's first contention, that the findings of fact fail to show that the appellant filed with the clerk a verified account as required by statute, we are of the opinion that such contention is without substantial merit. We are of the opinion that the findings of fact made by the court show the filing of the mechanic's lien. The court's finding of fact upon this is as follows: "That within ninety days after

furnishing the last item of material the plaintiff made and filed in the office of the clerk of this court its mechanic's lien, claiming a mechanic's lien against the above-described premises." The respondent claims that this is a mere conclusion of law, and not a statement of fact. We do not agree with this contention. It is true that, in the filing of a mechanic's lien, there must be an itemized statement of the account attached to the claim of lien, and there must also be a verification of the claim of the lien. A compliance with these requirements would have to exist before the lien could be filed. If there was no compliance with these requirements there would be no lien or proper claim of lien. Hence, when the court found as a fact that the plaintiff made and filed in the office of the clerk of court a mechanic's lien, it found that all the requirements of a mechanic's lien had been complied with, otherwise it would not have found it to be a mechanic's lien. It was not necessary for the court in its findings of fact to set out and show that each of the steps and requirements of law leading up to the acquiring and perfection of a mechanic's lien were complied with. This would be a cumbersome and unnecessary manner of stating the facts. When the court found that the plaintiff had made and filed its mechanic's lien it must have done so with full knowledge before it that all of the requirements of law in regard to perfecting a mechanic's lien had been complied with. And the statement that the plaintiff had made and filed its mechanic's lien is therefore a statement of fact, and not a conclusion of law. The court found as a fact that the plaintiff had made and filed its mechanic's lien. The plaintiff either made and filed a mechanic's lien or it did not do so. The court found that it did, and its doing so disposes of this question.

The second contention of the respondent is that the material not being used for an improvement on the premises for which it was purchased to be used, there can be no lien upon such premises, that is, upon the land where such fence was to have been constructed. We cannot agree with this contention of the respondent, and are of the opinion that, notwithstanding the fact that the material purchased was not used upon the premises where it was agreed at the time of the purchase of such material it should be used, nevertheless the land upon which such material was purchased to be used is subject to a lien for the purchase price of such material, whether the same is used thereon or not.

Section 6814 provides that the person claiming a mechanic's lien "shall upon compliance with the provisions of this chapter have for his labor done or materials, fixtures or machinery furnished a lien upon such building, erection or improvement, and upon the land belonging to such owner, on which the same is situated, or to improve which said work was done, or the things furnished, to secure the payment for such labor, machinery, material or fixtures."

This language contemplates not only a lien upon the building, erection, or improvement, but in addition thereto a lien upon the land where such improvement is situated, or the land to improve which the work was done, or the material furnished. The word "and" in the language above quoted is not used in an explanatory sense, but means and expresses the relation of addition. It is used as a co-ordinate conjunction, and signifies that the person claiming the lien shall have a lien upon the building, erection, or improvement, and in addition to a lien upon them he also has a further or additional lien upon the land upon which the improvement is situated, or to improve which said labor was done or material furnished. And in this case not only has the plaintiff who claims the lien a lawful right to claim it against the building or improvement, but in addition thereto and separate and apart therefrom, there is the additional right existing to claim it against the land. Words & Phrases contains several cases illustrating the use of the word "and," among which is the case of LaSalle v. Kostka, 190 Ill. 130, 60 N. E. 72. Another case found in Words & Phrases is Tipton v. People, 156 Ill. 241, 40 N. E. 838. The rule laid down in such case is that the word "and" commonly means "in addition to." So, in the case at bar, the word "and" in the section we are considering means that, in addition to the lien upon the building, one who complies with the law in reference to filing a lien for material furnished for such buildings, or which was furnished to improve a certain tract of land, in addition to a right to a lien upon the building, has a right to a lien upon the land, for which the material was furnished to improve, or which was improved by the material furnished, and this right to a lien upon the land is a complete right in itself and may exist whether the material was actually used upon the land it was agreed to be used, or used upon other land than that agreed upon at the time of the purchase thereof, it being made to appear that the material was purchased, agreed to be used, and was

furnished, for the improvement of land upon which the lien is claimed. It would be a strange and unreasonable construction to put upon such section to construe it to mean that the person who sells the material to another to be used upon a certain tract of land must follow the material and see that it is used upon that land. Such a construction would almost, if not wholly, necessitate the seller of such material not only following the material to the premises upon which it is to be used, but to remain upon the premises and see that it was used in the building to be constructed or the improvement to be made, for if a materialman sold posts and wire to another to build a fence around a tract of land and delivered the posts and wire to him, and after the intervening of several weeks or months went out to the premises and found the premises fenced, such materialman could not then positively show that the material used in building such fence was the same as he sold unless he had placed a secret mark of some kind upon such material. For instance, supposing A and B each owned a section of land and each made a contract with C for sufficient posts and wire of the same kind and quality with which to fence each of their respective sections of land; and supposing, further, that A and B came in at or about the same time and each hauled out the wire and posts necessary to fence his respective section, and after each had gotten all the material home they exchanged material so that A took and fenced his land with the material sold to B, and B did likewise with the materials sold to A. It is thus clear that the wire and posts purchased by A to improve his land was used upon B's land, and that purchased by B was used upon A's land, so that in either case the material purchased was not used upon the premises which it was agreed it should have been used. Under such circumstances, would it be reasonable to claim that the materialman should not have a lien upon A's section of land for the material which he sold him to improve it, and likewise with B? Surely not. To construe this section which we are considering so as to give its language a natural meaning and to effectuate the intention of the parties is a proper rule to govern. It is clear, therefore, that where one furnishes the material to improve a certain tract of land, the description of which is known to both parties and is the land included in their agreement to improve which such material was purchased by the owner of such land and was furnished to him by the materialman with the understanding and agree-

ment that it should be used to improve such land, the land is subject to a lien whether the improvement is constructed thereon or not, and it is no part of the business or duty of the materialman to follow the material and see that it is used upon the land for which it was furnished and purchased to improve. The findings of fact in this case by the court set forth "that at the time the plaintiff and defendant entered into the contract as aforesaid, and this plaintiff did furnish the material as aforesaid, the defendant was the owner of, and in possession of, said premises, to wit, northeast quarter of section 28, township 135, range 96; that the plaintiff sold and furnished to the defendant the material as aforesaid in reliance on the credit of the real estate of the defendant, and not in reliance on the personal credit of the defendant. That the plaintiff did not consent, and had no knowledge of such diversion. That the defendant did not use the material furnished by the plaintiff for the improvement of the premises aforesaid."

The point at issue in this case was directly presented and decided in the case of State Loan Co. v. Whiteearth Coal Min. Brick & Tile Co. 34 N. D. 101, 157 N. W. 834. That case and the authority therein cited amply sustain our position in this case. The question is no longer an open one in this state.

By reason of what we have heretofore said, we hold the plaintiff is entitled to a lien upon the northeast quarter of section 28, township 135, range 96, to improve which the material was furnished, and that it was reversible error in the court to adjudge plaintiff's mechanic's lien null and void, and order its cancelation and satisfaction of record. However, as there is no dispute but what the plaintiff furnished the defendant the material to the value as claimed, and filed a mechanic's lien against the land of the plaintiff to secure the value of such material furnished, and all the legal questions being disposed of in this case, it is not necessary to grant a new trial. To do so could only result in a waste of time and the adding of more expense. The plaintiff was clearly entitled to his lien. Hence, we are of the opinion that that part of the judgment appealed from should be modified.

The judgment appealed from is modified, and it is held by this court that the mechanic's lien made and filed by the plaintiff and claimed by him to be a mechanic's lien is in fact a mechanic's lien, and plaintiff is entitled to foreclose the same. Costs to be taxed in favor of appellant.

ROBINSON, J. I concur in result.

On Denying Petition for Rehearing.

PER CURIAM. The former opinion decided all the questions presented and argued by the respective counsel. In a petition for rehearing, respondent attempts to raise two new questions. He contends: 1. That the appeal should be dismissed because plaintiff appealed from a part of the judgment; and (2) that the findings of fact fail to show that, prior to the commencement of the action, ten days' written notice of plaintiff's intention to foreclose the mechanic's lien was given to the record owner of the real property as required by § 6825, Comp. Laws 1913.

It is proper to state at the outset that counsel ought not to present their lawsuits piecemeal, as respondent's counsel has attempted to do in this case. The propositions now presented clearly should have been raised before the former decision was handed down. Not only so, but the motion to dismiss the appeal should have been made as soon as possible and before the submission of the case on its merits. 4 C. J. 594 et seq.

We are agreed, however, that there is no merit in either of the questions now presented.

Respondent asserts that there can be no appeal from a part of a judgment, and cites Prescott v. Brooks, 11 N. D. 93, 90 N. W. 129, and Hoellinger v. Hoellinger, 38 N. D. 636, 166 N. W. 519.

The cases cited are not in point. In those cases the appellant appealed from, and sought to obtain a trial *de novo* in the supreme court of, a part of a judgment. The question involved in those cases was not whether a party may appeal from a part of a judgment, but whether a party may appeal from a part of a judgment and obtain a trial *de novo* in the supreme court of a part of the case.

In the case at bar the evidence has not been transmitted to this court. The appellant has not asked for a trial anew of the case or of any question of fact therein. Appellant concedes that the findings are correct, and merely challenges the conclusions of law drawn by the trial court therefrom.

That in some cases an appeal may be taken from a part of a judgment is expressly recognized by § 7821, Comp. Laws 1913.

So far as the second point is concerned, respondent's contention is equally untenable. The trial court found that the material was fur-

nished under an agreement between plaintiff and defendant, and that defendant was the owner of the premises when the agreement was made and the material furnished. It is presumed that a thing once found to exist continues as long as is usual with things of that nature, and that the law has been obeyed. Comp. Laws 1913, § 7936, subds. 32 and 33.

Rehearing denied.

WESLEY L. PAGE, Appellant, v. ED. A. SMITH, Respondent.

(167 N. W. 218.)

Accounting — use and occupation — review of evidence.

For reasons stated in the opinion, it is *held* that defendant is not entitled to certain items allowed him upon an accounting.

Opinion filed January 26, 1918. Rehearing denied April 2, 1918.

From a judgment of the District Court of Dickey County, *Allen,* J., plaintiff appeals.

Modified.

E. E. Cassels and *T. L. Brouillard,* for appellant.

Ed. A. Smith, for respondent.

PER CURIAM. Plaintiff brought this action to quiet title to a quarter section of land in Dickey county. On a former appeal we held plaintiff's title to be invalid, and found defendant to be the fee owner. The cause was remanded in order that an accounting might be had and the amount due the defendant from the plaintiff and his grantors for the use and occupation of the premises be determined. See page v. Smith, 33 N. D. 369, 157 N. W. 477. After the cause had been remanded, additional pleadings were filed and evidence taken upon this question, and the trial court found the value of such use and occupation

to be $1,455.20, with interest upon the various amounts aggregating $494.22, making a total allowance to the defendant for such use and occupation of $1,944.42. The plaintiff has appealed from the judgment, and complains of certain items allowed by the trial court. The items of which plaintiff complains are: (1) Items allowed for the years 1900 to 1904, inclusive; (2) items allowed for the years 1908 and 1909; and (3) the allowance of interest on the items allowed for such use and occupation.

(1) With respect to the first item of which plaintiff complains we find that there is some evidence tending to show that the plaintiff's grantors received certain rent for the premises during the years 1900 to 1904, inclusive, and we are of the opinion that the court's findings as to these items is supported by the evidence.

(2) With respect to the items allowed for the years 1908 and 1909, we are of the opinion, however, that plaintiff's contention is correct. The controversy with respect to these items arises with respect to the time when a part of the land was first put under cultivation. Upon the former trial there was some testimony to the effect that about 70 acres of the land was broken in 1907. The evidence upon the latter trial is to the effect that the land was not broken in 1907 but in 1909. The evidence is undisputed that the party who broke the land received the entire first year's crop for the breaking. An examination of all the evidence adduced in the case, both upon the former trial and upon taking of the account, clearly shows that the land was first broken in 1909. The evidence also shows that plaintiff's grantors received $20 rent therefor in 1908, but received no rent therefor during the year 1909. Consequently, the items allowed by the trial court for the years 1908 and 1909 are erroneous and should be stricken from the account, and in lieu thereof the defendant is entitled to be allowed $20, the amount which the evidence shows plaintiff's grantors to have received.

(3) With respect to the allowance of interest, we are clearly of the opinion that plaintiff's contention is correct. It was not the intent of this court as disclosed by our former opinion that any interest should be allowed to the defendant upon such items. It may be observed that the mortgage bore 6½ per cent interest. Interest was payable annually. Some of these interest instalments had become due and payable thirty-three years before our opinion was handed down. Defendant, however,

was not required to pay any interest upon such interest instalments, but was merely required to pay straight interest for the entire period at 6½ per cent. It is manifest that this provision of the decree was quite favorable to the defendant. And it was assumed that this would in a measure be offset by the fact that plaintiff and his grantors had during the course of time received certain rents and profits for which they would not be required to pay any interest until the amount thereof was determined. It was not intended that defendant should be allowed interest on the rents and profits received by plaintiff and his grantors. Consequently, the allowance thereof to the defendant was erroneous. This item must, therefore, be eliminated from the account.

The case is therefore remanded, and the District Court is directed to modify its former judgment, and enter judgment in accordance with the views expressed in this opinion. No costs will be allowed on this appeal.

JOHAN BENDEWALD et al., Respondents, v. WILHELM LEY, David Klein, Sr., David Eisenbeiss, Matheis Kapp, David Klein, Jr., Friedrich Hinsz, et al., Appellants.

(168 N. W. 693.)

Courts — jurisdiction — religious questions presented for consideration — doctrinal beliefs — courts have assumed to pass on — schism — what constitutes — constitution — ecclesiastical powers — primary sources of faith — civil courts without jurisdiction — exclusively within ecclesiastical authority.

1. Where civil courts have assumed to pass upon and decide on the alleged doctrinal beliefs of any given religious denomination either as measured by its own constitution or that of any superior body to which it is attached for religious or ecclesiastical purposes, or where such civil courts attempt to define and decide what constitutes a schism, when examined in the light of the constitution of such religious body, or its ecclesiastical power, authority, or fundamental sources of its faith, belief, or teaching, such civil courts are acting wholly without jurisdiction in all such matters. All such matters are purely

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NOTE.—On litigation growing out of schism or division in religious society, see note in 24 L.R.A.(N.S.) 692.

On the question of jurisdiction of civil over church controversies when property or civil rights are involved, see note in 100 Am. St. Rep. 743.

and conclusively of an ecclesiastical nature, and must be determined exclusively by the ecclesiastical authority or judicatories, which exist within all religious organizations.

Different religious organizations or corporations — property — ownership — possession of — determination of — all doctrinal questions must be settled — before civil courts should take jurisdiction — by ecclesiastical authority.

2. Where the ownership, possession, or right of possession of property is in controversy between two different religious organizations separately incorporated, though each belong to the same general religious denomination, and before the ownership and right of possession to such property can be determined, doctrinal questions or questions affecting church polity must first be determined, the civil court should not assume jurisdiction of such controversy until it appears that all doctrinal questions and questions of church polity have been acted upon and disposed of by some ecclesiastical authority or power within such religious denomination or society.

Complaint — absence of allegations as to church polity — except by reference to constitution of such organization demurrable.

3. Where a complaint in an action such as this contains no allegations as to church polity, except as the constitution of such religious organization affords an indication of its principles and church polity, and there are no allegations of church polity in the complaint supporting such constitution, such complaint is demurrable.

Complaint — ecclesiastical authority — theology — church polity — beliefs — teachings — absence of allegations relating to — absence of — demurrable.

4. Where there is no allegation in the complaint that ecclesiastical, theological, or other questions relating to the church polity, beliefs, or teachings of a religious organization, which are involved in the action, and which give rise to a controversy or difference relating to such questions, have been determined by some ecclasiastical authority within such general church organization, a demurrer to such complaint should be sustained.

Religious organizations — property — ownership or possession — in dispute between — questions of doctrine — teachings — faith — church polity — not involved — civil courts have jurisdiction — may settle such property rights.

5. Where the ownership, possession, or right of possession of property is in controversy or dispute between religious organizations, and there is not involved for determination in such controversy any questions relative to doctrine, teachings, faith, discipline, or church polity, and there is involved in such controversy only the property right, the civil court has, and should assume, jurisdiction, and determine such property right.

Opinion filed December 19, 1917. Rehearing denied April 2, 1918.

Appeal from an order of the District Court of McIntosh County, North Dakota, Honorable *Frank P. Allen,* Judge.

Reversed.

Hugo P. Remington, for appellant.

Neither the state courts nor the civil courts will determine a question of doctrinal difference, or of church polity, for the sake of permitting or furnishing a basis upon which to predicate a civil action. All questions of doctrine, teachings, beliefs, and theory must first be settled within the church organization. Courts will only determine property rights between two disputing church bodies, when separated from such questions. 34 Cyc. 1185; Mack v. Kime (Ga.) 24 L.R.A.(N.S.) 675; Watson v. Jones, 13 Wall. 666.

There must first be an adjudication of all such questions of church polity by the church organization itself, so that the sole question of the right to the property in dispute may be presented to and determined by the civil courts. Gudmundson v. Thingvalla Lutheran Church, 150 N. W. 750, 754.

Franz Shubeck, for respondent.

In this case it is not a question of heresy, but an interest in property, that is involved. Plaintiffs have a temporial right; their property has been taken away from them, and it is the question of their right to do so that is here involved. Gudmundson v. Tingvalla Lutheran Church, 29 N. D. 291, 150 N. W. 250.

Where a certain membership of a church organization withdraw and unite with another, they abandon and relinquish all property rights in the organization from which they withdraw. Godfrey v. Walker, 42 Ga. 563; Bates v. Houston, 66 Ga. 201.

The doctrine that a decision by an ecclesiastical tribunal is conclusive as to its own jurisdiction has been expressly repudiated by a number of our courts. Watson v. Avery, 2 Bush, 330; Gartin v. Penick, 5 Bush, 110; Kinkead v. McKee, 9 Bush, 535; Watson v. Garvin, 54 Mo. 353; Ramsey v. Hicks (Ind. App.) 87 N. E. 1091; Bear v. Heasley, 98 Mich. 279, 24 L.R.A. 615, 57 N. W. 270; Boyles v. Roberts (Mo.) 121 S. W. 805; Associate Reformed Church v. Theological Seminary, 4 N. J. Eq. 77; McAulley's Appeal, 77 Pa. 397; Kerr's Appeal, 89 Pa. 97; Krecker v. Shirey, 163 Pa. 534, 29 L.R.A. 476, 30 Atl. 440; Landrith v. Hudgins (Tenn.) 120 S. W. 783.

That civil courts have jurisdiction and will protect church members in their temporial rights and will also restrain an unwarranted diversion of church property is held in numerous cases. Lindstrom v. Tell, 154 N. W. 969.

A majority of the members of a church corporation, organized as a body of Christian believers of a particular sect, cannot devote or appropriate the property of such corporation to any other use or purpose than that intended and fixed by such church. Franke v. Mann, 81 N. W. 1014; Rottman v. Bartling, 22 Neb. 375, 35 N. W. 126; Krecker v. Shirey, 163 Pa. 539, 29 L.R.A. 476; Kniskern v. Lutheran Church, 1 Sandg. Ch. 439; Hale v. Everett, 53 N. W. 9, 16 Am. Rep. 82; Schradi v. Dornfeld, 52 Minn. 465; Schnorr's Appeal, 67 Pa. 138.

If plaintiffs are right in their contention that the Lutheran Church is a congregated form, each association and independent congregation an autonomous body, the complaint is surely sufficient and the procedure adopted proper. Schradi v. Dornfeld, 52 Minn. 465, 55 N. W. 49; Fodness v. Brounberg, 73 Wis. 257, 41 N. W. 84; Duessel v. Proch, 78 Conn. 343, 3 L.R.A.(N.S.) 854, 62 Atl. 152; Gudmundson v. Thingvalla Lutheran Church, 29 N. D. 291, 150 N. W. 750; Mack v. Kime, 24 L.R.A.(N.S.) 692; Smith v. Pedigo, 145 Ind. 361, 33 N. E. 777; Brundage v. Deardorf, 92 Fed. 214; 34 Cyc. 1172; Baker v. Dicker, 79 Cal. 365.

GRACE, J. This is an appeal from the order of the district court of McIntosh county, North Dakota, Honorable Frank P. Allen, Judge.

The action brought is one in which it is sought to have decided which of two separate and distinct classes of persons belonging to separate and distinct religious corporations, each of which, however, bears the name and claims its faith to be that which is taught by the German Evangelical Lutheran Emmaus Church, is entitled to possession of, and the exclusive right to use, a certain church building and church property which is more fully described in the complaint.

To the complaint in the case there has been entered a demurrer. In order that the complaint may be fully understood, it, together with the demurrer thereto, will be set out in full.

The complaint as is follows:

"That the defendant, the German Evangelical Lutheran Emmaus

Church of Ashley, McIntosh County, North Dakota, is a domestic religious corporation organized under the laws of North Dakota in August, 1913. That the defendant, the Evangelical Lutheran Emmaus Church of Ashley, McIntosh County, North Dakota, is a domestic religious corporation organized under the laws of the state of North Dakota in February, 1908. That the aforesaid corporations are and at all times hereinafter mentioned have been separate and distinct corporations.

"That the plaintiffs, Johan Bendewald, Sr., Heinrich Ehley, Daniel Bendawald, Johan Bendewald, Jr., are, and at the times hereinafter mentioned were, members of the Evangelical Lutheran Emmaus Church, County of McIntosh, Ashley, North Dakota, together with the following persons defendants herein, Wilhelm Ley, David Klein, Sr., David Eisenbeis, Mathias Kapp, David Klein, Jr., Michael Heddig, Johan Goehring, Freidrich Hinz, Adolph Moench, Christian Goehring, Johannes Goehring, Heinrich Quast, Gottleib Strobel.

"That the German Evangelical Lutheran Emmaus Church, organized in 1913, is joined as party defendant, that the interest of all parties interested in the subject-matter of this action may be fully determined. That the Evangelical Lutheran Emmaus Church of Ashley, McIntosh County, North Dakota, organized in 1908, cannot be induced to bring this suit, it being under the control of the parties complained of, as will appear more fully from the facts hereinafter pleaded, and is therefore made a party defendant in order to determine its rights in the subject-matter under dispute.

"That the Evangelical Lutheran Emmaus Church of Ashley, County of McIntosh, North Dakota, was organized and chartered under the laws of North Dakota, in February, 1908, for the sole purpose of maintaining and promoting religious worship according to the general usages of the German Evangelical Lutheran Synod of Missouri, Ohio, and other state's churches. That said corporation affiliated itself with the German Evangelical Lutheran Emmaus Church Synod of Missouri, Ohio, and other states (commonly and hereinafter called the Missouri Synod), and since its formation has called and been served by pastors of the Missouri Synod. That said Evangelical Lutheran Emmaus Church of Ashley, County of McIntosh, North Dakota, adopted a constitution, a copy of which is hereunto attached and made a part

of this complaint, which was subscribed to by the above-named plaintiffs and persons defendant. That in accordance with the above-stated charter purpose this constitution in paragraphs 3, 4, 7, 10, and 17 contain and adopt the confession of faith, church policy, and practice required of churches affiliated with the Missouri Synod. That said Evangelical Lutheran Emmaus Church of Ashley, McIntosh County, North Dakota, for the purpose stated in its articles of incorporation, a copy of which is hereunto attached and made part of this complaint, and in its constitution, on the 9th day of March, 1908, acquired that tract or parcel of land described below, and erected thereon one frame church building, one shed, and other buildings to the value of $1,200, to which sum the plaintiffs contributed heavily; the above-mentioned tract of land is described as follows, to wit: Beginning at the northwest corner of the southwest quarter of section fifteen (15), in township one hundred thirty (130), north of range sixty-nine (69), west of the fifth principal meridian, thence running south along the west line of said quarter section, twenty-one rods and nine-tenths of a rod (21.9), thence running east twenty-one rods and nine-tenths of a rod (21.9) parallel to the south line of said quarter section; thence running north twenty-one rods and nine-tenths of a rod (21.9) parallel to the west line of said quarter section; thence running west twenty-one rods and nine-tenths of a rod (21.9) to the place of beginning and containing three (3) acres to be the same more or less. That the Missouri Synod financially aided the said Evangelical Lutheran Emmaus Church of Ashley, County of McIntosh, North Dakota, to acquire and erect the above-described property and to maintain the church organization up to the present time in large sums of money, to wit, $1,259, which financial aid was given by the Missouri Synod in consideration of the purpose stated in the articles of incorporation and the stipulations of the constitution of said church, especially in paragraphs 3, 4, 7, 10, and 17.

"That on or about the 27th day of June, 1913, the above-named persons defendant, being a majority, resolved to sever the connection of the Evangelical Lutheran Emmaus Church of Ashley, County of McIntosh, North Dakota, with the Evangelical Lutheran Synod of Iowa and other states, commonly and hereinafter called the Iowa Synod. (The pleader has evidently made a mistake in using the following words in this paragraph: 'With the Evangelical Lutheran Synod of Iowa and other

states.' He no doubt intended to use the following words: 'With the Evangelical Lutheran Synod of Missouri, Ohio, and other states, commonly known as the Missouri Synod'), against which action the plaintiffs then and there protested and have continued to protest. Whereupon the same defendants in August, 1913, formed a separate religious corporation by name German Evangelical Lutheran Emmaus Church of Ashley, McIntosh County, North Dakota, and as such affiliated themselves with the Iowa Synod. Then meeting again as the Evangelical Lutheran Emmaus Church of Ashley, County of McIntosh, North Dakota, the same defendants over the plaintiff's protest, resolved to sell, and since have sold, for the grossly inadequate sum of $1, all the above-described property of the Evangelical Lutheran Emmaus Church of Ashley, County of McIntosh, North Dakota, and as such German Evangelical Lutheran Church of Ashley, the defendants named are now using the above-described property for the purpose of maintaining and promoting religious worship according to the usages of the Iowa Synod, and have by force and threats prevented and continue to prevent the plaintiffs from using said church property for the purposes stated in the articles of incorporation and in the constitution of said Evangelical Lutheran Emmaus Church of Ashley, County of McIntosh, North Dakota.

"That the defendants' acts complained of in paragraph 4 of this complaint and the use of said church property for the purpose of promulgating the Iowa Synod doctrines and worship are in violation of the charter and constitution of the aforesaid Evangelical Lutheran Emmaus Church of Ashley, McIntosh county, North Dakota, and that said acts always have and now do stand disapproved by the Missouri Synod, and all of the said acts of defendants have been against its earnest protest and wishes. That the above-mentioned sale was colorable only, and made fraudulently and in bad faith for the purpose only of defeating the trust placed upon said property by the charter and constitution of said Evangelical Lutheran Emmaus Church of Ashley, County of McIntosh, North Dakota.

"That the Iowa Synod and its pastors do not accept the symbolical books and confessions without reservation as required by paragraphs 3 and 7 of the constitution, but reserve unto itself and its pastors the right to reject and differ with certain doctrines therein, and do so reject and

differ from the following fundamental Evangelical Lutheran Emmaus Church doctrines contained in said confessions and symbolical books; the acteriological doctrines as confessed in articles 2 and 7 of the Formula of Concord; the eschatological doctrines as contained in article 17 of Augsburg Confession and in part 2, article 4, of the Smalcald Articles; the doctrines concerning Sabbath observance as contained in article 28 of the Augsburg Confession, in the smaller and in the larger catechism of Dr. Luther. That the Iowa Synod is not an orthodox Evangelical Lutheran Synod as required by paragraph 7 of the constitution, nor does it maintain and promote religious worship according to the general usages of the Missouri Synod, as required by the charter of the aforesaid Evangelical Lutheran Church of Ashley, County of McIntosh, North Dakota. That the practice of the Iowa Synod concerning admission of members is not the practice required in paragraph 4 of the constitution.

"That the Iowa Synod differs from the Missouri Synod in all these points mentioned in paragraph 6 of this complaint. That the Missouri Synod has determined and for over forty years publicly maintained that the Iowa Synod differed from it in essential particulars regarding doctrines, practice, and church policy as aforesaid, which determination was known to all parties, plaintiffs and defendants in this action, before the Evangelical Lutheran Emmaus Church of Ashley, County of McIntosh, North Dakota. In 1908 incorporation for the purpose stated, affiliated with the Missouri Synod, adopted the constitution with the stipulations referred to in paragraph 3 Synod's financial aid in consideration thereof. That the plaintiffs have been recognized and adjudged by the Missouri Synod as remaining true to the original confession as set forth in paragraph 10 of the attached constitution.

"That the Iowa Synod and the Missouri Synod, as stated aforesaid, are two entirely separate and distinct church organizations, having nothing together in common, each being wholly independent of the other. That no application for relief to the higher authorities of the Synod of which plaintiffs are affiliated, to wit, the Missouri Synod, has been made as a decision, decree, or command from said Missouri Synod, would be nugatory and unenforceable and not binding on the defendants herein for the reasons stated aforesaid.

"Wherefore, plaintiffs pray that the above-mentioned sale and con-

veyance be canceled and set aside, and that the court declare and decree that the defendants other than the Evangelical Lutheran Emmaus Church of Ashley, County of McIntosh, North Dakota, organized in 1908, have no interest of any nature in said church property, that the defendants be restrained from using said church property for the purpose of disseminating the doctrines of the Iowa Synod, and be forever enjoined from doing so, and from interfering with and preventing the plaintiffs and others who have joined him in this action in using the said church property for the purpose intended by the charter and constitution of the Evangelical Lutheran Emmaus Church of Ashley, County of McIntosh, North Dakota. For the court to declare and decree that the persons defendant have seceded from and are no longer members of the Evangelical Lutheran Emmaus Church of Ashley, County of McIntosh, North Dakota, and to grant such other relief and damages as to the court may seem meet and proper."

The demurrer to such complaint is as follows:

"Now appear the defendants, Wilhelm Ley, David Klein, Sr., David Eisenbeis, Mathias Kapp, David Klein, Jr., Johann Goehring, Freidrich Hinez, Christian Goehring, and demur to the complaint of the plaintiff herein, upon the following grounds, all of which appear upon the face of said complaint:

"That the court has no jurisdiction of the subject-matter of the action.

"That there is a defect of parties plaintiff, in this, that the complaint does not show a right in the plaintiff to ask for the relief demanded, nor state that the plaintiffs subscribed to the various creeds set forth in the said complaint as requisite to membership in the church of which they claim to be members, and that said action should be brought by the church of which the plaintiff is a member.

"That there is a defect of parties defendant in this, that the said complaint does not set forth the entire membership of the said congregation, which is necessary to a complete determination of the question involved.

"That there is a further defect of parties plaintiff in that the plaintiff assumes to bring the action on behalf of himself and others, and the others are not named in full, and as to those which are named no authority for the bringing of the action by the plaintiff in their behalf is shown.

"That the complaint fails to state facts sufficient to constitute a cause of action."

The defendants state five grounds in their demurrer upon which they rely. The consideration of these grounds may be grouped by considering them under two heads. Under the first head will be considered the jurisdiction of this court of the subject-matter and the alleged failure of the complaint to state a cause of action. Under the second head may be considered the defects of the parties plaintiff or defendant.

The courts of this state have not been so frequently occupied in considering cases presented to them in which was involved the determination of whether or not a "schism" existed in a religious body. Such cases have not frequently arisen in this state. Such cases, however, seem to have arisen with considerable frequency in other jurisdictions, and there are many decisions of different courts of the various states, many of which assume to pass upon the existence or nonexistence of a "schism" in a religious body or organization, whose religious tenets, beliefs, or doctrinal practices or customs, are presented to such courts for consideration.

We are convinced that where civil courts have assumed to pass upon and decide what are the doctrinal beliefs of any given religious denomination, either as measured by its own constitution or that of any superior body to which it is attached for religious or ecclesiastical purposes, or where such civil court attempts to define and set forth what constitutes a schism when examined in the light of such constitution or ecclesiastical power or regulations, such civil courts are acting wholly without jurisdiction in all such matters, for the reason that all such questions are purely and exclusively of an ecclesiastical nature, which must be determined exclusively by the ecclesiastical authority or judicatories to be found within all religious organizations. We are convinced that in any given case where there is a doctrinal or ecclesiastical question presented, the civil court should not assume jurisdiction until such doctrinal or ecclesiastical questions are disposed of by the proper ecclesiastical authority within such religious organization.

An examination of paragraphs 5, 6, 7, and 8 of the complaint discloses that such paragraphs of such complaint present ecclesiastical and doctrinal questions for our decision.

From the complaint it appears there are two synods,—the Missouri

Synod, which promulgates its religious doctrines and tenets of faith to which the plaintiffs adhere and assert allegiance; the Iowa Synod, to which the defendants adhere, which, according to the complaint, promulgates and teaches doctrines and tenets of faith materially different from that of the Missouri Synod. The plaintiffs claim and allege that the Iowa Synod and its pastors do not accept the symbolical books and confessions without reservation as required by paragraphs 3 and 4 of the constitution, but reserve unto itself and its pastors the right to reject and differ from certain doctrines therein, and do reject and differ from the following fundamental Evangelical Lutheran Emmaus Church doctrines contained in said confessions and symbolical books: The acteriological doctrines as confessed in articles 2 and 11 in the Formula of Concord; the eschatological doctrines as contained in article 17 of the Augsburg Confession, and in part 2, article 4, of the Smalcald Articles; the doctrines concerning Sabbath observance as contained in article 28 of the Augsburg Confession in the smaller and in the large catechism of Dr. Luther. That the Iowa Synod is not an orthodox Evangelical Lutheran Synod as required by paragraph 7 of the constitution, nor does it maintain and promote religious worship according to the general usage of the Missouri Synod, as required by the charter of the aforesaid Evangelical Lutheran Church of Ashley.

We as a civil court are asked to pass upon and determine all of these doctrinal questions. We are asked to determine what doctrines of the Lutheran faith are promulgated by the Iowa Synod and by the Missouri Synod. We are asked to determine the fundamental orthodox doctrines of the Lutheran Church by investigating and examining its symbolical books, its confessions of faith, such as are found in the Augsburg Confessions and portions of the Smalcald Articles, and other fundamental sources of authority upon which such faith rests, and to determine whether or not the defendants have departed from such faith, or which of the two contesting parties to this action is adhering to the orthodox principles of faith. To do this is not within the power of the civil courts, but the passing and deciding upon all such doctrinal questions is exclusively the privilege of some ecclesiastical authority, to be found within such religious denomination, or in some synod or council with which it is associated. Within its own membership such church has many eminent theologians who have devoted their entire life to the

study and analysis of all such doctrinal questions. They have their synods and congregations, and in the one or the other lies ecclesiastical power to determine for themselves as they see best and as meets the approval of their conscience, all these disputed questions of doctrines and tenets of faith, and to them and to their ecclesiastical authority should be left the solution of all such questions. What authority or what right has a civil court to tell any individual when he is digressing from the fundamental principles, authority, or law upon which his faith rests? It amounts to an interference by the civil courts with the right of conscience, and is a long step toward interference with the right of religious liberty and worship.

The 1st Amendment to the Constitution of the United States denies to Congress the power to make any law respecting an establishment of religion, or prohibiting the free exercise thereof. To the same effect is § 4 of article 1 of the Constitution of the state of North Dakota. By each Constitution the civil authorities are denied the right to control or in any manner interfere in purely ecclesiastical matters. So far as the civil authority is concerned, every person within the jurisdiction of the United States may determine for himself all questions which have reference to his relation to his Creator. As was said in the case of Mack v. Kime, 129 Ga. 1, 24 L.R.A.(N.S.) 685, 58 S. E. 184: "No civil authority can coerce him to accept any religious doctrine or teaching or restrain him from associating himself with any class or organization which promulgates religious teachings. Whether he shall adopt any religious views, or, if so, what shall be the character of those views and the persons with whom he shall associate in carrying out the particular views, are all questions addressed to his individual conscience, which no human authority has a right, even in the slightest way, to interfere with, so long as his practices in carrying out his peculiar views are not inconsistent with the peace and good order of society."

The civil authority, both legislative and judicial, are traversing, under our Constitutions, both national and state, in forbidden and prohibited territory when they assume to legislate, or to interpret laws which undertake to define and interpret doctrinal and ecclesiastical questions, so as to be binding upon individuals or interfere with the determination of the individual conscience with reference thereto.

There seems to be two well-defined systems of ecclesiastical authority

or government,—one is the federated, and the other the congregational or independent form. In the former there is a gradation of ecclesiastical government; in the second the right of government is claimed to exist within the congregation. It is claimed in the case at bar that the religious organization in question belongs to the congregational form of government, and that all matters pertaining to church polity and government are to be determined within the congregation. If this be true, it nevertheless remains a fact that there is some tribunal therein where ecclesiastical questions may receive attention. If the congregation be that place, then the ecclesiastical questions must be disposed of there, before a civil tribunal can take charge to enforce property rights which cannot be disposed of properly until there is a disposition of the dispute concerning the doctrinal questions involved. We are of the opinion, however, that the fact that the original congregation was affiliated with the Missouri Synod demonstrates that it recognized some higher ecclesiastical authority to which it was attached for certain purposes. We are of the opinion that among these purposes the very purpose of having a synod is to dispose of just such questions as have arisen in this case. It appears to us, before the original congregation was admitted under the jurisdiction of the Missouri Synod, it was required to submit its constitution to the Missouri Synod and have its approval of such constitution before it was admitted into such synod. One of the purposes for which the synod exists, as we understand the matter, is to afford a tribunal where an opportunity is afforded for disposing of all disputed questions concerning the teachings, doctrines, and beliefs, and is the ecclesiastical authority to determine when members of the congregation are diverging or digressing from the rules of faith, practice, and belief as expressed in the constitution of the congregation, which was required to be approved by the synod before such congregation was admitted under the jurisdiction of such synod. One of two things is certainly true, either such ecclesiastical power is lodged within the congregation or within the synod. In either event there must be a determination upon the doctrinal questions involved, either by the one or the other, before the civil tribunal can undertake to enforce rights of property which depend upon the decision of doctrinal questions or questions of faith, teachings, and practice.

Where the right of property, or the right to possession and use of

property, is involved, and a determination must be made as to which of two contending persons or classes of persons are entitled to such property, or the possession and use thereof, and before such determination can be made by the civil tribunal, a doctrinal question or one relating to the creed or teaching must be also decided, the better rule is for the civil tribunal to require all such questions relating to doctrine and creed to first be decided by some ecclesiastical authority within the religious denomination within which such controversy arises, and, after such decision by the ecclesiastical authority, the decision of the civil court should permit the property in question to go to the person or persons who were awarded the decision in their favor by the church tribunal or ecclesiastical authority.

The most complicated cases which arise are those in which there is a mere difference in opinion, or divergence of views, between the members of a religious organization as to what are the true doctrines and teachings of the organization, or, in other words, a schism. In all such cases surely no civil court is a proper tribunal to which such issue should be presented. The result is different where there is an abandonment of all the teachings and doctrines of the church, and there is an effort on behalf of some of the members of such church or organization to divert the church property to the promulgation of doctrines, creeds, or teachings entirely different and distinct from that for which the organization was formed, thus eliminating all disputes as to doctrine. In such case the civil court might interfere to protect the rights of the remaining members of the original organization from an entire diversion of the property to uses and practices entirely foreign to the purposes for which such organization was brought into existence. But it is not difficult to see in such class of cases no real doctrinal questions could ever arise, and the taking of such property and diverting it to an entirely different use and purpose from that for which it was intended, might be prohibited on the ground that the original organization held the property impressed with an implied trust for the uses and purposes for which such organization was founded, and if dissatisfied members of such organization sought to devote such property, and have it devoted, to the use of religious doctrines or other doctrines entirely and fundamentally different from that of the original organization, then

such diversion of the property from its original purpose may be prohibited, by a civil tribunal.

Another instance where a civil court might afford a remedy without any action having been taken by any ecclesiastical authority is where the deed which transfers the property to the religious organization reserves therein and expressly sets forth the terms of an express trust to which the property described in such deed is to be dedicated and used, and there is a diversion or attempted diversion of the property to a use and for a purpose entirely different from that described in the express trust. In such case the grantor of the trust, or his heirs, but none other, could restrain the diversion of the property to other uses than those expressed in the deed of trust. In such case there are no doctrinal questions or questions of faith, practice, belief, or schism arising. The question in such case is merely restraining the violation of the terms of an express trust, and the civil courts have jurisdiction and can afford direct relief by an adequate remedy.

In our country there is no state church or state religion, hence, there are no ecclesiastical courts. Whatever ecclesiastical tribunals there are, whether they be councils, synods, or other forms of ecclesiastical tribunals, exist wholly and entirely within the various religious denominations and derive whatever authority they possess from such religious denominations, or the respective members thereof, and as such ecclesiastical tribunals, they receive no civil authority or power from our government, either under our Constitution or otherwise. Such ecclesiastical tribunals as a rule exercise the authority conferred upon them by their respective organizations in hearing and disposing of questions of discipline, doctrinal disputes, beliefs or teachings, and schisms, as where there is a dispute among the members of the congregation as to matters of doctrine and belief, and as to which of the parties to such dispute are digressing or wandering from the standard rules and regulations of the organization, and as to which are adhering to the principles and tenets of faith as defined by the constitution, symbolical books, or other sources of authority. Such disputes often involve the further question, which of the two contending parties should be entitled to the church property or other property of the organization. Such tribunals have a right to determine all questions concerning faith, teachings, beliefs, and schisms when such questions are presented to them, and in-

cidentally may conclude which of the two contending parties, in the judgment of the ecclesiastical tribunal, is entitled to the possession of the church property; and while such conclusion is in no way mandatory upon the civil tribunal, the civil tribunal will, as a general rule, permit the property to go the way indicated by the conclusion of the ecclesiastical tribunal; and where suit is brought in the civil court for the purpose of acquiring title to such property, or getting possession thereof, the civil court in its judgment will usually award the possession and use of such property to the prevailing party before the ecclesiastical tribunal.

Where the ecclesiastical questions have been disposed of by the authority having jurisdiction of such matters, and there remains the single question as to which of the two contending factions of a religious corporation is entitled to the property, the same principle may be applied which prevails in the case of any corporation not of a religious character; namely, that a mere majority of the members of a corporation cannot divert the corporate property to uses foreign to the purposes for which the corporation was formed. Applying this principle to a church corporation, where the ownership, control, and possession of property, or either of them, is the issue, such church corporation having been formed for the purpose of teaching or promoting certain well-defined principles or doctrines of religious faith, which are set forth in its articles of incorporation, or its constitution, or fundamental law, all the church property that such corporation acquires, immediately upon being so acquired, becomes impressed with a trust for the purposes of carrying out the intents and purposes of such trust in accordance with the purposes for which such religious corporation was organized, and part of the congregation, even if that part be a majority, cannot devest such property of its trust character and divert it to religious uses diametrically opposed to, or inconsistent with, the religious uses and purposes impressed upon such property at the time the church corporation received the same, against the will, without the consent of, and against the protest of the minority, and it is immaterial how small the minority is.

The manner of the use of the church property, where such use is not in excess of the corporate power, and when such use is in accord with the uses and purposes of the church corporation, and in agreement with the faith, teachings, and principles to propagate and promulgate which such church corporation was organized, may be determined by the

majority of the congregation, especially if such church corporation is operated or governed by the congregational or independent form of church government; but no majority, however large, can devote the church property to the teaching of a faith opposed to, or inconsistent with, that of the church corporation from whose teachings the majority may digress or depart, as against the will and protest of a minority, however small; and this for the reason that when the church corporation received the property, such property was impressed with an implied trust for the benefit of, and to be devoted to, the uses and purposes for which such church corporation was organized.

The proper rule in such case as the one at bar we are fully convinced is for the civil courts to confine their jurisdiction exclusively to the one question of property rights, and to determine such property rights only after all doctrinal questions, or questions relating to faith, practice, and teachings of the particular religious denomination involved, have been disposed of by the ecclesiastical authority vested in such religious organization. The safety of this rule becomes manifest when we consider there are several hundred different sects or religious denominations, some of which are within themselves subdivided into various other organizations or associations professing the same general faith, but disagreeing upon the interpretation to be placed upon different matters relating to their particular faith. It will readily be seen that differences of opinion are likely to arise concerning matters of religious doctrine, and which will cause divisions within the organization, and which very often, as in the case at bar, may also present the question, which of the factions are entitled to the possession of the church property. The result is bound to be that the civil courts, if they assume jurisdiction of such matters, will be called upon most frequently, in order to settle property rights, to first decide doctrinal questions. They will be called upon to decide whether a certain faction in the church is complying with the rules, regulations, and doctrines of faith of the church by measuring the compliance of such dissenting faction with the constitution of such church, and determining whether they believe in the fundamental doctrines of faith of such church as defined by its constitution, symbolical books, or other fundamental sources of its faith. Such surely cannot be the duty of civil courts; and for the courts to assume such function would involve it in endless difficulty, and as we have before stated, it would be in clear

contravention of the Constitution both of the United States and of our state. We are fully convinced that the civil courts should confine themselves purely to the consideration of property rights and the protection and enforcement thereof. Neither do we believe that the civil courts should inquire into, nor determine, the jurisdiction of the ecclesiastical tribunals or authority of whatever nature or kind they may be. The jurisdiction of such ecclesiastical tribunals, especially where it relates to ecclesiastical questions, is a matter to be left exclusively to such tribunals, and with which the civil courts are in no way concerned.

As to the second question involved in the demurrer, under the circumstances of this case as alleged in the complaint, we are of the opinion, there are no defect of parties plaintiff, when the pleadings are given a liberal construction. The two respective associations were incorporated. Necessarily, then, there must have been trustees in each corporation. If it were possible, the proper way of bringing the action would have been for the trustees of the corporation of which the plaintiffs remained members, being the first church corporation organized, to bring action against the other corporation; but from the allegations of the complaint, when liberally construed, it appears that this could not be done, as the following contained in the second paragraph of the complaint shows: "That the Evangelical Lutheran Emmaus Church of Ashley, County of McIntosh, organized in February, 1908, cannot be induced to bring this suit, it being under the control of the parties complained of, as will appear more fully from the facts hereinafter pleaded, and is therefore made a party defendant in order to determine its rights in the subject-matter under dispute."

From such allegation it will appear that the authorities or trustees within such corporation could not be induced to bring the action. In such case any member of the corporation for himself and on behalf of all others similarly situated, who desire to join as plaintiffs, or who desire to participate in the benefits of such litigation, could join as plaintiffs. However, the allegations should be clear that the trustees of the organization to which the plaintiffs belong not only could not be induced to bring the suit, but refused to bring such suit. Such refusal to bring such suit could be shown by the neglect of the trustees to bring such suit within a reasonable time after demand made upon them to bring such suit. We are of the opinion, however, that even though it be

construed there is not any defect of parties plaintiff, there is a defect of parties defendant, for the reason that the suit should have been brought against the corporation organized in 1913, and not against the members of such corporation. Corporations act in their corporate capacity, and are to sue and be sued in their corporate capacity, unless, as in the case of the plaintiffs herein, there is a legal excuse why the action cannot be maintained by the corporation itself. The defendants are all members of the corporation organized in 1913. If the corporation of which they are members were made a party defendant, the members of such corporation would have been bound by the result of the judgment.

The complaint presents doctrinal questions which are in controversy between the parties. The doctrinal questions must be disposed of by some ecclesiastical authority or tribunal before the civil courts should act and render their judgment determining the ownership and possession, or right of possession, of the property. There is no allegation in the complaint that the doctrinal questions in controversy have been submitted to any ecclesiastical tribunal, or any decision had from such tribunal of such doctrinal questions. It appears from the face of the complaint that there has been no such submission of such doctrinal questions to any ecclesiastical tribunal, nor any decision thereon from any ecclesiastical tribunal. This being true, the complaint is fatally defective, and the civil court should not undertake to determine the possession or right of possession of the property in question until all doctrinal questions are disposed of by some ecclesiastical tribunal.

The complaint clearly presents a dispute or controversy between two church associations or organizations relative to doctrinal beliefs, certain religious teachings, and religious beliefs as measured by the constitution of the church association first organized, and the symbolical books and fundamental sources of authority of the faith of the Lutheran Church. The complaint in effect alleges and presents a schism or heresy by the religious society herein subsequently organized as measured by the fundamental authority hereinbefore mentioned, which the first church organization accepted as the foundation of its faith and belief. The demurrer has the effect to admit the existence of the dispute and controversy in reference to the schism, heresy, doctrinal beliefs, etc. It is clear, therefore, that before the property question can

be disposed of, all of such disputed doctrinal questions must also be properly met and disposed of. Truly then, there can be no dispute under this state of facts but that there is presented to the civil court by this complaint all those disputed doctrinal questions for decision, and which must first be decided before any proper disposition can be made of the property involved. We are clear that all such disputes and controversy relating to such ecclesiastical questions should not be decided by the civil courts but by some ecclesiastical authority, which, as we have before stated, exists within all religious denominations in some form or another, and the civil courts should not assume jurisdiction to dispose of the property interest where its determination of the property question carries with it a decision upon the ecclesiastical questions above referred to. The civil courts have jurisdiction to determine property rights between different religious organizations the same as between other persons or parties where there is not presented with the question of property right questions of heresy, schism, or questions of church polity, doctrinal beliefs, etc., upon which must be decided, and upon which right to the property is dependent.

We are fully convinced that the demurrer in this case must be sustained, for the reasons we have heretofore fully set forth.

BIRDZELL, J. (concurring). A thorough study of the complaint, including the constitution and the articles of incorporation of the original Evangelical Lutheran Emmaus Church congregation of Ashley, North Dakota, has served to convince me that the demurrer to the complaint must be sustained. The basic ground upon which this conclusion is based is that the complaint contains no allegations of the ultimate facts upon which the decision of this case upon its merits must be based. The complaint is wholly devoid of allegations as to church polity, except as the constitution affords an indication of its principles of government, and without allegations supplementing the constitution in this particular, and without evidence in support of such allegations, it cannot be determined ultimately whether or not the defendants have exceeded the power vested in them as executive officers and members of the congregation. A plaintiff in an action of this character should not leave open to conjecture the matter of the minority right, upon which the claim to relief is based. The weakness of the complaint becomes manifest when it is examined with reference to its significant omissions.

First: There are no allegations that the congregation of the German Evangelical Lutheran Emmaus Church ever attached itself or sought to attach itself inseparably to the Missouri Synod. It is stated in the articles of incorporation that "this corporation is founded for the purpose of maintaining and promoting religious worship according to the general usages of the German Evangelical Lutheran Synod of Missouri, Ohio, and other state's churches," but this statement in the articles of incorporation falls far short of committing the congregation to an indissoluble union with the particular Synod mentioned. It is generally recognized by the authorities that a church whose form of government is congregational rather than federated or, more properly speaking, centralized, may affiliate with any Synod, conference, or group within the denomination of which it is a constituent element. See Lawson v. Kolbenson, 61 Ill. 405; Duessel v. Proch, 78 Conn. 343, 3 L.R.A. (N.S.) 854, 62 Atl. 152; Schradi v. Dornfeld, 52 Minn. 465, 55 N. W. 49; Wehmer v. Fokenga, 57 Neb. 510, 78 N. W. 28; Heckman v. Mees, 16 Ohio, 583; Fadness v. Braunborg, 73 Wis. 257, 21 N. W. 84. Furthermore the subject-matter of this provision in the articles is more appropriate for a by-law than for the permanent articles. Comp. Laws 1913, § 5009; 34 Cyc. 1117, 1118.

Second: It appears by article 11 of the constitution that the congregation reserved to itself the "supreme power in the external and internal management of its own ecclesiastical and congregational affairs," and provided that no decision or enactment in behalf of the congregation or with reference to a number thereof, as such, should be valid, unless enacted in the name of the congregation or according to the power confessed by the congregation. As a limitation upon the powers of the congregation in these matters, it was stated that *"not even the congregation* shall be empowered to enact or decide anything contrary to the word of God and the symbols of the Lutheran Church, and any such enactment or decision shall be null and void." It is apparent from this article that it was the intention of the congregation that it should exercise large powers of control over its own affairs, both temporal and ecclesiastical, and that it should have power to arrange its external ecclesiastical connections. It is also apparent that the congregation was regarded as the supreme governing authority in such matters. The article is en-

titled "Church Government," and the sentence which limits the power of the congregation begins with the significant expression, *"but not even* the congregation shall be empowered," etc. The manifest implication of this language is that there is no power in church government above the congregation. But as to this I express no opinion. The strength of the language quoted only points to the necessity of allegations of church polity. The limitation upon the powers of the congregation in these particulars does not refer in any way to the Missouri Synod or to any other synod. Apparently, it only limits the congregation to decisions which shall be within the word of God and the symbols of the Lutheran Church. I do not understand that any particular synod professes to include the whole of the Lutheran Church. In calling attention to these matters, it is not meant to indicate that this paragraph of the constitution is necessarily to be taken as the sole expression of church polity, but in view of the expressions referred to, which are certainly exceedingly broad, and in view of the further fact that the authorities which have had occasion to deal with controversies arising within the Lutheran Church have regarded the church as adhering to the congregational form of government, the necessity of allegations showing wherein the congregation has transgressed its power becomes apparent. It is not alleged anywhere in the complaint that the congregation has decided any question contrary to the word of God and the symbols of the Lutheran Church.

Third: It is not alleged in the complaint that the theological questions giving rise to the differences between the plaintiffs and the defendants have been determined by any ecclesiastical authority whatsoever. All that is alleged in this connection is that the plaintiffs have been recognized and adjudged by the Missouri Synod as remaining true to the original confession as set forth in paragraph 10 of the constitution. This does not amount to an allegation that the Missouri Synod is the properly and regularly constituted church tribunal for the decision of such questions; that a controversy within its jurisdiction was submitted to it, and that such controversy was decided adversely to the defendants and in favor of the plaintiffs. Before the decision of the Synod can be given any weight, the jurisdictional facts and a determination of the cause must be alleged in the complaint.

Without allegations of fact in the complaint, touching the matters

above referred to (and the plaintiffs are required to prove only the allegations in their complaint in order to obtain the relief sought from the defendants), it is apparent that the civil courts will be driven to the necessity of determining purely ecclesiastical questions. The law does not contemplate that courts shall be driven to this necessity where there is any ecclesiastical judicatory within the church for the decision of such questions. In order to avoid making theological questions of law or fact for the determination of civil courts, it has become a well-established principle, applicable to cases of this character, that where the appropriate church judicatory has determined the ecclesiastical questions involved, the courts are prone to follow such determination. See note to Mack v. Kime, 24 L.R.A.(N.S.) 675, at page 699. If parties can come into court, in the first instance, under allegations alleging heresy as the basis for the determination of property rights, and ask to have the question of the alleged heresy determined for the first time in the civil courts, manifestly there would be no longer any necessity for first determining such questions in the appropriate church tribunals; and if a complaint which charges heresy alone as a basis for relief in matters of property rights be held sufficient as against a demurrer, there is no longer anything to prevent purely religious questions from becoming original matters of decision in the civil courts where an allegation of heresy by one party is met with a general denial by the other. According to my understanding of the law, it is a prerequisite to the bringing of an action respecting the right to the use of the property of a church congregation that there shall first have been a determination by some appropriate authority within the church of the ecclesiastical or doctrinal questions at issue between the contending factions; and a complaint which fails to allege the existence of such a tribunal, the submission thereto of the questions involved, and the decision, is fatally defective. See 34 Cyc. 1185, 1186; Wehmer v. Fokenga, 57 Neb. 510, 78 N. W. 28.

It has been suggested that some special significance attaches to the fact that the Articles of Incorporation of the Evangelical Lutheran Emmaus Church of Ashley stated that the purpose for which the corporation was organized was to maintain and promote worship according to the doctrines and usages of the Missouri, Ohio, and other state's churches. But as previously shown in this opinion, the statement of matter, appropri-

ate only for statement in a by-law, adds nothing to the force of the charter. See 34 Cyc. 1118. Section 5009, Comp. Laws 1913, expressly provides what the by-laws of a religious corporation may contain. Paragraph 5 of this section states that such corporations may, in their by-laws, provide for "other regulations not repugnant to the law of the state and consonant with the objects of the corporation." Section 4536, Comp. Laws 1913, which is a special section dealing with the matter of by-laws for religious corporations, shows clearly that the legislature contemplated that the officers of a religious corporation should at all times perform their functions "in such manner as may be in conformity with or provided by the general laws, canons, rules, regulations, usages, or discipline of the religious organization to which the members of such corporation are attached." These statutes only serve to emphasize the indispensability of the allegations that are lacking in the instant case. There is nowhere any allegation that the officers of the corporation have not acted in conformity with the general laws, canons, rules, regulations, usages, or discipline of the religious organization to which the members of the corporation are attached. A careful reading of the statutes authorizing the formation of religious corporations convinces me that the legislature has not sought to make of the religious corporation an instrument for the perpetuation of religious dogmas or beliefs, save as this result may be attained in conformity with the usages and discipline of particular religious organizations. The corporation is merely an instrumentality which the association may adopt for the purposes of convenience in the handling of its affairs, and the changing of the corporate name or the obtaining of a second charter by the same society is not a fact of controlling significance in considering the question of the identity of the congregation which at the particular time is using the property in furtherance of its religious objects.

It is also sought to attach special importance to the fact that a substantial money contribution was made by the Missouri Synod. But it is generally held that this fact is of no special significance in determining the question of identity. See First Baptist Church v. Fort, 93 Tex. 215, 49 L.R.A. 617, 58 S. W. 892.

The case of Watson v. Jones, 13 Wall. 679, 20 L. ed. 666, is distinctly not an authority for an implied trust in such a case as the one at bar. The extremely able and oft-cited opinion of Mr. Justice Miller in that

case recognizes that there may be a religious trust of property, which is devoted to some specific form of religious doctrine or belief "by the deed or will of the donor, or other instrument by which the property is held." But it also recognizes that where property is held by a religious congregation "either by way of purchase or donation, with no other specific trust attached to it at the hands of the church than that it is for the use of that congregation as a religious society,"—there being no trust imposed,—"the court will not imply one for the purpose of expelling from its use those who, by regular succession and order, constitute the church, because they may have changed in some respects their views of religious truth." Ibid. Where this situation exists, as is apparently the case here, the question is wholly one of identity, to be resolved according to the usages of the particular religious organization.

It has also been suggested that the complaint alleges a violation of an express trust, but it is quite obvious that the complaint contains no allegations from which it can be inferred that any express trust was created. It is not alleged that there was any trust created by the instrument of conveyance to the church, nor is any trust to be implied from the allegations relating to the original organization of the society. See Watson v. Jones, supra.

The crucial question is the question of identity of the defendants as the members of the religious society. If they constitute the society which is engaged in carrying out the purposes of the original organization, they should not be disturbed in their use of the property to that end. As heretofore indicated, it is difficult to see how this question of identity can be determined according to the general laws, canons, rules, regulations, usages, and discipline of the religious denomination, in the absence of allegations in the complaint showing what these usages are, and the extent to which they have been relied upon and appealed to by the plaintiff.

ROBINSON, J. As the complaint shows, several years ago at Ashley, North Dakota, the four plaintiffs and thirteen defendants were united as brethren of a Lutheran church at Ashley, North Dakota. They erected a church building worth $1,200 and organized in accordance with the Missouri Synod. Later the defendants reorganized in accordance with the Iowa Lutheran Synod and held the church property and refused to permit worship according to the ritual of the Missouri Synod.

Under the statute any three persons may form a religious corporation by filing with the secretary of state articles of incorporation stating the name of the corporation, its location, its duration, the names of its directors, and that it is formed for religious purposes. The articles may not adopt or include any religious creed. That and many other things may be included in the by-laws as provided by statute. The members of the corporation have control of its affairs and property, and they may at their pleasure change both the articles of incorporation and the by-laws. The property and polity of a religious corporation is under the control of the majority, and not the minority, of its members. Manifestly the four members cannot override the determination of the thirteen members. Hence, the complaint does not state a cause of action.

Demurrer sustained.

CHRISTIANSON, J. (dissenting). I fully agree with my associates that civil courts have no ecclesiastical jurisdiction and should not take cognizance of a schism or division within a religious society, unless some property or civil right is involved. I also agree that "so long as the effects of the schism or division are confined to spiritual, religious, ecclesiastical, or theological matters, it furnishes no basis for interference by the civil courts at all, however vitally it may affect the interests of the society as an ecclesiastical or spiritual body." I also believe that where "a religious organization has, under its form of government, a tribunal constituted with jurisdiction to decide differences between its members as to the creed, teaching, or doctrine, the civil courts should not undertake to review or revise the judgment in reference to such matters." And that such decision when properly made ought to be accepted by the civil courts as conclusive upon the question of creed, doctrine, or teaching, regardless of any opinion that the judges of civil courts may entertain as to the correctness of the determination.

The courts, however, recognize that rights of property or of contract of religious organizations are under the protection of the law, and the actions of their members subject to its restraints. They also recognize the principle that property dedicated by way of trust to the purpose of sustaining and propagating definite religious doctrines is held in trust

for and must be utilized for the purpose to which it has been dedicated. Watson v. Jones, 13 Wall. 679, 20 L. ed. 666.

While this does not mean that when the majority members of a religious organization adopt certain changes in doctrine or religious views they thereby become seceders and lose their identity as, or rights in, such organization, even a majority may not (where the members have unalterably bound the organization and dedicated church property to the propagation of certain definite religious doctrines) wholly abandon the tenets so adopted, or abandon the organization itself without losing their interest in the church property. There is a radical difference between an abandonment of the fundamental tenets of a church and a mere difference of opinion among the members of an organization as to what are its true doctrines and teachings. Mack v. Klime, 129 Ga. 1, 24 L.R.A. (N.S.) 688, 58 S. E. 184.

In this state, religious organizations may be incorporated in the manner provided for formation of corporations in general. Comp. Laws 1913, § 5005. Such corporations are placed on the same general basis as corporations organized for educational, benevolent, charitable, or scientific purposes. § 5005, supra.

In the instant case we are dealing with a corporation formed for certain definite purposes, and whose entire property has been transferred, over the protest of minority members, to another corporation for a mere nominal consideration.

The complaint under consideration alleges that in 1908 the plaintiff and defendants associated themselves together and organized a religious corporation under the laws of this state, under the name of the Evangelical Lutheran Emmaus Church of Ashley, the purpose of which, as stated in the articles *of corporation, was to maintain and promote religious worship according to the usages of the German Evangelical Lutheran Synod of Missouri.* That said corporation affiliated itself with the German Evangelical Lutheran Synod of Missouri, and adopted a constitution and confession of faith prescribed by, and required of the the churches affiliated with, said Synod. That in said constitution and confession it as specifically agreed to be beyond the power of the congregation to alter the confession of faith then adopted. That said constitution provided that "if at any time . . . a separation should take place on account of doctrines, the property of the congregation and all the

benefits therewith connected shall remain with those members who shall adhere to the confession set forth (in ¶ 3 of the constitution) and who pledge their ministers and teachers to the same." That this religious corporation acquired certain church property of the value of $1,200; that such property had been purchased almost wholly with moneys contributed by the Missouri Synod for such purpose, and was being devoted to the propagation of certain given doctrines espoused by such synod and set forth in the confession of the local church.

That in 1913 the defendants organized a new and separate religious corporation under the name of *German* Evangelical Lutheran Emmaus Church of Ashley, and as such affiliated themselves with the Iowa Synod; that the Iowa Synod rejects many of the doctrines adopted as fundamental and unalterable in the confession of faith of the Evangelical Lutheran Emmaus Church of Ashley. That the plaintiff is not a member of this latter corporation. That the defendants as members of the Evangelical Lutheran Emmaus Church of Ashley voted to sell and did sell all of the church property of the Evangelical Lutheran Emmaus Church of Ashley to the *German* Evangelical Lutheran Church of Ashley for the grossly inadequate sum of $1.

While there is an implied contract of association among the members of all corporations that a majority may bind the whole body as to all transactions within the scope of the corporate powers, it is of the essence of the same implied contract (even as applied to business corporations) that the corporate powers shall be exercised only to accomplish the objects for which they were called into existence, and that the majority does not control those powers to prevent or destroy the original purposes of the corporation. Thomp. Corp. § 4496.

It is a well-settled principle of law that persons interested in two corporations cannot use their powers as directors or majority stockholders in one to obtain some personal or pecuniary interest for the other corporation at the expense of the minority members of the first corporation. In such cases, where a conflict between interest and duty arises, the courts of equity will scrutinize the transaction with care, and, in case fraud or breach of trust appears, the transaction will be set aside. See Thomp. Corp. §§ 4507, 4512; Cook, Corp. 5th ed. §§ 670, 662.

It should be remembered that the questions on this appeal arise on a demurrer to the complaint. The demurrer admits all facts well pleaded.

The complaint must be liberally construed with a view to substantial justice between the parties. Comp. Laws 1913, § 7458. It seems to me that the facts stated in the complaint, and admitted by the demurrer, are sufficient to require a court to entertain jurisdiction, and entitle plaintiff to some appropriate relief.

BRUCE, Ch. J. (dissenting). I am unable to concur in the majority opinions in the above-entitled case.

I am willing to concede, in fact, I have actually stated in my dissenting opinion in the case of Gudmundson v. Thingvalla Lutheran Church, 29 N. D. 291, 150 N. W. 750, that a civil court can only assume jurisdiction in church matters where property rights are involved. I am also willing to concede that the courts should not attempt to settle theological and ecclesiastical disputes except where it is absolutely necessary, and that whenever such a question has been submitted to and passed upon by a church tribunal the finding of that tribunal should be conclusive upon the courts. I am also willing to concede, as in the case of the so-called Frederickson resolution in the Gudmundson suit, that even though the particular dispute has not been passed upon by the church authorities, a prior ruling on a similar theological or ecclesiastical question should be considered as highly persuasive authority and be followed by the courts.

I also realize that many cases hold that, where the organization of a church is purely congregational and no particular faith or creed is defined in its constitution or deed of trust and no superior body controls, what are legitimate and what are not legitimate church usages, and what doctrines should be taught, is for the majority to determine.

I am, however, firmly of the opinion that when, as in the case at bar, the plaintiff seeks to have a conveyance of church property set aside and the interests of an allegedly seceding faction forfeited therein, property rights are involved and a civil court has jurisdiction of the controversy. I am also of the opinion that when, as in the case at bar, the complaint clearly alleges a departure from the original faith on which membership in the corporation is dependent, and the defendants demur to that complaint, the demurrer admits the facts properly pleaded in the complaint, including the departure from the faith; and that there is, therefore, on such a demurrer, no theological question to decide.

I am also of the opinion that when a complaint, as does the one in the case at bar, clearly alleges the adoption of a church constitution, which recognizes a particular faith, and which provides that in case of a schism those who adhere to that faith shall hold the property, and also alleges the joining with a synod of the same faith, and gifts and contributions to the church both by the synod and the members of the congregation on the strength of this fact of dedication and belief, and that this synod has passed upon the theological question involved though not in a direct controversy between the parties nor in the exercise of appellate jurisdiction over them, and a demurrer is filed which necessarily admits the facts which are properly pleaded, the departure from the faith and the violation of the provisions of the constitution are conceded, and there is again no theological question for the courts to decide.

Under such a state of facts I can see no difference between a case where the church property is given to the congregation by some third party and dedicated by such third party by way of trust to the congregation for the furtherance of certain religious doctrines, and one, as in the case at bar, where the organizers of the church and the seceders themselves dedicate the property to that use by means of a written constitution.

I am of the opinion that the order of the district judge should be affirmed, and that the demurrer was properly overruled.

ALBERT PETERSON, Appellant, v. KARL V. SWANSON and Helen Morton, Respondents.

(167 N. W. 389.)

Pleading — complaint — basis of action — cause of — facts only stated — demurrer — office of — trial of case — objections first raised on — not looked upon with favor — legal rights and remedies.

The basis of every action is a complaint, which should state in a plain and concise manner the facts constituting a cause of action. When a complaint wholly fails to state a cause of action, the proper practice is to demur to it, so that before trial the court may pass upon the sufficiency of the complaint

and settle the issues to be tried. Objections to a pleading merit no favor when first made on the trial of the case.

The law does not favor a trip-up practice or the denial of legal rights and remedies because of defects in a complaint which may be amended.

Opinion filed April 6, 1918.

Appeal from the District Court of Traill County, Honorable *A. T. Cole,* Judge.

Plaintiffs appeal.

Reversed and remanded.

Hjort & Acker (*M. A. Brattland,* of counsel), for appellant.

A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. Such treatment only follows when it clearly appears that he is entitled to no relief of any kind. Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 425; Peters v. Foss, 20 Cal. 587; People v. Loewy, 29 Cal. 264.

Where a complaint is assailed for the first time by a general objection upon the trial, every presumption will be indulged in favor of the pleading. Morris v. Occident Elev. Co. 33 N. D. 447; Guild v. More, 32 N. D. 451.

If this were not a case properly triable in a court of equity, such objection was waived by respondent because not timely made.

"An action may not properly be brought in a court of equity and yet its judgment therein is not necessarily null and void, unless objection be made by the defendant at the commencement of the action." Cummings v. Mayor etc. 11 Paige, 596; Bank of Utica v. Mersereau, 3 Barb. Ch. 528; Creely v. Brick Co. 103 Mass. 514.

The amendments to the complaint as offered by appellant were reasonable and in accord with the general rule. They did not inject new causes, nor was there anything to cause surprise on the part of respondent, and under that discretion vested in the trial court such amendments should have been allowed, and their disallowance was an abuse of discretion. Webb v. Wegley, 19 N. D. 610; Holler v. Amodt, 31 N. D. 19 and cases cited; Comp. Laws 1913, § 7482.

Where one not having the right redeems property from a chattel mortgage sale, it is conclusively presumed that he acted as agent and

trustee for the person lawfully entitled to exercise such right. An involuntary trust comes into existence under such circumstances. Perry, Tr. & Trustees, 181; Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; Gates v. Kelley, 15 N. D. 639, 110 N. W. 770; Yerkes v. Crum, 2 N. D. 77, 49 N. W. 422; Henry v. Raiman, 25 Pa. 354, 64 Am Dec. 703; Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065; Downard v. Hadley, 116 Ind. 131, 18 N. E. 457; Comp. Laws 1913, § 2673; Bowler v. First Nat. Bank, 21 S. D. 449, 130 Am. St. Rep. 725; Centerville v. Turner County, 25 S. D. 300, 126 N. W. 605; Barr v. O'Donald, 76 Cal. 469; 39 Cyc. 172; Currie v. Look, 14 N. D. 482; Prondzinski v. Garbutt, 10 N. D. 300; McNew v. Brown, 42 Mo. 189; Henry v. Brown, 8 N. J. Eq. 245; Morris v. Vyse, 145 Mich. 253; Bragg v. Hartney, 92 Ark. 55; Barnes v. Thuet, 116 Iowa, 359; Magniac v. Thomson, 15 How. 281; Mathews v. Ins. Co. 75 Ala. 85.

But there was an express agreement between the parties as set out in paragraph 5 of the complaint, and therefore when such so-called redemption was made, a voluntary trust was brought into existence. Comp. Laws 1913, § 6272; Paine v. Paine, 12 L.R.A.(N.S.) 547.

All other objections having been waived, the objection to the complaint here made should have been taken by demurrer, so as to enable the court below to determine the question of its sufficiency and to settle the issues to be tried. Code Civ. Proc. art. 2, chap. 8; Comp. Laws 1913, §§ 7442, 7447; Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057; Norton v. Colegrove, 41 Mich. 544, 3 N. W. 150; Barton v. Grey, 48 Mich. 164, 12 N. W. 30; Whittlesey v. Delancy, 73 N. Y. 571; Lounsbury v. Purdy, 18 N. Y. 515.

The right of redemption in plaintiff is clearly pleaded; the want of right or authority to redeem in defendant is also set forth. Therefore the interest of plaintiff is sufficiently pleaded. 1 Pom. Eq. Jur. 402; Baumen v. Bean (Mich.) 23 N. W. 451; Lamb v. Jaffery, 41 Mich. 719, 3 N. W. 204; Burke v. Wilber, 42 Mich. 327, 3 N. W. 861; Swenson v. Swenson (S. D.) 97 N. W. 845; Sherwood v. Sioux Falls (S. D.) 73 N. W. 913; Jenkinson v. Vermillion, 3 S. D. 238, 52 N. W. 1066; Anderson v. Alseth, 6 S. D. 566, 62 N. W. 435; Whitbeck v. Sees (S. D.) 73 N. W. 915; Stutsman County v. Mansfield, 5 Dak. 78, 37 N. W. 304.

The American state courts do not derive their equitable powers as

they do their common-law functions, as a part of the entire common-law system of jurisprudence which we have inherited from England, and which is assumed to exist even independently of legislation.

"Their equitable jurisdiction is wholly a creature of statute, and is measured in each state by the extent and limitations of the statutory authority." 1 Pom. Eq. Jur. 282.

Under our statute there is distinction between action at law and suits in equity. 1 Pom. Eq. Jur. 375; McDonald v. O'Neil, 113 Mass. 92; Mitchel v. Read, 61 N. Y. 123, 19 Am. Rep. 252; Moore v. Crawford, 130 U. S. 122.

The facts here urged, however, address themselves peculiarly and exclusively to a court of equity and invoke the power of that court to extend complete relief. Patterson Land Co. v. Lynn, 27 N. D. 391; Combs v. Little (N. J.) 40 Am. Dec. 207; Laing v. McKey, 13 Mich. 124; Beattey v. Brumet, 94 Ind. 76; Jasper v. Hazen, 1 N. D. 750; Wingate v. Ferris, 50 Cal. 105.

It is a general principle that where confidence is reposed and that confidence is abused, courts of equity will grant relief. 10 R. C. L. §§ 68, 100, pp. 326, 350; Hiberger v. Stiffler, 83 Am. Dec. 593; Pom. Eq. Jur. § 1053; Comp. Laws 1913, § 6280.

Theo. Kaldor, for respondent.

"It is true that distinctions between actions, so far as the form of action is concerned, have been abolished, but whether the facts so alleged constitute any cause of action at all is to be determined by the substantive law, and this law has not been changed." Black v. M. & N. Elev. Co. 7 N. D. 124, 73 N. W. 90; Byrne v. McKeachie, 29 S. D. 476, 137 N. W. 343.

"In alleging fraud it is well settled, both at law and in equity, that the mere general averment, without setting out the facts upon which the charge is predicated, is insufficient. These facts should be set forth clearly and concisely, so as to apprise the opposite party of what he is called upon to answer." 9 Enc. Pl. & Pr. p. 686; Bothomley v. Squires, 1 Jur. N. S. 694; Cohn v. Goldman, 76 N. Y. 284; Hoon v. Hoon, 126 Iowa, 391, 102 N. W. 105; Estee, Pl. 4th ed. §§ 2748, 2749, 2752; Kent v. Snyder, 30 Cal. 666; Ockendon v. Barnes, 43 Iowa, 615; Magniac v. Thomson, 15 How. 281; Estep v. Armstrong,

69 Cal. 536; Rolfes v. Russell, 5 Or. 400; Lawrence v. Montgomery, 37 Cal. 183.

"A fraudulent intent should be averred in pleading a charge of fraud, and the facts relied upon as constituting the fraud, must be pleaded. Estee, Pl. 4th ed. §§ 2752, 2886; Case v. Codding, 38 Cal. 193; 2 Story, Eq. Jur. § 1201; 39 Cyc. 112; Taylor v. Boardman, 24 Mich. 287; Taylor v. Klamp, 51 Neb. 17, 70 N. W. 525; Nagengast v. Aly, 93 Md. 522, 49 Atl. 33.

A material fact, not alleged, is presumed not to exist. Stillings v. Van Allstine (Neb.) 89 N. W. 756; Cooke v. N. P. R. Co. 22 N. D. 266, 133 N. W. 303.

There is no voluntary trust shown. There is no allegation that plaintiff requested either of the defendants to redeem the property from the sale, or that there was any such agreement existing between them. Churchill v. Howe (Mich.) 146 N. W. 623; Jasper v. Hazen, 1 N. D. 750, 51 N. W. 584.

The complaint shows that the sale occurred in 1914 and this suit was not instituted for fifteen months thereafter.

The plaintiff is guilty of such laches as will bar a recovery here. McDermid v. McGregor, 21 Minn. 111; Allen v. Allen, 47 Mich. 74; McGrew v. Foster, 113 Pa. 642.

No reasons are assigned in the complaint for such delay. Sterns v. Page, 1 Story, 204; Landsdalle v. Smith, 106 U. S. 391; Walker v. Ray, 111 Ill. 315; Hollinger v. Reeme, 138 Ind. 363; Birdsall v. Johnson, 44 Mich. 134; Re Holden, 37 Wis. 98; Haskin v. Fisher, 125 U. S. 217.

"The objection of laches may be made by the parties at the hearing or may be raised or the laches taken notice of by the court on its own motion." Lakin v. Sierra Gold Min. Co. 25 Fed. 337; Coon v. Seymour, 71 Wis. 340; Espy v. Comer, 76 Ala. 501; Haskell v. Bialey, 22 Conn. 574; Goodson v. Goodson, 140 Mo. 206; Smith v. Thomson, 7 Gratt. 112; Muffett Co. v. Peoria Co. 83 Hun, 73; Raymonds v. Flavel, 27 Or. 219.

There is no consideration shown for the alleged oral agreement. No consideration is presumed, except when a written instrument is pleaded and relied upon. Nothing of this sort appears here. 4 Enc. Pl. & Pr. p. 928; Comp. Laws 1913, §§ 5837, 5851.

The reason assigned by the trial court for its decision is immaterial. It is only important that the court's ruling is correct. Comp. Laws 1913, § 7447, 8 Enc. Pl. & Pr. 198.

Robinson, J. When this case was called for trial and a witness sworn, the court sustained an objection to any evidence on the ground that the complaint does not state a cause of action. Motions to amend were objected to and denied, and judgment was given that the action be dismissed, without prejudice to an action at law for damages.

In this state the distinction between actions at law and suits in equity are abolished. There is but one form of action for the enforcement of private rights and the redress of private wrongs, which is named a civil action. There is no form of pleading, and yet the basis of every action is a complaint, which should state in a plain and concise manner the facts constituting a cause of action.

When a complaint wholly fails to state a cause of action, the proper practice is to demur to it, so that before trial the court may pass upon the sufficiency of the complaint and settle the issues to be tried. Objections to a pleading merit no favor when first made on the trial of the case.

In this case the complaint is not well framed, and yet it shadows forth a cause of action against defendant Swanson. It gives this impression, that on November 21, 1912, the plaintiff and John O. Melberg owned a threshing outfit worth $2,000, on which they made a chattel mortgage to Ole Larson to secure $265, and interest. Ole Larson transferred the mortgage to H. D. Reed, and the mortgagor, John Melberg, transferred his interest in the property to defendant Swanson, who took the place of the mortgagor, so that he and the plaintiff became common owners of said mortgaged property. That on October 31, 1914, under a power of sale in said mortgage, H. D. Reed caused the same to be foreclosed by a sale of the property to himself for the sum of $537.50. And that within five days after the sale, defendant Swanson, claiming under a transfer by said mortgagor, redeemed the property from the sale by paying to H. D. Reed the sum of $537.50. That under such redemption, which was merely a payment of the mortgage, defendant Swanson now wrongfully claims to own said property, and denies that the plaintiff has any title or interest therein. That for

nearly two years prior to the sale Swanson had used the property to do threshing for Helen Morton and for others, and from such use he had received large sums of money, amounting to the sum of $1,500, or more, the amount being unknown to the plaintiff; and that from the money so received he promised and agreed with the plaintiff to pay said mortgage debt, and to protect the property against any foreclosure, and to account for and pay to the plaintiff his share of said money, —all of which he has failed to do. Such is the general outline of the cause of action as shadowed forth by the complaint. There is no apparent reason why Helen Morton should be a party to this action. The law does not favor a trip-up practice or the denial of legal rights and remedies because of defects in a complaint which may be amended. Hence, it is ordered that the judgment be reversed, with costs of the lower court to abide the event of the suit, and the case remanded for trial on an amended complaint to be served within thirty days after the filing of the remittitur. Appellant will recover costs on this appeal.

Reversed and remanded.

MATT FROELICH, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Appellant.

(167 N. W. 366.)

Personal injuries — damages — suit to recover — default in making answer — through mistake or inadvertence — application for relief from such default — promptly made — granted on condition — payment of terms — amount excessive — abuse of discretion.

1. Where the defendant, the Northern Pacific Railway Company, was sued for damages by the plaintiff for personal injuries and the defendant inadvertently failed to serve its answer within the thirty days' period, and the defendant, upon discovering its failure to answer, without delay applies to the court for relief against such default, and such relief is granted on the condition that defendant pay $250 to plaintiff's attorneys as terms or costs before the court would order the relief asked for by the defendant, it is *held* that the imposing of such terms by the court was abuse of discretion.

District court — special terms — may call — jury may be drawn for such terms — manner of drawing — same as for general term — litigant — ordered to pay costs of — to obtain relief from default — order void.

2. A district court may, when in its judgment it is deemed advisable or necessary, call a special term and may also order that a jury be drawn for such special term. Where the jury is ordered drawn for a special term, it must be drawn in like manner as at a general term, and the cost of the jury must be paid in like manner as at a general term. An order made that a litigant pay the costs of calling a jury at a special term as a condition precedent to the granting of relief to the litigant from his default is an absolutely void order.

Opinion filed February 9, 1918. Rehearing denied April 5, 1918.

Appeal from the District Court of Morton County, *J. M. Hanley*, J. Reversed.

Watson, Young, & Conmy, for appellant.

An appearance in a pending cause for the purpose of participating in the taking of depositions to be used upon the trial thereof is to all intents and purposes a general appearance, and entitles the party so appearing to the statutory notice of any and all further proceedings in the cause, and an order issued without such notice, but wholly upon an *ex parte* application, is void. Comp. Laws 1913, § 7600, ¶ 2; Kelsey v. Covert, 6 Abb. Pr. 336, 15 How. Pr. 92; Saltus v. Kip, 12 How. Pr. 342; Rickards v. Swetze, 3 How. Pr. 413; Martinson v. Marzolf, 103 N. W. 939; Naderhoff v. Geo. Benz & Sons, 141 N. W. 501.

In an application for relief from a default in making timely answer, where the court grants such relief only upon condition that the party pay the costs of summoning a special jury to assess the damages for the plaintiff, such order is void for abuse of discretion. State v. Boucher, 8 N. D. 277.

The court did not exercise a sound discretion in making its order that appellant also pay to respondent's counsel the sum of $250 as terms for relief from appellant's default in making answer, and for such abuse of discretion the order is void. The award of such an amount is not just. Comp. Laws 1913, § 7804.

Jacobsen & Murray, for respondent.

This appeal is not from a part of the order of which complaint is made, but while receiving and adopting of the benefits of it, an appeal

is taken from the whole order, and should be dismissed. State ex rel. Heffron v. Bleth, 21 N. D. 27.

The notice of appeal and the undertaking are separate instruments, and defects in one cannot be cured by the other.

The form or substance of the notice of appeal is not controlled by the specifications of error. Comp. Laws 1913, §§ 7821–7824; State ex rel. Heffron v. Bleth, supra; 2 C. J. §§ 535, 552, 664, 679; McDowell v. McDowell, 27 N. D. 577; Silvius v. Brunsvold (S. D.) 142 N. W. 944; Wishek v. Hammond (N. D.) 84 N. W. 587; Clearview Park Improv. Co. v. Detroit & L. St. C. R. Co. (Mich.) 129 N. W. 353; Reiger v. Turley (Iowa,) 131 N. W. 866; Pithan v. Wangler (S. D.) 136 N. W. 1084; Walnut Irr. Dist. v. Burke (Cal.) 110 Pac. 517.

No notice of assessment of damages is required to be given. The application for such assessment and the assessment may be *ex parte;* but if a party has appeared, he is entitled to notice of application for judgment on the assessment. If he has not appeared, no notice at all is required. Comp. Laws 1913, § 7600, subd. 2.

In jurisdictions like ours, the assessment of damages precedes the application for judgment. 23 Cyc. 754–765.

There is no such thing in this state as an interlocutory judgment. Hibernia Savings & L. Soc. v. Matthai (Cal.) 48 Pac. 370.

Appearing before an officer and taking part in the taking or depositions of witnesses is not a voluntary appearance, and does not constitute an appearance in the action. Bentz v. Eubanks (Kan.) 4 Pac. 269.

The court has power to impose reasonable terms as a condition to granting relief from a default. 23 Cyc. 971.

GRACE, J. Appeal from the district court of Morton county, J. M. Hanley, Judge.

This is an appeal from an order of the court requiring the defendant and appellant to pay attorneys for the plaintiff the sum of $250 two days prior to January 18, 1917. The action is one brought by the plaintiff against the defendant to recover $20,000 for personal injuries alleged to have been received by the plaintiff while an employee of the defendant in its roundhouse at Mandan, North Dakota. The injuries are alleged to have occurred by reason of the negligence of the

defendant in keeping and maintaining a certain dangerous machinery, —a circular saw blade, called a sawing machine, which plaintiff was required to operate. The complaint fully sets forth the negligence of the defendant with reference to keeping and maintaining the aforesaid alleged dangerous machinery which the plaintiff was required to operate. The defendant's answer is a general denial, and as a further defense the answer alleges that it was the duty of plaintiff to operate the saw in the car shop, and alleges further that plaintiff at the time of the injury was using the same for his own personal benefit and contrary to orders. The defendant further by way of defense alleges contributory negligence on the part of the defendant.

The summons and complaint were personally served upon the defendant in Hettinger county, North Dakota, on the 18th day of September, 1916, by the sheriff of said county. At the same time the summons and complaint were served upon the agent of the defendant at Mott, North Dakota, there was also served upon the defendant by service upon its same agent, a notice to take depositions in the action on September 22, 1916. The defendant through oversight and inadvertence, which it fully explains by affidavits on its behalf, did not answer the complaint of the plaintiff within thirty days. The plaintiff applied to the court for an order of default and submitting damages to a jury. The order of default was made by the court on the 23d day of October, 1916. The order provided that the defendant having failed to give any notice of appearance and the plaintiff having made application to the court for a default judgment and for an assessment of damages, and having consented that the matter be submitted to a jury of not more than four persons qualified to act as jurors, and the plaintiff having guaranteed the costs of calling a special jury of four persons, the court ordered that a special term of the district court for the county of Morton be called for the 26th day of October, 1916, at 2 o'clock P. M., and directed the clerk of the district court of Morton county to draw and summon a sufficient number of persons, to wit, twelve, possessing the qualifications to appear at the court room at Mandan on October 26, 1916, at 2 o'clock P. M., to assess the damages of the plaintiff. The order also further showed that more than thirty days had expired since the service of the summons and complaint, and the defendant had wholly failed to serve an answer or demurrer to the complaint. The defendant

having received knowledge of the notice to take depositions, one of its attorneys, Mr. Conmy, left Fargo on the evening of the 21st and was in Mandan on the 22d day of September, 1916, and took part as attorney for the defendant in the taking of the depositions in the case as per the notice served upon the defendant, which was served personally on defendant's agent. The defendant, upon acquiring knowledge that plaintiff was seeking to have defendant declared in default and for assessment of damages, went to Mandan, and arrived there on the 25th day of October, 1916. Affidavits were prepared, reciting the facts with reference to the defendant's failure to answer, its inadvertence and oversight, and the causes therefor, and procured an order to show cause why an order should not be made extending the time for the defendant to answer. The order to show cause was issued and returnable on the 25th day of October, 1916. On January 10, 1917, the trial court made its order in such case, relieving the defendant from default and permitting it to answer, but as a condition for granting such relief the court required the defendant to pay to plaintiff the sum of $250. This order was served on defendant's counsel on the 11th day of January, 1917, and the order fixed January 16th as the time by which such money must be paid, or otherwise the defendant would not be relieved from its default. The defendant applied to the court to fix the amount of the supersedeas bond, which was done by the court, and an appeal from the order of the court was taken and perfected to this court.

The first assignment of error by the appellant in this case is: "That the court erred in making the order appealed from herein, requiring this defendant and appellant to pay to attorneys for the plaintiff the sum of $250 two days prior to January 18, 1917." Second: "The court abused its discretion in making its order herein requiring the defendant and appellant to pay to the attorneys for this plaintiff the sum of $250 two days prior to January 18, 1917, or be in default."

We are of the opinion that either of the errors assigned is sufficient to reverse the order of the court. The matters contained in the appeal will be considered first upon their merits. The respondent claims that the order of the lower court imposing terms should be sustained for three reasons: First, plaintiff had not made application to the court for judgment; it had only applied to the court for an adjudication that the defendant was in default and for the calling of the jury to

assess damages. Second, the defendant had not given notice of appearance in the action before the expiration of the time for answer. Third, the terms imposed were just and reasonable. The respondent claims as authority for his first reason subdivision 2 of § 7600, Comp. Laws 1913. We are of the opinion that the plaintiff has not brought himself within the provisions of subdivision 2 of § 7600, if it is shown that the defendant made an appearance in the action, before the expiration of the time for answering. The provision of such section so far as it has any bearing upon this case is as follows: "And when the action is for the recovery of money only or of specific real or personal property with damages for the withholding thereof, the court may order the damages to be assessed by jury, or, if the examination of a long account is involved, by a reference as above provided. If the defendant gives notice of appearance in the action before the expiration of the time for answering, he shall be entitled to eight days' notice of the time and place of application to the court for the relief demanded by the complaint."

This action is one to recover money. The question now to be determined is whether the defendant gave any notice of appearance in the action. The summons, complaint, and notice to take depositions were served on the defendant through its agent on September 18, 1916. The deposition was to be taken September 22d, and was taken September 22d before the justice of the peace. Mr. Conmy, attorney for the defendant, appeared at the taking of such deposition for the defendant. Conmy so stated to Murray, attorney for the plaintiff, on the 22d day of September, at the Nigey hotel in the city of Mandan, at which time Conmy had gone to Mandan to assist in the taking of depositions and representing the defendant in the taking of such depositions. The respondent claims that such appearance at the taking of the depositions did not constitute a general appearance in the case. The depositions were taken before a justice of the peace, but it must be remembered that the justice of the peace was not the court which had jurisdiction of the action. In this connection it may be well for us to examine § 7438, Comp. Laws, 1913, which is as follows: "From the time of the service of the summons in a civil action or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction *and to have control of all the subsequent proceedings.* A voluntary appearance of a defendant is equivalent to personal service of the summons

upon him." The taking of the deposition in the action was a proceeding subsequent to the service of the summons and complaint. The control of the proceeding of taking the deposition was, as a matter of law, in the district court in which such action had been commenced and was pending. The justice court had no control of the deposition as a matter of law. The justice court in this matter was merely an officer who was entitled to administer oaths and reduce the testimony of the witness to writing, have it properly sworn to and authenticated, and then have such depositions returned to the district court or the clerk thereof. A notary public could have just as well taken the deposition. The proceedings, therefore, of taking the deposition was a proceeding in the district court and under the authority of the district court for use in an action then pending in the district court, and the district court had control over such proceeding. The appearance of the defendant at the taking of such deposition was in reality an appearance in a proceeding in the district court or in a proceeding where the district court had control, and in an action in which the district court had original jurisdiction. The appearance of the defendant at the taking of such deposition and its taking part therein, the purpose of such deposition being for use in the trial of the action in the district court, was a general appearance, and entitled the defendant by reason of the appearance of the defendant by its attorney Conmy to a notice of all further proceedings in the case. The defendant having made a general appearance, it would have served no useful purpose for the defendant to have gone through the form of serving another notice or a written notice. The notice provided by subdivision 2 of § 7600 is not required to be in writing. The plaintiff in this case had full notice of the defendant's appearance before the time expired for answering, and the defendant was entitled to the statutory time of eight days' notice with reference to the application for the order of default and submitting the damages to a jury. Such eight-day notice not having been served upon the defendant, the district court was without authority to grant the order of default and submitting the damages to a jury, and its order in that respect is void. Our state Constitution provides: "The right of trial by jury shall be secured to all and remain inviolate; but a jury in civil cases in courts not of record may consist of less than twelve men, as may be prescribed by law."

The district court, in its order for default and submitting damages to a jury, provided, the consent of the plaintiff having been made to appear, that the matter be submitted to a jury not to exceed four persons qualified to act as jurors, and the plaintiff having guaranteed the cost of calling a special jury of four persons, the special term was ordered. The clerk of the district court did by order of the court draw and summon twelve persons possessing the qualifications of jurors who were directed to appear at the court room at Mandan, October 26, 1916, and assess the damages of the plaintiff. Whether the twelve were to participate in fixing the damages, or whether that number was ordered drawn, out of which four might be selected to determine the damages, we are not advised in this proceeding, but it does appear from the order that it was the intention of the plaintiff, and it was the order of the court, that four jurors should determine the damages in that case. In a court of record such as the district court, in the trial of a civil action, the finding or verdict of any jury which consisted of less than twelve qualified jurors, in other words, the constitutional jury, would be of no binding force or effect. The jury would at least have to consist of twelve members in order for its verdict to be of any binding effect, unless there was a binding stipulation between the parties to submit it to a less number. If the order which, as it appears, undertook to provide a determination of the damage by a jury composed of four men, it was a void order. There is no doubt, it is conceded, that the district court has the right and authority to call a special term of court whenever in its judgment it shall appear there is a necessity for so doing. If, however, a special term of court is called, the machinery for the conducting of such special term of court is no different than that required in the conduct of a general term of court. If in the discretion of the court it deems it advisable or necessary to call a jury to determine questions of fact to be tried at such special term, such jury would be called in the same manner as it would be called at a general term, and be recompensed for their jury duty in the same manner. We know of no law to the effect that one called upon to try his case at a special term of court called by the district court shall be required as a precedent condition to his right to have his case tried to the court and jury, to pay all or part of the expense for the calling of such jury. Such litigant should be required to pay no more than he is required to pay as

costs in the trial of the case at a general term. The charging up of the entire cost of a jury at a special term of the district court to a litigant who has a case to try therein, even though the litigant has to some extent been in default by reason of oversight and inadvertence, is abuse of discretion within the rule that courts may impose terms upon litigants as a condition precedent to granting them some relief from a default. Courts are public institutions instituted and maintained for the purpose and with the intention of being a place where each and every litigant shall have an equal right and privilege to submit his differences and troubles to the court composed of the judge and the jury, and receive an adjudication of the merits thereof. No case is ever tried until it is tried upon its merits. And it is one of the main duties of courts to see that cases are tried upon their merits. Every litigant that goes before the court may not come away fully satisfied with the result of the judgment and decision of the court and jury, but every litigant should come away fully convinced that a full and fair opportunity has been afforded such litigant to have the merits of his case fully considered, and full opportunity to be heard, and when such is the case, no litigant can well complain.

The order of the District Court appealed from is reversed, with costs.

CHRISTIANSON, J. (concurring specially). I believe that the trial court had the right to impose some terms as a condition for relieving defendant from its default in this case. The terms imposed, however, were excessive and unreasonable, and they ought to be reduced to a reasonable amount.

ROBINSON, J. (concurring). This is an appeal from the conditions of an order setting aside a default. The condition imposed was the payment of $250 as costs of the motion. It is a personal injury suit. It is brought to recover $20,000 as damages sustained by the plaintiff when a roundhouse employee of defendant. In this and in another similar case to recover $25,000, on September 18, 1916, at Mott, North Dakota, the summons and complaint was served on the defendant's agent, with a notice of the taking of a deposition on September 22, 1916. The depositions were duly taken before a justice of the peace.

J. C. Conmy appeared as attorney for defendant and stipulated concerning the manner of taking the depositions.

By inadvertence no answer was served within thirty days, and on October 20th, the day after the time for answering expired, plaintiff's attorney made an affidavit of default and on October 23d, the court made an order for the assessment of damages by a special jury on October 25th at 2 o'clock P. M. Accordingly a special jury was summoned at an expense which appears enormous and illegal; mileage $55.80; livery $70. One hundred and twenty-five dollars and eighty cents, in addition to a good salary, is the pay of one day for a man with a Ford automobile!

At the time set for the assessment of damages, defendant's counsel appeared with affidavits excusing the default, and in each case obtained an order extending the time to answer on condition of paying $250. A motion is made to dismiss the appeals on the ground that as defendant accepted the benefits of the orders he cannot appeal from the conditions, but the conditions are manifestly unreasonable and contrary to law. A party does not have to buy justice at such a price. The statute is that, upon a motion in an action or proceeding, costs may be awarded not exceeding $25. Twenty-five dollars is the limit and $10 is the common allowance. But in this case there was no good reason for the allowance of any costs. The default proceedings were grossly irregular, and were not in accordance with good faith and professional etiquette. The attorneys for the plaintiff well knew that the default in serving an answer was a mere inadvertence, and that in a damage suit for so large a sum no responsible party would purposely suffer a default judgment. They knew that Watson, Young, & Conmy were attorneys for the Northern Pacific Railway Company, and that in each of the actions Conmy had appeared as an attorney for the defendant, and had stipulated with them concerning the taking of a deposition, and that was a full and complete appearance in the case. When a party makes default in serving an answer to an amended complaint, he must be given ten days' notice of an application for judgment. § 7475. When a defendant gives notice of appearance, he is entitled to eight days' notice of an application to the court for the relief demanded in the complaint. Comp. Laws, § 7600.

The service of an answer, a notice to take depositions, or a stipula-

tion by an attorney for the taking of depositions, is a notice of appearance and it answers all purposes of a regular formal notice, but in the absence of any statute limiting the costs that may be imposed on a motion, and in the absence of any such appearance and stipulation for the taking of depositions, such a default proceeding should never be sustained. It bears no mark of good faith and fairness. Good faith consists in an honest intention to abstain from taking an unconscientious advantage of another, even through the forms and technicalities of the law. Comp. Laws, § 7286.

Counsel for the plaintiff knew well that Watson, Young, & Conmy were attorneys for the defendant, and that their failure to answer on time was a mere inadvertence. They knew that without any expense they could communicate with defendant's attorneys in a moment by going to or phoning the agent at Mott. They knew that any default taken under such circumstances could serve no honest purpose, and that it must be set aside. Hence, the award of costs was grossly wrong. It was not merely an abuse of discretion. It was in excess of jurisdiction. Hence, it is reversed and vacated.

CASPER SCHANTZ, Administrator of the Estate of Raphael Schantz, Deceased, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

(167 N. W. 370.)

This case is governed by the decision rendered in Froelich v. Northern P. R. Co. ante, 307.

Opinion filed April 8, 1918.

Appealed from an order of the District Court of Morton County. Reversed.

Jacobson & Murray, for respondent.

Watson, Young, & E. T. Conmy, for appellant.

GRACE, J. This action was argued and submitted at the same time as the case of Froelich v. Northern P. R. Co. (ante, 307, 167 N. W. 366). The facts in the case are the same as in Froelich v. Northern P. R. Co. In principle, this case is also identical with that.

On the authority of the case of Froelich v. Northern Pacific Rail-

way Company the order of the District Court appealed from is reversed, with costs.

MINNEAPOLIS DRUG COMPANY, a Corporation, Respondent, v. CLYDE W. KEAIRNES et al., Appellants.

(167 N. W. 326.)

"Bulk Sales Law" — sale of merchandise under — creditors — void as to — unless statute complied with — goods of debtor — trust fund for creditors — purchaser a trustee.

Under the "Bulk Sales Statute" a sale of merchandise in bulk is void as to creditors unless made in the prescribed manner. When not so made, the goods of the debtor become a trust fund for the benefit of his creditors and the purchaser becomes a trustee for the benefit of the creditors.

Opinion filed February 28, 1918. Rehearing denied April 9, 1918.

Appeal from the judgment of the District Court of Adams County, Honorable *W. C. Crawford,* Judge.

Defendants appeal.

Affirmed.

E. C. Wilson, for appellants.

In such cases as this one it is absolutely necessary for plaintiff to allege and to prove that execution had been issued and returned unsatisfied. Minkler v. U. S. Sheep Co. 4 N. D. 507; McGreenery v. Murphy, 39 L.R.A.(N.S.) 374.

Under the "Bulk Sales Law," if there were no compliance so far as affects the creditors, any creditor could have Keairnes declared to be a receiver for such creditor, of the goods and merchandise that came into his possession by virtue of the sale. Comp. Laws, § 7226; McGreenery v. Murphy, 39 L.R.A.(N.S.) 374, supra.

Nothing in such law indicates that there is any proceeding for a court of equity. The remedy against the so-called receiver is the same

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NOTE.—The recent cases, as those cited in the earlier annotations, show a general disposition on the part of the courts to afford creditors of one who has made a sale in violation of the Bulk Sales Law every reasonable remedy, both at law and in equity, to protect their rights, as will be seen by an examination of notes in 39 L.R.A.(N.S.) 374, and L.R.A.1916B, 974, on remedy of creditors where sale is made in violation of Bulk Sales Law.

On statutory requirements on sale of stock of goods in bulk, see note in 2 L.R.A. (N.S.) 331.

as against anyone who holds the property of another. The object of the creditor is to get the money or the property, and the remedy is by appropriate action at law. Bixler v. Fry (Mich.) 122 N. W. 119; Tumlin v. Vanhorn, 77 Ga. 315.

In all cases where there is a valid levy, it excludes all other creditors so far as the property levied upon is concerned, excepting in bankruptcy cases. Garnishment is a seizure and creates an effectual lien; and resort to such remedy was proper. Rood, Garnishment, § 1; Burcell v. Goldstein, 23 N. D. 257; Rood, Garnishment, § 77, and citations; Blake v. Hubbard (Mich.) 7 N. W. 266.

Equity requires diligence, and any creditor may elect which of two remedies he will pursue,—by attachment or garnishment levy he gains a preference over all others. Ainsworth v. Roubal (Neb.) 105 N. W. 248; Salemonson v. Thompson, 13 N. D. 182.

In garnishment, under the Bulk Sales Law "the reward inures only to the benefit of the swift creditor." Comp. Laws, § 7583; Musselman v. Kidd (Mich.) 115 N. W. 409; Coffey v. McGahey (Mich.) 148 N. W. 356; Edgewell v. Haywood, 3 Ark. 357; John Spry Lumber Co. v. Chappell, 184 Ill. 539, 56 N. E. 794; Hillyer v. LeRoy (N. Y.) 72 N. E. 237; 6 Pom. Eq. Jur. §§ 893, 895 and cases cited; Battery Park Bank v. Western Bank (N. C.) 37 S. E. 461.

"The fact that another creditor had subsequently brought a suit against the bank on account of the same property or liability that the first creditor sought to charge in the action could not affect their right under their prior garnishment. Citizens Bank v. Farwell, 63 Fed. 117; Bradford v. Cooledge (Ga.) 30 S. E. 579; McGreenery v. Murphy, 39 L.R.A.(N.S.) 374, supra.

P. D. Norton and *C. M. Parsons,* for respondent.

The purchaser of property under the "Bulk Sales Law" of this state becomes the receiver of the property, for the benefit of all the creditors of the vendor of such property. The sale was illegal in that the statute was not followed. No list of names and addresses of the creditors, with the amount due each, was ever made or given by the vendor to his purchaser. Code, § 7224; Humiston, K. & Co. v. Yore (Mich.) 148 N. W. 266; Coffey v. McGahey, 148 N. W. 356.

"A purchaser in possession of a stock of goods who has not complied with the Bulk Sales Law will be held to have received the property in

trust for the benefit of the creditors. Scheve v. Vanderkolk (Neb.) 149 N. W. 401; Rev. Stat. 1913, § 2651; Fechheimer-Keiffer Co. v. Burton (Tenn.) 51 L.R.A.(N.S.) 343, 164 S. W. 1179.

"Since subrogation is a remedy invented by courts of equity, they will move to administer it where the result will be an equitable one, but not to work injustice to another in the defeat of an equal right." American Bonding Co. v. National Mechanics' Bank, 99 Am. St. Rep. 480; Kanffle v. Knoxville Bkg. & T. Co. 128 Tenn. 181, 50 L.R.A. (N.S.) 167.

The receiver in this case could not permit a preference to some creditors and evade a liability to other creditors standing in the same relation. Such is not the intent of the law. Scheve v. Vanderkolk (Neb.) 149 N. W. 401, supra; Fechheimer-Keiffer Co. v. Burton (Tenn.) 51 L.R.A.(N.S.) 343, 164 S. W. 1179, supra.

ROBINSON, J. This is an appeal from a judgment of the district court under the "Bulk Sales Statute." Comp. Laws 1913, § 7226. The statute is to the effect that sales of merchandise in bulk shall be void as to creditors unless made in a prescribed manner. That when a sale is not made in manner prescribed, then upon the application of any creditor the purchaser shall become a receiver of the goods for the benefit of all the creditors.

The purchaser in this case paid into court $410 as the price and value of the goods sold to him. And the court gave judgment that the money should be distributed *pro rata* to all the creditors after first paying the expense incurred by the appellants in trying to obtain a preference by garnishment and the levying of attachments. The judgment is manifestly fair and equitable, and in accordance with the letter and spirit of the statute. It gives to each creditor a dividend of about 40 per cent instead of permitting two or three parties to jump in and take all the money. Appellants claim that by extra diligence in garnishing and attaching the money they have gained a preference right over the other creditors. To allow their claim would be to nullify the beneficent purposes of the statute. It is fair to assume that each creditor contributed his share to the stock of goods, and that on a sale of the same each should receive a *pro rata* share.

We agree with the supreme court of Washington that the object of

this law was to hold the goods of debtors under such circumstances as a trust fund for the benefit of the creditors, and to hold the purchaser in possession as a trustee for such creditors. Fritz Henry v. Munter, 33 Wash. 629, 74 Pac. 1003. The purpose was to prevent an expensive and unseemly scramble for unjust preferences, and to secure a fair distribution of the property of insolvent debtors.

Judgment affirmed.

BIRDZELL, J. I concur in the result.

H. O. DALEN, Appellant, v. N. J. CODDINGTON, Respondent.

(167 N. W. 334.)

Witness — testimony of — conclusions — facts relative to subject-matter — error without prejudice.

1. Where a witness testifies to a conclusion relative to a certain subject-matter and in his testimony also testifies to the facts relative to the subject-matter, the admission and evidence of the conclusion of the witness over objection, if error, is error without prejudice and is harmless.

Affidavit — dictated by attorney — on information received from client — wrong date inserted — clerical error — proper to prove — by stenographer — by attorney.

2. Where an attorney dictated an affidavit upon information received by him from his client, and in dictating the affidavit caused to be inserted a wrong date, it is proper to prove such clerical error either by the stenographer after laying a proper foundation for her testimony, or by the attorney who dictated the affidavit if he is able to testify of his own knowledge to the fact.

Parts of testimony — of witness — given on a former trial — introduced by one party — other party may introduce balance of such testimony — same subject-matter.

3. Where one party in the trial of the case introduces parts of the testimony given by a witness on a former trial with reference to parts of the subject-matter of the litigation, the opposing party has the right to introduce the balance of the testimony given upon such former trial by such witness in so far as it relates to all the subject-matter concerning which the first party introduced a portion of the testimony. *Held* that appellant has not brought himself within this rule.

Opinion filed March 1, 1918. Rehearing denied April 9, 1918.

Appeal from the judgment of the District Court of Ward County, Honorable *K. E. Leighton,* Judge.

Affirmed.

F. B. Lambert and *F. J. Faytle,* for appellant.

A witness cannot state what he understands or thinks about the subject-matter under consideration. These statements are mere conclusions. 1 Thomp. Trials, 389.

Or for a witness to state what the defendant meant by the use of certain language. 1 Thomp. Trials, 738.

Or to state his belief concerning the subject-matter. Smith v. Northern Pac. 3 N. D. 553.

Or what a party intended. Witt Mfg. Co. v. Riley, 11 N. D. 203; Am. v. Hogue, 17 N. D. 375, 17 L.R.A.(N.S.) 1113, 116 N. W. 339.

A witness will not be permitted to say what his "understanding of the deal" was, from conversation had between the parties. Mulroy v. Jacobson, 24 N. D. 354, 139 N. W. 697.

"Where a contradictory statement has been shown, the party who introduced the witness is entitled to show the entire conversation in which the statement was made, when the statement was made when testifying as a witness, the entire testimony given by the witness on that occasion." 40 Cyc. 2758, and cases cited.

"Where one part of a deposition is introduced or read in evidence the adverse party has a right to read the whole deposition so far as it is competent evidence for him in the cause." 13 Cyc. 984.

"Where defendant reads an answer to a certain interrogatory in a deposition given by the deponent to be used in a former suit between the parties, in order to contradict such deponent's statement in a deposition in the present suit, it is held that plaintiff has a right to use such parts only of the rest of the deposition as relate to the subject-matter of the interrogatory or qualified answer." Weber v. Calden, 65 Me. 165.

A witness has a right to explain his answers to questions propounded on his cross-examination. 7 Enc. Ev. 142, 145, 164; Weir v. McGee, 25 Tex. Supp. 20–32.

The reasonableness and sufficiency of the explanations are for the jury. 7 Enc. Ev. 147 and cases cited; People v. Lambert (Cal.) 57 Pac. 307; People v. Shaver (Cal.) 52 Pac. 651; Huntley v. Territory

(Okla.) 54 Pac. 314–317; Thornton v. State, 65 S. W. 1105; Rudy v. Myton, 19 Pa. Super. Ct. 312; Will v. State, 74 Ala. 21; Noyes v. Gilman, 71 Me. 394.

A part of the deposition cannot be read and a part omitted, at the option of the party offering it. All evidence competent or pertinent to the transaction should be read or known. Bank v. Elev. Co. 11 N. D. 280, 289.

"Where inadmissible evidence is allowed to be introduced on one side, similar evidence is rendered admissible in rebuttal." 20 Century Dig. col. 655.

"Where a broker, instead of procuring a person who is ready, willing, and able to accept the terms his principal authorized him to offer, procures one who makes a counter offer, more or less at variance with that of his employer, the latter is at perfect liberty either to accept the proposed party upon the altered terms, or to decline to do so. If he accepts, he is legally bound to compensate the broker for the services rendered. 4 R. C. L. § 52, p. 313; Stewart v. Mather, 32 Wis. 344; Ball v. Dolan (S. D.) 101 N. W. 719–721; Eggland v. South (S. D.) 118 N. W. 719–722; Webb v. Burroughs (S. D.) 127 N. W. 623; Henderson v. Moe, 64 Mo. 393; Coleman v. Meade, 76 Ky. 358; Ratts v. Shepard, 37 Kan. 21, 14 Pac. 496; Platt v. Thompson, 42 Kan. 664, 16 Am. St. Rep. 512, 22 Pac. 726; McFarlane v. Lillard, 2 Ind. App. 160, 28 N. E. 229; Adams v. Decker, 34 Ill. App. 17; Lawrence v. Atwood, 1 Ill. App. 217; Heaton v. Edwards, 90 Mich. 500, 51 N. W. 544; Ransom v. Weston, 110 Mich. 240, 68 N. W. 152; Martin v. Selliman, 53 N. Y. 615; French v. McKay, 181 Mass. 485, 63 N. E. 1068; Henry v. Stewart, 185 Ill. 448, 57 N. E. 190.

Palda & Aaker and *E. T. Burke*, for respondent.

Mistakes in the taking of testimony on the trial, or when a witness testifies to conclusions, rather than to facts, when later on the facts relating to the subject-matter are brought out by competent testimony, the former error is cured. In any event the conduct of the trial and matters pertaining to the examination of witnesses rest largely in the discretion of the court. 40 Cyc. 2408; Blackerby v. Ginter, 34 Dak. 254.

A witness cannot pick out parts of his testimony given on a former trial without giving all of it. 40 Cyc. 2408.

GRACE, J. Appeal from a judgment of the district court of Ward county, Honorable K. E. Leighton, Judge.

This action is one brought by the plaintiff to recover a real estate broker's commission claimed to have been earned by plaintiff in procuring a purchaser for certain real estate owned by the defendant in the city of Minot, North Dakota, and described as lots 1 and 2, block 9, Brooklyn addition to the city of Minot, upon which lots were situated a hotel building and a small house, the small house being situated on the back end of the lots. The plaintiff claims the contract was to secure a purchaser who would buy such property, either for cash or trade, or procure a proposition of sale, which would be agreeable to, and accepted by, the defendant, for which service plaintiff claims the defendant agreed to pay the plaintiff 5 per cent of the selling price. Plaintiff further claims that on or about the 15th day of March, 1915, he procured from one Anna Huermann a trade proposition for the defendant for the above property, which was acceptable to, and which was accepted by, the defendant, and the deal then and there consummated at the stipulated price for defendant's property in the sum of $10,000. The plaintiff thereby claims there is $500 due him as his commission.

The foregoing matters are the substance of plaintiff's complaint.

The defendant for his answer interposed a general denial. The case was tried to a jury, which returned a verdict in favor of the defendant.

The claim and theory of plaintiff is that the selling price of the property was to be $10,000 in cash or trade, and that his commission would be earned when he procured a purchaser for the defendant who would pay such price for the property in a cash or trade proposition which would be agreeable to, and accepted by, the defendant.

The plaintiff further contends that the proposition related to the sale of all of such property, and no reservation was made of the small house on the back end of such lots. On the other hand, the defendant contends that no commission was to be paid unless it was an all cash deal for the sum of $10,000, the defendant to retain the back end of the lots including the small house thereon. Plaintiff claims further that the proposition which he obtained from the intending purchaser was accepted by the defendant. The whole property was on the 15th day of March, 1915, sold by the defendant to the purchaser for $10,000, a part of which purchase price being paid by the purchaser transferring cer-

tain other real estate in the city of Minot to the defendant. The purchaser was the same as the one with whom plaintiff had been negotiating for the sale of the property in question.

The main elements or issues of the case appear to be substantially as follows: (1) The nature and terms of the contract between plaintiff and defendant with reference to the sale of such property and whether the small house and some number of feet of ground on the back end of such lots were or were not included in such contract. (2) Whether plaintiff procured a purchaser for the defendant upon the terms provided by the contract or upon other terms which were finally accepted by the defendant, and whether plaintiff procured a purchaser who made a proposition to purchase such property which was acceptable to, and accepted by, the defendant. (3) Whether at any time during the time of the negotiations for the sale of such property the plaintiff abandoned further effort for the sale thereof, thus terminating his agency.

Each of these matters was a question of fact exclusively for the jury. The jury returned a verdict in favor of the defendant. Among many assignments of error by the appellant two may receive thorough consideration. They are appellant's third and fourth assignments of error. The third assignment of error is as follows: "The court erred in allowing the witness Coddington to testify over the objection of plaintiff's counsel as follows:

" 'Q. So that any deals that you made were entirely different than any Mr. Dalen was trying to negotiate as shown by exhibit A, or the first contract you had, that you should pay him 5 per cent if he made an all money deal?' Objected to as calling for a conclusion, and leading and suggestive. Overruled.

" 'A. It was different, yes; it was not an all-money deal, and the time was not the same. The payments were not the same.' "

The fourth assignment of error is as follows: "The court erred in allowing the witness Coddington to testify over the objection of counsel for plaintiff as follows:

" 'Q. Mr. Coddington, after you had this talk in the pool hall with Mr. Dalen, when you said the deal blew up, and you could not do anything, did you believe that he had abandoned any—in every way this transaction or having anything more to do with the handling of this

property that you were offering for sale?' Objected to as calling for a conclusion. Overruled.

"'A. Yes, sir'"

The record discloses that previous to the time of the asking of this question, Coddington had testified he met the plaintiff in the pool room immediately after plaintiff had returned from seeing Mrs. Huermann, the prospective purchaser, and that plaintiff at such time in the pool room told the defendant the deal had blown up.

The appellant's main objection to the questions and answers set forth in assignments of error Nos. 3 and 4 is that the answers to such questions were merely conclusions of the witness and had a bearing upon the material issues in the case.

Referring to the third assignment of error, we are of the opinion that the answer of the witness did not constitute a conclusion when considered as a whole. It is true the witness testified the deal was different. This standing alone might have been considered as a conclusion of the witness. The witness, however, did not stop with testifying that the deal was different, but testified wherein it was different by showing the deal which plaintiff tried to make was not an all money deal, and the time was not the same. The payments were not the same. The deal offered by the plaintiff did not comply with the terms upon which plaintiff was authorized to make the sale. All of the testimony in this regard being considered together, it is apparent that the answer of the witness was largely based upon questions of fact, and was not a mere conclusion of the witness.

The same reasoning applies to the fourth assignment of error. The witness did not merely testify to what he believed, and say nothing more, but proceeded to testify to the facts which tended to show an abandonment of the agency by the plaintiff. We are of the opinion there was no error in the admission of the testimony referred to in assignments of error Nos. 3 and 4. If there were any error in this regard, in view of the testimony, such error was harmless. In regard to assignments of error Nos. 3 and 4, the plaintiff has not brought himself within the rule of Smith v. Northern P. R. Co. 3 N. D. 553, 58 N. W. 345, or Mulroy v. Jacobson, 24 N. D. 354, 139 N. W. 607.

Referring to appellant's 6th assignment of error, regarding the objection to the admission of the testimony of the witness Palda, we find

no error. The defendant at the time of the drawing of the affidavit had conferred with Palda. Palda dictated the affidavit in question for the opening of the default judgment. He was in position to have actual knowledge of the typographical error in the affidavit with reference to whether a certain date in the affidavit, to wit, March 15th, was a typographical error and should have been March 1st instead of March 15th. If Mr. Palda had knowledge of such error, he was a competent witness to testify to the fact, notwithstanding the stenographer who took the dictation from him would also have been a competent witness to call. We are clear there is no error in admitting the testimony of Mr. Palda.

Referring to assignment of error No. 2, appellant claims error in that defendant having introduced a certain portion of the testimony given by Dalen on a former trial, and did not permit plaintiff to offer certain testimony given by the plaintiff on a former trial. Where a party to an action introduces testimony by introducing in evidence part of the testimony given by a witness on a former trial, the opposing party has a right to introduce all the testimony relative to the subject being inquired about. The appellant, however, has not brought himself within this rule. The defendant did introduce part of the testimony of Dalen given at a former trial. The appellant did not proceed to have all the testimony in reference to the subject inquired about at the former trial read from the record, but simply asked the witness, the plaintiff, on redirect examination, if he had not testified in the former trial that he was to get his commission if he would procure a deal that the defendant would accept. It does not appear that this was an effort to introduce the balance of the testimony of the witness given at a former trial, part of which had been brought out by the defendant. We are of the opinion that the appellant has not brought himself within the rule. There was no error in sustaining the objection to the question asked by plaintiff's counsel.

We have carefully examined the trial court's instructions, and, considering the same as a whole, find no reversible error therein. A further reason why the judgment should be affirmed is that, after a careful reading of the record and an examination thereof, we are firmly convinced there is no probability a different result might be had on a new trial. This court should not as a general rule reverse a judgment and grant a new trial where there is no probability a different result might

be had on such new trial. Blackorby v. Ginther, 34 N. D. 258, 158 N. W. 354.

The judgment is affirmed, with costs.

CHRISTIANSON, J. I concur in result.

ROBINSON, J. This is a second action against defendant to recover a commission for helping him make a sale of certain hotel property in Minot. In the first action plaintiff sought to recover as the reasonable value of his services a commission of $300. In this action he sues to recover 5 per cent on $10,000. The jury found against him and he appeals. The complaint avers that the defendant agreed to pay a commission of 5 per cent on the sale value of the property if the plaintiff secured a purchaser. That plaintiff did secure a purchaser and a sale at the agreed price of $10,000. The answer is a general denial. The issues were immensely simple and afforded little chance for either court or jury to fall into error.

The property in question consists of two lots on which there was a hotel known as the "Home Hotel" and on the back end of one lot there was a dwelling house worth about $1,000. This property Coddington himself sold to Mrs. Huermann for $10,000 on or about March 15, 1915. When the Coddingtons talked with the plaintiff about making a sale of the Home Hotel for $10,000 it was distinctly stated that the dwelling house was not to be included. That clearly appears from the testimony of the plaintiff himself, as given on both trials, and it clearly appears from the positive testimony of Mr. and Mrs. Coddington. The plaintiff was never in any way retained or employed to sell the hotel property with the dwelling house on the rear end of the lots.

The court might well have directed a verdict against the plaintiff. There was no evidence to sustain a verdict in his favor. The case is entirely clear, and there is nothing to be gained from quoting or discussing the testimony. Judgment affirmed.

On Rehearing.

ROBINSON, J. As the record shows, the plaintiff had no reasonable cause or excuse for the prosecution of this action, and yet there is filed a motion for rehearing which is in keeping with the action. It is in

gross violation of professional ethics and the rules of the court, and hence it is denied, with censure.

GRACE, J. I concur in the denial of the petition for rehearing.

MARTIN PAULSON, Respondent, v. J. A. REEDS, Appellant.

(167 N. W. 371.)

Broker — commissions earned — on sale of lands listed with him — action to recover — sale on terms of listing contract — inability to make — sale made on different terms — conditionally accepted by landowner — agent — adoption of acts — evidence — jury — instructions.

1. In an action by a broker to recover a commission under an express contract upon a sale of real property, where it appears that the broker was unable to negotiate a sale according to the terms of the listing agreement previously made; and where the defendant entered into a less favorable contract negotiated by the broker with the understanding, as claimed by the defendant, that the broker was to make up the difference out of his commission,—*held*, reversible error for the court to instruct the jury that, if it should find that there was an agreement between plaintiff and defendant as to commission, as alleged by the plaintiff, and that if the land was sold on other terms than those originally agreed upon, the defendant would be bound to pay the full amount of the commission if he adopted the changes made while still permitting the plaintiff to continue to act as his agent.

Real estate broker — selling land for principal — on different terms — from those in listing contract — assent of owner — on condition that commissions shall be different — new agreement controls.

2. Where a real estate broker sells land for his principal upon terms different from those contained in the original listing agreement; and where the owner assents to the sale with the understanding that the commission shall be different from that originally agreed upon,—no commission in excess of that provided by the new agreement can be recovered.

Opinion filed March 1, 1918. Rehearing denied April 9, 1918.

Appeal from District Court of Richland County, *A. T. Cole*, J.

Reversed.

W. S. Lauder, for appellant.

It is the law that where a party sues on an express contract he cannot recover on an implied contract, nor on a *quantum meruit*. 9 Cyc. 749 et seq., Wernli v. Collins (Iowa) 54 N. W. 364; Morrow v. Board of Education (S. D.) 64 N. W. 1126; Ball v. Dolan (S. D.) 114 N. W. 998; 2 Enc. Pl. & Pr. 990.

The gist of appellant's entire contention is that if respondent furnished to the appellant a buyer who was ready, able, and willing to buy the land on the terms of the listing contract, and this appellant so sold his land, or arbitrarily refused to accept such buyer and sell, then respondent could recover. If no such buyer was furnished by respondent, and sale was not made under the listing contract, then respondent cannot recover upon some other theory. 21 L.R.A.(N.S.) 935; 29 L.R.A.(N.S.) 533; 34 L.R.A.(N.S.) 1050; 139 Am. St. Rep. 225; 2 Hill's Dig. (Dak.) pp. 174–177; Ward v. McQueen, 13 N. D. 153, 100 N. W. 253.

Under the listing contract, plaintiff was to procure a purchaser ready, willing, and able to buy the land on certain definite, stated terms, and that he did not furnish such a purchaser; that the purchaser he did furnish refused to buy on the terms specified in the listing contract. Anderson v. Jorgenson, 16 N. D. 174; Ames v. Le Mont, 107 Wis. 231; McArthur v. Slauson, 53 Wis. 41; Ball v. Dolan, 18 S. D. 558; Milligan v. Owens, 123 Iowa, 285; Wenks v. Hazzard (Iowa) 123 N. W. 1099.

He, the broker, was not entitled to commissions for furnishing a purchaser at a less price or upon less advantageous terms to the landowner than those stated in the listing contract. Cook v. Forst, 116 Ala. 396; Steinfield v. Strom, 31 Misc. 167; Reiger v. Bigger, 29 Mo. App. 428; Anderson v. Jorgenson, 16 N. D. 174; Williams v. McGraw, 52 Mich. 480; Crombie v. Waldo, 137 N. Y. 129; Rake v. Townsend (Iowa) 102 N. W. 499; Monson v. Kill, 144 Ill. 248; Stautenburgh v. Evans (Iowa) 120 N. W. 59; Pepsen v. Morohn (S. D.) 119 N. W. 988; Morill v. Davis, 27 Neb. 775; O'Brien v. Gilland, 4 Tex. Civ. App. 40; Mullenhoff v. Gensler, 15 N. Y. Supp. 643; Harwood v. Triplett, 34 Mo. App. 273; Smith v. Allen, 101 Iowa, 608; Oliver v. Sattler, 233 Ill. 536; Gough v. Coffin (Tex.) 120 S. W. 210; Stearns v. Jennings, 128 Wis. 379; Everman v. Herndon, 71 Miss. 823; Am. & Eng. Enc.

Law, 434; 9 C. J. 597 et seq. and cases cited under note 6, p. 588; Beers v. Schallern (N. D.) 161 N. W. 557.

The question of imagined justice or fairness and that in any event something is due plaintiff for his part in the transaction, is not involved in this lawsuit. Plaintiff predicates his suit and his right to recover upon an express contract, and the only question presented is, Did plaintiff perform according to such specific contract? Ferguson v. Willard, 116 C. C. A. 406, 196 Fed. 370; Johnson v. Virginia-Carolina Lumber Co. 89 C. C. A. 632, 163 Fed. 249; Cook v. Forst, 116 Ala. 395; Van v. Pelot, 55 Fla. 357; Jones v. Adler, 34 Md. 440; Williams v. McGraw, 52 Mich. 480; Antisdel v. Canfield, 119 Mich. 229; Brown v. Adams (R. I.) 69 Atl. 601; Ball v. Dolan, 21 S. D. 619; Largent v. Storey (Tex.) 61 S. W. 977; Terry v. Bartlett, 153 Wis. 208, 140 N. W. 1133; Bridgeman v. Hepburn, 13 B. C. 389; Hughes v. Dodd, 164 Mo. App. 454; Trickey v. Crowe, 8 Ariz. 176; McArthur v. Slauson, 53 Wis. 41; Ryan v. Page, 134 Iowa, 60.

Wolfe & Schneller, for respondent.

This action is not based upon the listing contract made at the time the lands were first listed with plaintiff for sale. The facts show that later on plaintiff procured a purchaser; that then defendant agreed with plaintiff that plaintiff shall have and retain as his commissions all over and above a certain amount; that the lands were sold to this purchaser so procured and furnished by plaintiff for an amount $1,200 in excess of the net sum stated and agreed to be accepted by defendant and actually accepted by him. The actual agreement under which all parties acted was oral and therefore could be modified orally, or by acts or conduct. Sunshine Cloak & Suit Co. v. Roquette Bros. 30 N. D. 143.

BIRDZELL, J. This is the third appeal in an action wherein the plaintiff sues to recover commissions upon the sale of 800 acres of land. Upon the first appeal (Paulson v. Reeds, 24 N. D. 211, 139 N. W. 1135) the respondent confessed error which resulted in the reversal of a judgment for $700 in his favor. Upon the second appeal the judgment was for $1,200, which judgment was reversed for error in instructions to the jury (Paulson v. Reeds, 33 N. D. 141, 156 N. W. 1031). The facts necessary to an understanding of the case have been previously stated, and it is not necessary to restate them *in extenso.* Sufficient

facts will be stated, however, in connection with the discussion of the instructions given by the trial court, to demonstrate wherein the instructions are erroneous.

However strong the disinclination may be to reverse a judgment based upon the third favorable verdict of a jury, the duty to do so is nevertheless incumbent upon the court when the error is clear and its prejudicial effect obvious. The error in this case is of that sort, as will readily appear from an examination of the charge to the jury. The charge of the court was in part as follows:

"If the plaintiff and the defendant in this case entered into a contract for the sale of the defendant's land, and you so find from the evidence, if you also find that defendant signed exhibit 'A', wherein it is stated that he will take $16 an acre net for the lands in question, I charge you that said exhibit is not of itself and standing alone a contract between the plaintiff and the defendant, fixing or determining the right of the plaintiff to a certain and definite commission or compensation for negotiating a sale, but if you find in fact it was signed by the defendant, and he knew what he was signing, it constitutes a link in the chain of evidence whereby plaintiff seeks to establish the contract alleged between himself and the defendant, not only for the sale of the lands in question, but a link in the chain of evidence seeking to establish and prove the compensation or commission which plaintiff was to receive for his services as a land broker and an agent for the defendant.

"In order for the plaintiff to recover in this action the minds of the parties must have met upon the proposition of the plaintiff acting as agent or broker for the defendant, and their minds must also have met upon the matter of paying a commission to plaintiff, and as to that matter their minds must have met upon the proposition of the plaintiff receiving as a commission all above the sum of $16 per acre received through the sale of the lands in question, as the plaintiff rests his case upon an express contract founded upon such claimed agreement. . . .

"Among other matters to be weighed and considered by you in making up your verdict, is the question of whether or not there was a variation from the terms of sale as claimed to have been stipulated by the defendant to the plaintiff in permitting the plaintiff to try to effect a sale of the lands in question, and if there was a variance in the sale that was made from the terms originally stipulated and agreed upon between

plaintiff and defendant, you must further find before you can find a verdict for the plaintiff, that the defendant understood and had his attention called to such variance, and that he accepted and adopted the same while still permitting the plaintiff to act as his agent and broker.

. . .

"If you find from the evidence that the contract claimed by the plaintiff was not entered into and agreed upon by and between plaintiff and defendant, in other words, if you find that at no time did the minds of the parties to this action meet upon the proposition alleged by plaintiff, to wit, that the defendant was to have a net price of $16 per acre, and the plaintiff to have all received above that as his commission, and it is agreed between the parties here that the land sold for $17.50 an acre, then you would find a verdict for the defendant. If you should find, however, that the agreement between the plaintiff and the defendant was as alleged by plaintiff, that the defendant should receive a net price of $16 an acre and the plaintiff take as his commission all above that, and that as a part of that agreement or an agreement with plaintiff to act as agent or broker named specific terms of sale, and you further find that those terms and agreements were departed from in any material respect, and the land was sold on other terms than the terms agreed upon between plaintiff and defendant, and you further find that the defendant did not agree with the plaintiff to the change of terms and did not consent to a sale by plaintiff of the land under the claimed change in terms and agreement, but the sale was consummated without the agency of plaintiff continuing, and without the defendant agreeing to the change in terms and conditions of sale alleged to have been made, then you must find for the defendant. . . .

"The agent or broker must furnish a buyer ready, able, and willing to buy on the terms and conditions upon which the lands have been given by the seller to the agent for sale. However, if a purchaser, ready, able, and willing to buy is produced, and he refuses to buy on all the terms and conditions which the seller has named to his agent or broker, and the seller through his agent—in this case the defendant through the plaintiff—agrees to other terms and conditions as to the sale to the purchaser, and demands no new terms as to the compensation or commission which the agent or broker is to have, then if you find such to be the fact in this case, I charge you if the defendant received, or was to

receive, the $16 per acre net claimed by plaintiff to have been the agreed price between him and defendant, the seller, and the lands were sold for a price netting the defendant $16 per acre, and you find that the contract was as alleged by the plaintiff for his compensation or commission to be all above the price of $16 per acre, and the defendant consummated the deal through and by the assistance of the plaintiff, his agent, then plaintiff has established his claim herein, and your verdict must be in his favor for the amount of commission claimed. . . .

"As heretofore charged, you must find, first, whether or not there was an express contract, as claimed by the plaintiff herein, to wit, a contract for the sale of the land of the defendant at a net price to him of $16 an acre, and if you also find that the plaintiff was to have as his commission and compensation all of the price received over and above said $16 per acre net, and you further find that although the terms as originally stated by defendant to plaintiff upon which he would sell the land involved in this controversy were varied and changed to some extent in the actual transaction as completed, then if you find that the defendant understood and was aware of the changes or variations and accepted and adopted them while still permitting the plaintiff to continue to act as his agent or broker in the transaction made at the sale of said lands, then you will find a verdict for the plaintiff, as claimed by him. . . .

"While the defendant claims a contract different from that set up by the plaintiff, and also claims a variation in the terms of sale, and has offered some testimony as to not accepting the variations from the terms of listing, I charge you that in this case, the plaintiff rests his case on the claimed contract between plaintiff and defendant for a compensation or commission of all received above the sum of $16 an acre net to the defendant, the plaintiff must recover, if he recovers at all, the sum of $1,200, with legal interest thereon from the 15th day of November, 1910, as it is agreed that the lands were sold for $17.50 an acre.

"Before the plaintiff can recover, he must prove, by a fair preponderance of the evidence, the following essential facts: . . .

"3. That Paulson actually sold the land, on terms of sale then assented and agreed to by Mr. Reeds, with knowledge of the facts, whether they were the original terms or not. . . .

"If you find these four essential facts (of which the foregoing is one) in favor of the plaintiff's contention for them, then the plaintiff should have a verdict for $1,200, with legal interest thereon since November 15, 1910. . . .

"The terms of sale are stated and noted in exhibit 'B,' and this exhibit you will be at liberty to take with you to the jury room. It is admitted that these are not in all respects the same terms as the terms stated to the plaintiff when it is claimed the lands were listed with him by the defendant for sale. However, if you find that the defendant accepted and adopted them, and the sale was made on the terms as set out in exhibit 'B,' and the plaintiff Paulson continued as the agent of the defendant, then you must find a verdict for the plaintiff, as claimed by him."

Upon the latter of the two former appeals of this case, the judgment of the trial court was reversed because of instructions given to the jury, stating in substance that the commission which the plaintiff was to receive was governed by the terms of exhibit "A," this exhibit being a memorandum as follows:

Wyndmere, N. D., June 28, 1910.

Martin Paulson:—

You are hereby authorized to sell my land, W.½ S. E.½, 21, and E.½ of 20, 132–52, at $16 per acre net to me.

J. A. Reeds.

The jury, upon the trial reviewed upon that appeal, was told in substance that if Reeds signed exhibits "A" and "B" (the latter being the sale contract), he would owe the plaintiff $1,200 commission. It was held that exhibit "A" could not be considered as controlling on the question of commissions, and that this question should have been submitted to the jury on all of the oral testimony. Upon this trial the jury was correctly instructed as to the effect of exhibit "A," but a reading of the quoted portions of the charge discloses that the jury was also instructed that, if the defendant signed exhibit "B" while plaintiff was acting as his agent, knowing at the time he signed it that it did not contain the terms of the contract the plaintiff had been authorized to negotiate for him, he would be bound to pay to the plaintiff his full

commission of $1,200. It will be readily seen that this instruction makes the signing of exhibit "B" with knowledge of its contents, and, while the plaintiff was still acting as agent for the defendant, conclusive as to the commission agreed upon. It authorized the jury to ignore the testimony given by the defendant to the effect that the plaintiff was to stand the difference between the value of the contract evidenced by exhibit "B" and the value of such a contract as the plaintiff was originally authorized to negotiate for the defendant. Upon analysis it will be seen that there is no substantial difference between the making of exhibit "A" an exclusive and absolute criterion of the amount of plaintiff's commission and making it the criterion conditioned only on the circumstance of Reeds' signing of exhibit "B" with knowledge that Paulson was purporting to act as his agent. The instruction in this case is, in reality, open to the same vice as the one that was held erroneous upon the former appeal.

The confusion which seems to have characterized all of the trials of this action results from a failure to apply elementary principles to a rather complicated set of facts. The listing agreement and the brokerage or commission contract are properly regarded as separate and distinct, but, though separate and distinct, they are yet parts of the same transaction, and the latter is so far dependent on the former that the right to the agreed commission can only arise when a sale has been negotiated in accordance with the authority contained in the listing agreement. In short, the execution of the listing contract to the point of supplying a purchaser ready, willing, and able to buy upon the terms thereof, is the condition precedent to the right to recover the agreed compensation. It is not now, and has not been, as we understand it, the contention of the plaintiff and respondent that a sale has ever been negotiated in accordance with the original listing agreement, and similarly, it is not now and never has been the contention of the defendant and appellant that he ever agreed to pay to the plaintiff the full difference between $16 per acre for the land sold and the price obtained under the terms of exhibit "B." In view of the respondent's position, it is essential for him to show, before he can recover any sum as an agreed commission, that he sold the defendant's land in accordance with the terms of a listing agreement in consideration of the fulfilment of which defendant agreed to pay him a stated commission. The plain-

tiff admits that, at the time exhibit "A" was signed, the defendant had no knowledge of the terms of the sale which had previously been negotiated by plaintiff, and he further admits that the sale was not consummated according to the terms of the previous listing agreement, in that the cash payment was but one fourth of that stipulated in the listing agreement, and the interest on the deferred payments was more than $700 less than that originally contemplated. The respondent also admits that at the time exhibit "B" (the sale contract) was signed by the defendant, he did not even contend that it conformed to the previous listing agreement, and that the defendant became acquainted with its terms for the first time at the meeting at which it was signed. There is testimony in the case to the effect that at this meeting the defendant signed exhibit "B" with the understanding, had then and there between him and the plaintiff, that the plaintiff was to make up the difference between the value of the sale contract as made and the contract as it would have been had it been made in accordance with the original listing agreement.

Reeds's testimony on this subject is as follows:

Q. When you came there, the contract had been prepared?

A. Yes, Paulson handed it to me.

Q. Do you recall who gave it to you and how it came?

A. Paulson handed me his and McGann the other.

Q. You remember it?

A. Yes.

Q. This paper exhibit "B" I think you testified is one of the duplicates?

A. Yes, sir.

Q. And did you read it over?

A. Yes, I did.

Q. Now, what did you say to Paulson after you read that contract over?

A. I said, "Who the devil authorized you to sell my land on them terms?" I says, "I never did," and he says, "I know you didn't,"—I told him I wanted 7 per cent on the stuff that run from the date of the contract if it run five years, and he says, "I know, but I couldn't get that;"—and I says, "This contract don't say anything about any inter-

est until the 15th of November;" and he says, "I will make that up, I will make that right;" and I says, "Here is another thing, this $9,000 runs five years and only 6 per cent interest, instead of 7 per cent;" and he says, "I will make that right, I will make that right."

Q. Was there anything said to Huey there about modifying it?

A. He told him but Huey wouldn't pay no attention to him.

Q. What did Huey say?

A. He told him, "No," he wouldn't do any more than he had done. . . .

Q. After he had made the statement that he would make up the difference, you signed the contract?

A. Yes.

Q. Has he ever made up any difference?

A. No.

The jury should have had an opportunity to consider this testimony under proper instructions. If it is true, the defendant never agreed to pay the plaintiff a commission measured by the difference between $16 per acre and $17.50 per acre, in consideration of the procurement by the plaintiff of a purchaser who purchased according to the terms of exhibit "B." The respondent presents a forcible argument to the effect that a change in the listing agreement which was assented to by the defendant would not alter the obligation to pay the commission previously agreed upon, but the facts and circumstances as testified to by the defendant go to show that there was a change, not only in the listing agreement, but one which affected the commission as well. In this state of the record, it was clearly error for the trial court to instruct the jury, which was done repeatedly in the charge, that if there was a change in the listing agreement and if the defendant assented to the sale with knowledge of the change, and while the plaintiff was still acting as his agent, he became bound to pay to the plaintiff the full amount of the commission which would have been earned had the sale been made according to the original listing agreement.

We have not overlooked the fact that the charge, the giving of which was held to be error in Paulson v. Reeds, 33 N. D. 141, 156 N. W. 1031, contained a statement somewhat similar to the one just referred to, and that it was not singled out as being erroneous in the opinion

rendered. But a careful reading of that case discloses that the principle according to which it was decided runs counter to the principle adhered to by the trial court in giving the instructions under examination. In the opinion referred to, the court cited with approval its own previous decision in the case of Anderson v. Johnson, 16 N. D. 174, 121 N. W. 139, wherein it was said: "It seems to have been the theory of plaintiff's counsel and also the trial judge that all it was necessary for them to prove in order to recover was the existence of the contract as pleaded, and that they produced the person claiming to own the property, and he, in fact, entered into a contract with defendant to sell the same to him upon some terms acceptable to defendant. In other words, even though Staiger was unwilling and refused to sell at the price of $2,300 [the listing contract], that, if defendant dealt with him on any other terms whatever, plaintiffs would still be entitled to their commission . . . This is clearly erroneous." Furthermore, the court said that if a dispute had existed "as to that part of the listing contract having reference to the terms upon which the land should be sold, and pending this dispute exhibit "B" [the sale contract] was produced and shown to Reeds as plaintiff's version of the listing contract, and Reeds then accepted the same, it would probably be presumed that he had receded from his position upon the contract, and had accepted the version contended for by plaintiff." Paulson v. Reeds, 33 N. D. 141–153, 156 N. W. 1031. But, according to the plaintiff's own admission, exhibit "B" was not produced as the plaintiff's version of the listing contract, but as an admitted departure therefrom. It cannot be said that by signing exhibit "B," under such circumstances, the defendant necessarily agreed to pay the original commission. See Steinfeld v. Storm, 31 Misc. 167, 63 N. Y. Supp. 966, and Reiger v. Bigger, 29 Mo. App. 421. The record in this case discloses clearly that the signing of exhibit "B" by the defendant, under the circumstances, was an equivocal act and one reasonably susceptible of the inference that Reeds was thereby expressing his agreement to the payment of a commission measured by the difference between the value of exhibit "B" compared to the contract originally contemplated, or an agreement by him to pay a reasonable commission, or, if the jury disbelieved his version and believed that of the plaintiff, that he was to pay the full

amount of the commission originally agreed upon, but was to be given until November 15th following to pay it.

This case is clearly distinguishable from the case of Gelatt v. Ridge, 117 Mo. 553, 38 Am. St. Rep. 683, 23 S. W. 882. In that case the contract, negotiated for the principal and to which he assented, gave him the benefit of the full net price stipulated in the listing agreement, and, at the time he assented to the terms of the contract, no question whatever was raised as to the amount of the commission. None of the authorities cited in the dissenting opinion seems to us to be applicable to a case such as is presented here. A careful examination of the cases cited will disclose that they merely support either of two propositions: First, that an owner of property who avails himself of the services of a broker and negotiates a sale of his property to a purchaser supplied by a broker is obliged to pay a commission; second, that where a broker supplies a purchaser, with whom the owner of the property negotiates a sale, such vendor cannot escape liability for the commissions agreed to be paid by taking over the negotiations and departing from the original listing agreement. Neither of these propositions is involved here, for the reason that the plaintiff is not attempting to recover on the *quantum meruit,* nor is it a case where he negotiated a sale differing in terms from the original listing agreement, in an attempt to avoid the payment of commissions. No authority has been cited, and we are confident none can be found, which will support the contention that an owner of property who has listed it for sale on stated terms and upon an agreed commission is bound to pay such commission to a broker who has negotiated a sale upon terms not previously assented to by the owner, where it is expressly agreed between the owner and the broker, at the time of the signing of the sale contract, that the broker is to receive a commission different from that originally stipulated. It is as competent for the parties to a commission agreement to alter it by mutual understanding during the course of performance as it is to thus change an agreement of any other character.

It is true the jury was instructed that the plaintiff, in order to recover, must establish the contract sued upon, and it was further told that exhibit "A" was to be considered in connection with all the other evidence in determining whether or not the defendant had assented to the alleged commission contract. But this general instruction, when

considered in the light of the entire charge given, cannot reasonably be said to have overcome the impression that must have been created by the repetition of the specific statement applicable to the transaction on June 28th. This statement was repeated in various forms, all meaning in substance that if an agreement ever was made, whereby the defendant undertook to pay as a commission all that was received for his land above $16 per acre, such agreement bound him to pay the full commission if he assented to the terms of the sale as made, while the plaintiff was still acting as his agent.

We do not agree with appellant's counsel wherein he contends that, under the complaint, which alleged an express contract entered into on the 28th day of June, 1910, there can be no recovery under the evidence in this case. There was ample evidence from which the jury could have found that the express contract upon which plaintiff sues was made. There was, therefore, no error committed in refusing to grant the motion for a directed verdict. As we view the record, all of the evidence descriptive of the transaction had at the time of the signing of the sale contract should have been left to the jury under proper instructions, and from it they would have been warranted in finding that the defendant expressly agreed to pay the plaintiff the full amount of his commission, or that he expressly agreed to pay him a portion only of the commission originally agreed upon, or that no agreement whatever was reached, in which event, under proper pleadings, the recovery would be limited to the *quantum meruit*.

The judgment of the trial court is reversed and the cause remanded.

ROBINSON, J. (concurring). The plaintiff sues to recover $1,200 commissions on a sale of 800 acres. The jury found for the plaintiff, and defendant appeals. The complaint avers that in June, 1910, defendant owned the west half and the southeast quarter of 21 and the east half of 20 in 133–52; that he listed the land with plaintiff for him to sell on certain specified terms, and for securing a purchaser he agreed to pay the plaintiff such sum as he might realize from the sale over and above $16 per acre; that on the same day plaintiff procured for defendant a purchaser at $17.50 an acre and thereby earned $1,200.

The answer is a general denial. The claim of defendant is that the commission was to be $1 an acre and only 50 cents in case of a sale

made to a purchaser introduced to the agent by defendant, and that defendant did introduce a purchaser. Also that no sale was made in accordance with the terms on which the land was listed. Defendant also claims that the action is based on an express contract for the sale of land on express terms, and there is no evidence of a sale in accordance with the terms of the contract.

This is the third appeal to this court. The first appeal was from a judgment for $700, which was reversed because of error in the instructions of the court. Paulson v. Reeds, 24 N. D. 211, 139 N. W. 1135. The second appeal was from a judgment for $1,200. It was reversed because the court erroneously instructed the jury in effect that the signing of a paper known as exhibit A settled the question of commissions at $1.50 an acre. Exhibit A reads thus:

Martin Paulson:—

You are hereby authorized to sell my land west ½ and S. E. ¼ section 21 and east ½ 20–133–52 at $16 per acre net to me.

J. A. Reeds.

The court held that this exhibit does not mention the matter of commissions, and the word "net" does not amount to a contract to pay all of the purchase price over the net to the agent. Louva v. Worden, 30 N. D. 401, 152 N. W. 689. That when the owner lists real property for sale with a broker and at a net price, in the absence of an express contract to that effect, such broker is not entitled to receive as commissions all the selling price in excess of such list price, but is merely entitled to a reasonable commission not to exceed such excess. Ibid.

On June 28, 1910, defendant met one Mr. Huey and introduced him to the plaintiff as a land buyer, and on the next day he arranged with the plaintiff to purchase the 800 acres at $17.50 an acre. He was to pay cash $500, to pay on receipt of abstract $500, and on November 15, 1910, $4,000 and for the balance $9,000 to give a 6 per cent mortgage payable in five years. Such was the contract as reduced to writing and agreed to between the agent and the purchaser. When it was shown to defendant he turned to his broker Paulson and said in substance: "I never authorized you to sell my land on any such terms as that." Paulson said: "I know you did not, but that is as near as I could get

Huey to come to our terms." Reeds said: "I told you I wanted $800 a quarter down and 7 per cent balance." Paulson answered: "You said you would accept 6 per cent if the contract did not call for a mortgage running over three years." Defendant said: "But this thing calls for a mortgage running five years." Paulson said: "Perhaps we can get together and fix this up. Maybe Huey will make the interest 7 per cent or you will let the mortgage run for three years."

Huey refused to make any change. It is entirely clear there was no sale in accordance with the express terms on which defendant had agreed to pay a definite commission. As defendant contends, the terms of sale did not accord with the listing contract. When defendant objected to the contract of sale as drafted by plaintiff, the latter conceded that it was not according to the terms given him, but requested the plaintiff to sign it, saying that they could arrange the matter of commissions so as to make it right and satisfactory.

The defendant by his counsel duly requested the court to give to the jury numerous special instructions, which are to the effect that as this action is based upon an express contract in regard to the terms and conditions for the sale of the land, the plaintiff cannot recover without proving a compliance on his part with the terms and conditions. In other words, that to recover a specified brokerage commission in accordance with the terms of a special contract, the broker must prove a full compliance by him with all the terms of the contract.

The requested instructions were pertinent and material because the plaintiff's claim is based on a specific contract, and the evidence is that plaintiff did not produce a purchaser ready and willing to buy the land on the terms of the contract, and that no sale was made on any such terms. After listing the land the owner still retained the right to sell the same on any terms, or to permit his broker to sell at a reduced price and at a reduced or reasonable commission. By assenting to a sale at a reduced price or on different terms, the owner did not agree or bind himself to pay the listing commission though he may have bound himself to pay a reasonable commission; that is, what his services were reasonably worth under all the circumstances. The express listing commission is earned only when a person is produced who is ready, able, and willing to buy in accordance with the express listing terms. A contract with a broker to sell land or to procure a purchaser is governed by

the same rules as other contracts. It must be free and mutual, and the parties must agree upon the same thing in the same sense. In matters of dispute concerning a broker's contract for the sale of land and services under it, judges and juries have a right to use their common sense and common knowledge.

Concerning variations from the listing terms of sale, the court instructed the jury to the effect that they must award the plaintiff the specified commission of $1.50 an acre, regardless of any variation to which the defendant assented. That was gross error. Under such a law if the defendant had assented to the sale of his land at $17.50 an acre, payable in five or ten years without any interest, he would still be liable for a commission of $1.50 an acre. But by the terms of the listing contract the plaintiff was to have $800 cash on every quarter section and 7 per cent on the balance of the price from the date of sale. By the terms of the sale defendant had no interest on the price from June 28 till November 15th, and for five years his interest on $9,000 was reduced from 7 per cent to 6 per cent. That was the same as reducing the list price $791.33. There is testimony that when defendant objected to the new deal which he had not authorized, the plaintiff promised to make it good from his commissions. Had he done so the chances are there would have been no expensive lawsuit.

In this case the complaint should have stated not only a cause of action on the express contract, but also a cause of action alleging the reasonable value of the services rendered and accepted by defendant. And the jury should have been given proper instructions in regard to each cause of action. Hence, in furtherance of justice within thirty days after the return of the remittitur the plaintiff may amend his complaint by adding to it a cause of action based on the reasonable value of the services rendered and accepted.

GRACE, J. (dissenting). Appeal from the judgment of the district court of Richland county, Honorable A. T. Cole, presiding by request.

This action is one brought by the plaintiff against the defendant to recover $1,200 and interest alleged to be due the plaintiff as commission for making sale of a tract of 800 acres of land for the defendant.

The complaint is in the usual form. It describes the land which plaintiff claims he sold for the defendant, and sets forth a cause of

action upon an express contract. The third paragraph in the complaint reads as follows:

"That on or about the 28th day of June, 1910, the plaintiff and the defendant entered into an agreement whereby the defendant authorized, empowered, and employed the plaintiff to procure for him a purchaser of said lands upon terms then agreed upon between the plaintiff and the defendant, and agreed to pay to the plaintiff for his services therein such sum of money as might be realized from the sale of said premises over and above the sum and price of $16 per acre, and the plaintiff accepted such employment; that thereafter and on the same day the plaintiff procured for the defendant a purchaser, to wit, one W. G. Huey, who was then ready, willing, and able to purchase said lands upon the terms agreed upon between the plaintiff and the defendant, and who at said time did purchase the same from the defendant at the price of $17.50 per acre; that pursuant to the agreement between the plaintiff and defendant, the compensation of the plaintiff was to be paid by the defendant on or before the 15th day of November, 1910; that by reason of the premises the plaintiff earned and the defendant became justly indebted to the plaintiff in the sum of $1,200,—all of which is past due, has been demanded of the defendant, and is wholly unpaid."

The defendant in his answer admits the allegations in the complaint relative to the description of the land. The remainder of the answer consists of a general denial.

The facts in the case are substantially as follows: Defendant in the year 1910 was the owner of 800 acres of land located in Richland county, North Dakota. The plaintiff in the year 1910 was a real estate agent located at Wyndmere, North Dakota. Plaintiff claims that in the earlier part of the year 1910, probably in January of said year, the defendant listed the land in question with the plaintiff for sale, at a net price of $16 per acre, with $3,000 to be paid down when deed passed, the balance to run not more than three years, with mortgage back on the land to secure the balance of the purchase price at 6 per cent per annum. Plaintiff claims that at the time the land was listed defendant expressly promised to pay the plaintiff whatever the plaintiff sold the land for in excess of $16 per acre. The defendant claims that the cash payment should not be less than $800 per quarter section; and that should the deferred payments extend for a longer period than

three years, such payments should bear interest at the rate of 7 per cent per annum. The defendant contends that should he introduce to plaintiff a buyer for the land to whom plaintiff could sell the land, then plaintiff's commission should be only 50 cents per acre; but that if plaintiff procured the purchaser and made a sale to such purchaser, then the plaintiff should have $1 per acre.

On the 28th day of June defendant introduced a Mr. Huey to plaintiff as a prospective land buyer, and requested plaintiff to show Huey Reeds's lands. Plaintiff claims that the defendant asked plaintiff to show Huey his, Reeds's lands, with others, Paulson sold Huey Reeds's lands, being the 800 acres of land described in the complaint; not on the terms upon which the land was listed, but upon terms stated by Huey, and which were finally accepted by the defendant and reduced to writing and set forth in exhibit B. Paulson, after showing the land to Huey, procured Reeds to sign exhibit A, which reads as follows:

Wyndmere, North Dakota, June 28th.

Martin Paulson:—

You are hereby authorized to sell my land, the west half and the southeast fourth of section 21, and the east half of 20–133–52, at sixteen dollars ($16) per acre net to me.

J. A. Reeds.

After exhibit A was signed, Paulson wrote the sales contract, exhibit B, in duplicate. The cashier of the First National Bank of Wyndmere acted as notary public in the execution of the contract between Reeds and Huey. After exhibit B was drawn, it was read by Reeds while in Paulson's office. Reeds discovered that the contract contained terms of sale of the land different from those upon which he had authorized Paulson to sell the land. Paulson admitted the terms were not in accord with their agreement, but informed Reeds that was as near as he could get Huey to come to Reeds's terms. Reeds said he had told Paulson he wanted $800 a quarter section down and 7 per cent on the balance. Paulson claimed Reeds said he would accept 6 per cent if the contract did not call for more than three years. Huey refused to make any change in the contract, but stated that he might pay the whole

thing up inside of a year. The contract was finally signed in the form of exhibit B.

This action is one to recover commissions upon an express contract for the sale of the land hereinbefore referred to. The case is more easily understood if it is divided into three parts,—one relating to that part of the express contract concerning commissions; second, that part relating to the terms of the contract upon which the land was to be sold; and, third, that part relating to the terms upon which the land was sold and the sale accepted.

It must be conceded that the defendant was the owner of the land; that he authorized the plaintiff to sell it; that plaintiff did sell it to Huey; that defendant agreed to pay plaintiff a commission for making such sale. The merest inspection of exhibit A, which we have above set out, discloses that it is not a complete contract with reference to its subject-matter. It is silent as to the terms of sale, and as to the commissions to be received by plaintiff for making such sale, if such sale were made. It is evident, therefore, that the contract with reference to commissions is a separate part of the whole agreement which was made in addition to exhibit A, and, if made, is proper to be proved by parol testimony. The appellant claims that the plaintiff should be limited in his proof of an express contract with regard to his legal right to recover in pursuance of such express contract such commission to the time expressed in the complaint, as on or about the 28th day of June, 1910. We are not inclined to agree that the complaint should be so strictly construed as to limit the proof to that particular time, in view of the fact that it must be conceded there was some agreement with reference to the promise and agreement by the defendant to the plaintiff of a commission for the sale of such land, and that is the important point, and the time of the agreement is not so material or essential. However, if the proof should be limited to about the time of June 28th, we are of the opinion that there is sufficient proof of an agreement at that time by the defendant to pay the plaintiff a commission to support the verdict of the jury.

The following testimony given by the plaintiff is very pertinent:

Q. Now, what was the talk had at the time exhibit A was signed?

A. When I handed it to him he read it, and he says, "Paulson, I

cannot pay a commission out of this." I says, "Mr. Reeds, that is net to you." He says, "All right." Then he took the pen and signed it, and he says, "What do you get for it—I suppose you get $20 an acre?" and I says, "No, I do not;" I says, "I get $17.50 an acre."

Q. Afterwards, did Reeds come to your office?

A. Yes, sir.

Q. Did you go to meet him, or did he happen to come there, if you know?

A. I started to get him and McGann, and I met Reeds. He started to my office, and I met him just outside my office door.

Q. You were on your way to get McGann?

A. Yes, sir.

Q. At that time was there anything said between you and Reeds about the sale of this land—anything in connection with it?

A. Yes, sir.

Q. Now, what was said there?

A. He said, "Paulson, I want half of what you get above a dollar an acre of your commission."

Q. What did you say?

A. I said, "No, we will abide by your agreement."

Upon cross-examination the witness Paulson again gave substantially the same testimony.

It is evident from such testimony of the plaintiff that Reeds then understood that Paulson was claiming to be entitled to a commission amounting to $1.50 per acre. Reeds knew the net selling price of the land to him was $16 an acre. He at that time knew that Paulson was selling the land for $17.50 an acre, and knew that Paulson was claiming $1.50 an acre as his commission for making such sale, and that Paulson refused to divide the commission with Reeds above a dollar an acre; and that with all this knowledge, talk, and understanding Reeds executed the contract, exhibit B. We are of the opinion, therefore, that such conversation with respect to these matters at the time of the execution of exhibit A supports plaintiff's claim as to the terms of the agreement as to commissions, and supports plaintiff's claim as to the commission which should be paid the plaintiff for the sale of such land, and that the evidence of such agreement supports the verdict

of the jury, at the time of the signing of exhibit A, and the time of the conversation as to commissions which occurred at such time in abiding by the agreement as to commissions. We are further of the opinion, notwithstanding the claim of the appellant, that the plaintiff should be limited in proof strictly to that which would establish the agreement on or about the 28th of June, 1910, that it is proper to permit the plaintiff to introduce other proof tending to establish any agreement between these parties whereby defendant agreed to pay the plaintiff a commission for the sale of the land in question, it being also shown that subsequent to such agreement plaintiff did sell the land. The plaintiff does not allege that the agreement was made exclusively on the 28th day of June, but alleges that it was made on or about the 28th day of June; and by giving to the pleadings and the complaint in this case that liberal construction which has become a fixed rule in our jurisprudence, to the end that substantial justice may be done between parties litigant, we are of the opinion that any talk or agreement between the plaintiff and defendant in January, 1910, having reference to commissions for a sale of the land in question, by the plaintiff, which sale was later effected by the plaintiff, is not too remote and is so closely connected with the whole contract with reference to the sale of such land, including the matter of commissions, that the same was properly admitted. Especially is this true when we keep in mind that we must seek elsewhere than exhibit A, not only to find the agreement as to commissions, but also as to the terms upon which the land was to be sold.

With reference to what was said in regard to commissions in January, Paulson testified as follows:

Q. Mr. Paulson, I will ask you to state now to the court and jury as near as you can recall it what Reeds said to you, and what you said to him about the sale of the lands involved in this case at the time of the talk you say you had in January.

A. He asked me on what conditions I handled the land, and I told him as a rule I listed it at a net price to the owner, and whatever I get above that would be my commission, and he said: "That is all right with me. I want that much net to me, and I will give you what you get."

If this testimony is true, it shows conclusively the agreement between the parties as to the commission. In view of the fact that the agreement in regard to commission was a parol agreement, and the further fact that the plaintiff actually did make a sale of the land in question, any testimony which would tend to establish or show the agreement between the parties as to the amount of commission to be paid was relevant and material testimony, and was admissible as such even though such conversation and talk between the parties with reference to the commissions was at a different time than June 28th, the material and important point being whether such agreement was actually made between the parties, and if a sale of the land was made by plaintiff, and not when it was made. There was testimony on behalf of the defendant tending to show that if he brought the purchaser to the plaintiff the plaintiff would then receive only 50 cents an acre, but that if plaintiff procured the purchaser, then the plaintiff should receive $1 per acre. All this testimony was for the jury. What contract for commissions, if any, was made between the plaintiff and defendant, was a question of fact to be determined by the jury from all the testimony, circumstances, and facts in the case. The jury heard the testimony of plaintiff and defendant, and their respective witnesses, and determined that the plaintiff was entitled to the sum of $1,200 for his commission for making such sale of such land, and the verdict of the jury is sufficiently supported by the evidence. We are satisfied there was no prejudicial error in the admission of any of the testimony which had reference to the agreement in regard to commissions.

The second and third points may be considered together, they having reference to the terms upon which the land was to be sold, and the terms upon which the land really was sold. It may be conceded that the terms upon which the land was sold were different from the terms upon which plaintiff was to sell the land by reason of his original agreement. It is claimed by the plaintiff that the first arrangement was that $3,000 was to be paid down on all the land at time of sale, and the balance was to be carried a certain time at 6 per cent. On the other hand, the defendant claims the down payment was to be $800 per quarter section, and the balance, if paid within three years, was to draw interest at 6 per cent, but, if for a longer period, at 7 per cent. The land was actually sold on the following terms: $500 at the

time of the sale, $500 when the abstract was furnished showing merchantable title, and $4,000 on November 15, 1910, deed then to be furnished, and balance to run five years at 6 per cent. It will be seen that these terms are entirely different from the terms stated either by the plaintiff or defendant, but they were the actual terms upon which the plaintiff sold the land and which sale was accepted and agreed to by the defendant as is more clearly shown by exhibit B, the written contract of sale wherein the terms are fully set forth. The defendant seeks to escape the payment of the commissions in question upon the theory that plaintiff undertook to sell such property upon certain terms, and did not do so; and having failed to sell upon those terms, and did sell upon other terms which were accepted by the defendant, the defendant denies any liability to plaintiff for commissions. The defendant claims the plaintiff cannot recover because he did not sell upon the terms which were given him by the defendant. There is no question of deception, fraud, or false representation in this case. When the defendant executed exhibit B, he knew that the terms of the sale therein stated were not the terms upon which he had theretofore agreed to sell said land. The plaintiff also knew that the terms were not the same as agreed upon between plaintiff and defendant, although plaintiff and defendant do not agree on what the actual terms were. The defendant called plaintiff's attention to the fact that the contract for the sale of the land contained different terms than those upon which the land was to be sold. The plaintiff agreed with him the terms were different, but claimed they were the best terms he could get Huey to make, and Huey would not close the contract and buy the land upon any other terms. There was some testimony which tended to show that Huey might pay all the purchase price within a year, and the record does show that Huey subsequently paid all the purchase price and took a deed to said land to his wife. It does not appear from the record that by reason of the change in the terms of the contract Paulson should receive any different commission than that theretofore agreed upon. The agreement as to commission was unchanged so far as it was affected by the difference in the terms which were expressed in exhibit B, the written contract, and those terms upon which the land was to have been sold. There being no change in the agreement with reference to the price of the land, or amount of commissions by reason

of such change in terms, the plaintiff is liable as a matter of law for the commissions as agreed upon. Reeds did not have to sign the contract, exhibit B, if he did not care to. He could have refused to execute such contract for the reason that the same did not express the terms upon which he agreed to sell the land, and in that event Paulson could have recovered no commissions from him. But Reeds having accepted other terms upon which said land should be sold, the price remaining the same, and having executed such contract ratifying such terms, nothing further being said about the commission agreement, he was legally liable and bound to pay the commissions as defined by the agreement, and the commissions were fully and fairly earned by the plaintiff.

Appellant lays great stress upon the listing agreement. What then was the listing agreement? It is certain that exhibit A is at least not all of the listing agreement, even though it is considered part of it. We must look elsewhere for the terms of the listing agreement; that is, the time of the payments, and the rate of interest on deferred payments. We must look elsewhere also for the agreement as to the commission, if any, which was to be paid plaintiff for making such sale. All of these taken together in this case constitute the listing agreement, and constitute the contract between plaintiff and defendant. It cannot be said that after such contract or listing agreement was agreed upon between the parties, if it were so agreed upon, that it could not be thereafter changed by the subsequent agreement or conduct of the parties, the contract being largely oral. And in so far as such listing agreement or contract with full knowledge of both parties was changed, or if the conduct or acquiescence of the parties was such as to approve or ratify such change in the terms of the contract, it would be binding upon both of them. The contract or listing agreement was changed by changing the terms of the sale of such land, that is, by the payment of an amount down at the time of the sale different from that which was formerly to have been paid down at the time of sale; another sum payable at the furnishing of the abstract; another sum on the 15th day of November, 1910; and the balance paid in a certain manner as shown by exhibit B, all of which terms were different from those claimed by the defendant or the plaintiff, and from the terms specified in the original listing contract. This is the only manner in which the old

contract was changed. This change affected only that part of the contract which was made orally. Nothing was said about any change in that part of the contract relative to commissions; and what the contract was with reference to commissions was a question of fact for the jury under all the facts and circumstances of the case. The jury found that plaintiff was entitled to recover the sum of $1,200. They found, therefore, that plaintiff was entitled to all the excess for which plaintiff sold said land over and above $16 an acre, which was in accordance with the testimony of plaintiff as to what the contract really was with reference to commissions, as understood and agreed by and between plaintiff and defendant in January, 1910. The jury disbelieved what the defendant testified to as to what the understanding and agreement was with reference to commissions had in the month of January, 1910, and believed the plaintiff's testimony, not only as to the understanding and agreement, if any, had in the month of January, but at any other time up to and including the time of the execution and delivery of exhibit B. Exhibit A did not by any means contain all the terms of the contract between the parties. It was therefore competent to introduce oral testimony to show what the remaining terms of the contract were which were not included in the written contract; and what such contract was, was a question of fact exclusively for the jury under all the testimony, facts, and circumstances of the case. This view of the situation results in this court holding that not only exhibit A, but all the negotiations between plaintiff and defendant commencing with January and up to and including all of the time to the execution of exhibit B, are to be taken into consideration, and that the making of the contract between the plaintiff and the defendant was not in fact concluded until the signing of exhibit B, at which time the difference in the terms of the sale of the land was known to the defendant and the reasons explained to him why such terms were so changed, which was that the terms of exhibit B were the only terms on which the purchaser would deal, and having such full knowledge of such changes and nothing being said about any other changes in the contract between plaintiff and defendant referring to commissions, the contract, exhibit B, was knowingly and willingly executed by the defendant. It follows, therefore, that the plaintiff procured for the defendant a purchaser who purchased the land upon the terms agreed upon between plaintiff and

defendant, considering that the whole contract between plaintiff and defendant was not complete until the time, or about the time, of the signing of exhibit B. In this view of the whole matter, we are of the opinion that the plaintiff complied with the terms of the contract, and is entitled to recover his commission in the amount found by the jury. Even if the plaintiff in this case was required to bring himself within the rule laid down in Anderson v. Johnson, 16 N. D. 174, 112 N. W. 139, we are of the opinion that under the facts and circumstances of the case, including the making of the contract of listing between plaintiff and defendant, and considering that the contract was really in the making commencing with January and ending at the time exhibit B was signed, that plaintiff has brought himself within the rule laid down in that case.

What is a listing contract? It may be said to be a contract whereby one, the owner of the property, confers upon another, his agent, the right and authority to sell such property to anyone whom the agent may find as a purchaser upon terms and conditions specified in such listing or agency contract; but even so, after the time of the making of such contract with the agent, or the conferring of such authority upon him, there is nothing to prevent the parties from subsequently agreeing and consenting to a change in the terms of such contract, and in so far as such contract was subsequently changed by the agreement, both parties would be bound thereby, and this being an oral contract, it could be modified orally or by the acts and conduct of the parties. Sunshine Cloak & Suit Co. v. Roquette Bros. 30 N. D. 143, L.R.A.1916E, 932, 152 N. W. 359. The listing agreement or contract is in effect the authority of the principal to the agent to sell certain property upon certain terms. If the principal changes the terms of the agency or listing contract, and there is no objection to such change by the agent, and he assents to or acquiesces to such change, the listing contract then, as between the principal and the agent, is not the same as it was before, but the listing contract or authority to sell is the listing contract or authority as changed. Whatever authority the agent had to make the sale of the property at the time the sale was made constitutes the authority or listing contract, and this is determined not alone by the original listing contract, but by the original listing contract as it is after it is modified or changed and such changes are agreed to by the parties

or impliedly consented to by their acts and conduct. If an agent has a listing contract or authority to sell land or property, which includes the terms of sale, he cannot sell contrary to such terms and contrary to his authority and recover a commission, but his power and right to sell the property and recover commissions for making such sale are to be measured by his right and authority to sell at the time the sale is consummated.

The appellant has assigned a large number of errors, many of which relate to the exclusion of testimony and the admission of testimony. In all such errors assigned by the appellant which refer to the reception of certain evidence objected to by the defendant, or the exclusion of certain evidence offered by the defendant, there is no reversible error, nor was there reversible error in the court overruling certain motions made by the defendant to strike out certain testimony offered by the witness Paulson. The court was not in error in refusing to grant the defendant's motion for a directed verdict. The court was not in error in permitting the reception in evidence of any of the exhibits offered and received in evidence. The court was not in error in permitting the plaintiff to read the evidence of the witness McGann given on a former trial of the same case in the same court, which case was appealed to the supreme court and a settled statement of the case had in such appeal, it appearing by competent testimony in this case that the witness McGann was permanently located in the banking business in the state of South Dakota, and as a matter of law was not therefore a resident of this state at the time of this trial. There was no error in refusing to give any of the instructions of law requested by the defendant, nor error in refusing to charge the jury as the defendant had requested. There was no error in the court's instructions to the jury as given. The charge was full, fair, and complete, and was a careful and clear statement by the court to the jury of the law relative to the legal principles involved in the whole case. The case is one which has been bitterly contested. Each party to the litigation has been represented by able and astute counsel. The rights and claims of the respective parties have been ably asserted and defended by the respective counsel. The trial court was most eminently fair to all parties, and took exceedingly great pains that no testimony should reach the jury which was not competent, and if incompetent testimony was offered

in the presence of the jury or if the respective counsel in the discussion of various legal propositions might have said something irrelevant to the case, in the presence of the jury, which might tend to prejudice their minds, the court again and again cautioned the jury to disregard all such irrelevant matters. The case having thus been fairly presented to the jury, and they having carefully considered the same, and returned their verdict into the court, and there being no reversible error in the record, the verdict of the jury should stand as given.

The majority opinion reverses the judgment only for two reasons, namely: First, failure of the court to give some instruction with reference to the consideration of the testimony in the case, which testimony is to the effect that, at the meeting where exhibit B was signed, defendant signed exhibit B with the understanding then and there had that the plaintiff was to make up the difference between the value of the sale contract as made, and the contract as it would have been had the sale been made according to the original terms. The difference claimed is approximately $700. All of this testimony is set forth in the majority opinion. Second, that certain of the instructions of the court were erroneous, which were to the effect that if the defendant signed exhibit B while plaintiff was acting as his agent, knowing at the time he signed it that it did not contain the terms of the contract, that the plaintiff had been authorized to negotiate for him, he would be bound to pay to the plaintiff his full commission,—$1,200. For these two reasons, the judgment of the trial court is reversed. We are positive there is no merit in either of these reasons assigned in the majority opinion when clearly analyzed and examined. The first reason assigned is without merit when it is remembered that the entire charge of the court must be construed together; and if, as a whole, it fairly and fully advises the jury as to the law of the case, certainly there should be no reversal. The court again and again instructed the jury that, in order for the plaintiff to recover in the action, the minds of the parties must have met upon the proposition of the plaintiff acting as agent or broker for the defendant, and their minds must also have met upon the matter of the amount of the commission agreed to be paid to plaintiff. As to that matter, their minds must have met upon the proposition of the plaintiff receiving as a commission all above the

sum of $16 per acre received from the sale of the lands in question, as the plaintiff rests his case upon an express contract founded upon such claimed agreement. The court even went much further than this and instructed negatively upon the same subject, to the effect that, if the jury found from the evidence that the contract claimed by the plaintiff was not entered into and agreed upon by and between plaintiff and defendant; in other words, if the jury found that at no time did the minds of the parties to this action meet upon the proposition alleged by plaintiff, to wit, that the defendant was to have a net price of $16 per acre and the plaintiff to have all received above that as his commission, and it being agreed between the parties that the land sold for $17.50 an acre,—then the jury should find a verdict for the defendant. The court, therefore, clearly submitted to the jury all the testimony with reference to the making of the contract regarding the amount of commission which was to be received by plaintiff in case of sale. Certainly the court could not, and it would be improper, or if not improper, unusual, to set out certain testimony and refer to it specifically and give an instruction of law thereon. The questions to be decided by the jury were, What was the contract as to the commissions? What was the net price of the land? And what was the land sold for? All these questions were carefully submitted to the jury in order that they might determine from all the testimony what, in fact, was the contract between plaintiff and defendant as to the commissions to be received by plaintiff in case of sale. The court did not refer, and properly so, to any testimony of the plaintiff along these lines, and just as properly did not refer to any of the testimony of the defendant. The court instructed the jury to find what the contract was, and in order for the jury to do this, they must, and no doubt did, consider all of the testimony. It would be an unheard of proceeding for the court to reiterate to the jury certain testimony either in behalf of the plaintiff or defendant and then give instructions to them as to the consideration of such testimony. Certainly, there is nothing in this record to show that the jury did not consider all of the testimony, and the case was submitted to them with the instructions given and reiterated time and again to determine what, in fact, was the contract between plaintiff and defendant, and the jury did this, and in doing so considered all the testimony in the case.

It is difficult to conceive how the court could give a clearer and more specific charge, one open to so little criticism in this regard. Clearly, the contention that it was error not to give an instruction upon the testimony set forth in regard to this matter in the majority opinion, is absolutely without any merit whatever. By any stretch of imagination, prejudicial error cannot be predicated upon failure of the court to call attention to such testimony specifically, especially where the subject to which such testimony referred was submitted to the jury, and the law relative thereto fully and thoroughly explained.

The jury in arriving at their verdict as to what amount of commission had been earned by plaintiff under his contract were instructed to consider all the testimony. The jury did consider all the testimony relative to the amount of commission which plaintiff had earned under his express contract. In considering all the testimony the jury must have and did consider the testimony given by the defendant with regard to the alleged conversation had with the plaintiff just before the signing of exhibit B, wherein defendant claims to have called the attention of the plaintiff to the difference in interest, which is claimed to amount to about $700, and which defendant claims plaintiff agreed to make good. All this testimony, however, was for the jury. All the testimony in regard to this difference was considered by the jury, and the jury evidently must have considered such testimony as not having any weight. The jury could have found that, under the agreement pertaining to commissions, there was $1,200 due plaintiff, but that on account of the alleged agreement whereby plaintiff was to make up the difference of $700, that amount should be deducted from the whole commission, leaving only $500, but the jury evidently, after considering all the testimony, refused to give any weight or credit to the testimony of the defendant with reference to the $700 difference, and found as a matter of fact that the plaintiff had earned his whole commission of $1,200. The evidence of the defendant relative to the $700 claim is part of the evidence relative to what the commission contract in fact was. That testimony, together with all other testimony, as to what commission plaintiff was to receive for making such sale, was to be considered by the jury, and they were to determine from all such testimony on what contract for commissions for making sale of said land the minds of the plaintiff and defendant actually met. That was the

question submitted to the jury, and which was to be determined from all the testimony in the case with reference thereto, and the court's instructions dealt fully with the subject of the contract with reference to the commission to be paid plaintiff. The jury were fully instructed as to the law. The jury did determine, as a question of fact, what was the contract as to commissions earned by plaintiff, and the finding is conclusive.

As to the second reason for reversing the judgment, we desire to say that, if the court had given any other instruction except that which it did give, it would not have stated the law of this case. The court gave the only possible instruction it could give. The change in the terms of the contract were all submitted to the jury under full instructions. The jury was instructed that, if there were any changes in the terms of the contract to which defendant did not assent, plaintiff could not recover. The court's instructions in this regard are so full and explicit that there is no need of further explanation of their meaning. We say it is the law that where, as in this case, a person authorizes another to sell his property for a stated sum upon certain terms, and agrees to pay therefor a stated commission, and thereafter the terms of the sale are modified, no change being made in the amount of commissions to be paid, and the sale is made upon the modified terms with the knowledge, consent, and approval of the owner of the property, and he ratifies the sale, then he is obligated to pay the commission originally agreed upon. This was the instruction of the court, and if the court had instructed the jury otherwise, and the plaintiff had been defeated, an instruction other than the one given undoubtedly would have been reversible error. In other words, the plaintiff cannot recover at all, unless he can recover under the law as laid down by the court and contained in its instructions to the jury. No other instruction is applicable to this case, because it clearly sets forth all the law that is applicable to this case. If the plaintiff recover at all, he must recover for a sale under the modified contract; he must recover his commissions under an express contract; and for making a sale of the property, the terms of which are those contained in exhibit B. Exhibit B contains the terms of contract for sale. The plaintiff must recover his commission, if at all, for making that sale; and we claim that, plaintiff continuing to act as defendant's agent at the time exhibit B was signed,

and being the procuring clause of such sale, and exhibit B being read by defendant before signing the same, and he having signed the same with full knowledge of the terms therein, and having fully approved of the sale, and accepted the new terms, and received the money, and fully completed the sale, thus fully ratifying such sale, he is legally bound to pay the plaintiff his commission as determined by the express contract; and the terms of the express contract for commissions were submitted to, and determined by, the jury, under all the testimony, facts, and circumstances of the case. Contracts of brokerage between brokers and owners of property are exceedingly many, and each must be construed in the light of the terms which it contains. In the case of Gelatt v. Ridge, 117 Mo. 553, 38 Am. St. Rep. 683, 23 S. W. 882, we find a parallel case to the one at bar. The reasoning of the court in that case is so lucid that it is impossible to misunderstand it. In that case the contract was in writing, and it would greatly aid, we believe, the majority to understand the contract under consideration, if they would contemplate the original contract in this case as being in writing, and then the modification of the written contract which the testimony in this case shows was made. If the contract and its modification had been in writing, and no change in the written contract was made with reference to commissions, there could be little doubt as to what the conclusion of the majority would be. The court in that event, no doubt, would hold that the terms of the written contract as it existed at the time of sale were binding and effective, and such written contract would be construed in the light of the terms therein contained. The elements of the contract in the Missouri case are as follows: Thomas S. Ridge, by an instrument in writing, authorized Gelatt to sell certain property in Kansas City for the sum of $70,000; terms of sale, $30,000 cash in thirty days from date, $10,000 cash in three days from date, and the remainder, $23,000 in six months, with interest at 6 per cent; purchaser to pay an encumbrance of $17,000 bearing 7 per cent interest. Ridge agreed to pay Gelatt for making such sale on the above terms, $1,400, and any excess obtained for said property above said price. On the next day after making such contract Gelatt, the agent, sold the property to Brady, upon the following terms: Sale price, $72,000; earnest money, $500; $10,000 in two days from date, $500 of which had been paid, $25,000 on delivery of deed, $21,000 six

months from date of deed, at 6 per cent, and assume $17,000 encumbrance with 7 per cent interest from date of said deed. After Gelatt had procured these terms from the purchaser, they were submitted to the owner of the property, Ridge. These terms of sale were submitted to and approved by Ridge. Another time was appointed at which the written contract was to be signed and balance of the cash payment made. At the subsequent meeting, it was disclosed that a tenant occupied a portion of the premises and the evidence tended to prove that the defendant agreed to arrange with him in regard to vacating the premises. At the meeting subsequently held, when the written contract was to be signed, the owner of the property refused to carry out the contract unless the purchaser would take the property subject to the lease of the tenant, which the purchaser declined to do. It was shown that the purchaser of the property was able, ready, and willing to carry out the contract. The sale was finally consummated on the terms procured by Gelatt, but Ridge refused to pay the commission, and suit was entered to recover the same. The complaint was amended and changed alleging the authority to sell and agreement as to the commission, as contained in the written contract, and sale on the terms contained in the receipt, and ratification of the sale upon these terms, and a final consummation of the sale by the execution of the deed. This is exactly the condition in the case at bar, and the Missouri supreme court in its decision uses the following language: "It is next contended that there can be no recovery for the reason that the contract made by the agent varied from the terms of his authority, and that this would be the case though the terms of the sale made were more advantageous to the principal than was required under the letter of authority. There is no doubt, as a general principle of law, that an agent must act within the terms of his authority, and a substantial variance therefrom would defeat his right to compensation, though such variation may have been advantageous to his principal." Nesbitt v. Helser, 49 Mo. 384. Yet, it is well settled that if the principal ratify the contract made by the agent, the substituted terms become a part of the original agreement and can be enforced as such. Woods v. Stephens, 46 Mo. 556, and cases cited. The evidence tends to prove that it is very conclusive that defendant did fully approve and ratify the terms of the sale as made by plaintiff, and from the instructions, the jury must have so found. The suit was

not upon the *quantum meruit* as claimed by defendant, but was upon the original contract as made and supplemented by the ratification and acceptance of defendant. If, as before stated, the departure by the agent from the terms of the authority given may become, upon approval and ratification by the principal, a part of the original contract, the compensation, if fixed therein, should be measured thereunder. Also to the same effect was Notkins v. Pashalinski, 83 Conn. 458, 76 Atl. 1104, 20 Ann. Cas. 1023; Delta & P. Land Co. v. Wallace, 83 Miss. 656, 36 So. 263; Shober v. Blackford, 46 Mont. 194, 127 Pac. 329; Hubachek v. Hazzard, 83 Minn. 437, 86 N. W. 426; Prindle v. Allen, 164 Mich. 553, 129 N. W. 695; Weeks v. Theodore Smith & Co. 79 N. J. L. 388, 75 Atl. 773; Hobbs v. Edgar, 23 Misc. 618, 51 N. Y. Supp. 1120; Smith v. Sears, 160 Ill. App. 240; Dexter v. Campbell, 137 Mass. 198; Carnes v. Finigan, 198 Mass. 128, 84 N. E. 324.

The reasoning of the majority opinion is centered in the following paragraph, which, when thoroughly analyzed, will be found to contain its own refutation. The paragraph is as follows: "No authority has been cited, and we are confident none can be found, *which will support the contention that an owner of property who has listed it for sale on stated terms and upon an agreed commission is bound to pay such commission to a broker who has negotiated a sale upon terms not previously assented to by the owner, where it is expressly agreed between the owner and the broker at the time of the signing of the sale contract that the broker is to receive a commission different from that originally stipulated. It is as competent for the parties to a commission agreement to alter it by mutual understanding during the course of performance as it is to thus change an agreement of any other character.*"

The majority opinion assumes a condition it seems to us does not exist, *viz.*, that the sale was not made upon terms previously assented to by the owner. We say the sale in fact was made upon terms previously assented to by the owner, and which the owner understood, knew, ratified, and accepted the benefit of. The owner did this when he signed exhibit B with full knowledge of all its terms,—ratified exhibit B and accepted the benefits thereof. The majority opinion is again wrong in assuming that at the time of the signing of the sale contract there was an agreement that the broker was to receive a commission different from that originally stipulated. Whether there was such an ad-

ditional agreement was a question of fact for the jury. The jury found there was no such additional agreement, and therefore found against defendant's contentions in regard to the $700 interest claim, which was the only change in the commission agreement attempted to be shown by the defendant. The defendant having failed to do this before the jury, who were the exclusive judges of fact, the reasoning of the majority of the court does not therefore have any force in this regard. The majority opinion, in the paragraph referred to, states that it is competent for the parties to a commission agreement to alter it by mutual understanding during the course of the performance. This is no doubt true, but the very question whether any such change was made was submitted to the jury, and the jury disbelieved defendant's testimony in this regard and found in favor of the plaintiff. It appears to us that the majority of the court are clearly in error in arriving at their conclusion in this case. The facts in this case have three times been submitted to a jury, the members of which were the peers of both plaintiff and defendant. Three times have the jury returned a verdict in favor of plaintiff. Under such circumstances it is fair to presume that a different result will not be had upon a new trial. This principle was enunciated by this court in the case of Blackorby v. Ginther, 34 N. D. 258, 158 N. W. 354, where the court used the following language: "A new trial will ordinarily not be awarded where it would be ineffectual, or if there is no reasonable prospect that the result would be different upon a new trial."

Another principle enunciated in that case is that, where a verdict has substantial support in the evidence, the supreme court will not weigh conflicting evidence.

In the case of Soules v. Northern P. R. Co. 34 N. D. page 10, L.R.A.1917A, 501, 157 N. W. 823, the court laid down this principle, which is set forth in the syllabus of the case: "The charge to a jury must be taken as a whole, and where such charge as a whole clearly presents the issues of the case, mere technical defects in portions thereof are not grounds for reversal of the judgment."

We are clear the judgment should have been affirmed.

ZORA E. SWINGLE, Appellant, v. H. P. SWINGLE and William McCarty, Respondents.

(167 N. W. 715.)

Premises — taking and retaining possession of — color of title — damages for — action to recover — verdict and judgment — sustained by evidence.

Evidence examined and *held* to sustain the judgment of the trial court in the amount of damages allowed plaintiff against defendant for defendant's unlawful taking and retaining possession, under color of title, of premises, to the possession of which the plaintiff was rightfully and lawfully entitled.

Opinion filed April 10, 1918.

Appeal from District Court of Billings County, North Dakota, *W. C. Crawford,* Judge.

Affirmed.

Murtha & Sturgeon and *H. E. Honey,* for appellant.

In a law action the plaintiff would be entitled to treble damages against McCarty for the use of the land. Code, § 7175.

McCarty cannot recover the consideration paid for the land nor for improvements made thereon nor for taxes paid. He is not an adverse claimant holding under color of title in good faith, and therefore can have no relief. Wood v. Conrad (S. D.) 50 N. W. 95; Lindt v. Uhlein (Iowa) 89 N. W. 214.

A deed void on its face is not color of title, and the person occupying land thereunder cannot claim to be acting in good faith. 21 Cyc. 551 (3) et seq.; 552, 3, note 30, 553; Baumann v. Franse (Neb.) 56 N. W. 395; 2 Words & Phrases, pp. 1264 et seq.

The owner of land need not return to a party so holding the consideration he paid. Watts v. Gallagher (Cal.) 31 Pac. 626; Shoemaker v. Collins (Mich.) 14 N. W. 559; Ballou v. Bergvendsen, 9 N. D. 285; Wood v. Conrad (S. D.) 50 N. W. 95, supra; Deffenboch v. Hawke (U. S.) 29 L. ed. 423.

Plaintiff is entitled to the value of an owner's share in the crops,— same as though land had been rented, and interest from the end of each year. Baldwin v. Bohl (S. D.) 122 N. W. 247.

A debtor's right to exemptions cannot be defeated by set-off by the creditor. 18 Cyc. 1463; Cleveland v. McCanna, 7 N. D. 455; Pickrell

v. Jerauld (Ind.) 27 N. E. 433; Junker v. Hustes (Ind.) 16 N. E. 197; Long v. Collins (S. D.) 88 N. W. 571; Long v. Collins (S. D.) 94 N. W. 700; Cadwell v. Ryan, 16 L.R.A.(N.S.) 494; Treat v. Wilson (Kan.) 70 Pac. 893; Belou v. Robbins (Wis.) 8 L.R.A. 467; Bradley v. Earle, 22 N. D. 139, 42 L.R.A.(N.S.) 575, 132 N. W. 660; Butner v. Bowser (Ind.) 3 N. E. 889; Davidson v. Meyers (S. D.) 135 N. W. 720; note to Bradley v. Earle, 42 L.R.A.(N.S.) 575; Wylie v. Grundysen (Minn.) 19 L.R.A. 33; Neblett v. Shackleton (Va.) 32 L.R.A.(N.S.) 577; Ekhart v. Schlecht, 29 Tex. 129; Clark v. Bird, 48 So. 359.

Plaintiff is not only entitled to recover the land, but also to recover the value of the use and occupation of it, with her costs; and this property being exempt, there can be no legal offset. Neblett v. Shackleton (Va.) 32 L.R.A.(N.S.) 577; Bradley v. Earle (N. D.) 42 L.R.A. (N.S.) 575; Cleveland v. McCanna, 7 N. D. 455; Long v. Collins (S. D.) 88 N. W. 571; Long v. Collins (S. D.) 94 N. W. 700; Cadwell v. Ryan, 16 L.R.A.(N.S.) 494 note; Bradley v. Earle, 22 N. D. 139, 132 N. W. 660.

Newton, Dullam & Young, for respondents.

The detriment caused by the wrongful occupation of real property in cases not embraced in the sections of the Code covering the subject is deemed to be the value of the use of the property for the time of such occupancy, not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages, and the cost of recovering possession. Code §§ 6167, 7173–7175; 39 Cyc. 870 E.

Plaintiff can recover only the reasonable rental of said property. The occupancy of the tenant though wrongful, was in good faith on his part. He did not force plaintiff to move off the place. She was off when he took possession. 162 N. W. 914.

Plaintiff in such cases can only recover the value of such use and occupation of the premises as defendant is shown to have enjoyed. 39 Cyc. 879; Sanford v. Johnson (Minn.) 4 N. W. 245; Baldwin v. Bohl (S. D.) 122 N. W. 247.

Defendant is entitled to recover for all he expended in the protection of the premises while so in his possession. Subrogation is no longer confined to cases of strict suretyship, but is broad enough to include

every instance in which one party is required to pay a debt for which another is primarily liable and which in equity and good conscience ought to be discharged by the latter, and is the mode which equity adopts to compel the ultimate discharge of such obligations by him who should pay them. 37 Cyc. 370, 447; Dillon v. Warfel (Iowa) 32 N. W. 194; Hester v. Aultman & Co. 57 N. W. 1053; Bailey v. Bank, (S. D.) 150 N. W. 942; Tellett v. Albregston (S. D.) 152 N. W. 152; Stroh v. O'Hern, 142 N. W. 865; N. W. Mutual Sav. & L. Assoc. v. White, 31 N. D. 348; Mavity v. Stover (Neb.) 94 N. W. 834.

Defendant should be allowed for the seeding of the premises and labor done, all in good faith by him. Mavity v. Stover, 94 N. W. 834.

GRACE, J. Appeal from a judgment of the district court, Billings county, North Dakota.

This action was brought by the plaintiff to quiet title to a quarter section of land, more fully described as the N.½ of the N.E.¼ and N.½ of the N.W.¼ of section 20, township 139, range 102, Billings county, North Dakota. On a former appeal we found that the plaintiff was entitled to the use and occupation of said land as a homestead, and that the deed executed by H. P. Swingle to Wm. McCarty, not having been executed or acknowledged by the plaintiff herein, was absolutely void. The case was remanded that an accounting might be had and the amount due the plaintiff from the defendant for the use and occupation of such premises might be determined. See Swingle v. Swingle, 36 N. D. 611, 162 N. W. 912. After the case had been remanded, additional pleadings were filed and evidence taken upon the value of the use and occupation while the premises were used and occupied and in the possession of the defendant, which was from September 22, 1914, to June 7, 1917. Testimony of the value of the use and occupation was, on July 7, 1917, submitted to the court. The court made the following findings in effect:

That McCarty in September, 1914, bought the 1914 crop from Harmon P. Swingle for $100. The reasonable value of the use and occupation of the premises for 1915 and 1916 was $100 for each of said years. That on March 6, 1916, McCarty paid $24.32 taxes, and also paid interest on a mortgage against said land in the sum of $300.30. That McCarty seeded oats in the spring of 1917 to the amount of 25

acres, which was all the plowed land upon said premises, and the reasonable value of said seeding was $100. The court allowed McCarty the further credit of $18 for another small item, making a total allowance of $442.62. Against this credit the plaintiff was allowed to offset $200, leaving a balance in favor of McCarty in the sum of $242.62. The court further held that said sum should be a lien upon the land, and further held that plaintiff should have a personal judgment against defendant McCarty for the costs of the first trial in the district court, and the costs of appeal to the supreme court in the same case, and for entering, serving, and recording this judgment, and that all costs taxed against McCarty be deducted from the $242.62. The appellant makes six assignments of error, all of which we have considered.

Appellant sets forth the specifications of the insufficiency of the evidence. The action was tried to the court without a jury. It was tried, by the consent of both parties, by the court without a jury. If the findings of fact by the court find substantial support in the evidence, they should not be lightly disregarded. While such findings are not absolutely binding upon this court, they should receive serious consideration, if they are substantially supported by the evidence.

We are of the opinion that the whole of the tract of land, including the buildings, should be considered together as constituting a single property, the value of the use of which is to be determined as a whole from the testimony relative thereto. This property is a farm. The farm must be considered as an entity. It must be considered in its entirety, and the value of the use is to be determined by ascertaining, as near as possible, the value of the use and occupation of the premises as a whole, not by determining what the house and garden might rent for separately, or what the hay land and plow land might rent for separately. The real question is: What is the value of the use and occupation, the rents, of this quarter section of land when considered as an entirety? Testimony which would show, or tend to show, what was the value of the use and occupation of these premises when considered as an entirety, is the only competent testimony. It is apparent that the testimony relative to the use of the house and garden plot, etc., which undertakes to place a value upon the use, though separate and apart from the value of the use of the entire premises, is not, in fact, competent testimony,

nor is it the proper way nor rule by which to proceed to prove the value and use of the entire premises.

We are of the opinion that the method of proof resorted to by appellant for the purpose of proving the rental value of the plow land is extremely vague and speculative. It may be, though we do not pass upon that question in this case, that the value of the use of the premises such as this could be proved in the manner attempted by the appellant, if a proper foundation had been laid. If, for instance, the appellant had shown that all the farms adjoining the premises in question, and all the farms in the immediate vicinity or community, were of the same general fertility and productiveness as the premises in question, that all of such farms were farmed in the same general manner and with the same degree of care as the farm in question, and there had been shown, respectively, the average production in the different years of each of the farms adjoining or in the immediate vicinity or community, and had drawn a parallel, in all other respects, between the adjoining farms or those in the vicinity and the premises in question, then such testimony might be competent to show what would be the probable production of the premises in question. It being also further shown what share of the crop was customary to be given as rent or for the value of the use of the land, and that such is the only or at least the prevailing method in that community of renting such property, and therefore, the only method of determining the value of the use of such premises. If such rule, in any event, could be said to be a proper rule, it could have no application where the premises, the rent of which is in dispute, are cropped. In such case, it is self-evident the production or crops raised upon the land would have to be taken into consideration in determining the value of the use of such land, and probably would be the true measure of damages under such circumstances. If this might be considered the proper method of establishing the value of the use of the premises in question, it is clear the appellant has not brought himself within such rule, and has laid no foundation for the introduction of the testimony which he introduced in the attempt to prove the value of the use when this method is employed. His testimony in this respect must be held to be purely speculative. The defendant and other witnesses testified that the value of the use of this land was fifty ($50) dollars per year. The court allowed

one hundred ($100) dollars per year for each of the years 1915 and 1916. The court did not allow anything for the year 1914. In this, the court was right, for the defendant purchased the crop from H. P. Swingle, who, at the time of purchase thereof, had a right to sell the same. Whatever crop there was for 1917 the appellant received the benefit of. The court allowed the defendant one hundred ($100) dollars for having seeded such crop. As to the value of the use of the hay land, the testimony is quite conflicting. In the testimony adduced by the appellant's witnesses, they testify only to what the hay land should have produced in the years 1915 and 1916. There is no foundation for such testimony. There is no showing that the hay land in question had produced any specific quantities of hay in other preceding years. There is, therefore, no foundation laid upon which an estimate may be based as to what hay should have been produced in the years 1915 and 1916, even though it be considered that the weather conditions and rainfall were approximately the same in 1915 and 1916 as they were in other preceding years. It clearly appears to us that such testimony relates to speculative damages, and such testimony was incompetent to prove the real measure of damages. The defendant testified as to the quantity of hay procured from said land in the years 1915 and 1916. In 1915 he cut no hay on the land because it was cut the year before and the hay land would not stand to be hayed every year. He testified that in 1916 he had three stacks aggregating about 40 tons, which was worth about five ($5) dollars per ton. He testified that he did not get any oats in 1915, and only about 500 bushels in 1916. It is our opinion that the trial court, under all testimony, made a just allowance to the plaintiff for the value of the use of said land for all the time she was entitled to recover for the value of the use thereof. The improvements which McCarty made upon the land, being a flowing well which cost him seven hundred twenty ($720) dollars, and the clearing out of 20 acres from sage brush, which he said was worth ten ($10) dollars per acre, while not chargeable or recoverable against the plaintiff, nevertheless, in passing, they may be noticed for the purpose of showing that the premises in question were not decreased in value, in any respect, during the time they were in McCarty's possession. The court also allowed the defendant three hundred dollars thirty cents ($300.30) which he had paid out on interest for a certain mortgage. The defend-

ant testified there was a mortgage of one thousand ($1,000) dollars against the premises, and that he paid interest for three years, paying one hundred ($100) dollars each year, and also testified to paying certain taxes and another item for eighteen ($18) dollars. We are of the opinion that these charges in favor of the defendant were properly allowed. It clearly appears there was a mortgage upon the land, the defendant clearly testified to that effect. It is not disputed the defendant was in possession of the premises under color of title by reason of receiving a deed from H. B. Swingle. Such deed was declared by this court to be void. Nevertheless, the defendant, having paid such taxes while holding such land under color of title, is entitled to be reimbursed. Under the circumstances as they exist in this case, it is not necessary to make any further showing as to the assessment of the taxes nor that the premises were subject to taxes. At least the presumption would be that the premises were subject to taxes. In view of the defendant's testimony with reference to the payment of the taxes, the burden, if any, was on the defendant to show no assessment or that the land was not subject to taxes.

We have carefully examined all errors assigned, and find no reason to disturb the judgment of the trial court. Evidence amply sustains the judgment of the trial court. The judgment is affirmed. The respondent is allowed the statutory costs of this court in this appeal.

S. BIRCH & SONS CONSTRUCTION COMPANY, a Corporation, Appellant, v. CITY OF FARGO, a Municipal Corporation, et al., Respondents.

(167 N. W. 390.)

City commissioners — contract for paving — payment of price — mandamus to compel — duty of commissioners — specific performance of — mandamus will only lie for — pleading — demurrer.

This is a suit for a mandamus to compel the city commissioners to pay on the contract price of a pavement a balance of 15 per cent which has been retained pursuant to the paving contract. However, under the plain words of the statute the writ of mandamus may be issued to the city commissioners only

"to compel a specific performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station."

Manifestly there is no claim that the city commissioners have neglected the performance of a duty which the law specifically enjoins on them. Hence, the order sustaining the demurrer is affirmed.

Opinion filed April 10, 1918.

Appeal from an order of the District Court of Cass County, Honorable *A. T. Cole,* Judge.

Plaintiff appeals.

Affirmed.

Engerud, Divit, Holt, & Frame, for appellant.

W. H. Fargo (*Spalding & Shure,* of counsel), for respondents.

ROBINSON, J. This is an appeal from an order sustaining a demurrer to the complaint. As it shows plaintiff made a paving contract with the city of Fargo, and did paving on which he received 85 per cent of the contract price, amounting to $102,300. The balance 15 per cent, $17,999.18, remains unpaid. The contract provides as follows: "Monthly estimates will be given by the engineer of value of work actually constructed and in its permanent place, and certificates for 85 per cent of estimated value of the work done will be issued, the remaining 15 per cent to be reserved until the completion of the whole work." Under the contract work may be suspended by the engineer, and he has directed the suspension of all work on First avenue for the reason that the recent construction of a sewer has made the avenue unfit for paving until the ground settles, which may not be until the middle of next summer.

The plaintiff has duly completed all the work except the pavement on First avenue, and has requested the city commissioners to pay the 15 per cent retained. This they have failed to do because they doubt the right and legal authority to do it. There is no showing that the commissioners have ever passed a resolution to take any official action in regard to the pavement, and by their city attorney they have appeared and opposed the motion for a mandamus. The demand of the complaint is that a peremptory writ issue directing the city commissioners to issue to Birch & Sons warrants on the paving district for the unpaid 15 per cent, amounting to $17,999.18. The contract in regard to the manner of making payments accords with the statutes in Comp. Laws

1913, § 3710. "In case the contractor to whom any such contract shall be let shall properly perform the work therein designated, the city council may, from time to time in its discretion, as the work progresses, pay to such contractor upon an estimate made by the city engineer of the amount already earned thereunder, 85 per cent of the amount shown by such estimate to have been so earned, in warrants drawn on the fund from which the same is to be paid."

Thus it appears that the city has justly complied with its written contract, and the plaintiff has no cause of action against it, but it is urged that the enforced delay in completing the work is a damage to the plaintiffs, and that the city commissioners are quite willing to pay the 15 per cent if this court would only issue a mandamus directing them to do it, and clearly indicated that it is right and proper for them to make such payment.

However, under the plain words of the statute the writ of mandamus may be issued to the city commissioners only "to compel a specific performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station." Comp. Laws, § 8457.

Manifestly there is no claim that the city commissioners have neglected the performance of a duty which the law specifically enjoins on them. Hence, the order sustaining the demurrer must be affirmed.

THEODORE OLSON, Petitioner, v. ANDREW ROSS, as Sheriff of Cass County, State of North Dakota, Respondent.

(167 N. W. 385.)

Statute — constitutionality of — considered — only when properly before court — determination of cause — necessary to.

1. The constitutionality of a statute will be considered only when the question is properly before the court and necessary to a determination of the cause.

NOTE.—For authorities on the question of regulation and prohibition of the use of trading stamps and similar devices, see notes in 2 L.R.A.(N.S.) 588; 7 L.R.A. (N.S.) 1131; 30 L.R.A.(N.S.) 957; 49 L.R.A.(N.S.) 1123; L.R.A.1917A, 433; and L.R.A.1918B, 383.

Statute — enforcement of — one not prejudiced by — cannot question constitutionality — rights of others — because impaired.

2. One who is not prejudiced by the enforcement of a statute cannot question its constitutionality or obtain a decision as to its invalidity on the ground that it impairs the rights of others.

Trading Stamp Act — redeemable in goods — statute — sale of redeemable only in cash — does not prohibit or regulate.

3. The North Dakota Trading Stamp Act (Laws 1917, chap. 238), relates only to trading stamps redeemable in goods, wares, and merchandise, and does not prohibit or regulate the sale of trading stamps redeemable only in cash.

Opinion filed April 11, 1918.

Application by Theodore Olson for a writ of habeas corpus.

Writ granted.

Miller, Zuger, & Tillotson, James Manohan, and *Frank T. Walcott,* for petitioner.

The statute in question, being penal, must be strictly construed. Chase v. Curtis, 113 U. S. 452.

This trading stamp system has been employed in various states for a long time, and its plan has been defined and passed upon by the courts. Com. v. Gilson, 125 Ky. 440.

An ordinary trading stamp or coupon is in substance a mere form of allowing discounts on cash payments, and its issuance is entirely harmless and within the constitutional right of contract. Ex parte Drexel, 147 Cal. 763; Chaddock v. Day, 75 Mich. 527.

One engaged in the trading stamp system here under consideration is engaged merely in conducting a discount system, on cash purchases. Ex parte Holland, 147 Cal. 763; Ex parte Hutchinson, 137 Fed. 949; Denver v. Frueauff, 39 Colo. 30; Lohman v. State, 81 Ind. 17; Sperry v. Temple, 137 Fed. 992, 993; Winston v. Beeson, 135 N. C. 271; State ex rel. Simpson v. Sperry & H. Co. 110 Minn. 378.

That there is a marked difference between the use by merchants of trading stamps as a symbol or token to enable them to give a discount on small as well as large purchases, and the use of stamps and coupons as an advertising medium, is recognized by merchants and laymen generally. 53 Current Opinion, p. 440.

The use of a co-operative discount system by merchants promotes

thrift. The collection of these little pieces of paper finally represents something of value and under such practice the habit of thrift and saving is formed. Tanner v. Little, 240 U. S. 384.

"It is a landmark of our Constitution that the individual is permitted to engage in any lawful pursuit in a legitimate and honorable manner, and he is above interference even by the legislature if he keeps within the limits suggested." People ex rel. Appell v. Zimmerman, 102 App. Div. 103.

The contract here in question has been repeatedly held valid. Young v. Com. 101 Va. 853, 869; State v. Caspare, 115 Md. 7; State v. S. & H. Co. 110 Minn. 378; People v. Dycker, 72 App. Div. 308; Ex parte Drexel & Holland, 147 Cal. 763; O'Keefe v. Somerville, 190 Mass. 110; Com. v. Sisson, 178 Mass. 578; State v. Dalton, 22 R. I. 77; Montgomery v. Kelly, 142 Ala. 552.

It has also been so held to be beneficial to all concerned. State v. Shugart, 138 Ala. 86; Montgomery v. Kelly, 142 Ala. 552; Ex parte McKenna, 126 Cal. 429; Ex parte Drexel, 147 Cal. 763; Denver v. Frueauff, 39 Colo. 20; Hewin v. Atlanta, 121 Ga. 723; Opinion of Justices, 208 Mass. 607; O'Keefe v. Somerville, 190 Mass. 110; Com. v. Emerson, 165 Mass. 146; Com. v. Sisson, 178 Mass. 578; Opinion of Justices, 115 N. E. 978; Long v. Maryland, 74 Md. 565; State v. Caspare, 80 Atl. 606; People v. Sperry & H. Co. 164 N. W. 503; State v. Sperry & H. Co. 110 Minn. 378; State v. Ramseyer, 73 N. H. 31; People v. Gillson, 109 N. Y. 389; People v. Dycker, 72 App. Div. 308; People v. Zimmerman, 102 App. Div. 103; Winston v. Beeson, 135 N. C. 271; Com. v. Moorhead, 7 Pa. Co. Ct. 513; State v. Dalton, 22 R. I. 77; State v. Dodge, 76 Vt. 197; Young v. Com. 101 Va. 853.

Prohibition of the trading stamp business has been repeatedly held to be in violation of constitutional rights. Montgomery v. Kelly, supra; Hewin v. Atlanta, supra; State v. S. & N. H. Co. supra; State v. Ramseyer, supra; People v. Gillson, supra; State v. Dalton, supra; State v. Dodge, supra; State v. Sperry & H. Co. 94 Neb. 785.

The decisions of the courts of last resort of each state are supreme as to whether any laws or ordinances enacted within their borders are violative of the state's Constitution. 11 Cyc. 751 note 5, 753, note 12; State ex rel. Kickbush v. Hoeflinger, 37 Wis. 393; Ellis v. Northern P. R. Co. 80 Wis. 459; Security Nat. Bank v. St. Croix Power Co.

117 Wis. 211; Soehnlein v. Soehnlein, 146 Wis. 330; Re Opinion of Justices, 115 N. E. 978; Rast v. VanDeman & Lewis Co. 240 U. S. 342; Tanner v. Little, 240 U. S. 369; Pitney v. Washington, 240 U. S. 387; 208 Fed. 605.

"The use of coupons, profit sharing certificates, and the like is an entirely legitimate method of advertising, and the merchants employing this method are entitled to the protection of the Constitution of the United States." State v. Shugart, 138 Ala. 86; Ex parte Drexel, 147 Cal. 763; Hewin v. Atlanta, 121 Ga. 723; Com. v. Sisson, 178 Mass. 578; Winston v. Beeson, 135 N. C. 271.

When a suitor in this state invokes the protection of its Constitution and calls for the construction of its own laws, its own supreme court is supreme, and its judges need not follow the decisions of any Federal tribunal when the reasoning of those decisions is at variance with their own judgment. 115 N. E. 978; 11 Cyc. 751 and 753 and cases cited; 37 Wis. 393.

The plan of this system is to enable the merchant to sell his goods for cash, instead of on time. This is an advantage to him, and is also a benefit to the customer who practically receives a discount and who will buy more cautiously if he pay cash, and will spend only according to his means. Winston v. Beeson, 135 N. C. 271.

The Trading Stamp Law of this state is unconstitutional and void because it violates the right of liberty guaranteed by both Federal and state Constitutions. Denver v. Frueauff, 39 Colo. 20, 80 Pac. 389; People v. Dycker, 76 N. Y. Supp. 111; People v. Gilson, 109 N. Y. 387; Ex parte Drexel, 147 Cal. 763.

The law is unconstitutional in that it discriminates in favor of persons and corporations who give trading stamps in original packages redeemable by themselves or their dealers in goods, wares, or merchandise. It is an arbitrary classification. Gulf Ry. v. Ellis, 165 U. S. 152; Frorer v. People, 141 Ill. 171; State v. Sperry & H. Co. 110 Minn. 378; State v. Caspare, 80 Atl. 606; Winston v. Beeson, 135 N. C. 271; State v. Goodwill, 6 L.R.A. 621; State v. Loomis, 115 Mo. 307; Southern R. Co. v. Greene, 216 U. S. 418.

"It is not a statute for the protection of a particular class of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency." Seaboard Air Line v.

Simon, 47 So. 1001; Gulf R. Co. v. Ellis, 165 U. S. 152; Tanner v. Little, 240 U. S. 369; Re Opinion of Justices, 115 N. E. 978; People v. Zimmerman, 102 N. Y. App. Div. 103; Winston v. Beeson, 135 N. C. 271; People v. Dycker, 72 App. Div. 308; Denver v. Frueauff, 39 Colo. 20; State v. Dalton, 22 R. I. 77.

William Langer, Attorney General, *Chas. W. Dunn,* and *S. L. Nuchols,* for respondent.

The statute under consideration is an appropriate and proper exercise of the police power of the state, and the power to enact it is not denied by the state Constitution. State Const. art. 1.

The police power of the state is the power inherent in every sovereignty; the power to govern men and things under which the legislature may, within constitutional limitations, not only prohibit all things hurtful to the comfort, safety, and welfare of society, but prescribe regulations to promote the public health, morals, and safety and add to the general public convenience, prosperity, and welfare. 6 R. C. L. §§ 182 et seq.; 3 Words & Phrases, 2d series, 1064 et seq., and authorities there cited; State ex rel. Linde v. Taylor, 33 N. D. 76, 123, 156 N. W. 561; C. B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; State v. Wilson, 168 Pac. 679; Sperry & H. Co. v. Weigle — Wis. —; Rast v. VanDeman & Lewis, 240 U. S. 342, 60 L. ed. 679, 36 Sup. Ct. Rep. 370; Eubank v. Richmond, 226 U. S. 137, 142; Sligh v. Kirkwood, 237 U. S. 52; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Deems v. Baltimore, 80 Md. 164, 26 L.R.A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; Re Marriage License Docket, 4 Pa. Dist. R. 162; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Wiseman v. Tanner, 221 Fed. 694.

The only limitation on this power is that it may not be exerted unreasonably or arbitrarily or with unjust discrimination. Adams v. Tanner, 244 U. S. 590; Rast v. Van Deman & Lewis, 240 U. S. 342; Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864; Rideout v. Knox, 148 Mass. 368; Tanner v. Little, 240 U.

S. 369; Hadacheck v. Los Angeles, 239 U. S. 394, 60 L. ed. 348, 36 Sup. Ct. Rep. 143; Reinman v. Little Rock, 237 U. S. 171.

This power is the least limitable of the exercises of the government. Hall v. Geiger-Jones Co. 242 U. S. 539, 61 L. ed. 480, 37 Sup. Ct. Rep. 217; Sligh v. Kirkwood, 237 U. S. 52; Noble State Bank v. Haskell, 219 U. S. 104; Adams v. Tanner, 244 U. S. 590; Powell v. Pennsylvania, 127 U. S. 678; Austin v. Tennessee, 179 U. S. 343; Booth v. Illinois, 184 U. S. 425; Otis v. Parker, 187 U. S. 606; Murphy v. California, 225 U. S. 623; Rast v. Van Deman & L. Co. 240 U. S. 342; Linde v. Taylor, 33 N. D. 76, 156 N. W. 561; Wiseman v. Tanner, 221 Fed. 694.

"The police power of a state is as broad and plenary as its taxing power." Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 373, 14 Sup. Ct. Rep. 499; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 9 Sup. Ct. Rep. 6; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992.

The appreciation of the consequences of such legislation is not open for judicial review. Chicago, B. & Q. R. Co. v. McGuire; German Alliance Ins. Co. v. Kansas, supra; S. W. Oil Co. v. Texas, 217 U. S. 114; Munn v. Illinois, 94 U. S. 113; Otis v. Parker, 187 U. S. 606; Bunting v. Oregon, 243 U. S. 426; Rast v. Van Deman & L. Co. 240 U. S. 342; Hall v. Gieger-Jones Co. 242 U. S. 539, 61 L. ed. 480, 37 Sup. Ct. Rep. 217; Trading Stamp Cases, 240 U. S. 342; Armour & Co. v. North Dakota, 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440; Hadacheck v. Los Angeles, 239 U. S. 394; Price v. Illinois, 238 U. S. 446, 59 L. ed. 1400, 35 Sup. Ct. Rep. 892; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67; Powell v. Pennsylvania, 127 U. S. 678; Crowley v. Christensen, 137 U. S. 86; Holden v. Hardy, 169 U. S. 366; Capital City Dairy Co. v. Ohio, 183 U. S. 238; Jacobson v. Massachusetts, 197 U. S. 11; Silz v. Hesterberg, 211 U. S. 31; McLean v. Arkansas, 211 U. S. 539; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549; Purity Extract Co. v. Lynch, supra; Hammond Packing Co. v. Montana, 233 U. S. 331.

We cannot invent constitutional provisions, nor can we set aside laws of our own initiative, no matter how much we may disapprove of them. Lee v. Dolan, 34 N. D. 449, 158 N. W. 1007; Linde v. Taylor, 33 N.

D. 76, 156 N. W. 561; Atkins v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; N. P. R. Co. v. Richland Co. 28 N. D. 172, L.R.A.1915A, 129, 148 N. W. 545; 6 Words & Phrases, 5813 et seq.; 4 Words & Phrases, 2d series, 27 et seq.; State v. Coyle, 3 Okla. Crim. Rep. 50, 122 Pac. 243; McAllister v. Fair, 72 Kan. 533, 3 L.R.A. (N.S.) 726, 115 Am. St. Rep. 233, 84 Pac. 112, 7 Ann. Cas. 973; Vidal v. Philadelphia, 2 How. 127, 11 L. ed. 205; State ex rel. Starke Co. v. Laramore, 175 Ind. 478, 94 N. E. 761, Ann. Cas. 1913B, 1296; Schultz v. State, 89 Neb. 34, 33 L.R.A.(N.S.) 403, 130 N. W. 972, Ann. Cas. 1912C, 495; Allen v. Smith, 84 Ohio St. 283, 95 N. E. 829; Ann. Cas. 1912C, 611; Perkins v. Heert, 158 N. Y. 306, 43 L.R.A. 858, 70 Am. St. Rep. 483, 53 N. E. 18; 29 Am. & Eng. Enc. Law, 2d ed. 569.

"What makes for the general welfare is necessarily in the first instance a matter of legislative judgment, and a judicial review of such judgment is limited." German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; State v. Olson, 26 N. D. 304, L.R.A.1918B, 975, 144 N. W. 661; Van Woert v. Modern Woodmen, 29 N. D. 441, 452, 151 N. W. 224; N. P. R. Co. v. Richland Co. 28 N. D. 172, L.R.A. 1915A, 129, 148 N. W. 545; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; State ex rel. Montgomery v. Anderson, 18 N. D. 149, 118 N. W. 22; Hooper v. Stack, 69 N. J. L. 562, 56 Atl. 1; State ex rel. Linde v. Packard, 35 N. D. 298, L.R.A.1917B, 710, 160 N. W. 150; State v. Elev. Co. 17 N. D. 23, 114 N. W. 482; Re Lipschitz, 14 N. D. 622, 95 N. W. 160; Vermont Loan & Trust Co. v. Whithed, 2 N. D. 82.

This court generally, where it has been possible, has sustained the validity of police measures rather than to annul them. State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 46 N. W. 970; Vermont Loan & Trust Co. v. Whithed, 2 N. D. 82, 49 N. W. 318; State v. Fraser, 1 N. D. 425, 48 N. W. 343; State v. Markuson, 5 N. D. 147, 64 N. W. 934; State ex rel. Stoeser v. Brass, 2 N. D. 482, 52 N. W. 408; State ex rel. Larabee v. Barnes, 3 N. D. 319, 55 N. W. 883; Patterson v. Wollman, 5 N. D. 608, 67 N. W. 1040; State v. Kleetzen, 8 N. D.

286, 78 N. W. 984; State ex rel. Flaherty v. Hanson, 16 N. D. 347, 113 N. W. 371; State v. Elev. Co. 17 N. D. 23, 114 N. W. 482; State v. Fargo Bottling Works Co. 19 N. D. 396, 124 N. W. 387; Litchville v. Hanson, 19 N. D. 672, 124 N. W. 1119; State v. Olson, 26 N. D. 304, 144 N. W. 661; State v. Armour & Co. 27 N. D. 177, 145 N. W. 1033; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561; Downey v. N. P. R. Co. 19 N. D. 621, 125 N. W. 475.

The prohibition of the trading stamp business is within the authority of the state legislature in the exercise of its police power, and is not repugnant to the "due process" limitation contained in the 14th Amendment to the Constitution. Rast v. Van Deman & Lewis, 240 U. S. 342; Tanner v. Little, 240 U. S. 369; Pitney v. State, 240 U. S. 387; Beggs v. Paine, 15 N. D. 436, 109 N. W. 322; Fenton v. Ins. Co. 15 N. D. 365, 109 N. W. 357; Lawton v. Teele, 132 U. S. 133; Booth v. Illinois, 184 U. S. 425; Otis v. Parker, 187 U. S. 606; Dobbins v. Los Angeles, 195 U. S. 223; Murphy v. California, 225 U. S. 623; Postal Teleg. Co. v. Charleston, 153 U. S. 692; McCray v. United States, 195 U. S. 27; Kehrer v. Stewart, 197 U. S. 60; Hammond Packing Co. v. Montana, 233 U. S. 331; Central Lumber Co. v. S. D. 226 U. S. 157; Keokee Coke Co. v. Taylor, 234 U. S. 224; Erie R. R. v. Williams, 233 U. S. 685.

"It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare." Eubank v. Richmond, 226 U. S. 137; Sligh v. Kirkwood, 237 U. S. 52; Southwest Oil Co. v. Texas, 217 U. S. 114; Munn v. Illinois, 94 U. S. 113; Camfield v. United States, 167 U. S. 518; Rideout v. Knox, 148 Mass. 368; 5th Ave. Coach Co. v. New York, 221 U. S. 467; Com. v. McCafferty, 145 Mass. 384; Lansburgh v. District of Columbia, 11 App. D. C. 512; Atty. Gen. v. Sperry & H. Co. 110 Minn. 378; Louisiana v. C. A. Underwood or So. Merchandise Ex. — Sup. Ct. of Louisiana; Hewin v. Atlanta, 121 Ga. 723.

CHRISTIANSON, J. This is an original application for a writ of habeas corpus presented to this court after a denial of an application for such writ by Judge Cole of the third judicial district. It appears from the petition that the petitioner has been arrested and is held in the

custody of the sheriff of Cass county by virtue of a commitment duly issued by a justice of the peace, in Cass county, in a criminal action properly instituted before him, wherein the petitioner is charged with violating the provisions of the so-called Trading Stamp Act, viz., chapter 238, Laws 1917.

Section 1 of the act provides:—"Every person, firm or corporation who shall use, and every person, firm or corporation who shall furnish to any other person, firm or corporation to use in, with or for the sale of any goods, wares, or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar schemes or devices which shall entitle the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm or corporation any goods, wares or merchandise, free of charge or for less than the retail market price thereof, upon the production of any number of said stamps, coupons, tickets, certificates, cards, or other similar devices, shall before so furnishing, selling or using the same obtain a separate license from the auditor of each county wherein such furnishing or selling or using shall take place for each and every store or place of business in that county, owned or conducted by such person, firm, or corporation from which such furnishing or selling, or in which such using, shall take place. Provided that this act shall not apply to using or furnishing coupons, tickets, certificates, cards or similar devices contained in or attached to the original package of said goods, wares or merchandise, by the manufacturer, jobber, distributer, or packer thereof, and directly redeemable by the manufacturer, jobber, distributer, packer or retailer of such goods, wares or merchandise."

The other sections prescribe the procedure for obtaining the license, fix the license fee, and declare that "any person, firm, or corporation violating any of the provisions of this act shall be guilty of a misdemeanor."

The criminal complaint charges that the petitioner is an employee and manager of the Sperry & Hutchinson Company, a foreign corporation, and not a manufacturer, packer, jobber, or distributer, and that without first having obtained a license under the statute above quoted, he did wilfully and unlawfully furnish to one Victor J. Baldwin, a merchant, for use by him as evidence of and discount to customers making cash payments for merchandise, certain green trading stamps,

redeemable in cash by the Sperry & Hutchinson Company, and that such trading stamps were furnished to the said Baldwin with the intent that he should give said stamps to customers as evidence of and discount for cash payments for merchandise in accordance with the conditions and provisions of a certain written contract.

The contract which is set out in the complaint recites that Baldwin "desires to adopt and use a co-operative system of giving a cash discount on small as well as large cash purchases, for the purpose of encouraging cash trade," and that "the Sperry & Hutchinson Company . . . is fully equipped to furnish said system and services relating thereto." By the contract Baldwin agreed "to order and receive such S. & H. Green Trading Stamps, *redeemable in cash,* in lots of not less than five pads per lot, and a minimum of not less than five pads every six months, each pad containing 5,000 stamps, and to pay upon delivery for the use and redemption thereof in cash and its services in connection therewith $15 per pad." Baldwin further agreed "to offer said stamps to customers upon making cash purchases, and when accepted give as evidence of and discount for cash payment, and only *for redemption in cash* by said agent (Sperry & Hutchinson), one of said stamps to be given with each 10-cent purchase and multiple thereof." The Sperry & Hutchinson Company agreed to deliver to Baldwin *"its S. & H. Green Trading Stamps redeemable in cash"* when ordered by him, as provided in the contract, and to furnish him with its trading stamps books in reasonable quantities, the books to be given to the customers, in which to preserve the stamps until presented to the Sperry & Hutchinson Company for redemption in cash. The Sperry & Hutchinson Company further agreed to redeem the stamps *in cash* at their face value (1 mill each), but when the stamps are presented in its trading stamps books each containing 1,000 stamps, then it agreed *to pay $2 in cash for such redemption,* or 2 mills each for said stamps. On the back of each stamp is the following printed statement:

Subject to the notice in our green stamp book this stamp *will be redeemed by us in cash.* It is our property and not transferable except as stated in such notice.

[Signed] Sperry & Hutchinson Company.

It will be noted that the contract and the stamps expressly stipulate that the stamps are redeemable in cash only. There is no provision for a redemption in goods, wares, or merchandise.

The petitioner claims that he is unlawfully in custody, and that the commitment under which he is held is void for two reasons: (1) That the Trading Stamp Law is unconstitutional and void; (a) because it violates the right of liberty guaranteed by both the Federal and state Constitution; (b) because the act discriminates in favor of persons and corporations who give trading stamps in original packages which are redeemable by themselves or their retailers in goods, wares, and merchandise; (2) that the facts set forth in the complaint do not constitute a violation of the statute for the reason that the trading stamps furnished by petitioner are redeemable in cash only.

It is requested that we first determine the constitutionality of the statute. A constitutional question does not arise merely because it is raised and a decision thereon sought. A party who assails the validity of a statute on constitutional grounds must show that he is prejudiced by the alleged unconstitutional provision, and that a decision on the constitutional question is necessary in order to protect him in the enjoyment of the rights guaranteed to him by the Constitution. "Courts will not assume to pass upon constitutional questions unless properly before them, and the constitutionality of a statute will not be considered and determined by the courts as a hypothetical question. It is only when a decision on its validity is necessary to the determination of the cause that the same will be made, and not then at the instance of a stranger, but only on the complaint of those with the requisite interest. These principles have been recognized by the Supreme Court of the United States. That tribunal has announced that it rigidly adheres to the rule never to anticipate a question of constitutional law in advance of the necessity of deciding it, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, and never to consider the constitutionality of state legislation unless it is imperatively required." 6 R. C. L. § 74, pp. 76, 77. And where a "case may be decided on either one of two grounds, and one of these does not involve the constitutionality of a statute, the court will decide it on that ground." 6 R. C. L. § 75, p. 77.

It is well settled that a person who is seeking to raise the question as

to the validity of a discriminatory statute has no standing for that purpose, unless he belongs to the class which is prejudiced by the statute. And where the class which includes the party complaining is in no wise prejudiced by the general rule, or the particular objectionable feature of the statute does not happen to prejudice the plaintiff, he cannot be heard to complain of the statute on the ground that it is unconstitutional. For "one who is not prejudiced by the enforcement of an act of the legislature cannot question its constitutionality, or obtain a decision as to its invalidity on the ground that it impairs the rights of others. It has been said that courts cannot pass on the question of the constitutionality of a statute abstractly, but only as it applies and is sought to be enforced in the government of a particular case before the court; for the power to revoke or repeal a statute is not judicial in its character." 6 R. C. L. pp. 89, 91.

The legislative annals of recent years abound with enactments seeking to regulate the trading stamp business, and to prohibit some forms thereof. Not only has this subject been deemed one appropriate for legislative action, but some of the trading stamp schemes have been severely condemned by the courts. See Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455. Relator's counsel contends, however, that the scheme denounced by the United States Supreme Court in Rast v. Van Deman & L. Co. supra, was one wherein the coupons were redeemable in premiums. And it is asserted that the purpose of this system is to promote the sale of quantities of certain kinds of goods, and that inasmuch as the purchaser must acquire a sufficient number of tokens or stamps to enable him to procure the desired premium, this scheme may lead to improvident buying. It is pointed out that this objection does not apply to trading stamps such as those furnished by the relator; that these trading stamps are merely evidence of a cash discount, and utilized as a convenient medium for the allowance thereof; and that by means of the trading stamp a cash discount is allowed to every cash purchaser regardless of the amount of the purchase, and that the practice tends to encourage cash purchases, and is an incentive to thrift and economy rather than to improvidence.

That there is some distinction between the two systems is apparent. This seems to have been recognized by the Supreme Court of the United

States in Rast v. Van Deman & L. Co. supra. Whether the form of trading stamp business pursued by the relator is free from objection is not a question properly involved in this proceeding, and one upon which we express no opinion. It is sufficient to say that the legislature, as a matter of legislative policy, has recognized the distinction contended for by relator's counsel. For the statute which it enacted does not purport to regulate or prohibit the sale or furnishing of trading stamps redeemable in cash, but relates only to, and does in effect tend to prohibit the sale of, trading stamps redeemable in goods, wares, or merchandise by a third party. The criminal complaint in this case shows that the petitioner furnished stamps redeemable in cash only. He furnished no stamps redeemable in goods, wares, or merchandise. Hence, he has committed no act violative of the statute.

The writ will issue as prayed for.

GRACE, J. I concur in the result.

ROBINSON, J. (concurring). This is a habeas corpus case. The defendant has been arrested and held for a violation of the recent Trading Stamp Act (Laws 1917, chap. 238). It is a petty kindergarten case which should have been heard and decided in two hours, and yet by the unwise indulgence of the court, six distinguished counselors were permitted to talk the case for two whole days.

The act declared it a misdemeanor for any person or corporation (without a license) to use or furnish any person for use in the sale of any merchandise, any stamps, coupons, certificates, or cards which shall entitle the purchaser to procure from any person any merchandise free of charge or for less than the retail market price.

The complaint charges that contrary to the statute defendant did wilfully and unlawfully furnish to one Victor J. Baldwin, a merchant, for use by him and as evidence of a cash discount to customers making cash payments for merchandise, certain green stamps, coupons, or vouchers commonly known as "trading stamps" redeemable in cash by Sperry, Hutchinson, & Company at a purported face value of 1 mill each. The stamps are redeemable in cash, and not otherwise by Sperry, Hutchinson, & Company.

From the complaint it appears the face value of a trading stamp is

1 mill, and the stamps are sold to the dealer in lots of not less than five pads. Each pad contains 5,000 stamps and the dealer pays for the same $15, which is 3 mills for each stamp. The stamps are given out by the local dealer as a discount to cash purchasers, and are redeemed in cash only at the face value of 1 mill for each stamp or 1 cent for ten stamps. But when stamps are presented in trading stamp books and in lots of 1,000, there is paid for the lot $2 in cash, or 2 mills for each stamp. For a book of stamps containing five pads the dealer pays $75, and at the very most the cash redemption is $50. Of course many of the stamps are lost and never presented for redemption, so we allow the stamp dealer a clear profit of 50 per cent.

What fools we mortals be! Of course the business is deceptive and pernicious, but it is not within the prohibition of our statute because the redemption is in cash, and not in merchandise. In Wisconsin a similar act has recently been well considered and the act was sustained by good reason and authority. Trading Stamp Cases, 166 Wis. 613, 166 N. W. 55, Ann. Cas. 1918D, 707. There the act prohibited the use of trading stamps redeemable in any goods, wares, merchandise, or *anything of value,* but our statute is different. It does not prohibit the use of trading stamps redeemable in cash or "in anything of value."

In Wisconsin there was printed on the back of each stamp the following:

Subject to the notice in our green trading stamp book this stamp will be redeemed by us in merchandise or cash. It is our property, and not transferable except as stated in such notice.

[Signed] Sperry & Hutchinson Company.

On the trading stamps in question there is printed in microscopic letters, the following:

Subject to the notice in our green stamp book this stamp will be redeemed by us in cash. It is our property and not transferable except as stated in such notice.

[Signed] Sperry & Hutchinson Company.

You will note the word "merchandise" is omitted from our stamps, and it is not made an offense to use trading stamps redeemable in cash.

Manifestly the statute forbids only the sale of trading stamps which are redeemable in merchandise, and hence, the complaint does not state a cause of action, and for that reason the defendant must be discharged. The whole argument has turned on the constitutional validity of the act, but that becomes only a moot question, as the complaint does not charge a sale of stamps redeemable in merchandise. Defendant must be discharged.

THOMAS LONNEVIK, Respondent, v. M. SIGBERT AWES COMPANY, a Corporation, and M. Sigbert Awes, Appellants.

(167 N. W. 370.)

Justice court — recovery by plaintiff — two separate cases — appealed to district court — there consolidated — tried as one — evidence — judgment.

In justice court the plaintiff recovered two separate judgments against the defendant for $160 and $90.95. Each case was appealed to the district court and by stipulation the two actions were consolidated and judgment was given in favor of the plaintiff on evidence not contradicted. The record shows no error.

Opinion filed April 11, 1918.

Appeal from the District Court of Ramsey County, Honorable *C. W. Buttz,* Judge.

Defendants appeal.

Judgment affirmed.

Flynn & Traynor, for appellants.

"In determining whether the contract was divisible or indivisible, the intention of the parties should be sought to be ascertained from an examination of the entire instrument." The contract here is one and indivisible. Elliott Supply Co. v. Green, 160 N. W. 1002.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful." Young v. Metcalf Land Co. 18 N. D. 441.

Both actions in justice court were based upon the same contract, and

plaintiff had but one cause of action, if any at all, He could not institute and maintain two separate actions. 1 C. J. 1112, 1113.

If there are several sums due under one contract and a suit is brought for a part only, a judgment in such suit will be a bar to another action for the recovery of the residue. A cause of action arising out of a contract cannot be divided into several demands and made the subject of separate actions. Baird v. United States, 24 L. ed 703; Herriter v. Porter, 23 Cal. 385; Hill v. Joy (Pa.) 24 Atl. 203; Pettit v. American Cent. Ins. Co. 69 Mo. App. 317.

"Where several claims payable at different times rise out of the same contract, suit may be brought as each liability accrues; but if suit is not brought until more than one has become due, all must be sued for in one action." Cohen v. Clark (Mont.) 119 Pac. 775; Comp. Laws 1913, § 5907.

The justice court never had jurisdiction of the two actions here instituted, for there was but one cause of action and that was in excess of the amount over which such court had jurisdiction. Comp. Laws 1913, § 9006; Feillett v. Engler, 8 Cal. 76.

"A single cause of action cannot be split up into several actions so as to give a justice of the peace jurisdiction." 24 Cyc. 472; 1 C. J. 1110; Bunker v. Hanson (Minn.) 109 N. W. 827; Wedgewood v. Parr (Iowa) 84 N. W. 528.

"Want of jurisdiction of the subject-matter cannot be waived by any act of the parties, and the question will be considered by an appellate court though not raised in the court below." Porter v. Welsh (Iowa) 90 N. W. 582; St. Louis & S. F. R. Co. v. Brown (Kan.) 61 Pac. 457; Comp. Laws 1913, § 7447; James River Bank v. Purchase, 9 N. D. 280; Nelson v. Ladd (S. D.) 54 N. W. 809; Murry v. Burris, 6 Dak. 170, 42 N. W. 25; McMeans v. Cameron (Iowa) 49 N. W. 856.

Siver Serumgard, for respondent.

"A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful." Young v. Metcalf Land Co. 18 N. D. 441.

The contract here is a divisible one, and the justice had jurisdiction in both actions. Bunker v. Hanson (Minn.) 109 N. W. 827.

ROBINSON, J. This is an appeal from a judgment for personal services $160 and expenses paid $90.95, making the total sum of $250.60. In justice court one action was for the wages and a separate action for the expense money. In district court by stipulation the two actions were consolidated and tried as one action on an amended complaint. On the trial the plaintiff was the only witness. His testimony is short and shows $160 due to him for personal services and $90.95 for expenses paid for and at the request of the defendants.

At the close of plaintiff's testimony Mr. Traynor, attorney for defendants, said: Defendants have no evidence to offer, but we ask the court to grant a stay of execution for sixty days, pending an appeal. The court said, All right. You do not care to offer any evidence of any kind? Mr. Traynor said: No, we have none to present. Then Traynor rested, and the court directed a verdict for the plaintiff. Now, it is claimed that the justice court had no jurisdiction because the two actions in justice court were based on a single cause of action, and that the district court succeeded only to the jurisdiction of the justice court, but the claim needs no answer. The evidence does show two separate causes of action, and in any event when the two actions were consolidated by stipulation, the case stood as one cause of action in the district court.

Judgment affirmed, with costs, and it is directed that the case be forthwith remanded.

JOHN McCARTY, and Finch, Van Slyck, & McConville, Plaintiffs, v. CHARLES GOODSMAN, also Known as Charles W. Goodsman, Asa J. Styles, and Paul Campbell, Defendants, ASA J. STYLES, Appellant.

and

JOHN McCARTY and Finch, Van Slyck, & McConville, Plaintiffs, v. CHARLIE GOODSMAN, also Known as Charles W. Goodsman, Asa J. Styles, and Paul Campbell, Defendants and Respondents, and JOHN McCARTY, Appellant.

(L.R.A.1918F, 160, 167 N. W. 503.)

Mortgage — acceleration clause in — default of mortgagor — mortgagee may declare whole sum due — limitations — statute of — when begins to run — how becomes operative.

1. Where an acceleration clause in a mortgage provides that upon the default of the mortgagor it shall be legal for the mortgagee to declare the whole sum secured by the mortgage to be due, the entire debt does not become due upon the failure to pay an instalment note, so as to start the Statute of Limitations running against the action to foreclose, in the absence of a declaration to that effect by the holder of the mortgage.

Mortgage — foreclosure for whole amount secured — declaration — Statute of Limitations — application of — personal liability on note.

2. For the purpose of applying the Statute of Limitations, the cause of action to foreclose a mortgage is to be considered independently, and is not affected by the Statute of Limitations barring an action to enforce a personal liability upon the notes secured by the mortgage.

Debt secured — payable in instalments — sums due at different dates — declaration that all is due on one default — absence of — cause of action — first accruing — date of maturity of last note.

3. Where a mortgage is given to secure an entire debt which is represented by instalment notes falling due at different dates, and where it does not appear that the holder of the mortgage elected, under the acceleration clause, to treat the whole sum as due upon the default in the payment of one of the notes first maturing, the cause of action to foreclose the mortgage for the entire debt will be held to have first accrued upon the maturity of the last note.

NOTE.—Authorities passing on the question of effect of acceleration provision in mortgage or note to start the Statute of Limitations running are collated in notes in 12 L.R.A.(N.S.) 1190; 22 L.R.A.(N.S.) 1110; 51 L.R.A.(N.S.) 151; and L.R.A. 1918F, 169.

Statute — susceptible of an interpretation that would render unconstitutional — due process of law — taking property without — constitutional — will be so construed if possible — limited application.

4. Where the language of a statute is apparently susceptible of an interpretation which would render it unconstitutional as authorizing the taking of property without due process of law; if possible, the statute will be so construed as to render it constitutional, and to this end it may be given a limited application.

Attorney's lien — foreclosure of — by advertisement — not authorized.

5. Section 6878, Comp. Laws 1913, construed and *held* not to authorize the foreclosure of an attorney's lien by advertisement under the provisions of § 8185, Comp. Laws 1913.

Papers subject to attorney's lien — sold at void foreclosure — claim upon which lien is based — purchaser at such sale entitled to benefit of — equity.

6. The purchase, at a void foreclosure sale, of papers which are subject to an attorney's lien, is *held*, under the circumstances of this case, to entitle the purchaser in equity, to the benefit of the claim upon which the lien is based.

Opinion filed January 17, 1918. Rehearing denied April 12, 1918.

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

Affirmed.

Harold B. Nelson and *Albert E. Coger,* for John McCarty, appellant and respondent.

An attorney's lien is strictly dependent upon continuity of possession. Where promissory notes are introduced and received in evidence upon a trial proceeding in district court, they become court files and are in the possession of the court, and thereafter if one of the attorneys obtains the consent of the court for their removal from the files of the cause in which they were used, to his own office and into his own hands, his possession of them is the possession of the court still, and he can claim no lien on them, as papers belonging to his client, in his possession. Heard v. Cherry, 145 Ky. 80; Pollock v. Aitkens, 4 S. D. 374; Wisconsin R. Co. v. Given, 69 Iowa, 581; Howe v. Mutual Reserve, 115 Iowa, 285.

An attorney's lien cannot be transferred to another, and such attempted transfer destroys it. 2 Mechem, Agency, 2d ed. § 2272; 6 C. J. 777.

The delivery for collection or other special purpose, by the pledgee to the pledgeor, does not extinguish the lien. 31 Cyc. 818, 819.

"A client's knowledge of facts affecting litigation is equivalent to the knowledge of his attorney." 6 C. J. 641, § 145; McNemar v. McNemar, 143 Ill. 184.

"The relation of attorney and client is created by contract, and litigants who have not thus assumed liability for attorney's fees cannot be held liable therefor, although they may have been benefited directly or indirectly by the attorney's services." Rees v. Patty, 60 Am. St. Rep. 510; Roselius v. Delachaise, 5 La. Ann. 481, 52 Am. Dec. 597; Chicago v. Larmed, 26 Ill. 213; Turner v. Meyers, 23 Iowa, 391; Atty. Gen. v. North American L. Ins. Co. 91 N. Y. 57, 43 Am. Rep. 648; Hand v. Savanah, 21 S. C. 162; Westmoreland v. Martin, 24 S. C. 238.

Asa J. Styles, Attorney *pro se,* and *Paul Campbell,* Attorney *pro se* and for Asa J. Styles, appellant and respondent.

"A lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguished in like manner with any other accessory obligation." Comp. Laws 1913, § 6720.

Where the contract of pledge is merely collateral to the principal obligation it is given to secure, it is discharged by the payment of the principal obligation. So, too, the discharge of the principal obligation of the debtor in any other way will operate to discharge the contract of pledge. 31 Cyc. 851.

It is then fraud from any right of the pledgee to hold it for any other debt than that for which it was pledged." Comp. Laws 1913, § 6724; 31 Cyc. 817, 818, 853.

"The lien of a pledge is dependent upon possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledge holder as hereinafter prescribed." Comp. Laws 1913, § 6772.

"A mere agreement by the debtor that the creditor shall take and hold certain property as security for the debt is insufficient. Delivery is necessary." George v. Butler, 26 Wash. 456, 57 L.R.A. 396, 67 Pac. 263; Presidio County v. Bond Co. 212 U. S. 75.

"Where a debt is payable in instalments the general rule is that the statute begins to run as to each instalment, from the time when it falls

due, and that the creditor can recover only on those instalments falling due within the period before the beginning of the action." 25 Cyc. 1106; Davis v. Harrington, 53 Ark. 5, 13 S. W. 215; DeUprey v. DeUprey, 23 Cal. 352; Washington L. & T. Co. v. Darling, 21 App. D. C. 132; Burnham v. Brown, 23 Me. 400; Baltimore Co. v. Barnes, 6 Harr. & J. 57; Wood v. Cullen, 13 Minn. 394 (365); Berry v. Doremus, 30 N. J. L. 399; Mason v. New York, 28 Hun, 115; Pelton v. Bemis, 44 Ohio St. 51, 4 N. E. 714; Adelbert v. Toledo, 5 Ohio S. & C. P. Dec. 14, 3 Ohio N. P. 15; Bush v. Stowell, 71 Pa. 208, 10 Am. Rep. 694; Overton v. Tracey, 14 Serg. & R. 311; Miles v. Kelly (Civ. App. 1894) 25 S. W. 724; Morrill v. Smith County (Civ. App. 1895) 33 S. W. 899; 33 Century Dig. Limit. of Actions, §§ 280, 281 et seq.; 25 Cyc. 1089, note 51.

Promissory notes payable in instalments are within the rule of the text. 25 Cyc. 1107; Burnham v. Brown, 23 Me. 400; Bush v. Stowell, 71 Pa. 208, 10 Am. Rep. 694.

Interest coupons outlaw independent of the principal debt. Clark v. Iowa City, 20 Wall. 583, 22 L. ed. 427; Amy v. Dubuque, 98 U. S. 470, 25 L. ed. 228; Griffin v. Macon County, 2 L.R.A. 353, 36 Fed. 885; Cases cited in 33 Century Dig. col. 496; 18 Am. Dig. Annual ed. Limit. of Actions, § 51 (Key Number).

Our Statute of Limitations begins to run not from the "maturity of the debt" nor from the time the debt "becomes due," but from the time "the cause of action has accrued." A cause of action may have accrued on a note, authorizing commencement of foreclosure of a mortgage securing it, long before the debt represented thereby has by the terms of the note matured or become due, if the mortgage is so worded as to allow it.

Accelerating words in a mortgage and the fact that the holder forecloses for the full amount of the secured debt are sufficient to show that the holder has elected to declare the entire amount due, on account of default in the payment of the first instalment. Doolittle v. Nurnberg, 27 N. D. 521; Westcott v. Whiteside, 63 Kan. 49, 64 Pac. 1032; 25 Cyc. 1104; 7 Cyc. 858–861; 33 Century Dig. Limit. of Actions, § 281; Belloc v. Davis, 38 Cal. 242; Whitcher v. Webb, 44 Cal. 127.

These acceleration provisions in a mortgage are solely for the benefit of the mortgagee, so that the mortgagor cannot take advantage of it

in computing limitations. Richardson v. Warner, 28 Fed. 343; Batey v. Walter (Tenn.) 46 S. W. 1024; Wall v. Marsh, supra; Doran v. O'Neal, 37 S. W. 563; Boyd v. Buchanan (Mo.) 162 S. W. 1075; Trust Co. v. Light Co. (Miss.) 63 So. 575; Hemp v. Garland, 4 Q. B. 519; Reeves v. Butcher, [1891] 2 Q. B. 509; Bank v. Peck, 8 Kan. 660; Ryan v. Caldwell, 106 Ky. 543, 50 S. W. 966; Wheeler v. Howard, 28 Fed. 741; Harrison v. Reigor, 64 Tex. 89; Dodge v. Signor, 18 Tex. Civ. App. 45, 44 S. W. 926; Singleton v. Heriott, 37 S. C. L. (3 Rich.) 321; Snyder v. Miller, 71 Kan. 410, 69 L.R.A. 250, 114 Am. St. Rep. 489, 80 Pac. 970; Pierce v. Shaw, 51 Wis. 316, 8 N. W. 207; San Antonio v. Stewart, 94 Tex. 441, 61 S. W. 386; Manitoba Mortg. Co. v. Daly, 10 Man. 425; Westcott v. Whiteside, 63 Kan. 49, 64 Pac. 1032; Lycoming Co. v. Batcheller, 62 Vt. 148, 19 Atl. 982; Hunt v. Roberts, 45 N. Y. 691; Park v. Cooke 3 Bush, 168; Noell v. Gaines, 68 Mo. 649; Salmon v. Claggett, 3 Bland, Ch. 179; Green v. Frick, 25 S. D. 342, 126 N. W. 579; Moore v. Sargent, 112 Ind. 484, 14 N. E. 466; McFadden v. Brandon, 8 Ont. L. Rep. 610; Germond v. Hermosa Ice Co. 9 S. D. 387, 69 N. W. 578; Trust Co. v. Light Co. 64 So. 216, 63 So. 575; Spesard v. Spesard, 75 Kan. 87, 88 Pac. 576; Buchanan v. Berkshire Co. 96 Ind. 510; White v. Miller, 52 Minn. 367, 19 L.R.A. 673, 54 N. W. 736; Rasmussen v. Levin, 28 Colo. 449; Banzer v. Richter, 123 N. Y. Supp. 678; Malcolm v. Allen, 49 N. Y. 448; Brownlee v. Arnold, 60 Mo. 79; Kelley v. Kershaw, 5 Utah, 804, 14 Pac. 804.

"Where by the terms of the contract the failure to pay an instalment of a debt matures the whole debt, by the terms of the contract the Statute of Limitations runs from the first default." Ganser v. Ganser, 83 Minn. 199, 86 N. W. 18; 25 Cyc. 1107, and cases cited; Bank v. Peck, 8 Kan. 660; Ryan v. Caldwell (Ky.) 50 S. W. 966; Wheeler v. Howard, 28 Fed. 741; Boyd v. Buchanan, 162 S. W. 1075.

The statute runs from date of default, and not from date of election. Goss v. Lovell, 101 Pac. 72–75; San Antonio v. Stewart, 94 Tex. 441, 61 S. W. 386; Green v. Frick, 25 S. D. 342; Buchanan v. Berkshire Co. 96 Ind. 510; Doolittle v. Nurnberg, 27 N. D. 521.

"An attorney has a lien for a general balance of compensation in and for each case, upon any papers belonging to his client which have come

into his hands in the course of his professional employment in the case for which the lien is claimed." Comp. Laws 1913, § 6875, subd. 1.

An attorney's lien may be foreclosed by advertisement, and the foreclosure here of the Campbell lien transferred to Styles the title to the notes and mortgage on which the lien foreclosed was claimed. Comp. Laws 1913, § 6878; Black v. Elev. Co. 7 N. D. 129; Mitchell v. Elev. Co. 15 N. D. 495; Schlosser v. Moores, 16 N. D. 185; Wonser v. Elev. Co. 31 N. D. 382; Garr-Scott v. Clements, 4 N. D. 559; Grove v. Loan Co. 17 N. D. 352.

Plaintiff failed to show any interest in the property or existing indebtedness in their favor. Bank v. Bank, 8 N. D. 50.

"The assignee of a right of property or chose in action is concluded by a judgment for or against his assignor, in a suit begun before the assignment, but not where his rights vested prior to the commencement of the action." 23 Cyc. 1260, and cases cited.

"The rule with regard to privies is that its operation must be mutual upon both parties; both litigants must be concluded or the proceedings cannot be set up as conclusive for either." Hunt v. Haven, 52 N. H. 169 citing Bouv. Inst. 374; Sobey v. Beiler, 28 Iowa, 323; Coles v. Allen, 64 Ala. 105; Reynolds v. Ætna Co. 55 N. E. 310 and cases cited; Ward v. Boyce, 36 L.R.A. 549 and note.

Birdzell, J. This is an action for the foreclosure of a mortgage on 160 acres of land, securing the payment of $700 and interest. Judgment was entered in the district court of Pierce county in favor of the plaintiff, but it was ordered that certain of the proceeds of the foreclosure sale be paid to the defendant Styles as assignee of an attorney's lien, existing in favor of the defendant Campbell. The defendant Styles appealed from the judgment, demanding a review and trial *de novo* of certain questions of fact, which are set forth in seventy-seven specifications. The plaintiff McCarty, also appealed, specifying errors in the holding of the trial court sustaining the attorney's lien of defendant Campbell and entering judgment therefor in favor of Styles as assignee. The defendant and respondent Campbell moves to dismiss the latter appeal as to him, upon the ground that there has been no settlement of the statement of the case.

The facts necessary to an understanding of the questions involved in this matter are as follows:

In 1906 Styles purchased from a bank, of which his brother was cashier, a quarter section of land, subject to an encumbrance of $500 in the shape of a mortgage owned by the Union Central Life Insurance Company. It developed later, however, that, in addition to the mortgage mentioned, the former owner of the land, one Charles W. Goodsman, had given the mortgage in question in this suit, to secure the payment of five promissory notes, aggregating $700. These notes and mortgage ran to Theodore P. Scotland & Company. Soon after the discovery by Styles of the Scotland & Company mortgage, he brought an action (February, 1907) to quiet his title as against the mortgagee. In that action the validity of the Scotland & Company mortgage was upheld by the judgment of the trial court, which judgment was affirmed by this court in Styles v. Theo. P. Scotland & Co. 22 N. D. 469, 134 N. W. 708.

In the action to quiet title, the defendant Scotland & Company was represented by Paul Campbell, a party defendant in this action. Campbell had obtained possession of all the above-mentioned notes and introduced them in evidence to substantiate his client's claim. Not having been fully paid for his services, he later claimed an attorney's lien upon them.

In August, 1912, McCarty attempted to foreclose the mortgage in suit by advertisement, claiming to be the owner of the entire obligation secured thereby. In September a restraining order was obtained, restraining further foreclosure proceedings under the advertisement. This order was based upon three affidavits, setting forth, among other defenses, Campbell's lien. Nothing further having been done by way of realizing upon the securities, Campbell started foreclosure proceedings under his lien in August, 1913. After six days published notice, the lien was foreclosed by advertisement by the sale of all of the notes on August 28, 1913, at which sale Styles became the purchaser, the amount paid by him being $173.17. On October 18, 1913, or soon thereafter, the exact date being immaterial, this action was begun by McCarty and Finch, Van Slyck, & McConville for the foreclosure of the mortgage in question. The complaint alleges an assignment from Theodore P. Scotland & Company to John McCarty of all of the notes

excepting a $100 note, as of July, 1907, and an assignment of the $100 note to Finch, Van Slyck, & McConville as of October 1, 1904. It also disputes Campbell's lien and alleges the facts with reference to the foreclosure thereof. The defendants Styles and Campbell answered separately. The answer of the former covers fifteen printed pages and sets forth five defenses to the action. In reality, it is an argument of the case. Briefly stated the defenses set forth are a reliance upon the title secured through the foreclosure of the attorney's lien, an estoppel as against the plaintiffs to foreclose the mortgage on the ground that in the previous suit of Scotland & Company against Styles the notes and mortgages had been held to be the property of Scotland & Company; also that the defendants in this case are not precluded by the former judgment from showing that the mortgage itself is void by reason of not having been executed by the mortgagor.

The answer of Campbell denies the consideration for the alleged assignment of the $100 note from Scotland & Company to Finch, Van Slyck, & McConville, and alleges that the assignment of the four notes to McCarty was an assignment to him as trustee for the benefit of the creditors of Scotland & Company. Also that the Finch, Van Slyck, & McConville assignment was collateral to indebtedness which was afterwards fully paid; that the possession of the notes was not delivered to the assignees; that plaintiffs, by reason of their knowledge and acquiescence in his defense of the suit against Scotland & Company, are precluded and estopped as against him and his successor in interest to dispute the rights which Styles obtained as purchaser at the lien foreclosure sale.

The findings, conclusions, and judgment of the trial court are in accord with the questions and principles discussed in a comprehensive memorandum decision which was rendered in disposing of the case, and the questions which arise on Styles's appeal are foreshadowed in that opinion. The learned trial judge considered that four questions were involved. First, "What is the effect of the judgment and decree entered in the case of Styles v. Scotland & Company described in finding of fact number eight?" Second, "Has the Statute of Limitations run since said judgment and decree was entered, so as to bar this foreclosure sought in the complaint?" Third, "Did defendant Campbell have a lien on the personal property, to wit, the notes and mortgage sought to be fore-

closed in this action?" Fourth, "If such an attorney's lien existed, was it foreclosed?"

While the appellant Styles asks for a review of seventy-seven specifications of facts, the mere enumeration of which covers thirty-three pages of his brief, the real questions involved in this appeal are those relating to the propriety of the adverse decision of the trial court upon the four questions discussed in the memorandum decision, and the correctness of certain findings of fact necessary to sustain the decision and judgment thereunder. In the argument of the appellant Styles, the errors assigned are grouped under nineteen heads, and the legal propositions therein raised, which merit discussion, will be considered in the order appealing to us as most logical, and with such brevity as is consistent with a comprehensive review of the real questions presented on the record.

It is claimed that the plaintiff's action is barred by the Statute of Limitations. In support of this contention the appellant Styles invites our attention to the fact that two of the notes secured by the mortgage in question fell due October 1, 1903. This action was not commenced until October 18, 1913, or soon thereafter. The mortgage was given to secure a debt of $700, which was represented by five promissory notes, dated August 21, 1903, the amounts and maturity of which are as follows: $250, October 1, 1903; $50, October 1, 1903; $100, October 1, 1904; $50, October 1, 1905; and $250, October 1, 1906. The mortgage securing these notes contains an acceleration clause as follows: "And the said Charlie Goodsman does covenant and agree . . . to pay said sum of money above specified at the time and in the manner above mentioned. . . . And if default be made by the party of the first part in any of the foregoing provisions, it shall be legal for the party of the second part, its successors, and assigns, or its attorney, to declare the whole sum above specified to be due." The mortgage also contains a provision empowering the mortgagee to sell the premises under the statute in case of default in the payment of any part of the money due upon the notes. The argument is that inasmuch as the mortgagee had a right, immediately upon the default in the payment of the first notes, to foreclose the mortgage, and having allowed more than the statutory period to elapse since the first default before bringing this action, the action is barred by the statute. Comp. Laws 1913,

§ 7374. That this contention is unsound appears clear to us after consideration of the many authorities cited by counsel. The acceleration clause only gives to the mortgagee a right, upon default in any part, to declare the whole debt due. It is clear that such a provision does not operate automatically to make the whole sum due as a matter of law. It may well be, as contended by counsel, that it is not necessary for the mortgagee to take any affirmative steps whatsoever before bringing an action or initiating foreclosure proceedings, but from this it does not follow that there must not be an exercise of the option before the action or the right to foreclose matures. The bringing of an action is in itself a sufficient declaration that the remainder of the amount claimed is due, but without the bringing of an action and without other evidence of an exercise of the option it cannot be said that a cause of action has accrued. It is one thing to say that the bringing of an action is a sufficient determination of an option to declare the whole sum due (Doolittle v. Nurnberg, 27 N. D. 521, 147 N. W. 400), and quite another thing to say that the option must be held to have been exercised in the absence of any evidence whatever of an election. The logic of the appellant, if applied to a possible situation where more than ten years might elapse between the first default and the maturity of the last notes secured by the mortgage, would require a holding that the right to foreclose the mortgage upon the nonpayment of the last notes was barred before the arrival of the date of maturity fixed therein.

The authorities generally will be found to support the foregoing conclusion, where the acceleration clause is similar to that in the case at bar. See 27 Cyc. 1101; also Hall v. Jameson, 151 Cal. 606, 12 L.R.A. (N.S.) 1190, 121 Am. St. Rep. 137, 91 Pac. 518, and numerous cases cited in the L.R.A. note to the above case. The authorities, however, are divided as to the effect of a default where the acceleration clause is absolute as distinguished from optional. See the L.R.A. note, supra. But as we are not dealing with an acceleration clause which is absolute, we express no opinion as to which is the proper rule. Nor are we concerned with such a question as was before the supreme court of Missouri, in Boyd v. Buchanan, 176 Mo. App. 56, 162 S. W. 1075 (cited by appellant), where the stipulation was that "on failure to pay any instalment of interest when due, the holder . . . may collect the principal and interest at once." It was held in the latter case that the cause

of action *accrued,* within the language of the Statute of Limitations, at once, upon the default, and it will be observed that the acceleration clause said nothing about an option to declare any sum due. This case is readily distinguishable from the case at bar, and the acceleration clause involved therein may properly be classified as absolute. The same is true of the acceleration clause involved in the case of Central Trust Co. v. Meridian Light & R. Co. 106 Miss. 431, 51 L.R.A.(N.S.) 151, 63 So. 575, 64 So. 216.

In holding that the Statute of Limitations does not bar the action to foreclose the mortgage, we do not dispose of the whole question of the statute as presented by Styles's appeal. As to the first two notes, amounting to $300, it is not questioned that more than ten years elapsed between the date of their maturity and the bringing of this action. The question as to the running of the Statute of Limitations, as to the sum represented by these notes, introduces considerations not applicable to the attempt to invoke the statute as to the whole debt. It is a well-settled rule in this jurisdiction that the Statute of Limitations barring actions on notes, and the statute barring the remedy of foreclosure, are to be applied independently. A mortgage may be foreclosed, for instance, after the Statute of Limitations has barred an action on the notes for which the mortgage is security (see Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518), and this rule has the support of the decided weight of authority. See Jones, Mortg. § 1204; also numerous cases cited in the note in 95 Am. St. Rep. 664. It has even been held in this jurisdiction that, in the absence of a special Statute of Limitations barring foreclosure by advertisement, such proceedings were not barred by the ordinary Statute of Limitations applicable to civil actions, and that a foreclosure by advertisement, in the absence of a special Statute of Limitations, may be resorted to years after an action on the note would be barred. Clark v. Beck, 14 N. D. 287, 103 N. W. 755. It is true conversely that an action to foreclose may be barred while the legal remedy of the creditor to collect the debt remains. Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 Ann. Cas. 1160. Thus, the sole question presented by the invocation of the Statute of Limitations as to the first two notes resolves to this: For purposes of foreclosure and the application of the Statute of Limitations thereto, must

the accrual of the right to foreclose be controlled by the maturity of a portion of the obligations for which the mortgage is security, or, in the absence of a declaration of an option, may the mortgagee be considered as standing upon the singleness of his cause of action to foreclose, in which case it will be deemed to have first been perfected when the whole debt matures? The mortgage is given to secure the entire debt of $700, and the fact that the indebtedness is represented by instalment notes, maturing at different dates, cannot affect the creditor's right to stand upon the singleness of his cause of action to foreclose for the nonpayment of the entire debt, when all of it shall become due, in case the mortgagee has not elected to treat it all as due upon the default in the payment of an instalment. Since it does not appear that the holder of the mortgage declared the whole sum due, it must be assumed that he elected to treat his cause of action to foreclose the mortgage as a single cause, which was being held in abeyance, awaiting the maturity of the entire debt. It follows that the right to foreclose the mortgage for the nonpayment of the entire debt of $700 and interest did not arise until the maturity of the last note on October 1, 1906, and that the foreclosure action was not barred as to any portion of such indebtedness. See 27 Cyc. 1560.

Before passing to the next question to be considered, it is proper to remark that there is the gravest doubt in the minds of the members of the court as to whether the cause of action for the foreclosure of the mortgage, in any event, can be considered as having arisen upon the maturity of the first notes. It was established as a fact in the case of Styles v. Theo. P. Scotland & Co. 22 N. D. 469, 134 N. W. 708, that the Goodsman mortgage was executed and redelivered on October 5, 1904, more than a year subsequent to the maturity of the first notes; also that Goodsman did not obtain a receiver's receipt for the land covered by the mortgage until November 4, 1903; also that Goodsman left the state in November, 1903, and deeded the land to Styles's grantor, in October, 1904. But we have preferred to consider the propositions advanced by counsel under the most favorable interpretation possible of the facts in the instant case.

This brings us to a consideration of the foreclosure of the attorney's lien for the purpose of ascertaining what right Styles derived therefrom. This lien was foreclosed by a sale of the notes, pursuant to a notice

published in conformity with the requirements of § 8125, Comp. Laws 1913, governing the foreclosure of chattel mortgages by advertisement. The legality of this method of foreclosure is assailed by the respondent McCarty, who contends that the statutory provisions governing foreclosure by advertisement are not applicable to the foreclosure of an attorney's lien arising by operation of law. Section 6878, Comp. Laws 1913, is relied upon by the appellant as authority for the proceedings taken. Section 6878, Comp. Laws 1913, is the first of two sections, which comprise chapter 100 of the Civil Code. This chapter deals with the matter of "the filing and foreclosing of liens on personal property." Section 6878 is as follows: "Upon default being made in the payment of a debt secured by a lien upon personal property, such lien may be foreclosed upon the notice, and in the manner provided for the foreclosure of mortgages upon personal property, and the holder of such lien shall be entitled to the possession of the property covered thereby for the purpose of foreclosing the same. The costs and fees for such foreclosure shall be the same as are provided in § 8132. A report of such foreclosure shall be made in the manner set forth in § 8128; provided, that when the lien has not been filed in the office of any register of deeds then a report of such sale shall be filed in the office of the register of deeds of the county wherein the property is sold. Such liens may also be foreclosed by action as provided in chapter 29 of the Code of Civil Procedure."

The appellant argues with much force that the foregoing provision authorizes the foreclosure of all liens enumerated in the preceding chapters of the Civil Code, by advertisement, as well as by action; and the language of the section, when considered alone, is apparently susceptible of such interpretation. But when the section is examined in the light of the other statutory provisions respecting liens and their enforcement, and with due regard to the fundamental constitutional requirement of due process of law, it becomes quite apparent that the statute in question cannot properly be construed as authorizing the foreclosure of an attorney's lien in this manner. Of the liens provided by statute, there can be no doubt that mechanic's liens and miner's liens can be foreclosed only by action. See Comp. Laws 1913, §§ 6825–6841. Of the remaining liens, those for the service of sires, for furnishing seed, for threshing, and for performing farm labor, become

effective only upon filing in the office of the register of deeds a statement of the service rendered or upon the furnishing of the thing which affords the basis of the lien. See Comp. Laws 1913, §§ 6849–6852, 6855, 6858. The other liens are the lien for keeping stock, the lien of a vendor of real property for the unpaid purchase price, the lien of a vendor of personalty for the unpaid purchase price, the lien of a purchaser of realty for the amount paid, which arises in case of failure of consideration, liens for improvements on personalty, factor's lien, banker's lien, seaman's lien, officer's lien, innkeeper's lien, attorney's lien, and blacksmith's and machinist's liens for repairs. Foreclosure by advertisement is expressly excluded in the case of the liens on real estate, and it may safely be said that the procedure is wholly inappropriate as to the lien of a vendor of personalty. Section 6878 is not applicable to the latter, because the provision giving the lien makes it enforceable in like manner as if the property were pledged to the vendor for the price, and for the foreclosure of a pledge actual notice is required. Comp. Laws 1913, § 6786. As to the remaining liens, they are, for the most part, if not entirely, dependent on possession, and are of the character of those that could not have been foreclosed at the common law, either by sale upon notice or by suit in equity. Section 6878 was doubtless enacted for the purpose of giving to the holder of any of the various liens enumerated a right which would not exist except for the statute, *viz.*, the right to realize out of the property subject to the lien the amount for which the property is held.

It will be noted that the statutory liens, with respect to their origin, are of two general classes,—those in which either actual or constructive notice to the owner of the property of the amount claimed, and to third parties, is required to be given before the lien becomes operative, and those in which no such notice need be given. The attorney's lien upon papers of his client in his possession falls within the latter class. As to liens of the second class, our basic inquiry is, Is the remedy of foreclosure by advertisement available? Without expressing any opinion as to the applicability of this remedy to liens of the first class, we do not hesitate to express the conviction that it is not available to holders of liens of the second class. In dealing with this question, it should be remarked at the outset that the remedy of foreclosure by advertisement is a harsh remedy and one readily capable of being abused to the

disadvantage of the one whose property is held by the creditor. A lien of the class under consideration arises by operation of law, and no notice whatever is required to perfect it. There need not even be a notice that any balance is owing to the attorney. The first and only notice required by law, if the contention of the appellant Styles is correct, is the notice of sale which is required to be published for six days under § 8125, Comp. Laws 1913. It will readily be seen that this interpretation of the statutes would result in transferring the property of a client, which had been intrusted to the attorney, to the purchaser at a foreclosure sale, not only with remarkable facility, but without any notice of any hearing of any sort for the purpose of determining the amount of indebtedness for which the lien is claimed.

It is true that § 6878, Comp. Laws 1913, makes provision for the releasing of an attorney's lien upon the execution of a bond in double the amount claimed, or in such sum as may be fixed by a judge, which procedure, if taken, would leave the attorney to a suit on the bond to determine the amount recoverable for his services; and that it is also provided that the lien will be released upon the failure of the attorney to furnish a bill of particulars of services within ten days after a demand therefor. But there is nowhere any requirement that the lienor shall serve notice of his claim or his lien. Such being the condition of the statutory law with respect to the lien of an attorney, the fundamental constitutional requirement of due process would not be satisfied by a statute that purported to authorize the transfer of title to such papers at a sale to be conducted upon six days' published notice. It is essential that at some time previous to such a final consummation there shall have been a reasonable notice of an appropriate hearing, in which the extent and validity of the claim could have been determined at the election of the debtor party. However appropriate such a procedure may be, as applied to liens for a fixed sum or for a claim, of which the lienee has had either actual or constructive notice before the lien arises (Martin v. Hawthorne, 5 N. D. 66, 63 N. W. 895), we are satisfied that it can have no proper application to a lien of the character in question.

As hereinabove pointed out, it is manifest that the broad language of § 6878, Comp. Laws 1913, cannot with propriety be construed as prescribing a procedure to be followed in foreclosing all liens upon personal property; for, as will be seen upon examination, the statutes au-

thorizing certain liens, such as mechanics' and miners' liens, are complete in themselves and authorize foreclosure by action; and the lien of a vendor of personalty, which is provided for in the chapter immediately preceding § 6878, is enforced in like manner as if the property were pledged for the price. As to such liens, § 6878 is therefore clearly inapplicable, and in order that it may not be open to the constitutional objection of violating the requirement of due process it is necessary to construe it as not applicable to those liens whose foreclosure by advertisement would amount to a legislative authorization to take the property of a lienee without due process of law.

It may be remarked in passing that the statutory provisions, governing foreclosure of mortgages upon personal property by advertisement, show upon their face that they were enacted in the light of the custom according to which the mortgaged property remains in the possession of the mortgagor, and that, while six days' published notice is all that is required to foreclose the mortgage by sale of the property, the mortgagee must first obtain possession of the property. This, in itself, will ordinarily operate to apprise the mortgagor of the approaching foreclosure, and will give him an opportunity to enjoin the contemplated sale, if any reasons exist therefor, and to remit the creditor to his right of foreclosure by action. Obviously when this procedure is undertaken with respect to property already in the possession of the one foreclosing, the likelihood that notice will reach the lienee is much less than in the case of mortgaged personalty.

Being of the opinion that the attorney's lien was never legally foreclosed, the question as to the right acquired by Styles as purchaser at the sale remains to be considered.

The trial court held that Styles stood in the position of an assignee of the attorney's lien. While this position is contested by the respondent McCarty, and while in his appeal he seeks to obtain a reversal of this ruling, we are not prepared to say that the conclusion is not warranted and the result justified upon a proper application of equitable principles. In a sense, this whole controversy arose over the fruits of the litigation in the former case of Styles v. Theo. P. Scotland & Co. 22 N. D. 469, 134 N. W. 708, and it is equitable to require that those who reap the benefits of that litigation should pay therefrom a proper fee to the attorney through whose efforts the suit was successfully ter-

minated. Where all the equities of a cause are presented to a court possessed of equity powers, in order to accomplish justice, the court may deal with a given subject-matter within its control regardless of the strictly legal aspects of the case. It matters little whether the abortive foreclosure can be considered sufficient from a legal standpoint to constitute Styles the assignee of Campbell's lien; it is but just that Styles should have the benefit of the reasonable claim of Campbell, who no longer asserts it as against him. As we view the record, Campbell's claim appears reasonable and just, and we do not feel warranted in disturbing the findings of the trial court regarding it.

In view of the conclusions reached upon the merits of this case, it is unnecessary to discuss the questions presented by the motion of the respondent Campbell. Neither is it necessary to consider separately the questions presented by McCarty's appeal as they affect the respondent Styles. The judgment of the trial court is in all things affirmed, without costs to either party, except as follows: Appellant McCarty shall pay to respondent Campbell $50, costs of this appeal, and the appellant Styles shall pay to McCarty a like sum as costs.

ROBINSON, J. (dissenting in part). Charles Goodsman owned the land in question, a quarter section in 21–153–72. To secure $700 and interest, according to five promissory notes, Goodsman mortgaged the land to Theo. B. Scotland Company. The mortgage is dated November 24, 1903, and is acknowledged and recorded October 5, 1904. Asa Styles acquired the Goodsman title and brought a suit to test the validity of the mortgage, and it was held valid. Styles v. Theo. P. Scotland & Co. 22 N. D. 469, 134 N. W. 708. In that groundless suit Paul Campbell was retained as attorney for the mortgagee, and he put in evidence the mortgage notes, which were obtained for that purpose from parties who held them as collateral, though there was no reason for obtaining the notes or putting them in evidence. After the trial Campbell secured possession of the notes by an order directing the clerk of the court to deliver them to him. Then he claimed a lien on the notes for $148.30 and sold the notes to Styles under an attempted foreclosure of his lien. On October 25, 1909, the mortgagee made to the plaintiff John McCarty an assignment of the mortgage and the notes. In August, 1912, he attempted to foreclose by advertisement. By order of the

court, a stop was put to such foreclosure on affidavits of Asa Styles, Charles Goodsman, and Paul Campbell, claiming that Styles had a valid defense as the owner of the land and the owner of the mortgage. The complaint is dated October 18, 1913. In August, 1916, a judgment was duly entered, directing the sale of the land to pay the mortgage debt, and that the alleged attorney's lien be first satisfied from the proceeds of the sale.

This is an action to foreclose a mortgage which the court has adjudged to be valid. Styles v. Theo. P. Scotland & Co. supra. The action is not barred by the Statute of Limitations, as it was commenced within ten years after the debt matured and came due. The facts stated show the defendant Asa Styles has no interest in or lien upon any of the mortgage notes. Styles appeals, and McCarty appeals from the part of the judgment in regard to the attorney's lien.

By his appeal Styles seeks to question and relitigate the validity of the mortgage, but that question has been fairly decided against him. Styles pleads that the action was barred because it was not commenced within ten years after the cause of action accrued. The cause of action did not accrue until ten years after the last three notes became due,—and the action was commenced in October, 1913. It is also claimed that Styles is the owner of the notes and mortgage under a pretended foreclosure of the attorney's lien, as if it were a chattel mortgage. Of course that is mere nonsense. The only real question is on the appeal of McCarty. He claims that neither Styles nor Paul Campbell ever had a lien on the notes, and that the court erred in decreeing that the lien claimed should be paid from the sale of the mortgaged premises. Certainly there was no occasion for putting the notes in evidence or for ever giving them to the attorney. He was not employed by the owner of the collateral notes, and he had no claim or cause of action against them on their notes, and his claim was not improved by transferring it to Styles. The judgment should be modified by striking out all that relates to the attorney's lien, and, as so modified, the judgment should be affirmed.

On Petition for Rehearing.

BIRDZELL, J. The appellant Styles has called to the court's attention § 8078 of the Compiled Laws of 1913. The section is as follows: "In case of mortgages given to secure the payment of money by instal-

ments, each of the instalments mentioned in the mortgage shall be taken and deemed to be a separate and independent mortgage, and the mortgage for each of such instalments may be foreclosed in the same manner and with like effect as if a separate mortgage was given for each of such instalments, and a redemption of any such sale shall have the like effect as if the sale for such instalments had been made upon a prior independent mortgage." It is contended that the above section operates to mature the cause of action for the foreclosure of the mortgage as to each instalment at the maturity thereof. Conceding this to be the effect of the statute, it does not follow that it matures the cause as to the entire amount. Where a mortgage is given to secure an *entire* sum, it will give rise to a *cause of action* to foreclose the lien for the entire amount, only when the amount becomes due or is declared due under the acceleration clause. This cause of action may be treated by the mortgagee as being single and indivisible, notwithstanding one or more defaults affecting instalment notes. The effect of a statute such as that quoted above is merely to secure to the holder or holders of instalment notes the right to foreclose the lien of the mortgage applicable to each note, by enabling such holder or holders to exercise the power of sale, and to give a right of redemption from any such sale in like manner as if the instalments represented successive mortgages. The section has no application whatsoever to the right of foreclosure for the entire amount of the mortgage lien.

Considerable argument is expended in an effort to demonstrate that a right to foreclose the mortgage is barred by the Statute of Limitations, by reason of the fact that more than ten years elapsed between the bringing of the action and the maturity of the first instalment note. Throughout this argument counsel has apparently lost sight of the rule followed in the main opinion to the effect that the Statute of Limitations applicable to a cause of action on a note, and the statute applicable to a cause of action for foreclosure, operate independently of each other. We are not concerned here with a cause of action upon the notes. The action that is before us is one for the foreclosure of the lien of a mortgage in which the mortgagor has covenanted for a lien to secure the payment of an entire sum. This cause of action did not mature, as pointed out in the main opinion, until within ten years prior to the bringing of this suit.

In the petition for rehearing, counsel also contend that the plaintiffs and respondents are precluded from maintaining this suit by reason of the finding in the previous suit of Styles v. Theo. P. Scotland & Co. 22 N. D. 469, 134 N. W. 708, that Scotland & Company were the owners of the notes. This contention overlooks the effect of the other findings in the same case. The court in that action held that the mortgage was unpaid, and determined the amount as well as the nature of the lien. Styles v. Theo. P. Scotland & Co. 22 N. D. 479, 134 N. W. 708. It would, of course, have been competent for the appellant to have shown in this action that he had discharged a portion of this lien, or, if a portion of it was held by someone not a party to the proceeding, he could have had such party joined. His argument, however, stops short of this, and seeks by technicality to magnify the effect of the previous findings of ownership in favor of Scotland & Company. A finding of ownership in Scotland & Company certainly would not be *res judicata* as against the interest of a stranger to the proceedings acquired before the suit was instituted.

The petition for rehearing is denied.

PETERNELLE C. ARNTSON, Appellant, v. FIRST NATIONAL BANK OF SHELDON, a Banking Corporation, and Thomas J. Harris, as Trustee of Ingebrigt E. Arnston, Bankrupt, Respondents.

(L.R.A.1918F, 1038, 167 N. W. 760.)

Will — disposition of property — constructive trust — involuntary trust — promise to deed over property — by children to mother — on death of father leaving no will — trust created by — may be enforced in equity against children — judgments against children — lien and claim of mother to lands — superior to such judgments.

1. Where one sick unto death calls his children to him, and says, "I want

NOTE.—For authorities discussing the question as to whether a constructive trust may be based upon an undertaking to hold, for the benefit of another, property received through devise or inheritance, where no actual testamentary intention has been frustrated, see notes in 33 L.R.A.(N.S.) 996 and L.R.A.1918F, 1045.

On the question of creation of constructive trusts in land by parol, see comprehensive note in 115 Am. St. Rep. 786.

mother (his wife) to have all, and I want you boys to deed it to her when I am gone. This will be as good as a will," and the sons promise to convey such property to the mother, and in reliance on such promise the father dies without making a will, a constructive trust, according to the ordinary rules of equity, an involuntary trust, under the provisions of §§ 6273 and 6280 of the Compiled Laws of 1913, is created, which may be enforced against the sons and which is superior to the liens of the judgments of their individual creditors.

Property descending to sons — promise by them to convey to mother — made to father dying without will — oral trust created — subsequent execution of conveyance — made in compliance with promise — takes case out of statute.

2. Where an oral trust is created by the promise of the sons at the sick bed of their father to convey the property, which descends to them, to their mother after their father's death, the subsequent execution of a conveyance will take the transaction out of the provisions of the statutes, which generally require trusts in relation to real property to be created in writing.

Lands — creation of trusts in — resting wholly in parol — person receiving lands for benefit of another — trust not declared in writing but fulfilled — court will recognize its existence — creditor of trustee — cannot dispute trust.

3. The law refuses its aid to enforce agreements creating trusts or charges upon land when they rest altogether in parol, not because the trusts are therefor void, but because it will not permit them to be proved by such evidence. But when a person who has received the title to such lands for the benefit of another, although not having declared the fact in writing, recognizes and fulfils the trust, it is not the duty of the court to deny its existence, nor can an individual creditor of such trustee dispute the same.

Lien of judgment — affects only actual interest in lands — real owner may always show his interest — absence of fraud — apparent ownership — not real — may be shown — lien of judgment — does not attach to naked legal title.

4. The interest which the lien of the judgment affects is the actual interest which the debtor has in property, and a court of equity will always permit the real owner to show, there being no intervening fraud, that the apparent ownership of another is or is not real; and when the judgment debtor has no other interest, except the naked legal title, the lien of the judgment does not attach.

Trusts — "created or declared by operation of law" exempts from expression in writing — includes constructive trusts.

5. The term, "created or declared by operation of law," as found in § 5364

of the Compiled Laws of 1913, and which exempts from the requirement of expression in writing, the trust so created, includes constructive trusts.

Oral trust — confidential relations — influence of — trust violated — constructive trust arises — promises — refusal or failure to keep — courts of equity will enforce.

6. Where confidential relations prevail between the parties to an oral trust, and the trust is violated, the law presumes that the influence of the confidence upon the mind of the person who confided was undue, and a case of a constructive trust arises, not, however, on the ground of actual fraud, but because of the facility for practising it, and in such a case courts of equity will enforce the promise to convey, even though it may be not in writing, as the mere refusal to carry it out is constructively fraudulent.

Respecting property — constructive trusts — raised by equity — acquired by fraud.

7. Constructive trusts are such as are raised by equity in respect to property, which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it.

Implied or resulting trust — purchaser or encumbrancer of property for value and without notice — prejudiced by — unrecorded deeds — secret trusts — creditors and purchasers — protected against.

8. Section 5366 of the Compiled Laws of 1913, which provides "that no implied or resulting trust can prejudice the rights of a purchaser or encumbrancer of real property for value, and without notice of the trust," and § 5594, which provides for the recording of deeds, merely protect creditors and purchasers against unrecorded conveyances of or secret trusts upon the property of their debtors, and of property which, if it had not been for the secret trusts or the unrecorded conveyances, would have been properly subjected to their debts.

Wills — execution of — strictness of law — requires expression of real intention — creation of trust in lieu of will — heirs — creditors of — cannot complain.

9. The strictness of the law in relation to the execution of wills is not due to any solicitude for the creditors of the heirs, but to a desire that the real intention of the testator shall be ascertained and prevail. A personal creditor of one of the heirs, therefore, cannot complain that the deceased, instead of making a will of his property to his wife, created a trust by which his children agreed to convey it to her.

Opinion filed April 12, 1918.

Action to quiet title.

Appeal from the District Court of Ransom County, Honorable *Charles A. Pollock,* Special Judge.

Judgment for defendants. Plaintiff appeals.

Reversed.

Statement of facts by BRUCE, Ch. J.

This is an action to quiet title in the plaintiff, Peternelle C. Arntson, in certain real estate owned by her husband while living. The plaintiff claims under a deed executed by her sons after the death of their father, and in pursuance of an agreement made with him shortly before his death. The defendant bank claims title to the interest of one of the sons, Ingebrigt E. Arntson, and bases its claim on a purchase made by him on an execution sale for a deficiency decree on the foreclosure of a mortgage made by the said Ingebrigt Arntson, said mortgage having been made to the said defendant, and the defendant purchasing at its own sale, the levy having been made prior to the execution of the deed by the sons to their mother, but the sale being subsequent to execution and recording of the instrument.

Briefly and in chronological order the facts are as follows:

On August 7, 1912, respondent commenced an action to foreclose its mortgage on real estate owned by one I. E. Arntson, in Ransom county, the action being afterwards decided in favor of Arntson in the lower court and respondent herein appealed.

Meantime, and while the appeal was pending, Eric Arntson, the father of said I. E. Arntson, became sick unto death, called his five boys about his deathbed and said to them, in substance:

"I haven't much property to leave, but what I have I want mother [his wife] to have it all, as she has got to have someone to take care of her, and I want you boys to deed it to her when I am gone. This will be as good as a will."

The five boys agreed to this and so told their father, who died a few days later, April 17, 1914.

About a month after this agreement between the father and sons and the father's death, this court reversed the decision of the lower court in the foreclosure action, and judgment was entered against I. E. Arntson; the land covered by the mortgage was sold, and a deficiency judgment for $669.31 entered.

In November, 1915, execution issued on this deficiency judgment and was levied on the interest of said I. E. Arntson in 260 acres of land of which his father, Eric Arntson, died seised,—the land the sons had agreed at their father's deathbed to convey to their mother.

On December 4, 1915, all the five boys joined in a deed to their mother of their father's land, said deed reciting that it was executed to carry out and execute the parol trust declared and created by their father at his death. This deed was recorded on December 4, 1915.

Thereafter, and on the 5th day of February, 1916, the sheriff sold the lands levied on, and the creditor defendant purchased at such sale, and this action was thereafter brought by appellant, the widow of Eric Arntson and the mother of the five boys, to quiet her title as against the sheriff's certificate held by such creditor bank, the respondent herein. Respondent counterclaimed, appellant replied, and the case was heard by Judge Pollock on said counterclaim and reply, and a decision rendered for respondent, whereupon this appeal was perfected and a trial *de novo* demanded.

Pierce, Tenneson, & Cupler, for respondent bank.

No trust was ever created or existed in this case. The heirs (debtors) received their interest in the real estate and property by virtue of the statutes of succession and by operation of law, and not by any act of the decedent. Nothing was done by the deceased to complete a trust or to bring into existence a valid and legal trust. 39 Cyc. 43, 76; 1 Perry, Trusts, 5th ed. § 99, p. 103; Brabrook v. Savings Bank, 104 Mass. 228; Jones v Lock, L. R. 1 Ch. 25.

"There must be some act of delivery out of the possession of the donor, for the purpose and with the intent that the title shall thereby pass." Minchin v. Merrill, 2 Edw. Ch. 333; Howard v. Windham Co. Sav. Bank, 40 Vt. 597; Brabrook v. Savings Bank, 104 Mass. 231; Re Small, 50 N. Y. Supp. 341.

If anything remains for the donor to do to vest the legal title in the donee, the court cannot execute the trust if it is voluntary. 1 Perry, Trusts, 5th ed. § 100, p. 105.

The arrangement as made between the parties as disclosed was void as a testamentary disposition. No interest was to pass or vest until after the death of the father, the so-called trustor. Diefendorf v. Diefendorf, 8 N. Y. Supp. 617; Hill v. Hill, 7 Wash. 409, 35 Pac. 360;

Chestnut St. Nat. Bank v. Fidelity Ins. Co. 136 Pa. 339, 65 Am. St. Rep. 860, 40 Atl. 486.

A testator cannot affect the equitable any more than the legal estate for the one is a constituent part of the ownership as much as the other. No such disposition as is here claimed can be made unless it be declared in writing in strict conformity with the statute regulating devises and bequests. 1 Perry, Trusts, §§ 89–94, pp. 91–93.

If a gift or testamentary disposition is intended and the instrument is informally executed, it cannot be held valid as a trust. 1 Perry, Trusts, § 97, pp. 99–100 and cases cited in note 1 (a).

An express trust in real property cannot be created or proved by parol. Comp. Laws 1913, §§ 5364, 5384, 5394, 5511, 5888; 39 Cyc. pp. 46, 49 and notes 65 & 66; Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088; Carter v. Carter, 14 N. D. 66, 103 N. W. 425; Smith v. Mason, 55 Pac. 143; Von Trotha v. Banberger (Colo.) 24 Pac. 883; Reagan v. McKibben (S. D.) 76 N. W. 943; McCammon v. Pettitt, 3 Sneed, 242, 2 Devlin, Real Estate, 3d ed. § 1183.

Defendant's judgment became a lien upon the interest of Arntson, the heir, immediately upon his father's death. Comp. Laws 1913, § 7691; Union Bank v. Ryan, 23 N. D. 482; Yader v. Bank (Iowa) 119 N. W. 147.

A judgment creditor is placed in the same position as a purchaser or encumbrancer under our recording statute. Comp. Laws 1913, §§ 5594, 5727, 6755; Mer. St. Bank v. Tufts, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760; Ilveldsen v. First St. Bank, 24 N. D. 227, 139 N. W. 105.

BRUCE, Ch. J. (after stating the facts as above). The question to be decided in this case is whether the deed of the children to their mother was effective as against the levy of the judgment of the First National Bank of Sheldon, and against the sheriff's certificate which it obtained at the sale under said judgment. Did or did not the oral promise of the children of the deceased to convey the property to their mother create a trust which was superior to such lien and to such certificate? Was there any property of the defendant Ingebrigt Arntson on which the lien of the judgment could operate?

(1) The contention of the defendant the First National Bank of

Sheldon is that no trust was created because the title to the property remained in the hands of the deceased up to the time of his death and there was no conveyance to trustees.

(2) That from everything that was done and said it clearly appears that the deceased intended that the arrangement should be the same as a will, and that no title or interest should pass from him until after his death; that the arrangement, therefore, amounted to a testamentary disposition, and being oral, and not in writing, and not being executed with the formality required by law in the case of wills, it was null and void.

(3) That the trust, if any, was oral, and that under the statutes of North Dakota an oral trust is void.

(4) That under §§ 5742 and 7691 of the Compiled Laws of 1913, the judgment became a lien upon the interest of Ingebrigt Arntson in his father's estate immediately upon his father's death.

(5) That defendant bank is a judgment creditor of the said I. E. Arntson, and is placed in the same position as a purchaser under § 5594 of the Compiled Laws of 1913, which relates to the recording of deeds.

(6) That at the judgment sale it became a purchaser of the property from the heir, and as such was protected by the provisions of § 5727 of the Compiled Laws of 1913 from secret gifts made by the deceased.

(7) That under the provisions of § 6755 of the Compiled Laws of 1913 a defeasance is not enforceable as against any person other than the grantee, unless it is in writing and recorded.

The sections of the Compiled Laws which need to be considered in this case are the following:

Section 5364: "No trust in relation to real property is valid unless created or declared:

"1. By a written instrument subscribed by the trustee or by his agent thereto authorized in writing. [See § 4821, Revised Codes of 1905. Subdivision 1 of § 5364, as given in the Compiled Laws of 1913, is incorrectly compiled.]

"2. By the instrument under which the trustee claims the estate affected; or,

"3. By operation of law."

Section 5366: "No implied or resulting trust can prejudice the

right of a purchaser or encumbrancer of real property for value and without notice of the trust."

Section 5742: "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the county court and to the possession of any administrator appointed by that court for the purpose of administration."

Section 7691: "On filing a judgment roll upon a judgment directing in whole or in part the payment of money, it may be docketed with the clerk of the court, in which it was rendered, in a book to be known as the judgment docket, and in any other county upon filing with the clerk of the district court for said county a transcript of the original docket, and it shall be a lien on all the real property except the homestead in the county where the same is so docketed of every person against whom any such judgment shall be rendered, which he may have at the time of the docketing thereof in the county in which such real property is situated or which he shall acquire at any time thereafter, for ten years from the time of docketing the same in the county where it was rendered, and no judgment heretofore rendered shall hereafter become a lien on real property as herein provided, unless it is docketed in the county where the land is situated."

Section 5594: "Every conveyance by deed, mortgage or otherwise, of real estate within this state, shall be recorded in the office of the register of deeds of the county where such real estate is situated, and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any part or portion thereof, whose conveyance, whether in the form of a warranty deed or deed of bargain and sale, deed of quitclaim and release, of the form in common use or otherwise, is first duly recorded; or as against any attachment levied thereon or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance. . . ."

Section 5727: "The rights of a purchaser or encumbrancer of real property in good faith and for value derived from any person claiming the same by succession are not impaired by any devise made by the decedent from whom succession is claimed, unless the instrument con-

taining such devise is duly proved as a will, and recorded in the office of the county court having jurisdiction thereof, or unless written notice of such devise is filed with the county judge of the county where the real property is situated within four years after the devisor's death."

Section 6755: "When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees or persons having actual notice unless an instrument of defeasance duly executed and acknowledged, shall have been recorded in the office of the register of deeds of the county where the property is situated."

Section 6273: "An involuntary trust is one which is created by operation of law."

Section 6280: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it."

There can be no doubt that there was in the case at bar no express trust, as there was no transfer of the title in the property to the trustee or trustees during the lifetime of the deceased. It seems, indeed, that the intention was merely that the arrangement should take the place of a will, or, to use the language of the testator, "be as good as a will," and that not only was no transfer to the mother contemplated during the deceased's lifetime, but no present transfer to his children, as trustees, was either contemplated or made.

It is also clear from the evidence that no conveyance was made until after the execution of the First National Bank had been levied, and it is clear that since, under § 5742 of the Compiled Laws of 1913, the title to the property vested in the heirs immediately upon the death of the deceased, subject only to debts of the intestate and the control of the administrator for the payment of such, the lien of that judgment was paramount unless it could be defeated by a subsequent execution of the parol trust, or there was a prior and enforceable constructive trust.

This subsequent execution of the deed can only be held to have defected the judgment lien on the theory that the judgment creditor

merely stood in the shoes of his debtor, and had no greater right than he had, and that the real estate, though nominally in the names of the sons and daughters at the time of the levy of the execution, did not in fact belong to them, and could not have been voluntarily used by them in the payment of their debts.

This theory, however, we believe to be correct and to be controlling.

The question is one primarily of proof. The action is one to determine adverse claims. The plaintiff introduces in evidence a deed from the heirs to herself, executed, it is true, after the lien of the judgment had attached, but by those in whom the legal title to the land vested after the death of the deceased. The defendant bank relies upon the sheriff's certificate and asks to have the deed set aside. It is clear that, as between the sons and daughters and their mother, the deed is valid and binding, as it seems to be well established that: "The law refused its aid to enforce agreements creating trusts or charges upon lands, when they rest altogether in parol, not because the trusts are therefore void, but because it will not permit them to be proved by such evidence. But when a person who has received the title to lands purchased for the benefit of another, although without having declared the fact in writing, recognizes and fulfils the trust, it is not the duty of the court to deny its existence. . . . A debtor will not be permitted to convey away his property, either real or personal, and relieve it from the encumbrances occasioned by his debts; but there is nothing to prevent his restoring to others their property if it has been placed in his hands. Nor is there any reason why the property of others should be subjected to the payment of his debts, if he is honest enough to refuse to avail himself of an opportunity to use it for that purpose." Sieman v. Austin, 33 Barb. 9; Borst v. Nalle, 28 Gratt. 423; Freeman, notes in 115 Am. St. Rep. 783; Eaton v. Eaton, 35 N. J. L. 290; Hays v. Reger, 102 Ind. 524, 1 N. E. 386; Robbins v. Robbins, 89 N. Y. 251; Gallagher v. Northrup, 215 Ill. 563, 74 N. E. 711, reversing 114 Ill. App. 368; Collins v. Collins, 98 Md. 473, 103 Am. St. Rep. 408, 57 Atl. 597, 1 Ann. Cas. 856.

It is also well established that "The interest which the judgment lien affects is the actual interest which the debtor has in the property, and a court of equity will always permit the real owner to show, there being no intervening fraud, that the apparent ownership of another

is or was not real; and when the judgment debtor has none other than the legal title, the lien of the judgment does not attach." White v. Carpenter, 2 Paige, 219, note; Keirsted v. Avery, 4 Paige, 9; Thomas v. Kennedy, 24 Iowa, 397, 95 Am. Dec. 740; Brown v. Pierce, 7 Wall. 205, 19 L. ed. 134; Monticello Hydraulic Co. v. Loughry, 72 Ind. 562; Hays v. Reger, 102 Ind. 524, 1 N. E. 386; Richmond v. Block, 36 Or. 590, 60 Pac. 385.

It is true that in the majority of the cases upon the subject, and which have held the trust superior to the judgment lien, there was an actual transfer of the legal title to the trustee by the grantor or creator of the trust; but we do not see that this alters the situation. There was an oral promise, and in consideration of or relying upon that promise the deceased refrained from making a will. Immediately upon his death the title to the property vested in those whom he had intended to create trustees. Why should equity treat the case any differently than if he had actually deeded the land to these persons, taking from them an oral promise which they afterwards performed?

The defendant bank was neither a party to nor a privy to the transaction which it here assails, and it will not be heard to object to it on account of the nature of the evidence by which it is proved, since the parties themselves have executed it and are satisfied with it. Dixon v. Duke, 85 Ind. 434; Savage v. Lee, 101 Ind. 514; Hays v. Roger, 102 Ind. 524, 1 N. E. 386; Richmond v. Bloch, supra.

We are satisfied, indeed, that even if the children had refused to convey the property to their mother they could have been compelled to do so on the theory of a constructive trust, and that the equities of the plaintiff are much greater than those of the defendant bank, which, if the deceased had not relied upon the promises of his children, and had made a will, would have had no property to attach whatever. The creditors of heirs are not privies to the making of a will by the testator and to his acts. As against the wife and mother, the bank has no equities. It has parted with nothing of value. It did not loan the money on the strength of Ingebrigt Arntson's title to the land, for at the time of the loan the land belonged to his father, and his father could do with it as he chose.

Although there is some conflict upon the subject, the courts now seem generally to concede that, under statutes such as § 5364 of the

Compiled Laws of 1913, constructive trusts come within the definition and exception of trusts which are "created or declared . . . by operation of law." In the light of the judicial decisions indeed, "the phrases, 'trusts by implication of law,' 'trust by operation of law,' 'implied trusts,' and 'trusts arising or resulting by operation of law,' are all synonymous and embrace all trusts where a transaction of equitable cognizance is inseparably connected with the creation of the trust." Freeman's notes in 115 Am. St. Rep. 775; Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640.

"A constructive trust. . . is merely an express trust wherein some transaction of equitable cognizance is inseparably connected with the creation of the trust, so that a court of equity has jurisdiction to administer relief to the parties on the whole transaction, including the express agreement between them, *notwithstanding that agreement* is oral and would not be cognizable in a court of justice in the absence of the equitable elements connected with it. A constructive trust can never arise in the absence of an express agreement of trust between those concerned in the transfer of the legal title of land, but is always superimposed upon and could not exist without an express oral trust, which in turn would be unenforceable without the constructive trust." Freeman's notes in 115 Am. St. Rep. 775.

We believe that there was a constructive trust in the case which is before us.

It is true as a general proposition that a mere breach of an oral agreement to convey an interest in land is not such a fraud as will create a constructive trust and justify the intervention of a court of equity, but "where confidential relations prevail between the parties to an oral trust and the trust is violated, the law presumes that the influence of the confidence upon the mind of the person who confided was undue; and a case of constructive trust arises, not, however, on the ground of actual fraud, but because of the facility for practising it. Hayne v. Hermann, 97 Cal. 259, 32 Pac. 171" (115 Am. St. Rep. 791, note); Allen v. Jackson, 122 Ill. 567, 13 N. E. 840.

It is immaterial indeed whether the fraud was intentional or not, or whether it existed when the legal title passed, for "in such a case courts of equity do not enforce the trust in violation of the Statute of Frauds, but relief is granted as based on the constructive fraud and

the confidential relation." Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088; Hanson v. Svarverud, 18 N. D. 550, 120 N. W. 550, Ransdel v. Moore, 153 Ind. 408, 53 L.R.A. 753, 53 N. E. 767; Powell v. Yearance, 73 N. J. Eq. 117, 67 Atl. 892; Kimball v. Tripp, 136 Cal. 631, 69 Pac. 428; note to Stahl v. Stahl, 2 Ann. Cas. 774–777; Russell v. Jackson, 10 Hare, 204, 68 Eng. Reprint 900; Re O'Hara, 95 N. Y. 403, 413, 47 Am. Rep. 53; Ragsdale v. Ragsdale, 68 Miss. 92, 11 L.R.A. 316, 24 Am. St. Rep. 256, 8 So. 315; Dixon v. Olmius, 1 Cox Ch. Cas. 414, 29 Eng. Reprint, 1227.

The case at bar comes clearly within this rule. Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; Bohm v. Bohm, 9 Colo. 100, 10 Pac. 790; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Goldsmith v. Goldsmith, 145 N. Y. 313, 39 N. E. 1067.

Under circumstances such as those before us courts of equity will enforce the promise to convey, as the refusal to carry it out is constructively fraudulent, and this even though the promise was not in writing. Beach,Tr. & Trustees, § 225; Cardiff v. Marquis, and Hanson v. Svarverud, supra.

It is not always necessary that fraud in the inception of the transaction should be proved in order that there should be a constructive trust. "Constructive trusts," indeed, "are such as are raised by equity in respect to property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds the legal title." 2 Washb. Real Prop. 520; Lewis v. Lindley, 19 Mont. 422, 48 Pac. 765.

In the case before us, also, we clearly have an involuntary trust as defined by §§ 6273 and 6280 of the Compiled Laws of 1913, and which seem to include both a constructive and a resulting trust. These sections are as follows:

Section 6273: "An involuntary trust is one which is created by operation of law."

Section 6280: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it."

"In the case of a resulting trust there is always the element, although it is an implied one, of an intention to create a trust by reason of which, although it is by no means an express trust, it approaches more nearly thereto. Constructive trusts, on the other hand, have none of the elements of an express trust, but arise entirely by operation of law without reference to any actual or supposed intention of creating a trust, and often directly contrary to such intention. They are entirely *in invitum,* and are forced upon the conscience of the trustee for the purpose of working out right and justice or frustrating fraud." 39 Cyc. 27.

If, in the inception of the transaction before us, the children of the deceased and the defendant Ingebrigt Arntson purposely induced the deceased to refrain from making a will by promising him to convey the property to his wife when the same should vest in them by virtue of the Statutes of Inheritance, we have all of the elements of a constructive trust. If, on the other hand, we have an intention expressed or implied to create a trust, that is to say, an intention to allow the property to descend to the heirs of the estate under the promise of these heirs to convey their interest to the wife of the deceased, we have a resulting trust.

In both cases we have involuntary trusts, and in both cases the practical result is the same. In one case the fraud would lie at the root of the transaction, and the trust, springing from the fraud by which the title was obtained, would be constructive. In the other, the transaction is based upon the promise itself, and the fraud upon the refusal to carry it out after the title to the property had been obtained. The trust, whether it be called constructive or resulting or involuntary springs from the intention of the testator and the promise of the legatee; and a trust clearly exists where heirs and next of kin "induce their ancestor or relative not to make a will by promising in case his property falls to them through intestacy to dispose of it, or a part of it, in the manner indicated by him. The rule is founded on the principle that the legacy would not have been given or intestacy allowed to ensue unless the promise had been made; and, hence, the person promising is bound in equity to keep it, as to violate it would be fraud. Amherst College v. Ritch, 151 N. Y. 282, 37 L.R.A. 305, 45 N. E. 876; Mead v. Robertson, 131 Mo. App. 185, 110 S. W. 1095; McDowell v. McDowell, 141

Iowa, 286, 31 L.R.A.(N.S.) 176, 133 Am. St. Rep. 170, 119 N. W. 702.

It is clear, also, that § 5366 of the Compiled Laws of 1913, which provides that "no implied or resulting trust can prejudice the right of a purchaser or encumbrancer of real property and without notice of the trust," does not apply. As far as the bank's right as a purchaser at the sale was concerned the proof shows that the deed from the heirs was recorded before the sale. As far as its rights as an encumbrancer are concerned it is clear that the debtor, Ingebrigt Arntson, had no interest which was subject to the levy.

The deed did not constitute the foundation of the trust, but evidence merely; and, as we have before said, the trust could have been enforced against the lien of the bank even though no deed had been executed. The property, in short, never belonged to the children, nor to the said Ingebrigt Arntson. The bank certainly had no claim upon it prior to the death of the deceased, as the deceased owed it nothing (§ 5366) and the recording statute merely protects creditors and purchasers against secret trusts upon and unrecorded conveyances of the property of their debtors, and of property which, if it had not been for the unrecorded conveyances, would have been properly subject to their debts.

Since, indeed, the heirs would have been compelled to convey to their mother, it is immaterial whether the deed was executed after the levy of the execution or not.

Nor can the defendant bank complain on the ground that, by the means adopted, the deceased avoided the requirements of the statutes which relate to the execution of wills. The strictness of the law in relation to these matters is not due to any solicitude for the creditors of the heirs, but to a desire that the real intention of the deceased shall be ascertained and prevail.

The judgment of the District Court is reversed, and the cause is remanded with directions to enter judgment quieting the title of the plaintiff against the claim of the defendants.

BIRDZELL, J. (concurring specially). I concur in the reversal of the judgment and in the reasons given therefor, which are stated in paragraphs 2, 3, 4, 5, 7, 8, and 9 of the syllabus. Inasmuch, however, as the trust in this case is executed, I express no opinion as to whether or not a trust created under the circumstances shown to have existed in

this case is one that could be enforced if it remained executory. I am of the opinion that the transfer cannot be said to have been fraudulent and void as to creditors, nor one subject to a lien in favor of creditors upon a larger interest of the judgment debtor than he himself claimed under the circumstances; and I deem it unnecessary to say that an enforceable constructive trust existed.

I am authorized to say that Mr. Justice CHRISTIANSON concurs in the view herein expressed.

THOMAS BUCHANAN, Administrator of the Estate of Carl Westerland, Deceased, Respondent, v. WALTER PRALL, Appellant.

(167 N. W. 488.)

Conveyance of land — grantor of weak and unsound mind — suicide — action by administrator — to rescind conveyance.

1. Carl Westerland, being a person of weak and unsound mind, conveyed to defendant a quarter section of land at much less than its value. He then committed suicide, and this action was at once commenced to rescind the conveyance.

Person of unsound mind — contract or conveyance by — subject to rescission — undue influence — may consist of taking unfair advantage of another's weakness of mind — rescission may follow.

2. Under the statute a conveyance or other contract of a person of unsound mind, but not entirely without understanding, is subject to rescission. Rescission may be for undue influence which consists in taking an unfair advantage of another's weakness of mind. The judgment for rescission is affirmed.

Opinion filed April 22, 1918.

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

Defendant appeals.

Affirmed.

Craven & Morris (*Edward P. Kelly,* of counsel), for appellant.

It is to be presumed that all persons over the age of majority are sane and capable of transacting business. The burden therefore of

proving insanity is upon the party alleging it. 22 Cyc. 1115, notes 16, 17 cases cited.

"The test of whether a person is competent to make a deed is that he should be qualified to do that particular business rationally,—not, on the one hand, that he should be capable of doing all kinds of business with judgment and discretion; nor, on the other, that he should be wholly deprived of reason so as to be incapable of doing the most familiar and trifling work." Nelson v. Thompson, 15 N. D. 295, 121 N. W. 1058; Jackson v. King, 4 Cow. 207, 15 Am. Dec. 354; Westerland v. Newberry, 164 N. W. 323.

To avoid a contract on the ground of mental unsoundness there must be an inability to know what the act is to which the contract relates. Whart & S. Med. Jur. § 2.

So long as one possesses requisite mental faculty to transact rationally the ordinary affairs of life, he will not be relieved from the responsibility of the ordinary citizen. Titcomb v. Vantyle, 84 Ill. 371.

The party must be incapable of fully comprehending and understanding the consequences which shall naturally come from his acts in the particular instance. Baldwin v. Dunton, 40 Ill. 188; Harvy v. Chase, 52 Me. 305.

If a man be legally *compos mentis* he is the disposer of his own property, and his will stands for the reason of his actions. Osmund v. Fitzroy, 4 P. Wms. 129; Shelf. Lun. 27; Whart. & S. Med. Jur. § 74.

T. F. McCue, for respondent.

This is an action to rescind and to restore the parties to *status quo,* and not an action to recover the land without returning everything received for it. A court of equity proceeds upon the assumption that it can result in no injustice to place both parties in the position in which they were prior to the making of the contract. In this respect the trial court has the right to exercise its sound discretion, and after such court has seen and observed the witness, and has fully considered the facts and circumstances, and has exercised its discretion, its decision should not be disturbed unless substantial justice has not been done. 2 Warvelle, Vend. p. 833; Mutual L. Ins. Co. v. Pearson, 114 Fed. 395; Shaefer v. Steade, 7 Blackf. 184.

The introduction of testimony as to conversations of defendant had with deceased is prohibited. Comp. Laws 1913, § 7871, ¶ 2.

The deeding away of one's land is not classed among the common things, and when the consideration especially is inadequate, a presumption of fraud and undue influence arises.

Inadequacy of price, or the mental inequality of the persons, may raise such presumption, if so gross, and so great, as to shock the conscience; or either may aid in raising such presumption if accompanied by other conditions and circumstances, such as disability. 14 Am. & Eng. Enc. Law 2d ed. 194.

Because so many persons who destroy their own lives are insane at the time, the fact of such suicide removes the presumption of sanity. Coffey v. Home Ins. Co. 35 N. Y. Supp. 314.

Evidence to offset this was based merely upon impressions and conclusions, and therefore improper as proof. No familiar relations or intimate accquaintance was shown. Paul v. Clements (Mich.) 142 N. W. 384.

The proof in such a case is complete when the evidence shows the grantor was of unsound mind, coupled with any other fact that amounts to deceit or the taking advantage of such condition—such as an inadequate consideration. Comp. Laws 1913, § 4344.

A conveyance or other contract of a person of unsound mind but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission as provided by the statute. Mack v. Blanchard (S. D.) 90 N. W. 1042; More v. Calking (Cal.) 24 Pac. 729.

All that is required is to show that the grantor was of unsound mind at the time he made the conveyance. Thronson v. Blough, 166 N. W. 132.

Insanity is a question of fact to be determined by the court upon all of the evidence before it. Cogan v. Cogan (Mass.) 88 N. E. 662.

ROBINSON, J. As the administrator of Carl Westerland, plaintiff sues to rescind a deed by which the deceased conveyed to defendant the legal title to a good quarter section of land (the N. W.¼ 26–147–65 in Foster county). The land has never been used. It is good, new, rolling prairie. It is in a splendid location. It is 4 miles south from Brantford on the Great Northern Railway.

The grounds for rescission are that at the time of the making of the deed and for several years prior thereto, the deceased was a person

of weak and unsound mind, and that defendant took an unfair advantage of his weakness of mind by purchasing the land for $25 an acre when it was well worth $35 to $40 an acre. Under the statute "a conveyance or other contract of a person of unsound mind but not entirely without understanding, is subject to rescission." Comp. Laws, § 4344.

Rescission may be for undue influence which consists: (1) In the use by one in whom confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress. Comp. Laws, § 5852.

The conveyance in question was made on August 23, 1914. In eleven days the grantor committed suicide. The action was commenced and notice of the pendency of the same was filed on September 11, 1917. Defendant never paid anything on the land except by check. He took it subject to encumbrances of $2,200, and for the balance he gave a check on his own bank for $1,800. The check was never used, and it is at the command of and has been tendered to the defendant. There are no complications arising from a transfer to an innocent purchaser or from any laches or a failure to return the check. The only questions presented are: Was the deceased a person of weak and unsound mind at the time of the transaction and did the defendant take an unfair advantage of his weakness of mind? Did defendant buy the good land at $25 an acre when it was well worth $34 or $40 an acre? Such is the finding of the district judge, and such are the facts as shown by the testimony. Buchanan was a thoroughly competent witness, and he testified that the land was worth $38 an acre, and that he refused $35 an acre for an adjoining quarter; and Mr. Pattee, a witness for the defendant, put the value of the land at $35 an acre. Defendant himself puts the cash value at $25 an acre, but claims cash value is $10 an acre less than the time value. It appears deceased had no pressing need for the money, so he did not cash the check. He offered to let defendant take it home with him and to apply it on a debt not due. We may well conclude that the land was worth at least $35 an acre, and that in contracting to sell it

for $2,000 less than its value and to receive a check for $1,800, to apply it on a debt not due, or to carry it in his pocket, deceased showed himself to be a person of unsound mind, the same as when he took his life eleven days later.

This case does not fairly present any question in regard to the insanity of the deceased. The question is in regard to his weakness and unsoundness of mind. That is well shown by the testimony of physicians and his attorney McCue and Mr. Buchanan, and by his imbecile transactions and his suicide. The judgment is clearly right, and it is affirmed, with directions to send down the remittitur and close the case forthwith.

BRUCE, Ch. J., and GRACE, J., concur in result.

WILLIAM P. O'BRIEN, Respondent, v. T. A. HASLAM, Appellant.

(167 N. W. 487.)

Prior lien — waiver of — in favor of inferior lien — evidence does not show — verdict — judgment — appeal.

This is an appeal from a judgment on a verdict against Haslam for $273.55, the price of 269½ bushels of seed wheat. *Held*, that O'Brien did not waive his prior lien in favor of a second lien claimed by Haslam, the appellant. The verdict is well sustained by the evidence. It is clearly right and the judgment is affirmed.

Opinion filed January 31, 1918. Rehearing denied April 27, 1918.

Appeal from the District Court of Ramsey County, Honorable *C. W. Buttz*, Judge.

Defendant appeals.

Affirmed.

Brennan & Brennan (*E. T. Burke*, on oral argument), for appellant.

An action for conversion will not lie for disposing of property with authority. Coulter v. Cummings (Neb.) 142 N. W. 109; Siegel-Campion Live Stock Com. Co. v. Holly (Colo.) 101 Pac. 68; Chase v.

Blaisdell, 4 Minn. 90; Doyle v. Burns (Iowa) 99 N. W. 195; Carlson v. Jordon (Neb.) 93 N. W. 1130; Tousley v. Board of Education (Minn.) 40 N. W. 509; Griffin v. Bustle (Minn.) 40 N. W. 523.

If the owner of property consents to the property being disposed of he cannot claim conversion. There is no tort in such case. 38 Cyc. 2009, note 16; Taughter v. N. P. Ry. Co. 21 N. D. 111, 129 N. W. 747; (Idaho) 81 Pac. 114; Austin v. McMaine (Ind.) 43 N. E. 141.

Trover is not maintainable for conversion of money, unless there exists an obligation to return the specific money intrusted to defendant's care. Shrimpton & Sons v. Culver (Mich.) 67 N. W. 907.

Plaintiff's books were the best evidence and should have been produced on the defendant's demand. Jones, Ev. § 201, Spec. 18 & 19.

The issue with Haslam was clear and in no way involved plaintiff's supplies to Stanley, as no lien was claimed for them. Grand Tower Co. v. Phillips, 90 U. S. 471–480, 23 L. ed. 71; Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63; Gleeker v. Slavins (S. D.) 59 N. W. 323; Wheless v. Rhodes, 70 Ala. 419.

It did not appear from the testimony that the credits for which the liens were claimed had expired at the time of the alleged conversion. Parker v. Bank, 3 N. D. 87, 54 N. W. 313; Elestad v. Elev. Co. 6 N. D. 88, 69 N. W. 44; 9 N. D. 692, 693.

Flynn & Traynor, for respondent.

The point that the claim is not shown to have been due or in default is raised for the first time on this appeal. This is not permitted. The matter should have been presented in the trial court. It is an entirely new theory. Delaney v. Western Stock Co. 19 N. D. 630; Casey v. First National Bank, 20 N. D. 211; Crisp v. Bank (N. D.) 155 N. W. 78; 2 Cyc. 670.

Where a verdict has substantial support in the evidence, the supreme court will not weigh conflicting evidence, nor will it disturb such verdict upon the ground of an alleged insufficiency of the evidence. Blackorby v. Ginther, 34 N. D. 248; S. A. Patrick & Co. v. Austin, 20 N. D. 261; Nilson v. Horton, 19 N. D. 187; Casey v. Bank, 20 N. D. 211; Acton v. Fargo & M. St. R. Co. 20 N. D. 434; Rickel v. Sherman, 158 N. W. 266; Malmstad v. McHenry Tel. Co. 20 N. D. 21; Hayne, New Trials & Appellate Review, § 97; 29 Cyc. 1009, and note.

Robinson, J. This is an appeal from a judgment on a verdict

against Haslam for $273.55. During the year 1914 in Ramsey county one Stanley farmed about 619 acres of land in sections 14, 15, 22–155–65. O'Brien furnished him seed grain, binding twine, paid labor bills and did the threshing. He duly filed two seed liens for $315 and $112.55 and a threshing lien for $400. These were prior to all other liens. The seed liens were for 250 and 19½ bushels of wheat at 90 cents a bushel, 150 bushels of barley, 100 bushels of oats, 20 bushels flax. Subject to said liens Stanley gave Haslam a chattel mortgage on all of the crops to secure $537.55, and he gave O'Brien a second mortgage on the same crops. The O'Brien seed wheat was sown on the south side of the highway between sections 15 and 22. The Haslam mortgage was partly given for seed wheat sown on the north side of the highway. On the farm and south of the highway there was a granary about 48x18 feet with the ends facing east and west. It was divided into two parts, the east part being 30x18. O'Brien did the threshing. The Haslam wheat was first threshed and it was put into the west end of the granary. It was about 800 bushels. The O'Brien wheat was nearly 1,200 bushels, and it was put in the east end of the granary.

As O'Brien paid labor bills, binding twine, and threshed all the grain, he had ample reason and opportunity to know where the grain was put. He ordered a car to ship the grain from the east part of the granary, and his car was spotted at Grand Harbor. Then as O'Brien had no experience in shipping wheat his friend Haslam kindly offered to do the shipping for him. O'Brien innocently assented and his carload of 1,147 bushels of wheat was at once shipped by Haslam. He shipped it in his own name, saying nothing to O'Brien, and he at once drew on the consignee for $700. (That was October 3, 1916.) He received from the car of wheat the net sum of $921.19. Then in November he paid the threshing bill and concluded to hold the balance to apply on his mortgage.

Haslam testified that when O'Brien accepted his offer to do the shipping he said: "For me to go ahead and load the car and take out my mortgage, and whatever should be left over and above, to turn over to him." That story is highly improbable. O'Brien denied it and the jury did not believe it. O'Brien's threshing lien and his seed liens were clearly ahead of all other liens. That was not disputed. Hence, it would have been a silly thing for him to have said to Haslam: "You

go ahead and sell the wheat and apply the proceeds to your second lien, and if there be anything left over then let me have it to apply on my prior seed lien and threshing lien." O'Brien had furnished Stanley some grain, feed, and groceries, and paid for the twine and labor and expenses. He had done everything necessary to run the farm and to secure the crop and had his wheat safe and his car spotted. Hence it is too much to ask a jury or a court to believe that O'Brien, without any consideration, agreed that his wheat lien should be made second to the Haslam mortgage. The court instructed the jury to the effect that if such an arrangement was made they should find for Haslam. The court said: O'Brien had a right to waive his lien on the wheat. Certain it is that Haslam has no reason to complain of the charge of the court or of the verdict. The verdict is for the value of 269½ bushels of wheat at 90 cents a bushel, and interest; and it is well sustained by the evidence.

In any view of the case on all the evidence the verdict could not well have been otherwise. That is a sufficient answer to the numerous assignments of error. There is no question of consequence, as to whether or not Haslam wrongfully shipped the wheat in his own name or wrongfully received the price in his own name. As the jury found and as the fact is clear and patent, O'Brien had a first lien on the wheat for the thresh bill and for the price of his seed wheat, and when the first lien was turned into money, it was the money of O'Brien, and Haslam had no right to retain it for one minute, and he and his counsel should have known that fact. The judgment is affirmed.

STATE OF NORTH DAKOTA EX REL. W. S. SHAW, Petitioner, v. LYNN J. FRAZIER, as Governor of the State of North Dakota, and L. J. Wehe, Respondents.

(167 N. W. 510.)

Governor — power of — to remove certain public officers — statutes — constitutionality.

1. Sections 685 to 695 of the Compiled Laws of 1913, which vest in the governor the power to remove certain public officers for malfeasance in office and

disregard of official duty, are constitutional, and do not violate § 85 of the Constitution of North Dakota, which vests the judicial power in the supreme and other courts.

Public officer — removal by governor — malfeasance — disregard of public duty — statute — definite — district court — appeal to — from order — trial de novo.

2. Section 690 of the Compiled Laws of 1913, which provides for an appeal to the district court in cases where a removal of a public officer is sought, is sufficiently definite to provide for a legal appeal and for a trial *de novo* in such court.

Cities and villages — creatures of statute — Constitution — no restriction upon legislation — for removal of officials — courts — powers of — not exclusive.

3. Cities and villages are creatures of the statute, and no specific restriction is found in the Constitution upon legislative action in relation to the removal of their public officers, or which places that power exclusively in the courts.

City commissioners — board of — president of — office of — right of — not a private right.

4. The right of a person to the office of president of a board of city commissioners is not a private right.

Officer — removal — power — generally in courts — grant of — to some other branch of government — may be made by legislature — delegation of power.

5. Although the power to remove from office is generally regarded as a power which is possessed by the courts, in the absence of an express or implied grant to some other authority in the government, this power may be exercised by the legislature or may be delegated by the legislature to some other authority.

Power to remove administrative — exercised in judicial manner — "due process of law" — officers are agents of state — state may investigate acts — may make legislative provision for.

6. The power to remove from office is administrative rather than judicial, although it should be exercised in a judicial manner, and the state is not so bound by the term, "due process of law," that it is impossible for it to investigate its agents without subjecting itself as far as their removal is concerned to the delays and uncertainties of strict judicial action.

Officers — board of city commissioners — president of — creation of — legislature — not by Constitution.

7. The case of Ex parte Corliss, 16 N. D. 417, examined and *held* not to apply to officers, such as the presidents of city commissions whose offices are not provided for or embedded in the Constitution.

Writ of prohibition — inferior court or tribunal — jurisdiction of — when existing — writ will not lie.

8. The writ of prohibition will not lie when the inferior court or tribunal has jurisdiction nor will it lie to prevent a subordinate court from deciding erroneously or from enforcing an erroneous judgment in a case which it has the right to adjudicate.

Local self-government — statute — not infringed upon by — removal of mayors — police officers — governor.

9. No right of local self-government is infringed upon by § 685 of the Compiled Laws of 1913, which provides for the removal by the governor of municipal mayors and police officers.

Cities and villages — officers — removal of — by governor — appeal — place of hearing — statutory provisions — constitutionality.

10. Sections 685 to 695 of the Compiled Laws of 1913, which provide, among other things, for the removal of the officers of cities and villages for malfeasance in office or disregard of official duty, are not unconstitutional for the reason that the appeal from action of the governor which is provided for is required to be tried in some county other than that of the residence of the defendant.

City board of commissioners — president of — office of — created by legislature — private right — duties of office — one accepts subject to.

11. The office of president of a board of city commissioners is created by the legislature, and the holding of it is not based upon any personal or primary rights. When an official is elected he accepts office subject to the duties which are placed upon him and subject to removal under §§ 685 to 695 of the Compiled Laws of 1913.

City commission — president of — subject to removal — by governor — recall statute — not affected by — remedies — cumulative — statute.

12 The right of the governor to remove the president of a city commission for malfeasance in office or for disregard of official duty under §§ 685 to 695 of the Compiled Laws of 1913 is not restricted by § 3835 of the Compiled Laws of 1913, which provides for the recall of such city officers. The two remedies are cumulative.

Words, "other police officer" — president city commission — included in phrase.

13. The words, "or other police officer," which are found in § 685 of the Compiled Laws of 1913, include the president of a board of city commissioners.

Ejusdem generis — rule of — general words — application — persons or things enumerated — not limited to one — same in general.

14. Under the rule of *ejusdem generis* the general words apply to persons or things contained within the general genus of the particular persons or things enumerated, and are not limited to any particular one.

President of city commission — administrative police — is member of.

15. The president of a board of city commissioners is a member of the administrative police of such city.

Statute — words or titles of officers — "mayor" — includes president of city commissioners.

16. The word "mayor," as used in § 685 of the Compiled Laws of 1913, includes the president of a board of city commissioners.

Opinion filed February 2, 1918. Rehearing denied April 27, 1918.

Application for a writ of prohibition to restrain further proceedings in the removal of public officers.

Appeal from the District Court of Ward County, Honorable *A. T. Cole,* Special Judge.

Judgment denying writ and dismissing proceedings affirmed.

Statement of facts by BRUCE, Ch. J.

The petitioner, William Shaw, prays for a writ of prohibition which shall restrain the governor of the state of North Dakota from further proceedings in the suspension and removal of him, the said petitioner, from the office of president of the city commissioners of the city of Minot.

The charges which are made against the defendant petitioner and on which his removal is sought by the governor are as follows:

"That within the two years last past and prior to the commencement of these proceedings and while the said Shaw was president of the city, as aforesaid, the said W. S. Shaw, disregarding his duties as such officer, and in violation of the laws of the state of North Dakota and the ordinances of the city of Minot, knowingly permitted, allowed, and suffered numerous places within the city of Minot to be openly kept and maintained as places where intoxicating liquors were sold, bartered, and given away, in violation of chapter 83 of the Penal Code, Compiled Laws of North Dakota for 1913, and acts amendatory thereof, and in violation of the ordinances of the city of Minot, in which places persons were permitted to resort and did resort for the purpose of drinking intoxicating liquors as a beverage in violation of the laws of North Dakota and the ordinances of the city of Minot, and in which places intoxicating liquors were kept for sale, barter, exchange, and delivery

in violation of the laws, and did knowingly connive at the open and notorious maintenance of said places and did protect the proprietors and inmates thereof.

"That within the past two years and while said W. S. Shaw was president of the city commission of the city of Minot, as aforesaid, that both in violation of his duties and in disregard of the laws of the state of North Dakota and of the ordinances of the city of Minot, knowingly and corruptly allowed and suffered to be kept and maintained within the said city of Minot numerous places as bawdyhouses, and connived at the open and notorious maintenance of said places, and protected and shielded the owners and inmates thereof.

"That within the past two years and while said W. S. Shaw was president of the city Commission of the city of Minot, as aforesaid, said defendant, in violation of the laws of the state of North Dakota and the ordinances of the city of Minot, knowingly permitted, allowed, and suffered to be openly and notoriously kept and maintained in the city of Minot numerous places for gambling, where tables, cards, dice, and other gambling apparatus were kept and maintained, and where persons were permitted to resort for gambling, and where games of chance on which money and property were wagered and where persons did resort for gambling, and did knowingly and wrongfully connive at the maintenance of said places and did protect the proprietors and inmates thereof."

"Relator and complainant further alleges and shows that the said W. S. Shaw, an official of the city of Minot, as aforesaid, has been and still is a member of a club, to wit, the Elk's Lodge, in the city of Minot, within the two years last past, which up until on or about the 7th day of May, 1917, assembled together in a place in said city, known as the Elk's Home, for the purpose of drinking intoxicating liquors, and that defendant at the time above set forth and up to the 7th day of May, 1917, visited said premises where said club was maintained and where intoxicating liquors were sold as a beverage in violation of the laws of the state of North Dakota, and then and there did drink intoxicating liquors in said place on many occasions, and did then and there participate in the operation of said club in the illegal sale and disposition of intoxicating liquors,—all in the violation of chapter 83, Penal Code, Compiled Laws of North Dakota for 1913, and acts amendatory there-

to, and particularly in violation of §§ 10,122 and 10,123, Compiled Laws of North Dakota for 1913,—all to the public defiance of law and to the general promotion of disrespect for law and in violation of his official oath.

"Relator and complainant further alleges and shows that during the two years past the said W. S. Shaw, an official in the city of Minot, as aforesaid, did wilfully and unlawfully conspire with other officials of the city of Minot and county of Ward, and other private persons, for the perversion and obstruction of justice and against the due administration of the law.

"Relator and complainant further alleges and states that, within the two years last past and up to the time of the commencement of this action, the said W. S. Shaw, an official of the city of Minot, as aforesaid, did have knowledge of the violation of the Prohibition, Gambling, and Bawdyhouse Laws, and other laws of the state of North Dakota, and of the violation of the ordinances of the city of Minot covering the same offenses within the city of Minot, and that defendant has wilfully and wrongfully refused, failed, and neglected to take official action to enforce such laws, but, on the contrary, wilfully and in a grossly incompetent manner has permitted all of said laws to be violated and continually, and has refused to take official action to enforce said laws and ordinances upon repeated complaints made to defendant by citizens of Minot, as to the conditions existing in said city during said time."

The principal provisions of the statutes under which the removal is sought are as follows:

Section 685, Compiled Laws of 1913: "The governor may remove from office any county commissioner, clerk of the district court, county judge, sheriff, coroner, county auditor, register of deeds, state's attorney, county treasurer, superintendent of schools, county commissioners, surveyor, public administrator, mayor, chief of police, deputy sheriff or other police officer, or any custodian of public moneys, except the state treasurer, whenever it appears to him by competent evidence and after a hearing as hereinafter provided, that such officer has been guilty of misconduct, malfeasance, crime in office, or for habitual drunkenness or gross incompetency."

Section 686, Compiled Laws of 1913: "The complaint or charges against any such official authorized to be removed by the governor shall

be entitled in the name of the state of North Dakota and shall be filed with the governor. It may be made on the relation of any five qualified electors of the county in which the person charged is an officer or the state's attorney of such county, and such complaint or charges shall be filed by the attorney general when directed so to do by the governor. When the officer sought to be removed is one other than the state's attorney, it shall be the duty of the state's attorney to appear and prosecute, and when proceedings are brought to remove the state's attorney the governor shall request the attorney general or some other competent attorney to appear on behalf of the state and prosecute such proceedings."

Section 687, Compiled Laws of 1913: "The complaint or charges shall state the charges against the accused, and unless filed by the state's attorney or attorney general shall be verified, and may be amended as in ordinary actions; provided, that if such amendment of the complaint or charges include any new or additional charge, then a reasonable time should be allowed the accused to prepare his defense thereto."

Section 688, Compiled Laws of 1913: "Whenever charges are made against any such officer, the governor shall appoint a special commissioner to take and report the testimony for and against the accused, to be used on the hearing. Such testimony shall be reduced to writing and each witness shall subscribe his name to his testimony, when same is so reduced, and the governor in his discretion may, if in his judgment the best interests of the state shall require it to be done, by written order to be delivered to such officer suspend such accused officer from the performance of duty during the pendency of the hearing. If the governor shall so suspend the accused he shall immediately notify the board or persons authorized to fill a vacancy in such office and thereupon such board or person shall, within five days after receipt of such notice, appoint some competent person to fill such office and perform the duties thereof *ad interim*."

Section 690, Compiled Laws of 1913: "Whenever testimony has been taken upon charges filed against any officer, as hereinbefore provided, it shall be the duty of the special commissioner to forthwith report all such testimony to the governor and file the same in his office, and thereupon the governor shall fix a time and place for hearing on

a day not more than ten days from the date of the filing of the commissioner's report, and not less than five days from the date of the service of notice of such hearing upon the accused at which hearing the accused shall be entitled to be heard in person or by attorney. If upon the hearing the charges are sustained, the governor shall forthwith make his order in writing, removing such officer from his office and cause a copy of such order to be delivered to the accused and one copy to be delivered to the board or person having authority to fill a vacancy in such office, and thereupon such board or person shall, within five days thereafter, appoint some competent person to fill such office and perform the duties thereof, unless the accused had, prior to the final hearing, been suspended as hereinabove provided, and an *ad interim* appointment made. In such case the person appointed to such office *ad interim* shall continue until the expiration of the term for which the accused had been elected or appointed; provided, however, that in all cases where the accused person so removed deems himself aggrieved thereby, he shall be entitled to appeal from the decision of removal so made by the governor to any district court in this state upon filing a notice of appeal therefrom in the office of the secretary of state within fifteen days after the date thereof. Such notice to set forth the grounds of appeal and thereupon such accused person shall be entitled to a trial *de novo* in such court as now provided by law, provided, that such trial be not held in the county wherein the accused resides."

In support of his petition the petitioner contends:

(1) That the statute (§ 685 of the Compiled Laws of 1913) does not apply to the presidents of city commissions.

(2) That the moving papers which were filed with the governor are insufficient to invoke the power of removal.

(3) That §§ 685 et seq., under which the removal is sought, are unconstitutional for the reasons (a) that they confer judicial powers upon the governor and in this respect violate § 85 of the Constitution; (b) that they deny due process of law in that they provide for no appeal, or, at any rate, for an appeal that is insufficient and abortive and defective in the prescribed statutory procedure; (c) that the provision for an appeal and a trial *de novo* provides for a trial outside of the county in which the official resides, and not only denies the petitioner the right to a trial in his county and vicinage, but, on account of the

added expense of such a trial, amounts to a denial of a resort to the courts and therefore violates §§ 22 and 24 of the state Constitution.

McGee & Goss, for petitioner.

The office of president of a city board of commissioners is not included in or covered by the statute authorizing the governor to remove from office, for stated reasons, any of the officers there named. Code, § 685.

The statute is plain and definite, and the rule of construction is as follows: "It is a very well-settled rule that, so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences or of public policy, and it is the plain duty of the court to give it force and effect." 36 Cyc. 1106, 1108, 1114, 1115; 162 Fed. 331, 340, 95 C. C. A. 615; 170 Fed. 529.

"An express mention is an implied exclusion." The mention in the statute by name of all the officers subject to removal as stated, by the governor, must be construed to exclude all other officers. 36 Cyc. 1132, 1137.

In the use of the word "Mayor" in the act, the legislature did not intend to include therein the president of a board of city commissioners.

"An act is not *in pari materia* though it may incidentally refer to the same subject, if its scope and aim are distinct and unconnected." Code, § 685; 4 Words & Phrases, 3478; People v. New York C. R. Co. 25 Barb. 199; Waterford v. People, 9 Barb. 161; Wheelock v. Myers, 64 Kan. 47, 67 Pac. 632; 36 Cyc. 1147.

Removal statutes are penal in their nature and operation. They should not be stretched by judicial interpretation to cover offices not plainly within their terms for such reason. Such statutes are always refused application where the subject-matter is not within both the letter and the spirit of the statute. Minnehaha Co. v. Thorn (S. D.) 61 N. W. 688; State ex rel. v. Donohue, 135 N. W. 1030; State v. Roth, 144 N. W. 339; Myrick v. McCabe, 5 N. D. 422; State v. Borstad, 27 N. D. 533; State ex rel. v. Therrin (Mich.) 45 N. W. 78; McLaughlin v. Burroughs Bros. Atty. (Mich.) 51 N. W. 283; Dullam v. Wilson (Mich.) 19 N. W. 112; Hollman v. Yoe (Kan.) 58 Pac. 802; State ex rel. v. Meek (Iowa) 127 N. W. 1023; State ex rel.

Hickman v. Alcorn (Tex.) 14 S. W. 663; Smith v. Ling, 68 Cal. 324, 9 Pac. 171; State v. Preston, 34 Wis. 675; State ex rel. v. McGovern (Wis.) 142 N. W. 595.

The rule of construction of penal statute is well settled. "If a penal statute of this state contains a patent ambiguity and admits of two equally reasonable and contradictory constructions, that which operates in favor of the party accused under its provisions is to be preferred." State v. Fargo Bottling Works, 124 N. D. 387.

"A court cannot create a penalty by construction, but must avoid it by construction, unless it is brought within the necessary meaning of the act creating it." 3 L.R.A. 924; State v. Fargo Bottling Works, 124 N. W. 387.

The office of president of a board of city commissioners is excluded under the rule, *Ejusdem generis*. This officer was left to removal by and under the recall act. "Other police officers" means officers of like kind, degree, and station to those with whom the term or phrase is coupled. Code, § 685; 36 Cyc. 1119; Re Barre Water Co. (Vt.) 9 L.R.A. 195; Rhone v. Loomis (Minn.) 77 N. W. 31; 17 Am. & Eng. Enc. Law, 278.

When charges are once filed there is no authority vested in the governor, the referee, or other prosecuting officer to amend them by making them more specific. People ex rel. Metevier v. Therrien (Mich.) 45 N. W. 78.

In all such cases the statute must be strictly followed in the first instance, and defective charges cannot be supplemented by the prosecuting attorney or other official conducting the inquiry. MacLaughlin v. Burrows (Mich.) 51 N. W. 283; Dullam v. Wilson, 53 Mich. 393, 19 N. W. 112; Metevier v. Therrien, 80 Mich. 188, 45 N. W. 78; Hoffman v. Yoe, 58 Pac. 802; State ex rel. Barker v. Meek, 127 N. W. 1023; State v. Willing, 129 Iowa, 72, 105 N. W. 355; Wass v. Stephens, 128 N. Y. 123, 28 N. E. 21; State v. Preston, 34 Wis. 675; Com. v. Kneeland, 20 Pick. 220; Shaver v. Ingham, 58 Mich. 654, 55 Am. St. Rep. 712, 26 N. W. 162; Harrison v. State, 37 L.R.A. 154; Felton v. U. S. 96 U. S. 699, 24 L. ed. 875; Evans v. United States, 153 U. S 584, 38 L. ed. 830; Spurr v. N. W. 174 U. S. 728, 43 L. ed. 150; State v. Grassle, 74 Mo. App. 316; Tripplett v. Munter, 50 Cal. 644; Smith v. Ling, 68 Cal. 324, 9 Pac. 171; State v. Alcorn, 78 Tex.

387, 14 S. W. 663; State v. Scates, 43 Kan. 330, 23 Pac. 479; State v. Bourgeiois (La.) 14 So. 28; Ponting v. Isman, 7 Idaho, 581, 65 Pac. 434; State v. Roth, 144 N. W. 369; Ekern v. McGovern, 142 N. W. 595.

The charges here are too indefinite and evasive and uncertain. The primary requisite of a judicial hearing is that the accused shall be informed of what he is to meet and definitely of the person, time, and place, in order that he may properly prepare his proof and defense. State ex rel. Ekern v. McGovern (Wis.) 142 N. W. 545.

The statute in question is unconstitutional because it attempts to delegate judicial powers to other branches of government. 40 Am. St. Rep. 29; 5 R. C. L. 263; State ex rel. v. Blaisdell, 22 N. D. 86, 132 N. W. 869; State ex rel. v. Budge, 14 N. D. 532; Glaspel v. Jamestown, 11 N. D. 86; Bowman v. Silfer, 25 Pa. 28; Page v. Hardin, 8 B. Mon. 672; State v. Pritchard, 36 N. J. L. 101; Territory v. Cox, 6 Dak. 501; Eckern v. McGoveren (Wis.) 142 N. W. 595; State ex rel. Kinsella v. Eberhart (Minn.) 133 N. W. 857; State v. Peterson, 50 Minn. 239, 52 N. W. 655; Danohue v. County, 100 Ill. 94; State ex rel. Young v. Brill, 111 N. W. 639; McDermott v. Dinnie, 6 N. D. 278.

The remedy here is by writ of prohibition.

True the rule is that where this writ or remedy will later on be available in due course, objection to jurisdiction should first be made in the tribunal acting in excess of jurisdiction, to the end that the objection may be sustained and render the writ unnecessary. But such rule has its exception, and this case comes within the exception. Here the referee would have no power to act upon or sustain such objection, but, under the mandate of his appointing power, must proceed until the inquiry is finished. Charleston v. Littlepage, 51 L.R.A. 353, 80 S. E. 121; State v. Wear (Mo.) 33 L.R.A. 341; Board v. Holt, 51 W. Va. 435, 41 S. E. 337; Swinborn v. Smith, 15 W. Va. 483; Hein v. Smith, 13 W. Va. 358; Culpepper v. Gorrell, 20 Gratt. 484; note in 135 Am. St. Rep. 258, 260; State v. District Ct. (Mont.) 56 Pac. 216; Ex parte Yount, 209 U. S. 123, 52 L. ed. 714; 10 Mod. Am. Law 579.

Relief in this class of cases lies irrespective of the official interested. State ex rel. Kinsella v. Eberhart (Minn.) 133 N. W. 857; Ekrem v. McGovern (Wis.) 142 N. W. 595.

William Langer, Attorney General, *H. A. Bronson,* Assistant Attorney General, *D. V. Brennan,* Assistant Attorney General, *O. B. Herigstad,* State's Attorney, *R. A. Nestos,* Assistant State's Attorney, for respondents.

The statute here under consideration is entirely adequate to sustain the action of the governor in removing the president of a city commission; that the word "mayor" as used in said statute includes the "president of a city commission;" that his duties as an "officer" and as "custodian of public funds" are the same in effect as those of a mayor. Laws 1911, chap. 77, §§ 63, 64; Laws 1907, chap. 45, §§ 63, 64; Comp. Laws 1913, §§ 685, 3833, 3834.

This method of removal of public officials as provided by this law is merely cumulative to the methods previously existing. The law governing cities under the council system, wherever it relates to the duties of a mayor is given a blanket application to the duties of the president of a city commission. Comp. Laws 1913, §§ 3577, 3835, 9744, 10,334, 10,468, 10,482; Sess. Laws 1913, chap. 29.

One of the great duties of a mayor is to see to it that all laws and ordinances are enforced. The same is true of a president of a city commission. Under the counsel system the mayor is the chief executive officer; under the commission form the president occupies the same position. Code, §§ 3795, 3796.

He is also a peace officer the same as a mayor. Code, §§ 3571, 3573, 3833, 3834, 10,364; Smith, Sheriffs, Coroners & Constables, p. 42; (Wis.) 120 N. W. 862; 107 Pac. 508; 59 Hun, 107; Black's Dict. 906.

"The writ of prohibition will not issue on account of errors or irregularities in the proceedings of a court having jurisdiction, or on account of insufficiency of averment or pleading, or upon matters of defense which may be properly raised in the lower court." 16 Enc. Pl. & Pr. 1126, and cases cited.

The law here in question is constitutional. It must be noted that nowhere in the Constitution or in the Code is there anything which negatives the power of removal, either in the courts or executive officers. There is no prohibition contained in the Constitution or statutes against the removal or suspension of city officers or the president of a city commission. 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." Const. § 197; Comp. Laws 1913, §§ 3808, 10,334, 10,467–10,482.

The removal of an officer by the governor is not an act of punishment or for such purpose, but is designed to protect the people—the public—against abuse of power, and the legislature has the power to prescribe the method and machinery to be employed in removal cases. (Minn.) 52 N. W. 655; (N. Y.) 64 N. E. 451.

Such acts of removal are not judicial but are the exercise of administrative powers in a judicial manner. 29 Cyc. 1371; (Idaho) 36 Pac. 502; (Okla.) 28 Pac. 14; (Wis.) 122 N. W. 748; 67 S. E. 861; 10 Am. Dig. 1447; 5 N. E. 228; (Kan.) 42 Pac. 697; 4 Decen. Dig. Const. Law; (Mich.) 57 N. W. 33.

The law does not impinge upon any legal right of self-government. 139 N. W. 88; Comp. Laws 1913, § 685; Const. § 194; 52 N. W. 655.

The removal law provides definitely for appeal and protects the official affected in all his civil rights.

It was within the power of the legislature to enact such law, and the law does not contravene the provisions against depriving a man of life, liberty, or property without due process of law. 99 Mich. 358, 41 Am. St. Rep. 606.

The power of removal implies the power to suspend. Throop, Pub. Off. 403.

The provision contained in the law for appeal from the governor's ruling, to the effect that "the appeal shall not be held where the accused resides," is not unconstitutional, nor does it abridge any personal or private right.

The right of the accused to a trial within the county of his residence is not a constitutional right, and the prosecution, upon proper motion, may change the place of trial to another county; that being true, the legislature, in a proceeding over which it is given complete control by the Constitution, has the right to fix the place of any trial or hearing on such appeal. Barry v. Traux, 13 N. D. 131; Const. § 109; 2 Enc. Pl. & Pr. 16.

The petitioner had other plain, speedy, and adequate remedies at law which negative jurisdiction on the part of this court to grant the writ.

The most fundamental rule existing in regard to the issuance of a

writ of prohibition is that the petitioner must have first exhausted his remedies in the lower court or tribunal, or before the person sought to be restrained, especially in the way of objections to the jurisdiction of the governor or referee, and should show that such objections have been overruled. No such objections have ever been made in these proceedings. 32 Cyc. 824 and cases cited; 16 Enc. Pl. & Pr. 1128, 1130 and cases cited.

BRUCE, Ch. J. (after stating the facts as above). The first question to be determined is whether §§ 685 to 695 of the Compiled Laws of 1913 are unconstitutional for the reason that they delegate to the governor judicial powers and are in violation of § 85 of the Constitution, which provides that "the judicial power of the state of North Dakota shall be vested in a supreme court, district courts, county courts, justices of the peace, and in such other courts as may be created by law for cities, incorporated towns and villages."

We think they are not. In the first place not only do the statutes provide for the taking of testimony and for a full hearing before the governor, but for an appeal to the courts and a trial *de novo* also. See § 690.

Section 690, while not perhaps as complete and detailed in its provisions as it might be, is nevertheless sufficiently definite to provide for a legal appeal and for a trial *de novo* in the district court in the manner followed in the cases of appeals from justices and county courts where a trial *de novo* is asked, that is to say, in the same general manner "as actions originally commenced" in the district courts. See §§ 8620 and 9172, Comp. Laws 1913.

This certainly amounts to due process of law.

In the second place the Constitution expressly provides:

Section 197. "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."

Section 130. "The legislative assembly shall provide by general law for the organization of municipal corporations, restricting their powers as to levying taxes, etc."

This latter provision has been construed in Glaspwell v. Jamestown,

11 N. D. 86, 88 N. W. 1023, and State ex rel. Johnson v. Clark, 21 N. D. 517, 131 N. W. 715, as not merely conferring upon the legislature the power to create, but the power to control the government of, cities and villages. Cities and villages, in short, are creatures of the statute and of the statute alone; no specific restriction is found in the Constitution in relation thereto, and those therefore only apply which are general in their application, such as that which forbids the deprivation of liberty or property without due process of law, or § 85, which confines in the courts the exercise of the judicial power. Nowhere is there in the Constitution anything which prohibits the removal of city officers or which places that power exclusively in the courts.

We are here dealing with departments of government, and not with mere private rights. Atty. Gen. ex rel. Rich v. Jochim, 99 Mich. 358, 367, 23 L.R.A. 699, 41 Am. St. Rep. 606, 58 N. W. 611. Section 130 of the Constitution, which confers upon the legislature the power to provide for the organization of municipal corporations, in no way limits that power except in the matter of levying taxes, borrowing money, and contracting debts. The legislature was given the power to provide any method of government it chose or for any method of selecting officers. It could have provided for the appointment of municipal officers by the governor alone. There is nothing in the provision that prevents the legislature from providing for the election of such officers and the holding of their offices subject to the governor's right of removal.

While the power to remove from office is generally regarded as a power possessed by the courts, in the absence of an express or implied grant to another authority in the government, this power may be exercised by the legislature or may be delegated by the legislature to some other authority. 28 Cyc. 433; 29 Cyc. 1371; Rankin v. Jauman, 4 Idaho, 53, 36 Pac. 502; State ex rel. Clapp v. Peterson, 50 Minn. 239, 52 N. W. 655.

It is generally held that the power of removal from office is not a judicial but an administrative power, though it should be exercised in a judicial manner. The exigencies of the government often require the prompt removal of corrupt or unfaithful officers, and, such being the case, the legislature has the power to provide for removal. Rankin v. Jauman, 4 Idaho, 53, 36 Pac. 502; Re Guden, 171 N. Y. 529, 64 N. E. 451; Cameron v. Parker, 2 Okla. 277, 38 Pac. 14; State ex rel.

Wagnor v. Dahl, 140 Wis. 301, 122 N. W. 748; State v. Borsted, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B, 1014.

The state indeed "is not so bound by the term, 'due process of law,' that it is impossible for it to investigate its agents without subjecting itself, so far as their removal is concerned, to the delays and uncertainties of strict judicial action." Atty. Gen. ex rel. Rich v. Jochim, 99 Mich. 358, 23 L.R.A. 699, 41 Am. St. Rep. 606, 58 N. W. 611; State v. Borsted, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B, 1014.

The same considerations apply to the objection that, although § 690 provides for an appeal and a trial *de novo,* it denies that trial in the particular county of the official's residence.

As we have before pointed out, the matter is administrative rather than judicial, and involves the right to a public office rather than private property rights. Atty. Gen. ex rel. Rich v. Jochim, supra. It is also to be remembered that in the case of Barry v. Traux, 13 N. D. 131, 65 L.R.A. 762, 112 Am. St. Rep. 662, 99 N. W. 769, 3 Ann. Cas. 191, we held that the right to a trial by a jury in the county of one's own residence is not unconditional, but is always subject to the exception that the case may be removed either upon the application of the prosecution or the defendant when necessary to secure a fair and impartial trial. It was evidently the feeling of the legislature that in matters such as that before us an impartial trial could not be held in the county of residence on account of the political feeling which must necessarily there exist.

The case is not one where a jury is guaranteed by the Constitution. Although the right to an office often involves property, it is not strictly a property right. See Atty. Gen. ex rel. Rich v. Jochim, supra. The office is created by the legislature, and the holding of it is not based on any personal or primary rights. When the petitioner was elected he accepted the office subject to the limitations which were placed thereon and subject to the method of removal which the statute provided. It is also to be noted that the defendant, though denied the right to a trial in his own county, may select any other that he chooses.

Nor does the fact that § 3835 of the Compiled Laws of 1913, which was passed as chapter 67 of the Laws of 1911 and chapter 29 of the Laws of 1913, provides for a popular recall of city commissioners, alter the situation. At the most two remedies are afforded the public

for the malfeasance of its officers,—one is speedy, administrative, and peremptory, and the other is popular, cumbersome, and more or less dilatory.

The grounds of relief, too, are entirely different, and that afforded by § 38 of chapter 45 of the Laws of 1907, which provides for recall, is much more comprehensive than that afforded by chapter 685 of the Compiled Laws of 1913. Section 65 of the Compiled Laws of 1913 merely provides for a removal in the case of "misconduct, malfeasance, crime in office, habitual drunkenness, or gross incompetency," that is to say, for direct wrongdoing or gross incompetency. Section 3835 of the Compiled Laws of 1913 requires no reason to be given, and merely provides that "the holder of any elective office in cities which may adopt or have adopted the commission plan of government under any of the laws of this state applicable thereto may be removed at any time by the electors qualified to vote for a successor of such incumbent."

Under this act all that is necessary is a petition for removal, and no fault or crime or kind of malfeasance need be specified or mentioned. It is clear that under it persons may be removed for political fault merely, and, in fact, without any fault. Its intention was clearly to retain in the people the political control over their city officers and the control of the legislative policies of such officers.

Its enactment was due to the fact that the commission form of government removed city officers in a measure from the direct control of their wards and constituencies, and that the legislature feared that in certain instances such officers might adopt policies of government and of legislation which they might not approve.

The act in question also clearly provides that "this said method of removal shall be cumulative and additional to the methods heretofore provided by law." Though this provision uses the words, "heretofore provided by law," it also clearly expresses the intention that the method shall be cumulative. Even if it provided otherwise it would not be controlling upon the legislature of 1913, which passed the Removal Act which is before us, as it is elementary law that no legislature can tie the hands of its successors.

Nor is there any merit in the contention that the statutes before us interfere with the right of home rule and local self-government. These rights are often imaginary rather than real, and are all subject to con-

stitutional regulation and control. The legislature also may do practically anything which the Constitution does not forbid.

As we have before pointed out, cities are of legislative creation, and the power of the legislature to exercise control over them is conferred by the Constitution.

We are not unaware of the decision of this court in the case of Ex parte Corliss, 16 N. D. 470, 114 N. W. 962, but, as pointed out by us in the case of Runge v. Glerum, 37 N. D. 618, 164 N. W. 284, that case merely forbids interference with officers, such as sheriffs and district attorneys, whose offices are provided for and "embedded" in the Constitution, and does not in any manner hold it unlawful for the legislature to control officers and offices which are not of constitutional creation or the policies of cities which it alone has the power to create.

Nor is there any merit in the contention that the petition is indefinite, and that conclusions rather than facts are pleaded.

Even if the petition were defective in the particulars stated, and on this we express no opinion but rather incline to the contrary view, this is a writ of prohibition, and a writ of prohibition is only issued when an inferior court or tribunal is acting without jurisdiction. Where an inferior court has jurisdiction of the matter in controversy, prohibition will not lie. The writ does not lie to prevent a subordinate court from deciding erroneously or from enforcing an erroneous judgment in a case in which it has a right to adjudicate. 23 Am. & Eng. Enc. Law, 198, 200. There can be no doubt that the governor of North Dakota had jurisdiction in the matter which is before us.

This brings us to a consideration of the question whether § 685 of the Compiled Laws of 1913, under which the removal is sought to be effected, is in any event applicable to the president of a city commission. Does the word "mayor," which is used in the statute, include such an officer? Do the words, "or other police officers," also include him?

We are satisfied that the term, "or other police officers," does cover such an official. We realize that there is a contrary holding in the case of People v. Gregg, 59 Hun, 107, 13 N. Y. Supp. 114, 115. That case, however, was a criminal case, and all that the charter of the city provided was that "as the head of the police of the city he shall preserve peace and order therein." And all that the statute provided was that it should be unlawful for any police official in the several cities

of the state to be directly or indirectly interested in the sale of spirituous or malt liquors.

There was in the statute no enumeration of officers, and there was nothing in the charter or in the statute which specifically imposed any police duties on the mayor.

In our opinion § 685 of the Compiled Laws of 1913 expressly sets apart and enumerates as subject to its provisions all of what may be termed the administrative police officers of a city. The word "police" has been defined as "that species of superintendence by magistrates which has principally for its object the maintenance of public tranquility among the citizens. The officers who are appointed for this purpose are also called the police.

"The word 'police' has three significations. The first relates to the measures which are adopted to keep order, the laws and ordinances on cleanliness, health, the markets, etc. The second has for its object to procure to the authorities the means of detecting even the smallest attempts to commit crime, in order that the guilty may be arrested before their plans are carried into execution and delivered over to the justice of the country. The third comprehends the laws, ordinances, and other measures which require the citizens to exercise their rights in a particular form.

"Police has also been divided into administrative police, which has for its object to maintain constantly public order in every part of the general administration; and judiciary police, which is intended principally to prevent crimes by punishing the criminals. Its object is to punish crimes which the administrative police has not been able to prevent." Bouvier's Law Dict.

There is, in our minds, no doubt that the president of a city commission belongs to such administrative police body, and that he is included in the phrase, "mayor, chief of police, deputy, sheriff, or other police officers." We are cognizant of the rule known as *ejusdem generis,* and that "where general words follow the enumeration of particular classes of persons or things the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The particular words are presumed to describe certain species, and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious rea-

son that, if the legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes. The words 'other' or 'any other' following the enumeration of the particular classes are therefore to be read as 'other such like,' and to include only others of like kind and character." 36 Cyc. 1119.

It is to be noticed, however, that this quotation, which undoubtedly expresses the law, speaks of particular classes, and not of any particular class, and it is clear that what the genus is must be determined by all which are mentioned.

It is also clear to us that the president of a city commission belongs to the genus and is therefore included within the term, "or other police officer." Though not in all of his powers and duties, identical with a mayor, he is certainly an officer of like kind and character. He is certainly a member of the administrative police.

Section 3833 of the Compiled Laws of 1913 provides that "whenever, in the laws not repealed by this act, the words 'town council, city council, or village board' appear, it shall mean board of city commissioners; the word 'mayor' or 'president' shall mean president of the board of city commissioners. Whenever the words 'city commissioner' are used in this chapter they shall be construed to mean and include village commissioners."

Section 3834 provides: "All the provisions of law now in force or which may hereafter be passed by the legislative assembly in relation to the powers, duties or privileges of the president of boards of trustees of towns or villages, or mayors of cities, are hereby granted to the president of the board of city commissioners, and except where inapplicable all the provisions of law now in force or hereafter passed by the legislative assembly in relation to the powers, duties or privileges of town or village trustees, or other municipal boards thereof, or the powers, duties or privileges of city councils are hereby granted to the board of city commissioners provided for in this chapter; provided, cities incorporated under this chapter shall for all purposes according to their respective population retain the classification otherwise provided by law."

Section 3795 provides that "the president of said board of commissioners shall be the executive officer of said city, and shall see that all the laws thereof are enforced."

Section 3796 provides: "Whenever the president of the board of city commissioners shall deem it necessary, in order to enforce the laws of the city, or to avert danger, or protect life or property, in case of a riot or any outbreak, or calamity or public disturbance, or when he has reason to fear any serious violation of law or order, or any outbreak, or any other danger to said city or the inhabitants thereof, he shall summon into service, as a special police force, all, or as many of the citizens as in his judgment and discretion may be necessary and proper; and summons may be by proclamation or order, addressed to the citizens generally or those of any ward of the city or subdivision thereof, or such summons may be by personal notification. Such special police, while in service, shall be subject to the orders of the president of the board of city commissioners, shall perform such duties as he may require, and shall have the same power while on duty as the regular police force of said city, and any person so summoned and failing to obey or appearing and failing to perform any duty that may be required by this chapter shall be fined in any sum not exceeding one hundred dollars."

Section 3571 provides: "He [the mayor] may exercise within the city limits the powers conferred upon sheriffs to suppress disorder and keep the peace."

Section 3573 provides: "He [the mayor] shall perform all such duties as are or may be prescribed by law or by the city ordinances, and shall take care that the laws and ordinances are faithfully executed."

"Police," says Clark's Dictionary, on page 906, "is the function of that branch of the administrative machinery of the government which is charged with the preservation of public order and tranquility, promotion of public health, safety and morals, and the prevention and detection and punishment of crimes."

We are satisfied that the president of a city commission has such police powers, and that he is a member of the administrative branch of the city police. It may be, as suggested by counsel for the petitioner, that, under the commission form of government, there is a city police commissioner who in a large measure acts as a chief of police. It may also be true that appointments and removals are made by the commissioners as a whole rather than by the president of the commission, and

that formerly the appointments were made by the mayor with the consent of the council.

It is no doubt true that the president of a city commission has no veto power, and has not the control of legislation which was formerly possessed by the mayor. It may be that the president of a city commission has not the unlimited power to discharge employees and officers, but he has none the less imposed upon him the duty to enforce the laws even if he has not the power to make them. He has none the less the duty to see that all the police officers perform theirs.

He has the unlimited power to summon and control a special police force when such police force is necessary. He certainly has not the power to connive at a maladministration of the law.

This again leads us to a determination of the question (though the same is hardly necessary) whether the term "mayor" as used in § 685 of the Compiled Laws of 1913 includes the president of a city commission.

We are satisfied that it does. Section 3833 of the Compiled Laws of 1913 and a section of the very act which created the Commission form of government provides: "Whenever, in the laws not repealed by this act, the words, 'town council, city council, or village board,' appear, it shall mean board of city commissioners; the word 'mayor' or 'president' shall mean president of the board of city commissioners. Whenever the words 'city commissioners' are used in this chapter they shall be construed to mean and include village commissioners."

Section 3834 also provides: "All the provisions of law now in force or which may hereafter be passed by the legislative assembly in relation to the powers, duties or privileges of the president of boards of trustees of towns or villages or mayors of cities, are hereby granted to the president of the board of city commissioners, and except where inapplicable all the provisions of law now in force or hereafter passed by the legislative assembly in relation to the powers, duties or privileges of town or village trustees, or other municipal boards thereof, or the powers, duties or privileges of city councils are hereby granted to the board of city commissioners provided for in this chapter; provided, cities incorporated under this chapter shall for all purposes according to their respective population retain the classification otherwise provided by law."

It is true that § 3833 uses the words, "wherever in the laws not repealed by this act," and it is true that their section was first adopted in 1907, and that § 685, under which the removal was sought to be affected, was not passed until 1913. Section 3834 of the Compiled Laws of 1913 being § 64 of chapter 45 of the Laws of 1907, however, clearly expresses the intention that when the term "mayor" should be used thereafter it should be given the same significance as was given to it in § 3833 and in construing the statutes already enacted.

This is evidenced not merely by the statutes referred to, but by the fact that since the passage of the act which created the commission form of government in 1907 the legislature has almost uniformly adopted the practice of using the words, "mayor" and "city council," interchangeably, and in acts which relate clearly to the presidents of city commissions and to such commissioners. See § 2825, chap. 58, of the Laws of 1909; § 2826, chap. 58, of the Laws of 1909; § 26, chap. 92, of the Laws of 1907; § 1, chap. 49, of the Laws of 1909; § 1 chap. 55, of the Laws of 1909; § 2, chap. 56, of the Laws of 1909; § 1, chap. 69, of the Laws of 1911; § 2775, chap. 70, of the Laws of 1911; § 2776, chap. 70, of the Laws of 1911; chap. 71 of the Laws of 1911; chap. 69 of the Laws of 1911.

The judgment of the District Court is affirmed.

GRACE, J. I concur in the result.

CHRISTIANSON, J. (dissenting). It seems to me that the first question to be determined in this case is whether the statute authorizing removals by the governor includes the president of a city commission among the officers subject to such removal. And I am frank to confess that I have not found this question to be as simple or easy to solve as have some of my brethren. The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature. This intention must first be sought in the words and language employed, and where the meaning of the language used is plain there is no occasion to resort to other means of interpretation. And such language must be given effect by the courts, or they would be assuming legislative authority. 36 Cyc. 1106; Sutherland, Stat. Constr. § 237. It is only where the language of a statute has a doubtful meaning, or where its provisions are contradictory, or where an adherence to the strict letter

would lead to injustice or absurdity, that there is any room for judicial construction. 36 Cyc. 1107.

The statute authorizing the governor to remove certain officers does not specifically enumerate the president of a city commission, and the question is whether the legislature intended to and did include such officer in the terms, "mayor" or "other police officers." The statute in question was enacted by the legislative assembly in 1913. In the message of the retiring Governor Burke, delivered on January 8, 1913, he strongly recommended the enactment of such legislation. He called attention to the fact that each platform upon which he had been elected governor in 1908 and 1910 contained a plank in favor of such law, and that bills providing therefor had been introduced in the legislative sessions in 1907, 1909, and 1911. The reason urged by Governor Burke for the enactment of such Removal Statute was that the Constitution commanded the governor to enforce the laws of the state, and that the power to remove should be vested in the governor in order to enable him to carry out this constitutional command. In support of his argument, he referred to the power vested in the President of the United States and his duties under the Federal Constitution to see that "the other executive and administrative officers of the government faithfully perform their duties, which are prescribed by the statutes. See House Journal 1913, pp. 185–189. The law under consideration was enacted by the legislative assembly to which Governor Burke delivered this message. It was entitled "An Act Providing for the Removal of County, Township, Municipal and Other Officers." Laws 1913, chap. 132. The same legislative assembly, at the same session, and in fact on the same day, enacted another act "to provide for a means of removal of elective officers by the will of the people." This law applied to and authorized the removal of "the holder of any elective office in cities which may adopt or have adopted the commission plan of government," by the electors of such cities. Laws 1913, chap. 79.

It is true, the adoption of this latter method of removal did not necessarily signify any intention on the part of the legislature that this method should be exclusive, as the legislature might, if it desired, provide two methods of removal. But the significant fact still remains that the legislature at the same time considered and enacted two laws for the removal of public officers. It considered not only the methods

of removal to be employed, but the officers to which each of the methods of removal might be applied. It determined that certain officers should be subject to removal, and it enumerated such officers. As to one of the methods of removal, it specifically distinguished between the president of a city commission and the mayor of a city, by making the president removable by a vote of the electors and withholding such method of removal as applied to a mayor. It is stated in the majority opinion that the reasons which actuated the legislature in enacting the measure authorizing the removal of elective officers in a city having the commission form of government by a vote of the electors was "that the commission form of government removed the city officers, in a measure, from the direct control of their wards and constituencies, and that the legislature feared that in certain instances such officers might adopt policies of government and legislation of which they might not approve." This reason would apply equally and with even greater force to the mayor of a city, operating under the aldermanic form of government. Such mayor is elected by the electors of the city at large, and he has far greater power with respect to the administration of the city affairs and the shaping of its governmental policies than has the president of a city commission.

The laws of this state provide two different plans of city government. The first plan is the one generally adopted in this country. It is a complete copy in miniature of the government of the United States and of the state. The mayor is the chief executive officer, with no legislative power except that of veto. The city council constitutes the legislative department. The second plan is known as the commission plan. It originated in Galveston, Texas, after the great inundation in 1900. There are fundamental differences between the two systems. In discussing the two forms of city government, a well-known legal writer has said: "Its [the commission plan's] essential feature is to center responsibility, and render the officers directly accountable to the people by providing fewer head officers; and its chief merit, as claimed by its advocates, is that it simplifies municipal administration. It usually incorporates the referendum, initiative, and the recall. The names of candidates for office, who are few, are arranged alphabetically on the ballot, and emblems or devises and party names are forbidden. The officers are elected at large, and do not represent wards or districts, but

the entire local community. The work of municipal administration is apportioned among the commissioners (five is the usual number), each being the head of a department for which he is responsible. . . .

"The commission plan seems to have sprung from the conception that municipal government is merely a business question, and therefore it should be conducted in substantially the same manner as a large business corporation. That is, the conduct of the affairs of the local government should be assimilated as far as practical to the most efficiently managed private business. . . .

"Apart from the commission plan mentioned, the disposition to increase the powers of the mayor and thus center the responsibility upon this official appears to be the present idea in this country in municipal governmental development. The fundamental principle is that the office of mayor should be 'clothed with dignity and real authority,' and that he should have ample power to control fully the administration of all municipal affairs. In addition to the veto power, which is his chief agency in legislation, many thinkers and writers contend that he should have 'the sole right to appoint and the unrestricted power to suspend or remove subordinate officials or heads of departments.' . . .

"The idea of the autocratic mayor, which contemplates giving him all executive and administrative power and restricting the governing or legislative body, which may not be inaptly termed "the cure or kill remedy," while objectionable in some respects, appears in the opinion of many to offer the best solution of the municipal problem touching the selection of officers and the centering of responsibility." McQuillin, Mun. Corp. §§ 92, 93.

Speaking of the commission plan, a critical student of city government says: "The healthful kernel of this new movement is that it rests upon an abiding faith in the efficacy of public control. It places responsibility for good government exactly where it belongs, namely, on the people themselves, and makes necessary the development of a well-organized public opinion." Rowe, Problems of City Government, chap. 8, p. 190.

A reference to our statutes will show the aptness of these observations. The mayor appoints all the appointive officers of the city, including the city auditor, city assessor, city attorney, and chief of police. Comp. Laws 1913, §§ 3580–3612. He is also authorized to fill by

appointment any vacancy existing in the office of city treasurer. § 3631. He is also empowered to remove any appointive officer. § 3570. The president of the city commission has no such powers. Under the commission plan, the government is divided into departments. Each commissioner is elected by a majority vote of the commissioners to take charge of one department. One commissioner is known as "police and fire commissioner," and this commissioner has "under his special charge the enforcement of all police regulations of the city." Comp. Laws 1913, § 3794. The appointive officers, including policemen, of the city, are selected, not by the president of the city commission, but by a vote of the commissioners. § 3801. The power to remove the appointive officers is vested not in the president of the city commission, but in the commissioners. Comp. Laws 1913, § 3808. The mayor of the city has power to veto ordinances and resolutions passed by the city council. Comp. Laws 1913, §§ 3579–3596. The president of the commission has no right to veto. Comp. Laws 1913, § 3792.

Considerable importance is attached by the majority members to § 3796, Comp. Laws 1913. This section provides: "*Whenever the president of the board of city commissioners shall deem it necessary,* in order to enforce the laws of the city, or to avert danger, or protect life or property, in case of a riot or any outbreak, or calamity or public disturbance, or when he has reason to fear any serious violation of a law or order or any outbreak, or any other danger to said city or the inhabitants thereof, he shall summon into service, as a special police force, all, or as many of the citizens as in his judgment and discretion may be necessary and proper; . . . " This language speaks for itself. The powers conferred by this section upon the president of a city commission are for unusual occasions. It is interesting to note in this connection that the mayor of the city is authorized not only to call on the male inhabitants of the city to aid in enforcing the laws and ordinances, but may also call out the Militia to aid in suppressing riots or rather disorderly conduct, or to carry into effect any law or ordinance, subject only to the authority of the governor as commander in chief of the Militia. Comp. Laws 1913, § 3576. Manifestly § 3796 is not intended to and does not vest the president of the city commission with power to appoint policemen of the city except in cases of emergency, such as riot or other unusual disturbance, but

the power to appoint police ordinarily necessary in the government of the city is expressly reserved to and conferred upon the city commissioners. Comp. Laws 1913, § 2801.

Reference is also made in the majority opinion to §§ 3833 and 3834, Comp. Laws 1913. These sections were part of the act providing for the commission form of city government. The act was entitled "An Act to Provide for a Commission Form of Government in Cities Which Shall Adopt the Provisions of This Act." Manifestly many provisions, such as the levy of taxes and special assessments, and other statutory provisions relative to the administration of city affairs, would be equally applicable to either form of government. The existing statutes, however, referred to the "mayor" and "city council." Consequently, in order to avoid the necessity of re-enacting these provisions as a part of the law providing for the commission form of government, or to avoid any doubt as to what provisions were applicable, the legislature said: "Whenever, in the laws not repealed by this act, the words, 'town council, city council, or village board,' appear, it shall mean board of city commissioners; the word 'mayor' or 'president' shall mean president of the board of city commissioners." Whenever the words, "city commissioners," are used in this chapter they shall be construed to mean and include "village commissioners." Comp. Laws 1913, § 3833. And "all the provisions of law now in force or which may hereafter be passed by the legislative assembly in relation to the powers, duties or privileges of the president of boards of trustees of towns or villages, or mayors of cities, are hereby granted to the president of the board of city commissioners, and except where inapplicable all the provisions of law now in force or hereafter passed by the legislative assembly in relation to the powers, duties or privileges of town or village trustees, or other municipal boards thereof, or the powers, duties or privileges of city councils are hereby granted to the board of city commissioners. . . . " Comp. Laws 1913, § 3834. The legislature in enacting these provisions obviously had in mind only city government. The sole purpose of these sections was to make applicable, as far as practicable, under the commission form of government, the general provisions of law applicable alike to both plans of city government. These provisions should be applied for the purpose intended. It should not be assumed that a subsequent legislature in-

tended to wrench them from their setting, and to apply them to a purpose wholly foreign to that for which they were enacted.

It has been said that "it is generally safe to reject an interpretation that does not naturally suggest itself to the mind of the casual reader, but is rather the result of a laborious effort to extract from a statute a meaning which it does not at first seem to convey." Ardmore Coal Co. v. Bevil, 10 C. C. A. 41; 27 U. S. App. 96, 61 Fed. 757; Shultis v. MacDougal, 162 Fed. 331, 340. The majority opinion demonstrates quite clearly that the interpretation placed upon § 685, Comp. Laws 1913, is not one which "naturally suggests itself." It is only by a laborious effort, and by applying terms contained in statutes passed by other legislative assemblies for wholly different purposes, that the majority is enabled to say that this section applies to the president of a city commission.

When we consider the fundamental differences between the two forms of city government; that the same legislature on the same day passed two removal measures; that one of those specifically authorized removal of a mayor by the governor, but was silent as to the president of a city commission, while the other expressly authorized the removal of the president of the city commission by the electors of the city, but did not authorize the removal of a mayor in this manner,—it seems to me that no one can say that the legislature intended to include the president of a city commission in the first removal measure.

In view of what I have said, it is unnecessary for me to express any opinion on the constitutional questions raised. But inasmuch as the majority members have found it necessary to consider this question, I deem it proper to say that I am of the opinion that the Removal Statute under consideration is constitutional. I am not prepared, however, to concur in the discussion of the constitutional questions in the majority opinion. Whether the legislature has power to authorize the removal of an elective officer by the governor without permitting such review is a question of grave importance and considerable doubt, and one upon which I express no opinion. The question is clearly not involved in this case, as the Removal Statute before us provides for a judicial review of all questions.

Some reference is made in the majority opinion to § 130 of the state Constitution, and it is intimated that this section confers upon

the legislative powers with respect to municipal corporations which it would not otherwise possess. I believe this reasoning to be unsound.

The section reads: "The legislative assembly shall provide by general law for the organization of municipal corporations, restricting their powers as to levying taxes and assessments, borrowing money and contracting debts, and money raised by taxation, loan or assessment for any purpose shall not be diverted to any other purpose except by authority of law."

Manifestly this section does not confer upon the legislature any power or authority to deal with municipal corporations which it would not possess under the grant of legislative power. On the contrary it is rather a limitation upon the general grant of legislative power. It is a declaration of a constitutional policy with respect to the legislation relating to municipal corporations which the legislature is commanded to enact.

No one doubts the legislative power by appropriate laws to create, dissolve, supervise, or direct the conduct of the affairs of municipal corporations. This power, however, is subject to the limitations found in the state and Federal Constitutions, and this court has not hesitated to adjudge invalid statutes relating to municipal corporations which violated the state Constitution.

Thus, in Glaspell v. Jamestown, 11 N. D. 86, 88 N. W. 1023, this court held that it was beyond the power of the legislature to authorize proceedings for changing the boundaries of cities to be instituted in the district courts, for the reason that the power exercised in changing such boundaries was legislative and consequently could not be vested in the courts. And in Plummer v. Borsheim, 8 N. D. 565, 80 N. W. 690, this court held invalid as an unreasonable and arbitrary classification a statute relating to the organization of school townships.

ROBINSON, J. (dissenting). This is an appeal from an order of the district court by Judge Cole, dismissing a writ restraining proceedings by the governor to remove W. S. Shaw from the office of president of the city commissioners of Minot. The defense is: (1) That the complaint does not state a cause for removal; (2) that the statute does not authorize a removal; (3) that the statute is not constitutional.

The statute reads thus: The governor may remove from office any

county commissioner, clerk of the district court, county judge, sheriff, coroner, county auditor, county treasurer, superintendent of schools, surveyor, public administrator, mayor, chief of police, deputy sheriff or other police officer, or any custodian of public moneys, except the state treasurer, whenever it appears to him by complaint and evidence and after hearing that such officer has been guilty of misconduct, malfeasance, crime in office, habitual drunkenness or gross incompetency. Laws 1913, chap. 132.

The complaint is in effect that as president of the city commissioners, W. S. Shaw knowingly permitted to be kept numerous places in Minot, where intoxicating liquors were sold and given away, and that he permitted bawdyhouses, gambling houses, to be kept within the city; that he is a member of the Elks Lodge and visited the place known as the "Elks Home," where people assembled for the purpose of drinking intoxicating liquors, and that on many occasions he did there drink intoxicating liquors and participate with the club in the illegal sale of intoxicating liquors.

The same might be said of the mayor of St. Paul, Minneapolis, and nearly every other city. They all permit numerous things to be done which they cannot well prevent. They belong to clubs and may innocently participate in the doings of the clubs. The Lord knowingly permits the doing of such things and still he has an absolute power to prevent them. The clergy and some of the best men on earth do knowingly permit the doing of many things which by extra vigilance and self-sacrifice they might prevent. No facts are stated to show that Mr. Shaw is a bad or immoral man, or that he is a drunkard or that he is incompetent, or that he is not the choice of the voters of Minot. So far as the record shows, were he removed from office to-day, to-morrow or in a few days the people of Minot might re-elect him. If his recall is demanded by the citizens of Minot, they have a plain, speedy, and adequate remedy. They have only to file with the city auditor a proper petition demanding a recall and the election of a successor. Then the board of city commissioners must fix a date for holding such election. The person subject to removal may be a candidate; and the candidate receiving the highest number of votes is elected.

Aside from all that, there is a regular judicial procedure by which an officer may be removed for crime or malfeasance in office. 2. The

second point is on the words of the statute, that the governor may remove any mayor, chief of police, deputy sheriff, or other police officer. It is contended that the president of the board is in reality a police officer, and that he comes within the spirit and reason of the act. The answer is that the statute is penal, and it must be given a strict construction so as to include only those who come within the letter of the act. If the legislature had intended to include city commissioners, the question should not have been left open to doubt or discussion. To have named them in the list of removable officers were as easy as to name the mayor and chief of police. But there was good reason for naming only such officers as are not subject to recall. Of course a city or any person who employs men may reserve or be given the right to recall or discharge them.

On the constitutional validity of the act, it is proper to consider what might be done under it or under similar acts. An office is property, it affords a living. It is an annuity. It is probable that the office in question gives an annuity of $1,000 a year. In some cities (not in this state) the head of a city commission is hired for his expertness and is paid from $5,000 to $10,000 a year. Now if a statute may authorize the governor or any other person in a summary manner to deprive any city commissioner of his annuity, why may he not in like manner under a similar statute deprive any person of his lands and possessions? Such was the power exercised by the great feudal lords. But now we have written constitutions, both state and Federal, which provide that no man shall be deprived of his property without due process of law. That includes and guarantees a hearing and a trial according to the law of the land and the established course of judicial procedure. By the constitution the judicial power of the state is vested in the courts. They alone are given jurisdiction to hear and determine matters of legal dispute regarding personal and property rights. When a charge is made that a person is guilty of misconduct in office and he denies the charge, then, to establish it and to deprive him of his office and his annuity, there must be a trial by some competent tribunal, the taking of testimony, deliberation, and determination. The tribunal must have jurisdiction, which means a right to speak and determine the law and the facts of the case. This power is judicial. It is given exclusively to the courts and it may not be given to the governor.

To obviate this objection, the statute gives a half-way appeal to the courts. It provides that when a party is accused, the governor may order a hearing before a referee, suspend the accused from his office, deny him his salary during the hearing, and cause the vacancy in his office to be filled by an appointment. That the accused may appeal to any district court from the final decision of removal. That is not due process of law. A party may not be harassed or executed by a mock trial before he is legally tried and convicted.

The case presents another feature which was considered in a case arising under a statute authorizing the governor to appoint a temperance commissioner to act in any county as a state's attorney in the prosecution of liquor cases. The act was held void. The court said: The constitutional method of local administration of laws cannot be changed by the legislative assembly because they are of opinion that the local officers will not honestly administer such duties. In adopting the Constitution the people decided that the local officers will administer the law better than anyone else, and the legislative department is powerless to impeach their judgment. Ex parte Corliss, 16 N. D. 470, 114 N. W. 692.

There is great wisdom in permitting those of the same community to manage their own local affairs. They grow in sympathy and mutual kindness. They observe the precept: "Bear ye one another's burdens," and they naturally resent interference from outsiders. It is sure to do more harm than good.

The act is not constitutional. It does not authorize the removal of any city commissioner, and the complaint does not state facts showing a cause for removal.

THOMAS A. COLTER, Respondent, v. J. L. DILL et al., Appellants.

(167 N. W. 720.)

Mortgage — labor lien — preference over — mortgage — work not done prior to mortgage record — building — contract with owner.

In this case plaintiff claims that his labor lien should have preference over

recorded mortgages. His claim is denied on the ground that he did no substantial work prior to the recording of the mortgages, and he did no work for the erection of a building under a contract with the owner of the lots.

Opinion filed April 27, 1918.

Appeal from the District Court of Ward County, Honorable *K. E. Leighton,* Judge.

Defendants appeal.

Modified.

Palda & Aaker, for appellants.

A verified statement for a lien for services must be just and true. The wilful and intentional overstatement in a claim for a mechanic's lien, of the amount due, will vitiate the lien entirely. McCormack v. Philips, 4 Dak. 506 and cases cited; 29 L.R.A.(N.S.) 317.

Where a lien claimant places on record a statement which he knows is not correct, his right to lien is lost. Gibbs v. Hanchette (Mich.) 51 N. W. 691; Turner v. St. John, 8 N. D. 245.

There is no proof of a contract with the owner of the property (now deceased). The testimony of plaintiff of an oral contract with deceased was inadmissible, and the right to a lien fell with the death of the owner.

"In civil actions or proceedings by or against executors, administrators, heirs at law, or next of kin in which judgment may be rendered or order entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party." Comp. Laws 1913, § 7871, subd. 2; First Nat. Bank v. Hilliboe, 17 N. D. 76; Tubridy v. Wright, 144 N. Y. 519; Dobbs v. Enearl, 4 Wis. 471; Boisot, Mechanics Liens No. 340; Meyers v. Bennett, 7 Daly, 471; Crystal v. Flannelly, 2 E. D. Smith, 583.

In any event the lien here claimed is inferior and subject to defendant's mortgages on the property.

The party with whom plaintiff claims to have made the contract for his work was not the owner of the property, nor had he any right to contract for such work by plaintiff at the time such contract is claimed to have been made. Comp. Laws 1913, § 5558.

A purchase-money mortgage given prior to the accrual of a mechanic's lien will take priority over the lien. 27 Cyc. 250 and citations.

And such legal protection to such a mortgage remains with it until it is paid. Boisot, Mechanics Liens, No. 153; Rockel, Mechanics Liens, No. 164, 27 Cyc. 250.

"The lien must follow the contract, and no valid lien can be had against one particular lot or building, for labor performed on such lot or building and on other lots and buildings." Stoltze v. Hurd, 20 N. D. 412; Comp. Laws 1913, § 6818.

Bosard & Twiford and *Bradford & Nash,* for respondent.

The evidence of plaintiff was not directed against the deceased person or the administratrix or the heirs, but against the appellants, and therefore the inhibition of the statute in no manner applies. Shain v. Forbes (Cal.) 23 Pac. 198; Hubbell v. Hubbell, 22 Ohio St. 208; Bushes v. Railway Co. (Ark.) 103 S. W. 176; Fodds v. Rogers, 68 Ind. 110; Goss v. Austin, 11 Allen, 525; Braithwaite v. Aiken, 2 N. D. 57; St. John v. Aiken, 2 N. D. 140.

The statute does not preclude evidence by the survivor offered merely to identify records, books of account, etc. Dysart v. Farrow, 90 Iowa, 59, 57 N. W. 644.

Under our law the lien attaches from the commencement of the work, and the contractor has ninety days after the completion of the work in which to file lien. Comp. Laws 1913, §§ 6820, 6822; Haxton Steam Heating Co. v. Gordon, 2 N. D. 246.

After the lien has attached, the death of the owner of the land does not relieve the land from the lien. Boisot, Mechanics Liens, § 340, and cases cited.

Under our statute the lien of a mechanic takes effect from the commencement of the work on the building, and has priority over any mortgage or other lien recorded or docketed after the commencement of the work. Haxtum Steam Heater Co. v. Gordon, 2 N. D. 246; 53 Am. St. Rep. 776; 50 N. W. 708; Turner v. St. John, 8 N. D. 245, 78 N. W. 340; Robertson Lumber Co. v. Clarke, 24 N. D. 134, 138 N. W. 984; Ortonville v. Geer, 93 Minn. 501, 106 Am. St. Rep. 445.

There is no special protection given to a vendor's mortgage for the purchase price, except that extended under a strict compliance with the

recording act. Lion v. McGuffey, 4 Pa. 126; Lynch v. Dearth, 2 Pa. 101; Avery v. Clark, 87 Cal. 619, 25 Pac. 919.

ROBINSON, J. This is an appeal from a judgment in favor of the plaintiff confirming his claim to a mechanic's lien and declaring it superior to the lien of purchase-money mortgages. The only question necessary to consider is in regard to the status of the liens claimed by the appealing mortgagees. The property consists of eight lots in the city of Minot. The defendant J. Olson was the owner of the eight lots and the president of the German-American Bank. He made a contract with Christ Rudd, deceased, to sell him the eight lots at $500 a lot, and that the German-American Bank should loan him on each lot about $1,600 to pay the purchase price of the same and to improve the lots, and that Rudd should also give to Olson a small commission mortgage. Accordingly Olson made a deed of the lots to Rudd and at the same time took mortgages in accordance with the agreement. Olson retained the deeds and the mortgages in his own possession until he delivered them for record to the register of deeds on May 25, 1914, at 2:45 P. M. The delivery and recording of the deeds and mortgages was in all respects simultaneous. And until such delivery Rudd had no title or interest in the lots. As Rudd had no title until the delivery of the deeds and mortgages for record, it was in no wise possible for him, by any contract, to give a lien on the lots prior to the lien of the mortgages. However, in anticipation of obtaining the title to the lots, Rudd contracted with the plaintiff to do the work for which he claims a mechanic's lien, and the plaintiff commenced the work a few hours prior to the time of filing for record the deeds and mortgages. The work done prior to such filing was of little consequence, and it was not sufficient to give notice to anyone. It was done while Olson held his title and his deeds and his mortgages, and while he still had power to rescind the transaction.

The statute provides in effect that any person who performs labor or furnished material for the erection of a building upon lands under a contract with the owner of the land shall have a lien therefor upon such building and upon the land belonging to such owner on which the same is situated on compliance with the conditions of the Lien Law. Comp. Laws 1913, § 6814.

A party claiming a lien must in due time file with the clerk of the dis-

trict court a just and true account of the demand due him after allowing all credits and containing a correct description of the property to be charged with such lien and verified by his affidavit. Section 6820.

Under the statute, mechanics' liens are preferred to all other liens or encumbrances filed or docketed subsequent to the commencement of a building. Section 6822.

However, as in this case when a party claims that a labor lien has priority over a recorded mortgage he must show the doing of substantial work under a contract with the owner of the land. The work must be of such a conspicuous character as to fairly give notice to the holder of a recorded lien. In this case the alleged work done prior to the recording of the deeds and mortgages was too meager, and it was not done under a contract with the owner of the lots. Hence, the mechanic's lien must be and it is adjudged to be subject and subsequent to the lien of the appellant's mortgages.

Judgment modified accordingly.

MAX HENDRICK, Appellant, v. DANIEL W. JACKSON, Respondent.

(167 N. W. 757.)

Action to quiet title — relations of parties — fiduciary — violation of — foreclosure of mortgage in — redemption — findings and judgment.

1. In an action to quiet title in which the trial court permitted the defendant to redeem from a mortgage foreclosure on the ground that the plaintiff had obtained a sheriff's deed in violation of a fiduciary obligation owing to the defendant, the evidence is examined and *held* to support the findings and judgment entered by the trial court.

Pleading — answer — amendment to conform to proof — motion for — no ruling on by trial court — decision in conformity with proof and proposed amended answer — amended answer filed — motion to strike — properly denied.

2. Where a defendant moves to amend an answer to make it conform to the proof adduced at the trial, and where it appears that the trial court, though not ruling on the motion, has decided the case upon the issues presented at the trial and raised in the answer as sought to be amended, a motion to strike

from the record an amended, substituted answer embracing the allegations contained in the proposed answer, will be denied.

Opinion filed April 29, 1918.

Appeal from the District Court of Hettinger County, Honorable *W. C. Crawford,* Judge.

Affirmed.

C. H. Starke, for appellant.

Where a long time elapses between the time of trial and the date of findings by the court, and where no transcript or record was made or used by the court, there is no serious presumption that the findings are correct, and such findings are not entitled to that consideration which is usually accorded. Reed v. Ehr (N. D.) Adv. Sheets N. W.

A mistake of fact on the part of one party to a transaction in no manner induced by the other party will not justify a court of equity in granting relief of an affirmative nature. Tice v. Russell (Minn.) 44 N. W. 886.

A court of equity will not set aside a sheriff's deed and allow a redemption except upon evidence of a clear and convincing nature. Kenmare Hard Coal Co. v. Riley, 20 N. D. 182.

The evidence being of such a nature, the right to redeem after time is allowed only under certain well-recognized equitable rules and conditions. It must appear that the party was prevented from redeeming by fraud or mistake, or that there are exceptional equities in his favor. There must be no negligence on the part of the one seeking to redeem. In this case there was no promise to extend the time, nor was there any act that tended to mislead. 27 Cyc. 1822; 16 Cyc. 39; Becker v. Lough, 14 N. D. 81; Prondzinski v. Garbutt, 8 N. D. 191; Murphy v. Tutsch, 22 N. D. 104; Schroeder v. Young, 161 U. S. 334, 40 L. ed. 721; Benson v. Bunting, 127 Cal. 532, 78 Am. St. Rep. 81; Mahony v. Ellis (Wash.) 125 Pac. 1031.

A mistake of fact is never ground for affirmative relief in equity, unless the mistake is mutual or a mistake of one party known to the other. Comp. Laws, § 7202; Pom. Eq. Jur. § 870.

The foreclosure here was a statutory proceeding under the power of

sale, and the period of redemption had expired, and the redemptioner's rights had been forfeited, under the statute.

"Whenever any forfeiture is provided by statute, to be incurred upon the doing or not doing of some specified act, equity can afford no relief from it, and the same is true of a statutory penalty. A court of equity has no power to set aside the express terms of statutory legislation, however much it may interfere with the operation of common-law rules." Pomeroy, Eq. Jur. 3d ed. § 458; Smith v. Mariner (Wis.) 68 Am. Dec. 73.

In such cases equity will not step in and relieve from or mitigate the penalty or forfeiture imposed by the statute. Clark v. Barnard, 108 U. S. 436; State ex rel. Anderson v. Kerr (Minn.) 53 N. W. 719; Hoover v. Johnson (Minn.) 50 N. W. 475; Hyman v. Bogue (Ill.) 26 N. E. 40; McConkey v. Lamb (Iowa) 33 N. W. 146; Rucker v. Steelman, 73 Ind. 396; Prondzinski v. Garbutt, 8 N. D. 191; Schroeder v. Young, 161 U. S. 334; Benson v. Bunting, 127 Cal. 532; Mahony v. Ellis (Wash.) 125 Pac. 1031; Reynolds v. Loan Co. (Minn.) 48 N. W. 458; Nichol v. Tingstad, 10 N. D. 172; Becker v. Lough, 14 N. D. 81; Bailey v. Hendrickson, 25 N. D. 500.

The circumstances or fraud sufficient to permit a court of equity to interfere must be so clear and convincing as to amount to an estoppel. Kenmare Coal Co. v. Riley, 20 N. D. 182.

Jacobson & Murray and *L. A. Simpson,* for respondent.

A man cannot remain silent when law and conscience require him to speak, and then later on, and after another has relied and acted upon his silence and conduct, complain, or change the position of the parties to the injury of either. Mohal State Bank v. Duluth Elev. Co. 35 N. D. 619.

An agent shall acquaint his principal with all material facts in relation to a transaction in the interest of the principal, and will not be permitted, without his principal's knowledge and consent, to purchase for himself any outstanding adverse right or title, although he purchases such right or title at a judicial sale; and this is especially true when at such sale the agent represents himself as purchasing for his principal. 2 C. J. §§ 363, 365, pp. 706, 710; Patterson Land Co. v. Lynn, 27 N. D. 391, 147 N. W. 256; Comp. Laws 1913, § 5963.

A court of equity has the right to relieve from a forfeiture occasioned

through mistake. Comp. Laws 1913, §§ 5963, 7138; Wade v. Major, 36 N. D. 331.

Relief from a plain and acknowledged mistake in law is not beyond the reach and power of equity. Courts of equity have the right even in such cases to intervene and do justice. Benson v. Bunting (Cal.) 59 Pac. 991.

BIRDZELL, J. This is an appeal from a judgment of the district court of Hettinger county, entered in an action to quiet title. By the judgment the defendant is permitted to redeem the north half of section 32, township 136 N., range 94 W., from a foreclosure, in pursuance of which a sheriff's deed has been issued, upon paying to the plaintiff the amount due on the liens and encumbrances. The specification is for a trial *de novo*. The facts are as follows: In June, 1913, the defendant gave two mortgages covering the above-described land and also the southeast quarter of the southwest quarter of section 30. The first mortgage was to the Fargo Loan Agency for $2,600, and the other was to Jacob Graeber for $664. The latter mortgage was also subject to three other mortgages aggregating $1,320. Max Hendrick, plaintiff and appellant herein, acted as agent for the defendant in negotiating the loans made in June, 1913. The Graeber mortgage was foreclosed in May, 1914, and prior to the foreclosure sale the plaintiff Hendrick had purchased of the defendant for the sum of $1,000 the southeast quarter of the southwest quarter of section 30. Apparently for the purpose of protecting the interest so purchased, the plaintiff appeared at the foreclosure sale and bid in the north half of section 32 for the full amount due on the mortgage. A short while before the expiration of the period of redemption, the defendant Jackson and his wife packed up their effects and left for Iowa, where they remained for the period of about six months. They left their live stock and some other personal property behind, however. The plaintiff obtained a sheriff's deed to the premises at the expiration of the period of redemption, and when the defendant returned in the fall of 1915 he went to the plaintiff to obtain an order on the tenant, who at that time occupied the farm, to enable him to go there and obtain the personal property which he had left there in the spring. When Jackson went to the farm he remained as the permanent

occupant, and in his answer filed in this suit he claims the right to redeem from the foreclosure.

The facts upon which the trial court based the defendant's right to redeem are controverted, and will be stated later as they are gathered from the testimony.

The findings of fact upon which the existence of the right of redemption was based are to the effect that, in the bidding in of the land on foreclosure sale, the plaintiff acted in the capacity of agent for the defendant; that by his acts and conduct he led the defendant to believe (and the defendant did have reason to so believe), that the plaintiff was acting as his agent in bidding in and acquiring the sheriff's certificate; that a confidential and trust relation existed between the plaintiff and defendant in connection with the sheriff's deed, and that the plaintiff's acts were such as to lead the defendant to believe (and that defendant did believe), that the plaintiff would look after this foreclosure for him and protect him against the loss of his land. The court also found that the defendant, while absent in Iowa, during which time the period of redemption expired, relied upon the plaintiff to look after the matter of the foreclosure in the defendant's behalf. The foregoing findings raise the only question that is seriously urged upon this appeal. The appellant contends that the evidence does not sustain the findings, and it is clear that if they are not sustained by the evidence the judgment must be reversed because of the absence of any other equitable circumstances upon which the right of redemption could be based.

It is undisputed that the plaintiff had acted as the agent of the defendant in procuring the loan, to secure which the Graeber mortgage was given, but the extent of this agency beyond this is in doubt.

Hendrick's testimony bearing upon the matter is as follows:

A. Well now, on that date I was at the farm twice. On my way from Dickinson to Mott to attend the sheriff's sale I stopped to see Mr. Jackson and he was working among his tools in the barnyard, and I told him I was coming down here to attend the foreclosure sale, and asked him then if he had made any arrangements to take care of the Graeber matter and he said no, that he had not, and he wanted me to take care of it; that I would have to bid it in. So I came on to Mott and in the afternoon after the sale I stopped there again. Jackson was working about the buildings and I stopped my automobile near the house, and when

I got out I told him to tell Mrs. Jackson to come out of the house, I wanted to talk to both of them. And he said: "No, I don't want you to talk with Mrs. Jackson at all about this matter. I want you to keep it away from her." Naturally we walked a little ways from the house, and I told him I had bid in all of the land except the 40 acres.

Upon cross-examination he testified as follows:

Q. Now, Mr. Hendrick, before the sheriff's deed was issued you want us to understand that you were very anxious that Jackson should not lose his land; that he should redeem it?

A. Yes, sir.

Q. And you went so far as to make special trips down there to him for that purpose?

A. Yes, sir.

Q. You done practically everything that was in your power to encourage Jackson to redeem before the year was up?

A. Yes, sir.

Q. During these times you have mentioned you were posing as a friend and adviser of Mr. Jackson's relative to those deals?

A. Yes, sir.

Q. In a way with this Graeber deal you were acting as Jackson's attorney?

A. As his agent, yes, sir. . . .

Q. Now, did you ever tell Mrs. Jackson at any time or any place that you had sold the land?

A. I told Mrs. Jackson that I had entered into an agreement to sell. . . .

Q. Mr. Hendrick, after Jackson came back from Iowa if he had offered to pay you all what you had in the land would you have given him the deed back for it?

A. I couldn't. I was under obligations of agreement to sell to a party, and I told Jackson that if he would wait until I could withdraw from that agreement why I would entertain a proposition of that kind.

Q. So then Jackson was talking to you about paying you what you had in the land?

A. He asked me how much it would take, and I told him I wasn't in a position to entertain a proposition of that kind at that time.

At another place in his cross-examination, Hendrick had stated that he did not claim that he had ever sold the land to anybody else.

Jackson testified that he had listed his land with Hendrick for sale before going to Iowa, and that after he came back from Iowa the plaintiff came out to the place and the following conversation took place between Mr. and Mrs. Jackson and him: " 'If you get your money back can we have back our land?' He says, 'Did you see me and a man in the car upon this land?' She says, 'Yes.' He says, 'I sold the land and got my money for it.' I says, 'You can't sell the land.' That is after I commenced proceedings against him. He says, 'I sold it and got the money for it.' " Jackson also testified that on a previous occasion in Dickinson, Hendrick had told him that if he did not sell the land he could have it back by paying up his back interest. The testimony of the Jacksons and that of Hendrick is not, of course, consistent, but in that portion of Hendrick's testimony which is quoted above there are sufficient admissions of circumstances and facts to warrant the court in giving to the testimony of the Jacksons the greater weight. In so far as questions of veracity arise, we are conscious of the superior facilities of the trial court for forming a reasonable conclusion. We are satisfied from an examination of the record that there is sufficient evidence to amply sustain the findings of the trial court relative to the agency, the confidential relations, and of the reliance of the Jacksons upon Hendrick for protection in the matter of the foreclosure of the Graeber mortgage. There are circumstances in addition to those previously referred to that lend support to the findings. These pertain to previous transactions in which Hendrick had assisted the Jacksons in financial matters by acting as their agent and adviser.

The appellant has made a motion herein to strike the amended answer from the record on several grounds. The only ground that we need consider is that which goes deepest into the merits of the motion presented. It is contended that the copy of the amended answer which is substituted in the record for the original, on account of the loss of the original, does not conform to the amended answer as dictated into the record at the time of the trial. Appellant's counsel has apparently overlooked the motion made by respondent's counsel at the close of the trial, in which he moved for leave to further amend the answer to conform to the facts developed during the trial, by adding the following allegation: "That,

at the time the fraud herein alleged was perpetrated, Max Hendrick was the confidential agent for the defendant Jackson; that he violated his trust relationship. . . . " The statement of the case does not show that the court ruled on this motion, but in the light of the findings which were subsequently made it is clear that the court considered the issues presented as having been properly raised. In this state of the record, this court will have to consider that the answer was so amended. Since the respondents are entitled to a trial *de novo* upon the issues that were presented in the trial court, it would be futile to strike the amended, substituted answer from the record. The allowance of the motion could at most but result in ultimately incorporating an answer which would conform to the issues tried below.

The motion to strike is denied, and the judgment of the trial court is in all things affirmed.

BRUCE, Ch. J. I dissent. It appears to me that no agency is proved.

ROBINSON, J. (concurring). This action relates to a half section of land worth about $9,000 (N.½ 22–136–94). At a foreclosure sale on a mortgage to Jacob Graeber, plaintiff bid in the land for $493.73, which was about 10 per cent of the value of the equity of redemption. In May, 1915, the sheriff made to him a deed of the land. He brings this action to quiet his title. Because of superior equities the district court gave judgment permitting defendant to redeem by paying the plaintiff his money, with interest, and a bonus of $150. The plaintiff appeals and demands his pound of flesh. He made good money by acting as the friend, broker, and adviser of Jackson, and by placing his mortgage securities and realizing good money commissions. Their relations became so friendly and brotherly that Jackson trusted his friend Hendrick to bid in his land and to protect him against foreclosure sales, and in short to act the part of a guardian.

The claim of plaintiff is based on a foreclosure of the Graeber mortgage, which Hendrick obtained and caused to be foreclosed. It had no date. It was made to secure three promissory notes,—$150, due November 1, 1913; $111, due November 1, 1913; $300, due November 1, 1914. The mortgage was made to secure a cash loan of $400 and interest and a void promise to pay Graeber $200 for not bidding against Jack-

son at the government sale of land. Max Hendrick probably had some interest in the Graeber claim. He had it for collection. Jackson testifies: "Hendrick came to my place with the mortgage already made out. He said, It runs to Graeber covering the debt, $400. He said it covers only 40 acres in section 30." Hendrick did not read the mortgage. He was sixty-five years old and could not read without glasses. Hendrick said he was in a hurry. I says: "Is it on the 40 acres, and he says, 'Yes,' " and such is the testimony of Mrs. Jackson. Hendrick admitted that he did not read the mortgage to Jackson. Jackson says: "I signed it, but I did not read it at all. I borrowed $400 from Graeber. I paid, I believe $300 or $400;" but, as it turned out, the mortgage was on the 40 acres and on the north half of section 22, and it was acknowledged by Max Hendrick as of June 21, 1913, but the mortgage was not filed for record until September 11, 1913.

On April 3, 1914, seven months before the mortgage became due Graeber and Jackson commenced proceedings to foreclose it. The sale was made by the sheriff on May 9, 1914. For these and several other reasons the foreclosure should be held void:

1. The mortgage has no date and the notice of sale must give the date of the mortgage.

2. The acknowledgment was taken or put on by Max Hendrick, who was not a disinterested person, and it was not recorded until September 11, 1913.

3. The affidavit in regard to the publication of the foreclosure notice is that it was published five successive weeks commencing on the 3d day of April and ending on the 8th day of May, 1914.

4. The notice of sale does not give the date of recording the mortgage as required by statute. Comp. Laws, § 8080.

5. The power of attorney to foreclose is defective. It does not show the residence or postoffice of the person named as the attorney. It does not show that any sum is due on the mortgage.

6. The notice of sale does not state the amount due on the mortgage. In the certificate of sale it is stated that the sum due at date of sale is $443.73 and then there is added costs of sale, making a total of $493.73.

7. As a matter of fact nothing was due on the mortgage at the time of the sale. By giving Jackson credit for the amount paid on the mortgage and credit for the $200 bonus, wrongfully included in the mortgage,

nothing was unpaid only a part of the $300 note, which did not become due until seven months after the foreclosure.

For these reasons it appears that the mortgage foreclosure is void, but were it clearly valid no court should be asked to sustain such a drastic procedure. For his very questionable claim of $500 plaintiff wants the court to give him clear title to an equity worth $5,000. That is altogether preposterous. The manifest duty of plaintiff was to protect Jackson, instead of figuring to beat him out of his land by hasty, premature, snap foreclosure. He was bound to refrain from taking an undue advantage of Jackson even through the form and technicalities of law. Under such facts the trial court should not have allowed Max Hendrick a bonus of $150. The foreclosure proceedings were not conducted fairly or in good faith or according to law.

Judgment affirmed.

TILLIE ROZELL, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

(167 N. W. 489.)

Highway by prescription — or sufferance — abutting land — owner of — liability of — for obstructions or dangers — to travel — confined to beaten or traveled track.

1. In the case of a highway by prescription or sufferance the liability of the owner of the abutting land for obstructions or other dangers to the travel thereon is as a rule confined merely to the beaten or traveled track.

Real estate — owner of — use of by — ordinary care exercised by — injuries to traveler on abutting highway — damages for — not liable.

2. Where the owner of real estate has exercised ordinary care in the use of

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NOTE.—The question of liability of abutting owner for placing near highway object calculated to frighten horses is discussed in a note in 12 L.R.A.(N.S.) 1152, where it is stated that an owner of land has the right to use his property for every lawful purpose for which he may desire to use it, and is required to exercise only ordinary care in that use, in order to relieve him from liability for damages on account of injuries incidentally resulting to a traveler on the highway. This doctrine was applied in Piollet v. Simmers, 106 Pa. 95, 51 Am. Rep. 496, which is fully set out in the opinion in Davis v. Pennsylvania R. Co. 218 Pa. 463, 67 Atl. 777.

his property, he is not liable for damages incidentally resulting to a traveler on an abutting highway.

Railway company — permit crossing on track — by highway — ordinary care at use — to keep crossing safe — highway not legally described or appropriated — when company liable for damages.

3. Where a railway company permits a crossing of its tracks by a highway it must use ordinary care to make and keep the crossing safe for travel, and this even where the highway has not been regularly and legally described or appropriated. It is not liable, however, for accidents upon such highway which are indirectly occasioned by its use of its premises, in a manner which is not ordinarily and usually calculated to occasion danger.

Things calculated to frighten horses — what are — determined how — courts — juries — opinion evidence — not necessary upon such question.

4. Whether an article is or is not calculated to frighten horses is a question which is to be determined by the experiences, observations, and intellect of the courts and jury as applied to all the facts of the particular case, and opinion evidence need not be introduced thereon.

Articles not dangerous — judicial notice — courts will take.

5. The courts will take judicial notice of the nature and appearance of nail kegs, and that there is nothing in them which is intrinsically dangerous or usually calculated to inspire fright in a team of horses.

Opinion filed December 28, 1917. Rehearing denied April 30, 1918.

Action for personal injuries.

Appeal from the District Court of Billings County, Honorable *W. C. Crawford,* Judge.

Judgment for plaintiff. Defendant appeals.

Reversed.

Watson, Young, & Conmy, for appellant.

At the time of the occurrence of the accident of which complaint is here made, the railway crossing, or traveled road in question, had not been so used for twenty years, and not having continued for twenty years, the public had acquired no prescriptive right to the same as a highway. Burleigh Co. v. Rhud, 23 N. D. 362, 136 N. W. 1082.

In any event, it is doubtful whether the public could ever acquire anything more than the permissive right to use the crossing. Lincoln v. G. N. R. Co. (N. D.) 144 N. W. 713.

But assuming that we have here a highway by prescription, then such

highway is limited to the land actually used as a highway. "It is not necessary that a highway established by user should be of the statutory width of 4 rods. A highway by user becomes such as to the width and extent used." Wayne Co. v. Miller, 31 Mich. 447–449; Lyle v. Lesia, 64 Mich. 22, 31 N. W. 23; Scheimer v. Price, 65 Mich. 638, 32 N. W. 873; Kruger v. Le Blanc, 70 Mich. 76, 37 N. W. 880; Kratt v. Lewis, 39 Mich. 7; McKay v. Doty, 63 Mich. 581, 30 N. W. 591; Gregory v. Knight, 50 Mich. 61, 64, 14 N. W. 700; Coleman v. Railroad Co. 64 Mich. 163, 31 N. W. 47; Wayne Co. Sav. Bank v. Stockwell (Mich.) 48 N. W. 175.

"Adverse use by the public for the period named in the Statute of Limitations will establish a highway by prescription, but the title will be confined to the very way traveled during the period." State v. Auchard (Mont.) 55 Pac. 361.

Relying for right of way on use, the right could not extend beyond the use. District of Columbia v. Robinson, 180 U. S. 100; Davis v. Bonaparte (Iowa) 114 N. W. 896.

To establish a highway by prescription, the use must be general, uninterrupted, and continuous for the full period of the statute, and then even the right only covers that part actually used. Code of 1873; Gray v. Haas, 98 Iowa, 504, 67 N. W. 394; State v. Mitchell, 58 Iowa, 567, 12 N. W. 598; Fountain v. Keen, 116 Iowa, 409, 90 N. W. 82.

But this crossing, or the land used therefor, was in use for private purposes long before the crossing or way was used, and the place where the accident occurred never became a part of a public thoroughfare. 1 Thomp. Neg. 1194; Arndt v. Thomas (Minn.) 100 N. W. 378.

Any right which the public acquired to use this road was subject to such uses of the property as the defendant was then making of it. The public takes the right of use of such a road subject to the necessary and proper uses of the defendant company in storing its property or keeping it safe, and to use materials thereon necessary for repairs, such as kegs of nails, etc. Davis v. Bonaparte, 114 N. W. 96; East Tennessee Tel. Co. v. Parsons, 159 S. W. 584; Bayard v. Standard Oil Co. (Or.) 63 Pac. 614.

When the highway depends solely for its establishment upon adverse and continuous user by the general public, its width and extent of servitude are measured and determined by the character and extent of the

user, for the easement cannot be broader than the user. Marchand v. Maple Grove, 48 Minn. 271, 51 N. W. 606; Paper Co. v. West, 58 Wis. 599, 17 N. W. 554; Bartlett v. Beardmore, 77 Wis. 356, 46 N. W. 494; Scheimer v. Price, 65 Mich. 638, 32 N. W. 873; Western R. Co. v. Alabama G. T. R. Co. 96 Ala. 272, 11 So. 483; Bank v. Stockwell, 84 Mich. 586, 48 N. W. 174; O'Donnell v. Chicago, M. & St. P. R. Co. 28 N. W. 464.

No property owner is liable in damages to a person whose horses are frightened by such objects—kegs of nails—as were here placed along the highway in the ordinary course of affairs. These objects were in their usual and customary place for use by the defendant company, in repair work, in the ordinary manner. The use of the ground and of the nails was incident to defendant's proper and lawful business, and intended to contribute to the safe maintenance and operation of its railroad. 33 Cyc. 185; Pittsburgh Southern R. Co. v. Taylor, 104 Pa. 306, 49 Am. Rep. 580.

"The substance of the doctrine is that the mere exercise of the right of obstruction for a lawful purpose imposes no liability to pay for damages resulting therefrom. It must be an unreasonable or a negligent exercise of the right, in order to impose liability." Piollet v. Simmers (Pa.) 51 Am. Rep. 500; Chicago, B. & Q. R. Co. v. Roberts (Neb.) 91 N. W. 708; Lake Erie & W. R. Co. v. Juday (Ind.) 49 N. E. 843; Witham v. Bangor & A. R. Co. (Me.) 52 Atl. 764; O'Donnell v. Chicago, M. & St. P. R. Co. 28 N. W. 464; Davis v. Penn. R. R. Co. 12 L.R.A. (N.S.) 1152, and note, 218 Pa. 463, 67 Atl. 777; Davis v. Penn. R. Co. 218 Pa. 463; O'Sullivan v. Knox, 178 N. Y. 565, 80 N. Y. Supp. 848; Chandler v. Illinois C. R. Co. (Ill.) 100 N. E. 152; Elliott, Railroads, 1264; Cook v. Rice Lake Mill. & Power Co. 146 Wis. 535, 32 L.R.A. (N.S.) 1225, 130 N. W. 953, 132 N. W. 346, Ann. Cas. 1912C, 458.

Such obstructions must be unusual and out of the line of necessary and reasonable use, and must show negligence. East Tennessee Tel. Co. v. Parson, 159 S. W. 584; Nichols v. Atkins, 66 Me. 402; Keith v. Easton, 2 Allen, 552; Simonds v. Maine Tel. & Tel. Co. 72 Atl. 175; Heist v. Jacoby, 98 N. W. 1060; Gilbert v. Flint & P. M. R. Co. 16 N. W. 868; Hebbard v. Berlin, 32 Atl. 229; Cleveland, C. C. & I. R. Co. v. Wynant, 17 N. E. 118; People v. Cunningham (N. Y.) 43 Am. Dec. 709; Malloy v. Griffey, 85 Pa. 275.

Where a special verdict is allowed for presentation to the jury, it is error for counsel to argue the cause to the jury generally. The argument must be confined to the matters covered by the special verdict. In such cases the jury are not to know how their answers will affect the general liability of the parties. Morrison v. Lee, 13 N. D. 599; Guild v. More, 32 N. D. 476; Snider v. Walsh Power Co. 120 Pac. 88.

J. K. Swihart and *Gallagher & Halliday,* for respondent.

Although a railroad crossing is not on a public street or highway it becomes a public crossing so as to impose upon a railroad company the same liability as at a public crossing where the railroad company, by some act or designation, invites or induces persons to regard and use it as such; or where with the company's acquiescence it has been used as a public crossing for a long time. 33 Cyc. 921; Coulter v. G. N. R. Co. 5 N. D. 568, 67 N. W. 1046; Johnson v. G. N. Ry. Co. 7 N. D. 284; Bishop v. R. Co. 4 N. D. 540, 62 N. W. 605; Kunel v. Soo R. Co. 18 N. D. 367; Black v. Central R. Co. 51 L.R.A.(N.S.) 1215, 89 Atl. 24.

The distinction between the doctrine of "implied invitation" and dedication is clear and fundamental; dedication is the permanent devotion of private property to a use that concerns the public in its municipal character; the doctrine of *sub judice* is a rule of negligence applicable to the owner of property only as long as he holds it out as intended for use by the public in their capacity as individuals. Homes v. Drew, 151 Mass. 578, 25 N. E. 22; Plumber v. Dill (Mass.) 32 Am. St. Rep. 463; 37 Am. Dig. Col. 392, Decen. Dig. L. Supp. Negligence, Key No. 32; Chicago, etc., R. Co. v. Reith, 65 Ill. App. 461; Baltimore & O. S. W. R. Co. v. Slaughter (Ind.) 7 L.R.A.(N.S.) 597, 79 N. E. 186; Wolf v. Des Moines Elev. Co. (Iowa) 98 N. W. 301.

One who impliedly invites another upon his premises, as the defendant here did, owes to such other person a greater degree of care than he does a mere licensee. Pomponio v. New York, H. & H. R. Co. (Conn.) 32 L.R.A. 530.

It is immaterial to the liability of the railroad company if it places or leaves objects near a crossing on its right of way, calculated to frighten ordinarily gentle horses, that such objects were not on the highway or within the margins thereof. 33 Cyc. 940, 1153; Heinmiller v. Winston, 131 Iowa, 32, 6 L.R.A.(N.S.) 150, 117 Am. St. Rep. 405, 107 N. W. 1102; Atchison, T. & S. F. R. Co. v. Morros, 45 Pac. 956; Baltimore

& O. S. W. R. Co. v. Slaughter (Ind.) 7 L.R.A.(N.S.) 597, 79 N. E. 186; Wolf v. Des Moines Elev. Co. (Iowa) 98 N. W. 301; Cleghorn v. Western R. Co. (Ala.) 60 L.R.A. 269.

A railway company is also liable where such objects as are likely to frighten gentle horses are placed on its right of way at a private crossing or a crossing not legally laid out but which it has impliedly invited the public to use. Baltimore & O. S. W. R. Co. v. Slaughter (Ind.) 7 L.R.A.(N.S.) 597, 79 N. E. 186; Barber v. Manchester, 72 Conn. 675, 45 Atl. 1014; Ft. Wayne Coop. Co. v. Page, 170 Ind. 585, 23 L.R.A. (N.S.) 946, 84 N. E. 145; Wolf v. Des Moines Elev. Co. 126 Iowa 659, 98 N. W. 301, 102 N. W. 517; Heinmiller v. Winston, 131 Iowa, 32, 6 L.R.A.(N.S) 150, 117 Am. St. Rep. 405, 107 N. W. 1102; Lobenstein v. McGraw, 11 Kan. 645; Cleghorn v. Western R. Co. 134 Ala. 601, 60 L.R.A. 269.

Whether or not defendant was negligent is to be determined from the purpose for which the kegs of nails were placed on the highway, the time at which they were placed there, and the period during which they were allowed to remain, and the manner and place in which they were put. Atchison, T. & S. F. R. Co. v. Morrow (Kan.) 45 Pac. 956; Heinmiller v. Winston, 7 L.R.A.(N.S.) 150; Nye v. Dibley (Minn.) 93 N. W. 524; Mallory v. Griffey, 85 Pa. 275.

Whether the kegs occupying the position in which they were placed were objects calculated to frighten horses was a question for the jury. Overson v. Grafton, 5 N. D. 281, 65 N. W. 676; Aver v. Norwich, 39 Conn. 376, 12 Am. Rep. 396; Atchison, T. & S. F. R. Co. v. Morrow (Kan.) 45 Pac. 956; Cleghorn v. Western R. Co. 134 Ala. 601, 60 L.R.A. 269.

A charge otherwise proper is not erroneous merely because an intelligent juror would know therefrom the effect of his answers to the special questions. Swallow v. First State Bank (N. D.) 161 N. W. 207.

This is especially true where the court charges the jury that they are not to consider what the ultimate effect of their answers will be. Chopin v. Badger Paper Co. (Wis.) 53 N. W. 452.

Even if the jury had found that the plaintiff was guilty of want of prudence and ordinary care in permitting the boy to drive the team, still they must have also found that such want of care and caution con-

tributed proximately to the injury sustained. Mares v. N. P. R. Co. 3 Dak. 336, 21 N. W. 5.

It must clearly appear that an instruction prejudicially erroneous misled the jury, or it is harmless. Pendroy v. G. N. R. Co. 17 N. D. 453, 117 N. W. 531; Lemke v. Milwaukee, E. R. & L. Co. (Wis.) 136 N. W. 286.

Mere verbal inaccuracies in instructions are not ground for reversal, unless of such a nature as to be misleading. 13 Standard Proc. 811; Silke v. Johnson, 22 N. D. 75, 132 N. W. 640, Ann. Cas. 1913E, 1005; Horn v. Southern R. Co. 78 S. C. 67, 58 S. E. 963; McIntyre v. Orner, 4 L.R.A.(N.S.) 1130, 76 N. E. 750; Swalm v. N. P. Ry. Co. (Wis.) 128 N. W. 62; Palmer v. Schultz, 138 Wis. 455, 120 N. W. 384.

The terms, "calculated" and "having a tendency," have been used interchangeably by the courts frequently, in the sense in which they were used in the case at bar. Norfolk & W. R. Co. v. Gee, 3 L.R.A.(N.S.) 111; Colby v. McDermont, 6 N. D. 495.

Bruce, Ch. J. This is an action for damages which are alleged to have been sustained by reason of a team taking fright at some kegs of nails or spikes and running away.

The accident happened in the town of Medora and at or near a crossing of the defendant and on a road which passed by the depot. The road had never been legally laid out, but was simply a winding trail along the river which had been in use for many years. The crossing over the river was put in in September, 1884. Just before reaching the railway crossing, as one drives north toward the town of Medora on this road, there is a wooden bridge which is about 3 feet lower than the grade of the tracks. The kegs in question were about 5 feet north of the tracks and on ground level with them, and from 10 to 30 feet of the traveled highway. One approaching the tracks from the south would have no difficulty in seeing them.

There had been a wreck in the yards at Medora on August 24th, and these spike kegs were unloaded on the 25th to be used in repairing the track. The accident happened on the 27th day of August. The kegs were just west of the depot. Medora is a small town having a population of about 150 people, and there are no depot accommodations for freight of this kind. It, in fact, never appears to have been the custom of the railroad company to put dead freight of this kind into the depot.

The case is not one of a regularly dedicated or appropriated highway, but of a highway merely by prescription or sufferance. The proof, in fact, is far short of showing it to be a highway even by prescription. Burleigh County v. Rhud, 23 N. D. 362, 136 N. W. 1082.

If the defendant had been an ordinary landowner it is very clear that there would have been no liability on its part, as not only are the liabilities of one who consents to a highway by prescription or by license merely confined to the track itself (see State v. Auchard, 22 Mont. 14, 55 Pac. 361; Davis v. Bonaparte, 137 Iowa, 196, 114 N. W. 896; Bayard v. Standard Oil Co. 38 Ore. 438, 63 Pac. 614; O'Donnell v. Chicago, M. & St. P. R. Co. 69 Iowa, 102, 28 N. W. 464), but, to quote from the language of the supreme court of Pennsylvania, "if a farmer may not have a barrel of cider, a bag of potatoes, a horse power, a wheelbarrow or a wagon standing on his own premises by the side of the highway, except at the risk of having his whole estate swept away in an action for damages occasioned by the fright of an unruly horse, the vocation of agriculture will become perilous indeed." See Piollet v. Simmers, 106 Pa. 95, 51 Am. Rep. 496.

To again quote: "The principle is freely conceded that every person must so use his own property as not to injure others, and if he in a reckless, wanton, and wilfully negligent manner makes such use of his property as to injure others, he may be held liable in damages. It is equally true, however, that an owner of real estate has a right to use his property for every lawful purpose for which he may desire to use it, and is only required to exercise ordinary care in that use in order to relieve him fom liability for damages on account of injuries incidentally resulting to a traveler on the highway." Davis v. Pennsylvania R. Co. 218 Pa. 463, 12 L.R.A.(N.S.) 1155, 67 Atl. 777.

Although it is no doubt true that, if a railway company allows a crossing it must use ordinary care to keep such crossing in a safe condition, no different rule applies in the case of such a company than in that of an ordinary person.

The question is after all one of negligence; and although this question of negligence is ordinarily one for the jury, and in many cases of obstructions or unusual objects at a crossing, the question has been held to be a mixed question of law and of fact, it is almost everywhere held

that no proof need be introduced in the line of opinion evidence as to the tendency of the article to frighten horses, but that at most the matter is one which "is to be determined by the experience, observation, and intellect of the courts and jury as applied to all the facts of the particular case before them." Cleveland, C. C. & I. R. Co. v. Wynant, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118. There must also be some limit to liability and some reason; and the cases all recognize the fact that in some instances the nature of certain objects is a matter of such general knowledge that the courts may take judicial notice of the same, and that in such cases the question is one of law and of law alone. See Gilbert v. Flint & P. M. R. Co. 51 Mich. 488, 47 Am. Rep. 592, 16 N. W. 868, cited in Cleveland, C. C. & I. R. Co. v. Wynant, supra.

It must be remembered that in the case at bar the kegs were not placed in the highway but from 10 to 30 feet therefrom. They were placed upon the defendant's own property; and though perhaps it was not absolutely necessary to the work for which they had been obtained, namely, the repair of the tracks after a wreck, that they should have been put in that particular place, they were being used in that work, were placed where they were for that purpose, and were much in the same situation as the sacks of grain which the farmers everywhere in North Dakota scatter in their fields and along their highways during seeding operations, and as the machinery which they leave in the fields, and the sacks, tools, and utensils which they leave around their dwellings.

The question is, Would a reasonably cautious and intelligent man have anticipated that any danger to the traveling public would have arisen from such an act?

We think not, and that there is no room for reasonable men to differ on the proposition. Such being the case, the point is one for the court, and not for the jury, to pass upon.

We must of course take judicial notice of the nature and appearance of nail kegs. There is nothing in them more dangerous in appearance or more calculated to inspire fright than in a stump of a tree, a stone, a government mail box, or a sack of grain.

The testimony also shows that there was a bridge on the road to the south, the north end of which was 27 feet from the center and only 2.7 of an inch lower than the crossing. It is therefore clear that the plaintiff, when sitting in the seat of the wagon or buckboard, was in

clear view of the kegs, as, in fact, must any person of ordinary height have been even though walking upon the ground; and although the kegs might have been hidden while passing through the intervening portion of 27 feet, their existence must have been clearly known.

We are of the opinion that no negligence was shown on the part of the railway company. The judgment of the District Court is therefore reversed, and the cause is remanded with directions to dismiss the complaint.

GRACE, J. I dissent.

ROBINSON, J. (specially concurring). This is an appeal from a verdict and a judgment for $2,000 against the railway company. The charge is that at the crossing of a highway in Medora, and within a few feet of the highway, defendant by negligence left four kegs of spikes which frightened and caused a team of horses to run away with the plaintiff, to her damage $2,000. At the time of the runaway the plaintiff and her three small children were in a buckboard or one-seated buggy, and the team was driven by a little boy eleven years old weighing 59 pounds. The runaway occurred as the team was on the descent from a railway crossing, about 7 or 8 feet above the level of the country. One of the children was a baby, and when the team commenced to run, the mother took the baby on her lap and took hold of the lines with the boy. The boy was thrown out and took one line with him. The mother grabbed for the line, but could not reach it, so she was left in the buggy with the baby and another child and only one line to guide the team.

The case presents only two questions: (1) Was the company guilty of negligence in leaving the kegs near the highway, and did such kegs cause the team to run away? (2) Was the plaintiff guilty of contributory negligence in permitting so young and small a child to drive the team over such a crossing with his mother and the small children?

Of course the findings of the jury are in favor of the plaintiff, and on doubtful questions of fact on which there is conflicting evidence the courts commonly put the responsibility onto the jury and in that way wash their own hands of any guilt. Still, in reviewing a case of this

kind, it is for the judges to use their common sense and common knowledge. Kegs of nails are kegs of nails, boys are boys, horses are horses, and kegs of nails do not frighten them.

A little boy of eleven years old, weighing fifty-nine pounds, is not fit to drive a team and buckboard or one-seated buggy with a woman and two other small children. A woman with a baby on her lap is not fit to assist a little boy in driving a team over a rather dangerous place. In time of danger a team of horses should always be in control of a man, especially when there is on board a woman with small children. The chances are a thousand to one—and it may be easily demonstrated—that any competent man can safely drive a thousand teams over the crossing in question regardless of nail kegs, however numerous. When a team starts to run away a man can haul them in, saw their mouths, bring them to their senses with a good lash of the whip, and he can ride as fast as the team can run, and keep them on the road. But that may not be true in case of a man hampered and crowded with a lot of small children. It was sheer negligence and want of care and prudence for the mother to crowd herself and three small children onto the buckboard or one-seated buggy. It was made for only two persons. In driving a team a little boy is at a great disadvantage. He has not sufficient strength or the presence of mind. The horses know when they have a boy driving them and they have no confidence in him, but if the boy had been alone he would not have been crowded off his seat, and he could have remained in the buggy.

Mrs. Olmstead saw the accident and immediately heard the boy tell of it. He said: "Well, I don't know, unless the whiffletree got into the wheels and when it got loose it bumped the horses on the heels and they jumped and turned so short I fell out." In going down a hill with such a load, the horses must hold back, and there is danger of the whiffletree coming in contact with the horses' legs; that is a frequent cause of runaway.

The conclusion is that the railway company was not guilty of negligence in placing the nail kegs as they did, and defendant was guilty of negligence in driving with her three small children as she did, and her own negligence was the proximate and real cause of the accident.

On Petition for Rehearing.

BRUCE, Ch. J. In the petition for a rehearing in this case, exception is taken to several of the statements and the holdings of the main opinion, among them being one to the effect that "the kegs in question were about 5 feet north of the tracks, and on ground level with the tracks, and from 10 to 30 feet of the traveled highway. When approaching the tracks from the south one would have no difficulty in seeing them." The testimony also shows that there was a bridge on the road to the south, the north end of which was 27 feet from the center and only 2.7 feet lower than the crossing. It is therefore evident that the plaintiff when seated in the seat of the wagon or buckboard was in clear view of the kegs, as, in fact, most any person of ordinary height could have been even though walking upon the ground, and, although the kegs might have been hidden while passing through the intervening portion of the 27 feet, their existence must have been known.

Plaintiff and appellant claims that the evidence is that "from a point 97.3 feet south of the center of the crossing to the top of the south rail is an elevation of 7.3 feet, that from a point 9 feet north of the north rail and 10 feet east to the east thereof, which is approximately where the jury found that the kegs were placed, to the top of the north rail, is an elevation of 19.5 inches. The kegs, it is claimed, were about 2 feet high. It is claimed that it can be at once seen that the kegs were almost entirely concealed by the north rail when one stood on the crossing. Approaching from the south a team went up a grade of 7.3 feet in a distance of 93 feet to get on the crossing." Such being the case, plaintiff says that he is at a loss to know how the plaintiff could see the kegs before she got on the crossing.

All this may be true. Counsel, however, takes his data from the south end, and not the north end, of the bridge, and from a distance of 97.3 feet from the crossing, whereas the undisputed evidence also shows that the north end of the bridge and the part thereof which was nearest to the tracks was only 2.7 feet lower than the crossing. It is clear, therefore, that the kegs could have been seen from this point even if they could not have been seen from the other end of the bridge.

All of this, however, we hold to be unimportant. The question is whether the railroad company was negligent,—whether it was negligence

to leave the nail kegs where it did,—and we still adhere to our original opinion on this proposition.

In addition, and in response to the petition for a rehearing, we may say that it is immaterial whether the kegs were 10 feet or 6 feet from the tracks; also whether the company was in the habit of keeping such freight in its depot or had the facilities for so doing. We do not, in short, hold that a nail keg is an article which is easily calculated to frighten horses. We also note the contention that, although a highway by prescription is not proved, there is evidence of a crossing which had been sanctioned and allowed by a railroad company, and we are also aware of the general rule of law that, where a railroad company allows a crossing, it is required to use proper precautions for the safety thereof. We do not, however, find any lack of those reasonable precautions. We believe the law to be that "in no such case can a plaintiff recover unless the object of fright presents an appearance that would be likely to frighten ordinary horses, nor unless the appearance of the object is such that it should reasonably be expected that it might have that effect." See Nichols v. Athens, 66 Me. 402; Card v. Ellsworth, 65 Me. 547, 20 Am. Rep. 722. We cannot hold that a nail keg is such an object.

The petition for a rehearing is denied.

WEBER CHIMNEY COMPANY, a Corporation, Appellant, v. T. P. RILEY, Respondent.

(167 N. W. 753.)

District court — balance of account — action to recover — amount recovered — governs right to costs — recovery of fifty or more — amount reached by including interest — carries costs.

In an action in the district court to recover the balance of an account on which there is due, and on which plaintiff recovers, $50 or more, he is entitled to costs under § 7794 of the Compiled Laws of 1913, even though the award equals or exceeds that amount only by virtue of the inclusion of interest on the principal sum demanded and awarded.

Opinion filed May 1, 1918.

Appeal from the District Court of Cass County, *Cole, J.*

Plaintiff appeals.

Reversed and remanded.

Pfeffer & Pfeffer, for appellant.

Our statutes distinguish between the terms "costs" and "disbursements." The former does not include the latter. Comp. Laws 1913, §§ 7790, 7793, 7794.

A verdict for a specified amount, with interest thereon from a certain date at a certain rate, is a good verdict and is sufficiently definite; and where the sum allowed, with interest so computed and added amounts to $50 or more, the party is entitled to recover costs. Gaff v. Hutchinson, 38 Ind. 341; Page v. Cady, 1 Cow. 115; Burton v. Anderson, 1 Tex. 93; Evans v. Reeves (Tex.) 26 S. W. 219; Douglass v. Nichols, 133 Mass. 470; Joannes v. Pangborn, 6 Allen, 243; Loring v. Morrison, 25 App. Div. 139, 48 N. Y. Supp. 975, 5 Ann. Cas. 151; Nelson v. State, 2 Ind. 249.

Barnett & Richardson, for respondent.

The term "costs" includes "disbursements" under our statute. The statute makes no distinction between the two expressions. Wheeler v. Westgate, 4 How. Pr. 269; Emerick v. Krause (Wis.) 9 N. W. 16; Bond v. R. R. (Cal.) 128 Pac. 786; Code, § 7724.

The accumulation of interest on plaintiff's claim was due to its own delay in presenting or prosecuting its claim, and should not be allowed to be added to the actual amount of the verdict in order to increase the whole to a sum greater than $50, and thus carry costs. The action should have been brought in justice court. Such is the clear intention of the legislature. § 7794, subd. 3; Laney v. Ingalls (S. D.) 58 N. W. 572; Pyle v. Co. (S. D.) 47 N. W. 401; Paulson v. Sorenson, (N. D.) 157 N. W. 473.

The matter of costs is purely statutory. Murphy v. Casey (Cal.) 110 Pac. 956.

The word "recovery" has no reference to interest or costs. It relates entirely to the principal sum or amount in dispute, and all other matters are mere incidents. Code, § 7794; 5 Enc. Pl. & Pr. 160, note 2 (cases cited); Andrews v. Austin, 19 Mass. 528; George v. Pangborn, 33 Mass. 243; Van Horne v. Petrie, 2 Caines, 213; Steel v. Co. 2 Johns, 283; Ross v. Doe, 13 Johns, 306; Seaman v. Bailey, Colem & G. Cas. 391;

Mayer v. Arnold, 43 N. J. L. 144; Proctor v. Bailey, 5 Blackf. 495; 7 Words & Phrases, p. 6020.

CHRISTIANSON, J. Plaintiff brought this action in the district court of Cass county to recover the balance due upon an account. The jury returned a verdict in favor of the plaintiff for $43.33, with interest thereon at 6 per cent per annum from September 23, 1914. The interest amounted to $8.20. The total amount of the verdict, principal and interest, therefore, was $51.53.

The sole question presented for our determination on this appeal is whether plaintiff is entitled to recover costs. The trial court held that a plaintiff in an action for the recovery of money must recover at least $50, exclusive of interest, in order to be entitled to costs, and hence, refused to allow costs to the plaintiff. We believe the trial court was in error.

The allowance of costs depends entirely upon the terms of the statute. Butler Bros. v. Schmidt, 32 N. D. 360, 155 N. W. 1092. Section 7794, Comp. Laws 1913, provides: "Costs shall be allowed of course to the plaintiff upon recovery . . . in an action for the recovery of money when the plaintiff shall recover $50."

In this case plaintiff was entitled to interest as a matter of right, and the jury had no discretion as to its allowance. Comp. Laws 1913, § 7142. The verdict in the case was specific. It awarded $43.33, with interest thereon at the rate of 6 per cent per annum from September 23, 1914. The amount of the interest was merely a matter of calculation. The sum awarded by the jury in the verdict was $51.53. The statute is plain, and its meaning clear. No reference is made to, or distinction made between, principal and interest. The right to costs (in actions like the one at bar) is made dependent upon the amount recovered, and not upon the amount demanded in the complaint. Laney v. Ingalls, 5 S. D. 183, 58 N. W. 572; Paulson v. Sorenson, 33 N. D. 488, 157 N. W. 473. A party who owns an obligation on which there is due, and on which he recovers, $50 or over in a suit in the district court, is entitled to costs.

In considering the same question under a statute quite similar, the appellate division of the New York supreme court said: "On the last trial the plaintiff recovered judgment in the sum of $50.08 This was made up of $45.50 found to be due to the plaintiff upon the note

in suit, and $4.58 of interest thereon. The appellants insist that this interest cannot be regarded as part of the recovery for the purpose of fixing the right to costs, and that, inasmuch as the principal sum due on the note was less than $50, the plaintiff is not entitled to costs, under § 3228 of the Code of Civil Procedure. It seems to us, however, immaterial how the verdict is made up, if the total amount awarded by the jury equals or exceeds the sum of $50." Loring v. Morrison, 25 App. Div. 139, 48 N. Y. Supp. 975. See also Douglas v. Nicholas, 133 Mass. 470; Knecht v. Freyman, 86 Pa. 333; 5 Standard Proc. 874.

There is, however, a distinction between interest accruing before, and included in, the verdict, and interest on the verdict from the time of its return until judgment is rendered. Interest awarded by the jury in the verdict is part of the amount recovered by the prevailing party. But interest on the verdict is not ordinarily deemed a part of the recovery in determining the right to recover costs. Under our statute such interest is designated as costs to be taxed in favor of the party entitled thereto. Comp. Laws 1913, § 7799.

The decision of the trial court is reversed, and the cause remanded, with directions that costs be taxed and allowed in favor of the plaintiff.

GUST ECKSTRAND, Respondent, v. GUST JOHNSON, Appellant.

(167 N. W. 521.)

New trial — motion for — order denying — appeal — motion to dismiss — for want of prosecution — excusable delay — appeal perfected during pendency of motion — motion denied.

Where an appeal has been taken from an order denying a motion for a new trial, and motion is made to dismiss such appeal for want of prosecution and delay in presenting a settling of the statement of the case, and in sending up the judgment roll and delay in serving the brief, and it appears that the appellant relies principally upon the newly discovered evidence supported by affidavit as ground for a new trial, and it appearing the complete record on appeal was perfected and filed during the pendency of the motion to dismiss, —.

Held, under these circumstances, the motion to dismiss the appeal in this case should be denied.

Opinion filed May 2, 1918.

Motion to dismiss appeal.
Motion denied.
Lee Combs and *L. S. B. Ritchie,* for respondent.
Cowan & Adamson and *H. S. Blood,* for appellant.

GRACE, J. This is a motion to dismiss defendant's appeal from an order denying a motion for a new trial and from the judgment, and for an order affirming the order denying defendant's motion for a new trial and affirming the judgment, for the reason that appellant has failed and neglected to perfect and prosecute such appeals in the manner and within the time allowed by law. Judgment was entered in the case on the 11th day of December, 1916, in favor of the plaintiff. Defendant thereafter applied to the court for a stay of execution for the purpose of procuring a transcript of the testimony in such action, settling a statement of the case and moving for a new trial. A stay of about three months was granted; namely, to the 24th day of March, 1917.

On May 2, 1917, the appellant moved for a new trial, principally upon the ground of newly discovered evidence. On the 31st day of May, thereafter, the trial court entered its order denying appellant's motion for a new trial. On the 25th day of June, thereafter, appellant appealed from the order of the court denying a new trial. The appellant, in his affidavit opposing the respondent's motion to dismiss the appeal, relies almost exclusively upon his affidavits, wherein it is shown that he relies upon newly discovered evidence as the basis of his right to a new trial. The affidavit of Gust Johnson, Anton Ross, and Andrew Osterland are relied upon in this regard.

Subsequent to the service of the motion to dismiss the appeal, the record on appeal has been perfected and filed so that the appeal may now be determined on its merits. The motion to dismiss the appeal in this case is denied.

CHRISTIANSON, J. (concurring specially). It appears from affidavits filed, and it is a matter of common knowledge, that Judge Cowan, the senior member of the firm representing plaintiff, died during the pendency of this appeal. It is further stated in affidavits submitted by appellant that Judge Cowan was primarily in charge of the appeal. The record on appeal had been transmitted and appellant's brief served

and filed before the motion to dismiss was argued. Under all the circumstances I am satisfied that the delay in the transmission of the record and the service and filing of appellant's brief is not so great as to justify the court in dismissing the appeal.

HENRY LEMKE, Respondent, v. ALBERT THOMPSON, Appellant.

(167 N. W. 754.)

Contract — cause of action on — complaint — supplemented by answer setting up contract — terms of — account stated.

1. The complaint in the action is examined and *held* to state a cause of action on contract, being supplemented by the answer which sets up the contract in full out of which the suit arose, thus supplying any deficiency in the allegations in the complaint with reference to the terms of the contract. It is also further *held* that the complaint states a cause of action on an account stated.

Verdict — evidence — sustained by.

2. Evidence is examined and *held* to amply sustain the verdict of the jury.

Court — rulings of — on trial.

3. Rulings of the court examined and *held* to contain no reversible error.

Court — instructions to jury.

4. Instructions of the court examined and *held* to be without error.

Opinion filed May 3, 1918.

Appeal from the District Court of Ramsey County, North Dakota, Honorable *A. T. Cole,* Judge.

Affirmed.

Frich & Kelly, for appellant.

An account stated can only arise after a mutual examination of the claims existing, an agreement as to their correctness, and a definite fixing of the amount due and a promise to pay. Words & Phrases, 93.

Evidence that falls short of showing these facts, does not show an account stated. Coffee v. Williams (Cal.) 37 Pac. 504; Rosenbaum

v. McEwan, 131 Pac. 781; Gunn v. Mining Co. 130 Pac. 458; Teller v. Sumner, 18 Atl. 1071.

No statement of account, correct or otherwise, was ever forwarded to appellant. A demand for payment of a gross sum is not a "statement of account." 1 Century Dig. 754, § 31; Packing Co. v. Tallant, 133 Fed. 990; Howell v. Johnson, 38 Or. 571, 64 Pac. 659; Peoria Co. v. Turney, 58 Ill. App. 563; Davis v. Bank, 19 Wash. 65, 52 Pac. 526.

In this case there was no book debt or so-called account between the parties. The liability here is based upon and flows out of an express agreement reduced to writing. Therefore the written contract itself is the operative instrument, and the doctrine of account stated does not apply. Jasper v. Lamkin (Ala.) 24 L.R.A.(N.S.) 1237, 50 So. 336; Thomasma v. Carpenter (Mich.) 141 N. W. 559; Valley Lumber Co. v. Smith, 71 Wis. 308, 37 N. W. 413; Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99, 108; Gilson v. Stewart, 7 Watts, 100; Middleditch v. Ellis, 2 Exch. 623; Gutschall v. Cooper (Colo.) 86 Pac. 125; Williams v. Williams, 3 Ind. 222; Gallenger v. Traffic Co. (Wis.) 30 N. W. 790; Fraley v. Bispham, 10 Pa. 320, 51 Am. Dec. 486; Brewing Co. v. Friar (Mich.) 58 N. W. 52.

The contract here was required to be written, and being written, it could be altered only by an additional or supplementary contract in writing, or by an executed oral agreement. Comp. Laws 1913, §§ 5937, 5963.

No rescission of this contract has ever been made, nor has any new contract been shown to have been performed. Arnett v. Smith, 11 N. D. 55; Cotton v. Butterfield, 14 N. D. 465; Silander v. Gronna, 15 N. D. 552.

In instructing the jury it is the duty of the court to instruct only on the issues made up by the evidence, and not to speculate or conjecture upon what might have been in issue. Hutchinson v. Western Bridge Co. 97 Neb. 439, 150 N. W. 193; Eisentraut v. Madden, 97 Neb. 466, L.R.A. 1915C, 893, 150 N. W. 627; Miller v. McCall, 37 Okla. 634, 133 Pac. 183; Kinnaird v. Spottswood, 172 Ky. 612, 189 S. W. 904; Iverson v. Look (S. D.) 143 N. W. 332; Kopacin v. Paper Co. 125 Pac. 281; Senter v. Railway Co. 84 Neb. 256, 121 N. W. 113; Power v. Turner, 37 Mont. 521, 97 Pac. 950; Barron v. Railway Co. 16 N. D.

277; Wuale v. Hazel, 19 S. D. 483; 38 Cyc. 1617–1621 and cases cited in note 40.

A preponderance of the evidence is all that is required to establish a disputed question of fact in a civil action. Dohmen v. Ins. Co. 96 Wis. 38, 71 N. W. 69; McCord v. Moneyhan, 59 Neb. 593, 81 N. W. 608; Frick v. Krabaker, 116 Iowa, 494, 90 N. W. 498; Cooper v. Water Co. (Cal.) 116 Pac. 298; Fisher v. Ins. Co. (Tenn.) 138 S. W. 316; Gehlert v. Quinn (Mont.) 90 Pac. 168; State ex rel. v. Ellison (Mo.) 187 S. W. 23; 38 Cyc. 1755, and cases cited in notes 63–86.

"Regardless of the rule as to the propriety of instructing at all on the burden of proof, an instruction constitutes reversible error when it places the burden on the wrong party." 38 Cyc. 1748, 1749, and cases cited in note 98; Hillyard v. Blair (Utah) 155 Pac. 449.

A verdict that is ambiguous and uncertain as to the amount of recovery should not be received by the court. The jury must definitely fix the amount of the verdict. Comp. Laws 1913, § 7634; 38 Cyc. 1879, 1880, title "Interest," and cases cited; Sonnesyn v. Akin, 14 N. D. 261.

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

The parties here did not contemplate or intend changing or altering their written contract of sale, either in the amount or manner of payment, but sought only to ascertain and settle all dispute regarding the items and actual balance under the terms of the contract. Kreuger v. Dodge (S. D.) 87 N. W. 965; Killops v. Stephens, 66 Wis. 571; Woods v. McPherson, 21 N. D. 384; 1 Cyc. 368.

But notwithstanding the written contract, if subsequently and independently of the same, there is an admission of indebtedness, the amount may be recovered upon an account stated. Young v. Hill, 67 N. Y. 162; Gilson v. Stewart, 7 Pac. 100; Middleditch v. Ellis, 2 Exch. 623.

There need not be mutual accounts and mutual readings and examination in order to create an account stated. It may be one sided and consist of a single item or entry. Gross v. Briener, 18 U. C. Q. B. 410; Foster v. Allanson, 2 T. R. 479; Morvaria v. Ley, 2 T. R. 483; Cortledge v. West, 5 Hill, 488; Danforth v. Twp. Road Co. 12 Johns 227; 1 Cyc. 365; Thomasma v. Carpenter (Mich.) 141 N. W. 559

A contract for the sale of real estate may be rescinded by parol.

Arnett v. Smith, 11 N. D. 55; Cotton v. Butterfield, 14 N. D. 465; Silander v. Gronna, 15 N. D. 552; Wedge v. Kittleson, 12 N. D. 452; Haughan v. Sjernheim, 13 N. D. 616; Mahon v. Wedge, 11 N. D. 181.

GRACE, J. Appeal from the district court of Ramsey county, North Dakota, Honorable A. T. Cole, judge.

This action is one to recover $826.84 for a balance claimed to be due and unpaid upon the amount of the contract for the sale of certain property sold by Fred Lemke to the defendant, which contract for sale of such property and the claim for the payment thereof was, by Fred Lemke, assigned to Henry Lemke, W. F. Lemke, and B. W. Lemke. The plaintiffs claim there was an account stated had between the plaintiff and defendant, and that the agreed balance was $758.34. The facts of the case, concisely stated, are as follows:

In February, 1909, Fred Lemke sold to the defendant his farm implement business, stock in trade, and two parcels of real estate,—all located in Brocket, North Dakota. The terms of such sale were reduced to writing and invoice of property was taken and delivered to the defendant. The written agreement is as follows:

February 9, 1909. This agreement made and entered into this 9th day of February, A. D. 1909, made and entered into by and between Lemke Bros. Implement Company, by Fred Lemke, a member of the firm, party of the first part hereafter called the sellers, and Albert Thompson, party of the second part hereafter called the purchaser, witnesseth: That the said first party hereby agrees to sell their property in the village of Brocket,—lots 14 and 15 in block 4 with buildings, and lots 1 and 2 in block 3 with buildings, stock of machinery, etc., or all known to belong to the business in said business in Brocket for the consideration of $5,807.42 according to mutual agreement heretofore made to said second party that said second party shall assume the contracts entered into by said first party, provided, however, that such debts and liabilities shall only be such as refer to contract with jobbing houses. That manufacturers such as the International Harvester Company or wholesale implement houses, that of total or net amount due said first party shall be deducted, also the sum of $450 already paid as earnest money to bind said purchaser that the invoice

of all goods on hand shall become a part of this agreement and shall be hereunto attached. That said first party or sellers agree to and bind themselves to give or procure warranty deeds to lots numbered 14 and 15 in block 4, and 1 and 2 in block 3, with abstract of title to same when the purchaser or the said second party agrees to pay to said first party, in cash, the net amount due said first party under this agreement. Said second party has paid to said first party the sum of $800, receipt whereof is acknowledged by said first party. Witness our hands and seals the day and year above first written.

Lemke Bros. by Fred Lemke.

Albert Thompson.

Five thousand eight hundred and seven dollars and forty-two cents was the contract selling price of such property, upon which was paid or credited $5,111.58, leaving a balance of $695.84 upon which there would be interest at the legal rate from the time of the sale until the payment thereof. The defendant nowhere proves that he is entitled to any greater amount of credit than $5,111.58; and from the record before us, we are confident that he has received credit for all payments made, shortage for which he is entitled to credit, and payments made to parties such as machine companies under contracts from such companies with Lemke Bros., which contracts were assumed by the defendant. The defendant seeks to avoid liability for the balance claimed by the plaintiff to be due, principally on the ground that the action is not brought upon the contract to recover the balance unpaid, if any, of the contract price; and also seeks to avoid liability upon the theory that the plaintiff, having in his complaint alleged an account stated, has failed to establish the same by competent testimony. These points include about all the merit there is in the defense. It is not difficult to determine that neither of such defenses is really meritorious. If the defendant would show that he had paid the full contract price for the property, or that he had paid a greater portion of the contract price of the property than the plaintiff had given him credit for, so that he would be liable for a lesser sum than the amount for which plaintiff brought suit, such showing would be the basis of a meritorious defense. For the present, brushing aside all technical objections and technicalities, the only real question in the case is: How much money, if any, does

the defendant still owe plaintiff after deducting all payments made, and all credits given?

Considering defendant's first main objection, that the action is not brought upon contract, we are of the opinion that there is no merit in such contention. Under the rule of liberal construction of pleadings, it would appear to us that the complaint, when liberally construed and when taken in connection with the answer and when taken in connection with the fact that the whole contract is pleaded in the answer, states an action upon contract.

The complaint, in part, reads as follows:

"That on or about the 9th day of February, 1909, one Fred Lemke then and there being the owner of a certain machinery business and other property, both real and personal, at or about the village of Brocket, in the county of Ramsey, state of North Dakota, made sale thereof to the defendant, Albert Thompson, at a price then and there agreed upon, and said sale was thereupon consummated between the parties. That certain payments were made thereon, but leaving a balance of $826.84 due and unpaid on the said defendant to the said Fred Lemke, and on or about the 14th day of September, 1909, said balance being still due and unpaid, the account for said balance was duly assigned, transferred, sold, and set over to Henry Lemke, W. F. Lemke, and B. W. Lemke; and the plaintiff herein was, long prior to the commencement of this action, made the owner thereof for the purpose of collection by authorization from the said Henry Lemke, W. F. Lemke, and B. W. Lemke, and is now the owner thereof for the purpose of collection."

It will be observed that the language pleads the sale of the property, and admits the payment for the property with the exception of the sum therein stated. It is true, part of the terms of the sale of the property are not stated, but whatever the plaintiff has failed to state with reference to the terms of the contract are supplemented by the answer, which sets out in full, the agreement. We are of the opinion that the complaint sufficiently alleged the contract of sale, so that it would be permissible to prove what, if any, balance remained unpaid of the price for which such property was sold. In this regard, we do not say that the plaintiff set forth his cause of action under the contract in an ideal form; but considering this part of the complaint on

its own merits and also considering it in connection with the answer, we are able to understand what the issues are which are thus formed. In view of our conclusions in this regard, the contention of the defendant that the court erred in denying defendant's motion for a directed verdict is without merit.

Exhibit 3 was offered in evidence, and it shows payments and credits allowed defendant in the sum of $5,111.58. Among the credits so shown is one for $750, which was in payment for the Olsgard lots. All of these various items and payments were applied in reduction of the contract price on the property. All the different items of payment and credits, as well as the allowance for the shortage, would show a performance of the contract to the extent to which they reduced contract price. These credits to the amount stated are not disputed, and when applied in reduction of the contract price leave a balance substantially equivalent to that for which plaintiff has maintained this suit. Defendant has nowhere shown that he has paid that amount. He must concede that he has received credit for $750, price of the Olsgard lots, and though he paid $865 to Olsgard, the difference between $750 and $865 resulted from the accrued interest on $750 at the time the same was paid, together with the taxes.

The next proposition involved in this case is, assuming that the plaintiff has not made out a case on contract, is he entitled to recover by reason of an account stated? We are of the opinion that he is. There can be no question but that the plaintiff has properly alleged an account stated. Plaintiff alleges in substance that on or about the 30th day of December, 1909, an account was had between defendant and Henry Lemke, W. F. Lemke, and B. W. Lemke, through and by the said Fred Lemke, and a settlement and account stated was agreed upon and the balance due agreed thereon between the said parties, whereby it was agreed that it was then due and owing from the said defendant to the said Henry Lemke, W. F. Lemke, and B. W. Lemke the sum of $758.34, which amount the said defendant agreed to pay, and said Fred Lemke, for and on behalf of the said Henry Lemke, W. F. Lemke, and B. W. Lemke, agreed to accept in full settlement of said account and claim.

The complaint further shows that in the month of May, 1910, the items of said account were again gone over by the plaintiff and defend-

ant, and the said account stated, and the items thereof again ratified by the said defendant at the same agreed balance of $758.34, as being due December 30, 1909, which balance the said defendant again agreed to pay and the plaintiff to accept. This states a good cause of action on an acount stated. An account stated is defined thus:

"In general terms, where an account is rendered by one person to another, showing a balance due from the one to the other, and the indebtedness thus expressed is acknowledged to be due by the person against whom the balance appears, or where parties having previous transactions agree upon a definite balance as due from one to the other, this will constitute an account stated." 1 Cyc. 364.

"The bare statement of a balance due, if accepted, may constitute a stated account, even though the demand is not accompanied by an account of the items, under the rule that if a fixed and certain sum is admitted to be due for which an action would lie, that will be evidence to support a count on an account stated." 1 Cyc. 367.

"To constitute an account stated, the correctness of the balance must receive the assent of both parties. A certain fixed sum must be admitted by the one party to be due to the other, and where there are mutual or cross demands there must be an adjustment, a balance struck, and an assent to the correctness of the balance." 1 Cyc. 369.

"Where the parties meet and go over their accounts, and strike a balance in favor of one of them, to which the other assents as correct, this is sufficient to show an account stated, and the same result is brought about where the person to whom an account is rendered subsequently acknowledges the receipt of it and promises to pay it. An account may become stated where the statement of dealings between two persons is made out by one of them and submitted to the other, who acquiesces in its correctness; and if the acknowledgment in writing is not in fact stronger evidence of a statement of the account, it is at any rate sufficient to make the account a stated one, where the other elements concur." 1 Cyc. 372.

It was a question of fact for the jury whether or not there was an account stated, whether the plaintiff and defendant had a meeting on December 30, 1909, at which time they went over their accounts, and an allowance of the shortage was made the defendant by the plaintiff, and the defendant credited with all the payments and credits to which

he was entitled, and the whole amount thereof deducted from the contract price of the property so as to leave a balance of indebtedness owing from the defendant to the plaintiff. The testimony whether or not an account was stated on December 30, 1909, is somewhat conflicting. There is abundant testimony, however, to show that an account was stated on December 30, 1909. It would serve no useful purpose to set out any or all of this testimony, but it is quite sufficient to sustain the verdict of the jury. It is true that the defendant denies much of such testimony, and equally true there is a conflict in the testimony in regard to whether an account was had and an account stated agreed to. The jury were the exclusive judges of all the facts, and of the weight and sufficiency of the evidence and the credibility of the witnesses.

From all the testimony the jury determined the questions of fact in plaintiff's favor, and assessed his damages at $758.34, with legal interest thereon from December 30, 1909. The verdict of the jury is well sustained by the evidence, and the amount due from the defendant to the plaintiff is the sum set forth in such verdict. The jury could have arrived at the verdict which it rendered, either by determining the amount of the verdict to have been the balance due upon the contract or to have been the amount of the stated account. We have heretofore pointed out that the plaintiff pleaded the contract as well as a stated account.

We have carefully examined all assignments of error based upon the ruling of the court in overruling defendant's objections to the introduction of certain testimony, and also the ruling of the court in sustaining objections by plaintiff to the introduction of certain evidence by the defendant, and find the court, in making such rulings, committed no error. We have also carefully examined all the instructions given by the court and find no reversible error in the giving of such instructions. Exhibit 3 was properly admitted in evidence, and it was a question of fact for the jury, under all the testimony, whether it was a mere memorandum or a stated account.

The judgment is affirmed, with costs.

ROBINSON, J. (concurring). Defendant appeals from a judgment for $758.34 as a balance due upon an account stated. The complaint

avers that in February 9, 1909, Fred Lemke (the plaintiff's assignor) was the owner of a farm machinery business and of certain real property in Brocket, North Dakota, and he sold the same to defendant. That on December 30, 1909, an account was stated between the parties, and it was agreed that there was due and owing to Fred Lemke $758.–34, which he assigned to the plaintiff.

The answer denies the statement of an account. It avers that on February 9, 1909, Fred Lemke made a written contract (of which copy is given) to sell and convey to defendant by warranty deed with abstracts of title, lots 14 and 15 in block 4, and lots 1 and 2 in block 3, in Brocket, North Dakota, for which defendant promised to pay $5,807.42; that Fred Lemke failed to comply with the contract and failed to deliver a deed to the lots and failed to deliver all the personal property. On the trial defendant objected to any evidence of an account stated because it appeared the alleged cause of action was based on a special contract for the transfer of real and personal property, and the complaint failed to state the contract or to show any compliance with its conditions.

However, the court admitted evidence showing the making of the contract, the facts bearing on the performance of the same, the delivery of the property, and the making of payments. In short the evidence of the whole transaction was received and the case submitted to the jury in the same manner as if the facts had been properly stated in the pleadings. It was conceded that a written contract was made to sell and transfer the property for $5,807.42, and that defendant was entitled to payments and credits amounting to $5,111.48. This left a balance of $695.84. To this there was added for interest $62.50, which made the balance $748.34.

The alleged settlement was made on December 30, 1909. An exhibit was put in evidence, giving every item of the credits, payments, and allowances, amounting to $5,111.48, and defendant has not shown that any item is materially incorrect.

True it is Fred Lemke did not convey to defendant lots 1 and 2 in block 3, for which he held a contract from Olsgard. Defendant obtained from Olsgard a warranty deed paying him $865, which was $750 and interest at 12 per cent from date of contract till the day of the deed, and defendant was given proper credit for the payment.

There was ample evidence to sustain the settlement and accounting, and to show that it was correct, and it does not appear that any wrong has been done the defendant. However, the complaint should have fairly and concisely stated the special contract and a compliance with the same, the amounts paid by the defendant and the balance due from him. In the conduct of the trial both parties were at fault, but there was no occasion for the appeal.

Judgment affirmed.

DAN MOULTON, Respondent, v. CITY OF FARGO, a Municipal Corporation, Appellant.

(L.R.A.1918D, 1108, 167 N. W. 717.)

Free dumping ground — maintained by city — exercising governmental function.

1. In maintaining a free dumping ground a city is *held* to be exercising a governmental function.

On Rehearing.

Public teams — for hauling refuse — using by individuals — nominal charge for — enterprise not commercialized by.

2. The charge of 10 cents per load to those who wish to use the public teams for the purpose of conveying their refuse to a public dump does not in itself commercialize the enterprise so as to make the maintenance of such dump a private or corporate enterprise.

Public nuisance — offensive odors — smoke or gas — proof of.

3. It is not in itself a public nuisance to maintain a place where garbage and refuse is burned, and without proof of offensive odors, smoke, or gas, or similar injuries, and this in a populous district which is affected thereby, or where there is the danger of fire spreading to neighboring property.

Public dumping ground — public purpose — engaged in public enterprise — negligence of care taker — not liable for.

4. Where a city maintains a public dump for a public and not a commercial

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NOTE.—The question whether the removal of garbage is a public and governmental function within the rule exempting a municipality from liability is considered in notes in 5 L.R.A.(N.S.) 1005; 39 L.R.A.(N.S.) 649; and L.R.A.1918C, 609.

purpose, it is engaged in a public enterprise, and is not liable for the negligence of the care taker thereof in directing persons where to dispose of their refuse.

Municipal corporation — governmental enterprise — engaged in — public health — safety of property — matters of governmental cognizance — immunity.

5. The immunity of a municipal corporation on the ground that it is engaged in a governmental enterprise does not alone apply to cases where public health is concerned. Public safety and the safety of the property of the community are just as much matters of governmental cognizance.

Streets of city — loose papers — scattering upon — prevention of — duty to — public nature.

6. The prevention of the scattering of loose papers upon the streets and the burning of them in public places in a city, or even the burning of papers and refuse in the furnaces of buildings, which may result in dense smoke, and the carrying through the chimneys burning pieces of papers and the communication of sparks, is a duty which is essentially public in its nature.

Municipality — public and beneficial work — entering upon — private action — liability — none imposed.

7. There is no reason why a liability to a private action should be imposed when a municipality voluntarily enters upon a public and beneficial work, and to withhold it when it performs the service under the request of an imperative law.

Opinion filed November 27, 1917. Rehearing denied May 9, 1918.

Action for personal injuries.

Appeal from the District Court of Cass County, Honorable *A. T. Cole,* Judge.

Judgment for plaintiff. Defendant appeals.

Reversed and action dismissed.

Carmody, Louden, & Mulready and *V. R. Lowell,* for respondent.

Spaulding & Shure, for appellant.

ROBINSON, J. This is an appeal from a judgment for $500 recovered against the city for injury. The complaint avers that, pursuant to duties by law imposed, the city kept and supervised a dumping ground; that plaintiff hauled to the ground a load of garbage consisting mainly of dry, loose paper, and dumped the same as directed by the city super-

intendent of the ground, and that, when dumping, a smoldering fire flashed up and burned him.

The case presents two questions, namely: (1) Is there evidence to sustain the verdict? (2) Is the city liable for the alleged negligence?

As the evidence shows, by direction of the superintendent the plaintiff drove his load to the south and windward side of the dump, where there was no fire and no sign or indication of fire. There was a smoldering fire 30 or 40 feet to the north, but as a brisk wind blew from the south the smoldering fire was not in the least dangerous and it was not the cause of the injury. The plaintiff had his load about two thirds off, and was in a stooping position when in a twinkling a flame flashed up and burned him. He says: "All at once it suddenly came like an electric flash."

Of course to produce the flame there must have been some adequate cause. There must have been an explosive gas or some material saturated with kerosene or benzin; there must have been some flame or fire such as a burning match or a lighted cigar. The chances are ten to one that such material was in the load of garbage, and that by accident in throwing out the garbage a stray match was ignited. It is certain such an explosion was never caused by the burning of papers or by any smoldering fire, and the inflammable gaseous material which caused the explosion must have been contained in the load. Hence the injury was not caused by the negligence of the city or its superintendent.

In regard to the liability of a city for negligence in the keeping of a dumping ground, the decisions are in conflict. By statute the city has power "to regulate and prevent the throwing or depositing of ashes, offal, dirt, garbage, or any other offensive matter in, and to prevent injury to, any street, avenue, alley or public ground." It may regulate the same by rules and ordinances, and doubtless, to accommodate the public, it may establish and maintain a free dumping ground. That is a matter of discretion, and the better rule is that the city is not liable for negligence in maintaining a free dumping ground for the public good and as a matter of public service and convenience. The rule is that no legal obligation arises from the offer and acceptance of a gift or gratuity. There is reason and wisdom in the adage which forbids the looking of a gift horse in the mouth. When a city goes to the expense of keeping a free dump, it is done either as a governmental duty and function

or as a pure accommodation to the dumpers and the public. It is a mere gratuity and convenience for the benefit of the dumper. He does not have to use it. He may haul his garbage out of the city. Hence, the law does not give an action for negligence in superintending or in failing to superintend a gratuitous dump. A city is under no obligation to provide a dumping place. It may do it and leave the place without any superintendent, or it may employ a superintendent without incurring liability for his absence or mere neglect. The greater power includes the less. By employing a superintendent to aid or direct the dumpers, a city does not insure them against accidents.

Judgment reversed and action dismissed.

BRUCE, Ch. J., and CHRISTIANSON and BIRDZELL, JJ. We concur in the reversal of the judgment, but we express no opinion as to the origin of the fire. In our judgment this case is controlled by the case of Montain v. Fargo, 38 N. D. 432, L.R.A.1918C, 600, 166 N. W. 416, Ann. Cas. 1918D, 826.

GRACE, J. I dissent.

On Rehearing.

BRUCE, Ch. J. In a petition for rehearing and on the reargument held thereon, the plaintiff and respondent has contended that this court erred in maintaining that the case at bar was controlled by the prior decision Montain v. Fargo, 38 N. D. 432, L.R.A.1918C, 600, 166 N. W. 416, Ann. Cas. 1918D, 826. Respondent asserts that "the Montain Case involves the construction of a contract for the removal of kitchen garbage, a notoriously unsanitary commodity, the accumulation of which is notoriously detrimental to health." In it he asserts:

"Public-health agencies are at all times in evidence; an ordinance relating exclusively to the removal and disposition of kitchen garbage, a contract to be performed under the direction and supervision of the commissioner of health, teams, equipment, and men to be acceptable and satisfactory to the health commissioner, the garbage in course of removal under these agencies, on the way at the time to the municipal incinerator,

an instrumentality provided under the health powers of the municipality for the destruction of unhealthful and noxious substances."

"In the case at bar, on the other hand," he maintains that "the city of Fargo was not operating or maintaining an instrumentality designed primarily for the protection of the public health. . . . Any connection between the dumping ground and the question of public health was, at most, secondary and incidental. As a matter of law, the city is charged with the duty of keeping its streets free from obstructions and agencies that interfere with public travel and locomotion. As a matter of municipal pride, it is interested in preventing the deposit on its highways and public thoroughfares of *débris,* offal, dirt, and other offensive matter not necessarily inimical to the public health, but unpleasant to the eye and an obstacle to the free passage of its inhabitants. The authority conferred by law to keep its streets free from obstructions carries with it, under the uniform holding of the courts, the accompanying obligation to do so, or to become liable for any injury resulting from its failure. In the commission system of government which obtains in Fargo, this authority is granted in subdivision 9 of § 3818, Compiled Laws 1913, defining the commissions' general powers as follows:

" 'To regulate and prevent the throwing or depositing of ashes, offal, dirt, garbage or any other offensive matter, in, *and to prevent injury to any street, avenue, alley or public ground.*'

"And in subdivision 5 of the same section, granting the power, among other things, 'to prevent and remove obstructions,' on the streets or other highways or public grounds. The association in subdivision 9, of the power to prevent the deposit of offensive matter with the power to prevent injury to streets and public grounds, shows clearly the legislative intent to provide, primarily, for the protection of the streets and public grounds. It is not a health-protection authority primarily, but a street-protection authority. The health-protection authority, so far as the streets are concerned, is furnished in § 3820, Compiled Laws 1913, empowering the commissioner of health 'to cause the removal of all objects detrimental to health.'

"It was for the purpose of carrying out the authority to keep its streets and public grounds clean and in order that the city established the dump ground in question. At the time the accident to the respondent occurred, it did not use the dump ground for the destruction of unsan-

itary substances. It used its incinerator for that; or if it did not, it ought to have. It used the dump ground to hold the refuse which it had prohibited the public by ordinance appearing in the record from dumping on the streets or public places; first, to shield itself from the liability which might result from an injury through an accumulation on the streets or public places; or, second, to satisfy the civic pride of its inhabitants in clear and unobstructed thoroughfares. Now, both of these purposes and functions were administrative. Both had relation to the care of the streets always held an administrative function. Neither was under the supervision of the state board of health, nor, therefore, under the supervision of the health commissioner."

He cites with much emphasis the case of Denver v. Porter, 61 C. C. A. 168, 126 Fed. 288, in which the court among other things says: "In almost all affairs of purely local concern some indirect relation may be traced to a matter of health, safety, or other subject of governmental cognizance. The test is not that of casual or incidental connection. If the duty in question is substantially one of a local or corporate nature, the city cannot escape responsibility for its careful performance because it may in some general way also relate to a function of government."

He also cites the case of Roman v. Leavenworth, 90 Kan. 379, 133 Pac. 551, in which the supreme court of Kansas sustained a judgment against the city of Leavenworth for injuries occasioned to a boy while playing on the city dump by falling into a smoldering fire. He also takes exception to the opinion in calling the dump in question a free dump.

We are satisfied that there is no merit in any of these contentions. The dump was to all intents and purposes a free dump. It is true that, if property owners desired to make use of the municipal teams, a small charge was made. There was nothing in the ordinance, however, which prohibited such persons from using their own teams or from employing others, and there was no charge for the use of the dump itself. It is true that it seems to be a general rule that "a city or town which voluntarily undertakes work of a commercial character from which it seeks to derive revenue or other special advantage is liable like a private employer for the negligence of its servants or agents, who are engaged therein." Haley v. Boston, 191 Mass. 291, 5 L.R.A.(N.S.) 1005, 77 N. E. 888.

It can hardly be said, however, that the maintenance of the dump was a private business enterprise, or that the mere fact that those who used the public teams were required to pay the small amount of 10 cents per load therefor commercialized the whole enterprise. Ibid.

Nor does the fact that the load contained paper as well as manure alter the fact that the maintenance of the dump was a public enterprise. Nor is there any merit in the contention that the business of removing garbage and refuse was merely an administerial duty, which was placed upon the municipality, and that the property owners were required "to bear the heavy expense of loading, transportation, and unloading," and "to aid the city in its administerial supervision of the streets and public places, in promoting the city beautiful, in keeping the highways free from rubbish and obstructions, in escaping the possible liability resulting from such obstructions."

We agree with counsel for appellant that a city cannot maintain a public nuisance, or that which is in a sense a nuisance because it is attractive to children. Roman v. Leavenworth, supra. Here, however, there was no public nuisance proved, nor did the pleading justify any recovery on the theory that any such nuisance was maintained. The action was one for negligence. It is based on the charge that "the superintendent of the dumping ground carelessly and negligently conducted him, the plaintiff, to a particular place upon the said dumping ground, namely, to a point about 100 feet south of the north line and 50 feet east of the west line of the said dumping ground, as indicated by a wire fence which extends all around the same, which had been used as a pit for burning garbage and which the said defendant had carelessly and negligently permitted to smolder and burn beneath the surface in such a manner that the plaintiff in the exercise of due and reasonable care could not, and did not, see the fire or detect danger, and carelessly and negligently directed the said plaintiff to unload the contents of the said wagon at that particular place, without disclosing to him that fire had recently been burning in that pit, and that it was usual for garbage, once set on fire, to burn for a long period of time."

This is clearly a charge of negligence on the part of the superintendent in the conduct of the dump, or, rather in the direction of the person who used the same, and not a charge of maintaining a nuisance. It is

surely not a nuisance in itself to maintain a place where garbage and refuse is burned. Surely without proof of offensive odors or smoke or gases, and this in a populous district which is affected thereby, or the danger of fire spreading to neighboring property, the burning of refuse in a public dump cannot be deemed to be the maintenance of a nuisance of which the public can complain.

The nuisance, if any, was private, and not public; and the plaintiff was only affected thereby on account of the fact that he had resorted to the dump for the purpose of disposing of his refuse. Even this he was not compelled to do, as he could have taken it anywhere else outside of the city limits. The case is one merely of one resorting to a place which the public maintains for the disposal of refuse, and for damages on account of an injury occasioned while on such place by the negligent directions, or failure to direct, of the person in charge thereof.

It is merely the case of one entering upon a public place, which is maintained for a public purpose, and being directed by a care taker to occupy a dangerous position. It is much the same case as where one is directed by a care taker to climb a dangerous staircase in a hospital or a courthouse, or to take a dangerous elevator. There can be no doubt that in maintaining this dump the municipality was in the exercise of a governmental duty. The duty, we believe, was imposed or, at any rate sanctioned, by paragraph 72, § 3831, Compiled Laws 1913, which gives to the city commissioners the power to "adopt such other ordinances not repugnant to the Constitution and the law of the state, as the general welfare of the city may demand." It is not necessary, as counsel for appellant seems to contend, that § 3818, Compiled Laws 1913, which gives to the commissioners the power "to regulate and prevent the throwing or depositing of ashes, offal, dirt, garbage, or any other offensive matter, in, and to prevent any injury to any street, alley, avenue, or public ground," should alone be relied upon.

The load contained both manure and dry loose edgings and scraps of paper, and came from a paper house. This paper was extremely inflammable, and, if burned on city lots, would have been liable to have been blown hither and thither, and to have started other fires, and, even if burned in the furnace of a building, would have been conducive to danger.

It would be a mistake to hold, as counsel for respondent wants us to

hold, that the immunity of a municipal corporation on the ground that it is engaged in a governmental function only applies to cases where public health is concerned. Public safety and the safety of the lives and the property of the community are just as much of governmental cognizance. We have no objection to the statement which is made in the case of Denver v. Porter, 61 C. C. A. 168, 126 Fed. 288, that "in almost all affairs of purely local concern some indirect relation may be traced to a matter of health, safety, or other subject of governmental cognizance. The test is not that of casual or incidental connection. If the duty in question is substantially one of a local or corporate nature, the city cannot escape responsibility for its careful performance because it may in some general way also relate to a function of government." The prevention, however, of the scattering of loose papers upon the streets and the burning of them in public places within a city, or, even the burning of papers and refuse in the furnaces of buildings, which may result in dense smoke, and the carrying through the chimneys burning pieces of paper, and the communication of sparks, is a matter which is essentially public in its nature. 6 McQuillin, Mun. Corp. § 2625.

Nor is it necessary that the duty to control such matters should have been expressly imposed upon the municipality by the statute.

There is no good reason why a liability to a private action should be imposed, when a municipality voluntarily enters upon such a beneficial work, and to withhold it when it performs the service under the request of an imperative law. Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289; 6 McQuillin, Mun. Corp. § 2626.

The maintenance of the dump, indeed, and the ordinance in relation thereto, may have been both for the purpose of the public health, the keeping of the streets clear from refuse, and the protection of the city from fire, smoke, offal, odors, and the disease and injury which arise from rotting and decaying substances.

The case of Snyder v. St. Paul, 51 Minn. 466, 18 L.R.A. 151, 53 N. W. 763, is well worth reading. In it the court, by Mitchell, J., held that the city of St. Paul was not liable for the negligent construction of the entrances to one of the elevator shafts in the City Hall, nor for the negligent conduct of the servant in charge of the elevator in handling the same. Among other things it said: "The common-law rule is that no private action can be maintained against a municipal corporation for

the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no pecuniary profit. As respects what are sometimes called 'quasi municipal corporations,' such as counties, townships, and school districts, this is the rule everywhere, without exception. But as respects what are called 'municipal corporation proper', such as cities and incorporated villages, the general current of the authorities is to the effect that, even in the absence of an express statute, they may be impliedly liable for acts of misfeasance or neglect of duty on the part of its officers and agents, while for the same or a similar wrong there is no such liability resting on quasi municipal corporations. The most noted and familiar instance of this is the different rule applied to towns and counties as respects liability for negligence in not keeping highways in repair, and that applied to incorporated cities for negligence in failing to keep streets in repair. But respecting the principle upon which to rest this distinction, or as to the nature of the duties to which it extends, the courts seem to be much perplexed; and their decisions, often in conflict with each other, leave the subject in some confusion. The ground for the distinction is not to be found in the mere fact that one is created by special charter, while the other is not, for both are alike subdivisions of the state, created for public, although local, governmental purposes. Nor is it to be found in the fact that the one is given greater powers than the other, unless the power is not for public governmental purposes, but to engage in some enterprise of a quasi private nature, from which the municipality will derive a pecuniary benefit in its corporate or proprietary capacity; as, for example, power to build gasworks or waterworks, to furnish gas or water to be sold to consumers, or to build a toll bridge, from each of which the city would derive a revenue. In this class of cases it is generally held that corporations are liable for wrongful or negligent acts, because done in what is termed their 'private' or 'corporate' character, and not in their public capacity as governing agencies, in the discharge of duties imposed for the public or general benefit. But it is also generally held that they are not liable for negligence in the performance of a public, governmental duty imposed upon them for public benefit, and from which the municipality in its corporate or proprietary capacity derives no pecuniary profit. The liability of cities for negligence in not keeping streets in repair would seem to be an exception to this general

rule, which we think the courts would do better to rest either upon certain special considerations of public policy or upon the doctrine of *stare decisis* than to attempt to find some strictly legal principle to justify the distinction. And, as already suggested, as to what are public and governmental duties, and what are private or corporate duties, the courts are not in entire harmony, and their decisions do not furnish a definite line of cleavage between the two." See also Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Dosdall v. Olmsted County, 30 Minn. 96, 44 Am. Rep. 185, 14 N. W. 458; Bryant v. St. Paul, 33 Minn. 289, 52 Am. Rep. 31, 23 N. W. 220; Grube v. St. Paul, 34 Minn. 402, 26 N. W. 228.

The order which was formerly entered is affirmed.

GRACE, J. I dissent.

STATE OF NORTH DAKOTA, Appellant, v. W. D. GILLESPIE, Respondent.

(168 N. W. 38.)

Licensed architects — registration — statute — professional architect — right of — not abridged.

Chapter 58, Session Laws of 1917, which provides for the registration of licensed architects, construed and *held* not to abridge the right of a professional architect to continue to practise his profession as an unlicensed architect.

Opinion filed May 11, 1918.

Appeal from the District Court of Cass County, *A. T. Cole,* J.

Affirmed.

William Langer, Attorney General, and *A. W. Fowler,* State's Attorney, for appellant.

The statute applying to architects is analagous to the law relating

NOTE.—For a discussion of the question of regulation of architects, see note in 36 L.R.A.(N.S.) 1203, where it was held that a statute was not unconstitutional as granting special privileges and immunities to uncertificated architects, nor as omitting to fix in the act some standard or rule for determining the qualification of applicants.

to boards of health and to regulations promulgated by such boards. Comp. Laws 1913, § 433; Pierce v. Doolittle (Iowa) 106 N. W. 751, 6 L.R.A.(N.S.) 143; Blue v. Beach, 155 Ind. 121, 56 N. E. 89; note in 6 L.R.A.(N.S.) 143.

The defendant, by holding himself out as an architect and by practising such profession, violated the law in that he had failed to obtain license and register as an architect. Ex parte McManus (Cal.) 90 Pac. 703.

This law is not in violation of any constitutional provision. 2 R. C. L. 399; 5 C. J. 255; Ex parte McManus (Cal.) 90 Pac. 702; People v. Loser, 251 Ill. 527; note in 36 L.R.A.(N.S.) 1203.

Lawrence & Murphy, for respondent.

The only question before the court is whether or not a citizen of this state may practise architecture without first securing a license, if he does not hold himself out as a licensed or registered architect, as defined by the law. Architecture is primarily a mechanical art, akin to carpentry and other industrial pursuits. 1 Words & Phrases, 490; Wilson & Edwards v. Greenville, 65 S. C. 426, 43 S. E. 966.

The statute is penal in its nature and must be strictly construed, and will not be extended beyond the letter thereof. Folsom v. Kilbourn, 5 N. D. 402, 67 N. W. 291; Rudolph v. Herman, 4 S. D. 283, 56 N. W. 901.

"The controlling effect of sections adopted as parts of laws by amendment has often been recognized and given full effect in cases where the amendment did not signify a specific intent in so pronounced a manner as the one under consideration."

If a section of the act here in question is in conflict with the remainder of the act, it must be subservient to the legislative intention as expressed by the amendments to the original bill. State v. Burr, 16 N. D. 581; Arnett v. State (Ind.) 8 L.R.A.(N.S.) 1192, 80 N. E. 153.

If the act in question has the effect of prohibiting the practice of architecture except by licensed architects, it is unconstitutional. The title of the act is not sufficiently broad to admit of such abridgment of individual rights. It would be regulation but prohibition. Richards v. Boyene, 61 N. J. L. 496, 39 Atl. 708; State v. Ream, 16 Neb. 683, 21 N. W. 398; Miller v. Jones, 80 Ala. 89 (97); Stebbins v.

Mayr, 38 Kan. 573, 16 Pac. 485; Sedgwick County v. Bailey, 13 Kan. 600; Philpin v. McCarty, 24 Kan. 402; State v. Bankers' Asso. 23 Kan. 501; State v. Barrot, 27 Kan. 213; Railroad Co. v. Long, 27 Kan. 684; People v. Gadway, 61 Mich. 285, 28 N. W. 101; Ex parte Taylor, 38 Am. Rep. 338; Vicksburg R. Co. v. State, 62 Miss. 105; Treat v. White, 181 U. S. 264, 45 L. ed. 853; United States v. Isham, 17 Wall. 496, 21 L. ed. 728; Jackson v. Newman, 42 Am. Rep. 367; Tiedeman, Pol. Power § 3; Re Jacobs, 98 N. Y. 108, 50 Am. Rep. 636; People v. Gillson, 109 N. Y. 389, 17 N. E. 343; Cooley, Const. Lim. 6th ed. pp. 606, 607, 744; Ex parte Whitwell, 98 Cal. 73, 19 L.R.A. 727, 32 Pac. 872; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; Lakeview v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 40 N. E. 454; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Ruhstrat v. People, 49 L.R.A. 184; 1 Watson, Const. p. 603; State ex rel. Goodsill v. Woodmansee, 1 N. D. 246.

A man's labor is property. Labor is the foundation of all other property and is the most inviolable. This statute attempts to provide a means of taking property without due process of law. It is denying the equal protection of the law. Union Slaughter House Co. v. Crescent City Co. 111 U. S. 746, 28 L. ed. 585; 1 Smith, Wealth of Nations, chap. 10; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; State ex rel. Ritchey v. Smith (Wash.) 5 L.R.A.(N.S.) 674, 84 Pac. 85.

Birdzell, J. This is an appeal from an order of the district court of Cass county sustaining a demurrer to an information.

The defendant was arrested under an information charging the commission of an offense in violation of chapter 58, Session Laws of 1917, which provides for the registration of licensed architects. The alleged offense consisted in the failure and refusal of the defendant to become licensed as an architect, and in practising architecture at Fargo, North Dakota, between July 1, 1917, and March 28, 1918, without being licensed, contrary to the statute and the rules and regulations of the state board of architecture. The information alleges that the defendant, between the times mentioned, has continued to practise as an architect in the city of Fargo, and has held himself out to be an archi-

tect qualified to practise as such, and has made plans and specifications as an architect between such times, particularly for public school buildings and otherwise.

Inasmuch as the argument of the defendant and respondent goes to the question of the construction of the statute above referred to and to its constitutionality, a proper determination of the questions involved requires the consideration of the respondent's arguments as affirmative propositions. The respondent contends: (1) That the legislative intent to prohibit the practice of architecture by unlicensed architects is not clear, and that, as the statute is penal and harsh in its operation, it should be given a strict construction that would render it inapplicable to such architects; (2) that the act cannot be construed as applying to unlicensed architects for the reason that such a construction would (a) render the act broader than its title, and (b) render the act unconstitutional as embracing a multiplicity of subjects; and (3) that the act is unconstitutional in that the prohibition of the practice of the lawful calling of the defendant is not a proper exercise of the police power, and involves an interference with the liberty of the defendant as guaranteed by the Constitution of the state and by the 14th Amendment to the Federal Constitution.

If the first proposition advanced by the respondent is correct, it will obviously be both unnecessary and improper to consider the remaining questions. If, under a correct interpretation of the act, it is found to be not applicable to an unlicensed architect, and if there be no restrictions placed upon the practice of the profession by one who has not secured a license, the respondent would be in no way affected by the act, and consequently would not be in a position to assail its constitutionality. If, however, the act, when properly construed, is found to in any way interfere with the respondent in carrying on his professional activities, it will be necessary to consider the constitutional basis for the legislation so affecting him.

It is claimed that the legislative history of the act shows that it was the intention to provide for the classification of architects into licensed and unlicensed groups, and to make provisions whereby any architect desiring to become licensed could do so upon fulfilling the requirements of the law as administered by the state board of architecture. Anyone not desiring to become a licensed architect, however, it is con-

tended, might continue to practise his profession, and would be precluded only from holding himself out as a licensed architect.

The title of the act as originally introduced was: "A Bill for an Act Providing for the Registration of Architects and for Regulating the Practice of Architecture as a Profession in the State of North Dakota." There can be no doubt that, as originally drawn, the bill was intended to prohibit the practice of architecture as a profession by all persons who did not become registered under the terms of the act. The term "license" or "licensed" appears nowhere in the bill as originally introduced, and there is nothing in any of its provisions affording evidence of an intention to classify architects into licensed and unlicensed groups. The prohibitory provision of the original bill was as follows: (§ 15) "No person shall begin to use the title 'architect' or any variation of the same, or any other words, letters, or device to indicate that the person using the same is an architect, after the approval of this act, without being registered as an architect, in accordance with the provisions of this act."

The basis for the contention that the legislature desired only to provide a means whereby those desiring to become licensed under the provisions of the act could do so by their own voluntary action and thus obtain the right to practise the profession under a designation differing from that permitted to unlicensed architects is found in the amendments which were made during the course of the legislative procedure. Some minor amendments were made, changing the membership of the board from five to three members; making appropriate changes in the terms of office, so that one member would be appointed every two years; altering the preliminary educational requirements; shortening the period of residence and practice, as a prerequisite to registration without examination; changing the renewal license fee, and reducing the penalty for violation. Aside from the foregoing minor amendments, none of which reflect the intention of the legislature bearing upon the question in hand, the title and §§ 15, 19, and 30 were changed by the insertion of the word "licensed" before the word "architect," where the latter word appeared therein. The title of the act as finally adopted reads: "A Bill for an Act Providing for the Registration of *Licensed* Architects and for Regulating the Practice of Architecture as a Profession in the State of North Dakota."

The prohibitory clause, § 15, as finally adopted, reads: "No person shall begin to use the title '*Licensed* Architect' or any variation of the same, or any other words, letters or device to indicate that the person using the same is a licensed architect, after the approval of this act, without being registered as an architect in accordance with the provisions of this act." Section 19 as finally passed is as follows: "In case of a copartnership of licensed architects, each member must hold a certificate of practice." Section 30 of the act reads: "Every registered licensed architect shall, within thirty days, record his certificate of registration with the secretary of state of North Dakota, who shall provide a special book for such purpose." It will thus be seen that the title of the act, the prohibitory section, and the two cognate sections referred to, show an intention to provide for the registration of licensed architects and to prohibit persons from using the title "Licensed Architect" without becoming registered in the manner provided. But the remainder of the title and other provisions of the act, which have undergone no change since the bill was originally introduced, purport to relate to the regulation of the practice of architecture as a profession. Thus, in § 6 the board is authorized to adopt rules and regulations "for the regulation of the practice of architecture," and in § 8 it is made its duty to examine into the qualifications of, to register, and issue certificates of registration to those desiring to use the title of architect or to practise as architects. Section 16 is a legislative construction of the prohibitory section immediately preceding, which renders it inapplicable to persons who may desire to make plans and specifications for their own buildings. This section, it will be observed, would manifestly serve no purpose except as a part of an act designed to prohibit the practice of architecture by unlicensed persons. Section 32 provides that "every architect who is registered under the provisions of this act, and *who desires to continue to practise architecture* in North Dakota, shall annually during the month of July pay to the secretary of the board a renewal fee of ten dollars."

To what extent can it be said that the foregoing sections are intended to regulate the practice of architecture as a profession by those who are unlicensed? In determining this question, we must, of course, be guided by the legislative intention so far as it can be gathered from the act, and from the legislative history of the bill. In arriving at this

intention we must first seek to determine the underlying principle of the amendments that were made, so as to give effect to the purpose to be served by the amendments. If the amendments made reflect a different legislative policy from that stated in the original bill, it is the duty of the court, in construing all sections of doubtful meaning, so far as possible, to give to them an interpretation which will be consistent with the general policy of the amendments in order that the prime legislative purpose may not be thwarted.

At the outset it must be conceded that the various sections of the act are not wholly consistent with each other, and that this is due to the amendments that were made; but in construing the whole law we must take cognizance of the common errors which creep into legislation by reason of the manner in which legislatures are carried on. To quote again the language of the Indiana court in the case of Arnett v. State, 168 Ind. 180, 8 L.R.A.(N.S.) 1192, 80 N. E. 153, which has previously met the sanction of this court (State ex rel. Erickson v. Burr, 16 N. D. 581–593, 113 N. W. 705): "It is easy to understand how in the hurry of legislation there may be a failure, in connection with the adoption of an amendment, carefully to eliminate provisions which are really intended to be superseded . . . ." In the legislative history of the act in question we have most satisfactory evidence of a desire to depart from the policy evidenced by the original bill. From what has been said with reference to the amendments, it can be readily seen that there were no amendments going to the policy of the legislation, except those which were made by the insertion of the qualifying term "licensed" before the word "architect" in the various sections referred to. Had the bill remained as originally introduced, there could be no question that the practice of architecture without a license would have been an offense, and that there would have been no basis for any contention that the legislature contemplated merely a classification of professional architects as licensed and unlicensed architects.

The act as amended (§ 15) only prohibits, in express terms, those who are not licensed from representing that they are licensed. There is no express prohibition of the practice of architecture by an unlicensed person. The prohibitory section may properly be looked to as the best index of the legislative intention, since without it none of the remaining provisions could be rendered effective. It is for a viola-

tion of this section that punishment is imposed, and it is by virtue of its provisions, if at all, that one is restrained from doing that which before the enactment was perfectly lawful. It is elementary that such a provision should not be enlarged by construction. Especially should this elementary principle be controlling where, as here, there is no clause in the remainder of the act that will be rendered wholly ineffective if the literal interpretation of the section in question is adopted.

It is argued that the failure to amend § 8 by the insertion of the qualifying word "licensed" before the word "architect" evidences an intention on the part of the legislature to place unlicensed architects under the jurisdiction of the state board of architecture. Section 8 makes it the duty of the board to "examine into the qualifications of, register, and issue certificates of registration to those desiring to use the title of architect or to practise as architects in the state of North Dakota, and who have met the requirements of the board according to the provisions of this act." It must be conceded that there is considerable force in this argument, but the intention of the legislature is not to be gathered from one unimportant section of the act; and especially is this true where the literal interpretation of the particular section gives a meaning contrary to that expressed in sections which have been carefully amended in pursuance of an apparently different plan. There seems to be no power of authority conferred by § 8 that would not be vested in the board under the other provisions of the act, and in a sense the entire section is surplusage. If the act is read, admitting this section, it would be perfectly clear that the legislature had left it entirely at the option of the architect whether or not he would become licensed by the state board. In the absence of any provision in the law prescribing a license as a prerequisite to the practice of architecture, and of any provision penalizing the practice of the profession without a license, we would not be warranted in holding that the failure to amend § 8, so as to make it consistent with the amendments to other sections heretofore referred to, discloses an intention to preclude unlicensed architects from practising their profession.

Again, it is contended that, unless the act is construed to prohibit the practice by unlicensed persons, § 32 would be necessarily unconsti-

tutional in that it arbitrarily discriminates against those who have been once licensed and who fail to renew their license. According to the literal interpretation of § 32, every architect who is registered and who desires to continue to practise architecture in the state is required to pay an annual renewal fee of $10. Obviously, this section does not refer to those who do not choose to become registered, and are consequently to be permitted to continue the practice of architecture without the payment of any fee, but, it is contended, if one becomes registered, he cannot practice for a longer period than a year unless he will pay a renewal fee of $10. In brief, the argument is that any architect who becomes registered must, as a condition to being allowed to continue in practice, pay an annual fee or tax of $10, which charge is wholly on account of the initial registration; whereas those who do not register are permitted to continue to practise without a charge. This would seem to involve an arbitrary classification and if such were the necessary effect of the section in question, it would be the duty of this court to so construe the entire act, if possible, as to render it constitutional. To do this, we might be required to hold that the legislature intended to prohibit unlicensed persons from practising; but it seems to us that the more reasonable construction of § 32 is that it was only intended to prohibit *licensed* architects from continuing to practise *as licensed* architects unless they pay the annual renewal fee. This section only comprehended registered architects; and, since it was dealing with a limited class which had become distinguished from architects generally only by the fact of being licensed and registered as such, it is more reasonable to assume that the legislature intended only to impose the renewal fee as a condition of remaining in that class, than it is to assume that they intended to prohibit further practice entirely. It is as though the section read: "Every architect who is registered under the provisions of this act, and who desires to continue to practise architecture [as a licensed architect] in North Dakota, shall annually during the month of July pay to the secretary of the board a renewal fee of $10.

In so construing the above section, we are again mindful of the change in the entire policy of the legislation as evidenced by the amendments, and of the failure of the legislature to make its intention clear and unmistakable, due to the common imperfections in legislative pro-

cedure. As the bill originally stood, it was doubtless contemplated that no architect should be permitted to practise without a license, and, unless the amendments were intended to provide a means of voluntary classification of the profession into licensed and unlicensed groups, it is difficult to see their purpose.

In adopting the above construction of the act in question, it is proper to remark here that the legislature which passed the act was not without precedent for its action in authorizing a classification of a profession into licensed and unlicensed groups. The immediately preceding legislature of 1915 passed a somewhat similar act (Sess. Laws 1915, chap. 236), creating a board of nurse examiners and providing for the registration of licensed nurses who would be known as registered nurses, while at the same time excepting from the operation of the law all practical or trained nurses not pretending to be registered. It might also be remarked that both bills were introduced by the same author.

Since the act in question contains no provision in any way abridging the right of the defendant and respondent to practise his profession, the foregoing considerations require that the order of the trial court sustaining the demurrer to the information be affirmed. It is therefore unnecessary to consider the other questions urged by the respondent. The order appealed from is affirmed.

ROBINSON, J. (concurring). In this case the complaint charges defendant with the offense of doing business as an architect without first having obtained a license contrary to chap. 58, Laws of 1917. It avers that at Fargo, defendant maintains an office and place of business, and employs skilful draftsmen and follows the business of an architect, without first having obtained a license. The case comes to this court on an appeal from an order sustaining a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a public offense. The title of the statute is: "An Act Providing for the Registration of 'Licensed Architects,' and for Regulating the Business of Architecture as a Profession."

The act provides for a state board of architecture, and that no person shall begin to use the title "Licensed Architect" without being registered as an architect, and that any violation of the act is a misdemeanor

punishable by fine of from $50 to $200. The act is penal and must be given a strict construction. It does not in any way declare it a misdemeanor for a person to follow the business of an architect without first having obtained a license. It applies only to persons using the title "Licensed Architect." As there is no charge that defendant ever used that title, the complaint does not charge him with a public offense.

Of course it is contended that by fair intendment the statute applies to all architects. But such is not the letter of the statute. To obtain a license to do business under the statute, the architect must apply for registration and pay the board an application fee of $10, a certificate fee of $25, and annual fee of $10, and pay the expense of recording the certificate in the office of the secretary of state. While such an occupation tax may be well enough for those who choose to pose as "licensed architects" and to enjoy the benefits and the privileges of the statute, yet, if it were extended to all architects, the statute would be clearly void. The Constitution provides for a tax on property—not on men or on industry—sufficient to pay the necessary and limited expenses of the state.

Then by § 174 it is provided: The legislative assembly shall provide for raising revenue sufficient to defray the expenses of the state for each year, not exceeding 4 mills on the dollar, of the assessed valuation of all property, and also a sufficient sum to pay interest on the state debt.

Section 180: The legislative assembly may provide for the levying of an annual poll tax of not more than $1.50 on each male person over twenty years and under fifty years. Under the Constitution all laws of a general nature must have a uniform application.

The subject of every act must be expressed in its title. Every law imposing a tax must state distinctly the object of the tax to which only it shall be applied. Every person has a right to acquire, possess, and protect property, and to pursue and obtain safety and happiness. These provisions are all contravened by the act in question. It is not of uniform application. It does not apply to all persons of the same class. It applies only to a person using a certain title. Excepting the limited poll tax, the legislature has no right to levy a head tax or occupation tax. Every person is entitled to acquire and possess and

protect property, and to pursue and obtain safety and happiness, and for that purpose to follow any honest occupation without paying a tax for the privilege of doing it. Were it competent for the lawmakers to impose an occupation tax of $10 annually, why not $100 or $1,000? Even such a tax as imposed by the statute in question might well bar a poor and competent architect from the acquisition of property and the pursuit of safety and happiness.

While the statute is clearly void, it is equally clear that the complaint does not state facts sufficient to charge an offense against the statute.

Order affirmed.

C. EVENSON, Respondent, v. W. B. NELSON, Appellant.

(168 N. W. 36.)

Pleading — complaint — amendments — allowing — agency — allegations of.

1. Where a complaint was so drawn as to indicate reliance upon the circumstances surrounding transactions between the plaintiff and the wife and children of the defendant, relative to the supplying of articles of merchandise to them during defendant's absence,—*held*, that no error was committed by the trial court in allowing the complaint to be amended upon the trial so as to include allegations of agency.

Merchandise sold — amount — sold to wife — in absence of defendant husband — under previous arrangement — agency — sufficiency of — to charge defendant.

2. In an action to recover the price of merchandise wherein it appeared that the defendant, in anticipation of an extended absence from home, left his wife and three children upon a farm which had been rented to a tenant, and placed the wife in a position where she was required to manage the household,—*held*, that there was sufficient evidence of agency to charge the defendant with the goods, wares, and merchandise supplied to the family during his absence.

Goods supplied family — in defendant's absence — amount of — action against defendant husband — agency of wife — relied upon by plaintiff — court — instructions.

3. Where the plaintiff, in an action brought against the husband and father to recover for goods supplied to the family during his absence, chose to rely

upon agency, it was not error for the court to refrain from instructing the jury on the question of proper and adequate support.

Witness — custom of charging goods bought by wife to husband — testimony — not evidence of a general custom.

4. Where a witness was allowed to testify, over objection, to his custom as to charging goods to the husband where the same were bought by the wife, though such testimony is not proper evidence of a general custom, its admission is *held* not to be reversible error.

Wife — called as witness — by party adverse to husband — competency — no objection as to — failure of husband to object — equivalent to consent.

5. Where a wife was called as a witness by a party adverse to the husband, and no objection was made as to her competency to become a witness without his consent,—*held*, that her testimony is properly in evidence, and that the failure to object was equivalent to the giving of his consent, as required by § 7871, Compiled Laws of 1913.

Opinion filed May 14, 1918.

Appeal from County Court of Benson County, *O. D. Comstock*, J. Affirmed.

R. A. Stewart, for appellant.

Plaintiff claims ostensible agency in the wife to buy the goods and charge the husband with the obligation of payment.

"Ostensible agency is where the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Code, § 6324.

There is no want of ordinary care on the part of defendant, but there is great negligence and lack of care on the part of plaintiff in that having opportunity he failed to notify defendant of any material fact, and the entire evidence is to the effect that the defendant did not know of the running of the account, or the incurring of any obligation. Gordon v. Vermont Loan & T. Co. 6 N. D. 454, 71 N. W. 556; Bank v. Elev. Co. 11 N. D. 280, 91 N. W. 436; Code, § 4415; Sears v. Severson, 115 N. W. 519.

The acts of plaintiff in the causes of his dealings with others do not constitute general custom, and evidence of such acts is clearly erroneous. 91 N. W. 436, 438.

Plaintiff called defendant's wife as a witness in his behalf. Defendant offered no objection, but there was no overt act of consent that she

testify, and silence is not equivalent to consent in such a case. Webster; Clark v. Evans (S. D.) 60 N. W. 862; Kruger v. Dodge, 87 N. W. 965; Aldous v. Olverson (S. D.) 95 N. W. 917; Rathbone v. Maltz, (Mich.) 118 N. W. 991; 89 N. W. 954; 129 N. W. 3.

Rinker & Duell, for respondent.

Where a party may prove certain facts under a complaint without an amendment covering same, an amendment if allowed and made is harmless.

"Even without the amendment the plaintiff would have been entitled to prove all that he could have proved under the amended complaint." Gram. Constr. Co. v. Soo R. Co. 36 N. D. 172.

Where there is no legal separation of husband and wife, the debts contracted by the wife for the necessary family running expenses are prima facie against the husband. Bergh v. Warner, 5 N. W. 78.

Where the wife is called as a witness adverse to her husband, his failure to properly object is equivalent to consent that she may testify. Clark v. Folkers (Neb.) 95 N. W. 328; Pape v. Ferguson (Ind.) 62 N. E. 713; Danley v. Danley, 179 Pa. 170; Howard v. Hibbs, 61 Pac. 159; State v. Bloom, 94 App. Div. 620.

It is the general rule that a husband or wife may testify for or against each other when the question of agency is involved. Clark v. Evans (S. D.) 60 N. W. 964; Ingerham v. Weatherman, 79 Mo. App. 488; Bell v. Day (Kan.) 57 Pac. 1054; Schwantes v. State (Wis.) 106 N. W. 237.

If there is any evidence tending to prove the authority of the agent, then the act cannot be excluded from the jury, for they are the judges of the weight and sufficiency of the evidence. Berch v. Warner (Minn.) 50 N. W. 78; Lake Grocery Co. v. Chistri, 34 N. D. 400.

Defendant's motion for a directed verdict, made at the close of plaintiff's case, but not renewed at the close of the trial, is of no avail. Garland v. Keeler, 15 N. D. 550; Ward & Murray v. McQueen (N. D.) 100 N. W. 253; First Nat. Bank v. Red River Valley Nat. Bank, 9 N. D. 319; 1 N. D. 21; 6 N. D. 495; 8 N. D. 15.

There was but one issue in the case,—the question of agency, and the court instructed the jury fully on both actual and ostensible agency. Issues raised by the pleadings but passed or ignored in the trial have no further place in the action. Bergh v. Warner (Minn.) 50 N. W. 78; Martin v. Oakes, 25 N. Y. Supp. 387; 42 Misc. 201.

BIRDZELL, J. This is an appeal from a judgment for $174.71 and interest, entered in the county court of Benson county in favor of the plaintiff, and from an order denying a new trial.

The action was brought to recover the price of certain goods, wares, and merchandise which were supplied by the plaintiff to the family of the defendant during a period when the defendant was living on the Pacific coast with a daughter whom he had taken West for the benefit of her health. Defendant's wife and three children maintained a home at or near Sheyenne, North Dakota, and the goods which were supplied to them by the plaintiff were of the character which would properly be regarded as necessary for the support of the family. In the complaint, as originally drawn, there was no allegation of any agency on the part of the wife or of the children to whom the goods were supplied, but upon the trial the court permitted the plaintiff to file an amended complaint, differing from the original only in that it is alleged that the wife and children were acting as agents of the defendant in the purchase of the goods. There are a number of assignments of error, but it will be necessary to consider only those which are argued by the appellant, the remainder being deemed waived.

The appellant complains of the ruling of the trial court in permitting the complaint to be amended after the case was called for trial. The only amendment made was the addition of a clause alleging that the wife and children were agents of the defendant. Conceding that the amendment was necessary, though we express no opinion upon the point, it is inconceivable that the defendant could have been put to any disadvantage by this amendment; for he had ample notice that the trial would involve all of the circumstances surrounding the transactions between his family and the plaintiff.

The appellant also challenges the sufficiency of the evidence to establish an agency for the purchase of the goods. In the light of the facts developed at the trial, there is no merit in this contention. It appears that the wife was placed in a position where she was required to look after the management of a farm of 120 acres which was rented to a tenant; that she lived upon the farm with three of her children; and that under her direction improvements were made. That her husband had authorized a local bank to honor checks on his account signed by his wife; that he deposited money from time to time to replenish the ac-

count; and that some of those checks were cashed by the plaintiff. It is true that the evidence also shows that the defendant attempted to restrict the authority of his wife in the matter of contracting indebtedness on his account by telling her, from time to time, that he would send her sufficient money to enable her to pay cash for the things she needed to buy, and that she should not run accounts at the stores. This, in itself, is in effect a secret limitation upon the ostensible authority of the wife, and, since it was not communicated to the plaintiff prior to the transactions involved in this suit, it is rather an admission of the existence of an agency than proof to the contrary. We are satisfied that there was ample evidence upon which to submit the question of agency, and that the instructions of the trial court upon this subject were perfectly proper.

The appellant also contends that the court erred in not instructing the jury upon the question of proper and adequate support. The case cannot properly be said to turn upon the question of the adequacy of the support. The plaintiff relied upon his ability to establish an agency, the jury were amply instructed upon this issue, and a verdict has been returned in the plaintiff's favor upon such issue. Since there is evidence to support the verdict, the question as to whether or not the defendant provided amply support for his wife and children is immaterial.

The appellant also complains of the admission of certain of the plaintiff's testimony as to his custom in dealing with families. He testified that it was his custom to charge the goods furnished to families to the head of the family. It may be conceded that this is not proper evidence of custom or usage, because of being limited solely to the plaintiff's practice, but it does not follow that its admission is prejudicial error. The custom which the plaintiff testified he followed is one that is known by everybody to be so generally followed that it would even be proper to take judicial notice of it as a general custom.

It is further contended that it was reversible error for the court to permit the defendant's wife to testify at the instance of the plaintiff without his consent. Section 7871, Compiled Laws of 1913, is relied upon in this connection. So far as it is germane to the question presented, the section reads as follows: "A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or after-

wards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this subdivision does not apply to a civil action or proceeding by one against the other nor to a criminal action or proceeding, for a crime committed by one against the other."

The record does not disclose that any objection was made to the competency of Mrs. Nelson as a witness against her husband, but it does appear that she was fully cross-examined by his counsel. It is argued that, since no affirmative consent was given, the witness should have been precluded from testifying by the interference of the court. The appellant claims that the failure of the court to so interfere subjected him to the dilemma of choosing between interposing an objection to the competency of the witness, and thus incurring the risk of prejudicing his cause before the jury, or of remaining silent and submitting to the damaging effect of her testimony. The philosophy of a statute such as that above quoted, in its application to a case like the one at bar, is readily understood. It is but an expression of a policy designed to conserve matrimonial harmony. This it seeks to accomplish by refusing to allow one spouse to support an issue adverse to the other in a judicial forum, without the consent of the other, except where such may become necessary to vindicate the criminal law or to secure the civil right of one against the other. The primary purpose is not to subvert truth, and when one spouse is content to sit by and allow the other to testify he should be precluded from later contending that he did not consent. When he has allowed to be accomplished the mischief which the statute was designed to prevent, he cannot, with good grace, invoke its provisions to shield him from the effect of the testimony adduced. In so far as the statute would operate in favor of the defendant, he may, of course, waive it, and we are of the opinion that the failure to object is a waiver and is equivalent to consent. Wigmore, Ev. § 2242.

Finding no error in the record prejudicial to the appellant, the judgment of the trial court is affirmed.

BRUCE, Ch. J. (specially concurring). I concur in the above opinion. I am also of the belief that the original complaint was sufficient even without the amendment, and that, even when one is sought to be held for the act of an agent, the act can be alleged as the act of the

principal. Phillips, Code Pl. § 378; Hoosac Min. & Mill. Co. v. Donat, 10 Colo. 529, 16 Pac. 157; Weide v. Porter, 22 Minn. 429; Burnham v. Milwaukee, 69 Wis. 379, 34 N. W. 389; McNees v. Missouri P. R. Co. 22 Mo. App. 224; 2 C. J. 904.

ROBINSON, J. (concurring). Defendant appeals from a verdict of a jury and a judgment of the county court of Nelson county for $174, the price of groceries and family necessaries sold and delivered to the defendant at the request of his wife, from October 2, 1915, to March 10, 1916. The correctness of the account is not denied. It is in evidence, and it shows that the goods were necessaries for the family of defendant.

The defense is that the articles purchased were not necessaries, and that the wife did not have authority to charge them to defendant. He claims that he gave her sufficient money to run the house and care for the family. And it is true he gave her an occasional pittance of $50 or $100, but there is no claim that the groceries were not strictly necessary or that they were not furnished for the family of defendant.

Nelson worked on the Pacific coast for a good salary, and his wife represented him in caring for the house, the farm, and the family, and in charging him with necessaries for the family. She lived on his farm near Sheyenne, where the plaintiff kept a grocery store and kept poor, moneyless people from want. A wife and mother is not to be put on limited rations and treated like a dog. Defendant well deserves a severe rebuke for appealing or attempting to appeal such a case. It is a gross reflection on his manhood. The verdict is clearly right and the judgment is affirmed.

SIMON SHELLBURG, Plaintiff and Respondent, v. WILTON BANK OF WILTON, North Dakota, a Corporation, Defendant and Respondent.

I. C. DAVIES, as Administrator of the Estate of Charles J. Larsson, Intervener and Appellant, v. BISMARCK BANK, Defendant and Respondent.

(167 N. W. 721.)

Banks — certificates of deposit — action to recover on — transfer of certificates — to plaintiff — by owner just prior to his death.

1. The plaintiff sues to recover $6,000 on deposit certificates left by his uncle. The claim is that, two or three days prior to his death, the uncle transferred the certificate to his nephew, and that he did so relying on a promise of the nephew to care for him during his life.

Evidence of transfer — record fails to show.

2. There is no proof that plaintiff ever made such a promise or that deceased ever agreed to transfer the certificates to him.

Contract — consent of parties to — must be free and mutual.

3. The consent of parties to a contract must be free and mutual and communicated by each to the other.

Opinion filed December 14, 1917. On rehearing, April 27, 1918. Second petition for rehearing denied, May 15, 1918.

Actions on certificates of deposit.

Appeal from District Court, Burleigh County, Honorable *W. L. Nuessle,* Judge.

Reversed.

Theodore Koffel and *I. C. Davies* (*H. A. Bronson,* of counsel), for appellant.

Performance of consideration by living with a person during his life will not take an oral agreement therefor out of the Statute of Frauds. Austin v. Davis, 128 Ind. 472, 12 L.R.A. 120; Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222; Bender v. Bender, 37 Pa. 419; Gorham v. Dodge, 122 Ind. 1; Pond v. Sheehan, 132 Ill. 312, 8 L.R.A.

414; Moore v. Small, 19 Pa. 461; Crabell v. Marsh, 38 Ohio St. 331; Mauck v. Melton, 64 Ind. 414; Ham v. Goodrich, 37 N. H. 185; Smith v. Smith, 28 N. J. L. 208; Shanahan v. Swan, 48 Ohio St. 25; Hunt v. Hunt, 171 N. Y. 396, 59 L.R.A. 306; Franklin v. Matoa Gold Min. Co. 16 L.R.A.(N.S.) 381, 158 Fed. 941.

While the complaint does not so show, the proof here shows, if it shows anything, that the only consideration was for services "thereafter to be rendered." Spinney v. Hill, 81 Minn. 316, 84 N. W. 116.

Plaintiff seeks specific performance of a contract he claims to have made with the decedent. He seeks specific relief. The certificates of deposit which plaintiff claims decedent transferred to him have never been transferred because they were never indorsed by the owner, or decedent, and plaintiff cannot collect the money from the bank without such indorsement, under the express terms of the certificates, regardless of the statute on transfer of title. Therefore, in both instances the plaintiff seeks to have the court declare, in effect, an indorsement. He is seeking equitable relief. Code, § 7185, subd. 2; note to Selover, Neg. Inst. p. 163; Freeman v. Perry, 22 Conn. 617; Pavey v. Stauffer, 45 La. Ann. 353, 19 L.R.A. 716, 12 So. 512; Jenkins v. Wilkinson, 113 N. C. 532, 18 S. E. 696.

A bank is not bound to pay deposits evidenced by certificates of deposit except on production and surrender of the certificates properly indorsed. 7 C. J. p. 650, § 346; Fells Point Sav. Inst. v. Weedon, 18 Md. 320, 81 Am. Dec. 603; Cottle v. Buffalo Marine Bank, 166 N. Y. 53, 59 N. E. 736; Munger v. Albany City Nat. Bank, 85 N. Y. 580; Pardee v. Fish, 60 N. Y. 265, 19 Am. Rep. 176; Payne v. Gardiner, 29 N. Y. 146; Read v. Buffalo Marine Bank, 59 Hun, 578, 13 N. Y. Supp. 578; Tobin v. McKinney, 15 S. D. 257, 91 Am. St. Rep. 694, 88 N. W. 572, rehearing 14 S. D. 52, 91 Am. St. Rep. 688, 84 N. W. 228; Divine v. Unaka Nat. Bank, 125 Tenn. 98, 39 L.R.A.(N.S.) 586, 140 S. W. 747; Bellows Falls Bank v. Rutland Co. Bank, 40 Vt. 377; Hyland v. Roe, 111 Wis. 361, 87 Am. St. Rep. 873, 87 N. W. 252; Dollar v. International Bkg. Corp. 13 Cal. App. 331, 109 Pac. 499; Read v. Brayton, 143 N. Y. 342, 38 N. E. 261; 136 N. Y. 454, 32 N. E. 1083; Truman v. Dakota Trust Co. 29 N. D. 456, 151 N. W. 219.

Specific performance cannot be enforced against a party to a con-

tract if he has not received an adequate consideration for the contract. Code § 7198, subd. 1.

Or if it is not as to him just and reasonable. Code, § 7198, subd. 2; Hazelton v. Reed, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450.

It is not shown here that any service was ever performed by plaintiff, and therefore no value or consideration passed. Ramsey v. Gheen, 99 N. C. 215, 6 S. E. 75.

A court of equity will not lend its aid to a party who seeks to take an inequitable advantage of unforeseen events and circumstances, not contemplated by the contracting parties, especially when the complaining party can have adequate relief at law. Leigh v. Crump, 1 Ired. Eq. 299; Cannaday v. Shepard, 2 Jones Eq. 224; Lloyd v. Wheatly, 2 Jones Eq. 267; Herren v. Rich, 95 N. C. 500; Love v. Welch, 97 N. C. 200, 2 S. E. 242; Adams, Eq. 87 and notes.

A bill to compel the specific performance of a contract is an application to the sound discretion or the court, and such performance will not be decreed when, for any reason, it would be inequitable. Williams v. Williams (Wis.) 6 N. W. 814; Town v. Railway Co. (Wis.) 27 N. W. 169; Bird v. Logan (Kan.) 10 Pac. 564; Kelley v. Kendall (Ill.) 9 N. E. 261; Kelly v. Railroad Co. (Cal.) 16 Pac. 390; Bartley v. Greenleaf, 112 Iowa, 82, 83 N. W. 824.

In the case here the death of Larsson, the owner of the certificates, before performance of any contract was commenced, rendered it impossible for plaintiff to claim the aid of the court to put the certificates in such condition that the banks would have to honor them, according to their specific requirements, and to the law. Oliver v. Johnson (Mo.) 142 S. W. 277; Russel v. Sharp, 192 Mo. Loc. Cit. 285, 286, 111 Am. St. Rep. 496, 91 S. W. 134, and cases cited; Forrister v. Sullivan, 231 Mo. loc. cit. 373, 132 S. W. 722, and cases cited; Goodin v. Goodin, 172 Mo. loc. cit. 48, 72 S. W. 502, and cases cited.

It is essential to specific performance that the consideration should be valuable; a merely good consideration, such as natural love and affection, or the performance of a moral duty, will not suffice. Jeffreys v. Jeffreys, Cr. & P. 138; Moore v. Crofton, 3 Jones. & Lat. 442; Kennedy v. Ware, 1 Pa. 445; Morris v. Lewis, 33 Ala. 53; Keffer v. Grayson, 76 Va. 517; Barrett v. Geisinger, 179 Ill. 240; Bispham, Eq. 9th ed. 602; Winter v. Goebner, 21 Colo. 279, 40 Pac. 570; 2 Colo.

App. 259, 30 Pac. 51; Jeffries v. Jeffries, Craig & Ph. 138; Minturn v. Seymour, 4 Johns Ch. 497; Tallmadge v. Wallis, 11 Wend. 106; Cathcart v. Robinson, 5 Pet. 264; Ferguson v. Blackwell, 8 Okla. 489, 58 Pac. 647; Flood v. Templeton, 148 Cal. 374, 83 Pac. 148; Hamlin v. Stevens, 117 N. Y. 39, 69 N. E. 118; Ward v. Yorba, 123 Cal. 447, 56 Pac. 58; Brevator v. Creech, 186 Mo. 558, 85 S. W. 527.

Equity will not interfere to enforce the specific performance of a gift. Bispham's Principles of Equity, 9th ed. 601; Shepherd v. Shepherd, 1 Md. Ch. 244; Holland v. Hensley, 4 Iowa, 222; Buford v. McKee, 1 Dana (Ky.) 107; Studer v. Seyer, 67 Ga. 125; Strayer v. Dickinson, 205 Ill. 257; Re Lucan, L. R. 45 Ch. Div. 470; Tonseth v. Larson, 69 Or. 387; Atchley v. Perry, 55 Tex. Civ. App. 538.

Neither party to an obligation can be compelled to specifically perform it, unless the other party thereto has performed or may be compelled to so perform either completely or nearly so, together with full compensation for any want of entire performance. Code, § 7193, and cases cited; note to Emerson v. Pacific Coast & N. Packing Co. 1 L.R.A.(N.S.) 445; 1 Parsons, Contr. 9th ed. p. 486; Hammon on Contracts, p. 682.

The court erred in omitting to make findings, conclusions, and order for judgment as to the intervener. The intervener was in the cases through the orders of the court; he had the right to be there, and proper provision for a judgment as to him should have been made by the court. Osborn v. McClelland, 43 Ohio St. 284; Kernohan v. Durham, 48 Ohio St. 117; Sturtevant v. Bohn, 57 Neb. 671; Code, § 7143; Coburn v. Smart, 53 Cal. 742; Kimball v. Richardson-Kimball Co. 111 Cal. 396, 43 Pac. 111.

His rights should have been fully adjudicated and settled. Kimball v. Richardson-Kimball Co. supra; Coffey v. Greenfield, 55 Cal. 382.

F. H. Register and *S. E. Ellsworth,* for respondent, Shellburg, *Newton, Dullam, & Young,* for respondent, Wilton Bank, and *Benton Baker,* for respondent, Bismarck Bank.

All distinction between actions at law and suits in equity is abolished. Under the practice this cause was properly a jury case. Code, §§ 7608, 7846.

In the absence of a statute providing otherwise, both negotiable

notes and choses in action may be transferred without indorsement. Our statute does not require that either class of instruments be transferred in writing, and a transfer may be made without writing in cases in which a writing is not expressly required. Code, § 5493; Roberts v. First Nat. Bank, 8 N. D. 474, 79 N. W. 993; Krefer v. Tolbut (Minn.) 151 N. W. 529; Fruend v. Bank, 76 N. Y. 352; Basket v. Hassell, 107 U. S. 602.

Where an action properly triable by a jury is tried by the court without a jury, the supreme court will not try the case *de novo*, but the findings of the trial court are presumed to be correct. Appellant has the burden of showing error, and a finding based upon parol evidence will not be disturbed unless shown to be clearly and unquestionably opposed to the preponderance of the evidence. State Bank of Verona v. Maier, 34 N. D. 259, at 268.

By the delivery of the certificates of deposit here in question, the equitable title to them and the right to recover their amount passed at once to the person to whom they had been rightfully delivered. He at once becomes the real party in interest and may sue and recover in his own name. Edwards v. Wanher (Cal.) 53 Pac. 821; Smith v. Peck (Cal.) 61 Pac. 77; 20 Cyc. 1206, note 62, 1230, 1239; Connor v. Root (Colo.) 17 Pac. 733.

"A gift other than a gift in view of death cannot be revoked by the giver." Code, §§ 5538–5540.

"Soundness of mind in the donor and absence of fraud in a gift are presumed. No specific word of gift is required." Vander v. Roach (Cal.) 15 Pac. 354; Dirk v. Heiken, 61 Cal. 347.

There is nothing to show that the delivery of the certificates was made under circumstances which would naturally impress Mr. Larsson with an expectation of immediate death. The gift, therefore, was one *inter vivos*, and, when completed by delivery of the certificates, the property immediately vested in the plaintiff irrevocably, "and the donor had no more right and control over them after the delivery than any other person." Code, § 5540; 20 Cyc. 1203.

Indorsement of a negotiable instrument is not necessary to complete a valid *donatio causa mortis*. 7 Cyc. 792; Keifer v. Tolbert (Minn.) 151 N. W. 529; Westerloo v. DeWitt, 36 N. Y. 339; Riden v. Thrall (N. Y.) 26 N. E. 627.

"That the delivery of a certificate of deposit might constitute a valid *donatio causa mortis* does not admit of doubt. A certificate of deposit is a subsisting chose in action and represents the fund it describes as in the case of notes, bonds, and other securities, so that a delivery of it as a gift constitutes an equitable assignment of the money for which it calls." Re Van Alstyne (N. Y.) 100 N. E. 102; Basket v. Hassell, 107 U. S. 602; Fagan v. Troutman (Colo.) 135 Pac. 122.

Choses in action not negotiable and negotiable paper not indorsed may be the subject of a gift, and a delivery which vests in the donee the equitable title is sufficient without a complete transfer of the legal title. Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39; 20 Cyc. 1202, 1240; Johnson v. Holst (Minn.) 90 N. W. 1115; Cornell v. Cornell, 12 Hun, 312; Brown v. Brown (Conn.) 46 Am. Dec. 328; Grover v. Grover (Mass.) 35 Am. Dec. 319.

"Delivery of the key of a deposit vault containing bonds is a sufficient delivery of the bonds." Pink v. Church, N. Y. S. 307, affirmed in 29 N. E. 147; Code, § 5539.

ROBINSON, J. In this case two actions are united because they turn on the same identical question of fact. Each action is based on deposit certificates made to the deceased Charles Larsson. In each case plaintiff obtained a judgment for the amount of the certificates, and the administrator and the heirs appeal.

One complaint avers that on December 2, 1914, Larsson deposited with the Wilton Bank $3,500, receiving five certificates of deposit for $700, each payable to the order of C. J. Larsson in six months, with interest at 5 per cent. That on May 14th, Larsson for value transferred and delivered the certificates to the plaintiff, and that by mistake and inadvertence he failed to indorse the same, and died on May 17, 1915. The complaint in like manner counts on another certificate for $228.09.

In the Bismarck Bank case the complaint likewise counts on four deposit certificates of $500 each and on one for $250, dated December 3, 1914, payable in six months to the order of C. J. Larsson, with interest at 5 per cent.

The answer shows the appointment and qualification of the adminis-

trator, and claims the certificates as a part of the estate. The only consideration for the certificates of deposit was an alleged agreement on the part of the plaintiff to care for Larsson during his life, but there is nowhere in the record a word of evidence showing any such agreement, or showing that Larsson ever thought of indorsing his certificates to the nephew, the plaintiff, or that the nephew had the nerve to speak to his uncle of any such indorsement. The plaintiff was a young man of no home or property; he was a well driller and he lived in Nebraska in a very humble home with his sister, Mrs. Thurston. He had never seen his uncle only for a few days in 1914 and for three days in May, 1915, when he was received as a guest of his uncle at the home of Mr. and Mrs. Anderson, some 8 miles from Wilton, North Dakota. Larsson's age was sixty-five and during the last four years of his life he had been in ill health and had made his home with the Andersons, and they had treated him very kindly. He came to trust them, and he had promised to reward them for their care of him in addition to the sum which he paid for board. The $6,000 in question was the scrimpings and savings of many years. Larsson was nearing his grave, but he was not so feeble in body or mind as to think of transferring his $6,000 to his irresponsible and homeless nephew, and reducing himself to the position of a dependent and a pauper. He still had some hopes of life and he did think of going to live with his nephew and niece in Nebraska. To prepare for the trip on Friday afternoon of May 14, 1915, Larsson went to town with his nephew and Anderson in the car of the latter. He was helped into the bank, took a chair and waited some time for the arrival of Anderson. Then Anderson came and said to the cashier that Larsson wanted his box. The cashier asked Larsson if he wanted the box and he said, "Yes." The cashier testifies: "I got the box, opened the window and pushed it out in front of Larsson. Shellburg had the key when I pushed the box out, and he unlocked the box. Larsson wanted the cash on one certificate in the box. One of us took the certificate and asked Larsson if he wanted the money on it, and he said, 'Yes.' I asked if he was able to write his name and he said, 'No.' I wrote his name on the certificate, made his mark, and Anderson signed as a witness, and I placed the money near the deposit box in the window, and Shellburg took the money, $68.10. I locked the box myself and Shellburg said: 'We

will take the box with us.' I asked Larsson if he wanted Shellburg to carry the box and he said, 'Yes.' So I handed it over to Shellburg. I think Anderson and Shellburg both assisted the old gentleman to rise and go out of the bank."

They went home and the next day the old man became more feeble and sick, and died on May 17, 1915, about two and a half days from the time of his leaving the bank. If the old man was in a condition to do business when at the bank, if he desired to pass the title to his precious certificates, that was the time for him to do it and to put the agreement in writing in the presence of Anderson and the banker. But there is no evidence that the old man thought of making such a deal, and Shellburg did not venture to speak of it. True it is that when the cashier locked the box, wrapped it up, and passed it out of the window in front of Larsson, he pushed it to Shellburg, saying: This is for you, or this I give you, or some such words, meaning of course that Shellburg should take charge of the box on the way home. Then, when the old man got home, he had some refreshments and said to Mrs. Anderson, as she testifies: "I am ready to leave Monday. I have settled with Shellburg to take care of me, and if it don't reach what I got, he is to care for me as long as I live."

The cashier testified that Larsson wanted to know if he should take a draft for the money, of if he should turn the certificates into the bank down there, or if he should take the cash on it so that he could have excess money when he needed it. He says: "I told Mr. Larsson that he could take the certificates down there and could indorse them and turn them into the local bank and have them collect the interest on them, and if I should issue a draft at that time it would discontinue the interest on the certificates."

So, it appears poor Larsson concluded to keep his certificates drawing 5 per cent interest so he could have money as he needed it. There is no evidence that he ever thought of leaving himself a dependent or a pauper by transferring his certificates to his homeless nephew, and there is not a word of evidence that the nephew ever promised or agreed to care for his uncle, as alleged in the complaint.

A promise may be a good consideration for a promise, but in an action on a promise in consideration of a promise it is necessary to prove a promise by each party. The contract must be mutual. Both

parties must be bound or neither is bound. Section 5482. The consent of parties to a contract must be free and mutual and communicated by each to the other. Section 6837. It is essential to the existence of a contract that there should be parties capable of contracting and a sufficient consideration.

Section 5844. Consent is not free when it is obtained by undue influence or the taking of an unfair advantage of another's weakness of mind.

In his case there is no claim that there was any performance on the part of the plaintiff. The purpose of this action is to get $6,000 for nothing, and the contract asserted, if made at all, was made at a time when the old man was sinking into his grave and when his mind and body were equally feeble, and it is contrary to equity and good conscience. However, there is no evidence of any contract.

The judgment is reversed, and judgment is ordered in favor of the interveners.

GRACE, J. I dissent.

On Rehearing.

ROBINSON, J. On a rehearing of this case it has been strenuously insisted that, as the action is for the recovery of money only, the court is bound by the findings of the judge who presided at the trial and heard the testimony. So far as that rule has any force it does not apply in this case because there is no conflicting testimony, and hence there is no occasion to judge of the credibility of witnesses.

The claim of plaintiff was based on an alleged oral contract between himself and his deceased uncle. His claim is that he made to his uncle a promise to care for him during his life, and in consideration of such promise the uncle agreed to transfer to him deposit certificates amounting to about $6,000. In law a promise may be a good consideration for a promise, but the promises must be mutual and communicated by one to other. Both parties must be bound or neither is bound, and the parties must agree upon the same thing in the same sense.

By statute defendant was not permitted to testify to any promise on

his part, and no one has heard or testified to any promise by him. There is not in the record any testimony to show that the plaintiff ever promised to care for his deceased uncle, as alleged in the complaint. And it is mere beggary to insist that the court should presume a promise because the plaintiff was not permitted to testify.

But if the promise had been proved, still plaintiff cannot recover because of an entire failure of consideration. He did nothing whatever in pursuance of the promise. It appears beyond dispute that the plaintiff never did a thing toward the care of his uncle. True, this may have been prevented by the act of God and the sudden decease of the uncle, but that does not supply the total failure of consideration. When the consideration of a promise wholly fails, the promise is without any consideration and is unenforceable, and when the consideration fails because of mere impossibility of performance, the promise is not enforceable. 13 C. J. 368.

The plaintiff sues to get $6,000 for nothing. The decision by this court was well considered. It is clearly right and it is reaffirmed.

BRUCE, Ch. J., and CHRISTIANSON, J. I concur on the ground that I do not believe any mutual promise was proved.

BIRDZELL, J. I concur in the result. As I view the case there was competent evidence tending to establish a contract as to Larsson. Shellberg is the only person that could object to the competency of Mrs. Anderson's testimony, and he does not object for obvious reasons. However, I am of the opinion that the evidence fails to establish the terms of the contract with sufficient clearness, and that, if a contract existed, there was an entire failure of consideration. Certainly there is no evidence from which it can reasonably be inferred that Shellberg was to support Larsson while they remained at Anderson's.

GRACE, J. I dissent.

PER CURIAM. Plaintiff has filed an additional petition for rehearing, raising the question that this court has no power to order judgment, but should merely order a new trial. It is contended that this court has no power to order judgment in an action triable to a jury,

unless a motion for a directed verdict is made in the court below. In support of his contention, counsel cites § 7643, Comp. Laws 1913. The statute quoted and relied upon by plaintiff's counsel was adopted from Minnesota. And the Minnesota supreme court has held it not applicable to actions tried to the court without a jury. See Hughes v. Mechan, 84 Minn. 226, 87 N. W. 768; Noble v. Great Northern R. Co. 89 Minn. 147, 94 N. W. 434; Meshbesher v. Channellene Oil & Mfg. Co. 107 Minn. 104, 131 Am. St. Rep. 441, 119 N. W. 428. Nor are we wholly satisfied that this court is without power to order judgment, even in cases tried to a jury, even though no motion for a directed verdict was made, where the evidence clearly shows that it would be a futile and idle act to order a new trial. See Comp. Laws 1913, § 7844. But as this latter question is not involved in this case, we express no opinion thereon.

JOE HANEL, Respondent, v. JOHN OBRIGEWITSCH, Doing Business under the Name and Style of Dickinson Roller Milling Company, Appellant.

(3 A.L.R. 1029, 168 N. W. 45.)

Employer — to instruct employee as to dangers — rule requiring — object of — to give employee needed information — employee having such knowledge — failure to give is not proximate cause of injury in such case — negligence cannot be based on failure in such case.

1. The rule requiring the employer to instruct his employee and to warn him of dangers is only for the purpose of supplying the latter with information which he is not supposed to have, and, if it is shown that the employee did, in fact, possess the knowledge and an appreciation of the danger, a failure to warn him can in no sense be said to be the proximate cause of the injury, and, if not a proximate cause of the injury, it cannot be actionable negligence.

NOTE.—On the duty of a master to instruct and warn his servants as to the perils of the employment, see comprehensive note in 44 L.R.A. 33. On duty of master to warn servant of dangers of which he is already aware, see note in 29 L.R.A. (N.S.) 111.

For authorities passing on the question of master's duty to warn and instruct servant employed in dangerous work, see note in 1 Am. St. Rep. 548.

Employee — dangers — presumed to see and understand — prudence and intelligence require.

2. An employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience and in the same capacity for estimating their significance would see and understand.

Dangers — risks — apparent and plain — employee presumed to appreciate them.

3. The danger of having one's fingers crushed, if placed between the rollers of a machine for the purpose of removing material which has clogged the same, and while the engines are working and the machine is in operation, is a risk which is so patent and apparent that an employee of reasonable intelligence would be presumed to know and appreciate it.

Opinion filed May 18, 1918.

Action for personal injuries.

Appeal from the District Court of Stark County, Honorable *W. C. Crawford,* Judge.

Judgment for plaintiff. Defendant appeals.

Casey & Burgeson, for appellant.

The injury of the plaintiff was caused by his own negligence. The evidence clearly shows that he knew all about the operation of the feed-grinding machine and was familiar with all its workings, and that any dangers were clear and apparent to one of his knowledge and intelligence. Kroger v. Cumberland Fruit Package Co. 130 N. W. 513.

"Where a young man nineteen years old testifies that he did not know that, if he got his fingers into the rolls of a straw cutter they would be caught thereby, and that if caught he would be injured, it is not evidence tending to establish that such were the facts, and a nonsuit is proper." Rothe v. Barrett Mfg. Co. 71 N. W. 1034; Gardner v. Paine Lumber Co. 101 N. W. 700.

Where an employee of ordinary intelligence knows of dangers in connection with his employment, or where such dangers are clear, open, and apparent to such person of the age of the plaintiff, no instructions in relation thereto, from the employer, are necessary or required. Groth v. Thomann, 86 N. W. 178; Crowley v. Pacific Mills Co. 19 N. W. 344; Connelly v. Eldridge, 36 N. E. 469; Berger v. St. Paul M. & M. R. Co. 38 N. W. 14; Ciriack v. Merchants' Woolen Co. (Mass.) 15 N. E. 579;

De Souza v. Stafford Mills (Mass.) 30 N. E. 81; Pratt v. Prouty (Mass.) 26 N. E. 1002; Coullard v. Tecumseh Mills, 23 N. E. 730.

"An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed." Comp. Laws 1913, ! 6107; Truntle v. North Star Woolen Mills Co. 58 N. W. 832; Henry v. King Phillip Mills (Mass.) 29 N. E. 581; Patnode v. Warren Cotton Mills, 32 N. E. 161.

"The employer was under no obligation to warn plaintiff of the danger which was known to him, however his knowledge may have been acquired, and therefore he may not have appreciated the full extent of the danger." Downey v. Sawyer (Mass.) 32 N. E. 654; Derringer v. Tatley, 34 N. D. 43.

W. F. Burnett, for respondent.

Plaintiff was inexperienced in the working or handling of such machinery, and where the master gave him wrong or improper instructions, and plaintiff relied and acted upon them, the master or employer would be liable.

The question of what instructions were given, how they were given, and whether relied on by plaintiff, is properly one for the jury. Tuckett v. Am. S. & H. Laundry (Utah) 4 L.R.A.(N.S.) 990; Ross v. Double Shoals Cotton Mills, 140 N. C. 115, 52 S. E. 121.

The supreme court will not disturb the verdict of a jury if there is a question of fact necessarily involved, or if there is any evidence of negligence. Cameron v. Great Northern R. Co. 8 N. D. 124; Zink v. Lahart, 16 N. D. 56; Hall v. N. P. R. Co. 16 N. D. 60, 14 Ann Cas. 960; Umsted v. Colgate Farmers Elev. Co. 18 N. D. 309; Webb v. Dinnie Bros. 22 N. D. 377; Wyldes v. Patterson, 24 N. D. 218; Messinger v. Valley City Street & I. R. Co. 21 N. D. 82, 32 L.R.A.(N.S.) 881; Roux v. Blodgett & D. Lumber Co. (Mich.) 13 L.R.A. 728; Haines v. L. S. & M. S. R. Co. 129 Mich. 484, 89 N. W. 349; Smith v. Spokane, 16 Wash. 408, 47 Pac. 888; Stevenson v. Sheffield Brick & Tile Co. 151 Iowa, 371, 130 N. W. 586; Yanike v. Chicago & N. W. R. Co. 149 Wis. 554, 136 N. W. 329; O'Brien v. N. W. Consol. Mill. Co. 119 Minn. 4, 137 N. W. 399.

"The test of contributory negligence or want of due care is not found in the failure to exercise the best judgment or to use the wisest precaution, but allowance may be made for the influences ordinarily governing

human action, as what would, under some circumstances, be want of reasonable care, may not be such under others." Lent v. New York C. & H. R. R. Co. 120 N. Y. 467.

"Where there is a safe and an unsafe way of doing the work the master must give an unskilled servant instructions how to do it to avoid injury." Wright v. Stanley, 119 Fed. 330; Royer v. Tinkler, 16 Pa. Super. Ct. 457; Sheetran v. Trixler Stove etc. Co. 13 Pa. Super. Ct. 219.

This is true as a duty, even though the servant does not ask for instruction. Missouri P. R. Co. v. Watts, 64 Tex. 568.

BRUCE, Ch. J. This is an action to recover damages for personal injuries occasioned by the hand of the plaintiff being caught and crushed between two rollers in a flour and feed mill. The plaintiff was a man of thirty-nine years of age. He had worked at the blacksmith's trade for years in Russia, before coming to the United States, and during such employment had repaired wagons, plows, etc. He does not, however, seem to have been there employed around machinery. After coming to the United States he farmed for a while and while doing so and for about eight months used an ordinary farm feed mill. He had been working for about three and one-half months at the particular employment at which he was injured, and that employment seems to have furnished all of his real knowledge of grinding machinery. The machine at which he was injured was an iron frame with three sets of rolls inclosed, about 18 inches apart and one above the other. There was an opening in the iron frame just below each set of rolls. This opening was covered by an iron door which fitted into the machine so as to prevent dust coming out, and *the bottom of the door was about 6 inches above the set of rolls below.* In order to get his hand caught in the rolls, it was necessary to put it in the door, and down from 4 to 6 inches before it would reach the top of the rolls, or it would have to be drawn by something or by some means down that distance. So, too, as the rolls were about 17 inches in diameter it would be necessary that the fingers should be put or drawn a few inches lower between the rolls before they would be caught.

The negligence charged is, "that the defendant carelessly and negligently failed to instruct the plaintiff in respect to the mechanism of the said grinding machine, or as to the use thereof, or as to the manner of

operating the same, and neglected to warn the plaintiff relative to the risks incident thereto, and especially of the danger and risk of his hands being caught or drawn in between the rolls of said machine, although the plaintiff was ignorant of said danger and risks.

"That the defendant negligently and carelessly failed to provide a proper belt for the operation of said machine; that said machine was intended to be equipped, and should have been equipped, with a belt 6 inches in width; that prior to the time plaintiff entered the employ of the defendant, one of the belts on said machine had worn out, and the defendant negligently replaced the same with an old 4-inch belt, which was inadequate, and not of sufficient strength or width to properly operate and turn said grinder machine; and that the defendant with knowledge negligently permitted, allowed, and authorized the use of said defective, unfit, and worn belt in the operation of said machine and equipment so furnished by him, and negligently failed and neglected to warn and instruct the plaintiff of such dangerous, unfit, and defective appliance.

"That on or about the 18th day of November, 1914, while the defendant was operating said machine in the usual and ordinary manner, under instructions and by the direction of the defendant, the said machine, by reason of said defective and unfit belt and appliance, choked up and clogged, thereby making it necessary for the plaintiff in the course of his employment to clean the same to prevent injury to said machine and belting, and to protect and preserve his employer's property, and that while the plaintiff was cleaning said clogged machine in the usual and ordinary manner by reason of said defective belt, and by reason of the failure of the defendant to warn and instruct the plaintiff as to the dangers incident to the use of said defective machine and appliance, the plaintiff was injured as hereinafter set forth, to wit, while cleaning said machine in the usual and ordinary manner, and without negligence on the part of the plaintiff, the said machine which had become clogged, as hereinbefore set out, suddenly started and caught the right hand of the plaintiff between the rolls of said machine, and cut and bruised the same so that two fingers thereof had to be amputated, and all the joints of plaintiff's said hand became ankylosed so that the plaintiff has totally and permanently lost the use of said hand."

The answer is a general denial and in addition contains the defense that the plaintiff was not employed to work around the machine at all,

nor did his duties take him there, and that, "further answering, the defendant alleges that the belts driving the feed mill were in first-class condition for doing the work of grinding grain, and the rolls and everything connected with such work were properly covered so as to prevent accidents of any kind; that the plaintiff had no right or authority to be anywhere near such rolls, and in order for him to have his hand injured, it was necessary for him to open the door of the covering for such rolls and stick his hand in there; that the rolls between which he struck his fingers were not used for the grinding of grain at all, but were running spread apart and idle; that the defendant hired a miller for the purpose of looking after the grinding of feed as well as the grinding of flour, and it was not the duty of nor was plaintiff allowed to have anything to do with the rolls grinding the feed by which his hand was hurt.

"That upon information and belief defendant alleges that plaintiff, on the day in which he was hurt, came into the mill intoxicated, and because of such condition opened the door of the cover securely covering such rolls, stuck his hand between said rolls while running, and by so doing injured two fingers of his hand; that he was not at that time performing any duty imposed upon him by the defendant, nor was he doing anything that he was instructed or allowed to do, and his injuries were caused because of his intoxicated condition and his negligence in interfering with the machinery his duties did not require him to touch in any manner."

The defense of intoxication was clearly presented and must be conceded to have been determined in favor of the plaintiff by the verdict of the jury. The defense that the plaintiff was not employed to work around the machinery appears to have been abandoned.

The defense of contributory negligence and of the assumption of risk are hardly pleaded. The only real defense that is left is that of lack of negligence on the part of the defendant. On this point, however, it would appear that the claim that the belts on the so-called slow side of the machine were too small, and that this occasioned the machine to choke up, should be eliminated if, indeed, it has any merit, since these belts were on the machine at the time of the employment. The plaintiff knew of none other, and the machine choked at the beginning of his employment and choked repeatedly afterwards. Perhaps larger belts would have prevented the choking, though of this we are by no means certain. The case, however, is very similar to that in which one is employed to

drive an automobile which has no self-starter, and who breaks his arm while cranking the machine. It may be true that there would have been no accident, if a self-starter had been furnished. No court, however, would hold the master liable for the lack of the equipment.

The question, then, which is presented to us is, Where a person is employed to work in a mill, and in the grinding of grain at a machine, which is so equipped that it is liable to clog when grain is run therethrough, and when no specific instructions are given as to the care of the machine and as to the method of cleaning it when the clogging takes place, and when soon after the employment the machine does clog and the employer uses a method to relieve the difficulty, which is dangerous and palpably dangerous to anyone, can an adult employee, merely because the employer has used that method, continuously continue so doing without complaint, and can he later and, when injured, recover damages, because he was not told that the method used was dangerous?

To put the question in another form. Is it negligence for an employer to fail to warn an employee of a danger that is so obvious that one of his age and experience should readily realize it, or to refrain from a practice which such employee must realize is fraught with danger?

The plaintiff himself testifies that no specific instructions were given to him as to how to clean out the machine when it clogged, and admits that there was a way to stop the rolls and to thus work in safety, and that that was to either throw off the belt or to stop the engine.

After stating that the machine clogged about a week after he started to work, he testifies as follows:

He, Obrgewitsch, came right over and cleaned out that machine, and then he pressed on the belt and the machine started again. I simply told him that it stopped, that he would have to come over there. He opened one of the little doors and cleaned it out with his hand.

Q. I will ask you to state whether or not Mr. Obrigewitsch pulled out the feed or whatever there was in there with his hand out onto the floor, out through the door?

A. Yes, sir.

Q. Then when he pulled the feed out what did he do, if anything?

A. He pressed on the belt and the machine started up again.

Q. After this did the machine clog again?

A. Yes. It stopped a great many times especially when the grain was a little damp, or a little damp oats, why it bothered considerably.

Q. What did you do then, when the machine stopped?

A. I always proceeded to clean the machine the same way as I seen it done, the same way as I seen Mr. Obrigewitsch clean it.

Q. Now, did Mr. Obrigewitsch ever give any warning or caution about the danger of any parts of the machinery in the mill?

A. He never told me, or I never asked.

Q. Did Mr. Obrigewitsch see you clean this machine afterwards at different times?

A. I could not state positively he seen me, because I was always busy and had to watch the roll closely. He could have been there many times, but I could not say positively that I seen him there. The machine clogged so many times that I could not state. Sometimes it was two or three times a day, and sometimes it would not clog for a couple of days. Just as soon as wet grain would come around it would clog two or three times or more.

Q. Did you always or did you not use the same method of cleaning it out as that you had seen Mr. Obrigewitsch use?

A. Yes, sir. I never asked anybody else afterwards. I was crippled on the 17th day of November. The machine was clogged as usual.

Q. On each of the times when the machine was clogged and you cleaned it out with your hand, what, if anything, did you do to the belt to start it?

A. After I cleaned it out and seen the machine would pretty near go, I would either bear down on the belt with my knee, or sometimes on my hand, and then the machine would get hold again and start running. On the day of my injury I started to clean the machine, as usual it clogged up on me, and I got it nearly all out. I didn't see it was clogged out well enough, so I wanted to take out another handful, and just about the time I was reaching in for the rest of it, or the last hand full, to get a little more out of there, the machine suddenly moved and caught my finger.

Q. Did this machine ever start like that before on any occasion when you cleaned it without pressing on the belt?

A. The machine has never started that way before, and I was certain

it would never start. If it had started I would have been more careful and have looked out for it.

It is perfectly clear that it would have been the height of folly to have attempted to clean the machine when the rolls were revolving; for even if the fingers would not touch they would have been drawn down by the feed and particles that were being ground. The evidence shows that in the past this portion of the machine had frequently choked, and although the other rolls were still turning on the occasion of the cleaning by the employer and the particular rolls did not then revolve again until the belt was pushed against the wheel, had anyone the right to rely on such a fact?

We think not. The method employed by the master was certainly a dangerous one, but this fact must have been apparent to anyone of any intelligence, and the evidence is far from showing that the plaintiff lacked ordinary intelligence in this respect. Crowley v. Pacific Mills, 148 Mass. 228, 19 N. E. 344; DeSouza v. Stafford Mills, 155 Mass. 476, 30 N. E. 81; Coullard v. Tecumseh Mills, 151 Mass. 85, 23 N. E. 731; Ciriack v. Merchants' Woollen Co. 146 Mass. 182, 4 Am. St Rep. 307, 15 N. E. 579; Berger v. St. Paul M. & M. R. Co. 39 Minn. 78, 38 N. W. 814, 16 Am. Neg. Cas. 251; Connolly v. Eldredge, 160 Mass. 566, 36 N. E. 469; Groth v. Thomann, 110 Wis. 488, 86 N. W. 178; Gardner v. Paine Lumber Co. 123 Wis. 338, 101 N. W. 700; Roth v. S. E. Barrett, Mfg. Co. 96 Wis. 615, 71 N. W. 1034; Kroger v. Cumberland Fruit Package Co. 145 Wis. 433, 35 L.R.A.(N.S.) 473, 130 N. W. 513.

We realize that there are cases where an employee is entitled to rely upon the superior knowledge of his employer. Even, however, if the action of the employer in cleaning the roller in the way that he did could in any way be construed to be an instruction, it can hardly be believed that he had any superior knowledge in this respect. Surely everyone who has worked on a farm or anywhere else knows that it is dangerous to try to remove particles from between turning wheels, and that while machinery is in operation and the engines are working the rolls are liable at any time to start revolving, even though they may be temporarily clogged, and this even though the pressing of the belt thereon may increase the friction and more surely and immediately produce the result.

It is perfectly true, as pointed out by the plaintiff, that it is a general rule that where there is a safe and unsafe way of doing the work, the master must give the servant instructions how to do it to avoid injury. Missouri P. R. Co. v. Watts, 64 Tex. 568.

There is, however, no reason to believe that in the case at bar the question of skill was involved. It was a mere question of the ordinary knowledge which everyone possesses. The plaintiff himself testifies that there was a way to stop the rolls and to thus clean the machinery with safety, and that was either to throw off the belt or to stop the engine.

The question is not one of contributory negligence or of the assumption of risk. It is a question of negligence merely. The case comes within the rule that "there is no duty of warning and instruction, if the employee's duties are simple and the danger obvious, or, if by any other means he possesses knowledge of the risk to which he is subjected. The rule requiring the employer to instruct his employee and to warn him of danger is only for the purpose of supplying him with information, which he is not presumed to have, and, if it is shown that the employee did, in fact, possess the knowledge [and an appreciation of the danger], a failure to warn can in no sense be said to be the proximate cause of the injury, and, if not the proximate cause of the injury, of course it cannot be actionable negligence. The employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience and with the same capacity for estimating their significance would see and understand." 18 R. C. L. 569, 570.

The authorities upon the subject are very numerous and are practically all to the same effect. In Marsden Co. v. Johnson, 89 Ill. App. 100, the plaintiff, a boy of sixteen years, was injured while trying to remove a cornstalk, which had clogged the machine. Among other things the court said: "A boy sixteen years old, if of ordinary intelligence, is possessed of sufficient discretion to avoid obvious and apparent dangers, and certainly must know, if he puts his fingers into revolving rollers of the character of those in the machine in question, he cannot escape injury. It would hardly occur to appellant or its foreman as necessary to warn appellee not to put his fingers into these revolving rollers. The danger appears to have been patent and obvious to the most casual observer, as it seems to us; and hence we are of the opinion it was not negligence on the part of appellant not to have given this warning."

In the case of Lowcock v. Franklin Paper Co. 169 Mass. 313, 47 N. E. 1000, 3 Am. Neg. Rep. 659, it was held that the employer was not negligent in failing to instruct a boy of fifteen "that his hand would be caught like the paper if he put it in too far between revolving cylinders, as the danger was apparent." It was also held that "the statement of an employer to an employee putting paper between a revolving cylinder and a moving belt with the use of a split stick, that he could use his hands and it would not be dangerous, did not assert or suggest that his hands would not be caught and drawn along like the paper, when in contact with the inward moving surfaces."

In the case of Crowley v. Pacific Mills, 148 Mass. 228, 19 N. E. 344, the court said: "The plaintiff's injury was received, according to his own testimony, in consequence of his putting his finger in between the roll and the cylinder, in order to smooth the cloth, just before it passed upon the cylinder, by taking out a 'double edge,' as it was called, that being a term applied to the turning over or under of the edge of the cloth. The plaintiff was seventeen years old, and had been at work for about six months upon a machine substantially like that upon which he received the injury, except that the distance between the roll and the cylinder was less upon the latter machine; and he had been at work upon the latter machine nearly two weeks. The operation of the machine was simple. In view of the plaintiff's age and experience prior to the time of the accident, no duty then rested on the defendant to give him instructions in reference to the risk of possible injury. It could not be deemed necessary at that time to tell him that, if he should put his hand in between the cloth and the revolving cylinder, just at or just before the place where the cloth came in contact with the cylinder, there was danger that his hand would be caught. The omission to do this did not constitute negligence on the part of the defendant."

In the case of Kuich v. Milwaukee Bag Co. 139 Wis. 101, 120 N. W. 261, it was held that "where an employee about fourteen and one-half years old feeding bags into a printing machine could not fail to appreciate the danger if her fingers were grasped by the nippers grasping and drawing the bags into the machine, and the employee had been engaged in the operation of such machines for several months, and she possessed the intelligence and information to understand the danger incident to

her work, the employer was not required to instruct her, or to give her warning as to the danger of her fingers being caught by the nippers."

Numerous holdings to the same effect are everywhere to be found. See 18 R. C. L. 569, 570, and note to Cronin v. Columbian Mfg. Co. 29 L.R.A.(N.S.) 111; Ewing v. Lanark Fuel Co. 65 W. Va. 726, 29 L.R.A.(N.S.) 487, 65 S. E. 201.

Most of the cases cited are cases of minors. If the rule is applicable to minors, much more must it be applicable to adults.

We therefore hold that no negligence was shown, and the judgment of the District Court is reversed, with directions to dismiss the complaint.

GRACE, J. I dissent.

FARMERS GRAIN & MILLING COMPANY, a Corporation, Appellant, v. J. V. N. SUNDBERG and the Title Guaranty & Surety Company, a Corporation, Respondents.

(168 N. W. 55.)

Mortgage — foreclosure — redemption — postoffice address — of mortgagee in subsequent mortgage — register of deeds — failure to mail copy of foreclosure notice — to subsequent mortgagee — damages — suit to recover — by subsequent mortgagee — negligence of — cause of loss — action will not lie.

To secure a prior debt, plaintiff took from his insolvent debtor a mortgage for $800 on a quarter section of land. It was a third mortgage and it did not give the postoffice of the mortgagee. Seven months after default had been made in plaintiff's mortgage, the year of redemption expired on a foreclosure of the second mortgage.

The plaintiff brings this action to recover from the register of deeds the amount of its mortgage, with interest, because the register failed to mail to its postoffice or the postoffice nearest the land a copy of the foreclosure notice.

Held, that there is no evidence or presumption that the register knew the postoffice of the plaintiff, or that a copy of the notice mailed to the postoffice nearest the land would have been forwarded to the plaintiff, and that its own gross negligence was the real and proximate cause of its loss.

Opinion filed May 18, 1918.

Appeal from the District Court of Eddy County, Honorable *C. W. Buttz,* Judge.

Plaintiff appeals.

Affirmed.

Henry Leum (*Chas. A. Lyche,* of counsel), for appellant.

The register of deeds is a ministerial officer and as such is liable at common law, in the absence of express statutory provision against it, to an action for damages caused by his failure to perform the duties of his office, or for the negligent or illegal performance thereof. Rising v. Dickinson (N. D.) 23 L.R.A.(N.S.) 127, 121 N. W. 616.

In foreclosure cases it is the duty of the register of deeds, within ten days after the filing of the affidavit of the publication of the notice of foreclosure of a real estate mortgage by advertisement, to send by registered mail a copy of such affidavit to the record owner and to every subsequent mortgagee whose mortgage appears of record, addressed to them at the postoffices named in the record in his office; in the absence of a postoffice address appearing of record, then to the postoffice nearest the land described in the certificate, and make and file his affidavit of mailing. Code, §§ 8095, 8096.

His failure so to do renders him liable in damages. Code, § 8097; Gibson v. People, 5 Hun, 542, 543; People v. Walker, 23 Barb. 304; Fryatt v. Lindo, 3 Edw. Ch. 239; Burns v. People, 59 Barb. 531, 543; Webb v. Birdwell, 15 Minn. 479, 484, Gil. 394; Brownell v. Greenwich (N.Y.) 4 L.R.A. 685.

The register of deeds is liable for such fees as he should have collected. 9 Enc. Ev. p. 203 b. State v. King (Mo.) 36 S. W. 681.

"If a party has changed his place of business, and has informed the postoffice authorities of it, there is a presumption or inference that the letter has been delivered at the new address." Marston v. Biglow (Mass.) 5 L.R.A. 43; Comp. Laws 1913, § 7936, subd. 24, § 7938, subd. 31; St. Vincent's Inst. v. Davis, 129 Cal. 20, 61 Pac. 477; Grade v. Mariposa County, 132 Cal. 75, 64 Pac. 117; Williams v. Culver, 39 Or. 337, 64 Pac. 763; Hill's Ann. Laws, § 776, subd. 24; 9 Enc. Ev. p. 897.

The law presumes "that things have happened according to the

ordinary course of nature and the ordinary habits of life." Code, § 7936, subd. 28.

Rinker & Duell, for respondent.

In order to recover, plaintiff must show that the damage, if any, was the direct result of defendant's neglect,—that his negligence was the proximate cause. Amberg v. Kinley (N. Y.) 108 N. W. 830; Rising v. Dickinson (N. D.) 121 N. W. 116; State v. Ruth (S. D.) 68 N. W. 189.

"If the result complained of would have followed notwithstanding the misconduct of the officer, then the officer cannot be held liable." Hartnette v. Boston Store (Ill.) 106 N. E. 837; 23 Enc. Law, p. 379 (d.); Grove v. Bowman (Iowa) 1 N. W. 492; Hatcher v. Dunn (Iowa) 71 N. W. 343; Wooley v. Baldwin, 5 N. E. 573; Lick v. Madden, 36 Cal. 208; Boardman v. Hayne, 29 Iowa, 339.

ROBINSON, J. This is an appeal from a directed verdict and judgment for defendants. The plaintiff sues to recover $800 damages because of the alleged neglect of Sundberg, the register of deeds of Eddy county, to comply with this statute: "It shall be the duty of the register of deeds within ten days after the filing of the affidavit of publication of the notice of mortgage foreclosure in foreclosure of real-estate mortgages by advertisement, to send by registered mail a copy of such affidavit of publication to the record title owner and to every subsequent mortgagee whose mortgage appears on record, addressed to him at the postoffice given of record in his office. If no postoffice address appears of record or is unknown to the register of deeds, then to the postoffice located nearest the land described in such certificate." Laws 1909, chap. 126, § 1.

The claim of plaintiff is that the register of deeds failed to mail it a copy of notice showing a foreclosure sale of the land described in the complaint, and that for want of such notice it failed to redeem from the sale and lost its chance of recovering $800 and interest secured by its third mortgage on the south half of northwest quarter and south half of northeast quarter, § 3, twp. 150, range 63, in Eddy county. The postoffice nearest the land is Warwick and the postoffice of plaintiff is Mayville. The defense is that the postmaster at New Rockford, in Eddy county, did not know the address of the

plaintiff; that it did not appear from its mortgage record, and that to have mailed a notice to Warwick would have been an idle act; that there is no proof of any loss by reason of a failure to mail a notice to Warwick.

It is also claimed with much force that the effect of the statute is to impose on the register of deeds an unreasonable risk and burden without compensation, and to deprive him of his property without due process of law. Without passing on the constitutional validity of the statute, it is certain that any such statute must be given a strict construction, and any party seeking to recover damages under it must show himself clearly within its provisions. He must show that the damage was the natural and proximate result of a failure to mail it notice. When the affidavit of publication was filed for record in the office of the register of deeds, he did not know the plaintiff or his postoffice, and its recorded mortgage did not give its postoffice.

Under the statute he was bound to know that Warwick is the postoffice nearest the land. There is evidence that the deputy postmaster knew plaintiff's address, but there is no evidence that it was known to the postmaster, or that a letter addressed to the plaintiff at Warwick would have been forwarded to Mayville, a distance of about 100 miles. There is no evidence that Warwick was ever the postoffice address of the plaintiff or that it had ever received letters addressed to that office. To test the question, defendant mailed a registered letter to the plaintiff at Warwick, and it was returned and not forwarded; but the plaintiff insists that the statute raises a presumption that a letter addressed to the postoffice nearest the land would have been forwarded to the correct postoffice.

That is the point on which the plaintiff relies; but if such a presumption were to prevail in this case, it must prevail in every case, even though the party addressed never resided within a thousand miles of the land. We know, as in this case, that mortgages are frequently taken on lands that are 100 or 1,000 miles from the mortgagee, and by parties residing in New York city, in England, and in Scotland. Hence, it would be the height of absurdity to hold that a letter would be forwarded to a mortgagee if addressed to a postoffice nearest the mortgaged land.

The real and proximate cause of plaintiff's loss was its own negligence. It held only a third mortgage on the land, which was given to secure a prior debt which ought to have been paid in cash. The plaintiff knew that its mortgagee was not responsible, and that in all probability it would have to care for the two prior mortgages, and that it would devolve on it to care for such mortgagee and the taxes. It knew that its mortgage did not contain its postoffice address, and that it had not left its address with the register of deeds, or requested the register to advise it of proceedings to foreclose the prior mortgages.

The mortgage of plaintiff was made to secure $800 and interest. It was dated February 7, 1913, and due October 1, 1913. The prior mortgage for $1,200 and interest was foreclosed by a sale of the land on May 3, 1913. Time to redeem expired on May 3, 1914. At that time the plaintiff's third mortgage was seven months past due and wholly unpaid. That alone should have been sufficient notice to look out for the prior mortgages. The plaintiff was grossly negligent in regard to its mortgage lien, and its own gross negligence is the natural and proximate cause of its loss.

The suit is without any merit, either in law or equity.

Judgment affirmed.

BILL BRAEDER, Appellant, v. FRANK ARMITAGE, Respondent.

(168 N. W. 171.)

Justice court — change of venue — motion for — affidavit in support of — must be made by party — attorney cannot make.

1. Section 9036, Compiled Laws 1913, relating to a change of venue from a justice court, provides that the affidavit in support of such change of venue shall be made by the party applying for such change of venue. *Held* that the affidavit cannot be made by the attorney for the party.

Justice court — appeal from — on questions of law alone — notice should so specify — omission to so specify — may be cured by stipulation.

2. Where an appeal is taken from a justice court upon questions of law only, and the notice of appeal does not so specify, a stipulation in writing between the

parties to the action, that the appeal is upon questions of law only, supplies the want of the statement to that effect in the notice of appeal.

Opinion filed May 22, 1918.

Appeal from the District Court of Hettinger County, North Dakota. Reversed.

Jacobsen & Murray, for appellant.

Even though the justice lost jurisdiction by ordering the change of place of trial, still he acquired jurisdiction of the trial by the voluntary appearance of defendant before him and by defendant contesting the case upon the merits. Comp. Laws 1913, § 9018; Heard v. Holbrook, 21 N. D. 348, 131 N. W. 251.

But the justice did not lose jurisdiction by making the order changing the place of trial, because such order was void in that it was not based upon an affidavit by the party seeking the change. An affidavit made by the attorney is not a compliance with the statute. Comp. Laws 1913, § 9036; 24 Cyc. 508; Cromer v. Watson, 59 S. C. 488, 38 S. E. 126.

Defendant cannot impeach the transcript of the justice. Heard v. Holbrook, supra; Hanson v. Gronlie, 17 N. D. 191.

The notice of appeal should contain a specification that the appeal is upon questions of law only. This requirement is mandatory. In the absence of such specification there is no such appeal. Comp. Laws 1913, § 9164; Grovenor v. Signor, 10 N. D. 503.

The fact that he served with his notice of appeal a statement of errors would not have prevented him from obtaining and having a trial on the merits. What he did, not what he intended to do, controls. Comp. Laws 1913, § 9164.

Otto Thress, for respondent.

When a motion for change of venue is made in justice court, supported by proper affidavit, and the motion is granted and papers in the case transferred to another justice's court, the first justice has lost jurisdiction of the case for all purposes. Comp. Laws 1913, § 9038; Lacy Fruit Co. v. McClellan, 25 N. D. 499, 142 N. W. 44.

Jurisdiction of a cause is not lost until the order of transfer is made; such order completely devests the justice making it, of all jurisdic-

tion. Grundhauser Threshing Co. v. Thress (N. D.) 162 N. W. 558.

A justice's docket is deemed to be correct and cannot be attacked in a collateral proceeding. Comp. Laws 1913, § 9012.

The attack here is not collateral. It is a direct challenge to the entries appearing, upon which rests the justice's jurisdiction. 23 Cyc. 1089; Christenson v. Esheck (Neb.) 149 N. W. 76.

Finding of the lower court, though based upon conflicting evidence, should not be disturbed by the supreme court unless it clearly appears that the lower court was wrong. The docket entry of the justice shows that defendant appeared generally. Defendant states positively in his affidavit that he did not do so. Upon such showing the lower court found that defendant did not make a general appearance. 4 C. J. 777.

The stipulation of the parties to the effect that the appeal was taken on questions of law only is sufficient, and supplies any omission to so state, in the notice of appeal.

Further, the specifications of error attached to and served with the notice of appeal are sufficient to apprise respondent and court of the nature of the appeal. In any event such defects were waived by the respondent. 31 Cyc. 718, 724, 733.

GRACE, J. Appeal from the District Court of Hettinger county, North Dakota.

This was an action brought before a justice court before one Barth, justice of the peace of Mott, North Dakota, for $13.50 for alleged balance due on a labor account. Summons was returnable August 26, 1916, at 10 o'clock A. M. On August 25, 1916, the defendant's attorney filed an affidavit and motion for change of venue with said justice of the peace, which affidavit was signed by the defendant's attorney, Otto Thress. The motion for change of venue was granted, and the action was, by the justice, transferred or attempted to be transferred to Justice McCain, who notified both parties of the time and place of hearing before him, which was August 26, 1916, at 10 o'clock P. M.

On August 26, 1916, at 10 o'clock A. M. plaintiff made application to justice of the peace, Barth, to have the order granting the change of venue reversed, which was done on the motion of the plaintiff.

On August 26, 1916, at 10 o'clock A. M., defendant was requested

by plaintiff's attorney to go to the rooms of Barth, the justice of the peace. The defendant claims he remonstrated, but he did go, and the case was tried so far as the plaintiff was concerned. Defendant was called as a witness for plaintiff and cross-examined by the plaintiff. The defendant was not represented by an attorney, and did nothing further in the case than testify when called by the plaintiff. Justice McCain had returned the papers to Barth at the request of J. K. Murray, the attorney for plaintiff.

One of the main questions presented is: Did Justice of the Peace Barth lose jurisdiction of the case by the granting of the motion for a change of venue? The decision of this question is decisive of the appeal. It will be remembered that the affidavit for the change of venue was made by Otto Thress, the attorney for the defendant, and not by the defendant. The section of our statute relating to this subject is § 9036 of the Compiled Laws of 1913. That section requires the affidavit in application for a motion for a change of venue from a justice of the peace to be signed by the party applying for the change of venue, which affidavit shall be to the effect that the party who makes and files the affidavit believes he cannot have a fair and impartial trial before such justice by reason of the interest, prejudice, or bias of the justice. It is under this subdivision of said section that affidavit in question was made. The section plainly states that the affidavit shall be made by the party. This would seem to preclude the making of the affidavit by the attorney.

We are of the opinion that the affidavit made by the defendant's attorney, in this case, was void and of no effect, and in no manner affected the venue of the action. The affidavit should have been made by the defendant. The above section refers exclusively to practice in the justice court.

In an appeal from a justice court upon questions of law alone, the notice of appeal should specify that the appeal is upon questions of law alone; and where an appeal is taken and such specification is not made in a notice of appeal, we think the appeal would not be effective, but, in the case at bar, we think stipulation entered into between the parties to the action removed the necessity for such specification being inserted in the notice of appeal. The stipulation is as follows: "It is stipulated between the above parties by their respective at-

torneys that the appellant herein is appealing upon questions of law only, and is asking the court to review only the errors set out in the specification attached to his notice of appeal, and is not asking for a trial of the facts in the case in the district court, and is just seeking to have the court try the questions of law raised by the specification attached to the notice of appeal."

It is clear from such stipulation, that plaintiff understood and knew that the appeal was upon questions of law alone. He was in no way deceived or misled, and he had all the notice that he would have had had the proper specification, above referred to, been inserted in the notice of appeal.

Judgment appealed from is reversed, and the case remanded for further proceedings in harmony with this opinion.

Plaintiff is entitled to the costs.

ROBINSON, J. (concurring). In this case plaintiff appeals from a judgment, which is, that his action be dismissed.

In August, 1916, the action was commenced before Jacob Barth, a justice of the peace, to recover $1,350, for labor rendered to the defendant at his request. The summons was returnable August 26, 1916, at 10 A. M. On August 24, Otto Thress, attorney for defendant, made and filed with the justice an affidavit "that he believes he cannot have a fair and impartial trial before Justice Barth by reason of the interest, bias, and prejudice of the said justice of the peace." The affidavit was of no effect. It stated merely the belief of the attorney, and not the belief of his client, and there is no showing that the justice was paid $1 for transferring the case to another justice. However, the justice wrote an order to the effect that the case be sent to Justice R. E. McCain, but there is no showing that the case was ever sent to him. The docket of the justice of the peace is thus: August 26, 1916, at 10 A. M., all parties appeared in court before me, and, upon motion of plaintiff's attorney, order for a change of venue is reversed and case is called for trial at 11 o'clock A. M. Plaintiff makes oral complaint of the matter set out in the summons; the defendant for answer denies every allegation of the complaint. The plaintiff was sworn and testified in his own behalf; the defendant was sworn and testified in his own behalf. The court gave judgment against de-

fendant for $9 and costs. Then defendant served a notice of appeal in which he does not specify any errors of law. The statute is that the district court shall review only errors of law which are specified with reasonable certainty. Comp. Laws 1913, § 9164. Thus it appears that without objection to the jurisdiction of the justice the parties appeared at the time specified in the summons. Plaintiff stated his complaint as in the summons, and defendant answered, denying the same. Each party was sworn and the judgment was for $9. Clearly the justice had jurisdiction. The judgment was duly given. The record shows no reason for dismissing the action.

NILS KVALE, Respondent, v. DANIEL KEANE, Appellant.

(168 N. W. 74.)

Contract — by correspondence — making of — evidence.

1. Evidence examined and *held* not sufficient to establish the making of a contract by correspondence.

Parties — incapacity of one — to make contract — mental and physical condition — advanced age — matters for consideration — evidence.

2. Evidence examined and *held* to establish the incapacity of the defendant to make a contract by reason of his mental and physical disability, coupled with his very advanced age.

Letters sent through mail — receipt of by person to whom addressed — proof of — properly addressed — proper postoffice — properly stamped — deposited in some postoffice — or postal subdivision — mail boxes — rural routes — presumption of law.

3. Before there arises any presumption in law that a letter claimed to be sent by one party to another, the addressee, has been received by the addressee, it must first be proved that the letter so sent was properly addressed to the addressee at his postoffice address, and was properly stamped with sufficient postage thereon and deposited in some postoffice or some subdivision of the postal department where mail may properly and legally be deposited for collection and transmission, such as mail boxes on the rural routes.

Letter claimed to have been sent — letter claimed to be answer — value as evidence — how established — proof necessary — foundation.

4. Where it is sought to introduce in evidence an answer to a letter which it is claimed was previously sent, before the letter, which is claimed to be

the answer, can be received in evidence, it must first be proved that the letter previously sent was properly addressed to the addressee at his postoffice address with sufficient postage thereon, and that thereafter such letter was deposited in the postoffice or some branch of the postal service authorized to receive and collect mail for transmission, and, until such proof is made concerning the previous letter, there is no foundation laid for the admission in evidence of the purported answer thereto, and the same is inadmissible.

Opinion filed May 23, 1918.

Appeal from District Court, Renville County, North Dakota, Honorable *K. E. Leighton,* Judge.

Reversed.

James R. Hickey (*Lee Combs,* of counsel), for appellant.

An offer must be accepted without any qualifying terms. Comp. Laws 1913, § 5862.

An offer of a bargain made by one person to another, imposes no obligations on the former until it is accepted by the latter, according to the terms of the offer. Wilkins Mfg. Co. v. H. M. Loud & Sons, 94 Mich. 148, 53 N. W. 1045; DeJong v. Hunt, 103 Mich. 94, 61 N. W. 341; Central Bitulithic Paving Co. v. Highland Park, 129 N. W. 46.

A contract is never made so long as, in the contemplation of both parties thereto, something yet remains to be done, before the contract relation is established. Baker v. Holt, 14 N. W. 8; Northwestern Iron Co. v. Mead, 21 Wis. 480; Bowen v. McCarthy, 48 N. W. 155; Wilkings Mfg. Co. v. Loud & Sons Lbr. Co. 53 N. W. 1045; Russell v. Falls Mfg. Co. 82 N. W. 134; Saram v. Richards, 132 S. W. 285.

Where a condition is imposed in a purported acceptance of an offer, or any changes made in the offer as submitted, such an acceptance becomes a new or return offer, and will not constitute a contract until the other party has agreed to it. Weaner v. Burr, 31 W. Va. 736, 3 L.R.A. 94, 8 S. E. 743; Krum v. Chamberlain, 57 Neb. 220, 77 N. W. 665; Knowlton's Anson, Contr. 22; Baxter v. Bishop, 22 N. W. 685.

Contracts may be made by correspondence, but to constitute a contract by correspondence one letter must contain a distinct proposition, and the answer must be an unqualified acceptance. 1 Parsons, Contr. 476; Vassar v. Champ, 11 N. Y. 441; Gilbert v. Baxter, 71

Iowa, 327, 32 N. W. 364; Coad v. Rogers, 88 N. W. 947; Fashier v. Fetzer, 134 N. W. 557; Knox v. Murray, 140 N. W. 652; Robinson v. Willer, 87 Ga. 704; Lanz v. McLaughlin, 14 Minn. 72; Williams v. Stewart, 25 Minn. 516; Langelier v. Schaefer, 36 Minn. 361; Brown v. Munger, 42 Minn. 482; Ames & Frost Co. v. Smith, 65 Minn. 304; Reid v. N. W. Imp. & Wagon Co. 79 Minn. 369; Rahn v. Cummings, 131 Minn. 141, 155 N. W. 201; Leslie v. Mathwig, 131 Minn. 159; Lewis v. Johnson, 123 Minn. 409, L.R.A. 1915D, 150, 143 N. W. 1127, and cases cited; Wristen v. Bowles, 82 Cal. 84.

"The offer must be accepted without the injection of new terms." Nils v. Hancock, 140 Cal. 157, 73 Pac. 1070; German L. & S. Co. v. McLellan, 154 Cal. 710; Hunkins Willis Lime & Cement Co. v. Los Angeles Warehouse Co. 155 Cal. 41; Riley v. Grant, 94 N. W. 427; Stearns v. Clapp, 94 N. W. 430; Babcock v. Ormsby, 100 N. W. 759; Fountain City Drill Co. v. Lindquist, 114 N. W. 1098; Stenson v. Elfmann, 135 N. W. 694; Harris Bros. v. Reynolds, 17 N. D. 16; Beiseker v. Amberson, 17 N. D. 15, 116 N. W. 94.

The United States Supreme Court rule is the same. Eliason v. Henshaw, 4 Wheat. 225; Snow v. Miles, 3 Cliff. 608; Head v. The Providence Ins. Co. 2 Cranch, 127; Carr v. Duval, 14 Pet. 77; Ocean Ins. Co. v. Carrington, 3 Conn. 557; Myers v. Keystone Ins. Co. 27 Pa. 268; Tilley v. Cook County, 103 U. S. 155, 26 L. ed. 374.

"Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation either completely or nearly so, together with full compensation for any want of entire performance." The remedies must be mutual. Comp. Laws 1913, § 7193; 39 Cyc. 1551, 1561; Kinkead v. Schreve, 17 Cal. 275.

"Where a purchaser attempted to rescind the contract of sale, the vendor was not required to tender performance, except as a prerequisite to suit for performance." McArthur v. Sheboygan, 120 N. W. 575.

"It is as much the duty of the plaintiff to tender the money as it is the duty of the defendant to tender the deed." Englander v. Rogers, 41 Cal. 420 and cases cited; Dennis v. Strassburger, 89 Cal. 583; Claude v. Richardson, 103 N. W. 991; Arnett v. Smith, 11 N. D. 55,

88 N. W. 1037; 11 Century Dig. cols. 1148, 1458 and 1460; Coad v. Rogers, 88 N. W. 947.

Courts of equity will not compel parties to make contracts and then compel the specific performance of them. Kulberg v. Georgia, 10 N. D. 461, 88 N. W. 87.

Equity will not decree specific performance of a writing which lacks the essential elements of consideration, and mutual assent of the makers, to all the terms of the writing. Kaster v. Mason, 13 N. D. 107, 99 N. W. 1083; Miller v. Tjexhus, 104 N. W. 519; Sennett v. Melville, 107 N. W. 991.

An agent cannot make contract for the sale of land in absence of written authority. Comp. Laws 1905, § 5407; Ballou v. Bergvendsen, 9 N. D. 285, 83 N. W. 10; Ballou v. Carter, 137 N. W. 603.

Specific performance will not be decreed unless the party bringing the action has performed on his part, or can be compelled to specifically perform. Comp. Laws 1913, § 7193; Knudtson v. Robinson, 18 N. D. 12, 118 N. W. 1051; Stenson v. Elfmann, 29 S. D. 59, 135 N. W. 694; Ugland v. Kolb, 23 N. D. 158, 134 N. W. 879.

"Oral evidence is not admissible to supply defects in a written contract which by the Statute of Frauds is required to be in writing." Phelan v. Neary, 117 N. W. 142; Paul v. Paul, 125 Mo. 9, 28 S. W. 171; Wringer v. Holtzclaw, 112 Mo. 519, 20 S. W. 800; 26 Am. & Eng. Enc. Law, 21; Sennett v. Melville, 107 N. W. 991.

Ryerson & Rodsater, for respondent.

The findings of the trial court, while they may not be conclusive, are entitled to great consideration by the supreme court, and should be sustained when supported by substantial evidence. Merchants Nat. Bank v. Collard, 33 N. D. 556, 157 N. W. 488.

The land was not the homestead of the defendant. He never resided upon it with his family, or claimed it as the homestead of himself and family. Brokken v. Baumann, 10 N. D. 453.

"The prerequisites to an estate of homestead are in actual devotion to the use of a home." Styles v. Theo. P. Scotland Co. 22 N. D. 469; Calmer v. Calmer, 15 N. D. 120, 106 N. W. 684; Brokken v. Baumann, 10 N. D. 455, 88 N. W. 84; McCanna v. Anderson, 6 N. D. 482, 71 N. W. 769; Hoitt v. Webb, 36 N. H. 166; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245.

A witness may qualify as an expert in handwriting by showing that he has made a special study of handwriting; has given instruction in the art, or has had large experience in examining handwritings or signatures in the course of his profession or business. 17 Cyc. 171; State v. David (Mo.) 33 S. W. 28; Cochrane v. National Elev. Co. 20 N. D. 169, 127 N. W. 725; 15 Am. & Eng. Enc. Law, 268.

"Letters received in response to letters to particular persons purported to be written by or for the person addressed are presumed to be genuine." Melby v. Osborne (Minn.) 24 N. W. 253.

"The law presumes that letters mailed and telegrams sent in due course of business were received." Long Bell Lumber Co. v. Nyman (Mich.) 108 N. W. 1019; Omaha v. Yancey (Neb.) 135 N. W. 1044.

Where the pleadings clearly disclose that proof of certain documents will be necessary at the trial, no notice to produce the primary evidence is necessary, and, in its absence, secondary evidence will be received. J. L. Owens Co. v. Bemis, 22 N. D. 159, 133 N. W. 59.

Even though a contract is made without authority of the agent, yet its adoption with full knowledge of all the facts is a complete ratification. 16 Cyc. 754; Violet v. Rose (Neb.) 58 N. W. 216.

In the case of a contract claimed to have been made by correspondence in the form of letters, it is the duty of the court to construe the offer and the letter of acceptance together in their entirety. Single phrases or paragraphs cannot be separated and thus considered. It is from a consideration of the whole that the court must draw its conclusion as to whether or not both parties understood what they were doing, or whether or not the minds of both parties met on the subject-matter. Kreutzer v. Lynch (Wis.) 100 N. W. 887.

"An offer in specific terms and without conditions for the purchase of a tract of land, made by letter or telegram, unconditionally accepted, becomes a binding contract. Mitchell v. Knudtson Land Co. 19 N. D. 736, 124 N. W. 946; Federal Land & Securities Co. v. Hatch (Iowa) 125 N. W. 837; Sanders v. Pottlitzer Bros. Fruit Co. 144 N. Y. 209, 29 L.R.A. 431; 4 L.R.A.(N.S.) 177; Drummond v. Crane (Mass.) 35 N. E. 90; Greenawalt v. Este (Kan.) 10 Pac. 803; Cohn v. Plumer (Wis.) 60 N. W. 1000; 9 Cyc. 282 et seq.

A tender is never necessary where the other party has placed himself in a position so that any tender would be ineffectual—where it would

be a useless formality, like in this case—where appellant had sold the land in question to another and had so advised respondent. Kreutzer v. Lynch (Wis.) 100 N. W. 887; Potter v. Taggert, 54 Wis. 395, 11 N. W. 678; Gouche v. Milbrath, 94 Wis. 674, 69 N. W. 999; Matthews v. Ins. Co. 115 Wis. 272, 275, 91 N. W. 675; James v. Valentines School (Wis.) 99 N. W. 1043.

GRACE, J. Appeal from the district court of Renville county, North Dakota, Honorable K. E. Leighton, Judge.

This action is one of specific performance wherein the plaintiff seeks to have the defendant perform a certain alleged contract claimed by the plaintiff to have been made between defendant and plaintiff with reference to the N. E. ¼ of section 21, township 162, range 86, Renville county, North Dakota. Plaintiff claims that he is entitled to conveyance of said premises from the defendant to the plaintiff upon the payment by the plaintiff to the defendant of the purchase money according to the terms of the contract. The facts in the case are as follows:

On the 7th day of April, 1916, the defendant was the owner of a certain tract of land above described. The defendant is a resident of the city of St. Paul, Minnesota. It is claimed by the plaintiff, that on the 7th day of April, 1916, the defendant made an offer, in writing, to sell the land in question to the plaintiff for $3,200, the terms of such sale to be as follows: $250 when the deal is closed, $250 per year, after the year 1916, payable January 1st of each year, and the balance, at the end of five years, to then become due and payable; interest on deferred payments to be at the rate of 6 per cent per annum, payable semiannually, the first interest payments to be made October 1, 1916, and every six months thereafter. Plaintiff claims that on the 14th day of April, 1916, and before said offer to sell was withdrawn by the defendant, the defendant's offer to sell such land to the plaintiff was accepted, which acceptance in writing was communicated to the defendant and received by him about the 17th day of April, 1916. After acceptance by the plaintiff of defendant's offer was communicated to and received by the defendant, the defendant notified the plaintiff, in writing, that he would not perform his part of the contract. The plaintiff asserts, he is ready, able, and willing

to perform his part of the contract. Defendant refuses to make any conveyance of said land. The contract, if any, is in the form of letters exchanged between the plaintiff and defendant.

The action is maintained upon the theory, and the complaint is framed in pursuance of the theory, that the defendant made an offer, in writing, to sell the real estate in question for a specific price and upon specific terms; and that the plaintiff made an unconditional acceptance, in writing, of such offer, claiming thereby to have made a binding contract for the purchase of said land. It is a principle of law, well established and understood, in the law of contracts, that where one, by letter, makes an offer to sell property for a specified price and upon specific terms and there is an unqualified and unconditional acceptance of the offer, the mutual letters thus written make and constitute a contract in writing. It is also a well-settled principle of law that in thus construing such letters to constitute a contract, there must be no deviation from the terms of the offer in the letter accepting the terms of the offer. The letter of acceptance must contain no new or different proposition, which would, to any degree, change the terms of the offer. When an offer is made as above stated, the acceptance must contain no conditions which add to the terms of the offer. By this rule the transaction in question must be measured.

However, the terms of the contract, or the terms of the offer and the acceptance thereof, must be distinguished from matters which relate not to the terms of the contract, but to the execution and performance of the contract. This distinction is of importance where contracts are made as a result of correspondence. After setting forth the correspondence which is the basis of the contract in question, we will endeavor to point out the distinction as it applies to this case.

The entire correspondence is as follows: Kvale testifies he had some correspondence with Daniel Keane,—that he wrote a letter to him on March 17, 1915. He testified that he had no copy of the letter nor the original, but that he wrote and asked him if he would sell the land. To the letter written March 17, Kvale testifies he received a reply which is exhibit 2, which came inclosed in exhibit 1, the envelop. The envelop is postmarked at St. Paul, Minnesota, March 24, 1916. In the upper left-hand corner is the conceded address of

the defendant, "642 Inglehart avenue, St. Paul, Minnesota." The address on the envelop is "Mr. Nels Kvale, R. F. D. No. 2, Tolley, North Dakota."

Exhibit 2 reads as follows:

St. Paul, Minnesota. 3/23—16.

Mr. Nels Kvale,
R. F. D. No. 2,
Tolley, North Dakota.

Dear Sir:—

I received your letter of March 17, 1915, but did not answer at that time as I had a cash offer at that time. Will you let me know whether you still desire the place and what you would be willing to pay, at once? I also wish you would let me know what basis of crop payment you would be willing to make.

Hoping to hear from you soon, I am

Yours truly,
Daniel Keane,
642 Inglehart Avenue,
St. Paul, Minnesota.

The plaintiff testifies that he wrote an answer to exhibit 2, addressed to Daniel Keane at 642 Inglehart avenue, St. Paul, Minnesota, and deposited the same in the mail; that he received a letter marked exhibit 4, which came in the envelop marked exhibit 3. Envelop is postmarked St. Paul, Minnesota, April 10, 1916. In the upper left-hand corner, it contains the following words: "642 Inglehart avenue, St. Paul, Minnesota." The envelop is addressed to Mr. Nels Kvale, Tolley, North Dakota. The plaintiff testifies that the letter, exhibit 4, was contained in the envelop, exhibit 3, and was received by the plaintiff in the United States mail.

The letter, exhibit 4, reads as follows:

St. Paul, Minnesota, 4/7—16.

Mr. Nels Kvale,
Tolley, North Dakota.

Dear Sir:—

Received your letter of March 31st—16. I would accept thirty-two hundred ($3,200) dollars, based on the following payments:

Two hundred fifty (250) dollars when the deal is closed, $250 per year after 1916, first payment to be made on or before January 1st of each year, the interest to be paid semiannually on or before the 1st of October, 1916, and payment every six months, the rate of interest to be 6 per cent. I will give you a mortgage running for five years, and if you desire, you can renew mortgage at that time if the total amount of same is not paid. The taxes are paid for 1915 and you will pay all taxes from that year.

Will you kindly let me hear from you at your earliest possible convenience?

Yours truly,
Daniel Keane,
642 Inglehart Avenue,
St. Paul, Minnesota.

P. S. I do not understand what crop payments mean. If the proposition above agrees, kindly answer.

The plaintiff testified that he wrote Mr. Keane the letter which is exhibit 5, in answer to exhibit 4, and addressed it to Daniel Keane, 642 Inglehart avenue, St. Paul, Minnesota.

Tolley, North Dakota, April 14, 1916.

Mr. Daniel Keane,
642 Inglehart Avenue,
St. Paul, Minnesota.

Dear Sir:—

I have received yours of the 7th inst. in regard to sale of N. E. ¼ of sec. 21, twp. 162, rge. 86, which you offer for a price of $3,200 with a cash payment of $250 at the time when the deal is made and balance at 6 per cent semiannually. I hereby agree to pay you the said price as per your terms stated in your letter, and inclose my check for $10 in advance as part payment of the $250 to be paid when the deal is closed, and I would therefore ask you to have the contract executed and sent to me in duplicate form, and I will sign same and return copy to you with $240 still due you on the first payment. I will appreciate your prompt attention to this as the spring work soon

commences and I will have to make proper arrangements to work this land.

Yours very truly,
Nels Kvale.

In reply to this letter, plaintiff testifies he received the following letter:

Exhibit 6.

St. Paul, Minnesota, April 17, 1916.

Mr. Nels Kvale,
Tolley, North Dakota.
Dear Sir:—

Your letter was received by me this morning inclosing a check for $10 which I herewith return to you, as I have already sold my property, and will say that you were too slow in answering my letter. If you had answered it about five days ago the sale would have been made. Therefore, having sold the property, I return your check.

Yours very truly,
Daniel Keane.

It must be conceded that the terms of the contract are: The price of the land, the amount of the initial payment, and the subsequent payments to be made yearly, the time when the payments should be made, the rate of interest, the taxes, and the proposition to take a mortgage, which was evidently what the defendant meant in his reference to a mortgage in his letter of April 7th. These terms are definite and certain. There is no room for doubt as to what they mean. The plaintiff in his reply letter accepts all of such terms. Attention is called to his language in this letter: "I hereby agree to pay you the said price as per your terms stated in your letter,"—then follows the balance of the letter. It will be seen there are no new terms suggested, no change in the terms demanded, but an absolute acceptance of the terms as stated by the defendant. The other matters referred to in plaintiff's reply as to the making out of the contracts in duplicate which he asked the defendant to make out and send to him, and which he would sign and return a copy, together with the balance of the first payment of $240—all related to the execution and

performance of the contract, and did not relate to the making of the contract or the terms thereof. The making of the contract and execution and performance must be distinguished. The making of the contract, if it were made, was completed between the plaintiff and defendant when the plaintiff had quoted his price and terms in the manner in which he did, which price and terms were unreservedly accepted by the plaintiff. After this would come the execution of the contract which had been made. While the letters of themselves constitute the contract so far as to be binding between the parties, and are effective for the purpose of showing an actual meeting of the minds of the parties in the contract, and are sufficient to take the matter without Statute of Frauds, the plaintiff had the right to assume that the defendant would desire to have the contract executed in a more durable form and in accord with the ordinary custom of having the same put in the form of a contract for deed. When the defendant made the price and terms in the manner in which he did, he necessarily impliedly obligated himself to complete the sale of the land by reducing the terms to the form of the ordinary contract, or, in other words, to place such words in a permanent form so as to protect both himself and the buyer.

That part of the plaintiff's letter which refers to the payment of the $10 and the payment of the $240 after plaintiff had signed and returned a copy of the contract related to the performance of the contract, and, in no manner, changed the terms stated by the defendant. As it appears to us, if the defendant made the contract, it is his duty to enter into a contract or execute a conveyance which would contain the terms enumerated by him. It might not be the duty of the defendant to make such contract any more than that of the plaintiff, but it certainly constitutes no change in the terms of the contract for the plaintiff to request the defendant to draw such contract in duplicate.

We are of the opinion that the correspondence taken as a whole is insufficient to constitute a contract whereby the defendant sold the land in question to the plaintiff upon the terms stated in the letters of the defendant, and insufficient to show that the plaintiff purchased such land upon such terms provided; the correspondence, as introduced in the case, was incompetent evidence; and, further, there was no contract, for the reason that the defendant had insufficient capacity

to enter into the contract. As to the question whether the letters were properly admitted in evidence, and as to whether there was a sufficient foundation laid for the introduction of the letters in evidence, we are of the opinion that no proper foundation was laid for the introduction in evidence of such letters, and that they were improperly admitted as evidence. The general rule applicable in this case is that laid down in § 2153, volume 3, Wigmore on Evidence, and reads as follows: "When a letter is received by due course of mail, purporting to come in answer from the person to whom a prior letter has been sent, there are furnished thereby, over and above mere contents showing knowledge of facts in general, . . . three circumstances evidencing the letter's genuineness: First, the tenor of the letter as a reply to the first indicates a knowledge of the tenor of the first. Secondly, the habitual accuracy of the mail in delivering a letter to the person addressed and to no other person, . . . indicates that no other person was likely to have received the first letter and to have known its contents. Thirdly, the time of the arrival, in due course, lessens the possibility that the letter, having been received by the right person but left unanswered, came subsequently into a different person's hands and was answered by him. To this may be added the empirical argument that in usual experience the answer to a letter is found in fact to come from the person originally addressed. There seems to be, here, adequate grounds for a special rule declaring these facts, namely, the arrival by mail of a reply purported to be from the addressee of a prior letter duly addressed and mailed, are sufficient evidence of the reply's genuineness to go to the jury."

The author uses this further language in commenting upon this principle: "Such a rule, varying slightly in the phrascology of different judges, seems now to be universally accepted."

In the case at bar, there was no jury, but the rule applies with equal effect. A material question to be first answered is: When is a letter proved to have been sent or mailed, so that such proof of sending or mailing will be a foundation authorizing the admission in evidence of a reply letter thereto? We are of the opinion that it is the general rule that where a letter is offered in evidence, which letter is claimed to be an answer to a previous letter, before such letter which is the answer can be received in evidence, there must be proof that the pre-

vious letter was written or mailed. National Acci. Soc. v. Spiro, 24 C. C. A. 334, 47 U. S. App. 293, 78 Fed. 774. If it is shown that the previous letter is written and mailed in the usual and regular manner, with sufficient postage prepaid, the reply received in due course of the mail may be treated as prima facie genuine. The statement in a letter offered, that it is in answer to a letter previously received, does not of itself make the letter admissible. To so hold would dispense with the necessity of proof of the writing and mailing of the previous letter, and will also make the letter the proof of its own genuineness. This would not be the proper method of proof, and is not permissible. Smith v. Shoemaker, 17 Wall. 630, 21 L. ed. 717; Butterworth & Lows v. Catchcart, 186 Ala. 262, 52 So. 896.

This is one rule by which the genuineness of correspondence may be proved, but when proof is sought to be made under this rule, strict compliance with the requirements of the rule is necessary.

Another method of proof in such cases is to prove the genuineness of the letters, or, in other words, to properly authenticate them. For instance, if a letter has been written, direct proof that the letter was received by the person to whom it was addressed, and if a reply is received to such letter the genuineness thereof proved by showing that the signature to such letter is the genuine signature of the person who wrote it.

The plaintiffs have sought to establish their claim by the first method, and, in order to permit proof based upon the correspondence entirely, he must bring himself strictly within this first rule. It is certain that the rule should not be extended. To do so would afford too great an opportunity for fabrication and undue advantage. We are of the opinion that, where a person undertakes to show that he sent another a letter by mail, no presumption will arise that the letter so sent was received by the person to whom it was addressed unless it is shown that it was deposited in the postoffice or some department thereof, as, for instance, in a mail box on a rural route, and that such letter was properly addressed and stamped with sufficient postage. Trezevant v. Powell, 61 Tex. Civ. App. 449, 130 S. W. 234. It is conceivable that a person could write a letter to another and deposit it in the postoffice without stamping it and without placing sufficient postage thereon, and truthfully claim that he had addressed the letter

to the party at his proper address and deposited it in the United States mail. In order for a reply to a letter written to have a proper foundation for its admissibility laid, it must first appear that the letter written was properly addressed to the party at his known or usual address and properly stamped with the requisite amount of postage thereon and deposited in the postoffice or in some department thereof authorized to receive letters for the purpose of forwarding them to the parties to whom they are addressed. Has the plaintiff brought himself within this rule?

We think it advisable to quote some of the testimony in this regard:

Q. Mr. Kvale, did you have some correspondence with Daniel Keane?

A. Yes.

Q. State whether or not you wrote him a letter on March 17, 1915.

A. Yes.

Q. Have you a copy of that letter?

A. No.

Q. Have you the original letter?

A. No.

Q. Do you remember what you wrote about?

A. Yes.

Q. What did you write about?

A. I wrote and asked him if he would sell the land.

Q. What land?

A. If he would sell the quarter of land 160—21, about how much he would take for that. (The township and range named in this answer are evidently erroneous.)

Q. Do you remember whether that had reference to the N. E. ¼ 21–162–86?

A. Yes, sir.

It will be observed that this is the initial letter of the alleged transaction. It must also be observed that the plaintiff does not testify that such letter was addressed to the defendant at his known or usual address, or that such letter was deposited in the United States mail or in the postoffice or any department thereof authorized to receive such

letters, or that the postage was paid or the letter properly stamped, in accordance with the rules of the United States postal laws and regulations. It appears to us, the proof must be thus first made before there is any proper foundation laid for the introduction of a reply of such letter. The proof explicitly showing that no such foundation was laid, the alleged reply to such letter was entirely inadmissible though the reply may have been received in the customary way through the United States mail.

Further testimony of the plaintiff is as follows:

Q. Did you write a letter in answer to this and exhibit 2?

A. Yes.

Q. Addressed to Daniel Keane at 642 Inglehart avenue, St. Paul?

A. Yes.

Q. Did you deposit it in the mails?

A. Yes.

Q. After that did you receive any further letters from Daniel Keane?

A. Yes.

Q. I show you exhibit 3 and ask you whether you received that envelop in the mail?

A. Yes.

Q. Along about the 10th to the 15th of April?

A. Yes.

Q. I show you exhibit 4 and ask you whether or not that is the letter contained in the envelop marked exhibit 3?

A. Yes.

Q. And you received this letter in the United States mail?

A. Yes, sir.

It will be observed that the plaintiff, in the letter which he testifies he wrote in answer to exhibit 2, does not show that such letter was stamped with sufficient postage, hence there is no presumption that the same was delivered to the addressee. The plaintiff having not shown that such letter was stamped with the proper amount of postage, for aught that appears in the testimony, the plaintiff might have written the letter and deposited it in the United States Postoffice without

the proper stamps or postage thereon, and, if so, the letter would not be delivered, and at all events it is certain there could arise no presumption of its delivery, and there is no foundation laid which would admit in evidence a reply to such letter. Further, in reference to the letter claimed to be written in answer to exhibit 2, the letter itself is not in evidence, neither is there any copy thereof in evidence, and there is no testimony as to what the contents of that letter was.

We think it must conclusively appear there is no foundation for the admission in evidence of exhibits 3 and 4. The tenor of the letter claimed to be written in answer to exhibit 2 is not in evidence, and there is no way to know whether the tenor of exhibit 3 is in answer to the tenor of the letter claimed to be written in answer to exhibit 2. It clearly appears that exhibit 4 was not properly received in evidence, there being no foundation for its reception.

With all the letters we have referred to, being concededly inadmissible in evidence, the letter, exhibit 5, claimed to be written by the plaintiff in reply to exhibit 4, cannot be supported by exhibit 4 or any other preceding letters, and, standing alone, even if it were admissible, all that could be said of it would be that it is an offer by the plaintiff to purchase the land, which was declined by the defendant, if it is assumed that exhibit 6 is a letter signed by the defendant or under his authority, but exhibit 5 is subject to the same fatal error as exhibits 4 and 2. The testimony with reference to this letter, exhibit 5, does not show that it was deposited in the postoffice or the United States mail or any postage paid.

Testimony with reference to this letter is as follows:

Q. After receiving the letter of April 4th, did you write any letters to Daniel Keane?

A. Yes.

Q. Have you got the original letter?

A. Yes.

Q. You haven't got the letter you mailed to him, have you?

A. No.

Q. I will show you exhibit 5 and ask you if that is a copy of the letter you sent to Daniel Keane on April 14, 1916?

A. Yes.

Q. Did you inclose the original letter in an envelop?

A. Yes.

Q. And addressed it to Daniel Keane at 642 Inglehart avenue, St. Paul?

A. Yes.

Q. After sending that letter did you receive any further letters from Daniel Keane?

A. Yes.

Q. I will ask you whether you received exhibit 7 in the mail?

A. Yes.

Q. About the 17th or 18th of April?

A. Yes.

Q. About that time?

A. Yes.

Q. And is exhibit 6 the letter that was contained in that envelop?

A. Yes.

It is apparent that there was no foundation laid for the introduction of exhibit 5, for the reasons we have above stated. This being true, exhibit 6, the reply, was certainly not admissible in evidence. Exhibit 8 was the check for $10 which was returned with exhibit 6.

Measured by the rule which we have set forth which governs the admission of correspondence and letters, the plaintiff has wholly failed to bring himself within said rule. It is also plainly evident that the rule is one with which it is not difficult to comply. It is also evident that it will not be wise to extend the rule further than it is, and permit letters and writings to be introduced in such a loose manner as to open wide the door for much evil, which might easily result from any further expansion of the rule enunciated.

The only writing offered in evidence to which there is a genuine signature of the defendant is exhibit 9, which is an affidavit verifying the answer. The plaintiff put on the stand three competent witnesses, who testified to this, in effect, that the signatures of the defendant to exhibits 9 and 6 were the same. This testimony can avail the plaintiff nothing; for, as we have seen, exhibit 6 was inadmissible, and therefore cannot be considered as part of the testimony; and even if it

were admissible, exhibit 6 and 9, standing alone, would not prove any contract between plaintiff and defendant.

We are of the opinion that all the letters and correspondence, for the reasons we have stated, should have been excluded. Being thus excluded, the plaintiff must necessarily fail in his proof of the contract alleged in the complaint. Having this view of the case, it is really unnecessary to pass upon the mental competency of the defendant to enter into the contract in question, but to entirely dispose of the case we will do so.

There is testimony on behalf of the plaintiff, that the defendant was, at the time in question, about seventy-seven years of age. During the months of March, April, and May, 1916, he was very sick, afflicted with heart trouble; he had two operations. There was testimony that he could not carry on a connected conversation, that he was ordered by the doctor not to speak, that his mind wasn't right, that he would talk on one subject and the next time he would forget all about it. This testimony was given by his wife. We think the testimony, in this regard, standing alone and undisputed, is sufficient to establish a want of capacity to execute a contract as important as the one under consideration, however, or, in fact, to execute any contract. Especially is this true when the great age of the defendant is taken into consideration, coupled with the undisputed afflictions with which he was suffering at the time in question. We are convinced that the mind of the defendant was so incapacitated as to be unable to comprehend the import and consequence of business transactions of the nature of the one under consideration, and he was not in such mental and physical condition, according to the testimony, to have capacity to enter into the contract under consideration.

It appears to us, for the reasons hereinbefore stated, that the plaintiff can never recover upon his alleged contract, if for no other reason than the incapacity of the defendant. This being true, a new trial could serve no useful purpose.

Judgment is reversed, and the District Court is instructed to enter a dismissal of the action, with costs in favor of the defendant.

ROBINSON, J. (concurring). This is an appeal from a judgment for the specific performance of an alleged contract to sell and convey

to the plaintiff a quarter section of land in Renville county. There is no just claim that any payment or tender of payment has ever been made to the defendant. The alleged agreement is all in letters which fail to show a completed contract by a letter dated St. Paul, March 23, 1916. Defendant invited plaintiff to make an offer for the land. By letter of April 7, defendant offers to accept $3,200, payable $250 when the deal is closed and $250 a year after 1916, with interest at 6 per cent. By letter of April 14, plaintiff writes defendant: "I have your letter of the 7th inst., and agree to pay you said price as per terms stated in your letter and inclose you check $10 in part payment. I ask you to have the contract executed and sent to me in duplicate form. I will sign same and return copy to you with $250 due on first payment."

The writing of this letter did not complete a contract or tender performance of the same. It was merely a modified offer to complete a contract on the terms stated in the letter. In answer by letter of April 17th defendant returned the check and called off the deal. The defendant had not offered to make and sign contracts for the sale of the land, and to send them in duplicate to plaintiff, and to receive his check in payment, of $10 or any sum. The offer of defendant was in legal effect to sign contracts for the sale of the land on cash payment of $250 at St. Paul. Defendant would have acted the part of a mere simpleton had he made contracts and sent them to Renville county without first receiving the cash payment.

The letters show merely an attempt to bargain for the sale of the land. There is no showing of any completed contract. There is no showing of facts or circumstances which appeal to the conscience of the court or give the plaintiff any equity.

The statute is that specific performance cannot be enforced against a party to a contract in cases following:

(1) If he has not received an adequate consideration for the contract; (2) if it is not as to him just and reasonable; (3) if his assent was obtained by any unfairness; (4) if his assent was given under the influence of mistake, misapprehension, or surprise.

In equity there is no property right more sacred than that of a man's title to land. Hence on a bald or naked contract, when no payment has been made and no possession given, no man should be

forced to sell or part with his title to land only on proof showing a just, equitable, and considerate contract. There is no such proof in this case. There is some proof that at the time of writing the letters, defendant was advancing in the seventies, and that he was in feeble health, and that his letters were written inadvisedly. It needs no evidence to show the folly and imprudence of an aged man selling a quarter section of good North Dakota land for $3,200 on cash payment of $250 and annual payments of $250.

The purchaser having once obtained possession of the land might use it for years and never make a second payment, and the cost of regaining the land might exceed the first payment. Such bald and improvident contracts do not appeal to equity, but in this case the proof failed to show the making of any contract.

Judgment reversed and action dismissed.

L. C. COVERDELL and E. B. Bratt, Respondents, v. CARL ERICKSON, Sheriff of Williams County, North Dakota, Appellant.

(168 N. W. 367.)

Property — third-party claim to — allegation of ownership — sufficient — person from whom bought — consideration paid — neither need be alleged.

1. A third-party claim which is filed under the provisions of § 7550 of the Compiled Laws 1913 is sufficient in regard to its allegation of ownership, which states that at all times, including the time of seizure, the property was and still is the property of the claimers, and that the ground of their right and title to the possession of the said property is that said parties purchased the same with their own money and paid for the same themselves; nor can it be defeated merely because it states the value of the property is $900 and the proof shows it to be $778.74. It is not necessary, under the provisions of § 7550, to state from whom the property was acquired or the consideration paid therefor.

Factor — lien of — personal privilege — not transferable — creditor of factor — cannot assert lien in favor of factor.

2. The lien of a factor is generally considered a personal privilege, and is not transferable; and, if the factor refuses to assert the same, a creditor of the factor cannot assert it for him.

Goods — consigned to factor — for sale — bailment for sale — title remains in consignor — factor has mere personal lien.

3. Ordinarily when goods are consigned to a factor for sale this constitutes a bailment for sale, and not a sale to the consignee, and the title remains with the consignor until the goods are sold to a bona fide purchaser for value. The goods do not become the property of the factor or liable for his debts.

Opinion filed May 24, 1918.

Action of conversion against the sheriff.

Appeal from the District Court of Williams County, Honorable *Frank E. Fisk,* Judge.

Judgment for plaintiffs. Defendant appeals.

Affirmed.

John J. Murphy and *Ivan V. Metzger,* for appellants.

The right to the possession of the property upon which levy was made, was in Haynes, who made the affidavit of claim by third party, as plaintiff's agent. His relation to plaintiff was that of factor. Comp. Laws 1913, §§ 6145, 6369, 6371, 6867; 8 L.R.A.(N.S.) 474; Turner v. Crumpton, 24 N. D. 294; 9 C. J. 510; 19 Cyc. 116; Rosenbaum v. Hayes, 5 N. D. 476; Rosenbaum v. Haynes, 8 N. D. 461.

The goods were placed with Haynes for sale. A bailment for sale was thus created and Haynes had a lien on such goods. Comp. Laws 1913, § 7550.

The third-party claim is defective in that it is made by the factor, and the affidavit shows that he makes no personal claim to the property, and also shows that he had no interest in the property and that plaintiffs were the absolute owners and entitled to the possession of same. The value of property was incorrectly stated, and there is no showing from whom they received the property, nor the consideration paid. McFarlane v. Dick (Iowa) 123 N. W. 1005; Childs v. Ross (Iowa) 127 N. W. 1020; Shaw v. Tyrell (Iowa) 105 N. W. 1006; Gray v. Parker, 5 N. W. 697.

In attachment suits where defendant is in possession of the property sought to be impressed with levy, a third-party claim to such property must be made in full compliance with the requirements of the statute. Aber v. Twitchell, 17 N. D. 229; Probstfield v. Hunt, 17 N. D. 572.

And it is incumbent on plaintiff to allege and prove full compliance with the statute. Shaw v. Tyrell (Iowa) 105 N. W. 1006; Gray v.

Parker, supra; Donnelly v. Mitchell (Iowa) 93 N. W. 369 (Iowa) 87 N. W. 672.

William G. Owens and *Thomas M. Cooney,* for respondents.

Where a third-party claim to property seized by the sheriff is amply clear and plain in its allegations as to the claim of right to said property by the third person, to fully inform and apprise the sheriff and others interested of claimant's right, it is sufficient and is a compliance with the statute, even though irregular as to form.

If the substance of the allegations amounts to a claim of ownership or immediate right of possession, that is sufficient. Aber v. Twitchell, 17 N. D. 229.

It is entirely a question of the intention of plaintiffs as to whether or not Haynes was a factor. There were no advances made on the price of the property.

"Where there are no advances made on the strength of the bill of lading, the question is one of intention on the part of the owner of the property at the time of making the shipment." Rosenbaum Bros. & Co. v. Hayes, 5 N. D. 476, 479.

Haynes had not the possession of the goods. He had no factor's lien, because such lien is a personal one dependent upon possession. Rosenbaum Bros. & Co. v. Hayes, 5 N. D. 476, 8 N. D. 461.

BRUCE, Ch. J. This is an action against the sheriff, alleging a conversion of a carload of potatoes belonging to the plaintiff by reason of an attachment in a case in which W. J. Kelly was plaintiff and T. B. Haynes the defendant. The potatoes were sold as perishable matter under a stipulation of the parties to the attachment. Before the sale, however, a third-party claim was served on the sheriff by T. B. Haynes, but as agent for the plaintiffs, Coverdell and Bratt. The material part of the third-party claim was as follows:

Affiant further says that the said property so seized was not at the time of such seizure the property of said T. B. Haynes, nor has it ever been the property of such defendant, but was at all times, including the time of such seizure, and still is, the property of the aforesaid L. Coverdell and Bratt; and that the ground of said Coverdell and Bratt's title and right to possession of said property is that said parties purchased said

potatoes with their own money, paid for the same themselves, and sold the same, through affiant as their agent, to the Williston Grocery Company of Williston, North Dakota, and that the proceeds of the same was to be remitted to said parties at Kalispel, Montana. That, as aforesaid, this affiant never had and has never acquired any interest in said property with or from said parties in any manner, name, or nature.

Affiant further says that the value of said property is $900, and that he makes this affidavit for the purpose of obtaining possession of said property from the said sheriff.

Wherefore, affiant demands that the said sheriff surrender to this affiant, as the agent of said parties hereinbefore referred to, the said personal property so attached and held by him.

T. B. Haynes.

The statute under which the claim was filed is as follows: Comp. Laws 1913, § 7550. "If any property levied upon by the sheriff by virtue of a warrant of attachment is claimed by any other person than the defendant, and such person, his agent, or attorney, makes affidavit of his title thereto or right to the possession thereof, stating the value thereof and the ground of such title or right, the sheriff may release such levy, unless the plaintiff on demand indemnifies the sheriff against such claim by an undertaking executed by a sufficient surety; and no claim to such property by any other person than the defendant shall be valid against the sheriff, unless so made; and notwithstanding such claim, when so made he may retain such property under levy a reasonable time to demand such indemnity."

Prior to the shipment from Kalispell, Montana, the plaintiffs and Haynes, by name, T. B. Haynes and others, procured a bill of lading from Great Nothern Railway Company consigning the goods to the order of T. B. Haynes and others at Williston, North Dakota. This bill of lading was indorsed, "Pay to the Williston Grocery Co.," and the indorsement was signed, "T. B. Haynes, L. C. Coverdell, and E. B. Bratt." Accompanying this bill of lading was a draft for $580.75 drawn by T. B. Haynes as drawer on the Williston Grocery Company as drawee, and payable to the Conrad National Bank at Kalispell, Montana. This draft and bill of lading were forwarded from the Conrad National Bank to the First National Bank of Williston.

It is also clearly shown by the evidence that it was the intention of the parties to ship the potatoes to the Williston Grocery Company, and that the proceeds were to be remitted to the Conrad National Bank, but that if the Williston Grocery Company refused to take the potatoes, then Haynes was to dispose of them, and it was for this purpose that he was named in the bill of lading.

The trial court found the issues for the plaintiffs and rendered judgment in their favor for the sum of $618.68, debt and interest, $298, special damages, and $74.50, costs, a total judgment of $989.18. From this judgment this appeal has been taken, a motion for a new trial or for a judgment notwithstanding the verdict having first been made and overruled.

The points on which appellant demands a new trial are: (1) Insufficiency of the third-party claim; (2) an attachable interest of Haynes in the property of the plaintiff by virtue of a factor's lien.

It is claimed that in the affidavit for the third-party claim Haynes swore that he had no interest in the attached property, while as a matter of fact he had a factor's lien thereon, and also that in this exhibit the value of the potatoes is sworn to, as being $900, while the evidence, or rather the stipulation, showed that the weight of the potatoes was 44,560 pounds, that the value at Williston was $1.05 per bushel, and that, therefore, the value of the car was $779.80. It is claimed that a third-party claim must be substantially true, and that this was not the case with the affidavit in question.

We do not, however, believe that there was any material irregularity in the claim. It certainly sufficiently described the property, and the difference between $778.74 and $900 was not material. It was, at any rate, a matter of proof, and one who files a third-party claim certainly cannot be denied relief merely because he does not establish that the value of his property was exactly as claimed in his affidavit.

As far as ownership and right of possession is concerned, the affidavit sufficiently complies with the statute. It states that the property "at all times, including the time of seizure, was and still is the property of aforesaid L. Coverdell and Bratt, and that the ground of the said Coverdell and Bratt's title and right to the possession of said property is, that said parties purchased said potatoes with their own money and paid for the same themselves."

It is true a number of cases are cited by counsel for appellant, and among them the case of McFarlane v. Dick, 145 Iowa, 89, 123 N. W. 1005, which may appear to hold in his favor. It is to be noted, however, that §§ 3906–3991 of the Iowa Code are materially different from our own. These statutes require the owner not only to state the nature of his claim, but *from whom* he acquired the property and the *consideration* he paid therefor. This is not true of § 7550 of the Compiled Laws 1913, of the state of North Dakota. All that this statute requires is "the value thereof and the ground of such title or right."

It is next maintained that the said T. B. Haynes had an interest in and a possession of the property as a factor, and as such an attachable interest. This contention, however, is not borne out by the evidence. The potatoes, it is true, were consigned to the order of T. B. Haynes and others, and the consignees were named as T. B. Haynes and others, and the draft on the Williston Grocery Company was assigned by the said T. B. Haynes alone.

There is no proof, however, that the said T. B. Haynes at any time made any advances on the consignment, or at any time had the right or interest of a factor therein, or was ever intended to have the right of a factor, unless the Williston Grocery Company refused to accept the same. The agreement was merely that the said T. B. Haynes should act as an agent; that the proceeds of the sale from the carload of potatoes, or rather of the draft, should be transmitted to the Conrad National Bank at Kalispell, Montana, and that the plaintiff should pay to the said Haynes all that they brought over and above $1.07½ a hundred pounds. The evidence discloses that the bill of lading was indorsed to the Williston Grocery Company by T. B. Haynes, L. C. Coverdell, and E. B. Bratt, and transmitted to the bank at Williston. The said Haynes, indeed, seems to have had no interest in the shipment, nor was he intended to have such, unless it should happen that the Williston Company should not accept them, when it was agreed that he should take steps for their disposition, and in which event a reassignment or indorsement of the bill of lading would have been necessary. He had made no advances upon the property, and it is well established that "where . . . the advances were not made on the strength of the bill of lading, the question is one of intention on the part of the owner of the property at the

time of making the shipment." Rosenbaum Bros. & Co. v. Hayes, 5 N. D. 476, 477, 67 N. W. 951.

It is also well established that the lien of a factor is generally considered to be a personal privilege, and not transferable, that no question upon it can arise, except between the principal and the factor, and that if the factor refuses to assert it, no one can assert it for him. It "does not dispossess the owner until the right is exerted by the factor. It is a privilege which he [the factor] may avail himself of or not as he pleases. It continues only while the factor himself has the possession." Holly v. Huggeford, 8 Pick. 73, 19 Am. Dec. 303; Ames v. Palmer, 42 Me. 197, 66 Am. Dec. 271; 11 R. C. L. 774, 775. "Ordinarily when goods are consigned to a factor for sale, this constitutes a bailment for sale, and not a sale to the consignee, and the title remains with the consignor until the goods are sold to a bona fide purchaser for value. The goods do not become the property of the factor, or liable for his debts, though consigned on a *del credere* commission, and, if sold on execution to pay the debts of the factor, the purchaser gets no title as against the consignor. The factor has only a special or qualified property in the goods consigned to him, sufficient to enable him to carry out the purposes of the consignment and to protect the interest of the principle as against third persons." 11 R. C. L. 757.

The judgment of the District Court is affirmed.

P. S. CHAFFEE, Appellant, v. FARMERS' CO-OPERATIVE ELEVATOR COMPANY, Respondent.

(168 N. W. 616.)

Co-operative association — incorporated — stockholders — transfer of stock — to regulate and limit right — corporation has power to — by-laws — stock ownership — terms and limitations.

1. A co-operative association incorporated under chapter 92, Laws 1915, is empowered "to regulate and limit the right of stockholders to transfer their

NOTE.—On restrictions by by-laws or articles of association on the right to sell or transfer shares of stock, see note in 27 L.R.A. 271.

stock," and "to make by-laws for the management of its affairs, and to provide therein the terms and limitations of stock ownership."

By-laws — power to adopt — transfer of stock — by holders — provision for previous notice to corporation — opportunity to first buy such stock — par value — plus accrued undivided dividends.

2. Such co-operative corporation has power to adopt a by-law to the effect that "no stockholder shall transfer his stock without first giving the corporation ninety days' notice and option to purchase said stock at par, plus the accrued and undivided dividends, which are payable per share."

Enactment of such by-law — subsequent purchase of stock — certificate issued subject to rules and by-laws — assignee holding stock thereafter transferred in violation of such by-law — cannot compel transfer on books of corporation.

3. Stock purchased from the corporation subsequent to the enactment of such by-law, evidenced by a stock certificate containing a recital that the certificate is "issued and transferable subject to the rules and restrictions provided by the by-laws," is subject to the provisions of such by-law; and one who purchases the certificate and receives an assignment thereof from the original shareholder in violation of the by-law cannot compel the officers of the corporation to transfer the stock to him upon the books of the corporation.

Laws and enactments — titles of — Constitution — requirements of — subject of act to be expressed in title — regulations — provisions as to — in body of act — validity.

4. The title to chapter 92, Laws 1915, "An Act to Define Co-operative Associations and to Authorize Their Incorporation and to Declare an Emergency," does not contravene the provisions of § 61 of the Constitution, which requires that the subject of the act shall be expressed in the title, although the act provides that every corporation organized thereunder shall have power "to regulate and limit the right of stockholders to transfer their stock," and "to make by-laws for the management of its affairs, and to provide therein the terms and limitations of stock ownership."

Opinion filed May 25, 1918.

From a judgment of the District Court of Mercer County, *Hanley,* J., plaintiff appeals.

Affirmed.

H. L. Berry and *J. A. Hyland,* for appellant.

The power to regulate the transfer of stock in a corporation does not authorize a corporation to control its transferability by prescribing to whom the owner may sell and upon what terms. Victor G.

Bloede v. Bloede, 84 Md. 129, 33 L.R.A. 107, 57 Am. St. Rep. 373, 34 Atl. 1127.

The power to regulate the transfer does not include the power to restrain transfers or prescribe to whom they might be made, but merely to prescribe the formality to be observed in making them, and a corporation may not prevent a party from selling his stock, even to an insolvent person. Chouteou Spring Co. v. Harris, 20 Md. 383; Sargent v. Franklin Ins. Co. 8 Pick. 90; Bates v. New York Ins. Co. 3 Johns. 238.

Every owner of corporate shares of stock has the same uncontrollable right to alien them which attaches to the ownership of any other species of property. 10 Cyc. 557.

A stockholder may sell his stock at a sacrifice to himself, and the corporation, by any by-law or rule, may not prevent him from so doing. 10 Cyc. 557.

A charter power to regulate the transfer of stock does not include the power to prevent such transfers, or to prescribe to whom the owner may sell, or on what terms. 10 Cyc. 577–579; Chouteau Spring Co. v. Harris, 20 Md. 383.

A by-law which provides that a transfer of stock shall be invalid unless approved by the board of directors or representatives of the corporation is an invalid restraint upon the alienation of the corporate stock. Miller v. Farmers' Mill. Co. 78 Neb. 441, 110 N. W. 995.

Corporate legislation upon the subject of the transfer of stock will not be enforced beyond what is necessary to impart to the corporation knowledge of the names of stockholders, to whom dividends are payable, and who is entitled to vote, and such matters as are of personal concern to the corporation management. Farmers & M. Bank v. Wasson, 48 Iowa, 336; Re Klaus, 29 N. W. 582.

As a general rule, a corporate by-law which restrains the power of a stockholder to transfer stock thereof is an unreasonable restraint on the alienation of property, and is against public policy and therefore invalid. Gould v. Head, 41 Fed. 240; McMulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954; Finch v. Macoupin Tel. Co. 146 Ill. App. 158; Moore v. Bank of Commerce, 52 Mo. 377; Herring v. Ruskin Co-op. Asso. (Tenn.) 52 S. W. 327; Thomp. Corp.

¶ 1026; Johnson v. Laflin, 103 U. S. 800, 26 L. ed. 532; Feckheimer v. National Bank, 79 Va. 80.

The power to provide rules for the transfer of stock does not include the power to prevent the unconditional right of transfer, or to impose a penalty or to refuse the holder of stock the right to vote. 1 Thomp. Corp. ¶ 1027; Kinnan v. Sullivan Co. Club, 26 App. Div. 213, 50 N. Y. 95; Merchants' Bank, 45 Mo. 513; Driscoll v. West Bradley Mfg. Co. 59 N. Y. 96.

The right to acquire, hold, and dispose of property is declared by the Constitution to be inherent in the individual and inalienable. Any attempt by statute or ordinance to interfere with this right is unconstitutional. 8 Cyc. 866 and cases cited; People v. Hawkins, 68 Am. St. Rep. 736.

The law in question is unconstitutional for the reason that it is repugnant to the state Constitution, in that it embraces subjects not expressed in its title. Laws 1915, chap. 92; Fitz Maurice v. Willis (N. D.) 127 N. W. 95; State v. Nomland (N. D.) 57 N. W. 85; Divet v. Richland Co. (N. D.) 76 N. W. 993; Malin v. LaMoure County (N. D.) 145 N. W. 582.

Nuchols & Kelsch and *Samuel Rigler,* for respondent.

The title of an act should be liberally construed, and conflict with the Constitution must clearly appear. In case of doubt as to whether the subject is expressed in the title, the law will be upheld.

Titles should be construed in connection with the law, with the view of remedying the evil intended to be obviated by the Constitution makers,—that of preventing fraud by introducing into the body of the law provisions foreign to the subject expressed in the title.

If the subjects in the body of the law are germane, related thereto, or reasonably connected with subject expressed in the title, the provisions of the Constitution are satisfied. State er rel. Erickson v. Burr, 16 N. D. 581; Powers Elev. Co. v. Pottner, 16 N. D. 359; State v. Minneapolis & N. Elev. Co. 17 N. D. 23; State ex rel. Poole v. Peake, 18 N. D. 101; Laws 1915, § 3, chap. 92.

Except where limitations are imposed by the state or national Constitution, the sovereign power of the legislature is practically unlimited. Courts cannot say what means shall be employed to promote the public welfare, or that the means adopted are not the only ones or the

best, to attain the end sought. A violation of the Constitution must be so manifest and clear as to remove all doubt, before a court will declare an act void. The question of the wisdom of a legislative policy is a matter entirely for the legislature. Courts cannot review the economic facts on which the legislature bases its conclusions that an evil exists and should be remedied. State v. Armour, 27 N. D. 177; Van Voert v. Modern Woodmen, 29 N. D. 441; State ex rel. Gaulke v. Turner (N. D.) 164 N. W. 924; Martin v. Tyler, 4 N. D. 278; O'Laughlin v. Carlson, 30 N. D. 213; State v. Fargo Bottling Works, 19 N. D. 213; State v. Olson, 26 N. D. 304.

In determining whether the by-law here in question is contrary to public policy, the court can only look to the Constitution, laws, and judicial decisions of the state, to ascertain the public policy thereof. Vidal v. Girard, 43 U. S. 127.

The defendant is a co-operative corporation. Such corporations are very similar to joint stock companies. The authorities hold that where the articles of association prescribe the manner in which certificates of stock shall be transferred, there must be compliance with such regulation before the assignee can become a member of the association. 28 Cyc. 473, § 3 and cases cited.

A court of equity will not lend its aid in the perpetration of a wrong, nor aid appellant to injure the business of respondent. The court should leave appellant where, by his own mistake and wrongful act, he has placed himself. Funk v. Elevator (Iowa) 121 N. W. 53; Gould v. Head, 41 Fed. 240.

The right of an assignee of stock to have the same transferred on the books of the company is not technical or absolute, and circumstances may surround an assignment of corporate stock which induce courts of equity, in the exercise of a conscientious discretion, to refuse to recognize the assignee as a shareholder and entitled to all the rights thereof, and to withhold a decree against the corporation, commanding the stock to be transferred in his name. Senn v. United Premium Mercantile Co. 115 Mo. App. 585; Funk v. Elev. Co. supra; Thomp. Corp. § 2431; Rice v. Rockefeller (N. Y.) 17 L.R.A. 237.

CHRISTIANSON, J. The defendant Farmers Co-operative Elevator Company is incorporated under the provisions of chapter 92 of the

1915 Session Laws of North Dakota. The other defendants are the officers and directors of the corporation. The corporation has a capital stock of $10,000, divided into two hundred shares having a par value of $50 each. The plaintiff holds two certificates for one share each. These shares were originally sold and the certificates issued to one John M. Erickson, and were purchased by plaintiff and duly assigned by said Erickson to the plaintiff by formal assignment in writing indorsed on the back of each certificate. The stock certificates on their face contained the following provision: "Issued and transferable subject to the rules and restrictions provided by the by-laws." The certificates were duly presented for transfer, and transfer refused, for the reason that it violated the following by-law of the corporation: "No stockholder shall transfer his stock without first giving the corporation ninety days' notice and option to purchase said stock at par, plus the accrued and undivided dividends, which are payable per share."

The plaintiff thereupon instituted this equitable action to compel the officers of the corporation to transfer the shares of stock to the plaintiff on the books of the corporation. The district court rendered a decision in favor of the defendants, and plaintiff appeals.

It is undisputed that the by-law hereinabove set forth had been adopted by the defendant corporation and was in force at the time Erickson became a stockholder therein, and at the time he sold and assigned his stock certificates. It is also undisputed that he failed to comply with its provisions before he sold and assigned the certificates of stock to the plaintiff. Appellant contends, however, that the by-law is invalid, for two reasons: (1) Because it is a restraint on the power of alienation of property not authorized by the laws of this state; and (2) that chapter 92 of the Laws of 1915 (the act under which the corporation was organized) is unconstitutional for the reason that it violates § 61 of the state Constitution. We will consider these propositions in the order stated.

(1) The defendant corporation is organized under chapter 92 of the Laws of 1915. The law was entitled "An Act to Define Co-operative Associations and to Authorize Their Incorporation and to Declare an Emergency." The provisions of the enactment so far as material in this case are as follows:

Sec. 1. "For the purpose of this act, the words 'co-operative company, corporation or association,' are defined to mean a company, corporation or association which authorizes the distribution of its earnings in part, or wholly, on the basis of, or in proportion to, the amount of property bought from or sold to members, or to members and to other customers, or of labor performed, or other services rendered to the corporation. Provided, that nothing in this act shall be construed as in any way conflicting with or repealing any law relating to building and loan associations or instalment investment companies.

"Sec. 2. Any number of persons, not less than 25, may be associated and incorporated for the co-operative transaction of any lawful business, including the construction of canals, railways, irrigation ditches, bridges and other works of internal improvements.

"Sec. 3. Every co-operative corporation as such has power: First—to have succession by its corporate name; Second—to sue and to be sued, to complain and defend in courts of law and equity; Third—to make and to use a common seal, and alter same at pleasure; Fourth—to hold personal estate, and all such real estate as may be necessary for the legitimate business of the corporation; Fifth—to regulate and limit the right of stockholders to transfer their stock; Sixth—to appoint such subordinate officers and agents as the business of the corporation shall require, and to allow them suitable compensation therefor; Seventh—to make by-laws for the management of its affairs, and to provide therein the terms and limitations of stock ownership, and for the distribution of its earnings." See Laws 1915, chap. 92.

The act further provides that any corporation formerly organized under the general corporation law may become entitled to the same legal recognition as though its articles of incorporation had been originally filed under this act, by filing with the secretary of state a declaration signed by its president and secretary, stating that it is a co-operative corporation or association as defined by the statute, and that at a meeting of the stockholders, in which all stockholders were represented, all stockholders unanimously consented to come under the provisions of the act.

Whether a corporation may legally adopt a by-law requiring a stockholder to offer his stock to the corporation and afford it an opportunity of buying the same before offering it to a third person is a ques-

tion upon which the courts have differed. See 7 R. C. L. p. 263, § 241. While there are many decisions upon the subject, they are of little aid in determining the question before us. Not a single authority has been cited dealing with a similar statute. In most of the cases the question arose under the general corporation laws. Many of the courts which denied the validity of such by-laws predicated their holdings upon the proposition that there was no statutory authority for the enactment of a by-law restricting the transfer or ownership of corporate stock. In some of the cases, the statute merely authorized the corporation to adopt by-laws to regulate the transfer of stock, and did not empower the corporation to place any limitation or restriction on the ownership or transfer of stock. And at least in one case relied upon by the appellant the corporation was precluded by the statute from purchasing shares of its own stock. Obviously, these decisions are not applicable in this case. For it will be noted that the act under which the defendant corporation was organized confers express power upon every co-operative corporation organized thereunder, not only to regulate the transfer of stock, but to "limit the right of stockholders to transfer their stock," and also authorizes such corporation to provide in its by-laws "the terms and limitations of stock ownership." This language is clear, explicit, and far-reaching. It is not contained in the general corporation laws of this state, but is embodied only in the act providing for the organization of co-operative organizations. In this state the right of a corporation to purchase shares of its own stock from its surplus profits is expressly authorized by statute. Comp. Laws 1913, § 4531; German Mercantile Co. v. Metz, 21 N. D. 230, 130 N. W. 221. And the articles of incorporation of the defendant corporation stated that one of the purposes of its organization is "to buy, hold, or sell and otherwise deal in the stock of this corporation or any other corporation or association."

Hence, there can be no question as to the power of the corporation to enter into a contract to purchase its own stock from its surplus profits. And it has been held that a by-law like the one here under consideration may constitute a binding contract upon a stockholder who was a party to its adoption, even though the corporation might have no authority to enact it as a by-law. See New England Trust Co. v. Abbott, 162 Mass. 148, 27 L.R.A. 271, 38 N. E. 432. The effect

of the by-law was to give to the defendant corporation an option to repurchase the stock at a definite price at any time a stockholder desired to sell it. This arrangement was made at the time the stock was sold by the corporation to its different stockholders in the first instance. The certificates of stock issued by the corporation referred to the by-laws, and made the stock certificates subject to the restrictions therein. Parties to a contract of sale may either fix the price themselves, or leave it to be fixed in such manner as they agree upon, provided the method chosen is one by which the price can be determined with reasonable certainty. So the price may, by agreement, be left to be fixed in accordance with a valuation to be subsequently made by some third person. 35 Cyc. 48, 49; Benjamin, Sales, 6th Am. ed. §§ 87, 88.

Corporations are the creatures of statute. And the transfer of corporate stock is generally regarded as a legitimate subject of legislative regulation. The mode of formation, the powers to be exercised, and the manner of such exercise, are matters of policy to be determined by the legislature. For the public policy which dictates the enactment of law is determined by the legislature. Public policy is but the manifest will of the state (Jockoway v. Denton, 25 Ark. 625, 634) which must and does vary with the habits, capacities, and opportunities of the public. Davies v. Davies, L. R. 36 Ch. Div. 359, 56 L. J. Ch. N. S. 481, 56 L. T. N. S. 401, 35 Week. Rep. 697. And when the legislature has spoken and enacted a law embodying a certain principle, the policy is determined. And the courts are not concerned with the wisdom or expediency of the legislation or policy adopted, but are merely concerned with the interpretation of the law for the purpose of ascertaining the intent of the legislature. The only limits upon the legislative power in the establishment of public policy are the restrictions contained in the state and Federal Constitutions. Co-operative corporations are formed, and intended to operate, upon different principles from general corporations. This is manifested by the definition contained in the act under consideration. Co-operation is defined by Funk & Wagnall's New Standard Dictionary: "A union of laborers or small capitalists for the purpose of advantageously manufacturing, buying, or selling goods, or of pursuing other modes of mutual benefit." Industry is said to be carried on upon the co-operative principle when capital and labor are merged into one. 2 Fawcett, Polit. Econ. p.

254. Few things are more essential to the welfare of any organization than harmony. Nothing is more likely to cause harm, and even destroy the organization itself, than quarrels, dissensions, and conflicting interests among its members. In co-operative societies, this is peculiarly so. They are formed for mutual benefit. The different members are supposed to have, aside from the monetary interest, also a common interest in the object for which the organization was formed.

It is sometimes provided that no person engaged in a competing business shall become a stockholder or member of a co-operative society. See Jackson v. Sabie, 36 N. D. 49, 59, 161 N. W. 722. And frequently the membership is limited to those who, by reason of their vocation, have a common interest in the general object sought to be attained.

If stock in co-operative corporations could be sold and transferred the same as corporate stock in ordinary business corporations, to any person whom the stockholder saw fit, then it would be possible for persons whose interests were antagonistic to the co-operative association to become members therein, and thereby defeat the very purpose for which the corporation was formed. So, it seems not only proper, but necessary, in order that such corporations may continue and accomplish the purpose for which they are organized, to permit restrictions to be placed upon the right to transfer and own stock therein. See Healey v. Steele Center Creamery Asso. 115 Minn. 451, 133 N. W. 69. And when the purpose of co-operative associations and the fundamental distinction between such organizations and ordinary business corporations is considered, the by-law under consideration does not seem to be unreasonable or out of harmony with the statute under which the defendant corporation was organized. On the contrary, it seems to be a reasonable requirement, to enable the corporation to exercise proper supervision over its membership, so as to admit only such as are properly entitled to membership therein, and to exclude therefrom those whose admittance would tend to create disturbance and threaten the very existence of the corporation itself. In our opinion the by-law under consideration is not invalid, but is authorized by the law under which the corporation was formed.

Appellant's next contention is that chapter 92, Laws of 1915, violates § 61 of the Constitution, which provides that "no bill shall em-

brace more than one subject, which shall be expressed in its title." The specific contention is that the title of the act makes no reference to the transfer of stock, and that consequently the provisions of the act authorizing a co-operative corporation to enact by-laws relating to the transfer of stock are not covered by the title.

The requirement that the subject shall be expressed in the title of the act relates to substance, and not to form. The requirement is addressed to the subject, and not to the details, of the act. None of the provisions of a statute will be held unconstitutional when they are related, directly or indirectly, to the same subject, having natural connection, and are not foreign to the subject expressed in the title. As very frequently expressed by the courts, any provisions that are *germane* to the subject expressed in the title may properly be included in the act. Putnam v. St. Paul, 75 Minn. 514, 78 N. W. 90. The Constitution does not contemplate that the title shall employ anything more than general terms, leading to an inquiry into the body of the act. It does not contemplate that the title shall be an index, or furnish an abstract of the contents of the act. Generality or comprehensiveness of the title is not objectionable, provided the title is not misleading and is sufficient to give notice of the general subject of the proposed legislation and the interests likely to be affected. The choice of language is a matter within the legislative discretion. And if the title chosen fairly indicates the general subject of the act, and is comprehensive enough in its scope reasonably to cover all the provisions thereof, and is not calculated to mislead either the legislature or the public, it is a sufficient compliance with the constitutional requirement, even though it be not the most appropriate that could have been selected. See 26 Am. & Eng. Enc. Law, 579–581; Lewis's Sutherland, Stat. Constr. 2d ed. §§ 116–121.

The title must state the subject of the act for the purpose of information to members of the legislature and the public, while the bill is going through the forms of enactment. It is not required that the title should be exact or couched in the most precise language. "It is sufficient if the language used in the title, on a fair construction, indicates the purpose of the legislature to legislate according to the constitutional provision; so that, making every reasonable intendment in favor of the act, it may be said that the subject or object of the law

is expressed in the title." Lewis's Sutherland, Stat. Constr. 2d ed. § 121. As was said by this court in State ex rel. Erickson v. Burr, 16 N. D. 581, 587, 113 N. W. 705, "the title should be liberally, and not technically, construed. The construction should be reasonable. Conflict with the constitutional provision must appear clear and palpable, and, in case of doubt as to whether the subject is expressed in the title, the law will be upheld. Titles should be construed in connection with the law with the view of remedying the evil intended to be obviated by the Constitution makers,—that of preventing fraud or surprise upon the members of the legislature and the people by introducing provisions into the law independent of or foreign to the subject expressed in the title. If the subjects in the law are germane or reasonably connected with the subject expressed in the title, the constitutional requirement is sufficiently met." See also State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924.

By applying these well-settled principles in the case at bar, we have no difficulty in arriving at the conclusion that the statute does not contravene § 61 of the Constitution. The title of the act under consideration specifically states that it was an act to define and authorize the incorporation of co-operative societies. Manifestly, the membership in, and the powers to be exercised by, such corporations, are matters germane to their incorporation. Corporations can be formed and maintained only by members or stockholders. Where stock is issued, membership can be obtained and continued only by the purchase of stock therein. Hence, it seems entirely clear that matters relating to the issuance, transfer, and ownership of stock are connected with and germane to the object of the organization of such corporations, and that a law on that subject might properly enumerate the powers to be exercised by such corporations.

This disposes of the only errors assigned and questions argued in appellant's brief. It follows from what has been said that the judgment of the District Court must be affirmed. It is so ordered.

STATE OF NORTH DAKOTA, Respondent, v. AULDEN RICE, Appellant.

(168 N. W. 369.)

Trial court — jury — instructions.

1. Instructions of the court examined, and *held* to contain no reversible error.

State's attorney — opening and closing argument — remarks of.

2. Remarks of the state's attorney in the opening and closing argument examined, and *held* not to be prejudicial.

Opinion filed May 25, 1918.

Appeal from an order of the District Court of Ward County, Honorable *K. E. Leighton,* Judge.

Affirmed.

Bradford & Nash and *Ben E. Combs,* for appellant.

The jurisdiction of the court over the defendant related to but one offense,—that charged in the information,—and did not attach to the various offenses of which proof was permitted to be offered. Where two or more distinct offenses are testified to by witnesses, it is the duty of the state and it should be required to elect during its direct case, upon which offense it should proceed. State v. Poull, 14 N. D. 559.

Where evidence of more than one offense is offered and allowed, and no election made of record, in case of conviction no one could tell you which offense the jury convicted or found its verdict. People v. Jenness, 5 Mich. 305.

If only one offense can be charged, it logically follows that only one offense can be proved and relied upon for a conviction. State v. Valentine, 63 N. W. 541; State v. Crimmins, 31 Kan. 376, 2 Pac. 574.

Wm. Langer, Attorney General, *O. B. Herigstad,* State's Attorney, *R. A. Neston,* Assistant State's Attorney, for respondent.

The offense here charged is statutory rape.

"In prosecutions for statutory rape on a female under the age of consent, or on a woman imbecile, it is generally held that proof of acts prior to that alleged in the indictment is admissible, unless they are too re-

mote in point of time." 33 Cyc. 483; People v. Molineux, 62 L.R.A. 193; People v. Patterson, 102 Cal. 239, 36 Pac. 436; Cross v. State, 78 Ala. 430; State v. Peres, 27 Mont. 358, 71 Pac. 162; State v. De Hart, 109 La. 570, 33 So. 605; Alsabrooks v. State, 52 Ala. 24; State v. Robertson, 121 N. C. 551, 28 S. E. 59; 48 L.R.A.(N.S.) 236, 237.

The courts are practically unanimous in admitting evidence of intercourse between the same parties prior to the act upon which the state relies for conviction. State v. Trusty, 122 Iowa, 82, 97 N. W. 989; State v. Brown, 85 Kan. 418, 116 Pac. 508; People v. Nichols, 159 Mich. 355, 124 N. W. 25; State v. Schueller, 120 Minn. 26, 138 N. W. 937; Morris v. State, 131 Pac. 731; State v. Richey, 88 S. C. 239, 70 S. E. 729; Sykes v. State, 112 Tenn. 572, 105 Am. St. Rep. 972, 82 S. W. 185; State v. Rash, 27 S.D. 185, 130 N. W. 91, Ann. Cas. 1913D, 65.

The great weight of authority is also in favor of admitting proof of subsequent acts of intercourse. State v. Henderson, 19 Idaho, 524, 114 Pac. 50; Woodruff v. State, 72 Neb. 815, 101 N. W. 1114; Leedom v. State, 81 Neb. 585, 116 N. W. 496; Morris v. State, 131 Pac. 731; Sykes v. State, 112 Tenn. 572, 105 Am. St. Rep. 972, 82 S. W. 185.

Testimony which is otherwise admissible as tending to prove the defendant guilty of the crime charged is not rendered inadmissible by the fact that it also tends to show that he has committed some other offense. State v. Sysinger, 25 S. D. 110.

If a defendant desires the state to elect upon which of several like offenses it relies for a conviction, he should demand it properly and timely. The rule applicable does not mean that the court shall so require, in the absence of a proper motion or request therefor. State v. Poull, 14 N. D. 559; Mitchell v. People, 52 Pac. 672; Miller v. People, 23 Colo. 95, 46 Pac. 111; State v. Crimmins (Kan.) 2 Pac. 574; State v. Shweiter, 27 Kan. 500, 512; State v. Valentine, 63 N. W. 541; State v. Boughner, 63 N. W. 542; 1 Bishop, New Crim. Proc. 4th ed. 290; State v. Riggs (S. D.) 126 N. W. 509.

Such election must be requested and obtained before the state rests. The state must then announce its election, in order to enable the accused to make defense. But until a motion or request be made by the defendant, there is no occasion for the state to specifically elect, for there is no objection before the court. 33 Cyc. 1501; State v. Poull, 14 N. D. 559; State v. Valentine, 63 N. W. 541; State v. Boughner, 63 N. W. 542; State v. Crimmins, 31 Kan. 376.

GRACE, J. Appeal from district court of Ward county, Honorable K. E. Leighton, Judge.

The appellant was tried and convicted in the district court of Ward county, on July 18, 1917, of the crime of rape. The information in the case was in proper and legal form, and charged the defendant with the crime of rape in the first degree. The information alleged that the crime was committed on the 22d day of April, 1916. The charging part of the information is as follows: "That at said time and place the said Aulden Rice did wilfully, unlawfully, and feloniously have and accomplish an act of sexual intercourse with Eva O'Shea, a female person under the age of eighteen years, to wit, fourteen years of age, and not then and there the wife of the said Aulden Rice, and that the said Aulden Rice was then and there more than twenty-four years of age."

To the information the defendant entered a plea of not guilty. It thus became incumbent on the state to prove each and every allegation in the information, to the satisfaction of the jury, and beyond a reasonable doubt.

The defendant, having been found guilty by a verdict of the jury, made a motion for a new trial, which was denied by the court, and defendant appeals from the order denying such motion and makes six assignments of error and four specifications of particulars in which it is claimed the verdict is not sustained by the evidence,—all of which may be considered under two heads. First, the charge of the court relating to the time of the commission of the crime; and, second, the failure of the court to compel the state to elect upon which of the many acts of sexual intercourse shown in the testimony upon which the state would elect to rely; and in connection with these matters may be considered remarks of Attorney Nestos, then prosecuting attorney, who, it is claimed, at the time of the opening argument made the statement that the time of the commission of the offense was immaterial, so long as the offense was proved to have been committed at any time within three years prior to the filing of the information, which was July 16, 1917, which statement was reiterated by Mr. Nestos in his closing argument. The defendant's counsel, Mr. Nash, stated in reply to Mr. Nestos that time was material, and that the state must rely for conviction upon the offense charged in the information, which would be the first clear-cut offense proved. After all the testimony was in, both for the state and

defendant, and at the time of the making of such remarks by Mr. Nestos, defendant's counsel objected, and at that time requested the court to compel the state to elect upon which offense it would stand for a conviction. The court denied this request of the defendant.

The only witnesses testifying were Eva O'Shea, the complaining witness, and the defendant.

Eva O'Shea testified as follows:

My name is Eva O'Shea. I was fifteen years old May 18, 1917. I have lived for the last few years in Ward county, at Benedict and Aurelia. In March, April, and May of 1916, I resided with my stepfather, Aulden Rice, the defendant in this case, and my mother.

Q. During the month of April, 1916, did this defendant Aulden Rice, have sexual intercourse with you?

A. Yes, sir.

Q. Where did that take place?

A. Behind the house and behind the barn in the pasture on the farm where we were then living in Ward county, North Dakota, about 2½ miles from Aurelia.

Q. Had you had sexual intercourse with Aulden Rice, the defendant in this case, before the month of March, 1916?

A. Yes.

Q. On many occasions?

A. Yes, sir.

Q. When did these acts (of sexual intercourse) first occur with your stepfather, Aulden Rice?

A. When I was about ten years old.

Q. That would be about five year ago?

A. Yes, sir.

Q. And did the acts continue off and on from that time until the month of May, 1916?

A. Yes. My child was born January 22d, 1917. Aulden Rice is the father of that child. Aulden Rice, the defendant, is twenty-eight or twenty-nine years of age.

The complaining witness further testified that she was pregnant in February or March, 1916, and that Aulden Rice gave her medicine to drive the child away; that he had intercourse with her afterwards. She

testified that she had intercourse with her stepfather twice in February, 1916, and afterwards testified that she had intercourse with him more than twice during the month of February, 1916. She also testified that she had intercourse with others than Aulden Rice in the month of March; that she had intercourse in February with Jesse Fulton more than once, but all on the same occasion, and that she did not have intercourse with anyone else other than Fulton and her stepfather in February. She testified in March she had intercourse with her stepfather and with Oscar Edland before March 27th. She also testified that she had intercourse with Jesse Fulton, and that she endeavored to blame the parentage of her child on Jesse Fulton in order to save her stepfather.

The abstract of the case shows the following: "That Aulden Rice, the defendant, being first duly sworn, testifying in his own behalf, denied the various acts of sexual intercourse hereinbefore set forth in the testimony of the complaining witness. On cross-examination his testimony corroborated the testimony of Eva O'Shea, the complaining witness." As the testimony of the defendant on cross-examination corroborated the testimony of Eva O'Shea, he must have admitted the acts of sexual intercourse with her, testified to by her. The transcript of the testimony has not been returned to this court, and the statement of such corroboration of the complaining witness's testimony must be taken at full value. All this testimony shows the commission of many acts of sexual intercourse between the plaintiff and defendant, other than that alleged in the information. At the time of the admission of all such testimony relative to other acts of sexual intercourse than that set forth in the information, which was on the 22d day of April, 1916, the defendant made no objection, on the theory that the testimony of all such other acts of sexual intercourse were admitted simply and only for the purpose of corroboration, and that for this purpose the defendant did not object to the introduction of such testimony of such other acts of sexual intercourse, and in his brief says that "the several other acts of sexual intercourse were properly admitted in evidence as corroborative of the offense set forth in the information, and there was no objection on the part of the defendant's counsel to the proof of such acts for such limited purposes."

The defendant claims that by reason of the remarks made by the state's attorney, Mr. Nestos, that the time of the commission of the of-

fense was immaterial, so long as committed within three years, and the instructions of the court in one paragraph of his instructions to this same effect, changed the purpose for which the testimony of the other acts of sexual intercourse than that stated in the information was admitted. The defendant, in effect, contends that the statements of state's attorney in this regard and the instructions of the court really mean that the jury were instructed by the court and impressed by the statements of the state's attorney with the view, or that they might get the impression therefrom, that it could select any of the acts of sexual intercourse testified to by plaintiff, other than that described in the information, and find the defendant guilty on any of such acts of sexual intercourse of which testimony was given; that from such instructions by the court and such language by the prosecuting attorney, part of the jury might find the defendant guilty of one act of sexual intercourse, others of the jury might find defendant guilty of an entirely different act of sexual intercourse, and that the court might have had in mind still a different act of sexual intercourse of the defendant when giving its instructions, and that the giving of the instruction and the making of the remarks were prejudicial to the defendant.

The charge of the court must be considered as a whole, and the parts thereof which relate to the same subject-matter must be considered together. The court at the very beginning of its instructions uses the following language: "This is a criminal action brought to this court by the state's attorney filing an information in this court charging the defendant with having committed the crime of rape in the first degree, within this county and state, on the 22d day of April, 1916." The court then instructed that it was incumbent upon the state before conviction could be had to prove each and every allegation in the information to be true to your satisfaction and beyond a reasonable doubt, and in such instruction called attention that the filing of the information charging the defendant with the commission of an offense is no evidence whatever, and should not be considered by the jury. The court further instructed that the defendant was presumed to be innocent until the contrary, his guilt, is proved to the satisfaction of the jury beyond a reasonable doubt. The court then properly defined certain words, such as "wilfully," "unlawfully," felonicusly," and "rape," and gave such other instructions which are usual in such cases. The particular part of the instructions

complained of is as follows: "If you find beyond a reasonable doubt that the complaining witness is under the age of eighteen years, and not the wife of the defendant, and that the defendant is over the age of twenty-four years, and that the defendant had sexual intercourse with the prosecuting witness, Eva O'Shea, in Ward county, at any time within three years next preceding July 16, 1917, then defendant would be guilty as charged. If you fail to find all these facts beyond a reasonable doubt, he would not be guilty." This, if standing alone, might be considered somewhat misleading, but when considered in connection with the very first of the court's instructions, which called the attention of the jury to the fact that this was a criminal action, brought to the court by the state's attorney filing an information charging the defendant with having committed the crime of rape in the first degree on the 22d day of April, 1916, the meaning of the instruction complained of is quite apparent, and it must be considered that the court, having in mind the information and the above statements as to the time of the commission of the crime first made, desired to call the attention of the jury to the fact that the time of the commission of the act set forth in the information was not material. In other words, that it was not material whether the offense alleged to have occurred on the 22d day of April, 1916, did actually occur and was committed on that date, but that if that offense, the one mentioned and described in the information, were committed at another time, or any time within three years, then the defendant would be guilty as charged. It must be held that in the instructions complained of it was the clear intention of the court, as expressed in such instruction, to refer to the offense set forth in the information when he gave his charge, as to the immateriality of the time when such offense was committed. For instance, the offense alleged in the information may not have been committed on the 22d day of April, 1916, as charged, but that offense, the one relied upon in the information, may have been committed on the 21st day of April, or may have been proved to have been committed on the 25th day of March or at some other specified time, and if proper proof was given of such offense, and that offense was the one referred to in the information, the time of the actual commission of the crime becomes immaterial so long as committed within three years. We are clear that the instructions of the court and the remarks of the state's attorney as to the immateriality

of the time when the crime was committed referred to the immateriality of the time of the commission of the specific crime charged in the information.

The defendant relies, to sustain his position, largely upon the case of People v. Jenness, 5 Mich. 305, but as we view the matter that case is much different from the one at bar. Exceptions in that case were taken to certain instructions of the court, and we think properly, and part of such instructions were properly held to be reversible prejudicial error. The court charged the jury in that case as follows: "Although the information charges the prisoner to have committed the crime of fornication or incest on the 24th day of February, 1858, the time is immaterial, and the jury are at liberty to find the prisoner guilty of the offense charged if they are satisfied from the evidence that the same was committed in the city of Detroit within the period of six years previous to the time of filing the information." This part of the charge is substantially the same as was charged by the lower court in the case at bar. This is not the part of the instruction of the court in the Jenness Case upon which the supreme court of Michigan, in fact, based their reversal of the lower court. The real erroneous instruction in the Jenness Case was the following: "That though the information alleges that the prisoner had criminal connection with his niece, Delia E. Ashcroft, in this city, on the 24th day of February, time and place are immaterial, and the jury may find him guilty if from the evidence they believe that the act was not committed at the Howard House, but was committed in some other place in the city of Detroit within the period of six years prior to the time of filing this information." When this instruction is considered in connection with the remarks of the prosecuting attorney in the Jenness Case, which were to the effect that the jury might select any one of the acts on which evidence had been given as the ground of their verdict, there is an entirely different situation presented, and the supreme court in the Jenness Case said: "But the third paragraph of the charge clearly adopts the theory of the prosecuting attorney, and holds that any one of the several acts of sexual intercourse proved, or attempted to be proved, may be selected by the jury as the 'offense charged,' and that they may find the defendant guilty of the one thus selected," as he tells them: "They may find him guilty if from the evidence they believe that the act was not committed at the Howard House, but was committed at some other place in the city of Detroit

within the period of six years prior to the time of filing this information." In fact the above instruction of the court in the Jenness Case, in effect, told the jury that if they could not find the defendant guilty of the crime charged in the information, they could select any other of the criminal acts established by the evidence and find the defendant guilty on any such crime so selected. That is not the case at bar. The instruction of the court in the case at bar refers only to the immateriality of the time, providing the crime was committed within the three-year limitation period; and when his instruction is considered as a whole it appears plainly that they are all addressed to the crime charged in the information, and not to any of the other specific crimes which appear to have been established by the testimony of the witnesses. While the instruction is probably not as clear as it might have been, nevertheless, we are convinced that persons of average intelligence, such as the jury in the case at bar must be conceded to be, could gain no other impression than that if the crime charged in the information was not committed on the 22d day of April, 1916, yet if that identical crime, the one charged in the information, was committed at any other time, if within the three-year period, the time of the commission became immaterial.

It is a general rule in criminal cases, which is well established, that the commission of other similar offenses by the defendant cannot be offered in evidence for the purpose of showing that the person charged in the information with a crime has a criminal tendency or is of criminal disposition or nature, in order to thus show that there was more likelihood of his having committed the offense with which he is charged. There seems to be an exception to this rule as applied to sexual crimes and illicit intercourse between the sexes. It is clear that the admission of proof in the case at bar, of other offenses with the same person and of like kind as that charged in the information, was received in their corroborative and secondary character.

The court properly denied the request of defendant that the state be compelled to elect upon which of the offenses the state relied for conviction, there being but one offense charged in the information, and it plainly appearing that the state relied only upon the offense alleged in the information for conviction of the defendant, and that the instructions of the court, when considered as a whole, related to the offense charged in the information.

Even the defendant corroborates the complaining witness. This being true, the defendant in fact has no defense upon the merits. The verdict of the jury was that the defendant was guilty of the crime of rape in the first degree, as charged in the information. The proof is overwhelming to sustain the verdict. The defendant had a fair trial in every respect. The order appealed from is affirmed.

CHRISTIANSON, J. I concur in the result.

J. J. QUINLIVAN, Appellant, v. DENNSTEDT LAND COMPANY, Incorporated, Respondent.

(168 N. W. 51.)

Written contract — altered — cannot be — by subsequent oral contract — unless executed — new parol agreement — parties may make — new obligations — separate from and at variance with old written contract — new agreement binding, unless required to be written.

While a written contract cannot be altered by a subsequent parol agreement, unless such agreement is executed, the contracting parties may nevertheless enter into a new parol agreement creating obligations separate from, and at variance with, the old ones, and such new agreement will be binding unless the agreement is one required by the statute to be in writing.

Opinion filed April 2, 1918. Rehearing denied May 28, 1918.

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

From an order denying a new trial, plaintiff appeals.

Affirmed.

S. E. Ellsworth, for appellant.

After a broker has found a customer and negotiations are commenced, neither the principal nor the customer can break them off and defeat the broker's right to commissions by concluding the transaction without his aid. 19 Cyc. 262; Scott v. Clarke (S. D.) 54 N. W. 540; Nicholas v. Jones (Neb.) 37 N. W. 679; Donohue v. Padden (Wis.) 66 N. W. 804; McKenzie v. Lego (Wis.) 74 N. W. 249; Potvin v.

Curran (Neb.) 14 N. W. 400; O'Toole v. Tucker (N. Y.) 38 N. Y. S. 969; David-Fischer Co. v. Hall (Mich.) 148 N. W. 713.

"The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Comp. Laws 1913, § 5889.

"A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise." Comp. Laws 1913, § 5937.

"An executed contract is one the object of which is fully performed. All others are executory." Comp. Laws 1913, § 5921.

As applying to the above-named statutes: Annis v. Burnham, 15 N. D. 577, 208 N. W. 549; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924; Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 729; Fletcher v. Nelson, 6 N. D. 94, 69 N. W. 53; Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088; Reeves & Co. v. Bruening, 13 N. D. 157, 100 N. W. 241.

All the authorities agree that where, in the absence of fraud or mistake, the parties have deliberately put their contract into a writing which is complete in itself, and couched it in such language as imports a complete legal obligation, it is conclusively presumed that they have introduced into the instrument all material terms and circumstances relating thereto. Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; McCulloch v. Bauer, 24 N. D. 109, 139 N. W. 318; Harney v. Wirtz, 30 N. D. 292, 152 N. W. 803; J. I. Case Threshing Machine Co. v. Loomis, 31 N. D. 27, 153 N. W. 479; Wynn v. Coonen, 31 N. D. 160, 153 N. W. 988; Reitsch v. McCarty, 35 N. D. 555, 160 N. W. 694.

To supersede a written contract, a subsequent oral contract must be fully performed in all its terms. Civ. Code, § 1287; Share v. Coats (S. D.) 137 N. W. 402.

"An executed contract has the qualities of a chose in possession, while an executory contract is nothing but a chose in action,—the mere right to something arising from a contract, express or implied, which cannot be enforced without resort to legal process." 11 Am. & Eng. Enc. Law, 582; 3 Am. & Eng. Enc. Law, p. 824.

"An executory contract is one in which a party binds himself to do

or not to do a particular thing. A contract executed is one in which the object of the contract is performed." Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Mfg. Co. v. Galloway, 5 S. D. 205, 58 N. W. 565; Lewis v. Railroad Co. 5 S. D. 148, 58 N. W. 580; Strunk v. Smith, 8 S. D. 407, 66 N. W. 926; Bank v. Kellog, 4 S. D. 312, 66 N. W. 1071; Washabaugh v. Hall, 4 S. D. 168, 56 N. W. 82.

"The alleged oral agreement in this case to reduce the rent so many dollars per year was void and inoperative in so far as it remained unexecuted. The lessors had the right to repudiate it at any time and demand the full amount of rent provided for by the lease." McKenzie v. Harrison, 120 N. Y. 260, 24 N. E. 458.

An executory contract providing for payment is not to be deemed such until payment has actually been made. Share v. Coats (S. D.) 187 N. W. 402.

"Where a written contract for the sale of land provides that no agent can change its terms, evidence of statements made by an agent that the forfeiture clause would not be enforced was inadmissible." Stevenson v. Joy (Cal.) 128 Pac. 751; Manganese Steel Co. v. Bank (S. D.) 134 N. W. 886; Reiff v. Coulter, 47 Wash. 678, 92 Pac. 436; Downing v. Coolidge, 46 Colo. 345, 104 Pac. 392; Bradley v. Harter, 156 Ind. 499, 60 N. E. 139; Grand Forks Lbr. Co. v. McClure Logging Co. 103 Minn. 471, 115 N. W. 406; Culy v. Upham, 135 Mich. 131, 106 Am. St. Rep. 388, 97 N. W. 405.

Knauf & Knauf, for respondent.

The right to contract includes the right to modify, change, or abrogate a pre-existing contract, and hence any contract, whether in writing or oral, not under seal, may be annulled or changed by a subsequent oral contract, and the last contract will bind the parties. Bishop v. Busse, 69 Ill. 403; Putnam Foundry & M. Co. v. Canfield, 56 Atl. 1033.

It is clearly competent to plead and prove a new and distinct agreement upon a new consideration, whether it be a substitute for the old or in addition to and beyond it. 1 Greenl. Ev. § 303; Bannan v. Aultman & Co. (Wis.) 49 N. W. 967; Seaman v. O'Hara, 29 Mich. 66, 67; Ch. Cont. ed of 1848; 2 Phill. Ev. 363; 4 Phill. Ev. 301 note; Bryan v. Hunt, 70 Am. Dec. 262; Bryan v. Hunt, 4 Sneed 543; Richardson v. Hooper, 13 Pick. 446, 98 N. W. 1044.

A new oral contract can be proved by way of novation or an oral waiver agreed upon as to the terms of a written agreement or as to a cancelation thereof. Guidery v. Green (Cal.) 30 Pac. 786; Goss v. Lord Nugent, 5 Barn. & Ad. 65; Cummings v. Arnold, 37 Am. Dec. 155, and cases cited; Boyce v. McCulloch, 39 Am. Dec. 38; McNinch v. Northwest Thresher Co. 100 Pac. 524; Smith-Wogan H. I. Co. v. Moon, 108 Pac. 1103; Jones v. Longerbeam, 119 N. W. 1000; Tilley v. Bartow, 62 So. 330; Smith v. Consumers Cotton Oil Co. 30 C. C. A. 103.

A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise. Cal. Civ. Code, § 1698; Knarston v. Manhattan L. Ins. Co. 140 Cal. 57, 73 Pac. 740; Fairbanks, M. & Co. v. Nelson, 133 C. C. A. 215, 216.

A new contract, different from and at variance with the old one, and founded upon a valid consideration, is binding and may be enforced. Tabin v. Kells, 93 N. E. 596; Bishop v. Busse, 69 Ill. 403–407; Wilson v. McClenny, 13 So. 873; Homire v. Stratton, 164 S. W. 67; Youngberg v. Lamberton, 97 N. W. 571; Platte Land Co. v. Hubbard, 56 Pac. 65; Credit Clearance Bureau v. Hochbann Constr. Co. 144 Pac. 315; Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 144 Pac. 315.

Where defendant claims a new and distinct contract, based upon a valid consideration, and that it takes the place of the old one, and there is proof to sustain or support such claim, it becomes a question for the jury. 9 Cyc. 597; Monroe v. Perkins, 20 Am. Dec. 475; Blagborne v. Hunger, 59 N. W. 657; West Haven Water Co. v. Redfield, 18 Atl. 978.

Plaintiff was a mere sales agent. Harney v. Wirz, 30 N. D. 292.

The fact that a written contract provides that it may not be modified except by an instrument in writing will not avail where a party directly waives or participates in or encourages the waiver or new contract, or induces one to change his position to his detriment; such a party will not be heard to say that no new writing was made and therefore the new agreement is void. Blagborne v. Hunger, 59 N. W. 657; Westchester v. Earle, 33 Mich. 143; McFadden v. O'Donnell, 18 Cal. 164; Erskine v. Johnson, 36 N. W. 510; Osborne & Co. v. Stringham (S. D.) 57 N. W. 776; McLead v. Genius, 47 N. W. 473.

CHRISTIANSON, J. The defendant is a corporation engaged in land business. The plaintiff is one of its sales agents, and he brings the instant case to recover $5,395 and interest, which he claims is owing to him for procuring a certain purchaser for the defendant.

It appears that on May 1, 1915, the plaintiff and defendant entered into a written contract, under the terms of which the defendant appointed the plaintiff "as its district agent, with the privilege of selecting subagents, to cover the following described territory, to wit: The counties of Jerauld, Sanborn, Miner, Minnehaha, Hutchinson, Turner, Lincoln, Kingsbury, Brookings, Meadle, and Spink, all in South Dakota, and elsewhere, *not conflicting with other agents,* and the counties of Butler, Seward, and Saunders, all in Nebraska, and elsewhere *not conflicting with other agents,* and such other territory that the second party contracts with subagents, and said contracts are accepted by the company." And as compensation for services under the contract the land company agreed "to *pay second party fifty (50) per cent of the net profits realized on all sales of land to purchasers* from the territory assigned, or otherwise secured by the second party, or purchasers produced by subagents of said second party." The contract also provided: "That where a trade is made, the property traded for shall not be termed as cash, until same has been sold, at which time commissions are due, according to the above terms, unless otherwise agreed to in writing."

About June 12, 1915, while at work in Minnehaha county, South Dakota, the plaintiff was advised by one H. V. Harlan that his brother C. C. Harlan at Cedar Falls, Iowa, had a stock of goods, which he might exchange for North Dakota lands. The plaintiff thereupon wrote a letter notifying the defendant of this fact, and suggested that it enter into negotiations with Harlan, with a view of making the proposed exchange. The defendant had an agent, one J. E. Ray, at Cedar Falls, Iowa, and partly through correspondence, and partly through personal negotiations of the Dennstedt Brothers, but principally through the efforts of the agent Ray, the deal was finally consummated. The deal was closed on October 2, 1915, and a written contract of exchange was entered into on that day at Cedar Falls, Iowa. After Harlan had investigated the lands offered in exchange, he notified the agent Ray that he was willing to make the trade. Ray thereupon

notified the defendant company, and A. L. Dennstedt, the president, and E. W. Dennstedt, the vice president, went to Cedar Falls to examine the goods. After they had made the examination and before the deal was closed, they decided to make some definite deal with their agents with respect to the commissions to be paid in connection with the deal. And it is undisputed that on October 2, 1915, before the deal was closed, E. W. Dennstedt had a long-distance telephone conversation with the plaintiff with respect to the commissions to be paid the plaintiff. There is a dispute in the testimony, however, with respect to what was said during the conversation. E. W. Dennstedt gives the following version thereof: "I said to him that we were at Cedar Falls for the purpose of inspecting the Harlan goods; that we found them not as good as we expected and in fact they were poor in quality and shopworn; and that before we could go on with the deal we would have to get the commission arranged. I told him that we could not come out on the deal and pay a very big commission; that we had figured it all over and found that we could not pay him over $500 in full for his commission, as Mr. Ray was entitled to $1 per acre on the land in question, as the deal was in his territory; and said Mr. Ray had put a lot of work in on the deal. Mr. Quinlivan said, 'You had better make it $1,000.' I said, 'No, we could not do it.' Then he said, 'Give me $750.' I said, 'No, we would rather not make the deal than to pay over $500.' Then he said, 'Well, all right, I will take that. Go ahead, make the deal.' "

Dennstedt's version of the conversation is corroborated by A. L. Dennstedt and J. E. Ray, who were present at Cedar Falls, Iowa, and heard the words spoken by Dennstedt. It is also corroborated by A. E. Dennstedt and Fred Marshall, who testified that they were present at Wimbledon, North Dakota, and heard the part of the conversation spoken by the plaintiff.

The plaintiff admits that such conversation was had. He also admits that E. W. Dennstedt asked him to accept $500 as his commission. He denies, however, that he agreed to accept such sum. Plaintiff gives the following version of the conversation: "He, E. W. Dennstedt, said after we got down here and looking this matter over, we found it was a pretty bum lot of stuff and said $500 is all we can pay on the deal. We have to pay Ray a dollar an acre or $480. Well,

I told him I could not consider any such a proposition as that at all. *Well, he says, it is $500 or nothing.* I hung up the receiver. It made me angry."

It is undisputed that a few hours after this telephone conversation was had the defendant company entered into a contract with Harlan, whereby it exchanged certain lands for the stock of merchandise. The defendant continued to operate the store in which the stock of merchandise was contained for a short period, and received $2,590.18 for goods sold in the usual course of business. The testimony, however, further shows that during this time the store was operated at a loss of $654.54. The defendant subsequently traded the remaining portion of the stock of goods to one Olson and received therefor equities in two tracts of land,—one situated in Mower county, Minnesota, and the other in Ransom county, North Dakota, and $5,928 cash to boot. For the purpose of the trade the equities in the lands were valued at $7,700.

The evidence clearly shows, however, that they had no such actual value. In fact the lands were encumbered for practically their entire value, and the valuation of $7,700 placed on the equities was a fictitious or inflated value placed thereon for the purposes of the trade. The defendant offered to sell these equities to the plaintiff for $1,000 and the evidence shows that this about represented their actual value.

It is undisputed that the defendant had a duly appointed agent at Cedar Falls, Iowa, and that plaintiff had knowledge of this agent at the time he notified defendant that C. C. Harlan might possibly be interested in some North Dakota lands. In fact plaintiff testified that he suggested to the defendant that it take the matter up with its agent at Cedar Falls, and have such agent enter into negotiations with Harlan. It is also undisputed that the defendant paid its Cedar Falls agent a commission of $1 per acre for the land disposed of, which was the full amount of his commission for the sale of the lands under the contract between him and the defendant. It is further undisputed that the defendant has paid the plaintiff $482.76 to apply on his commission in the Harlan deal.

In his complaint plaintiff alleges that he, acting under the written contract, placed the defendant in communication with C. C. Harlan, with the result that it exchanged certain lands for a stock of goods of

the value of $13,638; that it realized therefrom a profit of $11,525, and that under the written contract plaintiff is entitled to receive $5,760. The defendant in its answer admits the execution of the contract, and alleges that the territory in and about Cedar Falls, Iowa, was not allotted to the plaintiff, but was at all times within the territory allotted to one J. E. Ray, a regularly and duly appointed sales-agent of the defendant for such territory. It denies that the goods received were of the value of $13,628, or worth any sum greater than $3,600. It further alleges that the profit realized by defendant on the deal did not exceed $1,200. The answer further alleges that the sale or exchange was made in territory outside of that allotted to and accepted by the plaintiff; that on examination of the goods it was found that they were of less value than expected, and that upon discovery of the fact the defendant, before making any deal, entered into an agreement with plaintiff, whereby plaintiff agreed to accept for all services performed by him in connection with the deal the sum of $500, and that the defendant has paid to said plaintiff all of such sum, except $17.82, which balance it offers to pay.

The case was tried to jury, which returned a verdict in favor of the plaintiff for the sum of $17.54. The plaintiff moved for a new trial. The motion was denied and plaintiff has appealed from the order denying such motion.

Appellant contends that the court erred in permitting defendant to introduce any evidence relating to the agreement made over long-distance telephone. He asserts that this testimony tended to vary and alter the terms of a written contract, and hence was inadmissible under the following statutory provisions: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all of the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument." Comp. Laws 1913, § 5889. "A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise." Comp. Laws 1913, § 5938.

We are unable to agree with appellant's contention. In the first place it seems quite clear that the deal with Harlan was not one within the terms of the written contract between the plaintiff and the defendant. Under this contract plaintiff was allotted certain territory in

South Dakota and Nebraska "and elsewhere not conflicting with other agents." It is conceded that Harlan resided outside of the territory allotted to the plaintiff, and that the territory in which he resided had been allotted to one J. E. Ray, a regularly appointed sales agent of the defendant. This fact was known to the plaintiff at the time he notified defendant that it might be able to make a deal with Harlan. It is also undisputed that all the actual negotiations leading up to the deal between the defendant and Harlan were carried on through Ray, and not through the plaintiff.

Manifestly the plaintiff could not have solicited and made the deal with Harlan without "conflicting" with Ray. Ray actually negotiated the deal and received the full amount of the commission to which he was entitled under his contract with defendant. The mere fact that the plaintiff suggested to his principal, the defendant, that it might make a deal with a person residing in territory not allotted to plaintiff, but allotted to another agent, certainly would not of itself imply that the defendant by acting on such suggestion would become obligated to pay a commission to the plaintiff for making the suggestion.

But even though Harlan be deemed a purchaser whom plaintiff might have produced under the terms of the written contract, there was nothing to prevent the parties from making a new oral contract with respect to the proposed Harlan deal. For it is well settled that parties who have undertaken contractual obligations by an agreement in writing may nevertheless enter into a new parol agreement creating obligations separate from the old ones and at variance with them, and such new agreement will be binding, unless the contract is one required by the statute to be in writing. 9 Cyc. 597, et seq. This principle has been recognized and enforced by this court. See Colean Mfg. Co. v. Blanchett, 16 N. D. 341, 345, 113 N. W. 614; Westby v. J. I. Case Threshing Mach. Co. 21 N. D. 575, 132 N. W. 137. The contract between plaintiff and defendant was not required to be in writing. It might rest wholly in parol. 20 Cyc. 234.

Plaintiff merely introduced to the defendant, rather suggested to it the name of, a possible prospective purchaser. Manifestly plaintiff was not entitled to any commission under his written contract, unless and until a deal was made. A deal could only be made when

the parties agreed upon the terms of the trade. If they failed to agree plaintiff would receive nothing.

It is undisputed that after defendants' officers had examined the stock of goods, they notified plaintiff that the stock was unsatisfactory, and that they could not, and would not, make a deal with Harlan if they were required to pay plaintiff the commission prescribed by the written contract. The defendant in effect rejected the proposals made by Harlan as a purchaser produced by the plaintiff under the written contract, and notified plaintiff of such rejection. If the deal had terminated there plaintiff would clearly have been entitled to no compensation whatever. The defendant, however, at the same time proposed to plaintiff another agreement with respect to the Harlan deal. Plaintiff admits that defendants' officers informed him over the telephone that it could not make a deal with Harlan, and would not deal with him, unless the plaintiff entered into an agreement to accept a commission of $500. And while there was a square conflict as to whether the plaintiff accepted the new proposition, the preponderance of the evidence and the verdict of the jury is to the effect that he did.

In the contract of exchange between the defendant and Harlan, the stock of goods was listed at $13,628. The evidence showed that this was the original cost price, and that some of the goods were many years old. Defendants offered evidence tending to show that the actual value was considerably less. Harlan testified that the actual value of the stock did not exceed 50 per cent of such invoice value.

The defendant also offered evidence tending to show that certain equities in lands received by it in exchange for the Harlan stock were worth less than the price at which they were listed in the exchange agreement. Plaintiff asserts that the admission of this evidence was error. This evidence had bearing only on the question of the net profits derived by the defendant from the Harlan stock. It was material only in determining the amount of commission plaintiff would have been entitled to receive under the written contract. Inasmuch as the jury found defendant's version of the oral contract to be the correct one, and that plaintiff was entitled to recover only the commission fixed in such oral contract, these assignments of error are rendered immaterial.

We are of the opinion, however, that the evidence was admissible under the theory on which plaintiff sought to recover. Under the

written contract he was entitled to receive 50 per cent of the net profits realized from sales to purchasers secured by him, and property taken in trade was "not to be termed as cash" until it had been sold. It seems too clear for argument that, if these provisions were to be applied in determining the amount of plaintiff's commission on the Harlan deal, the defendant would be entitled to show the actual net profits received by it, or rather the amount it actually received in cash or its equivalent for the Harlan stock. Plaintiff's counsel suggests that the defendant might have sold the stock for a mere pittance or given the goods away, and in this manner defeated plaintiff's claim to a commission. The situation suggested by counsel does not exist in this case. Doubtless the defendant would have been required to act in good faith. There is not even an intimation in this case that it did not act with perfect fairness, and in good faith sought to realize as much as possible out of the Harlan stock.

The record contains no error prejudicial to the plaintiff. He received not only a fair trial, but had the benefit of rulings and instructions more favorable than the evidence and the law warranted.

The order denying a new trial is affirmed.

BIRDZELL, J. (concurring). I concur in the foregoing opinion and in the reasons assigned for the conclusion, but I am also of the opinion that the verbal commission contract, even considered as an alteration of the written agreement, was so far executed as to be binding upon the parties, and was not such an alteration as is prohibited by § 5938 of the Compiled Laws of 1913. This statute merely expresses the equitable doctrine relative to the alteration of sealed instruments which had, in reality, become a part of the common law by judicial legislation without the aid of such statutes. See McCreery v. Day, 119 N. Y. 1, 6 L.R.A. 503, 16 Am. St. Rep. 793, 23 N. E. 198; Leake, Contr. pp. 584, 585, 602. Other sections of the Civil Code have given to simple written contracts the force of the sealed instrument at the common law. Comp. Laws 1913, §§ 5833, 5881, 5894, and the section in question, in my opinion, only extend the settled doctrine relative to alteration.

The statute was not designed to permit one party to a written agreement to work a fraud upon the other by inducing him to assent ver-

bally to alterations, and then, after the full performance by the one adversely affected by the alteration, to enforce the contract according to the original written provisions. An oral agreement which may alter a written contract is "executed," within the meaning of § 5938, whenever the party performing has incurred a detriment which he was not obliged by the original contract to incur, there being sufficient performance to render the enforcement of the original agreement inequitable. Stockton Combined Harvester & Agri. Works v. Glens Falls Ins. Co. 121 Cal. 167–175, 53 Pac. 565. See Anderson v. Johnston, 120 Cal. 657, 53 Pac. 264; Mackenzie v. Hodgkin, 126 Cal. 591–598, 77 Am. St. Rep. 209, 59 Pac. 36.

A clear illustration of the proper application of the statute referred to is afforded by the case of Erenberg v. Peters, 66 Cal. 114, 4 Pac. 1091. The plaintiff and defendant in that case were parties to a five-year lease, and an action was brought by the lessor to recover the stipulated rental. During the term, however, the building was burned, and the parties entered into an oral agreement whereby the plaintiff agreed to erect another building, and defendant to pay an increased rental of $10 per month for the unexpired portion of the term. The plaintiff neglected to erect the building, but it was held, in accordance with well-settled law, that the defendant was liable for the rent under the lease, and that the oral agreement, not having been executed, did not alter the terms of the lease.

If the proposition for which the appellant in this case contends is correct, there would have been nothing to prevent the defendant from enjoying the full benefits of the new building (had it been erected) for the remainder of the period without the payment of any additional rental. In my opinion, the statute was not designed to legalize this kind of fraud, much less was it intended to compel its sanction. Whenever the oral agreement has been fully executed by both parties, the obligation of the original written agreement is discharged, or when the party adversely affected by the oral alteration has done that which he was not obligated by the original written agreement to do, and has so far executed the oral contract that the enforcement of the original written agreement would not only deprive him of the benefit contemplated by the new agreement, but also subject him to substantial loss,

the oral agreement has been so far "executed" as to supersede the original written contract.

The case of Share v. Coats, 29 S. D. 603, 137 N. W. 402, relied upon by appellant's counsel, does not, in my opinion, contradict the principle above stated. In that case, the agent claimed that the verbal contract gave him a right to recover a higher commission than that provided for in the written agency agreement. It was not shown wherein the agent, in finding a purchaser, had done any more than he was required to do in the faithful performance of his obligation as an agent under the written contract. The written agency contract having bound the plaintiff to do everything that was done in effecting the sale upon which the added commission was claimed, he cannot be said to have incurred any detriment, nor to have altered his position to his prejudice in reliance upon the verbal agreement. See Gaar, S. Co. v. Green, 6 N. D. 48, 68 N. W. 318. Hence, the payment of an added commission to him would have been a mere matter of favor or good fortune; whereas, in the instant case, the defendant, in reliance upon the promise of the plaintiff, has been led to do that which it was in no manner bound to do, and which, according to the testimony that was believed by the jury, it would not have done except for the promise of the defendant.

ROBINSON, J. (concurring). The plaintiff sues on a written contract to recover commissions on a trade of certain lands in Stutsman county for a stock of goods and merchandise in Iowa. Though the trade was made by defendant itself, the plaintiff claims that it was brought about by his agency and mediation.

However, it appears that immediately prior to the trade the defendant called up the plaintiff at Wimbledon on the long-distance phone, and stated that unless the plaintiff agreed to accept a commission of $500 the trade would not be made. The plaintiff agreed to it and so the trade was made, and in that way the terms of the written contract were modified by an executed oral agreement on which the parties relied and acted. The plaintiff received all of the $500 excepting $17.54, which defendant offered to pay without a suit and for which the plaintiff recovered a verdict and judgment.

There was some dispute concerning the conversation on the long-

distance phone, but the clear preponderance of evidence is in accordance with the verdict. Thus it appears the plaintiff has had his $500 of easy money, which was much the same as money found, and it was in accordance with his agreement. Certain it is there was no reason for this suit and no reason for the appeal.

MERCHANTS' NATIONAL BANK OF WIMBLEDON, NORTH DAKOTA, a Corporation, Appellant, v. GEORGE E. BRASTRUP, Respondent.

(168 N. W. 42.)

Instrument — containing blank spaces — signing of — person to whom delivered — intrusted with power to fill spaces according to agreement — presumption — completed form.

1. If one signs an instrument containing blanks, he must be understood to intrust it to the person to whom it is so delivered to be properly filled in, according to the agreement between the parties, and when so filled in the instrument is as good as if originally executed in complete form.

Writings — blanks in — not under seal — may be filled in — instrument completed — oral authority sufficient.

2. Blanks of any description, left in writings not under seal, may, except as prohibited by the Statute of Frauds, be filled in in pursuance of mere parol authority.

Written instruments — alterations in — increasing liability of maker — explanation required only in such cases.

3. It is as a general rule only incumbent upon a plaintiff to explain an alteration in an instrument which increases the liability of the defendant, and not one which reduces it.

Promissory note — interest at stated rate till maturity — note bears legal rate — writing same in — justifiable — where rate less than stated rate till maturity.

4. A note which contains the clause, "with interest payable annually at the rate of $\overset{10}{\text{twelve}}$ per cent per annum to maturity," will be presumed to bear the legal noncontractual rate of interest, which in North Dakota is 7 per cent, and

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NOTE.—For authorities passing on the question of liability of maker, acceptor, or indorser of commercial paper where blanks therein are filled up contrary to his instructions, see note in 5 B. R. C. 702.

in such a case the holder would be justified in writing the word or figure "seven" therein and above the word "twelve," which has been crossed out.

Promissory note — alteration — material — fraudulent breach of trust — forgery — clear and convincing evidence required — instructions refusing — error.

5. A charge that a note which when sued upon contains the clause, "with interest payable annually at the rate of twelve (10) per cent per annum to maturity," when originally signed and delivered had the twelve merely stricken out and no figures inserted above, and that the agreement between the parties was either that no interest should be charged or at the most the legal rate of 7 per cent, is a charge of a fraudulent breach of trust, which practically amounts to forgery; and in such a case it is error to refuse to instruct the jury that "where a party seeks to avoid an instrument on the ground of an alteration, he must make out his case by clear and convincing testimony sufficient to convince the mind of a reasonably prudent and cautious person, especially when the change will amount to a crime," and that "the presumption of innocence and fair dealing among men is so persuasive that a situation which violates it calls for evidence of a more clear and satisfactory character than one that does not involve moral turpitude or the commission of a crime or offense."

Opinion filed May 6, 1918. Rehearing denied May 28, 1918.

Action on a promissory note.

Defense of a material alteration.

Appeal from the District Court of Stutsman County, Honorable *J. A. Coffey,* Judge.

Judgment for defendant. Plaintiff appeals.

Reversed.

John A. Jorgenson, for appellant.

"Where a party seeks to avoid an instrument on the ground of an alteration, he must make out his case by clear and convincing testimony." Riley v. Riley, 9 N. D. 580, 84 N. W. 347; Rosenberg v. Jett, 72 Fed. 90; Brunton v. Ditto, 51 Colo. 178, 117 Pac. 156; Tanner v. Newton, 254 Ill. 432, 98 N. E. 929; Smith v. Parker (Tenn.) Ch. 49 S. W. 285; Dickenson v. Ramsey, 115 Va. 521, 79 S. E. 1025; Hecht v. Shenners, 126 Wis. 27, 105 N. W. 309; Maldaner v. Smith (Wis.) 78 N. W. 141.

"Blanks of any description left in writings not under seal may, except so far as prohibited by the Statute of Frauds, be filled in pursuance of

mere parol authority." Yocum v. Barnes, 8 B. Mon. 496; Porter v. Hardy, 10 N. D. 551, 556, 88 N. W. 458; Violett v. Patton, 5 Cranch, 142, 3 L. ed. 61; Shows v. Steimer, 175 Ala. 363, 57 So. 700; White v. Alward, 35 Ill. App. 195; Hut v. Adams, 6 Mass. 519; Roe v. Town Mut. F. Co. 78 Mo. App. 452; New England v. Brown, 59 Mo. App. 461; Ex parte Edeker, 6 Cow. 59; Bugger v. Cresswell (Pa.) 12 Atl. 829; Baldwin v. Haskell (Tex. Civ. App.) 124 S. W. 443; Re Tahit Co. L. R. 17 Eq. 273.

"Where one signs or indorses a bill or note containing blanks to be filled, the delivery of such an instrument is an authority to fill up the blanks in conformity with the original agreement." Cox v. Alexander, 30 Or. 438, 46 Pac. 794; Stahl v. Berger, 10 Serg. & R. 170, 13 Am. Dec. 666; Lance v. Calvert, 21 Pa. Super. 102; Fitch v. Kelly, 44 U. C. Q. B. 578; Porter v. Hardy, 10 N. D. 551; South Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535; Smith v. Crooker, 5 Mass. 538; New England v. Brown, 59 Mo. App. 461; Montgomery v. Dresher, 38 L.R.A.(N.S.) 423 and note; 90 Neb. 632, 134 N. W. 251.

"The filling of blanks is a question of authority, and not of alteration of a completed instrument." Bolter v. Koxlowski, 112 Ill. App. 13, affirmed in 211 Ill. 79, 71 N. E. 858; Wadron v. Young, 9 Heisk. 777; White v. Alward, 35 Ill. App. 195; Montgomery v. Dresher, 90 Neb. 632, 38 L.R.A.(N.S.) 423, 134 N. W. 251; Visher v. Webster, 8 Cal. 109; 7 Cow. 337; Story, P. N. § 110; Johnson v. Blasdale, 1 Smedes & M. 17, 40 Am. Dec. 85; Chitty, Bills, 33; Violett v. Patton, 5 Cranch, 151; Russell v. Langstaffe, 2 Dougl. 514; 2 Kent, 617; Storey, Agency, 158; Wintle v. Crowther, 1 Cromp. & J. Ex. 316; Fisher v. Dennis, 6 Cal. 577; Holmes v. Trumper, 22 Mich. 430.

The instrument here furnishes no evidence that would create even a suspicion of fraud or wrongdoing. The writing, the ink, and all such matters, are proper to consider. Maldaner v. Smith (Wis.) 78 N. W. 140; Messenger v. St. Paul R. Co. 77 Minn. 34, 79 N. W. 583.

A statute authorizing a new trial for insufficient evidence confers power to grant a new trial where the verdict is against the weight of the evidence. McDonald v. Walter, 40 N. Y. 551; Inland Elec. Co. v. Hall, 124 U. S. 121, 31 L. ed. 1022, 8 Sup. Ct. Rep. 397.

Knauf & Knauf, for respondent.

When there are suspicious circumstances tending to discredit the in-

strument apparent upon its face, or from extrinsic facts, the burden of removing such suspicion is on the party seeking the use of the instrument. Jackson v. Osborn, 2 Wend. 555, 20 Am. Dec. 651; Clark v. Eckstein, 22 Pac. 507, 62 Am. Dec. 307.

Plaintiff having offered the altered note in evidence, it was incumbent on it to produce the evidence tending to show the alteration to have been made at a proper time or with the consent of the defendant. Greenl. Ev. 564; Smith v. United States, 69 U. S. 17 L. ed. 788–791; Inglish v. Breneman, 41 Am. Dec. 96; Courcamp v. Weber, 39 Neb. 533; Bewcomb v. Presbrey, 8 Met. 406; United States v. Linn, 1 How. 111; Page v. Danaher, 43 Wis. 221.

There were no blank spaces in this note to be filled. There was a plain, clear alteration,—the numeral "10" having been written in. Porter v. Hardy, 10 N. D. 551.

There is a vast difference between filling in blank spaces left in a delivered instrument, and changing or altering a completed instrument, such as was the one in the case at bar. Shows v. Steiner, 57 So. 700.

BRUCE, Ch. J. This is an action on a promissory note. The defense is a material alteration, and the answer alleges that "said sum was to bear no interest until after maturity, and that after the defendant had signed, executed, and delivered the said promissory note, the same was materially changed and altered by plaintiff, or its agent, to bear 10 per cent interest before maturity."

Judgment was rendered for the defendant and the plaintiff appeals. The errors which are assigned relate entirely to the instructions.

The portion of the note over which the controversy rages reads as follows:

"With interest payable annually at the rate of ~~twelve~~ 10 per cent per annum to maturity."

The printed word "twelve" is crossed out and the "figure "10" written above.

The defendant claims that the "twelve" was crossed out when he signed and delivered the note, and that nothing was inserted in its place.

The note was made payable to the Merchants' National Bank of Wim-

bledon. It was sent to the Stutsman County Bank of Courtney for execution. The cashier of the bank at Courtney, who obtained this execution, did not testify. The cashier of the Merchants' National Bank of Wimbledom testified that the note was in its present condition at the time it was received by him from the Stutsman County Bank. There is no direct testimony as to who drew the note in the first instance, as to its original form, nor as to whose writing the written portions are in. There is, however, testimony to the effect that the note was given in payment for a team of horses which were bought from one Lilley in May, 1912, but was made, executed, and dated on December 24, and made payable to the Merchants' National Bank, which had a mortgage on the team.

Lilley also testified that the defendant had a conversation with him before the note was executed, and claimed he ought to have a reduction because one of the horses had become diseased, to which he, Lilley, replied that it was not his fault, "but before we will have any dispute about this team, you go to the bank and make out a note now, and it will not have interest for last summer."

This conversation is testified to by Lilley as having been had in the fall, the horse having been sold in the spring. The defendant testifies that he did have a conversation shortly before the execution of the note, *but nothing was said at all about the interest.* The note was executed on the 24th day of December, 1912, and interest is merely claimed from that date. The defendant further testifies that at the time the note was executed the twelve was stricken out, and that the ten was not written over it; also, that he saw it twice after that time and that the ten was not there early in the spring of 1913.

It is first maintained that the court should have instructed the jury that, by delivering the note to the plaintiff bank with the twelve crossed out, the defendant impliedly consented to the insertion of the figure "10."

It may be laid down generally that "if one signs an instrument containing blanks, he must be understood to intrust it to the person to whom it is so delivered to be filled up properly according to the agreement between the parties, and when so filled the instrument is as good as if originally executed in complete form." Porter v. Hardy,

10 N. D. 551, 556, 88 N. W. 458; Re Tahite Co. L. R. 17 Eq. 273, 43 L. J. Ch. N. S. 425, 22 Week. Rep. 815.

It is also true that "blanks of any description, left in writings not under seal, may, except so far as prohibited by the Statute of Frauds, be filled in pursuance of mere parol authority." Yocum v. Barnes, 8 B. Mon. 496.

There is, however, in the record which is before us and outside of the note itself, no proof whatever of any agreement for the payment of 10 per cent interest, and though 10 per cent could, at the time of the execution of the note, have been contracted for, the legal rate, in the absence of such an agreement, was 7 per cent. Comp. Laws 1913, § 6072. There may therefore have been implied authority to insert the figure "7," but there was no implied authority to insert that of "10." Porter v. Hardy, supra; 2 Enc. L. P. 177; 2 Cyc. 164; Hoopes v. Collingwood, 10 Colo. 107, 3 Am. St. Rep. 565, 13 Pac. 909; Palmer v. Poor, 121 Ind. 135, 6 L.R.A. 469, 22 N. E. 984; Holmes v. Trumper, 22 Mich. 430, 7 Am. Rep. 661.

It is next urged that the trial court failed to instruct the jury, at the request of the plaintiff, that "where a party seeks to avoid an instrument on the ground of an alteration he must make out his case by clear and convincing testimony sufficient to convince the mind of a reasonably prudent and cautious person, especially where the change will amount to a crime;" and that "the presumption of innocence and fair dealing among men is so persuasive that a situation which violates it calls for evidence of a more clear and satisfactory character than one that does not involve moral turpitude or the commission of a crime or offense."

We are of the opinion that the court erred in not giving these instructions. If the 10 was written in without authority, either a forgery was committed or there was a breach of trust so closely akin thereto that moral turpitude was involved. The contention of the defendant is, indeed, so improbable that great care should have been exercised in the submission of the case to the jury.

There was little if anything on the face of the note which rendered it subject to suspicion. The word "twelve" had been stricken out and a lesser number inserted, and this was to the detriment rather than benefit of the plaintiff. As a rule it is only incumbent upon the plain-

tiff to explain an alteration which increases the liability of the defendant, and not one which reduces it. Greenl. Ev. 16th ed. § 564. The claim of the defendant was really that the plaintiff should have stricken out the whole paragraph as to interest. He does not pretend for a moment that the paragraph, with the exception of the figure "10," was not in when he signed the instrument, or that there was any agreement as to interest. He shows no reason whatever why he should not have been held liable in any event for 7 per cent.

The testimony of Lilley, too, is positive that the agreement was merely that the defendant should be excused from paying interest until the fall when the note was executed, and, as the note did not bear date until December 24, this agreement, if made, was complied with. The defendant does not deny having had a conversation with Lilley, nor does he deny having purchased the horse in the spring, nor does he claim that the purchase price has been paid. He merely denies that at the time of the conversation anything was said as to the interest. We have then a note which on its face excites no suspicion, and opposed to it a statement that after the twelve was properly crossed out, the ten was wrongfully inserted in its place. It is claimed by the defendant that the intention was that no interest at all should be charged before the maturity, and, yet, even if nothing further had been written or done, the note would still have read, "with interest payable annually at the rate of twelve per cent per annum to maturity and twelve per cent per annum after maturity until paid."

If left in the condition contended for by the defendant, the holder would clearly have had the right to insert the words "seven per cent," above the word "twelve," which had been stricken out, as without this insertion the note would have drawn that interest. The contention of the defendant lacks probability. He also charges forgery, or a fraudulent breach of trust, which would practically amount to forgery. The instructions should have been given. Maldaner v. Smith, 102 (Wis.) 30, 78 N. W. 141; Brunton v. Ditto, 51 Colo. 178, 117 Pac. 156; Riley v. Riley, 9 N. D. 580, 84 N. W. 347.

The judgment of the District Court is reversed and a new trial is ordered.

ROBINSON, J. (concurring). The plaintiff brings this action to recover from defendant on a promissory note for $300 and interest from December, 1912. In May of that year Lilley sold and delivered a team of horses to the defendant on his agreement to pay or give his note for the same to the bank which had a mortgage on the team. Defendant put off making payment or giving a note until December, when he claims some reduction from the price because one of the horses became diseased. The seller insisted that he was not at fault, and that defendant should go and make the note, which would give him a reduction of interest from May until December. The defendant went to Stutsman County Bank at Courtenay, and then signed the note, which was mailed to the plaintiff. He testifies that when he signed the note it was in this form:

No.....Wimbledon, N. D., Dec. 24, 1912.

One year after date, for value received, I promise to pay to the Merchants National Bank, of Wimbledon, N. D., or order, three hundred dollars, $300, at the Merchants National Bank in Wimbledon, N. D., with interest payable annually at the rate of.....per cent per annum to maturity, and twelve per cent per annum after maturity until paid. Interest not paid at maturity shall bear interest at the rate of twelve per cent per annum until paid.

He testifies that when he signed the note the word "twelve" was stricken out, and in place of it there was no figure "ten (10)" which now appears for the per cent. He testifies that in the fall of 1913, he saw the note at the bank in Wimbledon, and the figure "10" had not been inserted, and that he never gave any permission or authority to insert the figure "10." He does not testify to any agreement with the seller of the horses or with the bank that he was not to pay interest on the note until it became due. He does not in any way contradict the testimony showing that he was to make settlement for the horses at the time of delivery, and that by putting off settlement he obtained the use of the horses during the whole season of 1912 without paying anything, Certain it is there was no bargain and no thought in the mind of defendant himself or of any person that he should have the use of the horses for a second season without paying interest, and

now it seems that he has had the use of the horses for five or six years without paying or offering to pay a dollar, and, of course, that does not mark him as an honest and truthful man. Truth and honesty are virtues which go together.

Mr. Beers, cashier of the plaintiff bank, testifies:

The note came to the bank by mail. I was there when it was received and it is the same now as when it was received.

Q. Are you certain it is the same as when received?

A. I am very certain.

Hence, the weak and improbable testimony of defendant is flatly contradicted by that of the cashier, as well as by the facts and circumstances and the presumptions in favor of the note. His position is the same as if he had gone to the bank and borrowed $300 and then refused payment on the ground that when he signed the note the printed word "twelve" was crossed out and in lieu thereof no other word or figure was inserted to indicate the rate of interest. Now in all blank promissory notes used at the banks the printed rate of interest is 10 per cent, but the 10 is usually crossed out and a lower rate inserted.

If the maker of a note may avoid payment by swearing that at the time of signing the notes the printed 10 was crossed out and no other figure inserted, while the banker swears to the contrary, then nearly all persons may safely refuse to pay their bank notes. In this case after crossing out the twelve, the note contains a promise to pay $300, "with interest payable annually at the rate of.....per cent per annum till due."

Now, all that is said concerning the payment of interest should have been crossed out if the defendant was not to pay any rate of interest. If the defendant signed the note, leaving the rate blank and saying nothing concerning it, he thereby authorized the bank to insert the usual interest rate. And such insertion was not an alteration of the note. The note in question is fair on its face, and all the facts and presumptions are in its favor. Banks are not loaning money or taking notes due in a year without interest.

In this case defendant was legally and morally bound to pay interest on the price of the horses from the date of the note, and if he

thought to put off on the bank a note payable in a year without interest then he was guilty of dishonesty and fraud.

On these matters and in regard to the burden of proof the instructions of the court were clearly erroneous. The court also erred in refusing to give the jury the following special instructions, which were duly requested:

"The presumption of innocence and fair dealing among men is so persuasive that a situation which violates it calls for evidence of a more clear and satisfactory character than one that does not involve moral turpitude or the commission of a criminal offense.

"Where a party seeks to avoid an instrument on the ground of an alteration, he must make out his case by clear and convincing testimony, sufficient to convince the mind of a reasonably prudent and cautious person, especially when the change would amount to a crime."

In this case when the answer raised a question concerning the alteration of the note, the plaintiff should have added to his complaint a cause of action counting on the original purchase price of the team.

ROBERT R. FROEMKE and Herman A. Froemke, Substituted in the Place of Albert Froemke, Plaintiffs and Respondents, and PETER OLSON and Ingebor Sunby, Interveners and Respondents, v. W. S. PARKER and L. Altmann, Defendants and Appellants.

(169 N. W. 80.)

Perpetual injunction — supersedeas bond — not given — injunction abided pending appeal — dismissal of appeal — motion for — moot question.

This is an appeal from a perpetual injunction and for costs amounting to $105.80, and, in lieu of giving a supersedeas bond, defendants concluded to abide the injunction pending the appeal. Hence, a motion is made to dismiss the appeal on the ground that it presents only a moot question. The motion is denied, with costs.

Opinion filed May 28, 1918.

Appeal from the District Court of Ransom County, Honorable *Frank P. Allen*, Judge.

Defendants appeal.
Motions denied, with $25 costs.
Kvello & Adams, for appellants.
Pierce, Tenneson, & Cupler, for respondents.

ROBINSON, J. This action is brought by the plaintiff and interveners to permanently restrain the defendants from constructing and maintaining a drain so as to cause a large and unwonted flow of water from the land of the defendants onto the lands of the plaintiffs and interveners. On April 7, 1917, judgment was given that the defendants be permanently restrained from continuing the construction of the drain running from a slough on the land of the defendant Parker (east half sec. 26–135–55), thence across the land of defendant Altmann, and from keeping said drain open, and from draining the waters of said slough over and upon the land of the plaintiffs and interveners; and, also, that the plaintiffs and interveners recover from the defendants costs and disbursements amounting to $105.80.

On June 27, 1917, defendants appealed to this court from the whole of the judgment. They gave a regular appeal bond in the sum of $250, and in lieu of giving a stay bond they stopped the flow of water through the tile drain which they had constructed. On June 11, 1917, counsel for defendants wrote to counsel for plaintiffs a letter (exhibit "B"), which stated: "We have decided to appeal the Parker lake decision and will submit notice and appeal bond to you this week. To avoid further litigation in the event that the decision is affirmed, we will shut off the flow of water from the Parker lake. We will guarantee that none of the water will reach your tile, and therefore, the bond will be for the appeal costs only." On June 21, 1917, they wrote: "We do not want to do anything to affect the interest of our client pending the litigation, and to that end will take immediate steps to absolutely stop every bit of water coming through the tile."

Now, because the defendant did actually stop the flow of water and concluded to abide the judgment pending the appeal in lieu of giving a supersedeas bond or being in contempt of court, the plaintiff and intervener move that the appeal be dismissed on the ground that, by

the stoppage of the water pending the litigation, the case presents only a moot question.

It is wholly unnecessary to consider the affidavits pro and con. There is no dispute concerning the facts above stated, and the appeal is also from the judgment for costs amounting to $105.80, as well as from the decree that the defendants stopped the flow of water in the drain and forever kept it stopped. Defendant wisely concluded to stop the flow pending an appeal so as to incur no risk of a suit for damages. Plaintiffs claim the temporary stoppage of the water turns the whole matter of the suit into a moot question. Still they express a fear that the court may reverse the judgment, and permit defendant to open the flood gates and undo the improvements made by them pending the appeal. And what if counsel did induce the trial court to render a doubtful or erroneous judgment, should they be relieved from the risk of a reversal because the defendants do not care to risk a disregard or defiance of the judgment pending the appeal? To state the question is to answer it. If the matter had become a moot question, then a reversal of the judgment could not affect the rights of the parties.

The motion is clearly groundless, and it is denied, with $25 costs.

GRACE, J. I concur in the result.

STATE OF NORTH DAKOTA EX REL. HERB E. GERMAIN, Petitioner, v. JAMES H. ROSS, as Sheriff of Stutsman County, North Dakota, Defendant.

(— N. W. —.)

Committing magistrate — authority of — to hold one accused of crime — evidence required — need not be of convincing character beyond reasonable doubt — guilt of accused — sufficient cause to believe.

1. In order to authorize a committing magistrate to hold one accused of crime for trial, it is not required that the evidence submitted be of such convincing character as to establish the guilt of the accused beyond a reasonable doubt. All that is required is that the evidence reasonably show that there is sufficient cause to believe the accused guilty of an offense.

Criminal charge — commitment on — assailed by habeas corpus proceedings — grounds of — insufficiency of evidence — reasonable and probable cause — review to ascertain.

2. Where one who is committed upon a criminal charge assails the validity of the commitment in a habeas corpus proceeding on the ground of the insufficiency of the evidence, the reviewing court will inquire into the evidence only far enough to ascertain whether the accused has been committed on such criminal charge without reasonable or probable cause.

Intoxicating liquors — manufacture or sell — no inherent right in citizen to do so — agent of another in such traffic — immunity to citizens — statute does not abridge.

3. There is no inherent right in a citizen of the United States to manufacture or sell intoxicating liquors, or to engage in the liquor traffic as the purchasing agent of another. And chapter 194, Laws 1915, which prohibits any person from acting as the agent of another in the purchase or sale of intoxicating liquors, does not abridge any privilege or immunity guaranteed to citizens of the United States by the 14th Amendment to the Constitution of the United States.

Statute — liquor laws — do not contravene Constitution.

4. Chapter 194, Laws 1915, does not contravene § 1 of the North Dakota Constitution, which declares that "all men are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; and pursuing and obtaining safety and happiness."

Constitution — inhibition — legislative power — passage of laws.

5. Chapter 194, Laws 1915, does not violate any express or implied inhibition upon legislative power contained in § 217 of the Constitution, which provides: "No person, association or corporation shall within this state, manufacture for sale or gift, any intoxicating liquors, and no person, association or corporation shall import any of the same for sale or gift, or keep or sell or offer the same for sale, or gift, barter or trade as a beverage. The legislative assembly shall by law prescribe regulations for the enforcement of the provisions of this article and shall thereby provide suitable penalties for the violation thereof."

Opinion filed May 2, 1918.

Application by Herb E. Germain for a writ of habeas corpus.

Writ denied.

J. A. Jorgenson, for petitioner.

J. W. Carr, State's Attorney, *Wm. Langer,* Attorney General, and *Daniel V. Brennan,* Assistant Attorney General, for respondent.

CHRISTIANSON, J. This is an original application for a writ of habeas corpus, presented to this court after a denial of an application for such writ by Judge Coffey of the fifth judicial district, wherein the petitioner is confined. It appears from the petition that the relator was arrested for violating the so-called "Bootlegging" statute. Laws 1915, chap. 194. And that upon a preliminary examination duly had before a justice of the peace in Stutsman county, North Dakota, the relator was held to answer the charge set forth in the complaint at the next term of the district court, bail being fixed at $2,000. The defendant is now confined in the county jail of Stutsman county by the sheriff of said county under and by virtue of the commitment issued by said justice of the peace.

The relator contends that the commitment under which he is held is void for three reasons: (1) That the evidence is insufficient and fails to show that defendant has committed the alleged offense charged; (2) that the statute for the violation of which relator has been arrested is unconstitutional; and (3) that the bail demanded is unreasonable and excessive. We will consider these propositions in the order stated.

(1) It appears from the transcript submitted by the relator that the prosecution called the chief of police of the city of Jamestown as a witness, and he testified that he had occupied such official position in all for ten years; that he was acquainted with the relator and had known him since last fall; that he had a conversation with the relator on the morning of the day on which the preliminary examination was had; that such conversation was had in the presence of the committing magistrate; that during such conversation the relator stated that he had bought from 10 to 12 quarts of whisky in January and February, 1918; that he bought such whisky for parties who came up and asked him to get it for them; that these transactions took place on the streets of the city of Jamestown; that the relator claimed that he received no monetary profit from the transactions, but just got the drinks.

While the right to a preliminary hearing is universally recognized in this country, and in fact in all English-speaking countries (8 R. C. L. p. 104, § 66), such right is not a constitutional one, but is one granted by statute only. See State v. Hart, 30 N. D. 368, 373, 152 N. W. 672. The objects of a preliminary examination are: "To ascertain if a crime has been committed, and, if so, whether there is evidence suffi-

cient to give probable cause for believing that the arrested man is guilty of the crime, that he may not be further deprived of his liberty if there is no cause for such belief, and, in case there should be cause for such belief, that he may be informed of the nature of the accusation, and the state may take the necessary steps to bring him to trial; to perpetuate testimony which can be given at the time; and to determine the amount of bail to be given by the prisoner in case he is held for trial." 8 R. C. L. p. 104, § 66.

A complaint before a magistrate for the purpose of a preliminary examination only does not require the same certainty in the statement of the offense as an information, indictment, or complaint upon which the accused is tried. See State v. Hart, 30 N. D. 368, 152 N. W. 672, and authorities therein cited. And it has been said that the hearing is not governed by all the technical rules applicable upon a final trial. 11 Cyc. 309, 310.

In order to justify a committing magistrate in holding an accused for trial, it is not required that the evidence submitted be of such convincing character as to establish the guilt of the accused beyond a reasonable doubt. All that is required is that there be sufficient evidence to make it appear that a public offense has been committed and that there is sufficient cause to believe the accused guilty thereof. Comp. Laws 1913, § 10,611; Re Mitchell, 1 Cal. App. 396, 82 Pac. 347.

Cyc. (12 Cyc. 311), says: "It [the evidence] is sufficient to authorize the commitment of the accused or the holding him to bail if it be shown that probable cause exists to believe that he committed the crime charged, and the sufficiency of the facts from which this may be deduced is for the determination of the magistrate alone. It is not necessary to produce evidence which would convince a jury of the guilt of the accused beyond a reasonable doubt. A statute which forbids a conviction on the unsupported testimony of the prosecutrix, as in the case of seduction or rape, does not apply to a preliminary examination, but furnishes a rule of evidence for the trial only. The confession of the accused will justify holding him, although without proof of the *corpus delicti* or any other evidence." See also Re Dempsey, 65 N. Y. Supp. 717; 8 R. C. L. p. 106, § 68.

The inquiry on habeas corpus is confined to jurisdictional matters. And as the statute requires a committing magistrate to act upon evi-

dence in making his findings against one under examination upon a charge of having committed a crime, he is without authority to hold such person for trial unless a preliminary examination is waived, or there is some evidence produced at the hearing to justify the order of commitment. Such evidence is a jurisdictional prerequisite to a valid commitment, and on habeas corpus the reviewing court will inquire into the evidence so far as to see that this jurisdictional requirement has been observed, and no further. And it is well settled that on habeas corpus the court will not weigh conflicting testimony or measure the credibility of witnesses; nor will it substitute its judgment upon these questions for that of the committing magistrate. State ex rel. Styles v. Beaverstad, 12 N. D. 527, 97 N. W. 548. In a well-considered case on this subject the supreme court of Wisconsin said: "The reviewing court, in the exercise of its function, must necessarily pass upon and reverse or affirm the decision of the committing magistrate, if such matters are properly presented for its consideration, according to its determination thereof, and in doing so it does not go beyond jurisdictional defects. It can examine the evidence only sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate. It cannot go beyond that and weigh the evidence. It can say whether the complaint will admit of a construction charging a criminal offense, or whether the evidence rendered the charge against the prisoner within reasonable probabilities. That is all. When it has discovered that there was competent evidence for the judicial mind of the examining magistrate to act upon in determining the existence of the essential facts, it has reached the limit of its jurisdiction on that point. If the examining magistrate acts without evidence, he exceeds his jurisdiction; but any act upon evidence worthy of consideration in any aspect is as well within his jurisdiction when he decides wrong as when he decides right." State ex rel. Durner v. Huegin, 110 Wis. 189, 237, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332.

In this state the extent of review of the sufficiency of the evidence on habeas corpus is prescribed by the statute. And it authorizes a reviewing court to discharge a person committed on a criminal charge only when it is made to appear that such "party has been committed on a criminal charge without reasonable or probable cause." Comp. Laws

1913, § 11,373, subd. 7. Under the plain language of this statute the reviewing court may examine the evidence only far enough to ascertain whether the accused has been committed on a criminal charge without reasonable or probable cause; and unless the reviewing court, after an examination of the evidence, can answer the question raised as to the reasonableness or probability in the affirmative, it should not disturb the findings of the committing magistrate.

It is unnecessary for us in the instant case to determine whether a conviction for the crime of bootlegging can be sustained where the only evidence tending to establish it is the confession or admission of the accused, as that question is not before us. We are wholly agreed, however, that the evidence of the confession or admission in the case at bar was sufficient to justify the committing magistrate in holding the accused for trial, and that this court cannot say that the accused has been committed without reasonable or probable cause.

The statute which relator is charged with violating was enacted by the legislature in 1915. It provides: "Any person who shall sell or barter any intoxicating liquor upon any premises or place, public or private, within the state of North Dakota, not owned, kept, maintained or controlled by him; or, who shall act, directly or indirectly, with or without compensation, as the agent of another in connection with the purchase, or sale of intoxicating liquors; or, who shall solicit, procure or receive from any person, any order, providing for the purchase, sale or furnishing of intoxicating liquors either for delivery from within or from without this state, except from those authorized by law to sell or barter the same within this state, or, who shall aid, assist or abet in the commission of such crime, shall be guilty of the crime of bootlegging." Laws 1915, chap. 194.

Relator contends that this statute violates: (1) The clause of the 14th Amendment to the Federal Constitution, which prohibits any state from enacting or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States;" (2) § 1 of article 1 of the Declaration of Rights of the state Constitution, which declares that "all men are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property and reputation; and pursuing and obtaining safety and happiness;"

and (3) § 217 of the North Dakota Constitution, which provides: "No person, association or corporation shall within this state, manufacture for sale or gift, any intoxicating liquors, and no person, association or corporation shall import any of the same for sale or gift, or keep or sell or offer the same for sale, or gift, barter or trade as a beverage. The legislative assembly shall by law prescribe regulations for the enforcement of the provisions of this article and shall thereby provide suitable penalties for the violation thereof."

(1) The first question is: Does the statute abridge any privilege or immunity guaranteed to the relator as a citizen of the United States? We are entirely satisfied that it does not.

Laws regulating or prohibiting the traffic of intoxicants are referable to and comprehended under the police power of the government. 15 R. C. L. p. 254; 7 Enc. U. S. Sup. Ct. Rep. 519. And the general power of the states to control, regulate, and prohibit within their borders, the business of dealing in, or soliciting orders for, the purchase of intoxicating liquors, is beyond question. 7 Enc. U. S. Sup. Ct. Rep. 519.

The question of state power to deal with the liquor traffic has been considered by the Supreme Court of the United States in many cases both prior and subsequent to the adoption of the 14th Amendment. In a leading case decided at the January term, 1847, Chief Justice Taney, who prepared the principal opinion, said: "If any state deems the retail and internal traffic in ardent spirits injurious to its citizens and calculated to produce illness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic or from prohibiting it altogether if it thinks proper." License Cases, 5 How. 504, 12 L. ed. 256.

In considering a similar question in a case decided at the October term, 1890, the court, in a unanimous opinion prepared by Mr. Justice Field, said: "It is a question of public expediency and public morality, and not of Federal law. The police power of the state is fully competent to regulate the business,—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be

permitted under such conditions as will limit to the utmost its evils." Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

And in the recent case of Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845 (decided at the October term, 1916), the court held that a state may consistently with the 14th Amendment of the Federal Constitution forbid all shipments of intoxicating liquor, whether intended for personal use or otherwise. These decisions of the United States Supreme Court entirely dispose of relator's contention that the statute under consideration violates the 14th Amendment. See also Crane v. Campbell, 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98; State v. Brown, 40 S. D. 372, 167 N. W. 400; Fitch v. State, 102 Neb. 361, 167 N. W. 417.

(2) The next question is: Does the statute violate § 1 of article 1 of the state Constitution? We have no hesitation in answering this question in the negative.

In construing a constitutional provision it is the duty of the court to consider the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision. All provisions bearing upon any particular subject are to be brought into view and so interpreted as to effectuate the great purpose of the instrument. If possible, effect should be given to every part and every word, and the court should avoid a construction which renders any provision meaningless or inoperative. 6 R. C. L. pp. 47, 48.

The basic principle which underlies all legislation relative to the liquor traffic is that the traffic is one which the state may regulate or prohibit in the interests of public morality and welfare. The purpose of all legislation prohibiting the sale of intoxicants is to discourage and prevent their use. This was the obvious purpose of § 217 of the state Constitution.

In this state the people, in their Constitution, have solemnly declared that the manufacture and sale of liquor shall be prohibited, and commanded their lawmakers to put the constitutional policy into effect by the enactment of proper legislation.

The men who framed and the people who adopted the state Constitution, in plain and unmistakable language declared that no one had any

right, within the borders of North Dakota, to manufacture or import for sale, or keep or offer for sale, as a beverage, any intoxicating liquor. Not only so, but they specifically commanded the legislature to enact suitable legislation to make such traffic illegal and to provide suitable penalties for any person who engaged therein. Manifestly the prohibition of the manufacture, importation, and sale of intoxicating liquor would tend to render it difficult for any citizen to purchase such liquor.

It cannot be assumed that the men who framed and adopted the Constitution, and declared that the liquor traffic should be prohibited and a penalty imposed upon anyone who engaged in the manufacture or sale of intoxicants, nevertheless intended to reserve to every citizen of the state as an inalienable right essential to life, liberty, and happiness, the right to act as agent for another in the purchase of intoxicants. A bare statement of the proposition demonstrates its unsoundness.

(3) Does the statute contravene § 217 of the state Constitution? We think not. This section is a declaration of constitutional policy. The purpose and spirit of the provision is manifest. The section is not intended to confer any power on the legislature, but constitutes a command on the part of the people to the legislature to enact certain legislation to carry into effect the policy declared in the section. Clearly the statute under consideration does not violate any express inhibition contained in the section. The relator, however, asserts that § 217 merely prohibits the manufacture, sale, or gift of intoxicants, and contains no prohibition or restriction on the right to purchase or acquire the same. And it is contended that the express mention of the acts to be prohibited must be deemed to evince an intent to exclude all acts not enumerated, and to restrict legislative action to those specifically enumerated. It is well to remember that the principle invoked by the relator is merely a rule of construction. And that the great fundamental purpose of, and rule in, construing all constitutional provisions, is to ascertain and give effect to the intent of the framers and of the people who adopted it. Keeping in mind the object sought to be accomplished, and the evils, if any, sought to be remedied or prevented, by its adoption, the court should aim to give effect to the purpose indicated by a fair interpretation of the language used. 12 C. J. 700–702.

The Constitution recognized the liquor traffic as an existing evil, and that public morality and welfare required that it be prohibited within

the state. It ought not to be assumed that those who framed and adopted this provision intended to place any restriction upon the powers of the legislature to enact laws for the purpose of carrying into effect the very policy solemnly proclaimed in the provision. On the contrary, we must assume, in absence of clear evidence to the contrary, that they intended that the legislature should have the power to enact suitable laws to prevent the evil sought to be prevented and carry into effect the constitutional policy declared. As was said by the supreme court of Michigan in answering the contention that the enumeration in the Constitution of certain corporations subject to taxation limited the right of the legislature to impose taxes upon corporations to the corporations enumerated: "Considering the nature and object of a state Constitution, there could have been no necessity for any such specific grant of legislative power; since, according to well-settled principles, the particular authority would have been as clearly within the competency of the legislature without any such provision, as with it. . . . In the absence of any provision clearly evincing an intention to abandon the power in question, the purpose to relinquish it ought not to be presumed. . . . As the necessities of the state, under all circumstances, could never be accurately measured in advance, nor the resources of the community, in all their possible changes and relations, be anticipated or conjectured, it would seem reasonable to suppose that a people, so well versed in political affairs as those of this state, would not purposely withhold from their own government the power to supply the public wants by any eligible method of taxation, or deny themselves the right of selection among the rightful objects of it. A contrary view would pre-suppose the deliberate establishment of government, and the equally deliberate denial of a power which might be ultimately necessary to enable it to accomplish the ends of its institution. That a course so extraordinary had been pursued could never be admitted, except upon the clearest evidence." Walcott v. People, 17 Mich. 68. See also State v. Fargo Bottling Works Co. 19 N. D. 396, 26 L.R.A.(N.S.) 872, 124 N. W. 387.

Whether the legislature may, under our Constitution, prohibit the importation or purchase of intoxicants by a person for his own use, is not before us, and upon this question we express no opinion. We are, however, wholly satisfied that the legislature has the power to prohibit

persons from purchasing liquors for and delivering them to others. The statute before us does not prohibit a person from purchasing or receiving intoxicating liquors for his own personal use, but does prohibit a person from acting as the agent of another in the purchase or sale of intoxicants. In our opinion the purpose of the statute under consideration is to carry into effect the policy declared in § 217 of the Constitution, and to prevent evasion thereof by the device of agency. If § 217 is susceptible of the construction contended for by relator's counsel it would be largely a dead letter. Instead of preventing the sale of intoxicants, it would in effect shear the legislature of much of the power which it otherwise would possess to deal with the liquor traffic. If relator's argument is sound a number of persons might employ a person to act as their agent in the purchase and importation of intoxicants, and in this manner the very object of the constitutional provision be defeated. In our opinion the statute does not violate any of the constitutional provisions invoked, but is a valid enactment.

(4) With respect to the amount of bail little need be said. The maximum penalty for a violation of the statute is: (1) For the first offense imprisonment in the state penitentiary under an indeterminate sentence of from one year to three years for the first offense; and (2) for the second and each succeeding similar imprisonment for not less than two or more than five years. Under these circumstances we cannot say that the bail fixed is so grossly excessive as to justify any interference therewith. Upon the argument Mr. Brennan, the assistant attorney general, who represented the state, stated that bail in the sum of $1,000 would be adequate to insure the appearance of the relator for trial, and that the state was willing to have the bail reduced to that amount. For this reason bail is reduced to the sum of $1,000.

Writ denied.

ROBINSON, J. (dissenting). It is nearly two months since this matter was brought before the court and an application for a habeas corpus for the purpose of discharging the defendant or reducing the bail from $2,000 to $500. The case was heard in a very summary manner by three judges, and the consensus of opinion seemed to be that the bail should be reduced to $500. That is the sum I named as just and fair and no one said a word to the contrary.

The case should have been promptly decided and the bail reduced and the defendant permitted to go to work. Aside from the mere statement of the defendant himself, there is not a word of evidence to show the commission of any crime. There was not a word of testimony only as to what the defendant said concerning the purchase of liquor for a certain party. Now the commission of crime cannot be proven by mere confession. Thus, if the defendant had said that he stole a horse from John Smith, the proof would be insufficient without a showing that a horse was actually stolen from John Smith. It is no uncommon thing to hear people sit around and boast of petty crimes and misdemeanors they never committed, but that is neither here nor there.

The Constitution provides that excessive bail shall not be required nor excessive fines imposed. In this case it was sheer cruelty to refuse bail in the sum of $500 and to retain defendant in jail eating the bread of idleness at the expense of Stutsman county, when he is a worker and his work is so much needed.

MARGARET SHERIDAN and Nell S. Hopkins, Respondents, v. L. J. McCORMICK, Luina M. McCormick, and W. A. Overing, Appellants.

(8 A.L.R. 523, 168 N. W. 59.)

Creditors — debtor's property — fraudulent intent and schemes — to screen property from creditors — consideration not test — intent controls.

1. The law will treat as null and void as to creditors all fraudulent contrivances to screen the property of a debtor from his creditors. It is not the consideration but the intent with which a conveyance is made that makes it good or bad as against creditors. However valuable the consideration, if the conveyance be designed to delay, hinder, or defeat creditors, it is void.

Conveyance of real estate — grantor's intent to hinder, delay or defraud creditors — grantee not creditor — knowledge of grantor's intent — conveyance void as to creditors — though full consideration paid.

2. Where a conveyance of real estate is made by a grantor, with intent to hinder, delay, or defraud creditors, and the grantee not being a creditor of the grantor has knowledge of such fact, the consummation of the transfer is such

a participation in fraud by the grantee as will invalidate the transfer as to such creditors, even where full consideration is paid.

Execution — fraudulent conveyance — action to remove — judgment on which execution issues — presumed correct — no appeal taken — parties precluded from disputing claim — all defenses included and foreclosed.

3. No defense can be interposed in an action to remove a fraudulent conveyance from the path of an execution on the ground that the claim on which the judgment was entered and on which the execution was issued, was invalid or inequitable. The matter is precluded by the prior judgment, and when no appeal was taken it must be assumed that all of the defenses, both legal and equitable, which the defendants had or deemed themselves entitled to, were interposed on the former trial.

Conveyance of real estate — to defraud creditors — grantee having knowledge thereof — prior encumbrances on land conveyed — agreement by grantee to pay — payment by grantee — has no claim on property as security — as against the creditors.

4. Where at the time of the conveyance of real estate made and received for the purpose of defrauding the creditors of the grantors, the grantee as a part of the same transaction, and with knowledge of the fraud, agrees with the grantors to pay certain existing valid encumbrances upon the real estate so fraudulently conveyed, and subsequently and in pursuance of such an agreement pays such encumbrances, he cannot, when such conveyances are declared fraudulent and void as against the creditors of the grantors, hold such conveyances as security for the amounts so paid.

Opinion filed May 15, 1918. Rehearing denied June 1, 1918.

Action to set aside a fraudulent conveyance.

Appeal from the District Court of Renville County, Honorable *K. E. Leighton,* Judge.

Judgment for plaintiffs. Defendants appeal.

Affirmed.

Ryerson & Rodsater, for appellants.

"In all cases arising under § 5599 or under the provisions of this chapter, the question of the fraudulent intent is one of fact, and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration." Comp. Laws 1913, §§ 5052, 5055, 7223; Stevens v. Meyers, 14 N. D. 398, 104 N. W. 529; Merchants' Nat. Bank v. Collard, 23 N. D. 556.

"Fraud which would operate to avoid the transfer must have existed at the time of and as a part of such transfer."

The proof must be clean and convincing. Reitsch v. McCarthy, 34 N. D. 555, 160 N. W. 694; Doxsee v. Waddick, 122 Iowa, 599, 98 N. W. 483; Smyth v. Hall, 126 Iowa, 627, 102 N. W. 520.

Where the grantee had no notice or knowledge of the grantor's fraudulent intent, and no notice of facts calculated to put him upon his guard or to impute to him notice of such intent, and where he paid full consideration for the transfer, the same will not be set aside as fraudulent as to creditors. 20 Cyc. 465; Woodruff v. Bowles, 104 N. C. 197; Jones v. Simpson, 116 U. S. 609, 29 L. ed. 742; Catchings v. Harcrow, 49 Ark. 20; Tuteur v. Chase, 66 Miss. 476, 2 L.R.A. 832; Lyons v. Leahy, 15 Or. 8; Redhead v. Pratt, 72 Iowa, 99; Benson v. Maxwell, 21 W. N. C. 446; Fluegel v. Henschel, 7 N. D. 276.

The fact that vendor and vendee are relatives—brothers-in-law—raises no presumption of fraud.

The vendee must actively participate in the vendor's fraud, or conditions must be such as to raise the presumption of knowledge on his part. Guidry v. Grivot, 2 Mart. N. S. 13, 14 Am. Dec. 193; 31 L.R.A. 613, 36 L.R.A. 335.

J. E. Bryans and *E. R. Sinkler,* for respondents.

"If defendant has personal property and so conceals or places it out of the way, and the officer cannot find it, if the defendant wishes to save his real estate, it is his duty to turn over and expose such property before the sale of the real estate." First Nat. Bank v. Black Hills Fair Asso. 48 N. W. 852; Forber v. Waller, 25 N. Y. 430.

The sheriff's return was correct as amended, and the sheriff not only has the right, but it is his duty, to amend his return to correspond with the facts, where the rights of third parties have not intervened. 17 Cyc. 1373; Post v. Renneer, 151 N. W. 763.

In actions of this character it is not necessary that execution be returned unsatisfied. Salemson v. Thompson, 13 N. D. 182; Paulson v. Ward, 11 N. D. 100; Newman v. Willetts, 52 Ill. 98; Zall v. Soper, 75 Mo. 460; Poshly v. Mandigo, 42 Mich. 172; Foley v. Doyle, 95 N. W. 1067; 11 N. H. 311, 43 N. W. 169; Spooner v. Traders Ins. Co. 76 Minn. 311; Henderson v. Farley Nat. Bank, 123 Ala. 547, 82 Am.

St. Rep. 140; Allis v. Newman. 50 N. W. 1058; 12 R. C. L. p. 622, §§ 130 to 134.

The attachment here created a valid lien on the property attached, and is superior to the pretended transfer. 13 N. D. 182; 12 R. C. L. §§ 133 and 125, p. 625; Paulson v. Ward, 4 N. D. 100.

"Every transfer of property or charge thereon made, every allegation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest, and against any persons upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor." Comp. Laws 1913, § 7220; Paulson & Co. v. Ward, 4 N. D. 100; 14 Am. St. Rep. 747 note; Fahey v. Fahey, 127 Am. St. Rep. 118; Nelson v. Leiter, 190 Ill. 414, 60 N. E. 851; Hanson v. Bean, 51 Minn. 546; 12 R. C. L. §§ 44, 64, pp. 67, 547; 3 C. J. p. 681; Tyler v. Shea, 4 N. D. 377.

The grantee is not entitled to any protection or to any relief here. His participation in the fraud is clear and well defined. 12 R. C. L. § 65, p. 539; 14 Am. St. Rep. 577; 34 Am. St. Rep. 399.

Suspicion arises where the transaction is between relatives, and courts will scrutinize the same more closely. Fugel v. Henshall, 7 N. D. 276.

The fact that the fraudulent grantor has other property is of no moment. 123 Cal. 360, 69 Am. St. Rep. 64; Hagerman v. Buchanan, 14 Am. St. Rep. 732; 119 Am. St. Rep. 556.

BRUCE, Ch. J. This action comes before us for a trial *de novo,* and is brought to set aside a fraudulent conveyance. On the 3d day of May the plaintiffs recovered a judgment against the McCormicks for the sum of $1,140.25.

The indebtedness on which the judgment was founded grew out of the sale of an abstract business by the plaintiffs to the defendants, on September 8, 1911, for $4,100, payable in monthly instalments of $50, and the action was brought on the instalments then due and unpaid.

The transfer which is sought to be set aside was made by the McCormicks to the defendant W. A. Overing, the father of Mrs. McCormick, on the 10th day of April, 1914, and on the day of the commence-

ment of the action on which the judgment was obtained. The trial court found the issues for the plaintiffs, and "that the said deeds were executed and the land transferred wholly and voluntarily without consideration, and with the sole intent to hinder, delay, and defraud the plaintiffs in the collection of their claim, and to hinder, delay, and defraud all of their creditors, and that the said W. A. Overing, defendant, accepted and received such debts and the transfer of such land, with full knowledge of all of such fraudulent intent, and with the full and sole intent on his part to assist the said L. J. McCormick and Luina McCormick in their fraudulent purpose."

After a full argument and a thorough examination of the record, we are constrained to affirm this finding, and nothing would be gained by relating the testimony at length. The matter, indeed, is one largely of probability, and of the credibility of the witnesses, and on the latter point the trial judge had the opportunity of personal observation, which is not presented to us.

There can be no question that there was in the minds of the defendants the desire to prevent the plaintiffs from collecting their claim, and, as far as the consideration for the deeds is concerned, all that is presented is a claim for money alleged to have been advanced by the defendant Overing to the daughter some fourteen years before and before her marriage, but which not only was long since outlawed, if, in fact, it ever existed, but on and for which, according to her own statements, no interest had ever been paid, no note given, and no payment even demanded, and the only evidence of which was a memorandum contained in a note book owned by the defendant Luina McCormick. It is true that the defendant Overing paid the past-due taxes and the interest on a prior mortgage just prior to the transfer, but the evidence clearly shows that he did this because he was led to believe that the deeds could not be recorded without these payments. The case, indeed, in our minds, is not one where a debtor has honestly preferred a creditor, but one which clearly comes within the general condemnation of the authorities, which seem to hold that the law will treat "as null and void all fraudulent contrivances to screen . . . [the property of a debtor] from the pursuit of his creditors. It is fraudulent to defeat them by reservations of benefits to himself; it is equally fraudulent to

defeat them by benefactions conferred upon others. It is not the consideration but the intent with which a conveyance is made that makes it good or bad as against creditors. However valuable the consideration, if the conveyance be designed to delay, hinder, or defeat creditors, it is void." Note to Hagerman v. Buchanan, 14 Am. St. Rep. 732; Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271; Fluegel v. Henschel, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996; Paulson v. Ward, 4 N. D. 100, 58 N. W. 792.

The case also clearly comes within the provisions of § 7220 of the Compiled Laws of 1913, which provides that "every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor and their successors in interest and against any persons upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

There is, too, no doubt of the knowledge of the grantee Overing, of the fraudulent intent, nor of the applicability of the rule of law announced by us in the case of Fluegel v. Henschel, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996, and wherein we said: "Where a conveyance of real estate is made by a grantor, with intent to hinder, delay, and defraud creditors, and the grantee, not being a creditor of the grantor, has knowledge of such fact, the consummation of the transfer is such a participation in the fraud by the grantee as will invalidate the transfer, even where full consideration is paid."

There is, of course, no merit in the contention that the abstract business was not worth what the defendants agreed to pay for it, and that therefore, the plaintiffs do not come into a court of equity with clean hands. The matter is precluded by the judgment on which the execution is issued. We must asume that in that case the defendants interposed all of the defenses, both legal and equitable, which they had, or deemed themselves entitled to; and no appeal was taken from that judgment.

Nor do we believe that the defendant Overing is entitled to a lien for the taxes and interest paid by him.

Our conclusion from the record is that he knew of and was a party to

the fraud which was sought to be consummated, and it is well established that "where at the time of the execution of the conveyances of real estate made and received for the purpose of defrauding the creditors of the grantors, the grantee, as a part of the same transaction, agrees with the grantors to pay off certain existing valid encumbrances upon the real estate so fraudulently conveyed, and subsequently, and in pursuance of such agreement, the grantee pays such encumbrances, he cannot, when such conveyances are declared fraudulent and void as against the creditors of the grantors, hold such conveyances as security for the amounts so paid." Daisy Roller Mills v. Ward, supra.

The judgment of the District Court, however, goes too far, as it holds that the conveyance is void as between the McCormicks and Overing. As far as this action is concerned it is void only as to the lien of the plaintiff's judgment and attachment. It is modified to this extent and as so modified it is affirmed.

GRACE, J., being disqualified, the Honorable FRANK FISK, Judge of the Eleventh Judicial District, sat in his place.

ROBINSON, J. (dissenting). The purpose of this suit is to subject the half section of land in Renville county to the lien of the plaintiffs' judgment, which is $1,140.25. In an action by the plaintiffs against the McCormick defendants on May 18, 1914, the plaintiffs caused a writ of attachment to be issued and levied on the lands in question. On May 13, 1915, a judgment in said action was obtained and docketed, and an execution was issued against the defendants, and the next day it was returned unsatisfied. Pending said action the McCormicks conveyed to W. A. Overing, father of Mrs. Luina M. McCormick, the southeast quarter of 27–161–84, and the east half of west half of the same section. The deeds were made and recorded April 10, 1914. The first tract was owned by L. J. McCormick and the second by his wife. Both tracts were worth about $10,000 and were subject to mortgages amounting to over $7,000. At and prior to the transfer the past-due interest on the mortgages and the taxes amounted to $840, and the McCormicks were unable to pay the same. The mortgagees

were pressing them and insisting on immediate payment and threatening a foreclosure.

Under such pressure the daughter naturally requested her father, whose note was good at the bank, to loan them money to pay the interest and taxes. Having previously advanced the daughter several sums which, with interest, amounted to about $2,000, and which was then outlawed, the father refused to loan the money, and the land was conveyed to him for the amount due on the same and the money which he had loaned his daughter. Thus the McCormicks counted on paying their debts and shifting the burden onto the old man. However, it is quite clear the deeds were made not only because of immediate pressure and to prevent a ruinous foreclosure, but also to hinder and delay the plaintiffs, whose attorney was pressing them for a mortgage on the land. Defendant Overing knew, or should have known, of such intent.

However, under the statute the transfer should be held void only in so far as it might prevent the plaintiffs from collecting the judgment by the sale of the land; and though the general rule is that a fraudulent grantee of land cannot hold the same as security for the payment of prior liens and taxes, yet there are reasons why that rule should not govern this case. Defendant Overing may well be considered a ward of the court. He was an old man in poor health, and his mind was sadly impaired, and his payment of the interest and taxes was no damage to any party. The chances are that in buying the land his motive was to prevent a foreclosure and to get something for the money advanced to his daughter.

However it may be, it is quite certain the equity of Overing compares well with those of the plaintiffs. Their judgment was obtained on a deal which was rather sharp and unconscionable. It was given on notes for an abstract outfit sold to the McCormicks for $4,100, and taken back on a chattel mortgage and sold to the plaintiff for $500. The courts might well refuse to aid in the collection of such a judgment or any judgment not based on a fair and honest consideration. Thus in suits for specific performance a court refuses to aid an unconscionable deal when the deeds were made as part of the consideration for the same. Overing paid the taxes and the past-due interest on the

mortgages, amounting to $840, and since then he has paid a considerable amount of taxes and interest as the same became due, and for all such payments Overing has an equity superior to the plaintiffs, and he should have and retain full title to the land unless reimbursed for such payments.

It is clear the judgment in this case must be reversed for the reason it goes too far. It declares the deed to Overing to be null and void, whereas in any event such deeds may be adjudged void only so far as they hinder the collection of plaintiffs' judgment. *It is only to the extent of the judgment that the plaintiffs may question the right of the McCormicks to give away their land.*

As the record does not clearly show the several amounts paid by Overing for taxes and interest, on return of the remittitur, the district court should forthwith take such additional testimony as may be necessary to ascertain such payments and the amount of the same, with interest, and then to give judgment to the effect that for such amount Overing's claim of title to the land is and shall be superior to the plaintiffs' judgment, and that within thirty days the plaintiffs may repay the amount of such taxes and interest, and for the same that they be subrogated to a lien on the land, and that on such payment by the plaintiffs that the deeds to Overing be adjudged void in so far as they hinder the collection of the plaintiffs' said judgment.

FISK, District Judge (dissenting). I agree with the conclusion reached by Judge Robinson, but not in all that he says in his opinion.

There is little doubt but that the transfer of the land was fraudulent and made for the purpose of hindering, delaying, and defeating, if possible, the collection of the plaintiffs' judgment. I do not believe, however, that the defendant Overing was such an active participant in the scheme as to say that he should be punished by giving the plaintiffs' judgment priority over the amount Overing paid in taxes and interest, which were prior liens. Overing was an old man, and I believe he was used by his daughter and son-in-law to further their fraudulent scheme without any particular knowledge on his part of everything that was going on. Under such circumstances I do not believe the rules of law as announced by the majority opinion apply.

I am in full accord with all of the rules therein announced, but I believe the rule that "where the fraud is constructive only, the grantee comes into court with comparatively clean hands, and the courts treat him with leniency. In such cases the fraudulent conveyance has been allowed to stand as security for the purchase price, or for the amount of prior liens or debts of the grantor paid by the grantee, or for taxes paid." Daisy Roller Mills v. Ward, 6 N. D. 324, 70 N. W. 271, comes nearer fitting the facts in this case than the rules announced in the majority opinion.

INDEX.

ACCOUNT STATED.

1. The complaint in the action is examined and held to state a cause of action on contract, being supplemented by the answer which sets up the contract in full out of which the suit arose, thus supplying any deficiency in the allegations in the complaint with reference to the terms of the contract. It is also further held that the complaint states a cause of action on an account stated. Lemke v. Thompson, 492.

AGRICULTURE (SEED LIEN—WAIVER).

1. See O'Brien v. Haslam, 427.

ALTERATION OF INSTRUMENTS.

1. It is as a general rule only incum' ent upon a plaintiff to explain an alteration in an instrument which increases the liability of the defendant, and not one which reduces it. Merchant's Nat'l Bank of Wimbleton v. Brastrup, 619.

APPEAL AND ERROR.

1. Under the facts of the case it was not reversible error to fail to instruct the jury as to what constituted a natural watercourse or drainway, no specific instruction being asked. Reichert et al. v. Northern P. R. Co. 114.
2. This is an appeal from a judgment against defendants on a stay bond which was duly offered, accepted, approved, and filed. The appeal was from a judgment directing the sale of both real and personal property and, to secure a stay, defendants undertook and agreed to pay any deficiency that might arise under the sale of the property to an amount not exceeding $1,500. This was in accord with Compiled Laws, § 7829. The deficiency judgment is manifestly correct. Hilmen v. Bryn, 211.
3. Where an order to show cause to dismiss a case for want of prosecution or for failure to perfect the record on appeal has not been procured until after the record on appeal has been fully perfected, the appeal should not

APPEAL AND ERROR—continued.

ordinarily, be dismissed for want of prosecution. Auth v. Kuroki Elevator Company, 245.

4, 5. This court will not determine moot questions, nor require the doing of a useless thing. The writ of mandamus will not issue to compel the doing of an ineffectual act, or useless thing. Miller v. Stenseth, 257.

6. A motion to dismiss an appeal should be made as soon as possible and before submission of the case on its merits. McCaull-Webster Elevator Company v. Adams, 259.

7. The basis of every action is a complaint, which should state in plain and concise manner the facts constituting a cause for action. When a complaint wholly fails to state a cause of action, the proper practice is to demur to it, so that before trial the court may pass upon the sufficiency of the complaint and settle the issues to be tried. Objections to a pleading merit no favor when first made on the trial of the case. The law does not favor a trip-up practice or the denial of legal rights and remedies because of defects in a complaint which may be amended. Peterson v. Swanson et al. 301.

8. Where a witness testifies to a conclusion relative to a certain subject-matter and in his testimony also testifies to facts relative to the subject-matter, the admission and evidence of the conclusion of the witness over objection, if error, is error without prejudice and is harmless. Dalen v. Coddington, 321.

9. In an action to quiet title in which the trial court permitted the defendant to redeem from a mortgage foreclosure on the ground that the plaintiff had obtained a sheriff's deed in violation of a fiduciary obligation owing to the defendant, the evidence is examined and held to support the findings and judgment entered by the trial court. Hendrick v. Jackson, 466.

10. Where a defendant moves to amend an answer to make it conform to the proof adduced at the trial, and where it appears that the trial court, though not ruling on the motion, has decided the case upon the issues presented at the trial and raised in the answer as sought to be amended, a motion to strike from the record as amended, substituted answer embracing the allegations contained in the proposed answer, will be denied. Hendrick v. Jackson, 466.

11. Where an appeal has been taken from an order denying a motion for a new trial, and motion is made to dismiss such appeal for want of prosecution and delay in presenting a settling of the statement of the case, and in sending up the judgment roll and delay in serving the brief, and it appears that the appellant relies principally upon the newly discovered evidence supported by affidavit as ground for a new trial, and it appearing the complete record on appeal was perfected and filed during the pendency of the motion to dismiss. Held under these circumstances, the

APPEAL AND ERROR—continued.

motion to dismiss the appeal in this case should be denied. Eckstrand v. Johnson, 490.

12. Where a complaint was so drawn as to indicate reliance upon the circumstances surrounding transactions between the plaintiff and the wife and children of the defendant, relative to the supplying of articles of merchandise to them during defendant's absence,—held that no error was committed by the trial court in allowing the complaint to be amended upon the trial so as to include allegations of agency. Evenson v. Nelson, 523.
13. Where a witness was allowed to testify, over objection, to his custom as to charging goods to the husband where the same were bought by the wife, though such testimony is not proper evidence of a general custom, its admission is held not to be reversible error. Evenson v. Nelson, 523.
14. Compiled Laws of 1913, § 7643, permitting the Supreme Court of Appeal to direct the entry of judgment only where there was a ruling on a motion for directed verdict below, does not permit the court from entering judgment in an action tried by the court. Shellburg v. Wilton Bank of Wilton, 530.
15. This is an appeal from a perpetual injunction and for costs amounting to $105.80, and, in lieu of giving a supersedeas bond, defendants concluded to abide the injunction pending the appeal. Hence, a motion is made to dismiss the appeal on the ground that it presents only a moot question. The motion is denied, with costs. Froemke v. Parker, 628.

APPEARANCE.

1. One who has actual notice and seasonably appears cannot complain that a citation was insufficient or that no citation was given. Fisher v. Dolwig et al. 161.
2. Where the defendant, the Northern Pacific Railway Company, was sued for damages by the plaintiff for personal injuries and the defendant inadvertently failed to serve its answer within the thirty days period and the defendant, upon discovering its failure to answer, applies to the court without delay, for relief against such default, and such relief is granted on the condition that defendant pay $250 to plaintiff's attorney as terms or costs before the court would order the relief asked for by the defendant, it is held that the imposing of such terms by the court was abuse of discretion. Froelich v. Northern Pac. R. Co. 307.
3. Schantz v. N. P. Ry. Co. 317, see Froelich v. Northern P. R. Co. 307.

ARBITRATION AND AWARD.

1. An appointment of an arbitrator which is made at a special meeting of a school board, which is not called in the manner prescribed by the statute,

ARBITRATION AND AWARD—continued.

and from which one of the members is absent on account of having received no notice thereof, is not binding upon the school district. State ex rel. School Dist. No. 94 v. Tucker, County Auditor, 106.

2. Taxes levied and assessed, but uncollected, should be taken into account, under the provisions of § 1328 of the Compiled Laws of 1913, which, in the case of the annexation by one school district of a portion of another provides for the appointment of a board of arbitrators, and that "such board shall take an account of the assets, funds on hand, the debts properly and justly belonging to or chargeable to each corporation, or part of a corporation affected by such change, and levy such a tax against each as will in its judgment justly and fairly equalize their several interests." State ex rel. School Dist. No. 94 v. Tucker, County Auditor, 106.
3. The failure of one or a minority of a number of the arbitrators to appear and act, with the majority, after a sufficient notice and reasonable opportunity therefor, constituted substantially a dissent from the action of the majority, which will enable the latter to proceed in the absence of such member or minority to the rendition of a majority award, in a case where a majority award has been authorized, and unless an unanimity of action is required by the statutes. State ex rel. School Dist. No. 94 v. Tucker, County Auditor, 106.

ATTACHMENT.

1. A third-party claim which is filed under the provisions of § 7550 of the Compiled Laws of 1913, is sufficient in regard to its allegation of ownership, which states that at all times, including the time of seizure, the property was and still is the property of the claimers and that the ground of their right and title to the possession of the said property is that said parties purchased the same with their own money and paid for the same themselves; nor can it be defeated merely because it states the value of the property is $900 and the proof shows it to be $778.74. It is not necessary, under the provisions of § 7550, to state from whom the property was acquired or the consideration paid therefor. Coverdell et al. v. Erickson, Sheriff, 579.

ATTORNEY AND CLIENT.

1. Section 6878, Comp. Laws, 1913, construed and held not to authorize the foreclosure of an attorney's lien by advertisement under the provisions of § 8185, Comp. Laws, 1913. McCarty et al. v. Goodsman et al. 389.
2. The purchase, at a void foreclosure sale of papers which are subject to an attorney's lien, is held, under the circumstances of this case, to entitle the purchaser in equity, to the benefit of the claim upon which the lien is based. McCarty et al. v. Goodsman et al. 389.

BANKS AND BANKING.

1. The plaintiff sues to recover $6,000 on deposit left by his uncle. The claim is that, two or three days prior to his death, the uncle transferred the certificate to his nephew, and that he did so relying on a promise of the nephew to care for him during his life. Shellburg v. Wilton Bank of Wilton, 530.
2. There is no proof that plaintiff ever made such a promise or that deceased ever agreed to transfer the certificates to him. Shellburg v. Wilton Bank of Wilton, 530.

BROKERS.

1. Under the circumstances of this case, it was error to grant the request and motion of the respondent when both sides had rested, for a peremptory instruction to the jury, and for a directed verdict on behalf of the defendant, there being questions of fact involved in the case which should have been submitted to the jury and their verdict had thereon. Kopan v. Minneapolis Threshing Machine Co. 27.
2. Where the owner of property lists the same for sale with a broker for a definite period of time upon specified terms, and definite commission for making such sale by such broker is specified, the owner of the property may during the period of time specified in the agency contract and sell the property through other agents, but cannot do so and relieve himself from liability to pay the agent who had the property listed for a certain time, his commission as specified, where such agent, with no notice of any sale by another agent, and within the time produces a person ready, able, and willing to buy the property upon the terms stated in the agency contract. Starks v. Springgate, 228.
3. In an action by a broker to recover a commission under an express contract upon a sale of real property, where it appears that the broker was unable to negotiate a sale according to the terms of the listing agreement previously made, and where the defendant entered into a less favorable contract negotiated by the broker with the understanding, as claimed by the defendant, that the broker was to make up the difference out of his commission, held, reversible error for the court to instruct the jury that, if it should find that there was an agreement between plaintiff and defendant as to commission, as alleged by the plaintiff, and that if the land was sold on other terms than those originally agreed upon, the defendant would be bound to pay the full amount of the commission if he adopted the changes made while still permitting the plaintiff to continue to act as his agent. Paulson v. Reeds, 329.
4. Where a real estate broker sells land for his principal upon terms different from those contained in the original listing agreement; and where the owner assents to sale with the understanding that the commission shall

BROKERS—continued.

be different from that originally agreed upon,—no commission in excess of that provided by the new agreement can be recovered. Paulson v. Reeds, 329.

CANCELATION OF INSTRUMENTS.

1. One who seeks rescission in equity must restore or tender to the adverse party as a precedent to the right to rescind the consideration received under the contract sought to be rescinded. Loff v. Gibbert, 181.

2. A party who brings an equitable action for rescission does not become devested of his interest in the property offered to be returned by making the offer to return it. The offer to return becomes effective only if accepted by the adverse party or when a rescission is adjudged by the court. In event a rescission is not adjudged the parties stand in the same position as though the rescission had not been sought, and the property offered to be returned remains the property of the person who seeks rescission. Loff v. Gibbert, 181.

CONSTITUTIONAL LAW.

1. The constitutionality of a statute will be considered only when the question is properly before the court and necessary to determination of the cause. Olson v. Ross, 372.

2. One who is not prejudiced by the enforcement of a statute cannot question its constitutionality or obtain a decision as to its invalidity on the ground that it impairs the rights of others. Olson v. Ross, 372.

3. Sections 685 to 695 of the Compiled Laws of 1913 which vest in the Governor the power to remove certain public officers for malfeasance in office and disregard of official duty, are constitutional, and do not violate section 85 of the Constitution of North Dakota, which vests the judicial power in the Supreme and other courts. State ex rel. Shaw v. Frazier, Governor et al. 430.

4. Although the power to remove from office is generally regarded as a power which is possessed by the courts, in the absence of an express or implied grant to some other authority in the government, this power may be exercised by the Legislature or may be delegated by the Legislature to some other authority. State ex rel. Shaw v. Frazier, Governor et al. 430.

5. The power to move from office is administrative rather than judicial, although it should be exercised in a judicial manner, and the state is not so bound by the term, "due process of law" that it is impossible for it to investigate its agents without subjecting itself, as far as their removal is concerned, to the delays and uncertainties of strict judicial action. State ex rel. Shaw v. Frazier, Governor et al. 430.

CONSTITUTIONAL LAW—continued.

6. Where the language of a statute is apparently susceptible of an interpretation which would render it unconstitutional as authorizing the taking of property without due process of law; if possible, the statute will be so construed as to render it constitutional, and to this end it may be given a limited application. McCarty et al. v. Goodsman et al. 389.
7. The title to chapter 92, Laws 1915, "An Act to Define Co-operative Associations and to Authorize Their Incorporation and to Declare an Emergency" does not contravene the provisions of § 61 of the Constitution, which requires that the subject of the act shall be expressed in the title, although the act provides that every corporation organized thereunder shall have power "to regulate and limit the right of stockholders to transfer their stock," and "to make by-laws for the management of their affairs, and to provide therein the terms and limitations of stock ownership." Chaffee v. Farmers Co-operative Elevator Co. 585.

CONTRACTS.

1. The consent of parties to contract must be free and mutual and communicated by each to the other. Shellburg v. Wilton Bank, 530.

CO-OPERATIVE ASSOCIATIONS.

1. A co-operative association incorporated under chapter 92, Laws 1915, is empowered "to regulate and limit the right of stockholders to transfer their stock," and "to make by-laws for the management of its affairs and to provide therein the terms and limitations of stock ownership." Chaffee v. Farmers Co-operative Elevator Co. 585.
2. Such co-operative corporation has power to adopt a by-law to the effect that "no stockholder shall transfer his stock without first giving the corporation ninety days' notice and option to purchase said stock at par, plus the accrued and undivided dividends, which are payable per share." Chaffee v. Farmers Co-operative Elevator Co. 585.

CORPORATIONS.

1. Where one, a foreign corporation, a threshing machine company, with its principal place of business at Hopkins, Minnesota, and does business in other states, and has certain other states arranged into particular territory in which there is maintained a head office in which there is a general manager, such as a territory comprising a part of North Dakota, Minnesota and Montana, with head office at Grand Forks, North Dakota, and it appears that authority and power of the manager in the head office in such territory extends to and includes the making of contracts with the local agents in his territory for the sale of defendant's machinery, sub-

CORPORATIONS—continued.

ject to the approval of the company; and, further, the authority and power to sell from the head office the machinery of the company, the defendant in this case, such general manager and agent, having such authority to sell such machinery, under § 6340, Comp. Laws 1913, has authority to do everything necessary, proper, and useful in the ordinary course of business for effecting the purpose of his agency. Kopan v. Minneapolis Threshing Machine Co. 27.

2. Stock purchased from the corporation subsequent to the enactment of such by-law, evidenced by a stock certificate containing a recital that the certificate is "issued and transferable subject to the rules and restrictions provided by the by-laws," is subject to the provisions of such by-law; and one who purchases the certificate and received an assignment thereof from the original shareholder in violation of the by-law cannot compel the officers of the corporation to transfer the stock to him upon the books of the corporation. Chaffee v. Farmers Co-operative Elevator Co. 585.

COSTS.

1. In an action in the district court to recover the balance of an account on which there is due and on which plaintiff recovers, $50, or more, he is entitled to costs under § 7794 of the Compiled Laws of 1913, even though the award equals or exceeds that amount only by virtue of the inclusion of interest on the principal sum demanded and awarded. Weber Chimney Co. v. Riley, 487.

CRIMINAL LAW.

1. Instructions of the court examined and held to contain no reversible error. State v. Rice, 597.
2. Remark of the state's attorney in the opening and closing argument examined and *held* to be prejudicial. State v. Rice, 597.
3. Where defendant to an information for crime entered a plea of not guilty, it was incumbent on the state to prove each and every allegation in the information to the satisfaction of the jury beyond a reasonable doubt. State v. Rice, 597.
4. The charge of the court must be considered as a whole, and the parts thereof relating to the same matter must be construed together. State v. Rice, 597.
5. It is a general rule in criminal cases that the commission of similar offenses by defendant is inadmissible to show that he has a criminal tendency, in order to show that he probably committed the offense charged, though there is apparent exception to the rule as applied to sexual crimes. State v. Rice, 597.

CRIMINAL LAW—continued.

6. In order to authorize a committing magistrate to hold one accused of crime for trial, it is not required that the evidence submitted be of such convincing character as to establish the guilt of the accused beyond a reasonable doubt. All that is required is that the evidence reasonably show that there is sufficient cause to believe the accused guilty of an offense. State ex rel. Germain v. Ross, 630.

7. Where one who is committed upon a criminal charge assails the validity of the commitment in a habeas corpus proceeding on the ground of the insufficiency of the evidence, the reviewing court will inquire into the evidence only far enough to ascertain whether the accused has been committed on such criminal charge without reasonable or probable cause. State ex rel. Germain v. Ross, 630.

DEEDS.

1. Carl Westerland, being a person of weak and unsound mind, conveyed to defendant a quarter section of land at much less than its value. He then committed suicide, and this action was at once condemned to rescind the conveyance. Buchanan v. Prall, 423.

2. Under the statute a conveyance or other contract of a person of unsound mind, but not entirely without understanding, is subject to rescission. Rescission may be for undue influence which consists in taking an unfair advantage of another's weakness of mind. The judgment for rescission is affirmed. Buchanan v. Prall, 423.

DESCENT AND DISTRIBUTION.

1. The strictness of the law in relation to the execution of wills is not due to any solicitude for the creditors of the heirs, but to a desire that the real intention of the testator shall be ascertained and prevail. A personal creditor of one of the heirs, therefore, cannot complain that the deceased, instead of making a will of his property to his wife, created a trust by which his children agreed to convey it to her. Arntson v. First Nat'l Bank of Sheldon et al. 408.

EMINENT DOMAIN.

1. Where county commissioners attempt to establish a highway under the provisions of § 1927 of the Compiled Laws of 1913, they should comply with the provisions of the statute in regard to the assessment and payment of damages; and where such has not been done mere acquiescence by a property owner in the establishment of the road will not in itself amount to a waiver of the right to such determination of damages. Where, however, the property owner himself signed the petition for the highway and

EMINENT DOMAIN—continued.

stood by while improvements were made on an approach thereto, and in order that the same might be used, and for a number of years acquiesced in the use of the road, and himself aided in the construction of a small improvement thereon, he will not be allowed to question the right to the highway or to obstruct the use thereof, but will be limited to his right to damages alone. This right, however, may be asserted in an action which is brought against him for an injunction to restrain the obstruction of the highway, and even though the injunction is allowed. Rothecker et al. v. Wolhowe, 96.

2. In district court the jury awarded plaintiff $450 damages for a highway dividing his farm into two tracts of 11 and 61 acres. *Held*, that the verdict is well sustained by reason and evidence. It is not affected by passion or prejudice, and the court was wrong in ordering a new trial unless the plaintiff should accept $200 as the damages. Johnson v. Muller, 246.

ESTOPPEL.

1. To constitute an equitable estoppel there must exist a false representation or concealment of facts made with knowledge actual or constructive, and the party to whom it was made must have been without knowledge or means of knowledge of the real facts. Loff v. Gibbert et al. 181.

EVIDENCE.

1. Where a contract if full and complete as to all the terms of the contract, and the terms of such contract are plain and specific, and set forth fully the subject-matter of the contract, and such contract covers the subject-matter of the contract fully so as to be a complete contract, oral testimony is inadmissible to show a prior parol agreement entered into between the parties prior to the time of the execution of the written contract. Gilbert Manufacturing Co. v. Willis Bryan, 13.

2. Where a written contract is not complete, and where it does not cover the whole subject-matter of the contract, where there is a part of the subject-matter of the contract not incorporated in the written agreement oral testimony is admissible to establish such part as is not included in the written agreement; or if the contract is partly written and partly verbal, that part which is verbal may be proved by oral testimony, but in so far as the written contract covers and treats of the subject-matter and sets forth the covenants entered into and terms agreed upon, such written contract and the terms thereof cannot be varied by the introduction of oral testimony. Gilbert Manufacturing Co. v. Willis Bryan, 13.

3. Written contracts supersede oral negotiations and prior parol agreements so far as the subject-matter of the contract is covered within such written contract. Gilbert Manufacturing Co. v. Willis Bryan, 13.

EVIDENCE—continued.

4. Where a written contract is entered into between parties, which substantially covers all the subject-matter of the contract, and one of the parties, in resisting the legal effect of such written agreement, undertakes to set up a prior contemporaneous oral agreement made at or prior to the time of the execution of the written agreement, in the absence of fraud, delusion, or false representations, which induced the signing of the contract, or unless the contract was signed by a mutual mistake of law of both of the parties, or a misapprehension of the law by one party of which the other party was aware at the time of the making of the contract, which was not rectified, the written contract will be given effect, and oral testimony is not admissible to vary its terms of the meaning thereof. Gilbert Manufacturing Co. v. Willis Bryan, 13.
5. Where, during compromise negotiations, a party makes an admission with respect to independent facts, such admission may be received in evidence in subsequent litigation. Grabau v. Nurnberg, 57.
6. Evidence offered to show fraud in the execution of the land sale contract was inadmissible where both plaintiff and defendant were strangers to the contract, where both derived the title to the grain from the purchaser of the land, and where the purchaser had not attempted to avoid the contract on the ground of fraud. Such evidence would establish that the contract was at most voidable, and not void. Farmers Equity Exchange v. Blum, 86.
7. The opinions of experts cannot prevail over actual facts. Reichert v. N. P. R. Co. 114.
8. Where one party in the trial of the case introduces parts of the testimony given by a witness on a former trial with reference to part of the subject-matter of the litigation, the opposing party has the right to introduce the balance of the testimony given upon such former trial by such witness in so far as it relates to all the subject-matter concerning which the first party introduced a portion of the testimony. *Held*, that appellant has not brought himself within this rule. Dalen v. Coddington, 321.
9. The interest which the lien of the judgment affects is the actual interest which the debtor has in property, and a court of equity will always permit the real owner to show, there being no intervening fraud, that the apparent ownership of another is not real; and when the judgment debtor has no other interest, except the naked legal title, the lien of the judgment does not attach. Arntson v. First Nat'l Bank of Sheldon et al. 408.
10. Whether an article is or is not calculated to frighten horses is a question which is to be determined by appearances, observations, and intellect of the courts and jury as applied to all the facts of the particular case, and opinion evidence may not be introduced thereon. Rozell v. Northern P. R. Co. 475.

EVIDENCE—continued.

11. The courts will take judicial notice of the nature and appearance of nail kegs, and that there is nothing in them which is intrinsically dangerous or usually calculated to inspire fright in a team of horses. Rozell v. Northern P. R. Co. 475.

12. Before there arises any presumption in law that a letter claimed to be sent by one party to another, the addressee, has been received by the addressee, it must first be proved that the letter so sent was properly addressed to the addressee at his postoffice address, and was properly stamped with sufficient postage thereon and deposited in some postoffice or some subdivision of the postal department where mail may properly and legally be deposited for collection and transmission, such as mail boxes on the rural routes. Kvale v. Keane, 560.

13. Where it is sought to introduce in evidence an answer to a letter which it is claimed was previously sent, before the letter, which is claimed to be the answer, can be received in evidence, it must first be proved that the letter previously sent was properly addressed to the addressee at his postoffice address with sufficient postage thereon, and that thereafter such letter was deposited in the postoffice or to some branch of the postal service authorized to receive and collect mail for transmission, and, until such proof is made concerning the previous letter, there is no foundation laid for the admission in evidence of the purported answer thereto, and the same is inadmissible. Kvale v. Keane, 560.

14. While a written contract cannot be altered by a subsequent parol agreement, unless such agreement is executed, the contracting parties may nevertheless, enter into a new parol agreement creating obligation separate therefrom and at variance with, the old ones, and such new agreement will be binding unless the agreement is one required by the statute to be in writing. Quinlivan v. Dennstedt Land Co. Inc. 606.

EXECUTION.

1. This is an action to recover the value of personal property wrongfully taken from the possession of the plaintiff and sold on execution against a third party. The facts stated clearly show the taking and conversion of the property, and that it was wrongful, and that plaintiff is clearly entitled to recover the value of his property, with interest and costs. Robinson v. Shively, 155.

2. This is an action to recover the value of personal property wrongfully taken from the possession of the plaintiff and sold on an execution against a third party. The facts stated clearly show the taking and conversion of the property, and that it was wrongful, and that plaintiff is clearly entitled to recover the value of his property, with interest and costs. Quackenbush v. Shively, 156.

EXECUTOR AND ADMINISTRATOR.

1. A party to a probate proceeding may waive the service of citation by joining in the appointment of an administrator and by waiving such service in such petition. Fisher v. Dolwig et al. 161.

FACTORS.

1. The lien of a factor is generally considered a personal privilege, and is not transferable; and, if the factor refuses to assert the same, a creditor of the factor cannot assert it for him. Coverdell v. Erickson, Sheriff, 579.
2. Ordinarily when goods are consigned to a factor for sale this constitutes a bailment for sale, and not a sale to the consignee, and the title remains with the consignor until the goods are sold to a bona fide purchaser for value. The goods do not become the property of the factor or liable for his debts. Coverdell v. Erickson, Sheriff, 579.

FRAUDS.

1. An antenuptial agreement other than a mutual promise to marry, is under the provisions of § 5888 of the Compiled Laws of 1913, void unless made in writing. Fischer v. Dolwig et al. 161.
2. An oral antenuptial agreement, void under the Statute of Frauds, because not in writing, cannot be validated by reducing the same to writing after the marriage has been consummated. Fischer v. Dolwig et al. 161.

FRAUDULENT CONVEYANCES.

1. Plaintiff sues as the executor of Christine Klink to recover the value of a threshing-machine outfit which was purchased by her son Christ Klink and sold under an execution against his property. The son was insolvent. The aged mother had no use for a threshing machine. She never used it. The transfer was not followed by an actual and continued change of possession. *Held*, that as against creditors the alleged transfer was void. Klink v. Kelly, 207.
2. Under the "Bulk Sales Statute" a sale of merchandise in bulk is void as to creditors unless made in the prescribed manner. When not so made, the goods of the debtor become a trust fund for the benefit of his creditors and the purchaser becomes a trustee for the benefit of the creditors. Minneapolis Drug Co. v. Kcairnes, 318.
3. Section 5366 of the Compiled Laws of 1913, which provides "that no implied or resulting trust can prejudice the rights of a purchaser or encumbrancer of real property for value, and without notice of the trust," and § 5594, which provides for the recording of deeds, merely protect creditors and purchasers against unrecorded conveyances of or secret trusts upon the property of their debtors, and of property which if it had not been for the

FRAUDULENT CONVEYANCES—continued.
secret trusts or the unrecorded conveyances would have been properly subjected to their debts. Arntson v. First Nat'l Bank of Sheldon et al. 408.
4. The law will treat as null and void as to creditors all fraudulent conveyances to screen the property of a debtor from his creditors. It is not the consideration but the intent with which a conveyance is made that makes it good or bad as against creditors. However valuable the consideration, if the conveyance is designed to delay, hinder, or defeat creditors, it is void. Sheridan v. McCormick et al: 641.
5. Where a conveyance of real estate is made by a grantor, with intent to hinder, delay, or defraud creditors, and the grantee not being a creditor of the grantor has full knowledge of such fact, the consummation of the transfer is such a participation in fraud by the grantee as will invalidate the transfer as to such creditors, even where full consideration is paid. Sheridan v. McCormick et al. 641.
6. No defense can be interposed in an action to remove a fraudulent conveyance from the path of an execution on the ground that the claim on which the judgment was entered and on which the execution was issued, was invalid or inequitable. The matter is precluded by the prior judgment, and when no appeal was taken, it must be assumed that all of the defenses both legal and equitable, which the defendants had or deemed themselves entitled to, were interposed on the former trial. Sheridan v. McCormick et al. 641.
7. Where at the time of the conveyance of real estate made and received for the purpose of defrauding the creditors of the grantors, the grantee as a part of the same transaction, and with knowledge of the fraud agrees with the grantors to pay certain existing valid encumbrances upon the real estate so fraudulently conveyed and subsequently and in pursuance of such an agreement pays such encumbrances, he cannot when such conveyances are declared fraudulent and void as against the creditors of the grantors, hold such conveyance as security for the amounts so paid. Sheridan v. McCormick et al. 641.

FREEDOM OF SPEECH.

1. In this state every man may freely write, speak, and publish his opinions on all subjects, but is responsible for an abuse of that privilege to any person injured by such abuse. McCue v. Equity Co-op. Pub. Co. of Fargo et al. 190.

GARNISHMENT.

1. Where one is served with garnishment process, and within the time required by law makes and serves on the person who brought such garnishment pro-

GARNISHMENT—continued.

ceedings his affidavit or answer which fairly and fully sets forth the facts and circumstances relative to the property in his hands or under his control belonging to the defendant, and no issue is taken with such answer or affidavit of the garnishee within thirty days, the time specified by law in which persons maintaining such garnishment proceedings shall take issue with such garnishee's affidavit or answer, the facts and matters stated in such affidavit or garnishee answer are conclusive and must be taken as true. Brocket Mercantile Co. v. Lemke et al. 37.

2. In the case at bar there were two garnishees, the first being John W. Maher; the second being the Imperial Elevator Company. John W. Maher disclosed that he was in no manner indebted to the defendant. He further disclosed that he had security upon the crops grown upon certain lands sold by him to Fred Lemke, the defendant. Nowhere was there any admission of liability in such affidavit or answer, and there was a denial of such liability therein. No issue was taken on such affidavit or answer of John W. Maher within thirty days, and hence his statement of nonliability to the defendant must be taken as conclusive. Brocket Mercantile Company v. Lemke et al. 37.

3. The Imperial Elevator Company disclosed in their affidavit or answer that the property in question, the wheat and barley which was delivered at their elevator, was supposed to be owned by John W. Maher and one Havener. That after such grain was delivered to the elevator notice was served upon them by many persons, naming them, who claimed an interest or lien upon said grain, and claimed they owned the same in whole or in part. It appears from the record that there were sufficient liens filed against defendant's alleged half of such crop to more than equal the value thereof, which claims were filed prior to the time of the service of the garnishment process. Most of all of such liens were disclosed by the affidavit of the garnishee. No issue was taken on such affidavit, and the truth of the matters stated therein became conclusive. The plaintiff not having taken any steps to bring in any of the claimants by serving the order of the court upon them nor having taken issue with such allegations and thus proceeding in the way prescribed by law to compel such claimants to prove and establish the validity of their claims, it must be concluded as a matter of law that all of the allegations and statements in the garnishee affidavit or answer are true, and that the claimants referred to in such affidavit are the owners, in whole or in part, of half of such grain which is alleged as belonging to the defendant; and no issue having been taken so as to compel the claimants to establish the validity of their liens admitted to be on file at the time of the service of the garnishment summons and process, such liens must be *held* to be valid, and the defendant *held* to have no garnishable interest in such grain at the time

GARNISHMENT—continued.

of the service of the garnishment process. Brocket Mercantile Company v. Lemke et al. 37.

4. It appearing by the testimony that John W. Maher sold to Frank Lemke certain land upon crop payment, said Lemke to pay for such land by delivering one half of the crop raised thereon during each year of the life of the contract, and it appearing by the testimony that the defendant leased said land to one Havener for 1909, being the year in question when the crops in dispute were raised upon said land,—It was *held* so far as the record disclosed by reason of the leasing of such land as aforesaid, that at the time of the service of the garnishment process Fred Lemke had no garnishable interest in such crops. Brocket Mercantile Co. v. Lemke et al. 37.
5. Where garnishment process is served upon the garnishee the liability of the garnishee is determined by the facts and circumstances with reference to his indebtedness to the defendant, if any, at the time of the service of the garnishee summons. A change in events after the service of the garnishee summons upon the garnishee cannot increase his liability. Brocket Mercantile Company v. Lemke et al. 37.

HABEAS CORPUS.

1. Where one who is committed upon a criminal charge assails the validity of the commitment in a habeas corpus proceeding on the ground of the insufficiency of the evidence, the reviewing court will inquire into the evidence only far enough to ascertain whether the accused has been committed on such criminal charge without reasonable or probable cause. State ex rel. Germain v. Ross, 630.

HIGHWAYS.

1. In the case of a highway by prescription or sufferance the liability of the owner of the abutting land for obstructions or other dangers to the travel thereon is as a rule confined merely to the beaten or traveled track. Rozell v. Northern Pac. R. Co. 475.
2. Where the owner of real estate has exercised ordinary care in the use of his property, he is not liable for damages incidentally resulting to a traveler on an abutting highway. Rozell v. Northern Pac. R. Co. 475.

HUSBAND AND WIFE.

1. In an action to recover the price of merchandise wherein it appeared that the defendant, in anticipation of an extended absence from home, left his wife and three children upon a farm which had been rented to a tenant, and placed the wife in a position where she was required to manage the household,—*held*, that there was sufficient evidence of agency to charge

HUSBAND AND WIFE—continued.
the defendant with the goods, wares, and merchandise supplied to the family during his absence. Evenson v. Nelson, 523.

INSTRUCTION.

1. The instructions of the court examined and *held* that if such instructions contain any error, such error is harmless. Starks v. Springgate, 228.
2. Instructions of the court examined and *held* to be without error. Lemke v. Thompson, 492.

INSURANCE.

1. Where a contract of fire insurance, being the standard form of fire insurance contract on file with the Commissioner of Insurance of the state of North Dakota, contains a provision to the effect that said policy, unless otherwise provided by agreement indorsed thereon or added thereto, should be void if the insured should thereafter make or procure any other contract of insurance, whether valid or not, on the property covered in whole or in part by defendant's policy, and the insured after the issuing of defendant's policy did procure other insurance without written consent in the manner above stated, and the property upon which such double insurance was procured was struck by lightning and fire ensued therefrom causing the total destruction of such property, and after such loss the defendant acquired full knowledge of such additional insurance and notwithstanding such knowledge retained all of the premiums for the whole time for which such policy was issued, the policy being for a definite time, and never returned, offered to return, or tendered to the insured at any time or in its answer to the complaint seeking to recover upon such policy contract any of the unearned premiums, the defendant at all times maintaining its right to retain all such unearned premiums and never having cancelled, or demanded the cancelation of such policy in its said answer, or otherwise,—*held* that defendant by its conduct and its retention of all such unearned premiums waived the provisions of forfeiture aside of such policy providing against additional insurance, and is estopped to deny its liability on such policy contract. Yusko v. Middlewest Fire Ins. Co. of Valley City, 66.
2. Section 6548, Compiled Laws of 1913, is as follows: "In cases of double insurance the several insurers are liable to pay losses thereon as follows: 1. In fire insurance each insurer must contribute ratably towards the loss without regard to the dates of the several policies." *Held*, that such provision in a fire insurance policy, to the effect that it will become void if the insured procures additional insurance without the written consent of the insurer indorsed on such policy, when construed in the light of this section, is not void but voidable only; and where such provision in such

INSURANCE—continued.

policy against additional insurance may be waived by written consent of the insurer indorsed on such policy and the insured takes out additional insurance, which fact becomes known to the insurer, and the insurer keeps all unearned premiums and takes no steps to cancel such policy such policy contract does not become absolutely void thereby, but at the most becomes only voidable, and the insurer cannot, after loss has ensued avoid its risk. Yusko v. Middlewest Fire Ins. Co. of Valley City, 66.

INTOXICATING LIQUORS.

1. Chapter 194 Laws 1915, does not violate any express power or implied inhibition upon legislative power contained in section 217 of the Constitution which provides: "No person, association or corporation shall within this state, manufacture for sale or gift, any intoxicating liquors, and no person, association or corporation shall import any of the same for sale or gift, or keep or sell or offer the same for sale or gift, barter or trade as a beverage. The legislative assembly shall by law prescribe regulations for the enforcement of the provisions of this article, and shall thereby provide suitable penalties for the violation thereof." State ex rel. Germain v. Ross, 630.
2. Laws regulating or prohibiting the traffic of intoxicants are referable to and comprehended under the police power of the government. State ex rel. Germain v. Ross, 630.
3. The states have power to control regulation and prohibit within their borders the business of dealing in or soliciting orders for the purchase of intoxicating liquors. State ex rel. Germain v. Ross, 630.

JUDGES.

1. Where on the day of the opening of the term of district court, the court convenes, continues pending matters, and adjourns to a day certain, an affidavit of prejudice, filed after the opening of the term but before the date to which the adjournment was taken, is not filed within the time required by § 7644, Comp. Laws, 1913, and may be disregarded by the court. Grabau v. Nurnberg, 57.

JUDGMENT.

1. Where a sheriff, the defendant, levied an execution upon certain personal property and took it into his possession, and another, who claimed to be the owner and entitled to possession of such property, brought an action of claim and delivery against the sheriff and under the writ took possession of the property, but failed and neglected to prosecute the action with effect for more than five years, and the sheriff, the defendant, made a motion to dismiss such action for want of prosecution, and an order was

JUDGMENT—continued.

made by the court ordering such action dismissed without ordering a return of the property, or in the event return could not be had, judgment for the value thereof, and judgment of dismissal was entered upon such order, and no appeal was taken from the order or judgment, the court, at the time of the entry of judgment of dismissal of such action, had lost jurisdiction of both the persons and the subject-matter, and had no authority to entertain a motion made more than seven months later than the entry of the judgment of dismissal, and make an order modifying such judgment, awarding the defendant the return of such property or judgment for the value thereof. Barnett v. Will, 51.

2. Where the court was without jurisdiction to make an order modifying a judgment, its order and judgment entered thereon being void, the court nevertheless has the inherent authority and power to entertain a motion and enter its order setting aside and vacating such void order and judgment at any time as between the parties to the action, or others in privity with them. Barnett v. Will, 51.

3. Though a complaint sounds in deceit, rather than implied contract, where it is sufficient to apprise the defendant of the nature of the claim made, and where the evidence supports a recovery of damages for breach of warranty of title, the judgment is within the issues presented for trial. Farmers' Equity Exchange v. Blum, 86.

4. A person who stands by and allows a final decree of distribution to be entered, without in any way claiming the exemptions provided for by §§ 8725 and 8727 of the Compiled Laws of 1913, and who does not seek to have said judgment set aside or modified by said county court, and does not appeal therefrom, may not afterwards question the validity of such judgment on grounds which could have been presented on such appeal. Fischer v. Dolwig et al. 161.

5. Where the defendant, the Northern Pacific Railway Company, was sued for damages by the plaintiff for personal injuries and the defendant inadvertently failed to serve its answer within the thirty days period, and the defendant, upon discovering its failure to answer, without delay applies to the court for relief against such default, and such relief is granted on the condition that defendant pay $250 to plaintiff's attorneys as terms or costs before the court would order the relief asked for by the defendant, it is *held* that the imposing of such terms by the court was abuse of discretion. Froelich v. Northern Pacific Railway Company, 307.

JUSTICES OF THE PEACE.

1. In justice court the plaintiff recovered two separate judgments against the defendant for $160 and $90.95. Each case was appealed to the district court

JUSTICES OF THE PEACE—continued.

and by stipulation the two actions were consolidated and judgment was given in favor of the plaintiff on evidence not contradicted. The record shows no error. Lonnevik v. Sigbert Awes Co. et al. 386.

2. Section 9036 Compiled Laws of 1913, relating to a change of venue from a justice court, provides that the affidavit in support of such change of venue shall be made by the party applying for such change of venue. *Held* that the affidavit cannot be made by the attorney for the party. Braeder v. Armitage, 555.
3. Where an appeal is taken from a justice court upon questions of law only, and the notice of appeal does not so specify, a stipulation in writing between the parties to the action, that the appeal is upon questions of law only, supplies the want of the statement to that effect in the notice of appeal. Braeder v. Armitage, 555.

LANDLORD AND TENANT.

1. Evidence examined and *held* to support the judgment. Hopper v. Howard, 83.
2. Where a complaint alleges that plaintiff had farmed the land for defendant for two years under cropper's contract, that defendant had received practically all of the crops, that plaintiff had purchased on credit defendant's share of some of the crops, that defendant had made advances to the plaintiff, for which plaintiff's share of the crop was security, that defendant had extended credit to the plaintiff on a store account, and that defendant kept account of the amount and value of the crops received, advances made, etc., the complaint states a cause of action for accounting. Grabau v. Nurnberg, 57.
3. Evidence examined and *held* to support the judgment. Grabau v. Nurnberg, 57.

LIBEL AND SLANDER.

1. Under the laws of this state every person has, subject to qualification and restrictions provided by law, the right to protection from defamation by libel or slander, and any person who abuses the privilege of freedom of speech and liberty of the press by maliciously publishing libelous matter of or concerning another is liable to the person libeled for the injury occasioned by the publication. McCue v. Equity Co-op. Pub. Co. of Fargo et al. 190.
2. If there is any doubt as to the meaning of a publication claimed to be libelous, so that extrinsic evidence is needed to determine whether it is of actionable character, or if such publication is reasonably susceptible of two constructions, the one innocent and the other libelous, then it is a question for the jury which construction is the proper one. McCue v. Equity Co-op. Pub. Co. of Fargo et al. 190.

LIBEL AND SLANDER—continued.

3. A general demurrer to a complaint in an action for libel will be overruled if any of the statements therein, when construed in connection with the remainder of the article of which it forms a part, is reasonably susceptible of the libelous meaning ascribed thereto in the complaint. McCue v. Equity Co-op. Pub. Co. of Fargo et al. 190.
4. A general demurrer to a complaint in an action for libel admits allegations of falsity and publication and malice and correctness of innuendo as averred, unless it attributes a meaning not justified by the words or by the intrinsic facts with which they are connected. McCue v. Equity Co-op. Pub. Co. of Fargo et al. 190.
5. A complaint charging the publication of the statement of plaintiff McCue, "McHugh or McCue—take your choice—they are a fine pair and stand for the same proposition," admitted by demurrer, aided by the allegation that McHugh had been charged by certain newspapers and persons as being a thief, a rogue, and a rascal and engaged in crooked, fraudulent, and disreputable business practices, and in cheating the farmers and fraudulently and corruptly manipulating the prices of grain and weighing and grading grains, stated a cause of action. McCue v. Equity Co-op. Pub. Co. of Fargo et al. 190.
6. A complaint charging a publication of a statement that plaintiff, an ex-Attorney General had bragged that he was raising a slush fund to help defeat the candidates for the Supreme Court having a Nonpartisan League indorsement, did not state a cause of action. McCue v. Equity Co-op. Pub. Co. of Fargo et al. 190.
7. A complaint charging the publication of a statement that plaintiff, a former Attorney General had been so blind to the operation of blind pigs that the people discarded him on the first opportunity, did not state a cause of action. McCue v. Equity Co-op. Pub. Co. of Fargo et al. 190.

LICENSES.

1. The North Dakota Trading Stamp Act (Laws 1917, chap. 238), relates only to trading stamps redeemable in goods, wares, and merchandise, and does not prohibit or regulate the sale of trading stamps redeemable only in cash. Olson v. Ross, 372.
2. Chapter 58, Session Laws 1917, which provides for the registration of licensed architects, construed, and held not to abridge the right of a professional architect to practice his profession as an unlicensed architect. State v. Gillespie, 512.

LIMITATION OF ACTIONS.

1. Where an acceleration clause in a mortgage provides that upon the default of a mortgagor it shall be legal for the mortgagee to declare the whole

LIMITATION OF ACTIONS—continued.

sum secured by the mortgage to be due, the entire debt does not become due upon the failure to pay an instalment note, so as to start the Statute of Limitations running against an action to foreclose, in the absence of a declaration to that effect by the holder of the mortgage. McCarty et al. v. Goodsman et al. (two cases), 389.

2. For the purpose of applying the Statute of Limitations, the cause of action to foreclose a mortgage is to be considered independently and is not affected by the Statute of Limitations barring an action to enforce a personal liability upon the notes secured by the mortgage. McCarty et al v. Goodsman et al. (two cases), 389.
3. Where a mortgage is given to secure an entire debt which is represented by instalment notes falling due at different dates, and where it does not appear that the holder of the mortgage elected, under the acceleration clause to treat the whole sum as due upon the default in the payment for the entire debt will be held to have first accrued upon the maturity of the last note. McCarty et al. v. Goodsman et al. (two cases), 389.

MANDAMUS.

1. The writ of mandamus will not issue to compel the doing of an ineffectual act, or useless thing. Miller et al. v. Stenseth, 257.
2. This is a suit for a mandamus to compel the city commissioners to pay on the contract price of a pavement a balance of 15 per cent which has been retained pursuant to the paving contract. However, under the plain words of the statute the writ of mandamus may be issued to the city commissioners only "to compel a specific performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station." Manifestly there is no claim that the city commissioners have neglected the performance of a duty which the law specifically enjoins on them. Hence, the order sustaining the demurrer is affirmed. S. Birch & Sons Constr. Co. v. City of Fargo, 370.

MASTER AND SERVANT.

1. The rule requiring the employer to instruct his employee and to warn him of the dangers is only for the purpose of supplying the latter with information which he is not supposed to have, and if it is shown that the employee did, in fact, possess the knowledge and an appreciation of the danger, a failure to warn him can in no sense be said to be the proximate cause of the injury, and, if not a proximate cause of the injury, it cannot be actionable negligence. Hanel v. Obrigewitsch, 540.
2. An employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience and in the same

MASTER AND SERVANT—continued.

capacity for estimating their significance would see and understand. Hanel v. Obrigewitsch, 540.

3. The danger of having one's fingers crushed, if placed between the rollers of machine for the purpose of removing material which has clogged the same, and while the engines are working and the machine is in operation, is a risk which is so patent and apparent that an employee of reasonable intelligence would be presumed to know and appreciate it. Hanel v. Obrigewitsch, 540.

4. Where there is a safe and an unsafe way of doing the work, the master must instruct the servant how to do it to avoid injury. Hanel v. Obrigewitsch, 540.

MECHANICS' LIENS.

1. Where a materialman furnishes material to the owner of a certain tract of land with the agreement and understanding that the material is to be used upon such land, the materialman has a right to a lien, and may perfect a lien, against the land for which the material was furnished, even though the owner of the land divert the material, and same is used upon a tract of land different from that for which the material was furnished under the agreement and understanding. McCaull-Webster Elevator Co. v. Adams, 259.

2. Where a materialman furnishes material to be used upon a certain tract of land, he is not required to follow or trace such material and see that it is used upon the land for which it is furnished. If the purchaser of such material, after receiving the same diverts it and uses such material, or permits it to be used, upon a different tract of land from that for which it was purchased, such diversion does not preclude the right of the materialman to perfect a lien against the land for which such material was furnished. McCaull-Webster Elevator Co. v. Adams, 259.

3. A materialman who furnishes material to improve certain land not only has a lien upon the building or improvement, but also has a lien upon the land in addition to the lien upon the improvement, and may have a lien upon the land even though the material is not used in making improvements for which it was furnished and purchased, and even though the material be diverted by the purchaser and used upon other land than that to improve which the material was purchased and furnished. McCaull-Webster Elevator Co. v. Adams, 259.

MORTGAGES.

1. Comp. Laws 1913, § 8078, providing for that in case of mortgages securing the payment of money by instalments each instalment mentioned in the

MORTGAGES—continued.

mortgage shall be deemed an independent mortgage, and that the mortgage for each of such instalments may be foreclosed as if a separate mortgage, and that redemption of any such sale shall have the same effect as if a sale for such instalments had been made upon a prior, independent mortgage, merely secures to the holders of the instalment notes the right to foreclose the lien of the mortgage applicable to each note by exercising the power of sale, and gives a right of redemption therefrom, and has no application to the right of foreclosure for the entire amount of the mortgage lien. McCarty et al. v. Goodsman et al. (two cases), 389.

2. In an action to foreclose a mortgage defendant may show that he has discharged his part of the lien, or if a part of it is held by some one not a party to the proceeding, he may have such party joined. McCarty et al. v. Goodsman et al. (two cases), 389.

3. In this case the plaintiff claims that his labor lien should have preference over recorded mortgages. His claim is denied on the ground that he did no substantial work prior to the recording of the mortgages, and he did no work for the erection of a building under a contract with the owner of the lots. Colter v. Dill et al. 462.

4. In an action to quiet title, in which the trial court permitted the defendant to redeem from a mortgage foreclosure on the ground that the plaintiff had obtained a sheriff's deed in violation of a fiduciary obligation owing to the defendant, the evidence is examined, and held to support the findings and judgment entered by the trial court. Hendrick v. Jackson, 466.

MUNICIPAL CORPORATIONS.

1. In maintaining a free dumping ground a city is held to be exercising a governmental function. (Ed. Note.—For other definitions, see Words and Phrases, Second Series, Governmental Function.) Moulton v. City of Fargo, 502.

2. The charge of ten cents per load to those who wish to use the public teams for the purpose of conveying their refuse to a public dump does not in itself commercialize the enterprise so as to make the maintenance of such a dump a private or corporate enterprise. Moulton v. City of Fargo, 502.

3. Where a city maintains a public dump for a public and not a commercial purpose, it is engaged in a public enterprise, and is not liable for the negligence of the caretaker thereof in directing persons where to dispose of their refuse. Moulton v. City of Fargo, 502.

4. The immunity of a municipal corporation on the ground that it is engaged in a governmental enterprise does not alone apply to cases where public health is concerned. Public safety and the safety of the property of the community are just as much matters of governmental cognizance. Moulton v. City of Fargo, 502.

MUNICIPAL CORPORATIONS—continued.

5. The prevention of the scattering of loose papers upon the streets, and the burning of them in public places in a city or even the burning of papers and refuse in the furnaces of buildings, which may result in a dense smoke, and the carrying through the chimneys burning pieces, of papers and the communication of sparks, is a duty which is essentially public in its nature. Moulton v. City of Fargo, 502.

6. There is no reason why a liability to a private action should be imposed when a municipality voluntarily enters upon a public and beneficial work and to withhold it when it performs the service under the request of an imperative law. Moulton v. City of Fargo, 502.

7. Cities and villages are creatures of the statute, and no specific restriction is found in the Constitution upon legislative action in relation to the removal of their public officers, or which places that power exclusively in the courts. State ex rel. Shaw v. Frazier, Governor, et al. 430.

8. No right of local self-government is infringed upon by § 685 of the Compiled Laws of 1913, which provides for the removal by the Governor of municipal mayors and police officers. State ex rel. Shaw v. Frazier, Governor, et al. 430.

9. Section 685 to section 695 of the Compiled Laws of 1913, which provide among other things, for the removal of the officers of cities and villages for malfeasance in office or disregard of official duty are not unconstitutional for the reason that the appeal from action of the Governor which is provided for is required to be tried in some county other than that of the residence of the defendant. State ex rel. Shaw v. Frazier, Governor, et al. 430.

10. The office of president of a board of city commissioners is created by the legislature, and the holding of it is not based upon any personal or primary rights. When an official is elected he accepts office subject to the duties which are placed upon him, and subject to removal under section 685 to section 695 of the Compiled Laws of 1913. State ex rel. Shaw v. Frazier, Governor, et al. 430.

11. The right of the Governor to remove the president of a city commissioner for malfeasance in office or for disregard of official duty, under sections 685–695 of the Compiled Laws of 1913, is not restricted by section 3835 of the Compiled Laws of 1913, which provides for the recall of such city officers. The two remedies are cumulative. State ex rel. Shaw v. Frazier, Governor, et al. 430.

12. The words "or other police officer," which are found in section 685 of the Compiled Laws of 1913, include the president of a board of city commissioners. State ex rel. Shaw v. Frazier, Governor, et al. 430.

13. The right of a person to the office of president of a board of city commissioners is not a private right. State ex rel. Shaw v. Frazier, Governor, et al. 430.

MUNICIPAL CORPORATIONS—continued.

14. The president of a board of city commissioners is a member of the administrative police of such city. State ex rel. Shaw v. Frazier, Governor, et al. 430.

15. The word "mayor" as used in section 685 of the Compiled Laws of 1913, includes the president of a board of city commissioners. (Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mayor.) State ex rel. Shaw v. Frazier, Governor, et al. 430.

NUISANCE.

1. It is not in itself a public nuisance to maintain a place where garbage and refuse is burned, without proof of offensive gas, odors, smoke, or similar injuries, and this in a popular district which is affected thereby, or where there is the danger of fire spreading to neighboring property. Moulton v. City of Fargo, 502.

OFFICERS.

1. Section 690 of the Compiled Laws of 1913, which provides for an appeal to the district court in case where a removal of a public officer is sought, is sufficiently definite to provide for a legal appeal and for a trial de novo in such court. State ex rel. Shaw v. Frazier, Governor, et al. 430.

PLEADING.

1. A demurrer admits the truth of all issuable, relevant, material facts well pleaded. McCue v. Equity Co-op. Pub. Co. of Fargo et al. 190.

2. The basis of every action is a complaint, which should state in a plain and concise manner the facts constituting the cause of action. When a complaint wholly fails to state a cause of action, the proper practice is to demur to it, so that before trial the court may pass upon the sufficiency of the complaint and settle the issues to be tried. Objections to a pleading merit no favor when first made on the trial of the case. Peterson v. Swanson et al. 301.

3. Where a complaint was so drawn as to indicate reliance upon the circumstances surrounding transactions between the plaintiff and the wife and children of the defendant, relative to the supplying of articles of merchandise to them during the defendant's absence, *held*, that no error was committed by the trial court in allowing the complaint to be amended upon the trial so as to include allegations of agency. Evenson v. Nelson, 523.

PRINCIPAL AND AGENT.

1. Blanks of any description, left in writings not under seal may, except as prohibited by the Statute of Frauds, be filled in in pursuance of mere parol authority. Merchants Nat. Bank of Wimbledon v. Brastrup, 619.

PROHIBITION.

1. The writ of prohibition will not lie when the inferior court or tribunal has jurisdiction, nor will it lie to prevent a subordinate court from deciding erroneously or from enforcing an erroneous judgment in a case which it has the right to adjudicate. State ex rel. Shaw v. Frazier, Governor, et al. 430.

PROPERTY.

1. Where the trial court found that material was furnished under an agreement that defendant was the owner of the premises when the agreement was made, it is presumed, under Comp. Laws 1913, § 7936, subds. 32 and 33, that such ownership continued as long as is usual with things of that nature. McCaull-Webster Elevator Co. v. Adams, 259.

QUIETING TITLE.

1. Title to real property cannot be obtained through a forged deed. Catto v. Hollister, 1.

2. For reasons stated in the opinion it is *held*, that defendant is not entitled to certain items allowed him upon an accounting. Page v. Smith, 270.

3. Evidence examined, and *held* to sustain the judgment of the trial court in the amount of the damages allowed plaintiff against defendant for defendant's unlawful taking and retaining possession, under color of title, of premises, to the possession of which the plaintiff was rightfully and lawfully entitled. Swingle v. Swingle, 364.

RAILROADS.

1. Where a railroad company permits a crossing of its tracks by a highway it must use ordinary care to make and keep the crossing safe for travel, and this even where the highway has not been regularly and legally described or appropriated. It is not liable, however, for accidents upon such highway which are indirectly occasioned by its use of such premises, in a manner which is not ordinarily and usually calculated to occasion danger. Rozell v. Northern P. R. Co. 475.

RAPE.

1. Evidence examined and held to sustain a conviction of rape in the first degree. State v. Rice, 597.

REGISTER OF DEEDS.

1. To secure a prior debt plaintiff took from his insolvent debtor a mortgage for $800 on a quarter section of land. It was a third mortgage and it did

REGISTER OF DEEDS—continued.

not give the postoffice of the mortgagee. Seven months after default had been made in plaintiff's mortgage, the year of redemption expired on a foreclosure on a second mortgage. The plaintiff brings this action to recover from the register of deeds the amount of its mortgage with interest because the register failed to mail to its postoffice or the postoffice nearest the land a copy of the foreclosure notice. *Held*, that there is no evidence or presumption that the register knew the postoffice of the plaintiff or that a copy of the notice mailed to the postoffice nearest the land would have been forwarded to the plaintiff, and that its own gross negligence was the real and proximate cause of the loss. Farmers Grain and Milling Co. v. Sundberg et al. 551.

RELIGIOUS SOCIETIES.

1. Where civil courts have assumed to pass upon and decide on the alleged doctrinal beliefs of any given religious denomination either as measured by its own constitution or that of any superior body to which it is attached for religious or ecclesiastical purposes, or where such civil courts attempt to define and decide what constitutes a schism, when examined in the light of the constitution of such religious body, or its ecclesiastical power, authority, or fundamental sources of its faith, belief, or teaching, such civil courts are acting wholly without jurisdiction in all such matters. All such matters are purely and conclusively of an ecclesiastical nature, and must be determined exclusively by the ecclesiastical authority or judicatories, which exist within all religious organizations. Benewald et al. v. Ley et al. 272.
2. Where the ownership, possession, or right of possession of property is in controversy between two different religious organizations separately incorporated, though each belong to the same general religious denomination and before the ownership and right of possession to such property can be determined, doctrinal questions or questions affecting church polity must first be determined, the civil court should not assume jurisdiction of such controversy until it appears that all doctrinal questions and questions of church polity have been acted upon and disposed of by some ecclesiastical authority or power within such religious denominations or society. Bendewald et al. v. Ley et al. 272.
3. Where a complaint in an action such as this contains no allegations as to church polity, except as to the constitution of religious organizations affords an indication of its principles and church polity and there are no allegations of church polity in the complaint supporting such constitution, such complaint is demurrable. Bendewald et al. v. Ley et al. 272.
4. Where there is no allegation in the complaint that ecclesiastical, theological, or other questions relating to the church polity, belief or teachings of a

RELIGIOUS SOCIETIES—continued.

religious organization, which are involved in the action, and which gives rise to a controversy or difference, relating to such questions, have been determined by some ecclesiastical authority within such general church organization, a demurrer to such complaint should be sustained. Bendewald et al. v. Ley et al. 272.

5. Where the ownership, possession, or right of possession of property is in controversy between religious organizations and there is not involved for determination in such controversy any questions relative to doctrine, teachings, faith, discipline, or church polity, and there is involved in such controversy only the property right, the civil court has and should assume jurisdiction and determine such property right. Bendewald et al. v. Ley et al. 272.

6. In a suit by one church society against another involving property rights, the proper method of procedure is for the trustees of the corporation of which plaintiff's remained members to bring action against the other corporation subsequently formed. Bendewald et al. v. Ley et al. 272.

7. In a suit by one church corporation against another to determine property rights, where the trustees of a church of which plaintiffs are members cannot be induced to bring suit, any member of the corporation, for himself and on behalf of others, may join as plaintiffs. Bendewald et al. v. Ley et al. 272.

8. In a suit to determine property rights between two incorporated church organizations, action should be brought against the corporation and not its members. Bendewald et al. v. Ley et al. 272.

RULINGS OF COURT.

1. Rulings of the court examined and *held* to contain no reversible error. Lemke v. Thompson, 492.

SALES.

1. In an action brought to recover damages from a vendor, occasioned by the sale of grain to which vendor had no title and of which the vendee had been deprived in a suit brought against him by the owner, it is *held*, that the judgment in the former suit against the present plaintiff is admissible for the purpose of showing that he had been deprived of the grain. Farmers Equity Exchange v. Blum, 86.

2. A contract for the purchase of land upon which the grain was grown, in which the vendor reserved title to the grain thereon in security for the payment of the purchase price, was properly admitted in evidence for the purpose of showing lack of title in the defendant. Farmers Equity Exchange v. Blum, 86.

SALES—continued.

3. Evidence offered to show fraud in the execution of the land sale contract was inadmissible where both plaintiff and defendant were strangers to the contract, where both derived the title to the grain from the purchaser of the land, and where the purchaser had not attempted to avoid the contract on the ground of fraud. Such evidence would establish that the contract was at most voidable and not void. Farmers Equity Exchange v. Blum, 86.
4. Evidence examined and *held* sufficient to support the verdict of the jury. Farmers Equity Exchange v. Blum, 86.

SCHOOLS AND SCHOOL DISTRICTS.

1. An appointment of an arbitrator which is made at a special meeting of a school board which is not called in the manner prescribed by the statute, and from which one of the members is absent on account of having received no notice thereof, is not binding upon the school district. State ex rel. School Dist. No. 94 v. Tucker, County Auditor, et al. 106.
2. Taxes levied and assessed but uncollected should be taken into account under the provisions of § 1328 of the Compiled Laws of 1913, which, in the case of the annexation by one school district of a portion of another, provides for the appointment of a board of arbitrators, and that "such board shall take an account of the assets, funds on hand, the debts properly and justly belonging to or chargeable to each corporation, or part of a corporation affected by such change, and levy such a tax against each as will in its judgment justly and fairly equalize their several interests." State ex rel. School District No. 94 v. Tucker, County Auditor, et al. 106.

STATEMENT OF CASE.

1. The plaintiff sues to recover $6,000 in deposit certificates left by his uncle. The claim is that two or three days prior to his death, the uncle transferred the certificates to his nephew and that he did so relying on a promise of the nephew to care for him during his life. Shellburg v. Wilton Bank of Wilton et al. 530.

STATUTES.

1. Under the rule of ejusdem generis, the general words apply to persons or things contained within the general genus of the particular persons or things enumerated, and are not limited to any particular one. State ex rel. Shaw v. Frazier, Governor, et al. 430.
2. In the construction of a statute, the court must be guided by the legislative intention so far as it can be gathered from the act and from the legislative history of the bill. State v. Gillespie, 512.

STATUTES—continued.

3. If the amendments reflect a different legislative policy from that stated in the original bill, it is the duty of the court in construing all sections of doubtful meaning, so far as possible to give them the interpretation consistent with the general policy of the amendments. State v. Gillespie, 512.

4. The title to chapter 92, Laws 1915—"An act to define co-operative associations and to authorize their incorporation and to declare an emergency"—does not contravene the provisions of section 61, of the Constitution, which requires that the subject of the act shall be expressed in the title, although the act provides that every corporation organized thereunder shall have power "to regulate and limit the right of stockholders to transfer their stock" and to make by-laws for the management of its affairs, and to provide therein the terms and limitations of stock ownership. Chaffee v. Farmers Co-op. Elev. Co. 585.

STATUTORY DEFINITION OF LIBEL.

1. Any "false and unprivileged publication, by writing, printing, picture effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule or obliquy, or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation," is libelous. Comp. Laws 1913, § 4352. (Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Libel).

SUBROGATION.

1. The purchase at a void foreclosure sale of papers which are subject to an attorney's lien, is *held*, under the circumstances of this case, to entitle the purchaser, in equity to the benefit of the claim upon which the lien is based. McCarty et al. v. Goodsman et al. (two cases), 389.

SUFFICIENCY OF COMPLAINT.

1. The complaint states a cause of action for money had and received, and three separate causes of action for goods bargained, sold and delivered. On each point and issue there was a sharp and decided conflict of testimony. The jury found generally and specifically in favor of the plaintiff. There was a fair trial and no error, and the judgment is affirmed. Lahart v. Minnesota Grain Co. 158.

TAXATION.

1. Sections 2122, 2123, and 2124, Comp. Laws 1913, construed, and it is *held* that, in order that a tax deed may be valid the lands described therein must have been assessed and sold in separate tracts, when they were as a matter of fact in two tracts, noncontiguous and with 80 rods intervening. Moore v. Besler et al. 243.

TOWNS.

1. When a county is divided by a vote at a general election and the dividing line runs through a civil township which is composed of a congressional township and 19 sections of land in addition thereto so that such congressional township is located in the county which has been newly created, and the additional 19 sections in the old county, such additional territory still maintains its identity as a township in the county to which it formerly belonged and in which it now remains, and such original township is not dissolved save to the extent of the territory which is taken from it and which becomes unorganized territory in the new county. State ex rel. Stevenson Township et al. v. Nichols, County Auditor, 4.

TRIAL.

1. Under the facts of the case, it was not reversible error to fail to instruct the jury as to what constituted a natural watercourse or drainway; no specific instructions being asked. Reichert et al. v. Northern Pacific R. Co. 114.
2. Where the plaintiff, in an action brought against the husband and father to recover for goods supplied to the family during his absence chose to rely upon agency, it was not error for the court to refrain from instructing the jury on the question of proper and adequate support. Evenson v. Nelson, 36.

TRUSTS.

1. Where one sick unto death calls his children to him and says: "I want mother (his wife) to have all, and I want you boys to deed it to her when I am gone. This will be as good as a will"—and the sons promise to convey such property to the mother and in reliance on such promise the father dies without making a will, a constructive trust, according to the ordinary rules of equity an involuntary trust, under the provisions of §§ 6273 and 6280 of the Compiled Laws of 1913, is created, which may be enforced against the sons, and which is superior to the liens of the judgments of their individual creditors. Arntson v. First Nat. Bank of Sheldon et al. 408.
2. Where an oral trust is created by the promise of the sons at the sick-bed of their father to convey the property, which descends to them to their mother after their father's death, the subsequent execution of a conveyance will take the transaction out of the provisions of the statute which generally require trusts in relation to real property to be created in writing. Arntson v. First Nat. Bank of Sheldon et al. 408.
3. The law refuses its aid to enforce agreements creating trusts or charges upon land when they rest altogether in parol, not because the trusts are

TRUSTS—continued.

therefore void, but because it will not permit them to be proved by such evidence. But when a person who has received the title to such lands for the benefit of another, although not having declared the fact in writing, recognizes and fulfils the trust, it is not the duty of the court to deny its existence, nor can an individual creditor of such trustee dispute the same. Arntson v. First Nat. Bank of Sheldon et al. 408.

4. The term "created or declared by operation of law," as found in § 5364 of the Compiled Laws of 1913, and which exempts from the requirement of expression in writing, the trust so created, includes constructive trusts. Arnston v. First Nat. Bank of Sheldon et al. 408.
5. Where confidential relations prevail between the parties to an oral trust and the trust is violated, the law presumes that the influence of the confidence upon the mind of the person who confided was undue and a case of a constructive trust arises, not, however, on the ground of actual fraud, but because of the facility for practising it, and in such a case courts of equity will enforce the promise to convey even though it may not be in writing as the mere refusal to carry it out is constructively fraudulent. Arnston v. First Nat. Bank of Sheldon et al. 408.
6. "Constructive Trusts" are such as are raised by equity in respect to property, which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it. Arnston v. First Nat. Bank of Sheldon et al. 408.

VENDOR AND PURCHASER.

1. Evidence examined and *held* not sufficient to establish the making of a contract by correspondence. Kvale v. Keane, 560.
2. Evidence examined and *held* to establish the incapacity of the defendant to make a contract by reason of his mental and physical disability coupled with his very advanced age. Kvale v. Keane, 560.
3. Where one by letter offers to sell land for a specified price and upon specific terms, and there is an unqualified and unconditional acceptance of the offer, the mutual letters made and constitute a "contract in writing." (Ed. Note.—For other definitions, see Words and Phrases, First Series, Written Contract; Second Series, Written Contract or Agreement.) Kvale v. Keane, 560.
4. In construing letters to constitute a contract to sell land, there must be no deviation from the terms of the offer in the letter accepting the offer, and the letter of acceptance must contain no new or different proposition which would, to any degree, change the terms of the offer. Kvale v. Keane, 560.

WAREHOUSEMEN.

1. The surety on a public warehouseman's bond given pursuant to § 2247, Rev.

WAREHOUSEMEN—continued.

Codes, 1905 (§ 3111, Comp. Laws 1913) is not liable for a default of the principal occurring more than three years after the band by its terms had expired, and after two successive renewals had been given by the same principal, even though the default was in connection with grain stored while the surety's bond was in force. State use of Reilly v. Farmers' Co-op. Elev. Co. of Lansford, N. D., et al. 235.

2. Where grain is stored in a public warehouse and a storage ticket issued therefor to the owner, no default sufficient to hold the surety on the warehouseman's bond occurs until the ticket is presented and demand made for the grain or its equivalent and the same is refused. State use of Reilly v. Farmers' Co-op. Elev. Co. of Lansford, N. D., et al. 235.

WATER AND WATERCOURSES.

1. Where a railway company constructs an embankment across a natural drainway, it is its duty to prepare a culvert or other outlet sufficient for any flood which may reasonably be anticipated, and where the culvert or outlet is in fact insufficient for such purposes, the mere fact that competent engineers are employed, or that the embankment is constructed in the manner usually adopted by railway companies will not save such company from liability. Reichert et al. v. Northern P. R. Co. 114.

2. A plaintiff is not bound to exclude the possibility that the accident might have happened some other way than that contended for by him. He is merely required to satisfy the jury by a fair preponderance of the evidence of the truth of his contention. Reichert et al. v. Northern P. R. Co. 114.

3. Where property is flooded by the inadequacy of a ditch and culvert through a railway embankment which is constructed across a natural drainway, the burden of proof to show that the rainfall was so unusual and unprecedented that it need not have been anticipated is upon the defendant, and the fact is one primarily for the jury and not the court to pass upon. Reichert et al. v. Northern P. R. Co. 114.

4. The mere fact that a flood is unusual does not absolve a railroad company from liability if its ditches and culverts constructed through an embankment across a natural drainway are inadequate to carry off water and to save the adjoining property from loss. The question is whether it is beyond ordinary anticipation. Reichert et al. v. Northern P. R. Co. 114.

5. The same rule applies in cases of the obstruction of natural watercourses and of natural drainways. Reichert et al. v. Northern P. R. Co. 114.

6. It is not necessary to the proof of a natural drainway that there should be proof of a natural flowing at all times or of a wearing away of the grass at the bottom. In treeless areas, such as those in North Dakota, the courts must take cognizance of the natural topography of the country and of its climatic condition, and that large volumes of water rush down such drain-

WATER AND WATERCOURSES—continued.

ways in a few days and hours which in wooded areas would form continuous streams and take months to pass away. Reichert et al. v. Northern P. R. Co. 114.

7. In an action for damages to the basement of a hotel by obstructing and throwing back storm waters, the exclusion of testimony as to whether other culverts had been sufficient, going to collateral issues was not error. Reichert et al. v. Northern P. R. Co. 114.
8. In such action evidence as to whether the railroad property before the filling in was higher or lower than the street was inadmissible. Reichert et al. v. Northern P. R. Co. 114.
9. Surface waters having an accustomed flow in a drainage channel, or waterway having well developed banks, may not be stopped by an embankment across the channel so as to divert the waters to the injury of adjoining proprietors. Reichert et al. v. Northern P. R. Co. 114.
10. Where a railroad crosses a ravine, gully, or natural depression, forming the natural and accustomed channel for the escape of surface waters, it is incumbent upon the railroad to provide for the flowage. Reichert et al. v. Northern P. R. Co. 114.

WILLS.

1. When there is no ambiguity or imperfect description on the face of a will to explain or correct, the fact that it disposes of property which the testator did not own, neither renders the instrument indefinite nor justifies the courts in making a new will, for the testator based upon what, from intrinsic evidence, they assume he intended to convey. Such intention must be gathered from the terms of the will itself, and where the will is explicit the courts are powerless to vary its terms. In re Kahoutek Estate, Kahoutek v. Kahoutek et al. 215.
2. The fact that in one paragraph of a will a testator devises, by specific description property that he does not own, will not justify the courts in taking an equivalent amount from a bequest which is definitely made to another, and in saying that the fact that the former property was not owned by the testator justifies the conclusion that he intended that his valid and definite bequest should be set aside. In re Kahoutek Estate, Kahoutek v. Kahoutek et al. 215.
3. Under Comp. Laws 1913, §§ 5686 and 5708, extrinsic evidence is not permissible to correct a mere mistake, but is only permissible where there is a latent ambiguity, and where the false words or descriptions may be stricken out and there stil remains enough in the will to clearly evidence the intention of the testator and to describe the legatee or the property sought to be devised. In re Kahoutek Estate, Kahoutek v. Kahoutek et al. 215.

WITNESSES.

1. Where an attorney dictated an affidavit on information received by him from his client and in dictating the affidavit caused to be inserted a wrong date, it is proper to prove such clerical error, either by the stenographer after laying a proper foundation for her testimony or by the attorney who dictated the affidavit, if he is able to testify of his own knowledge to the fact. Dalen v. Coddington, 321.

2. Where a wife was called as a witness by a party adverse to the husband, and no objection was made as to her competency, to become a witness without his consent, *held*, that her testimony is properly in evidence, and that the failure to object was equivalent to the giving of his consent, as required by § 7871, Compiled Laws of 1913. Evenson v. Nelson, 523.

WORDS AND PHRASES.

1. The term "Act of God," in its legal sense applies only to events in nature so extraordinary that the history of the climatic variations and other conditions in the particular locality affords no reasonable warning of them. (Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Act of God.) Reichert v. N. P. R. Co. 114.

2. The word "and" commonly means in addition to (citing Words and Phrases, And.) McCaull-Webster Elevator Co. v. Adams, 259.

3. "Public Policy" is but the manifest will of the state, which must and does vary with the habits, capacities, and opportunities of the public. (Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Policy.)